

**SEARCHING FOR REPUTATION: RECONCILING FREE SPEECH AND
THE “RIGHT TO BE FORGOTTEN”**

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This article offers a comprehensive assessment of the tension between First Amendment law and the European Court of Justice’s decision in 2014 granting individuals the right to have search engines “forget” certain personal information about them. While the ECJ decision is vague on the boundaries of a “right to forget,” it correctly locates a problem of “too much speech” for speech’s own good as well as for the goods of privacy and reputation. Three developments combine to create the problem of too much speech. The first is the over-extension of commercial speech doctrine far beyond its modest beginnings. The Roberts Court has suggested that inherited distinctions between the importance of political and commercial speech are in jeopardy, as is the entire notion that the First Amendment distinguishes between the importance of speech on public and private matters. The second is the sweeping characterization of data as if it were already speech, no matter how raw and inarticulate the data. The third is the judicial treatment of search engine speech as if rankings are mere expressions of opinion entitled to heightened First Amendment protection against allegation of bias. I conclude by offering modest prescriptions for containing what counts as commercial speech and for setting expiration dates on how long personal information remains online as a way to introduce some amount of “forgetting” into the Internet while not going as far as the ECJ did.

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I. INTRODUCTION

Speak now or forever hold your peace.

–Book of Common Prayer (1662)

Never seek to tell thy love / Love that never told can be.

–William Blake (posthumously 1863)

The more total society becomes . . . the greater the idle chatter.

–Theodor W. Adorno (1952)

Online experience will start with birth, or even earlier. Virtual identities will supersede all others, as the trails they leave remain engraved online in perpetuity.

–Eric Schmidt and Jared Cohen (2013)

For speech to be speech, it has to stand in contrast to something—silence, pauses, gaps, action maybe, thinking before speaking, contemplation, reflection, isolation, seclusion, being out of touch, beyond the reach of communication or not writing this present Article.¹ In a tradition dating back at least to Aristotle, speech stands as a distinct human activity—distinct not only because speech differentiates us from other animals,² but also because speech is an exceptional occasion even for human beings. Speech according to Aristotle is “the peculiarity of man.”³

By contrast, speech today is our default position.⁴ We are more likely to be in reach of a communications device at all times than

¹ “We require such solitude as shall hold us to its revelations when we are in the streets and in palaces; for most men are cowed in society, and say good things to you in private, but will not stand to them in public. But let us not be the victims of words.” Ralph Waldo Emerson, *Society and Solitude in 7 THE COLLECTED WORKS OF RALPH WALDO EMERSON 7–8* (Harvard Univ. Press, 2007).

² Even a cat trained to say a few sentences in English does not speak. *See Miles v. City Council*, 710 F.2d 1542, 1544 (11th Cir. 1983) (denying First Amendment protection to “Blackie the Talking Cat” on grounds that cats lack personhood).

³ ARISTOTLE, *POLITICS* 11 (R. F. Stalley ed., Ernest Barker trans., 1995).

⁴ As the Roberts Court has noted, “modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars

not.⁵ We write and email more messages than previous generations sent and received letters.⁶ We conduct approximately twenty billion discrete online searches each month.⁷ We read more entries on Wikipedia in a day than were read on Encyclopedia Britannica in a year.⁸ We communicate more with Facebook friends than anyone could with friends in real space.⁹ We are in contact with the

might conclude they were an important feature of human anatomy.” Riley v. California, 134 S. Ct. 2473, 2484 (2014).

⁵ Ninety percent of American adults own a cell phone and 64 percent own a smartphone. 44 percent “have slept with their phone next to their bed because they wanted to make sure they didn’t miss any calls, text messages, or other updates during the night.” *Mobile Technology Fact Sheet*, PEW RESEARCH INTERNET PROJECT, <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet> (last visited June 2, 2015). The Pew study found that similar percentages of white, African-American and Hispanic adults own cell phones and smartphones. *Id.*

⁶ “[T]he number of worldwide email accounts is expected to increase from . . . 3.1 billion in 2011 to nearly 4.1 billion by year-end 2015.” Matthew Sundquist, *Online Privacy Protection: Protecting Privacy, the Social Contract, and the Rule of Law In the Virtual World*, 25 REGENT U. L. REV. 153, 161 (2012).

⁷ Google ranks first with nearly 65 percent of the U.S. market. Bing handles 19.7 percent on Microsoft sites, followed by Yahoo with 13 percent of the search market. *comScore Releases February 2015 U.S. Desktop Search Engine Rankings*, COMSCORE (Mar. 17, 2015), <http://www.comscore.com/Insights/Market-Rankings/comScore-Releases-February-2015-US-Desktop-Search-Engine-Rankings>. Google controls 92 percent of the search market in Europe. James Kanter & Mark Scott, *Europe Sees Violations of its Antitrust Law*, N.Y. TIMES, Apr. 16, 2015, at B1. Google recently changed its corporate name to Alphabet, but the search subsidiary will still be known as Google. *See* James B. Stewart, *Alphabet with a Capital G*, N.Y. TIMES, Aug. 14, 2015, at B1.

⁸ Wikipedia is among the top ten most visited Internet sites. Yochai Benkler, *A Free Irresponsible Press: WikiLeaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 375 (2011).

⁹ Aimee Lee Ball, *Are 5,001 Facebook Friends One Too Many?* N.Y. TIMES, May 30, 2010, at ST 1. Facebook establishes the cut-off for friends at 5,001. Facebook has 1.44 billion users worldwide, as of 2015. Vindu Goel, *Facebook Reports Quarterly Results Dominated by Shift to Mobile and Video*, N.Y. TIMES, Apr. 23, 2015, at B3. In addition to logging in to Facebook, persons use their Facebook identity as a kind of identity card to log in some ten billion times annually to other social apps. Vindu Goel, *Facebook to Let Users Limit Data Revealed by Log-Ins*, N.Y. TIMES, May 1, 2014, at B1. One out of every six

famous on Twitter¹⁰ and the anonymous on Yelp.¹¹ Instagram has 300 million monthly users who click on posts eighteen times a day.¹² In the online world, all of these exchanges flow with a speed and volume that is almost beyond comprehension. Americans used 2.3 *trillion* voice minutes in 2012 and sent six billion text messages, or 69,635 every second.¹³

Not coincidentally, governments and corporations spend more time monitoring our speech, giving the weaving of the World Wide Web a different meaning.¹⁴ This astounding amount of

minutes that Americans spend online is spent on Facebook. Vinu Goel, *How Facebook Sold You Krill Oil*, N.Y. TIMES, Aug. 3, 2014, at B4.

¹⁰ As of April of 2015, Twitter reported having 308 million monthly average users. Vinu Goel, *Ad Growth Disappoints at Twitter; Shares Fall*, N.Y. TIMES, Apr. 29, 2015, at B1. These users spent an average of 7.2 minutes a day on Twitter's mobile apps. Vinu Goel, *World Cup Gave Twitter a Big Burst in Traffic*, N.Y. TIMES, July 30, 2014, at B1.

¹¹ Yelp had a monthly average of 142 million visitors during the first quarter of 2015. *About Yelp*, YELP, <http://www.yelp-press.com/phoenix.zhtml?c=250809&p=irol-press> (last visited Aug. 29, 2015). Citing lack of jurisdiction, one state supreme court overturned lower court rulings that would have required Yelp to disclose the identity of anonymous reviewers in connection with a defamation suit. Justin Jouvenal, *Yelp Won't Have to Turn Over Names of Anonymous Users After Court Ruling*, WASH. POST (Apr. 16, 2015, 5:00 PM), http://www.washingtonpost.com/local/crime/yelp-wont-have-to-turn-over-names-of-anonymous-users-after-court-ruling/2015/04/16/aeb322c6-e39a-11e4-b510-962fcfab310_story.html.

¹² Vinu Goel, *It's Official: Instagram is Bigger than Twitter*, N.Y. TIMES (Dec. 10, 2014, 12:18 PM), <http://bits.blogs.nytimes.com/2014/12/10/its-official-instagram-is-bigger-than-twitter>. Facebook owns Instagram. Kashmir Hill, *Ten Reasons Why Facebook Bought Instagram*, FORBES (Apr. 11, 2012, 5:00 PM), <http://www.forbes.com/sites/kashmirhill/2012/04/11/ten-reasons-why-facebook-bought-instagram/>.

¹³ *Klayman v. Obama*, 957 F. Supp. 2d 1, 35–36, n.56 (D. D.C. 2013). The average cell phone user checks the device 150 times a day. Max Chafkin, *Cyborgs Won't Be the Only Ones to Love Next-Gen Wearables*, FAST CO. (Sept. 9, 2014, 6:00 AM), <http://fastcodesign.com/3035233/innovation-by-design-2014/cyborgs-wont-be-the-only-ones-to-love-next-gen-wearables>.

¹⁴ “Like any web, it can wrap itself around you [E]verything we do . . . [is] broken down into data, . . . mined in invasive expeditions in the name of commerce and government surveillance.” E. Doctorow, *The Promise – and Threat – of the Internet*, THE NATION, Dec. 4, 2013, at 4, 5.

communications begs the question: do we have “too much speech?”

In 2014, the European Court of Justice (“ECJ”), the highest court of the European Union, gave an emphatic yes to this question,¹⁵ widening the gap between American First Amendment jurisprudence and European law. The European Union now requires search engines to “forget” certain information about an individual when it is “inadequate, irrelevant or no longer relevant [to any public purpose]” and when that information is harmful to the privacy and reputation of the person.¹⁶ This so-called “right to have information forgotten” has its roots in the decisions of several European nations after World War II to codify a right to human dignity that even speech must respect.¹⁷

In this Article, I offer a qualified defense of the European Court’s view that the digital spread of speech threatens important social norms that we try to capture in terms such as dignity or privacy. However, the ECJ decision left the right to have information “forgotten” so vaguely defined as to provoke well-deserved criticism that the ruling requires internet services, upon request, to purge search results of anything embarrassing to individuals. I will explore these difficulties taking into account the tension between the way new technologies empower us with more speech opportunities and yet disempower us by ceding control over everything we say to the copying, replicating, and transmitting of data, the banal along with the intimate. In the digital world, any

¹⁵ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, 2014 E.C.R. ___, ¶93, available at http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065.

¹⁶ *Id.*

¹⁷ The most well-known example is the provision in German law that prohibits Holocaust denial. See Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law (Part I)*, 4 GERMAN L. J. 1, 3 (2003). Article I of the Basic Law of Germany reads: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [Constitution] May 16–22, 1949, art. 1 (Ger.). See Carl Friedrich, *The Political Theory of the New Democratic Constitutions*, 12 REV. OF POL. 215, 217 (1950).

item posted may live on forever.¹⁸ We must adjust our social interactions accordingly.¹⁹

In suggesting that we may have too much speech, I have both a legal and a normative argument in mind. The legal argument turns on whether every gathering and transmission of data, no matter how inarticulate and commercial in nature, counts as speech for First Amendment purposes. Recent court decisions draw analogies between rankings “expressed” by search engines and opinions published in traditional media. Just as the press cannot be sued for a “false” or “biased” opinion, so a search company cannot be liable for its subjective opinions about which sites provide the most relevant answers to users’ queries.²⁰ Moreover, personal data that used to be protected by privacy laws becomes protected instead within the First Amendment rights of marketers to buy and sell.²¹ I argue that such uses of the First Amendment call into question the basic settlement of post-New Deal constitutional law. That post-New Deal settlement distinguished between the deference courts owe to state economic regulation and the scrutiny courts should give to laws restricting fundamental noneconomic liberties, such as freedom of speech.²² As what we categorize as speech becomes near ubiquitous in our information society, the distinction between suspect regulations of speech and permissible regulation of commercial data enterprises collapses.

¹⁸ *But cf.* Jill Lepore, *The Cobweb*, NEW YORKER, Jan. 26, 2015, at 34–41 (explaining how posts on the Internet often disappear). Lepore reports on efforts to archive all Internet material, noting that if and when that happens, “the past will be inescapable, which is as terrifying as it is interesting.” *Id.* at 41. For information on the life cycle of information on the Internet, see Meg Leta Ambrose, *It’s About Time: Information Life Cycles, and the Right to be Forgotten*, 16 STAN. TECH. L. REV. 369, 372 (2013).

¹⁹ In his short story, *Funes the Memorious*, Jorge Luis Borges explored how burdened speech became in the presence of the title character who would remember forever everything said to him. For an exploration of how social interaction, as well as self-understanding, change when remembering, and not forgetting, becomes the norm, see VIKTOR MAYER-SCHONBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 112–127 (2009).

²⁰ *See infra* Part IV.

²¹ *See infra* Part III.

²² *See infra* Part III.C.

From the normative point of view, I offer two related arguments. First, I argue there may be too much speech for speech's own internal good.²³ Second, I argue there is too much speech for the good of external values such as reputation, privacy and individual control over personal information.²⁴ More speech is not always good for speech itself, since more speech for some threatens less effective speech for others;²⁵ speedy speech does not comport with accuracy;²⁶ and speech that is always "on" may recede into so much banal chatter or background noise.²⁷ My argument is not that more speech *has* to corrupt discourse. There are contexts in which a more speech, the better approach enriches our democracy, our economy, our individual autonomy, and our search for knowledge.²⁸ I argue only that we should be concerned

²³ "The great obstacle to consumers getting what they want will no longer be that there are too few products available; it will be that there are too many. The new system, by reducing barriers to entry, will make much more material accessible to consumers. Some of it will be good; most will be junk." Eugene Volokh, Symposium, *Emerging Media Technology and the First Amendment: Cheap Speech and What It Will Do*, 104 YALE L. J. 1805, 1815 (1995).

²⁴ I am indebted to Professor Oren Bracha, my colleague at the University of Texas School of Law, for reading an earlier draft and suggesting I sharpen the distinction between the internal harm too much speech does to itself and the external harm it does to important values other than speech.

²⁵ "[S]tate-created advantages not only allow corporations to play a dominant role in the Nation's marketplace, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659 (1990), *overruled by*, *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310, 363–65 (2010).

²⁶ Approximately forty percent of Facebook accounts purporting to be from a Fortune 100 company are fakes. Goel, *supra* note 12. *See also* Cass R. Sunstein, Symposium, *Emerging Media Technology and the First Amendment: The First Amendment in Cyberspace*, 104 YALE L. J. 1757, 1765 (1995) ("[Some speech imposes] risks of sensationalism, ignorance, failure of deliberation, and balkanization.").

²⁷ *See Twitter Study*, PEAR ANALYTICS 1, 4–5 (2009), <http://www.pearanalytics.com/wp-content/uploads/2012/12/Twitter-Study-August-2009.pdf> (finding 40.1% of tweets randomly sampled during a two week period were babble).

²⁸ For positive contributions of Twitter to news reporting, *see* Chrystia Freeland, *Why #RussiaInvadedUkraine Matters*, N.Y. TIMES, Sept. 6, 2014, at

about the emergence of short and quick speech practices that favor a new generation of sound “bytes” over the Aristotelian regard for the slower, intermittent but distinct capacity speech gives us to shape our world according to norms and ideals that could not exist apart from speech tied to reason and reflection.

In addition to harming speech, more speech sometimes harms outside or competing values. Consider the following familiar symptoms of democratic dysfunction: campaigning has become almost permanent, to the detriment of governance;²⁹ money speaks for some donors but saps public confidence in electoral integrity;³⁰ the same technology that makes speech abundant makes state or corporate surveillance of that speech also abundant;³¹ hatemongers troll online, using anonymity to undermine civility³² and

A21. See also David Carr, *The View from #Ferguson*, N.Y. TIMES, Aug. 18, 2014, at B1 (“[I]n a situation hostile to traditional reporting, the crowd sourced, phone-enabled network of information that Twitter provides has proved invaluable.”).

²⁹ William A. Galston, *The “Permanent Campaign” = Perpetual Paralysis*, WALL ST. J. (Oct. 28, 2014, 7:40 PM), <http://www.wsj.com/articles/william-galston-the-permanent-campaign-perpetual-paralysis-1414539559>.

³⁰ “[T]he financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process.” *Citizens United v. Fed. Elections Comm’n*, 558 U.S. 310, 394 (2010) (Stevens, J. dissenting).

³¹ Jack Balkin, Symposium, *Freedom of the Press: Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2305–06 (2014) (“[The] battle cry of cyberactivists in the early twenty-first century was . . . that ‘information wants to be free.’ We now understand that information also wants to be collected, collated, analyzed, and used for surveillance and control.”). For the connection between too much speech and too much surveillance, see *infra* Part VI.A.

³² See Farhad Manjoo, *Web Trolls Winning*, N.Y. TIMES, Aug. 15, 2014, at B1; Rebecca Mead, *The Troll Slayer*, NEW YORKER, Sept. 1, 2014, at 30–38 (noting vicious online misogyny in the U.K.); Musetta Durkee, Note, *The Truth Can Catch the Lie: The Flawed Understanding of Online Speech in In re Anonymous Online Speakers*, 26 BERKELEY TECH. L. J. 773, 811, n.188 (2011) (citing Article documenting hateful comments posted on a digital tribute site for a 17-year-old suicide victim).

sometimes openly making threats.³³ In addition, the variety of cable television channels and of Internet websites accommodates the tastes and politics of us all, but often on separate channels or sites, to the loss of common references.³⁴ Google speech controls online reputations that chain link persons to their worst moments.³⁵ Power and control over personal information flows from individuals to a handful of large technology companies that monetize private data into advertiser-valued information.³⁶

I do not mean to suggest that only one model of speech—rational and engaged in reciprocal conversation—is worthy of First Amendment protection. Neither politics nor ordinary social conversation takes place in a seminar room, and all manner of slogans, symbols, and chants are clearly protected speech, even when tied to the mobilizations of emotion rather than reason.³⁷ My argument is not meant to winnow out such recognizable forms of speaking, but rather it aims to address the question: what is the best understanding of the communication that search engines facilitate? Is Google a *speaker* entitled to First Amendment protection? Or is a search engine simply a tool, albeit a magnificent one, that furthers the speech of others? What would it even mean to say search engines “speak” to us?³⁸ Is a search engine our advisor? Does it have opinions? Is Google a publisher or editor like the *New*

³³ On the issue of what constitutes posting a true threat on the Internet, see *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (overturning the defendant’s conviction for threatening his ex-wife online and holding that criminal convictions for online threats require evidence that a defendant used words for the purpose of making a threat or with actual knowledge that the words would be viewed as a threat).

³⁴ See Jeffrey Abramson, *Second-Order Diversity Revisited*, 55 WM. & MARY L. REV. 739, 755–56 (2014).

³⁵ See *infra* Part V.

³⁶ See *infra* Part III.

³⁷ See *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that the First Amendment protects the emotional as well as ideational component of speech such as taping the phrase “Fuck the Draft” on a jacket).

³⁸ True, one can talk back to a search engine in ways one could not talk back to a television in the old days. But no one thinks a smoke detector and alarm system are engaged in protected free speech when they communicate with one another.

York Times? These questions are still new enough to have no definitive answers.³⁹

My project in this Article is largely diagnostic, though I do conclude with a set of prescriptions. I hope to describe the problem I call “too much speech” persuasively enough to force reconsideration of the Supreme Court’s libertarian commitment to the more speech, the better norm as if the phrase was self-justifying. As important as expanding the reach of speech is, so too is protecting the power of people to shelter themselves from misuses of personal data to the detriment of privacy, reputation and dignity. My diagnosis is that free speech principles are being strategically used to cut off debates about Internet governance before they even begin. It is important to locate these normatively misplaced uses of the First Amendment so as to open room for reasonable Internet regulations.

I begin in Part II by tracing the development of First Amendment law from an era of too little speech to our current era of too much speech. The era of too little speech was characterized by censorship, punishment of dissenters, and technologically enforced scarcity in the early days of broadcasting. In the face of these obstacles, the rallying cry justifiably became the more speech, the better.⁴⁰ The maxim captioned many of speech’s most historic victories, and it took firm root both in judicial doctrine and the popular imagination. Sometimes it spawned disagreement, as over applications of clear and present danger doctrine.⁴¹ In time, it achieved a working consensus on many issues.⁴²

³⁹ See Oren Bracha, *The Folklore of Informationalism*, 82 *FORDHAM L. REV.* 1629, 1646–53 (2014).

⁴⁰ See, e.g., *Whitney v. California*, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring).

⁴¹ Disagreement over clear and present danger doctrine prompted the famous Holmes-Brandeis dissents, beginning in *Abrams v. United States*, 250 U.S. 616 (1919). Through the first half of the 20th century, clear and present danger was a speech-restrictive doctrine. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding convictions of Socialist Party members); *Dennis v. United States*, 341 U.S. 494 (1951) (upholding convictions Communist Party members). But by 1969, clear and present danger doctrine became more speech-protective as a

In Part III, I argue that the growing equation of data with speech, no matter how raw and inarticulate the data is, threatens to upset the always precarious balance between maintaining privacy while facilitating the free flow of information. The fact that so much personal information about us is now in the databases of corporations and governments is a large reason why too much speech is a problem.

In Part IV, I discuss the special case of search engines and speech. “Search” has quickly become one of the major forces for knowledge and commerce on the Internet. Against the argument that search engines “speak,” I will argue that search engines are extraordinarily valuable tools for facilitating the speech of others. But like other tools or conduits of communication, they are not entitled to the heightened First Amendment protection courts are now giving them. Too much speech for search engine companies threatens the speech of web publishers who fare poorly in search rankings, perhaps unfairly at times. We need to prevent the First Amendment from being used to shield search engine companies against charges of bias or deception.

In Part V, I turn to the ECJ decision on “the right to be forgotten” as a way of reconciling speech and reputation. In Part VI, I argue that too much speech paradoxically spawns too much monitoring and surveillance of that speech.

In Part VII, I turn from diagnosis to prescription. If we are to undo speech corruption of discourse and democracy, I suggest

unanimous Court in a *per curiam* decision held that advocacy of opinions that fell short of attempting to incite imminent violence or lawless action was protected speech. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁴² So-called “conservative” judges such as Justice Scalia have accepted that even flag burners are protected by the more speech, the better approach. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 416–17 (1989). So-called “liberal” justices such as Justice Ginsburg have accepted that buffer zones outside abortion facilities cannot be so wide as to prevent protesters from effective opportunities to speak. *McCullen v. Coakley*, 134 S. Ct. 2518, 2537–41 (2014). Both sides swallowed hard and included even gay-baiting protests within hearing of the funeral of a fallen soldier as within the protections offered by the norm of the more speech, the better. *Snyder v. Phelps*, 562 U.S. 443, 457–58 (2011).

several remedies but two in particular. First, not all information exchanged during commercial transactions is entitled to First Amendment protection. In 1976, the Court first recognized the doctrine of commercial speech, striking down a state law that prohibited pharmacists from advertising the prices of prescription drugs.⁴³ That decision sensibly focused on the considerable health interests consumers have in obtaining prescription drugs at affordable prices.⁴⁴ Nothing in the decision committed the Court to turning the First Amendment into protection of all advertising, for example price ads for tobacco products.⁴⁵ Nor must the doctrine of commercial speech expand into a doctrine protecting the free speech rights of the Googles, Facebooks, and Amazons of the Internet to “speak” to third parties with the personal data we provided them to buy a product. However, this is exactly what is happening, to the degradation of free speech principles.

A second prescription is to follow Europe’s lead by developing a more robust concept of individual dignity. Those sympathetic to the critique of too much speech generally rely on notions from privacy or libel law to balance claims of free speech against claims of reputation. But privacy regulations can only do so much in an online environment where we seemingly consent to have our personal data gathered, stored, and transmitted. The ECJ’s particular prescription of giving individuals a right to have online information about them “forgotten” may be flawed, but it does point us in the right direction. The prescription for the ills of too much speech has to be one that restores significance to the act of

⁴³ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770–71 (1976).

⁴⁴ *Id.* at 755, 763–64.

⁴⁵ *But see Lorrillard Tobacco Co. v. Reilly*, 533 U.S. 525, 570–71 (2011) (striking down restrictions on tobacco advertising). Consider also the dispute over a Congressional law requiring cigarette companies to post a graphic warning on all cigarette packs. One court of appeals struck down the regulations the FDA promulgated pursuant to the statute. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F. 3d. 1205, 1221–22 (D.C. Cir. 2012). Another court of appeals upheld the Congressional statute against a facial challenge. *Discount Tobacco & Lottery Co. v. Food & Drug Admin.*, 674 F.3d. 509, 551 (6th Cir. 2012).

consenting to making personal information public. Individuals who have no choice but to consent if they are to use the services of online platforms have not volunteered to surrender power over their personal data in any meaningful way. Persons without power to control what they reveal about themselves in public are persons stripped of a basic human dignity.

Complaints about too much speech are as old as the Tower of Babel.⁴⁶ At a time of continuing repression abroad,⁴⁷ we do well to acknowledge the considerable advances an open Internet makes possible at home. But as in the biblical story where seven years of plenty gave way to seven years of famine, we can handle the opportunities created by our bounty of speech well or poorly. As a nation we responded to the rise of railroads with laws against rate discrimination.⁴⁸ We responded to the rise of radio and television by creating a Federal Communications Commission (“FCC”), charged with regulating the airwaves in the public interest,⁴⁹ and a Corporation for Public Broadcasting to take some bandwidth out of private hands.⁵⁰ In line with that tradition, the FCC recently moved to regulate Internet Service Providers (“ISPs”) as public utilities required to provide access to the Internet in nondiscriminatory ways.⁵¹ The adoption of so-called net neutrality rules is a hopeful

⁴⁶ *Genesis* 11:1–9. For an old gripe from 1710, see Jonathan Swift, *The Examiner*, in 1 THE WORKS OF JONATHAN SWIFT 300 (1880) (“[F]alsehood flies and the truth comes limping after it.”). A version usually but wrongly attributed to Mark Twain is that “a lie can travel halfway around the world while the truth is putting on its shoes.” See Benkler, *supra* note 8, at 348 (citing to wrongful attribution of quotation to Twain in Thomas Friedman, *Too Good to Check*, N.Y. TIMES, Nov. 17, 2010, at A33).

⁴⁷ See, e.g., Keith Bradsher & Paul Mozur, *Sealed Tight*, N.Y. TIMES, Sept. 22, 2014, at B1 (describing China’s “great firewall” restricting access to Google and other web sites); see also Edward Wong & Didi Kirsten Tatlow, *Beijing, Blocking Social Media Sites, Tries to Keep a Tight Lid on News of Unrest*, N.Y. TIMES, Sept. 30, 2014, at A10 (describing China’s propaganda department’s directive to delete any mention of the disorder in Hong Kong).

⁴⁸ Interstate Commerce Act, Pub. L. No. 49-41, 24 Stat. 379 (1887).

⁴⁹ Communications Act of 1934, 47 U.S.C. § 151ff (2012).

⁵⁰ Public Broadcasting Act of 1967, 47 U.S.C. § 396 (2012).

⁵¹ Rebecca R. Ruiz & Steve Lohr, *F.C.C. Votes to Regulate the Internet as a Utility*, N.Y. TIMES, Feb. 27, 2015, at B1. For cable and telecom company

sign that governance is maturing on the Internet. The concern in this Article is whether similar regulations for the public good will develop for the interactive computer services—the Googles, Facebooks, Twitters, Instagrams and the like—running on the Internet.

II. FROM TOO LITTLE SPEECH TO TOO MUCH SPEECH

Before there was too much speech, there was too little speech. The classic cases that gave rise to modern First Amendment law centered on the harms to democracy when government prevented dissenters from criticizing public policies or advocating unpopular points of view.⁵² The birthing process was slow and painful. Although the Supreme Court initially gave government wide leeway to punish dissent during time of war as an obstruction of the war effort, it slowly shaped a more protective paradigm.⁵³

The major prong of the speech protective paradigm, as it took shape from the end of World War I through the Vietnam War, was the principle of content neutrality. Simply put, the principle is that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁵⁴ Law can regulate expressions that threaten to incite imminent violence or unlawful conduct⁵⁵ or fall within historic categories never deemed to have speech value, such as obscenity, libel, or fighting words.⁵⁶

resistance to the FCC’s proposal to regulate ISPs as public utilities, see Steve Lohr, *F.C.C. Plans Strong Hand to Regulate the Internet*, N.Y. TIMES, Feb. 5, 2015, at B1.

⁵² For an account of imprisonment of persons who spoke against American entrance into World War I, see PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 128–32 (1979).

⁵³ Compare the Court’s initial record of affirming convictions of anti-war protesters, *Schenck v. United States*, 249 U.S. 47 (1919), with the Court’s eventual use of neutrality principles to protect a protester who wore a jacket displaying the words, “Fuck the Draft.” *Cohen v. California*, 403 U.S. 15 (1971).

⁵⁴ *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972).

⁵⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁵⁶ In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942), the Court noted that obscenity, libel, and fighting words were categories of speech outside

Consistent with neutrality toward messages, law can provide for reasonable time, place, and manner regulations of speech.⁵⁷ Likewise, government may justify incidental effects on speech that result from pursuing compelling state interests that have nothing to do with the content of speech.⁵⁸ However, the concept of neutrality bars government from justifying prohibitions on speech by declaring a given message harmful in and of itself.⁵⁹

At first, the theory driving speech protection located the value of speech in its service to the ends of democratic government. Justice Cardozo referred to speech as “the matrix, the indispensable condition, of nearly every other freedom.”⁶⁰ Justice Brandeis wrote in similar means-ends fashion about the connection between free speech and self-government.⁶¹ Before Brandeis and Cardozo, Thomas Jefferson had laid out the same defense of speech as a necessary condition of democracy.⁶²

Like judges, philosophers at first placed special value on the worth of political speech. “The primary purpose of the First Amendment,” Alexander Meiklejohn wrote in 1948, “is . . . that all the citizens shall, so far as possible, understand the issues which

the protections of the First Amendment. Although this remains true, the Court has scrutinized obscenity, libel, and fighting word statutes to make sure they do not intrude into areas of constitutionally protected speech. *See* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386–87 (1992).

⁵⁷ *See, e.g., Cox v. New Hampshire*, 312 U.S. 569, 575–76 (1941).

⁵⁸ *See, e.g., United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

⁵⁹ *See, e.g., Texas v. Johnson*, 491 U.S. 397, 416–17 (1989).

⁶⁰ *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

⁶¹ “Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.” *Whitney v. California*, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring).

⁶² “If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.” THOMAS JEFFERSON, *Inaugural Address*, in 8 THE WRITINGS OF THOMAS JEFFERSON 1, 3 (1897).

bear upon our common life.”⁶³ The plausible argument ran from more speech on public issues leading to more informed citizens and in turn to better democracy.⁶⁴ However, although the democratic argument was highly protective of political speech, critics faulted it for being underinclusive when it came to protecting speech about private matters.⁶⁵

In time the classic battles for more speech opened a second and broader front against too little speech. The idea took hold that speech had intrinsic as well as instrumental value. Individual self-expression became an end in itself, since no individual was truly free who lacked power to shape the contents of his or her mind.⁶⁶ The linguistic shift from “freedom of speech” to “freedom of expression” or better still “freedom of self-expression” was a sign of the theoretical shift behind the phrases.⁶⁷ The Court has cited the inherent value of individual autonomy to extend the protection of the First Amendment to such nonpolitical matters as commercial advertising,⁶⁸ art,⁶⁹ or nude dancing as art.⁷⁰ Sometimes,

⁶³ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 88–89 (1948).

⁶⁴ These theories tended to leave the end product of “better democracy” vaguely defined. John Stuart Mill taught that pluralism in speech is what enables truth to defeat falsity in democracies. JOHN STUART MILL, *On Liberty*, in 18 COLLECTED WORKS OF J. S. MILL 228–260 (J. M. Robson ed., 1977). Skeptics about objective truths argue that tolerance of speech makes representative democracy achieve “truth” only in the sense of making decisions more responsive to public opinion. ROBERT DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 10–11 (1982).

⁶⁵ See, e.g., Zechariah Chafee, Jr. “Book Review,” 62 HARV. L. REV. 891 (1949). For one scholar who follows that part of Meiklejohn’s theory that sees free speech as serving the “central democratic goal [of] reflective and deliberative debate,” see Sunstein, *supra* note 26, at 1762.

⁶⁶ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–7 (1970) (positing individual “self-fulfillment” as the sovereign First Amendment value).

⁶⁷ Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303, 306 (1991) (asserting that “freedom of expression is a public good”).

⁶⁸ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770–71 (1976).

⁶⁹ See Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J. L. & ARTS 169 (2012).

commentators attempted to stretch the democratic argument to explain the connection between individual and collective meanings of self-rule.⁷¹ Other times, for instance in Justice Scalia's remarks made about the First Amendment's "obvious" protection of Jackson Pollock's most abstract paintings,⁷² the Justice finds no need to locate some putative service of abstract art to politics.

In recent years, the Court has adopted an increasingly libertarian philosophy about free speech, holding that content as far removed from the workings of political democracy as snuff movies⁷³ and violent video games⁷⁴ are nonetheless protected forms of self-expression.⁷⁵ The Court's recent campaign finance decisions offer the clearest example of its libertarian tilt. In *Citizens United v. Federal Elections Commission*,⁷⁶ the Supreme Court overruled

⁷⁰ Compare *Schad v. Mount Ephraim*, 452 U.S. 61, 75–77 (1981) (holding that the First Amendment protects live nude dancing against a zoning law prohibiting adult stores from featuring it), with *Barnes v. Glen Theatre*, 501 U.S. 560, 570–71 (1991) (upholding requirement that nude dancers wear some cover over breasts and genitals).

⁷¹ Meiklejohn responded to critics by saying that the self-government rationale explained why we protect art and literature, since they help voters acquire "the knowledge, intelligence, [and] sensitivity to human values . . . which, so far as possible, a ballot should express." Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256; see also *Va. State Bd. of Pharmacy*, 425 U.S. at 763–64 (advertising prescription drug prices contributes information on a matter for public debate).

⁷² For this example, see Tushnet, *supra* note 69, at 169.

⁷³ *United States v. Stevens*, 559 U.S. 460 (2010).

⁷⁴ *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 950 (2011).

⁷⁵ As opposed to the libertarian emphasis on maximizing the free speech rights of individuals, egalitarians invoke the connection between speech and democracy to defend state legislation promoting equality in speech in certain situations. In the era of broadcasting, for instance, egalitarians defended equal access rules and the Fairness Doctrine. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). For the contrast between libertarian and egalitarian views on free speech, compare Eugene Volokh, Symposium, *Cyberspace and Privacy: A New Legal Paradigm? Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1091–93 (2000) [hereinafter *Troubling Implications*], with Kathleen Sullivan, *The Supreme Court, 2009 Term, Comment: Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145–46 (2010).

⁷⁶ 558 U.S. 310 (2010).

its own precedents⁷⁷ and declared that the more speech, the better approach included the right of corporations and unions to use their treasuries to fund independent electioneering communications right up until Election Day.⁷⁸ *Citizens United* repudiated any egalitarian notion that the speech of independent corporate expenditure groups could be limited out of concern for leveling the electoral playing field.⁷⁹ In a recent interview defending the *Citizens United* decision, Justice Scalia specifically invoked “the more speech, the better” norm as the sovereign First Amendment principle.⁸⁰

Money’s metamorphosis from thing to speech is characteristic of the too much speech era. Reasonable persons disagree on whether there is too much money in politics or whether corporate contributions and independent expenditures have as much potential to corrupt the political process as critics argue.⁸¹ This Article does not seek to resolve those disagreements; rather its concern is with a more general phenomenon that the transmogrification of money into speech represents.

⁷⁷ See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990); see also *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 136 (2003) (noting that the government has an interest in preventing the public from losing faith in the electoral process that results from moneyed speech drowning out the speech of others).

⁷⁸ *Citizens United*, 558 U.S. at 365–66.

⁷⁹ “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment” *Id.* at 349–50 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976)).

⁸⁰ Matt Vasilogambros & Sarah Mimms, *Scalia Defends Citizens United Decision, Reflects on Term in Rare TV Appearance*, NATIONAL JOURNAL (July 18, 2012), <http://www.nationaljournal.com/politics/scalia-defends-citizens-united-decision-reflects-on-term-in-rare-tv-appearance-20120718>.

⁸¹ While there is no doubt that the amount of money spent by independent groups during campaigns has vastly increased in recent years, see Ashley Parker, *Outside Spending Drives a Deluge of Political Ads*, N.Y. TIMES, July 28, 2014, at A1, there is little evidence that big donors are backing winning candidates, see Andrew Mayersohn, *Four Years After Citizens United: The Fallout*, OPENSECRETS.ORG (Jan. 21, 2014), <https://www.opensecrets.org/news/2014/01/four-years-after-citizens-united-the-fallout/>.

In the same era that the Court extended First Amendment protection to money as speech, it also bestowed the First Amendment's protection on commercial advertising for the first time.⁸² This broadening of what counts as speech continues apace on the Internet, permitting search engine companies to invoke the First Amendment as a shield against legal regulation of their business. More generally, a world of too much speech comes into existence whenever commercial data migrates en masse into the free speech column, to the detriment of the autonomy persons once enjoyed to control access to personal information.⁸³

Two questions loom. The first is how to distinguish commercial speech, largely protected against government interference, from commercial conduct subject to reasonable legal regulations.⁸⁴ The second is whether commercial speech is equal in value to political speech.⁸⁵ The answers to these two questions will go a long way to determining whether or not we live in an era of too much speech.

⁸² Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770–71 (1976). Prior to this decision, many states restricted advertising by professions, such as by lawyers. *See generally* Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (overturning restrictions).

⁸³ For argument to this effect, see *infra* Parts III.A and III.B.

⁸⁴ Compare Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2659 (2011) (stating that regulation of marketing of prescription drugs is a restriction on speech), with IMS Health Inc. v. Ayotte, 550 F.3d 42, 52–54 (1st Cir. 2008) (finding similar regulation in another state is a regulation of conduct, not speech).

⁸⁵ Compare Central Hudson Gas and Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980) (subjecting restrictions on commercial speech to intermediate scrutiny as opposed to the strict scrutiny that restraints on political speech receives), with Sorrell v. IMS Health Inc., 131 S. Ct. at 2664 (“A ‘consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.’”); see also Cass R. Sunstein, *Commentary: Low Value Speech Revisited*, 83 NW. U. L. REV. 555, 557 (“It is impossible to develop a system of free expression without making distinctions between low and high value speech, however difficult and unpleasant that task may be.”).

III. DATASPEAK: THE OVEREXTENSION OF COMMERCIAL SPEECH DOCTRINE

In the world of big data—also known as metadata—algorithms crawl through haystacks of raw information looking for new needles of knowledge.⁸⁶ We tell machines something about our preferences every time we buy a product, and they speak back to us with predictions about our future preferences.⁸⁷ They communicate a profile of our preferences (after removing personal identifiers) to advertisers interested in reaching in the aggregate persons with particular buying tastes.⁸⁸ Elsewhere, workplace scientists slice and dice data about employee performance to develop tests for hiring and promotion.⁸⁹ The National Security Agency (“NSA”) sits on its own haystack of dialed telephone numbers.⁹⁰ When necessary, the agency combs through it to see who might have called a person who in turned called the number of a terrorism suspect.⁹¹ In short, there is a significant amount of dataspeak going on.⁹²

Data enthusiasts turn to the First Amendment to protect the free flow of data from obstacles that privacy regulations are meant to create.⁹³ Even the most enthusiastic supporters of information

⁸⁶ According to IBM, “Big data is being generated by everything around us at all times. Every digital process and social media exchange produces it. Systems, sensors and mobile devices transmit it.” *What is Big Data*, IBM, <http://ibm.com/big-data/us/en/> (last visited Aug. 29, 2015).

⁸⁷ See, e.g., Bracha, *supra* note 39, at 1649 (posing the example of a search where the user tells the search engine her tastes in movies and the search engine makes recommendations for future movies to watch).

⁸⁸ See, e.g., *Privacy Policy*, GOOGLE, <https://privacy.google.com/about-ads.html> (last visited Aug. 29, 2015).

⁸⁹ Don Peck, *The Future of Work*, THE ATLANTIC, Dec. 2013, at 73.

⁹⁰ See *infra* Part VI.A.

⁹¹ Spencer Ackerman, *NSA Warned to Rein in Surveillance as Agency Reveals Even Greater Scope*, THE GUARDIAN (July 17, 2013), <http://www.theguardian.com/world/2013/jul/17/nsa-surveillance-house-hearing>.

⁹² “There’s been a real sea change in the past five years, where the quantities have just grown so large—petabytes, exabytes, zetta—that you start to be able to do things you never could before.” Peck, *supra* note 89, at 80.

⁹³ See *Troubling Implications*, *supra* note 75, at 1091–94; Jane R. Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 63 (2014).

freedom concede the need for a narrow band of privacy, protecting sensitive information of the sort contained in medical⁹⁴ or student records.⁹⁵ However, they suggest that most data is not intimate in these ways and should be fair game in a society devoted to the free flow of information.⁹⁶ They turn to the First Amendment with arguments that data *is* speech.⁹⁷

Treating commercial data gathering as a First Amendment activity is at the core of the problem of too much speech. Economic activities that should be subject to reasonable state regulation become free speech activities, apparently as important to the values of the First Amendment as political speech.⁹⁸

This Section will argue that commercial speech doctrine, sensible in its origins, is being put to uses for which it was never intended. In 1976, a group representing persons with conditions requiring use of prescription drugs filed suit against the Virginia Board of Pharmacy. At issue was a board regulation that prohibited licensed pharmacists from advertising the price of prescription drugs.⁹⁹ It is telling that the Court refrained from announcing any free speech right in pharmacists to advertise.¹⁰⁰ Instead, the Court emphasized the free speech rights of the *audience* to receive the advertising.¹⁰¹ The Court stressed that consumers' interests in receiving prescription drug price information was related to "an interest in their own health that was 'fundamentally deeper than a

⁹⁴ Federal law does protect the privacy of a patient's health card records maintained by health service providers or health plans. 42 U.S.C. § 1320a-7c(a)(3)(B)(ii) (2012).

⁹⁵ Family Education Rights and Privacy Act of 1974, 20 U.S.C. § 1232(g) (2012).

⁹⁶ For a statement of how Acxiom, a leading data-mining company, collects and markets data about us, see *Make Data Work for You*, <https://www.aboutthedata.com>, ACXIOM, (last visited Aug. 29, 2015).

⁹⁷ See *infra* Part III.B.

⁹⁸ *Troubling Implications*, *supra* note 75, at 1092 (noting speech about "daily life matters" is as important as any other speech).

⁹⁹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 753 (1976).

¹⁰⁰ *Id.* at 753, 770–71.

¹⁰¹ *Id.*

trade consideration.”¹⁰² Presumably, the case would have been less compelling had the consumers been seeking price information in order to comparison shop for shampoos.¹⁰³ Little in the Supreme Court’s original 1976 decision to include commercial speech within the protection of the First Amendment justifies the extensive speech protections that interactive commuter services and social platforms now seek.

A. *Not All Communications Tools Speak*

Some ground clearing is first necessary. Not everything that communicates information is speech, even broadly conceived.¹⁰⁴ To take an example offered by constitutional scholar Robert Post, navigation charts “communicate” but no court treats them as entitled to First Amendment protection.¹⁰⁵ Given the context in which they are used, charts function as products or tools subject to the normal rules of product liability in cases of inaccuracy.¹⁰⁶ For example, a blender functions to stir and mix and does not function as an expressive piece of glass sculpture. It *could* be a sculpture designed to speak to an individual, but context would point out the difference between tool and sculpture. Or to take one of Tim Wu’s

¹⁰² *Id.* at 755 (quoting trial court decision below); *id.* at 763–764 (“Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged.”).

¹⁰³ *Id.* at 764 (“[N]ot all commercial messages contain . . . a public interest element.”).

¹⁰⁴ Acts and conduct, and even silence and not doing an act, communicate. As communications theorist Paul Watzlawick and colleagues put it, “One cannot not communicate.” P. Watzlawick et al., *Some Tentative Axioms of Communication*, in *PRAGMATICS OF HUMAN COMMUNICATION - A STUDY OF INTERACTIONAL PATTERNS, PATHOLOGIES AND PARADOXES* 48–71 (1967). See also *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”).

¹⁰⁵ See, e.g., *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1035–36 (9th Cir. 1991) (analogizing an aeronautical chart to a compass).

¹⁰⁶ Robert C. Post, *Essay: Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249, 1254 (1995).

examples in *Machine Speech*, the sound of a car alarm might be speech if it were put in a song, but generally the sound functions as an automated warning device, not as expressive output for its human designer.¹⁰⁷

Similar to Post's navigation charts, Google Maps or MapQuest function as tools for getting from A to B. Obviously, these sites process and communicate information sought by users. But users do not converse with the map's designers, as if the designers were engaged in conveying some substantive message.¹⁰⁸ If courts obliterate this difference between speech and tools that facilitate the speech of others, they would be engaging in a new kind of "Lochnerizing" in which freedom of speech replaces the old liberty of contract as a way to shield commercial enterprises from state regulation.¹⁰⁹

B. *Not All Raw Data is Speech*

Jane Yakowitz Bambauer is a leading advocate of the position that "for all practical purposes, and in every context relevant to the current debates in information law, data is speech."¹¹⁰ For Bambauer, "[e]xpanded knowledge is an end goal of American

¹⁰⁷ Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1524–25 (2013).

¹⁰⁸ In *Rosenberg v. Harwood*, 2011 WL 3153314 (D. Utah 2011), a woman sued Google, claiming her reliance on Google Maps led her to step into a freeway and suffer an injury. Google defended by citing its free speech rights as a publisher. *Id.* The court did not reach this issue but dismissed the claims on the alternative grounds that Google owed no duty of care to the plaintiff. *Id.*

¹⁰⁹ For a discussion of how free speech principles can be misused to strike down economic regulations in a manner reminiscent of the disapproved *Lochner* era, see *infra* Part III.C. One example of how the doctrine of commercial speech can overextend the First Amendment came in a federal court decision, fortunately overturned, striking down the National Do Not Call Registry as an unconstitutional infringement on telemarketing. See *Mainstream Mktg. Servs. Inc. v. Fed. Trade Comm'n*, 283 F. Supp. 2d 115, 1167–68 (D. Colo. 2003), *rev'd*, 358 3d 1224 (10th Cir. 2003). Another troubling First Amendment decision, one that remains good law, involved the striking down of a regulation that forbade telephone companies to use customer data for unauthorized advertising purposes. See *U.S. West, Inc. v. FCC*, 182 F. 3d 1224, 1232–33 (10th Cir. 1999).

¹¹⁰ Bambauer, *supra* note 93, at 63.

speech rights, and accurate information . . . provides the fuel.”¹¹¹ Access to raw data is crucial to the creation of new knowledge since data is nothing other than “information . . . captured and recorded into a fixed, man-made format.”¹¹² It is data that led us to revise wrong notions that too much salt causes hypertension¹¹³ or that stress causes ulcers.¹¹⁴ For Bambauer, every restriction on data’s movement is an obstacle to knowledge and autonomy.¹¹⁵

Bambauer casts a jaundiced eye at most privacy regulations because “they are deliberately designed to disrupt knowledge creation.”¹¹⁶ In her view, carefully drafted privacy laws might be constitutional, but only if they survive heightened scrutiny under the First Amendment.¹¹⁷ Every privacy restriction raises a constitutional objection, many of them fatal.¹¹⁸ Those privacy norms that cannot survive such scrutiny should be “casualties”¹¹⁹ in the battle for freedom of information against retrograde forces of mind regulation marching under the banner of privacy.¹²⁰

However, Bambauer’s analysis bumps into a major problem. Although she notes in passing that “knowledge is power,”¹²¹ she pays scant attention to the “who” of data as opposed to the “what.” To those who fret about creditors using Big Data to size up a loan applicant, Bambauer’s response, true to the speech answering

¹¹¹ *Id.*

¹¹² *Id.* at 65.

¹¹³ *Id.* at 102.

¹¹⁴ *Id.* at 93.

¹¹⁵ *Id.* at 105.

¹¹⁶ *Id.* at 63.

¹¹⁷ *Id.* at 87; *id.* at 106 (“[D]ata should not be relegated in all cases to a lower form of protection.”); *id.* at 114 (“[G]overnment cannot limit the collection or dissemination of data in order to achieve certain preferred ends without a compelling interest to do so.”).

¹¹⁸ *Id.* at 109 (recognizing that her analysis “will lead to some consequences that are difficult to accept,” including “the leveling of popular consumer privacy laws”).

¹¹⁹ *Id.* at 112.

¹²⁰ *Id.* at 87 (“Data privacy laws have the unabashed goal of limiting, and shaping, what the government’s constituents can know.”).

¹²¹ *Id.* at 108.

speech approach, is that the customer can turn the tables and use the same data to shop for creditors.¹²² This might be true if the predicate—that consumers have the same access to Big Data as banks—were true for any but the most savvy and credit-worthy of consumers. The rest of the consumers live in a world of information asymmetry.¹²³ Even Bambauer acknowledges that certain hotel pricing sites know more about visitors—for instance whether they use a Mac computer—than visitors know about them, and that these sites use their information advantage to steer Mac users to more expensive hotels.¹²⁴ Bambauer dismisses those concerned about such examples as “[t]he equality camp.”¹²⁵ She scoffs at “academic . . . illuminati [who] tend to overreact to corporate power”¹²⁶ and offers her calming conclusion that “a person who is categorized in one instance will be the categorizer in the next and will rightly expect the liberty to judge and form his own opinions.”¹²⁷

One can accept Bambauer’s general view that factual data is indispensable to free thought without accepting her specific argument that unregulated corporate power over data gathering is necessary to, or even always consistent with, fact-driven inquiry.¹²⁸ For instance, Robert Post has argued that laws prohibiting the

¹²² *Id.* at 102.

¹²³ See, e.g., Leah Hunt-Hendrix & Astra Taylor, ‘Tech’ is Political—How We Respond to it Needs to be Just as Political, *THE NATION* (May 27, 2015), <http://www.thenation.com/article/tech-political-how-we-respond-it-needs-be-just-political/>.

¹²⁴ Bambauer, *supra* note 93, at 116; see also Andrew Tutt, *The New Speech*, 41 *HASTINGS CONST. L.Q.* 235, 245 n.27 (2014) (citing Dana Mattioli, *On Orbitz, Mac Users Steered to Pricier Hotels*, *WALL ST. J.*, (Aug. 23, 2012, 6:07 PM), <http://online.wsj.com/article/SB10001424052702304458604577488822667325882.html>).

¹²⁵ Bambauer, *supra* note 93, at 107.

¹²⁶ *Id.* at 108.

¹²⁷ *Id.* at 102.

¹²⁸ One does not have to cast corporations as the only villains in the marketplace of ideas to have concerns about, say, the commitment of tobacco companies historically to factual inquiry about the safety of their product. See Philip Shenon, *New Limits Set Over Marketing for Cigarettes*, *N.Y. TIMES* (Aug. 18, 2006), <http://www.nytimes.com/2006/08/18/washington/18tobacco.html>.

public disclosure of private facts, a tort in most states,¹²⁹ serve rather than hinder the marketplace of ideas by promoting rules of civility that permit individuals to engage with one another.¹³⁰ Violations of the rules of civility, Post remarks, are intrinsically disrespectful and serve as a way of silencing persons.¹³¹ The lack of respect places the injured person “outside of the bounds of the shared community” and hence outside of participation in public speech as an equal.¹³²

Enforcement of privacy norms is society’s way of reaffirming the dignity of the person as a full member of the community.¹³³ Or as anthropologist Robert Murphy puts it, “[i]nteraction is threatening by definition, and reserve, here seen as an aspect of distance, serves to provide partial and temporary protection to the self [The] privacy obtained makes other roles more viable”¹³⁴ Privacy lets us know that our personal and intimate relationships are secure even as we enter the public arena.¹³⁵

Legal scholar Paul Schwartz has raised specific concerns that disclosure of a person’s genetic information, however accurate, may relegate certain members of society into a “biological

¹²⁹ See Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L. J. 967, 971–72 (2003). The tort of public disclosure of private facts occurs when a person or persons widely discloses a private matter that is “highly offensive to a reasonable person” and “is not of legitimate concern to the public.” *Id.* at 971 (quoting Restatement of Torts (Second) § 652D (1977)).

¹³⁰ Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 959 (1989).

¹³¹ *Id.* at 967.

¹³² *Id.* at 968.

¹³³ *Id.* at 968, 971 (explaining that common law privacy is a normative concept that expresses “forms of respect deemed essential for social life.”).

¹³⁴ Sundquist, *supra* note 6, at 158 (quoting Robert F. Murphy, *Social Distance and the Veil*, 66 AM. ANTHROPOLOGIST 1257, 1259 (1964)).

¹³⁵ *Id.* at 173–74; see also Kate Murphy, *We Want Privacy, but Can’t Stop Sharing*, N.Y. TIMES, Oct. 5, 2014, at Sunday Review 4 (explaining that being under public observation triggers arousal mechanisms that “drain cognitive resources [and] . . . inhibit[] . . . our ability to explore our thoughts and feelings so we can develop as individuals.”).

underclass.”¹³⁶ Schwartz notes that genetic test results, taken out of context, can support a wrong-headed genetic determinism characteristic of past eugenics movements.¹³⁷ And while perhaps data can answer data in the emerging market for genetic information, “[t]he individual to whom these data refer faces a high price when attempting to explain the significance or insignificance of the information, and these explanatory costs can exceed the value of unrestricted disclosure to society.”¹³⁸

In Bambauer’s worldview, almost all data, whether about matters of public or private concern, can be useful in the creation of knowledge.¹³⁹ But, in *The Virtues of Knowing Less*, law professor Daniel Solove builds on the work of Hannah Arendt, Erving Goffman, and other scholars to argue that details about our intimate and private selves are not necessarily a reliable guide to the different selves we all play in public.¹⁴⁰ This difference between private selves and public lives is crucial to the Supreme Court’s sliding scale approach to libel, where the more private the person, the greater “the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation.”¹⁴¹

Bambauer does accept that individuals have a narrow right to privacy that she calls seclusion, which is essentially the right not to

¹³⁶ Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 TEX. L. REV. 1, 29 (1997).

¹³⁷ *Id.* at 28.

¹³⁸ *Id.* at 30. Schwartz refers to this as a “cost of explanation” problem necessitated in real markets by the less than rational behavior of employers. Thus, as opposed to the critiques of privacy as economically inefficient offered by leading scholars such as Judge Richard Posner or Richard Epstein, Schwartz defends nondisclosure of certain sorts of medical information as economically efficient. *See id.* at 23–30 (summarizing and criticizing the Posner-Epstein position on privacy).

¹³⁹ Bambauer, *supra* note 93, at 63.

¹⁴⁰ Solove, *supra* note 129, at 1037–38.

¹⁴¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (explaining that plaintiffs may recover presumed and punitive damages when false and defamatory statements raise no matters of public concern).

have information gathering going on inside your house or during intimate conversations.¹⁴² But she insists that the geography of seclusion be kept narrow, since the farther one is from home, the more one is in the ever-expanding grip of “the public.”¹⁴³ Once we use a credit card, we are in the information commons. Thus, one of the “casualties” of her narrowing privacy to seclusion would be President Obama’s proposed consumer privacy bill of rights for the Internet, insofar as that bill talks expansively of “American Internet users [] hav[ing] the right to control personal information about themselves.”¹⁴⁴

Bambauer is one among many scholars who takes aim at the elevation of speech about public affairs over speech about private matters.¹⁴⁵ In particular, she jettisons any wholesale assignment of commercial speech to the lowest levels of First Amendment protection.¹⁴⁶ For her, such hierarchies empower government to tell persons what it is important to know about. Bambauer is committed to the notion that all information is created equal.

C. *Data about Prescriptions: The Return of Lochner?*

Consider a recent dispute over the boundaries of commercial speech.¹⁴⁷ For our purposes, it is serendipitous that the case returns to a fact pattern that gave birth to the doctrine of commercial speech: information about prescription drugs.¹⁴⁸

¹⁴² Bambauer, *supra* note 93, at 111–12.

¹⁴³ *Id.* at 112 (extending seclusion outside the home has “severe effects on the liberty of others”).

¹⁴⁴ Press Release, White House, Fact Sheet: Plan to Protect Privacy in the Internet Age by Adopting a Consumer Privacy Bill of Rights (Feb 23, 2012), available at <https://www.whitehouse.gov/the-press-office/2012/02/23/fact-sheet-plan-protect-privacy-internet-age-adopting-consumer-privacy-b>.

¹⁴⁵ See, e.g., *Troubling Implications*, *supra* note 75, at 1095 (“[T]he public concern test is theoretically unsound.”); *id.* at 1050 (“The difficulty is that the right to information privacy - my right to control your communication of personally identifiable information about me - is a right to have the government stop you from speaking about me.”).

¹⁴⁶ Bambauer, *supra* note 93, at 106.

¹⁴⁷ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

¹⁴⁸ See *supra* notes 43–44 and accompanying text.

Pharmaceutical representatives engage in a marketing practice known as “detailing.”¹⁴⁹ Detailers are pharmaceutical representatives who obtain from pharmacies or health plans detailed information about the prescribing practices of a particular physician.¹⁵⁰ The detailers then use this information to customize their marketing, doctor by doctor.¹⁵¹

Vermont passed a law that contained three prohibitions on access to prescription information.¹⁵² The first prohibited entities such as pharmacies or health insurers from selling prescriber-identifying information.¹⁵³ The second prohibited these entities from disclosing prescriber-identifying data for marketing purposes, while permitting its use for other purposes.¹⁵⁴ The third prohibited pharmaceutical manufacturers from using the information to market their products to physicians.¹⁵⁵ Vermont asserted state interests in medical privacy and in keeping down health care costs by preventing marketers from influencing doctors to prescribe expensive brand-name drugs over generic alternatives.¹⁵⁶

The Supreme Court found a fatal flaw in the law.¹⁵⁷ Instead of enacting a general privacy ban on disclosure of prescriber-identifying information, the state went after only those sales, disclosures, or uses that contained content the state frowned upon (marketing) and a disfavored viewpoint (that held by the detailers doing the speaking to physicians).¹⁵⁸ Since the law violated core free speech principles of content and viewpoint neutrality,¹⁵⁹ the Court subjected the law to more heightened scrutiny than a

¹⁴⁹ *Sorrell*, 131 S. Ct. at 2659.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 2659–60.

¹⁵² *Id.* at 2660; *see also* VT. STAT. ANN., tit. 18 § 4631(d) (2015).

¹⁵³ *Sorrell*, 131 S. Ct. at 2660.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* For lucid analysis of the Vermont law, *see* Ashutosh Bhagwat, *Constitutional Constraints on State Health Care & Privacy Regulation After Sorrell v. IMS Health*, 36 VT. L. REV. 855, 855–80 (2012).

¹⁵⁶ *Sorrell*, 131 S. Ct. at 2670–71.

¹⁵⁷ *Id.* at 2663–64.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2663–64, 2667.

commercial regulation might otherwise have received and struck down the law.¹⁶⁰

What if Vermont *had* passed a more general or neutral ban on disclosure of prescriber prescription identification?¹⁶¹ If raw data is already speech, as Bambauer maintains, then such a law would have to survive heightened scrutiny by convincing the court that the privacy interests at stake were compelling and the restrictions narrowly tailored to meet those interests. In *Sorrell* the Court did not feel it necessary to reach that issue, since the lack of content and viewpoint neutrality was already dispositive of the case.¹⁶² However, in dicta Justice Kennedy staked out the more speech, the better approach that augurs ill for privacy regulations.¹⁶³ Justice Kennedy argued that data about the prescribing habits of physicians is factual.¹⁶⁴ And “[f]acts . . . are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. *There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.*”¹⁶⁵

If in the future Justice Kennedy’s views move from dicta to holding, then we can expect companies in the business of monetizing data to push for more free speech protection against privacy laws. In *Sorrell*, the information being disclosed went to the doctor’s professional habits, not his personal life or those of patients.¹⁶⁶ The *Sorrell* case left for another day the looming question of how to adjust the inherited free speech paradigm of “more information is always good” to the marketing of metadata that discloses truly personal information.¹⁶⁷

¹⁶⁰ *Id.* at 2672.

¹⁶¹ The Court specifically noted that such a neutral law would pose different questions. *Id.* at 2668.

¹⁶² *Id.* at 2667.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (emphasis added).

¹⁶⁶ *Id.* at 2665, 2668.

¹⁶⁷ The Federal Health Insurance Portability and Accountability Act (HIPAA) does protect the privacy of a patient’s health card records maintained by health

In a case from New Hampshire that was similar to *Sorrell*, the Court of Appeals for the First Circuit offered a different analysis of data's claim to First Amendment protection.¹⁶⁸ The First Circuit regarded the law as a reasonable regulation of the conduct, not the speech, of pharmaceutical representatives.¹⁶⁹ These representatives were engaged in selling prescription drugs just as other salespersons were engaged in selling beef jerky.¹⁷⁰ The analogy was unfortunately flippant, but it illustrated the court's point that, in the context of the case, the data sought served no normative purposes that would qualify the information as speech.¹⁷¹ As the court put it, the true concern of the pharmaceutical representatives was that the market for their services would dry up if they had no access to prescriber-identifying data.¹⁷²

Justice Breyer's dissent in *Sorrell* picked up on the First Circuit approach, going even further by spotting what, following Justice Breyer, may be called the *Lochner* elephant in the room.¹⁷³ Ever since the New Deal, there has been a more or less stable constitutional settlement based on the principle that courts owe more deference to legislative regulation of economic affairs than

service providers or health plans. 42 U.S.C. § 1320a-7c(a)(3)(B)(ii) (2006). However, with the proliferation of software apps run on mobile devices such as Fitbit or Apple's SmartWatch, many persons now store health data in places not covered by HIPAA. One wonders whether Bambauer would oppose new privacy laws restricting what private vendors can do with personal medical data stored on such devices. See *Smartwatches and Weak Privacy Rules*, N.Y. TIMES, Sept. 16, 2014, at A26. According to the *Wall St. Journal*, most of the nearly 40,000 health apps for wearable devices on the market today make money by selling user fitness data to marketers. Elizabeth Dwoskin and Melinda Beck, *As Apple Moves Into Health Apps, What Happens to Privacy?*, WALL ST. J., (Sept. 9, 2014, 7:21 PM), <http://blogs.wsj.com/digits/2014/09/09/as-apple-moves-into-health-apps-what-happens-to-privacy/>.

¹⁶⁸ *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008).

¹⁶⁹ *Id.* at 45, 50–54.

¹⁷⁰ *Id.* at 53.

¹⁷¹ *Id.* at 45, 50–54.

¹⁷² *Id.* at 53.

¹⁷³ *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2673 (2011) (Breyer, J. dissenting).

they do to regulations of noneconomic matters.¹⁷⁴ But this basic distinction collapses when courts characterize state laws regulating pharmaceutical marketing as state regulations of speech.¹⁷⁵ The *Sorrell* majority mistakenly reasoned as if Vermont had imposed restrictions on what pharmaceutical representatives could say to doctors in favor of their message. In fact, the state restricted only disclosure of prescriber data that the pharmaceutical companies wanted in order to customize their pitches.¹⁷⁶ Against their commercial interest stood the state's significant interests in treating that data as private and confidential, given by physicians to pharmacies and health insurers for one purpose only.¹⁷⁷ The *Sorrell* decision is solicitous of marketing as speech but less attuned to the norms of medical practice and how writing a prescription is hardly a doctor's invitation to engage in a dialogue with marketers. In one world, doctors "speak" to pharmacists for the benefit of their patients only; in another world, doctors as well as patients lose control over personal information, as it becomes a commodity to be sold and purchased.

D. *The Ever-expanding Bounds of the Public*

Some will respond to the argument in the preceding section by objecting that information has always functioned as a tradable commodity. Nineteenth century readers thought the penny press

¹⁷⁴ The most famous statement of this distinction comes in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁷⁵ "[G]iven the sheer quantity of regulatory initiatives that touch upon commercial messages, the Court's vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty. History shows that the power was much abused See *Lochner v. New York* . . ." *Sorrell*, 131 S. Ct. at 2679 (Breyer, J. dissenting). Several commentators have echoed Justice Breyer's warning that the Roberts Court is using freedom of speech in ways similar to the ways the infamous *Lochner* era courts used liberty of contract to strike down commercial regulations. See, e.g., Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1211–17 (2005).

¹⁷⁶ *Sorrell*, 131 S. Ct. at 2662, 2668.

¹⁷⁷ *Id.* at 2683 (Breyer, J. dissenting).

worth the price, if only to get the latest shipping news.¹⁷⁸ This response is true as far as it goes, but the observation does not go as far as supercomputers do in collecting data beyond the bounds of anything that was previously possible.¹⁷⁹ Our normative commitments to free speech and a free press were never meant to cater to a world where the treatment of every disclosure of every byte of information as valued speech would be to override the very boundaries on public discourse that people rely on in throwing themselves into it.¹⁸⁰

Beginning with the work of John Rawls, contemporary theories of justice measure the fairness of basic institutions against shared principles of public reason.¹⁸¹ Publicly reasoned arguments are those that do not depend on any ultimate moral, religious, or spiritual commitments that may matter much to us in private life but which cannot be rationally defended to those who believe in different ultimate values.¹⁸² However, these theories of justice presume that, outside of public deliberations and debates, a private realm of speech goes on and flourishes.¹⁸³ Private discourse does not belong in public debates, and publicity should not imperially invade our private lives. An ever-expanding notion of what is public threatens the realm of the private that democratic theories of justice take as a starting point.

IV. TOO MUCH SPEECH FOR SEARCH ENGINES?

In 2003, Search King, a small advertising placement company, alleged that Google deliberately lowered Search King's Google rankings as a way to kill off ad competition.¹⁸⁴ Search King's

¹⁷⁸ For the history of the penny press see MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 12–60 (1978).

¹⁷⁹ *See supra* notes 4–12 and accompanying text.

¹⁸⁰ *See supra* notes 130–35 and accompanying text.

¹⁸¹ JOHN RAWLS, *A THEORY OF JUSTICE* 397–98 (1999).

¹⁸² *Id.*

¹⁸³ *See, e.g.*, HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 148 (Penguin, 1977).

¹⁸⁴ *Search King, Inc. v. Google Tech, Inc.*, 2003 U.S. Dist. LEXIS 27193 (2003).

business model was to locate web sites highly ranked by Google and pay these sites to link with its clients' webpages, thereby raising the Google rankings of its clients' pages.¹⁸⁵ As the middleman that grew these "link farms," Search King profited.¹⁸⁶ Google guards against such "search optimization" firms, regarding them as attempts to game the system.¹⁸⁷ When its Google ranking, as well as those of its partnered sites, suddenly declined, Search King found its business model threatened.¹⁸⁸

A. *Search Engines as Opinion Speakers*

In moving successfully to dismiss the complaint, Google argued that it did not matter what its reasons were for ranking Search King and the partnered sites as it did.¹⁸⁹ After all, Google maintained, its search results were just its opinions about the relative worth of websites when it came to providing answers to a user's query.¹⁹⁰ The rankings, like any ratings, were neither true nor false, but a classic example of protected speech—a speaker (here the algorithm) publishing its opinions about a matter of public interest.¹⁹¹ Given Google's First Amendment status as an opinion

¹⁸⁵ Greg Lastowka, *Google's Law*, 73 BROOKLYN L. REV. 1327, 1354–55 (2008).

¹⁸⁶ James Grimmelman, *Google Replies to Search King Lawsuit*, LawMeme (Jan. 9, 2004), <http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=807>, available at <http://web.archive.org/web/20040612081746/research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=807>.

¹⁸⁷ For an analysis of use of search-engine optimization techniques to "game" the system, see, e.g., Heather Lloyd-Martin, *Secrets of Successful Search Engine Optimization*, (March 5, 2003), <http://searchenginewatch.com/sew/news/2047911/secrets-successful-search-engine-optimization#>.

¹⁸⁸ *Search King*, 2003 U.S. Dist. LEXIS 27193 at 3–4.

¹⁸⁹ *Id.* at 6, 13.

¹⁹⁰ *Id.* at 6; see also Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1477 (2013) (noting search results express opinions as to a webpage's usefulness or quality).

¹⁹¹ In an earlier case, the Supreme Court had held that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

speaker, a trial would be pointless, Google argued, since there was no such thing as evidence that could prove a mere opinion true or false, objective or biased.¹⁹² The trial judge agreed, going so far as to state that an algorithm's rankings "cannot be considered wrongful even if the speech is motivated by hatred or ill will."¹⁹³

Other courts have reached similar conclusions in extending traditional protections for opinion to the evaluations contained in Google search results.¹⁹⁴ In testimony before Congress, Google's CEO, Eric Schmidt, said, "[s]earch is subjective, and there's no set of 'correct' search results."¹⁹⁵ One court has alternatively protected Google by holding that free speech principles protect the company from being compelled to speak by indexing *any* particular website.¹⁹⁶ Google continues to take action against other alleged search optimization schemes by deliberately lowering their ranks.¹⁹⁷

¹⁹² Google argued for dismissal of the complaint since "[t]he PageRank values assigned by Google are not susceptible to being proved true or false by objective evidence. How could SearchKing ever 'prove' that its ranking should 'truly' be a 4 or a 6 or a 8? Certainly, SearchKing is not suggesting that each one of the billions of web pages ranked by Google are [sic] subject to another 'truer' evaluation? If it believes so, it is certainly free to develop its own search services using the criteria it deems most appropriate." Amy N. Langville and Carl D. Meyer, *GOOGLE'S PAGERANK AND BEYOND: THE SCIENCE OF SEARCH ENGINE RANKINGS* 53 (Princeton 2011).

¹⁹³ *Search King*, 2003 U.S. Dist. Lexis 27193 at *13.

¹⁹⁴ *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 439–40 (S.D.N.Y. 2014) (noting Chinese search engine has First Amendment right to block "pro-democracy" sites as exercise of editorial judgment); *Krinsky v. Doe*, 72 Cal. Rptr. 3d 231, 251 (Cal. Ct. App. 2008) (holding online poster's comments, "while unquestionably offensive," were "pure opinion" and hence "were not actionable under [state] defamation law."); *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at *20–*21 (N.D. Cal. Mar. 16, 2007) ("Google itself holds out PageRank as an opinion . . .").

¹⁹⁵ Testimony quoted in James Grimmelmann, *Search Engines*, 98 MINN. L. REV. 868, 872, n. 16 (2014).

¹⁹⁶ *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007) (holding the First Amendment protects Google's right not to run a website's ads).

¹⁹⁷ See Josh Blackman, *What Happens if Data is Speech?* 16 U. PA. J. CONST. L. 25, 30 (2014) (recounting Google's decision first to demote then to reinstate

Control over search rankings matters to the free flow of information, since a site that does not get indexed by a search engine might as well not exist.¹⁹⁸ There is such a dramatic drop off from clicks on sites displayed on page one of search results compared to clicks on page two sites that companies fear being exiled into digital Siberia.¹⁹⁹

In the U.S., decisions such as *Search King* make it difficult even to reach questions about possible bias in search engine rankings. Once a court categorizes these rankings as opinions, the protections of the First Amendment shelter search engines from regulatory oversight of the content of their speech. And yet, the analogy of algorithmic output to opinion speech is tenuous. At most, the opinion of the algorithm is something weak like “We think these are the sites you will find most useful to answer your query.”²⁰⁰ This is a far cry from Google offering *its own substantive opinion* about the *content* of the sites indexed. Google’s service seems more like a tool without any opinions of its own, an index useful to persons engaged in speech activity of their own.²⁰¹

In a white paper commissioned by Google, Eugene Volokh and Donald Falk follow the lead of the *Search King* decision by folding

the rankings of a website on rap lyrics suspected of using improper search optimization techniques).

¹⁹⁸ *Id.* at 29–30 (“[Google’s] ability to immediately and pervasively ‘disappear’ a site is significant. If you don’t play by the rules, your ranking can be destroyed, and you are effectively invisible.”); *see also* Oren Bracha & Frank Pasquale, *Federal Search Commission: Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1150, 1165–66 (2008).

¹⁹⁹ *See* Lastowka, *supra* note 185, at 1342 (stating that the average user rarely travels beyond first page of results); Bracha and Pasquale, *supra* note 198, at 1165 (citing to sources that find a drop off in users already occurring for the site listed second rather than first).

²⁰⁰ *See, e.g.*, Benjamin, *supra* note 190, at 1461.

²⁰¹ I take this distinction between speech and communication tools from Wu, *supra* note 107, at 1506–07.

Google Search into the inherited legal protections of opinion.²⁰² They do so by drawing an analogy between the first page of search results and the first page of a traditional print newspaper. Just as newspapers select stories important enough to appear on page one, so search engines crawl through web pages to select the most useful answers to a query, displaying the top ones on its equivalent first page of results.²⁰³ But, as Tim Wu argues, the analogy is misleading. A newspaper publishes stories as its own speech product, written by their reporters or selected by editors to appear as a story whose content the newspaper stands by.²⁰⁴ By contrast, Google does not endorse the results it indexes or claim that Google is speaking through these websites.²⁰⁵

Even if one accepted that search engines offer opinions, the opinions at issue could still be demonstrably false or biased. Here James Grimmelmann's distinction between normative and descriptive opinions is helpful.²⁰⁶ A search engine's display of top results to a query is a normative opinion, insofar as it depends on a host of subjective factors about how to compare the utility of sites, but the displayed list also purports to be a true description of what the search engine found, applying its own subjective criteria.²⁰⁷ Normative opinions are not falsifiable, but descriptive opinions are. Descriptive opinions are false when they are dishonest.²⁰⁸ They are dishonest when they do not accurately report what the search engine's subjective process actually retrieved.

Given how closely guarded the secret of a search engine algorithm is, outsiders are not in a good position to judge whether outputs are never, ever, frequently, or rarely dishonest in this

²⁰² Eugene Volokh and Donald M. Falk, *GOOGLE First Amendment Protection for Search Engine Search Results*, 8 J. L. ECON. & POL'Y. 883, 891, 898 (2012).

²⁰³ *Id.* at 891.

²⁰⁴ Wu, *supra* note 107, at 1528.

²⁰⁵ *Id.*

²⁰⁶ Grimmelmann, *supra* note 195, at 916.

²⁰⁷ *Id.* at 917.

²⁰⁸ *Id.* at 922.

sense.²⁰⁹ Yet search companies go out of their way to calm public fears by abandoning courtroom emphasis on the subjectivity of results in favor of public pronouncements about the honesty of search. Google, on its “Technology Overview” page of 2004, specifically assured users that “[t]here is no human involvement or manipulation of results, which is why users have come to trust Google as a source of objective information”²¹⁰ Google went on to underscore its commitment “to providing thorough and unbiased search results.”²¹¹ The wording is different today but the message is the same.²¹²

B. *Search Engines as Indexers*

There is considerable irony in these statements from Google. Although it claims *in some cases* that it is a classic opinion speaker entitled to heightened First Amendment protection, Google turns to an alternative and contradictory description of the search business when the case calls for it. Search engines suddenly stop speaking and become mere conduits for locating what a user wants. They function as automated intermediaries bringing together the questions of users and the answers found on web pages.²¹³ In lawsuits seeking to hold Google liable for objectionable content on indexed sites, continued insistence on search engines having their

²⁰⁹ See, e.g., Bracha and Pasquale, *supra* note 198, at 1178.

²¹⁰ See *Kinderstart.com, LLC v. Google Inc.*, No. C 06-2057 JF (RS), 2006 U.S. Dist. LEXIS 82481, at *3–*4 (N.D. Cal. July 13, 2006).

²¹¹ *Id.* In light of these remarks, it is jarring to read that Google has never claimed its search business was neutral. See Volokh and Falk, *supra* note 202, at 886 (“Google has never waived its rights to choose how to select and arrange its material.”).

²¹² “We never manipulate rankings to put our partners higher in our search results and no one can buy better PageRank. Our users trust our objectivity and no short-term gain could ever justify breaching that trust.” *Ten things we know to be true*, GOOGLE, <https://google.com/about/company/philosophy/> (last visited Aug. 29, 2015).

²¹³ Google’s general counsel invoked this description when he said “We like to think of ourselves as . . . a card catalogue.” Jeffrey Toobin, *Annals of Law: The Solace of Oblivion*, NEW YORKER, Sept. 29, 2014, at 26, 29.

own opinions might lead to undesirable results for the company.²¹⁴ For this reason, Google re-describes the business of search in purely functional terms, abandoning claims for being a message giver in favor of being a neutral medium that matches the questions and answers of others.

Permitting Google to toggle back and forth between First Amendment rationales is one telling sign of the too much speech era. The speech interests of users and web publishers are not well served when Google can set up one First Amendment shield to protect it against allegations of bias (such as “we are entitled to express our opinion”) and another to gain immunity for any harm to reputation or privacy (such as “we express no opinion about the content of the indexed sites”).²¹⁵

C. *Search Engine Bias*

As graduate students, Google founders Sergey Brin and Larry Page disparaged “advertising funded search engines” as “inherently . . . biased towards the advertisers and away from the needs of the consumers.”²¹⁶ They pejoratively had in mind the

²¹⁴ One famous case involved a lawsuit from the former “first lady” of Germany, Bettina Wulff. When a user started to type in the name “Bettina Wulff,” the autocomplete function on Google search would suggest links to allegedly libelous material. Google defended by stressing that these suggestions are “the algorithmic result of several objective factors, including the popularity of search terms.” See Grimmelmann, *supra* note 195, at 872, n.18.

²¹⁵ Congress granted search engines this sort of immunity in the Communications Decency Act (CDA), 47 U.S.C. § 230 (c)(1)(2000) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). In granting Google’s motion to dismiss plaintiff’s complaint alleging defamation and invasion of privacy, one federal court noted that through this provision, “Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party.” *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (2006) (citation omitted); *see also* Digital Millennium Copyright Act, 17 U.S.C. § 512(d) (2012) (immunizing “information location tools” from damage claims for copyright infringement).

²¹⁶ Bracha & Pasquale, *supra* note 198, at 1166, n.102 (citing to Sergey Brin & Lawrence Page, Computer Science Department of Stanford University, *The*

search engine that would auction off top rankings to the highest bidder, as if how much a company was willing to pay to be the first result displayed in response to a query about “asbestos exposure” was a good way of determining relevance. Such a protocol would probably elevate plaintiff litigation firms to the top.²¹⁷ To avoid bias, Brin and Page set out to devise a search engine that would determine the relative utility of websites through a non-advertiser driven process.²¹⁸

In the end, Google devised a spectacularly successful search algorithm that managed to appeal to both users and advertisers.²¹⁹ As Page put it in 2006, “[t]he economic success we continue to enjoy is the direct result of our ability to marry our user experience to the information that advertisers want to communicate.”²²⁰ Although the graphics of how Google displays search results have changed over time, Google has always distinguished displays that are purchased by advertisers versus rankings that result from the automatic workings of the search algorithm.²²¹

For the non-advertiser results, Google’s key breakthrough was to tie judgments of a particular website’s usefulness to how often other highly ranked websites linked to or referred to that website.²²² The more highly ranked a website was that linked to a page to be ranked, the more weight Google gave to its vote of confidence.²²³

Anatomy of a Large-Scale Hypertextual Web Search Engine § 8, at 18 (2000), available at <http://infolab.stanford.edu/~backrub/google.html>.

²¹⁷ I owe this example to Lastowka, *supra* note 185, at 1340.

²¹⁸ *Id.* at 1331–32.

²¹⁹ *Id.* at 1331.

²²⁰ *See id.* at 1327, (citing Google Q3 2006 Earnings Call Transcript (Oct. 19, 2006), <http://seekingalpha.com/article/18858-google-q3-2006-earnings-call-transcript>).

²²¹ *See* Eric Goldman, *Revisiting Search Engine Bias*, 38 WILLIAM MITCHELL L. REV. 96, 102 (2001).

²²² For a description of how Google search works, see Lastowka, *supra* note 185, at 1337–38.

²²³ Google’s Company Overview page states: “Google search works because it relies on the millions of individuals posting links on websites to help determine which other sites offer content of value. We assess the importance of every web page using more than 200 signals and a variety of techniques,

In other words, a website could rise through the ranks through a decentralized process of peer review. The most popular web pages, as judged by links to them, climb to the top of the pyramid.²²⁴

However, a number of factors could bias the apparent democracy of peer review, including: (1) manual or *ad-hoc* manipulation of search rankings to favor Google's own subsidiaries, such as YouTube or Google Play;²²⁵ (2) structural bias built into an algorithm purposely designed to favor majority preferences—a design that frequently will favor well-established and well-financed sites;²²⁶ and (3) ability of wealthier companies to “game the system” by using search optimization techniques to inflate their ratings.²²⁷ Some commentators respond that any bias in the search engine business would be self-correcting, since dissatisfied users would migrate to other search engines.²²⁸ But Google faces only weak competition in the U.S. and European

including our patented PageRank™ algorithm, which analyzes which sites have been “voted” to be the best sources of information by other pages across the web.” *Ten things we know to be true*, GOOGLE, <https://google.com/about/company/philosophy> (last visited July 25, 2015, 3:53 PM).

²²⁴ Yochai Benkler defends this pyramidal structure as the result of democracy and not plutocracy. The success of Google's search algorithm, Benkler maintains, is the way it “harnasse[s] the distributed judgments of many users.” Yochai Benkler, *Coase's Penguin, or Linux and The Nature of the Firm*, 112 *YALE L. J.* 369, 392 (2002).

²²⁵ Search King alleged *ad hoc* bias insofar as Google allegedly intervened against the automatic workings of its algorithm to demote Search King's ranking in retaliation against a competitor. For a complaint that Google unfairly favors its own android app site over a Portuguese competitor, see Danny Hakim, *Google is Target of European Backlash on U.S. Dominance*, N.Y. TIMES, Sept. 9, 2014, at A1. See also Adam Raff, *Search, But You May Not Find*, N.Y. TIMES Op-Ed, Dec. 28, 2009, at A27 (claiming that Google unfairly favors its own price-comparison sites to Foundem, a British price-comparison web site).

²²⁶ Bracha & Pasquale, *supra* note 198, at 1165, 1184.

²²⁷ For a suggestion that high rankings can essentially be bought, see Lastowka, *supra* note 185, at 1352–53.

²²⁸ Goldman, *supra* note 221, at 99–100, 102.

markets²²⁹ and competitors face an uphill battle as Google has such a head start at developing the necessary infrastructure.²³⁰

After receiving numerous allegations of search engine bias, the Federal Trade Commission (FTC) launched an antitrust investigation of Google in 2012.²³¹ The major allegation was that Google used its dominance in the search market to favor its subsidiaries over competitors. An FTC staff report recommended filing antitrust charges, finding that Google's "conduct has resulted—and will result—in real harm to consumers and to innovation in the online search and advertising markets."²³² However, in the end, the FTC issued a "no action" letter, finding insufficient evidence that Google manipulated searches to stifle competition.²³³ While Google "took aggressive actions to gain advantage over rival search providers," the commissioners found the company did so without breaking any applicable laws.²³⁴ Calls for legal reform went unheeded after Google agreed to alter some of its practices.²³⁵

²²⁹ Vindu Goel, *Growth for Yahoo, at Last, But Strategy is No Clearer*, N.Y. TIMES, Oct. 22, 2014, at B1. Bing, Microsoft's search engine, is Google's only substantial competitor (Yahoo is in the midst of a contract to use Bing in its searches) but even after investing \$100 million, Bing has not gained much market share against Google. *Id.* On the other hand, Eric Goldman points out that the Facebook platform has emerged as an alternative way to locate material on the web. Goldman, *supra* note 221, at 102.

²³⁰ Lastowka, *supra* note 185, at 1334 n. 40.

²³¹ STATEMENT OF THE FEDERAL TRADE COMMISSION REGARDING GOOGLE'S SEARCH PRACTICES, *In re* Google, Inc., No. 111-0163 (2013).

²³² Brody Mullins, et al., *Inside the U.S. Antitrust Probe of Google: Key Staff Wanted to Sue Internet Giant After Finding "Real Harm to Consumers and Innovation"*, WALL ST. J. (March 19, 2015), <http://www.wsj.com/Articles/inside-the-u-s-antitrust-probe-of-google-1426793274>.

²³³ FEDERAL TRADE COMMISSION, *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search* (Jan. 3, 2013), <http://ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>.

²³⁴ *Id.*

²³⁵ Mullins, *supra* note 232.

In Europe, regulators have long been suspicious of Google's market dominance.²³⁶ On April 15, 2015, the European Union's competition commissioner filed formal antitrust allegations against the company, alleging that the company diverts search traffic from competitors' shopping sites to Google's own shopping sites.²³⁷

The problem with search is not that we have too much of it. Rather, this section has argued that Google and other search engines receive too much First Amendment protection, to the point where the fairness of search results must be taken on trust. There may be good reasons for this trust, but it is never safe to permit a single company to be so dominant in a particular medium of speech ("search") that we cannot even examine whether its channels are fairly open to all. Courts make it difficult even to examine issues of bias by treating search algorithms as classic opinion speakers. Even if we were to concede that search results are subjective, there remains an important difference between transparent and deceptive search practices that the First Amendment should not prohibit consumers and competitors from examining.

V. SEARCHING FOR REPUTATION

The very idea of searching for someone's reputation would once have seemed odd. A person's reputation used to depend on what people who actually knew her, or at least who knew other people who knew her, thought about her. Search engines vastly enlarged the sources of information about a person, arguably representing a great victory for "the more speech the better." At least the promise was that online reputations would be more accurate, more information driven, more the product of many sources and globally accessible to all.²³⁸ Critics respond that online reputations are just as likely to be stale, out-of-date, and based on

²³⁶ Kanter & Scott, *supra* note 7, at B1; *see also* Hakim, *supra* note 225, at A1.

²³⁷ Kanter & Scott, *supra* note 7, at B1.

²³⁸ GORDON BELL & JIM GEMMEL, TOTAL RECALL: HOW THE E-MEMORY REVOLUTION WILL CHANGE EVERYTHING 56 (2009).

information taken out of context.²³⁹ They lament the lack of due process for anyone who claims harm from stories that search engines locate, migrate, and perpetuate.²⁴⁰

In 2014, the highest court in Europe entered the too much speech, too little reputation debate on the side of reputation.²⁴¹ Relying on EU privacy directives,²⁴² Mario Costeja Gonzalez of Spain sought to have Google remove links to online articles detailing debts he once had in 1998 that led to the attachment and public auction of some of his property.²⁴³ The stories were true and based on public records.²⁴⁴ Mr. Gonzalez had retired the debt and yet, to borrow a term from school days, the black mark remained part of his permanent record. Drawing on EU statutory law, the ECJ ruled that persons enjoy a right to have information about them “forgotten” in circumstances where the harm to reputation

²³⁹ See, e.g., JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 8–9 (Vintage Books 2001); MAYER-SCHONBERGER, *supra* note 19, at 10–15, 142; JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* 220, 228–29 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1125949.

²⁴⁰ MAYER-SCHONBERGER, *supra* note 19, at 10–15.

²⁴¹ Case C-131/12, *Google Spain SL, v. Agencia Española de Protección de Datos (AEPD)*, 2014 E.C.R. ___, available at http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065.

²⁴² Directive 94/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281) 31, art. 12., available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>. The European Parliament has provisionally approved a new data directive that specifically recognizes a “right of erasure.” That right in pertinent part provides that “data subjects shall have the right to obtain from the [data] controller the erasure of personal data relating to them . . . and to obtain from third parties the erasure of any links to, or copy or replication of that data, where . . . (a) the data are no longer necessary in relation to the purposes which they were collected or otherwise processed.” EUROPEAN COMMISSION, *Factsheet on the “Right to be Forgotten Ruling,”* http://ec.europa.eu/justice/data_protection/files/factsheets/factsheet_data_protection_en.pdf (last visited Aug. 29, 2015).

²⁴³ *Google Spain*, 2014 E.C.R. at ¶14.

²⁴⁴ *Id.* at ¶16.

outweighed any public benefit gained from the information.²⁴⁵ The Spaniard, the court ruled, was entitled to have Google remove links to the original 1998 article, since he had discharged the debt and the continual linking to that story no longer served any public purpose.²⁴⁶

Like most courts, the ECJ drew on the concept of privacy as the most fully developed legal tool available. However, the court was aware that the case did not quite fit within privacy.²⁴⁷ In referring to a right to have information “forgotten,” the ECJ struggled to articulate the distinct harm to dignity and reputation.²⁴⁸ The harm occurred not with the original public disclosure of the Spaniard’s debt troubles but with the persistence of the story over time. With the rise of search engines, an old story from 1998 in one Spanish newspaper’s online archive is republished and transmitted globally to anyone searching under Mario Costeja Gonzalez’s name.

Unfortunately, the ECJ left the scope of the right to have information forgotten overly vague. It did not provide guidance as to when a story becomes old or irrelevant enough to be forgotten.²⁴⁹

²⁴⁵ *Id.* at ¶91.

²⁴⁶ *Id.* at ¶98. Media accounts widely reported that the ECJ decision would result in the *deletion* of stories from the Internet but this claim is not accurate. The ECJ decision granted the Spaniard only the right to have search engines remove links to online stories when someone searched under his name. The online stories themselves would not be deleted and could be found by anyone retrieving them without search engine links. One commentator described the ECJ decision as doing no more than creating a “speed-bump” to protect reputation. Persons could still find the 1998 debt story about Mr. Gonzalez in slower and old-fashioned ways but they would not come across it simply by typing his name into a box as part of a general background check. Toobin, *supra* note 213, at 32 (quoting Viktor Mayer-Schonberger).

²⁴⁷ The ECJ expressly noted that the original online posting of the story in 1998 by a Spanish newspaper was quite lawful since the Spanish Ministry of Labor and Social Affairs had sought as much public notice of the auction as possible. *See Google Spain*, 2014 E.C.R. at ¶16.

²⁴⁸ See Part VII *infra* for the connection between dignity and reputation.

²⁴⁹ *Google Spain*, 2014 E.C.R. at ¶93 (right to have personal information removed when it is “inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed”).

The court did not even defend its specific conclusion that the 1998 story about the Spaniard's debts *was* for some reason within the right to forget. As law and economics scholar Judge Richard Posner noted in another context, complaints of the Spaniard's sort might amount to nothing more than a self-interested attempt to misrepresent oneself in public, to the disadvantage of others.²⁵⁰ Professor Richard Epstein takes a similar position, arguing that "when a major change in personal or financial status is contemplated by another party, the white lies that make human interaction possible turn into frauds of a somewhat deeper dye."²⁵¹

In sum, the ECJ decision left unanswered the question of whether its decision would lead to a dumbed-down web, carrying only purged versions of past personal histories. The court did not address the potentially crippling burden placed on data providers to monitor what should be deleted, when it should be deleted, and from where it should be deleted.²⁵² From Google's perspective, the ECJ's ruling threatened the very survival of a borderless Internet.²⁵³ If and when other regions of the world follow Europe in imposing their own local rules on what needs to be forgotten, then search companies would be under multiple and conflicting obligations.²⁵⁴

For all its flaws, a right to have search engines forget about past stories does have appeal as a way to restore to individuals the power to shape and reshape their reputations. In the U.S., public opinion polls suggest a broad consensus that individuals should be

²⁵⁰ RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 46, 660–63 (Richard A. Epstein et al. eds., Aspen Law & Business, 5th ed. 1998).

²⁵¹ Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV. 1, 12 (1994).

²⁵² In one instance, Google complied with a person's request to remove links to certain material that had once appeared in media outlets for *The Guardian* and *BBC*. These organizations complained and Google reinstated some of the links. See Mark Scott, *Google Touring Europe on "Right to be Forgotten"*, N.Y. TIMES, Sept. 10, 2014, at B3.

²⁵³ Farhad Manjoo, *"Right to be Forgotten" Could Spread*, N.Y. TIMES, Aug. 6, 2015, at B1.

²⁵⁴ See, e.g., Toobin, *supra* note 213, at 32.

able to delete or erase some private information.²⁵⁵ In Europe, during the five months immediately following the ECJ decision, Google received approximately 143,000 requests from individuals asking the company to take down links to allegedly stale information.²⁵⁶ Google granted about half of those.²⁵⁷ Fear of penalties might motivate Google to err on the side of granting requests. But it could be that even Google is finding the equities to

²⁵⁵ 92% of American adults surveyed by the Annenberg School of Communications favored regulations requiring marketers and advertisers to delete personal information upon request, with nearly two-thirds favoring a policy that would require immediate deletion after the transaction for which the data had been given is completed. Joseph Turow, et. al, *Americans Reject Targeted Advertising and 3 Activities that Enable It* (Annenberg School for Commc'n 2009), available at <http://ssrn.com/abstract=1478214>. In 2015, the Annenberg School conducted a follow-up survey, finding that 84% of respondents agreed with the statement, "I want to have control over what marketers can learn about me online." Natasha Singer, *Sharing Data, But Not Happily: Americans Are Uneasy About All That Tracking*, N.Y. TIMES, June 5, 2015, at B1.

²⁵⁶ Mark Scott, *Facebook Leads in Links Erased by Google in E.U.*, N.Y. TIMES, Oct. 10, 2014 at B3 [hereinafter Scott, *Links Erased*]; see also Noam Cohen & Mark Scott, *Times Articles Removed from Google Results in Europe*, N.Y. TIMES, Oct. 4, 2014, at A3. To handle requests, Google and Microsoft have developed online request forms. Mark Scott, *Microsoft Taking Steps to Comply with the Right to be Forgotten*, N.Y. TIMES (July 9, 2014, 11:06 AM), <http://bits.blogs.nytimes.com/2014/07/09/microsoft-to-wade-into-complying-with-the-right-to-be-forgotten/?src=xps> [hereinafter Scott, *Microsoft Taking Steps*].

²⁵⁷ Scott, *Links Erased*, *supra* note 256, at B3. Examples of requests granted are those from a rape victim and from a defendant exonerated in a child pornography case. See *id.* (rape story); Toobin, *supra* note 213, at 31 (child pornography). Google has also removed links to three *New York Times* articles: two wedding announcements, one death notice, and a report about a settled case from 2002. Cohen & Scott, *supra* note 256, at A3. Among requests that Google has denied are requests from a public official to remove links to news articles about child pornography accusations against him. See Toobin, *supra* note 213, at 31. Google has also denied requests from a person requesting delinking to a 2013 story reporting his *acquittal* in a criminal case, on the grounds that the story was still too recent to be irrelevant, see *id.*, as well as a request from a Swiss financial services professional seeking the taking down of links to ten web pages outlining his conviction for financial crimes. Scott, *Links Erased*, *supra* note 256, at B3.

favor less information about individuals, not more, which would indicate a rare instance of a retreat from the more speech, the better approach by which the Internet lives.

Two stories illustrate why some reform along the lines of a right to be forgotten is necessary. The first story is a slight and silly episode, the second horrible and heartbreaking.

In his book, *Delete: The Virtue of Forgetting in the Digital Age*, Viktor Mayer-Schonberger opens with the following story.²⁵⁸ A college student enrolled in a teacher certification program posted to a social networking site a photograph of her in a pirate hat holding a glass above the caption, “Drunken Pirate.”²⁵⁹ Even though she successfully completed all coursework, her university refused to grant her a teacher certificate after being notified by a supervisor who had seen the photograph and considered it unprofessional behavior.²⁶⁰ The student wanted the photograph forgotten, but her attempt to delete the photo was idle.²⁶¹ The social networking site did permit her to delete the photograph on *her own* page but by then it lived other lives on other sites not controlled by the former student.²⁶² In Internet language, the information had washed downstream.

It could be argued that the student consented to making the photograph public by posting it in the first place, that she knew or should have known how the Internet works.²⁶³ To be sure, this case

²⁵⁸ MAYER-SCHONBERGER, *supra* note 19, at 1–2.

²⁵⁹ *Id.*

²⁶⁰ Writer Jeffrey Toobin speculates that checking a job applicant’s Facebook page is probably part of due diligence today. *Outloud*, NEW YORKER podcast (Sept. 2014) (available using iTunes).

²⁶¹ MAYER-SCHONBERGER, *supra* note 19, at 4.

²⁶² *Id.*

²⁶³ Many argue that the burden should be on individual users to practice more “digital abstinence” about what they post online. Google’s CEO, Eric Schmidt, suggested that people have to become “much more careful how they talk, how they interact, what they offer of themselves.” *Id.* at 109. It is ironic to find a leading advocate of the more speech, the better approach suggest that individuals speak a bit less. Perhaps that is why, in another statement, Schmidt noted that self-censorship or strategies like using a pseudonym are likely to carry costs, since in the future the price of hiding information “might be

goes beyond what the concept of privacy can illumine, since the student publicly shared the photograph. The deeper issue is akin to the problem about forgetting that the ECJ grappled with in the case of the Spaniard's retired debt. At what point do the "drunken pirate" moments get forgotten and forgiven? *Who* has the power to decide when the photograph's online presence should expire and on what grounds of relevance, age, or other criteria?

These are questions that cannot sensibly be asked within the more speech, the better paradigm. The very notion that true information "expires" seems to be a contradiction in terms, as if data are like clothes that go out of style or truth is of limited duration. But Mayer-Schonberger, a leading critic of our too much speech world, sets out to defend the counterintuitive notion that too much remembering and too little forgetting is harmful to the human learning condition.²⁶⁴ Out of time or context,²⁶⁵ information bytes form online reputations controlled by anonymous "click voting" for the story that appeals to many who might never have met the person in the flesh. These artificial reputations stick to a person, thanks to the permanence of digital memory. For every web page that disappears, a copy of the original material springs up elsewhere.²⁶⁶ Online stories from the past remain front and center, regardless of the trajectory of a person's real life past the time when the information was originally stored.²⁶⁷

irrelevance" on the only platforms that will matter. ERIC SCHMIDT AND JARED COHEN, *THE NEW DIGITAL AGE: TRANSFORMING NATIONS, BUSINESSES AND OUR LIVES* 33 (2013).

²⁶⁴ MAYER-SCHONBERGER, *supra* note 19, at 92–128.

²⁶⁵ "In most cases, a high position on popular search engines . . . adds legitimacy and reliability to a statement or source. A statement, which in its original context, would not be relied upon as fact may be relied upon as fact if reproduced and displayed prominently in a particular search query." Durkee, *supra* note 32, at 804–05, n.172.

²⁶⁶ Ambrose, *supra* note 18, at 372.

²⁶⁷ "When intimate personal information circulates among a small group of people who know us well, its significance can be weighed against other aspects of our personality and character. By contrast, when intimate information is removed from its original context and revealed to strangers, we are vulnerable to

Where the first story seems almost a parody of those who think there can be no such thing as too much speech, the second story is somber. In the second story, the harm caused to a grieving family was neither to reputation nor to privacy since the photographs they wanted removed from the Internet were never theirs. The harm was to the basic respect and dignity a family is owed after the death of their daughter.²⁶⁸

In 2006, an eighteen-year old woman was decapitated in a car accident.²⁶⁹ Employees of the California Highway Patrol improperly emailed crime scene photographs to friends and the pictures of the decapitated woman began circulating on the Internet, eventually turning up on numerous websites, replicating like a malignant virus.²⁷⁰ Here was a situation where the information had no public value; those leaking it said they did so only for the photo's "shock value."²⁷¹ Distraught and worried that their three surviving children might see the pictures, the parents forbade them to go online and began, to no avail, to seek to have Google and other search engines remove links to the photos.²⁷² But there was nothing akin to the European right to forget available to them.²⁷³

From the moral point of view, there was no information benefit to the photographs' presences online that could possibly justify the harm to the family. Yet the family was legally powerless to demand the removal of the photographs.²⁷⁴ Individual websites or platforms, *at their discretion*, could remove the material. But when the items went viral, this was no solution. A search for the photographs might return a message that a website containing the

being misjudged on the basis of our most embarrassing, and therefore most memorable, tastes and preferences." ROSEN, *supra* note 239, at 8.

²⁶⁸ For an account of this story, see Toobin, *supra* note 213, at 26–32.

²⁶⁹ *Id.* at 26.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 32.

²⁷⁴ The family did win a civil damage suit against the California Highway Patrol for the leak of the photos to the media. *Id.*

photographs no longer existed, but the search engine would move on to link to the next of the sites to which the photographs had migrated.²⁷⁵

A case such as this shows why the ECJ decision, for all its problems, is groundbreaking. Against Google's protests, the ECJ rightly ruled that search engines effectively control the availability of material online²⁷⁶ and hence should not be able to disown all responsibility for the links they give out.²⁷⁷

VI. TOO MUCH SPEECH, TOO MUCH SURVEILLANCE

Government surveillance would seem to be a counter-example to my thesis that we live in a world of too much speech. After all, one would think that surveillance would chill people from speaking or being spoken to in the first place. But too much speech and too much surveillance strangely go together. This unexpected convergence may be the greatest threat to free speech that we face.

Few persons reject the legitimacy of some amount of government surveillance in an age of global terrorism.²⁷⁸ The sticking point is whether surveillance policies will be decided democratically, with as much public disclosure and public debate as security concerns permit,²⁷⁹ or will fear of terrorism pervert

²⁷⁵ *Id.* at 26. For the short life of some web pages, see Ambrose, *supra* note 18, at 372.

²⁷⁶ See Blackman, *supra* note 197, at 30 (noting sites not indexed by a search engine might as well not exist).

²⁷⁷ Case C-131/12, Google Spain SL, v. Agencia Española de Protección de Datos (AEPD), 2014 E.C.R. ___, ¶28, available at http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065.

²⁷⁸ *Klayman v. Obama*, 957 F. Supp. 2d 1, 39 (D.D.C. 2013) (“[E]veryone, including this Court, agrees [the prevention of terrorist attacks] is ‘of the highest order of magnitude.’”).

²⁷⁹ Compare David Frum, *We Need More Secrecy: Why Government Transparency Can Be an Enemy of Liberty*, THE ATLANTIC (May 2014), <http://www.theatlantic.com/magazine/archive/2014/05/we-need-more-secrecy/359820/>, with Nancy L. Rosenblum, *Governing Beyond Imagination: The “World Historical” Sources of Democratic Dysfunction*, 94 B.U. L. REV. 649, 657–60 (2014).

democracy into an odd justification for subjecting *everyone* to a secret policy of all search all the time?

A. *The Democratization of Surveillance*

While open information comes in with the democratic tide, even democracies feel the pull of authoritarian information policies in an age of terrorism. The very digital technologies that underwrite the expansion of speech also provide government with more capacity for surveillance of speech.²⁸⁰ In the era of investigative journalism that began roughly with Watergate, there was little the government could do to use the facilities of the *New York Times* or the *Washington Post* to monitor leaks of classified information to these newspapers.²⁸¹ What has changed is that the NSA is in a position to use, and does use, “the new press”—the advances in the infrastructure of communication provided by the internet service providers and platforms—to gather up, store and analyze what is being said through these facilities.²⁸² The government does this through a combination of methods, sometimes involving voluntary compliance from the tech giants²⁸³

²⁸⁰ See Neil M. Richards, Symposium, *Privacy and Technology: The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1936 (2013) (“The same digital technologies that have revolutionized our daily lives . . . have also created ever more detailed records about those lives.”).

²⁸¹ I owe this observation to Balkin, *supra* note 31, at 2297–98.

²⁸² See Richards, *supra* note 280, at 1936.

²⁸³ See *infra* notes 285 and 323 and accompanying text for controversy over how much voluntary compliance there has been. In 2010, WikiLeaks released video footage of military operations in Afghanistan and Iraq. It followed this by releasing to news organizations a sample of classified State Department cables. In response, the U.S. government mounted a campaign to enlist the help of electronics communications companies in shutting the site down. It succeeded in getting the registration company that directs users to the domain name, “wikileaks.org,” to cease service, so that users who searched for the site came up with nothing. Amazon ceased hosting WikiLeaks on its cloud computing service, Apple removed an iPhone app that provided access to information WikiLeaks had posted online. PayPal and other payment services ceased providing service for WikiLeaks. See Benkler, *supra* note 8, at 340–44 (noting that none of these companies were legally compelled to act against WikiLeaks, though considerable pressure was brought on them to do so). On the other hand, Google and Twitter did not fully cooperate with the efforts to shut down

while other times compelling disclosure,²⁸⁴ though this is not without resistance.²⁸⁵

As Neil Richards puts it, the novelty of contemporary surveillance is that corporate monitoring and government surveillance have become “related parts of the same problem.”²⁸⁶ If it were not for the trove of personal data about consumers, government would not be in a position to monitor our political activities quite as well.²⁸⁷ Or as Balkin suggests, the “democratization of information” includes the democratization of surveillance, as routine, daily data collection on *virtually all of us* becomes a standard method of tracing patterns that may uncover a plot or crime by someone else.²⁸⁸

One example of the convergence of government surveillance and corporate gathering of personal data was the program at issue in the 2006 case, *Gonzales v. Google*.²⁸⁹ To buttress its defense of

WikiLeaks. See Yochai Benkler, *WikiLeaks and the Protect-IP Act: A New Public-Private Threat to the Internet Commons*, 140 DAEDALUS 154, 158 (2011).

²⁸⁴ In 2013, the Justice Department secretly subpoenaed two months of phone records of various Associated Press reporters to investigate an AP story revealing classified information on a foiled Al Qaeda plot. See Sari Horwitz, *Under Sweeping Subpoenas, Justice Department Obtained AP Phone Records in Leak Investigation*, WASH. POST (May 13, 2013), http://washingtonpost.com/world/national-security/under-sweeping-subpoenas-justice-department-obtained-ap-phone-records-in-leak-investigation/2013/05/13/11d1bb82-bc11-11e2-89c9-3be8095fe767_story.html.

²⁸⁵ Recently released documents from a 2008 federal court case show the extent of Yahoo’s resistance to complying with government subpoenas for customer information. See Vinu Goel & Charlie Savage, *Threat of Daily Fine Shows Government’s Aggressive Push for Data*, N.Y. TIMES, Sept. 12, 2014 at B1.

²⁸⁶ Richards, *supra* note 280, at 1935.

²⁸⁷ In recognition of this problem, Apple announced in 2014 that its iOS8 operating system on the latest generation of iPhones “was designed so that it’s not technically feasible for us to respond to government warrants for the extraction of . . . data from devices . . . running iOS 8.” *Privacy-Government Requests*, APPLE, <http://www.apple.com/privacy/government-information-requests/> (last visited Aug., 25, 2015).

²⁸⁸ Balkin, *supra* note 31, at 2297.

²⁸⁹ 234 F.R.D. 674 (N.D. Cal. 2006).

the constitutionality of the Child Online Protection Act of 1998,²⁹⁰ the government subpoenaed evidence from search companies about the availability of indecent material on the Internet. It first sought “all” URLs indexed by the search engines, then a sample of a million, and finally settled on 50,000. It also sought the *texts* of all search queries entered during a two-month period, eventually narrowing the request down to 5,000 queries.²⁹¹ Google objected and eventually persuaded a federal court judge to block the request for texts of search queries and to scale back considerably the number of URL addresses to be turned over.²⁹² Still, in the end the government gained use of Google’s information infrastructure in ways that government could never have used the facilities of the *New York Times*.

1. *The NSA and Snowden Files: Telephone Monitoring*

In 2013, definitive evidence of the NSA’s secret phone data gathering operation came to light through former agency contractor Edward Snowden’s leaks to the British newspaper, *The Guardian*.²⁹³ The NSA operation centered on the collection and storage of virtually all telephone numbers dialed from or to a United States phone customer, for possible analysis to links to phone numbers linked to known or suspected terrorists.²⁹⁴ The program did not involve the NSA listening in to any conversations.²⁹⁵

²⁹⁰ 47 U.S.C. § 231 (2012).

²⁹¹ *Gonzales*, 234 F.R.D. at 678–79.

²⁹² *Id.* at 688.

²⁹³ See Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, *GUARDIAN*, June 5, 2013, <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

²⁹⁴ *Klayman v. Obama*, 957 F. Supp. 2d 1, 14–19 (D.D.C. 2013), *vacated*, *Obama v. Klayman*, 2015 U.S. App. Lexis 15189 (D.C. Cir. 2015) (per curiam).

²⁹⁵ *Id.* On June 1, 2015, the NSA telephone metadata program came to a temporary halt when Congress failed to extend statutory authority for it. Carl Hulse, *Bluff Called, McConnell Misplays His Hand in Phone Data Fight*, *N.Y. TIMES*, June 2, 2015, at A13. The next day, Congress approved a modified surveillance program where phone data would remain in the possession of the phone companies, but available to the NSA upon obtaining warrants from the

To date, four federal courts have ruled on the legality of the program. In *Klayman v. Obama*, Judge Richard Leon of the District of Columbia Circuit found the NSA's collection of bulk telephone data to be an unconstitutional infringement on Fourth Amendment rights against unreasonable searches.²⁹⁶ However, in *ACLU v. Clapper*, Judge William Pauley III of the Second Circuit upheld the constitutionality of the program, finding that phone users have no reasonable expectation of privacy in the numbers they dial.²⁹⁷

On appeal, both the United States Court of Appeals for the Second Circuit and the D.C. Circuit Court of Appeals vacated these respective district court decisions.²⁹⁸ However, neither court reached the constitutional issues of speech and privacy that are the concern of this Article.²⁹⁹ The Second Circuit ruled only that the NSA lacked statutory authority to engage in bulk collection of phone records.³⁰⁰ The court left open the issue of whether clear Congressional authorization of such a program would be constitutional.³⁰¹ In the D.C. Circuit, a three-judge panel vacated Judge Leon's decision in *Klayman* but remanded the case to the trial court for further proceedings that would give the plaintiffs an opportunity to uncover evidence during discovery that their *own* phone records were among those turned over to the NSA.³⁰²

Foreign Intelligence Surveillance Court. See Pub. L. No. 114-23, 129 Stat. 268, 269–77 (2015) (to be codified at 50 U. S. C. § 1861); see also Michael D. Shear, *In Pushing for Revised Surveillance Program, Obama Strikes His Own Balance*, N.Y. TIMES, June 4, 2015, at A14.

²⁹⁶ *Klayman*, 957 F. Supp. 2d at 7, 30–32.

²⁹⁷ *ACLU v. Clapper*, 959 F. Supp. 2d 724, 749–53 (S.D.N.Y. 2013), *vacated*, 785 F.3d 787 (2d Cir. 2015).

²⁹⁸ *ACLU v. Clapper*, 785 F.3d at 820–22; *Obama v. Klayman*, 2015 U.S. App. Lexis 15189, at *4 (D.C. Cir. Aug. 28, 2015).

²⁹⁹ *ACLU v. Clapper*, 785 F.3d at 821, n.12; *Obama v. Klayman*, 2015 U.S. App. Lexis 15189 at *1–*4, 11, 22.

³⁰⁰ *ACLU v. Clapper*, 785 F.3d at 821.

³⁰¹ *Id.* at 824–25.

³⁰² *Obama v. Klayman*, 2015 U.S. App. Lexis 15189. One judge found that the plaintiffs had shown a *probability* that their own phone records were among those collected by the NSA but had not shown a *substantial likelihood of*

Since neither court of appeals reached the constitutional issues addressed in this Article,³⁰³ District Judge Leon's vacated decision is still worthy of serious analysis. Of particular note, this section will argue, is Judge Leon's argument that Fourth Amendment law on privacy must evolve to keep up with the evolution of surveillance technology in this era of too much speech.

Judge Leon began by comparing the government's "old" style, occasional surveillance of *specific* phone conversations to the NSA's post 9/11 secret program for automatically collecting *bulk* data on the phone calls of millions of Americans.³⁰⁴ In the 1979 case, *Smith v. Maryland*,³⁰⁵ the Supreme Court ruled that the police did not need a warrant to install a pen register³⁰⁶ on the phone of a particular criminal suspect, since no one has a reasonable expectation of privacy in the numbers they dial.³⁰⁷ Telephone users voluntarily transmit this information to telephone companies, knowing that they become part of the telephone companies' business records.³⁰⁸ In defending the NSA bulk data collection, the government cited this case as the controlling precedent.³⁰⁹ However, the judge disagreed.³¹⁰ In *Smith*, the phone monitoring

ultimately prevailing on the merits. Id. at 6 (Brown, J.). He voted to remand the case to the trial court, where further discovery might uncover evidence that their phone records were among those collected by the NSA. *Id.* at 10–11. A second judge found the plaintiffs had not even established standing to sue. Nevertheless, he joined in the decision to remand in order to give the plaintiffs an opportunity to establish standing. *Id.* at 23–24 (Williams, J.).

³⁰³ Although the Second Circuit decided *Clapper* solely on statutory grounds, it did offer remarks on the constitutional issues for the guidance of the trial court upon remand. The court described the constitutional concerns as "vexing," "serious," and "daunting." *ACLU v. Clapper*, 785 F.3d at 821, 824–25.

³⁰⁴ *Klayman*, 957 F. Supp. 2d at 7, 30–32.

³⁰⁵ *Smith v. Maryland*, 442 U.S. 735 (1979).

³⁰⁶ A pen register is a small device that records phone numbers dialed.

³⁰⁷ *Smith*, 442 U.S. at 744. Subsequent to *Smith*, Congress enacted the Electronic Communications Privacy Act, 18 U.S.C. § 3121, requiring judicial approval of the installation of pen registers.

³⁰⁸ *Smith*, 442 U.S. at 742–44.

³⁰⁹ *Klayman*, 957 F. Supp. 2d at 31.

³¹⁰ *Id.* at 30–32. In *ACLU v. Clapper*, 957 F. Supp. 2d. 724, 752 (S.D.N.Y. 2013), the district judge reached the opposite conclusion, finding that *Smith* was

was of a particular person suspected of making threatening calls. In the NSA program, the agency routinely collected phone logs of millions of Americans suspected of nothing, in the hopes of mining the bulk data for leads to suspicious activity.³¹¹ In *Smith*, the surveillance lasted only a matter of days and data was not retained. In the NSA case, the bulk collection of data was ongoing and the agency showed every intention of maintaining its growing database “for as long as America is combatting terrorism.”³¹²

Finally, and most importantly for the judge, the relation between phone companies and government had dramatically changed from 1979 to 2013. In 1979, there was no formalized agreement between the two to conduct phone surveillance; rather, in 1979 there was only phone company cooperation with a criminal investigation targeted at a particular individual.³¹³ But, the judge continued, today’s citizens certainly did not expect what the Snowden files revealed, that the government and phone companies were operating “what is effectively a joint intelligence-gathering operation.”³¹⁴

still controlling and that persons had no privacy interest in dialed numbers in the possession of a third party (the phone company). In vacating the district court decision on other grounds, the Second Circuit described the Supreme Court’s privacy jurisprudence since *Smith* as “in some turmoil” and expressed sympathy for the argument that the movement of mass amounts of personal data onto mobile phones casts doubt on the continuing applicability of *Smith* to modern technologies. *ACLU v. Clapper*, 785 F.3d 787, 821–822 (2d Cir. 2015). One commentator predicts that “[t]he third party doctrine will be dismantled soon, and for good reason,” noting that “the sweeping collection programs brought to light by Snowden’s leaks have reinvigorated the push to abandon it.” Jane Bambauer, *Data, Police, and the Whole Constitution* 4 (unpublished manuscript) (on file with author).

³¹¹ The government defended its bulk collection of call logs by citing their use in foiling three imminent terrorist attacks. *Klayman*, 957 F. Supp. 2d at 40–41. But the judge concluded that none of the episodes involved the kind of urgency that might justify warrantless surveillance. *Id.* The district judge in *Clapper* reached the opposite conclusion. *ACLU v. Clapper*, 957 F. Supp. 2d at 755–56.

³¹² *Klayman*, 957 F. Supp. 2d at 32.

³¹³ *Id.* at 32–33.

³¹⁴ *Id.* at 33.

The judge drew this controversial, and probably overstated, conclusion from the government's own description of the NSA bulk phone data program as one where "certain telecommunications service providers . . . produce to the NSA *on a daily basis* electronic copies of call detail records, or telephony metadata."³¹⁵ The existence of such a formalized policy was a major factor in the judge's finding that "the relationship between the NSA and telecom companies [had] become so thoroughly unlike those considered by the Supreme Court" in 1979 as to make the *Smith* precedent inapplicable.³¹⁶

In issuing, but staying, a preliminary injunction against the NSA telephony collection, the judge cited the changes in Americans' telephone habits that made telephone records of such interest to the NSA. Here the problem of too much speech came to the fore. Mobile devices, principally smartphones, have morphed into ubiquitous, multi-purpose tools. Telephone "[r]ecords that once would have revealed a few scattered tiles of information about a person now reveal an entire mosaic—a vibrant and constantly updating picture of the person's life."³¹⁷

2. *The NSA and Snowden Files: Electronic Monitoring*

In addition to revealing the NSA collection of phone logs, Snowden leaked information about a "Special Sources Operation"

³¹⁵ *Id.* at 32 (emphasis added by the trial judge).

³¹⁶ *Id.* at 31. The judge characterized the cooperation between government and telecom companies as amounting to a joint enterprise since the companies were turning over bulk data on a routine, daily basis. However, this does not mean that the companies were cooperating voluntarily or that government somehow had a technological back door into company servers, as has sometimes been reported. For the back door rumors, see *infra* Part VI.A.2.

³¹⁷ *Klayman*, 957 F. Supp. 2d at 36 (citation omitted). In a prior case, the Supreme Court similarly emphasized that Fourth Amendment law has to change with the technology. In holding that the police need a warrant before searching a suspect's cellphone, Justice Roberts emphasized how much more personal information a person carries on a smartphone than persons could have carried on their person before. Failure to see how the smartphone has revolutionized communications would be analogous, Justice Roberts quipped, to a failure to see the difference between riding on horseback and flying to the moon. *Riley v. California*, 134 S. Ct. 2473, 2488 (2014).

where the NSA developed strategic partnerships with corporate conduits of electronic communications.³¹⁸ Code-named “PRISM,” Snowden considered the operation to be “the biggest single contributor to [NSA] intelligence reports.”³¹⁹

Exactly how PRISM worked remains a matter of dispute.³²⁰ One leaked NSA slide illustrated the agency collecting information “directly from the servers” of Internet giants, including Yahoo, Google, Facebook, Apple, and others.³²¹ But each of these companies has fiercely denied any knowledge of PRISM.³²² The Snowden files implied that NSA might have created or been given a “back door” into the servers of Internet giants, but recently released court documents cast doubt on that claim and support the companies’ contention that they resisted cooperating with the NSA.³²³

Even without a back door into the servers of tech companies, the U.S. government is adept at invisible forms of speech regulation that do not disturb the face of things. A prime example

³¹⁸ Ewen Macaskill & Gabriel Dance, *The NSA Files Decoded: What the Revelations Mean to You*, THE GUARDIAN (Nov. 1, 2013), <http://theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section/1>; see also Glenn Greenwald, *NSA Prism Program Taps into User Data of Apple, Google and Others*, THE GUARDIAN (June 6, 2013), <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>.

³¹⁹ Greenwald, *supra* note 318.

³²⁰ See Timothy B. Lee, *Here’s Everything We Know about Prism to Date*, WASH. POST (June 12, 2013), <http://washingtonpost.com/blogs/wonkblog/wp/2013/06/12/heres-everything-we-know-about-prism-to-date/>.

³²¹ Greenwald, *supra* note 318.

³²² Lee, *supra* note 320.

³²³ For Yahoo’s resistance, see Goel and Savage, *supra* note 285, at B1. See also Charlie Savage, *Redactions in U.S. Memo Leave Doubts on Data Plan*, N.Y. TIMES, Sept. 7, 2014, at A16. Apple’s website flatly states: “Apple has never worked with any government agency from any country to create a ‘back door’ in any of our products or services.” *Privacy-Government Requests*, APPLE, <http://apple.com/privacy/government-information-requests>. For Microsoft’s statement that it complied only with “lawful demands” of the government, see Nicole Perlroth, et al., *N.S.A. Able to Foil Basic Safeguards of Privacy on Web*, N.Y. TIMES, Sept. 6, 2013, at A1.

is the issuance of “national security letters” to electronic communications providers.³²⁴ The USA Patriot Act,³²⁵ passed in response to 9/11 and reauthorized by Congress in 2006, authorized the director of the FBI and other officials to issue a national security letter (“NSL”) to subpoena certain information about a named subscriber’s electronic communications.³²⁶ The provider is under a legal duty to comply with the NSL and also to say nothing about even receiving an NSL, let alone disclosing its contents.³²⁷ So, underneath the free flow of information, the very companies running the infrastructure are under the modern equivalent of gag orders or prior restraints typical of the too little speech era.

All of this takes place out of public sight and, for most of the last decade, with little judicial review.³²⁸ The little information made public by the government shows that the FBI issued 192,500 NSL letters between 2003 and 2006.³²⁹ Reviewing NSLs issued in 2006, the Department of Justice found over 640 legal violations.³³⁰

In response to the straightjacket which receipt of NSLs puts them in, eight large tech companies formed a coalition in 2013 known as “Reform Government Surveillance.” The coalition

³²⁴ 18 U.S.C. § 2709 (2012).

³²⁵ 50 U.S.C. § 1861 (2012). For amendments to the U.S.A. Patriot Act subsequent to the *Klayman* decision, see Shear, *supra* note 295.

³²⁶ 18 U.S.C. § 2709(a)–(b) (2012). The law did not authorize disclosure of the content of any communications.

³²⁷ 18 U.S.C. § 2709(c) (2012) (“No wire or electronic communication service provider . . . shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records.”).

³²⁸ *But see Doe v. Mukasey*, 549 F. 3d 861, 883 (2d Cir. 2008) (finding in part that the nondisclosure requirement is unconstitutional in the absence of the government initiating judicial review of the need for such a requirement).

³²⁹ Ellen Nakashima, *Plaintiff Who Challenged FBI’s National Security Letters Reveals Concerns*, WASH. POST (Aug. 10, 2010), <http://washingtonpost.com/wp=dyn/content/article/2010/08/10>. In response to customer concerns, Apple announced on September 18, 2014 that it has received fewer than 250 government national security requests as of that date in 2014. *See Privacy-Government Requests*, *supra* note 287.

³³⁰ U.S. DEPT. OF JUSTICE, A REVIEW OF THE FBI’S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006, 81 (2008).

reached a settlement with the Justice Department that permitted member companies to disclose to the public broad information about how many NSLs they have received per 1,000 users.³³¹ However, coalition members are still prohibited from disclosing anything to the person(s) being monitored.³³² Twitter did not join with other companies in settling with the Justice Department but instead filed a pending lawsuit, alleging that it had a First Amendment right to speak publicly to its members about government requests for personal data.³³³ This case promises to be a throwback to the too little speech era.

3. *A Post-Snowden Era?*

Can technology fix what technology wrought? Less than two years after Snowden leaked NSA files, Apple introduced a new iPhone and operating system that encrypted a user's passwords in ways that not even Apple can unlock. In its revised privacy policy, the company explicitly stated that it no longer had the technical capacity to cooperate with government requests for user data from the latest iPhones.³³⁴ The *New York Times* carried word of this development on page one under the headline, "Signaling a Post-Snowden era, iPhone Locks Out the N.S.A."³³⁵ The Android operating system is adopting similar strategies.³³⁶

Changes such as these show a genuine pushback against the too much speech/too much surveillance problem. Internet companies are aware that cooperation with surveillance could cost them

³³¹ Mark Isaac, *Twitter Sues U.S. to Expand Public Disclosure of Data Requests*, N.Y. TIMES, October 8, 2014, at B2.

³³² *See id.*

³³³ *Id.*

³³⁴ "Unlike our competitors, Apple cannot bypass your passcode, and therefore cannot access this data." *See supra* note 287 and accompanying text.

³³⁵ David Sanger & Brian X. Chen, *Signaling a Post-Snowden Era, iPhone Locks out N.S.A.*, N.Y. TIMES, Sept. 27, 2014, at A1. In an opinion piece published in the *New York Times*, Snowden agreed that technological changes since his original leaks have made a "profound" and positive difference in protecting privacy. Edward J. Snowden, *The World Says No to Surveillance*, N.Y. TIMES, June 5, 2015, at A23.

³³⁶ Sanger & Chen, *supra* note 335, at A3.

customers at home and abroad. To solidify trust, the companies have joined with human rights groups to form the Global Network Initiative (“GNI”). The basic principles of the GNI include the statement that “participating companies will respect and protect the privacy rights of users when confronted with government demands, laws or regulations that compromise privacy in a manner inconsistent with internationally recognized laws and standards.”³³⁷ But whether there are such “internationally recognized” standards is far from clear, at least to James Comey, director of the FBI.³³⁸ Comey criticized the encryption of the iPhone 6 as turning the phone into a device that Apple markets “expressly to allow people to hold themselves beyond the law.”³³⁹

The one thing that seems certain is that the NSA will respond to the latest technological impediments to data gathering with breakthroughs of its own. For instance, the *New York Times* reported (against a request from intelligence agencies not to publish the information) that the NSA has succeeded in using its code-breaking skills to decipher encrypted information.³⁴⁰ Secret programs of de-encryption are the equivalent of a stealth back door into reading secure information.

VII. FROM DIAGNOSIS TO PRESCRIPTION

Under the heading of too much speech, this Article groups together a number of otherwise discrete problems affecting the quality of discourse. These problems range from the private control one company has over the speech we call “search” to the public control governments have to subject speech to universal

³³⁷ *Principles on Freedom of Expression and Privacy*, GLOBAL NETWORK INITIATIVE, <https://globalnetworkinitiative.org/principles/index.php> (last visited Aug. 29, 2015).

³³⁸ Sanger & Chen, *supra* note 335, at A3.

³³⁹ *Id.* Comey compared the locked nature of the iPhone 6 to the marketing of “a closet that could never be opened—even if it involves a case involving a child kidnapping and a court order.” *Id.*

³⁴⁰ Perlroth, *supra* note 323, at A1. In urging the *Times* not to publish this story, the government argued that the NSA would lose the advantage if targets knew their encrypted information could be read. *Id.* at A3.

surveillance, to the Big Data collection on all of us. Each of these separate topics shares a common concern for the growing imbalance between the values of free speech and the competing values of privacy and reputation. This concern is not new, but the age of too much speech brings with it an ideology that decisively shifts power over personal data from individuals to corporate actors. That power shift is then justified by questionable uses of the First Amendment.

What can be done? By giving us access and links to an abundance of information, Google has earned the right to become a verb standing for the combined ways Internet services create and disseminate new knowledge.³⁴¹ But we can and should do better at bringing privacy and reputation along with us into the information age. This section suggests general reforms that would call speech back from its own excesses.

A. *Limiting the Reach of Commercial Speech Doctrine*

In 1976, the Supreme Court recognized for the first time that the advertising of prescription drug prices, even though an invitation to engage in a commercial transaction, nonetheless implicates First Amendment rights to valuable information.³⁴² As mentioned previously, the Court did not hinge its decision on the speaking rights of pharmacists to advertise prescription drug prices.³⁴³ In a case brought by a consumer council representing the interests of persons dependent on prescription drugs, the Court stressed the rights of the consumer audience to receive price information via advertising.³⁴⁴ Quoting from a lower court opinion, the Court stressed that the audience had an interest in health that was “‘fundamentally deeper than a trade consideration.’”³⁴⁵ Here was a case where advertising clearly served important public

³⁴¹ See, e.g., James B. Stewart, *Alphabet with a Capital G.*, N.Y. TIMES, Aug. 14, 2015, at B1.

³⁴² *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770–71 (1976).

³⁴³ See *supra* notes 99–101 and accompanying text.

³⁴⁴ *Va. State Bd. of Pharmacy*, 425 U.S. at 755.

³⁴⁵ *Id.* at 755 (quoting trial court decision below).

purposes. Presumably, a case about advertising the price of beef jerky would have fit less easily within the norms of the First Amendment.³⁴⁶ As the Court put it, “not all commercial messages contain . . . a public interest message.”³⁴⁷ Nor did the decision rest on some putative contribution advertising makes to the workings of the free market. Even while recognizing that commercial speech was sometimes entitled to First Amendment protection, the *Virginia State Bd. of Pharmacy* court emphasized that advertising as an economic activity could be subject to legal regulation when the ads proposed unlawful services, or were false or misleading.³⁴⁸

Compare the limited reach of commercial speech protection in 1976 with the blanket protection the First Amendment gave to commercial speech in the 2011 case, *Sorrell v. IMS Health Inc.*³⁴⁹ In *Sorrell*, the Court struck down a Vermont economic regulation that, among other things, restricted sales representatives of pharmaceutical companies from gaining access to prescriber-identifying prescription records kept by pharmacies. These salespersons wanted the information to customize their sales pitches to the identified physicians. In striking down the Vermont law, the *Sorrell* court came perilously close to announcing the death of privacy, since the First Amendment now gave drug salespersons access to what we normally consider confidential data—data communicated by physicians *only to pharmacists or health plans* in relation to treating patients.

In *Virginia State Bd. of Pharmacy*, recognition of commercial speech arguably fit prevailing norms about the right of consumers to make informed decisions about how best to afford prescription drugs. In *Sorrell*, the larger use of commercial speech doctrine flouts the state’s interest in regulating pharmacies and in keeping

³⁴⁶ In upholding a state regulation of prescription drug marketing, the First Circuit Court of Appeals found no First Amendment issue, analogizing the regulation to one of beef jerky. See *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 52 (1st Cir. 2008).

³⁴⁷ *Va. State Bd. of Pharmacy*, 425 U.S. at 762.

³⁴⁸ *Id.* at 770–72.

³⁴⁹ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

prescriber-identifying prescription information confidential.³⁵⁰ The *Sorrell* court does tout the potential health benefits of permitting pharmaceutical representatives to perfect their sales pitches to physicians.³⁵¹ But Vermont chose a regulatory scheme that rested on an alternative, reasonable view of the prescription drug market. Vermont took the position that keeping prescription drugs as affordable as possible was in the health interests of the state's population. The marketing practices of retailers, geared to selling high price brand name drugs, harmed these health interests, in the judgment of the state.³⁵² Nothing in the commercial speech doctrine should have prohibited Vermont from regulating the prescription drug business along these lines. But we get too much speech in *Sorrell* when what once was considered economic conduct (marketing) subject to reasonable state regulation becomes free speech protected from government interference.

B. *Privacy and Public Discourse*

In 1988 the *Washington City Paper* published a list of Judge Robert Bork's video rentals in an attempt to derail the Senate's confirmation of the judge's nomination to the Supreme Court.³⁵³ To prevent a recurrence of such surveillance, Congress passed the Video Privacy Protection Act.³⁵⁴ Critics objected to the law as an unconstitutional infringement on the free speech rights of video storeowners to speak to others who wanted to speak in turn about Judge Bork.³⁵⁵ However, snooping on Judge Bork's video rentals

³⁵⁰ *Id.* at 2677–79 (Breyer, J., dissenting) (criticizing majority for dismissing Vermont's considerable interests in regulating pharmacies).

³⁵¹ *Id.* at 2671.

³⁵² *Id.* at 2670; *see also* *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 54 (1st Cir. 2008).

³⁵³ For the reporter's account of his investigation of Judge Bork's video rentals, *see* Michael Dolan, *The Bork Tapes Saga*, <http://www.theamericanporch.com/bork4.html>. The reporter claimed his point in publishing the story was to show the importance of a constitutional right to privacy, a right that Judge Bork opposed in his judicial opinions. *Id.*

³⁵⁴ 18 U.S.C. § 2710(b)(1) (2002).

³⁵⁵ Paul M. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, 52 *STAN. L. REV.* 1559, 1562–64 (2000).

netted the *Washington City Paper* only a mundane list of movie titles whose informational benefits to the Senate confirmation hearings were far outweighed by the intrusions into privacy.³⁵⁶ As important as public discourse is, there should be space for private nondisclosure, as recognized in tort law.³⁵⁷ In a world where everything we communicate in private, even by renting a video, is fair game for public discourse, individuals are likely to adopt coping strategies such as self-censorship or even withdrawal from participation in public life.

Not everyone will agree that political debate is demeaned by the media's search for leaks about a candidate's video rental habits. Dirty tricks have a long and storied history in American politics, as elsewhere, and we should hardly expect or want to cleanse politics of sleaze. But as uncomfortable as it is to draw distinctions between highbrow and lowbrow politics, we are worse off when we avoid making any substantive judgments about how to police the line between private lives and public performance. *New York Times v. Sullivan*³⁵⁸ began as a paean to the need in a democracy for debate about the *public* conduct of public officials to be robust and uninhibited.³⁵⁹ In time, *Sullivan* sponsored an unintended erasure of any difference in the newsworthiness of a public official's private doings and public performance, on the thin theory that everything such officials do is relevant to their character and fitness for office.³⁶⁰ Whatever one thinks of this expansive reading of *Sullivan*, it bears remembering that even the Supreme Court acknowledges that private persons should be able

³⁵⁶ See Dolan, *supra* note 353. I can imagine the case is different if media investigation uncovers illegal possession of child pornography or possession of adult pornography that, while lawful to possess privately, may raise relevant questions of character and judgment. The published list of Judge Bork's video rentals contained no X-rated movies. *Id.*

³⁵⁷ Restatement of Torts (Second) § 652D (1977).

³⁵⁸ 376 U.S. 254 (1964).

³⁵⁹ *Id.* at 279–80.

³⁶⁰ See, e.g., MATT BAI, ALL THE TRUTH IS OUT: THE WEEK POLITICS WENT TABLOID (2014) (recounting how sensational media coverage of Sen. Gary Hart's extramarital affair caused him to drop out of the Democratic primary campaign in 1988).

to recover for damage to their reputations without meeting the *Sullivan* standard.³⁶¹

In hindsight, the brouhaha over video rental records seems quaint, since we now have computers privy to personal information far more sensitive and extensive. In recent years, Internet companies have strengthened their privacy policies considerably, under pressure from the Federal Trade Commission (FTC) and nonprofit groups.³⁶² But privacy is still precarious, which leads to the next suggestion.

C. *Opt-in Rather than Opt-out Consent*

In 2014, Facebook manipulated the news feeds of nearly 700,000 users without permission, changing the balance of negative versus positive news to see how the changes affected people's emotions and online behavior.³⁶³ At first, Facebook responded to public outcries by saying that "its [then] 1.28 billion monthly users gave blanket consent to the company's research as a condition of using the service."³⁶⁴ One researcher, who is now taking the lead to consider the ethics of such experiments, told a reporter that he had "not realize[d] that manipulating the news feed, even modestly, would make some people feel violated."³⁶⁵

³⁶¹ See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974).

³⁶² To settle deceptive trade practice complaints, Facebook, Google and Twitter, among others, signed consent decrees with the FTC in 2012, agreeing to do a better job of prohibiting disclosure of personal data users had explicitly declined to make public. See Complaint at 9, In the Matter of Facebook, Inc., No. 092 3184, available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookcmpt.pdf>; see also Sundquist, *supra* note 6, at 173–75; G.S. Hans, *Privacy Policies, Terms of Service, and FTC Enforcement: Broadening Unfairness Regulation for a New Era*, 19 MICH. TELECOMM. & TECH. L. REV. 163, 166, 175–90 (2012).

³⁶³ Vindu Goel, *As Data Overflows Online, Researchers Grapple with Ethics*, N.Y. TIMES, Aug. 13, 2014, at B1.

³⁶⁴ Vindu Goel, *Facebook Tinkers With Users' Emotions in News Feed Experiment, Stirring Outcry*, N.Y. TIMES, June 29, 2014, at B1.

³⁶⁵ Goel, *supra* note 363. For an example of how a reporter can cooperate with Google in legitimate scholarship to study differences in search queries between the "hardest" and "easiest" places in live in the U.S., see David Leonhardt, *In*

The notion that checking the proverbial “I agree to the terms of this service” is a meaningful form of consent is laughable. No ordinary person reads through all the small print to see if the agreement does grant Facebook the right to conduct experiments on its users. What is needed is a fuller use of “opt-in” rather than “opt-out” mechanisms for consent. When a privacy policy requires users to take steps to protect their privacy, the default position is set at making personal information public. By contrast, privacy becomes the default setting when a user explicitly has to agree to share information. Some states currently require companies to obtain explicit or affirmative consent before collecting sensitive information such as fingerprints or facial scans.³⁶⁶ However, a proposed “Bill of Rights” from the White House on consumer data privacy stops short of recommending that companies obtain explicit consent from individuals even when collecting health information on them.³⁶⁷

Many online users may find opt-in consent cumbersome, since they want to share information and find it inconvenient to take extra steps to do what they wish.³⁶⁸ This may be so, but the harm done by opt-out consent seems worse. The default setting on most browsers enables sites that users have visited to send those invisible cookies that permit the sites to store visitors’ browsing histories and to call them up whenever a user revisits.³⁶⁹ This may be harmless and make for a better Internet experience but it means

One America, Cameras. In the Other, Guns and Diets, N.Y. TIMES, Aug. 19, 2014, at A3.

³⁶⁶ Natasha Singer, *White House Proposes Broad Consumer Data Privacy Bill*, N.Y. TIMES, Feb. 28, 2015, at B1.

³⁶⁷ *Id.* For possible collection of health information through fitness apps, see *supra* note 167.

³⁶⁸ “With a trusted website, cookies can enrich your experience by allowing the site to learn your preferences or allowing you to skip having to sign in every time you go to the website.” MICROSOFT, *Cookies: Frequently Asked Questions*, <http://windows.microsoft.com/en-us/windows/cookies-faq#1TC=windows-7> (last visited Aug. 29, 2015).

³⁶⁹ For a general description of how cookies work, see MICROSOFT SUPPORT, *Description of Cookies*, <https://support.microsoft.com/en-us/kb/260971> (last visited Aug. 29, 2015).

that our computers exchange information with company computers in silent and largely invisible ways.³⁷⁰ Apparently, in a world of too much speech, we are speaking even when we are not. However, there is an easy technological fix for this. Users can reset a browser's default settings so as to require their explicit consent to receive these cookies.³⁷¹ For all the annoyance of such steps, the "incoming cookie alert" would "nudge" us to think about what personal information we wish to store on a website.³⁷² In other words, even without a "right to have information forgotten" of the European sort, users would already have modest power to make the forgetting, rather than the remembering, of personal data their default position when engaging in online commerce.

D. *Balancing the Interests of Search Engines and their Audience.*

The problem with search engines is not that they provide us too much search. It is that courts have been granting search engines an extraordinary level of First Amendment protection, sometimes to the detriment of the free speech rights of users and website publishers. In the hierarchy of First Amendment values, the highest rank goes to speakers who offer opinions on matters of public importance.³⁷³ As we have seen, many courts and commentators regard search engines as speakers of this sort, finding that rankings in search results are, like all ratings, inherently subjective.³⁷⁴

While there is something to this analysis, it favors the interests of search companies over the potentially competing free speech interests of online users and web publishers. Google's First Amendment position ("we can rank the relevance of various websites any way we wish, since we are speaking only opinions")

³⁷⁰ *Id.*

³⁷¹ See MAYER-SCHONBERGER, *supra* note 19, at 169–71. For instructions on how to block incoming cookies on Microsoft's *Internet Explorer* browser, see MICROSOFT, *Block, Enable, or Allow Cookies*, <http://windows.microsoft.com/en-us/windows7/block-enable-or-allow-cookies> (last visited Aug. 29, 2015).

³⁷² For the use of nudges to encourage certain forms of behavior, see CASS R. SUNSTEIN, *WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM* (2014).

³⁷³ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

³⁷⁴ See *supra* Part IV.A.

puts the audience in the position of taking the fairness of Google search on faith. This is not a strategy for dealing with a large company controlling nearly two-thirds of the U.S. search market and 90 percent of the European one.³⁷⁵ The better approach is for courts to inquire, in particular cases, whether treating search engines as engaged in “opinion speech” is in fact conducive to the free speech rights of the audience served by search engines.

E. *Reputation, Dignity, and the Right to be Forgotten*

A final suggestion is more speculative than the others. Most critics of too much speech fasten on the loss of privacy to explain their discomfort. But the loss goes beyond harm to privacy. American law should follow Europe’s lead in recognizing a concept of human dignity³⁷⁶ that in appropriate cases might limit the marketing of personal data.³⁷⁷

Reputation is an essential part of individual dignity, and too much speech can strip persons of the capacity to remedy mistakes and earn a new reputation.³⁷⁸ Google’s CEO, Eric Schmidt, writes of virtual identities being “engraved in perpetuity” as if this were a good thing.³⁷⁹ But part of what it means to respect the dignity of human beings is to look upon us as having the potential for growth, change, and transformation. In John Stuart Mill’s philosophy, we

³⁷⁵ See *supra* note 7.

³⁷⁶ The concept of human dignity came into European law following World War II as a way to define the rights that the very status of being human makes universal. Matthias Mahlmann, *The Basic Law at 60 – Human Dignity and the Culture of Republicanism*, 11 GERMAN L. J. 9, 30 (2010). See also *supra* note 17.

³⁷⁷ “The concept of human dignity is a social one that promotes a humane and civilized life. The protection of human dignity allows a broader scope of action [than privacy does] against treating people in intrusive ways” Lawrence E. Rothstein, *Privacy or Dignity?: Electronic Monitoring in the Workplace*, 19 N. Y. L. SCH. J. INT. ’L & COMP. L. 379, 383 (2000).

³⁷⁸ “[T]he individual’s right to the protection of his own good name ‘reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.’” *Gertz v. Robert Welch*, 418 U.S. 323, 341(1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart J. concurring)).

³⁷⁹ SCHMIDT & COHEN, *supra* note 263, at 7–8.

are all “experiments in living.”³⁸⁰ Search engines link persons to past events in ways that may or may not capture the present self. In the U.S., search engines are free to link persons to past stories, no matter how stale or irrelevant, no matter the damage to reputation. When reputation is divorced from a person’s ability to change, then a person is stripped of “the self-presentation [that is part of] what it means to be a person.”³⁸¹

At its best, the ECJ decision on a “right to be forgotten” is an attempt to restore the dignity of reputation to persons. However, considerable work needs to be done before the “right to be forgotten” can be acceptable in a First Amendment society. The most serious problem is that the ECJ decision would require the removal of links to even *truthful* information, a position that the Supreme Court has found difficult to accept in other contexts.³⁸²

This Article suggests one principle that could narrow a person’s “right to be forgotten” and make that right compatible with the First Amendment, which is to set expiration dates on personal data, limiting how long such data remains online. As Meg Ambrose has argued, information had a natural life cycle before the Internet, and perhaps even as recently as pre-search engine days.³⁸³ Information’s “value depreciate[d] over time” and tended to fade or be forgotten.³⁸⁴ Insofar as search engines interrupt that life cycle and re-present old personal information out of context, the setting of expiration dates could alleviate the harm.³⁸⁵

³⁸⁰ *On Liberty* 261 in 18 COLLECTED WORKS OF J. S. MILL (J. M. Robson ed. 1977).

³⁸¹ Ambrose, *supra* note 18, at 397 (citing David Velleman); *see also* J. David Velleman, *The Self as Narrator* 56–77 in JOHN CHRISTMAN AND JOEL ANDERSON, *AUTONOMY AND THE CHALLENGES TO LIBERALISM: NEW ESSAYS* (2012).

³⁸² *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (holding right to broadcast name of rape victim when lawfully found in the public indictment but leaving open the question of “whether truthful publication of very private matters unrelated to public affairs could [ever] be constitutionally proscribed”).

³⁸³ Ambrose, *supra* note 18, at 402.

³⁸⁴ *Id.*

³⁸⁵ For a similar suggestion regarding expiration dates, *see* MAYER-SCHONBERGER, *supra* note 19, at 183–95.

The social desirability of letting information expire varies considerably with the case. Consider three scenarios: (1) the desire of the student to have her drunken pirate photograph forgotten;³⁸⁶ (2) the desire of an ex-felon to have public access to his criminal records expire;³⁸⁷ and (3) the desire of a consumer to have personal data previously transmitted to Amazon expire.³⁸⁸ I am inclined to treat Scenario 3 as an easy case. Individuals should have a clear right to set an expiration date for how long they wish Amazon to store personal information transmitted as part of a business transaction. In Scenario 1, even if one accepted that the posting of a drunken pirate picture was ever relevant to the person's qualifications to be a teacher, nevertheless that relevance faded over time. At some point the harm to the person outweighed any public interest served by search engine links to sites perpetuating the photograph.

Scenario 2 is a closer call. Switzerland takes the position that public access to a criminal record should expire when the convicted person has served his time.³⁸⁹ At one point, the California Supreme Court ruled that a magazine violated an ex-felon's privacy rights by "outing" his eleven-year old record for burglary.³⁹⁰ However, the court subsequently changed its position.³⁹¹ When it comes to criminal conviction records, even old information arguably remains relevant to the convict's neighbors, prospective employers and others. At the same time, publicity means the ex-felon will never entirely be able to start anew. Reasonable people disagree on how to balance these competing

³⁸⁶ See *supra* notes 258–62 and accompanying text.

³⁸⁷ For such an example, see *Briscoe v. Reader's Digest Ass'n.*, 483 P. 2d 34, 40–42 (1971) (en banc), *overruled* *Gates v. Discovery Communications, Inc.*, 34 Cal. 4th 679 (2004).

³⁸⁸ For Amazon's privacy policy, see AMAZON, *Amazon.com Privacy Notice*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=468496> (last visited Aug. 29, 2015).

³⁸⁹ Ambrose, *supra* note 18, at 395.

³⁹⁰ *Briscoe*, 483 P. 2d at 40–42.

³⁹¹ *Gates v. Discovery Communications, Inc.*, 34 Cal. 4th 679 (2004).

equities.³⁹² But the existence of hard cases should not dissuade us from advocating expiration dates in Cases 1 and 3.

Uses of expiration dates or so-called “sunset provisions” to protect privacy and reputation are hardly novel. In fact, the federal Fair Credit Reporting Act already precludes credit agencies from reporting negative information about a consumer that is more than seven years old.³⁹³ There seems to be no reason why similar expiration norms could not restore to individuals some power over personal information in the databases of commercial enterprises.

F. *Dignity in American Law*

As previously stated, post-World War II Europe turned to the concept of dignity precisely to ground human rights on a source beyond the vagaries of positive law—the source being the status of human beings as such.³⁹⁴ In American parlance, to acknowledge that a right to dignity’s source lies beyond the Constitution is often to condemn it as irrelevant to the work of a judiciary tasked with interpreting a written document.³⁹⁵ However, the concept of human dignity seems foundational to the entire enterprise of limited government that the Constitution ordained.

In decisions on sexual intimacy, same-sex preferences, and same-sex marriage, the concept of human dignity has gained a foothold in American law, principally through the opinions of Justice Kennedy. Justice Kennedy has spoken of the right to marry as carrying a “dignity and status of immense import.”³⁹⁶ He held the federal Defense of Marriage Act (DOMA) unconstitutional precisely because it inflicted an “injury and indignity” on same-sex

³⁹² Compare Jonathan Zittrain’s position that people should be able to declare “reputation bankruptcy” and start anew, see ZITTRAIN, *supra* note 239, at 228–29, with Eugene Volokh’s position that information about an ex-felon remains quite relevant to many people dealing with him, *Troubling Implications*, *supra* note 75, at 1091–92.

³⁹³ 15 U.S.C. § 1681a(f) (2012).

³⁹⁴ See *supra* notes 17, 376 and accompanying text.

³⁹⁵ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 615 (2005) (Scalia, J. dissenting).

³⁹⁶ *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

couples that deprived them of an essential part of liberty.³⁹⁷ This line of cases relying on the dignity of marriage culminated in the Court's historic 2015 decision, holding that the Fourteenth Amendment requires all states to grant same-sex couples the right to marry.³⁹⁸

Critics regard the concept of dignity as vague and subjective.³⁹⁹ They question what the concept protects beyond what a person's liberty and equality already cover. One merit of Justice Kennedy's reliance on dignity is that it differentiates what is at stake in same-sex marriage cases from the more limited stakes in earlier decisions about sexual lifestyle.⁴⁰⁰ In those earlier cases, gays and lesbians arguably wanted only to be free to be left alone, free from state interference with intimate sexual choices. But in seeking a right to marry, same-sex couples demand the dignity that comes only with *public* recognition of the equal worth of their unions. The dignity that comes with public recognition is not a status that freedom to be left alone can deliver. Instead, social respect is crucial to maintaining self-respect.⁴⁰¹ It is all very well to say that individuals should have an internal sense of self-esteem. But what we think of ourselves is often dependent on what people think of the groups to which we belong.⁴⁰²

Reputation is an essential component of individual dignity. Self-respect and reputation are not one and the same things.

³⁹⁷ *Id.*

³⁹⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) ("There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.").

³⁹⁹ See sources cited in Rex D. Gleansy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 67 (2011).

⁴⁰⁰ See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

⁴⁰¹ Jeremy Waldron, *It's All for Your Own Good*, N.Y. REV. OF BOOKS 21, 22 and n.5 (Oct. 29, 2014).

⁴⁰² In a case that has never been explicitly overruled but is generally considered no longer good law, the Supreme Court made precisely this sociological observation when upholding a racial defamation or group libel statute on the argument that one's individual reputation could suffer from general insults to one's race. *Beauharnais v. Illinois*, 343 U.S. 250, 257–61 (1952).

However, self-respect is hard to achieve when one's choices in life no longer determine one's reputation. This is what the ECJ decision saw as the root of the problem with unchecked search engine power. The Spaniard wanted to have his reputation updated to show he had chosen to take responsibility and to pay off his debts. Instead he found that search engines rewound the past and re-presented it as the present, to the detriment of any effective capacity on the Spaniard's part to earn back a good reputation. Persons without power to alter their reputations are persons without a key aspect of dignity.⁴⁰³

Read in hindsight, the Supreme Court's first decision recognizing a right to privacy in the Constitution seems more about dignity than privacy.⁴⁰⁴ In striking down a state law that prohibited even married couples from using contraceptive devices for birth control purposes, the Court emphasized that the status of marriage was older than the Constitution and carried with it a "noble purpose" to the degree of being sacred.⁴⁰⁵ In tones of indignation, the Court wondered whether police could enforce the law by spying on the "sacred precincts" of the marital bedroom.⁴⁰⁶ The decision suggested that the Court found the law positively indecent, stripping married couples of the dignity to make their own choices about procreation.

So long as the issues were limited to use or possession of birth control devices in the marital bedroom, the concept of privacy did the same work as a concept of dignity. But in time, the Court expanded its ruling to cover the sale and advertising of contraceptive devices—hardly "private" matters—and their use by individuals whether or not married.⁴⁰⁷ Yet the Court reached the same conclusions. Government violates an essential human dignity

⁴⁰³ ZITTRAIN, *supra* note 239, at 229 (noting that the permanence of online reputation works against "socially desirable experimental behavior").

⁴⁰⁴ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴⁰⁵ *Id.* at 485–86.

⁴⁰⁶ *Id.* at 486.

⁴⁰⁷ See *Bolger v. Youngs Drug Prods. Corp.* 463 U.S. 60, 75 (1983); *Eisenstadt v. Baird*, 405 U.S. 438, 447–55 (1972).

when it takes over decision-making at the heart of what it means to be responsible for one's own life.⁴⁰⁸

While a full survey of references to dignity in American law is beyond the scope of this paper, we can mention some highlights.⁴⁰⁹ Dignity underscores an accused's Fifth Amendment right to remain silent and the Fourth Amendment's prohibition of stomach pumping for evidence as "offensive to human dignity."⁴¹⁰ The "basic concept underlying the Eighth Amendment is nothing less than the dignity of man."⁴¹¹ Dignity explains discomfort with human cloning, selling babies and paying fees to a surrogate mother (beyond paying medical expenses).⁴¹² And it most certainly goes to whether persons have a constitutional "right to die with dignity."⁴¹³

In a world where information is power, the question of what rights individuals have to control the migration of personal information into corporate and government databases is a question going to the human dignity that attaches to reputation. Fairness to a person's reputation is fragile in a world where searching is a new form of speaking largely controlled by one private corporation, at most a few, and where that dominance is solidified by First Amendment doctrines that protect search engine "speeches" to a remarkable degree. Meanwhile, individuals have little effective speech against online reputations that may no longer reflect their present conduct and circumstances.

VIII. CONCLUSION

Three shifts in First Amendment law combine to create the problem of too much speech. The first is classification of data

⁴⁰⁸ See *Eisenstadt*, 405 U.S. at 453.

⁴⁰⁹ For surveys of references to dignity in American legal cases, see sources cited in Gleansy, *supra* note 399, at 86, n.106.

⁴¹⁰ *Rochin v. California*, 342 U.S. 165, 172, 174 (1952).

⁴¹¹ *Roper v. Simmons*, 543 U.S. 551, 589 (2005) (O'Connor, J. dissenting).

⁴¹² See, e.g., PRESIDENT'S COMM'N ON BIOETHICS, *Human Cloning and Human Dignity: An Ethical Inquiry* (2002); REV. CODE WASH. §§ 26.26.011-26.26.903 (2007) (surrogacy contracts allowed but compensation prohibited).

⁴¹³ Death with Dignity Act, REV. OR. STAT. § 127.800 (2013).

collection and marketing as speech activities, no matter how raw, inarticulate, or private the data. The second is categorization of search engines as speakers of opinions occupying the highest rung on the hierarchy of First Amendment values. The third is the over-extension of commercial speech doctrine beyond its reasonable beginnings. That over-extension, together with the other two developments, elevates commercial speech to a normative position equal to political speech.

In its decision recognizing an individual's limited "right to be forgotten" by search engines doing business in Europe, the ECJ proposed a new balance between reputation and free speech. For all its flaws, the ECJ decision is a welcome pushback against the transfer of power over personal data from individual to data companies that marks the era of too much speech. This Article has suggested that use of familiar mechanisms, such as requiring affirmative consent from individuals before collecting or marketing their personal information or setting expiration dates on how long personal data remains in a company's database, could reintroduce an appropriate amount of "forgetting" back into the Internet without harm to the values protected by the First Amendment.