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Forget About It? Harmonizing European and American Protections for Privacy, Free Speech, and Due Process

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A. Introduction

In May 2014, the Court of Justice of the European Union (CJEU) issued its decision in the case of *Google Spain SL v. Agencia Española de Protección de Datos* (*Google Spain*). This is the now-famous "right to be forgotten" decision, in which the Court ruled that a search engine operator like Google must, upon request from a data subject, remove links that result from searches for an individual's name when those results are "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes . . . carried out by the operator of the search engine."[1] Since the decision was handed down, Google has received requests from European data subjects to remove over one million links to web sites containing information about them and has granted about 40% of these requests, including in cases where the web sites at issue contained personal information about their medical, sexual, reproductive, or past criminal activity.[2] Google has implemented the decision by removing links only within its European domains (such as Google.es or Google.de). But data subjects have recently argued that these privacy protections also should apply to a search engine's domains worldwide—to all of Google.com for example. To date, European authorities have agreed that these privacy protections should be implemented globally.[3] Further, the Article 29 Data Protection Working Party—composed of all the data protection authorities in the European Union—

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[1] Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317, para. 94, [hereinafter *Google Spain*] available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0131.

[2] See text accompanying notes 45 - 53.

[3] *See, e.g.*, Samuel Gibbs, *French data regulator rejects Google's right-to-be-forgotten appeal*, THE GUARDIAN (21 Sept. 2015), available at http://www.theguardian.com/technology/2015/sep/21/french-google-right-to-be-forgotten-appeal (explaining that French data protection authority Commission Nationale de l'Informatique et des Libertés (CNIL) ordered Google to remove links to websites containing information on French data subjects from all Google domains, not just from country-specific domains like Google.fr, and CNIL's president has rejected Google's appeal of this order).

has determined that these privacy protections should be implemented globally and not just on EU domains.[4] Can the European right to be forgotten be implemented in a manner that accords with U.S. constitutional rights?

Many U.S. commentators responded to the *Google Spain* decision by claiming that it was patently inconsistent with the First Amendment's free speech guarantee[5] and could not withstand constitutional scrutiny in the United States.[6] These commentators contend that if the U.S. passed a law granting individuals the right to demand that search engines remove links to web sites containing embarrassing, harmful, or offensive personal information about them, such a law would violate the First Amendment.[7]

These commentators are only partly correct. They fail to recognize the long history within the United States of protecting individuals' privacy rights—protections that have been rendered compatible with First Amendment freedoms.[8] Indeed, for the past century, individuals in the United States have vindicated their privacy rights by bringing actions under the tort of public disclosure of private facts and similar invasion of privacy torts, and such claims have often prevailed over First Amendment challenges where the information at issue is not of legitimate interest to the public.[9] Similarly, defamation and related laws allow individuals in the U.S. to vindicate their reputational and dignitary interests, and such claims have prevailed over First Amendment challenges where the information at issue is not of legitimate interest to the public and where the plaintiffs are not public figures.[10] Contrary to these commentators' assertions, the First Amendment does not grant the public an absolute right of access to information about other private individuals on matters that are not of public importance. The free speech guarantee does not provide absolute protection for the free flow of information where the content at issue embodies harmful, offensive, or embarrassing information about matters not of public importance. Providing individuals with the right to have links to such

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[4] Article 29 Data Prot. Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "*Google Spain and Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*" C-131/12*, WP 225 (26 Nov. 2014), at 9 [hereinafter Article 29 Data Prot. Working Party Guidelines], available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf.

[5] *See* U.S. CONST. amend. I ("Congress shall make no law… abridging the freedom of speech…").

[6] *See, e.g.*, Andrew Hughes, *Does the U.S. Have an Answer to the European Right to Be Forgotten?*, 7 LANDSLIDE 18, 19 (2014) ("[B]oth supporters and detractors of the ECJ ruling agree that such a law is likely impossible in the United States."); Eric Goldman, *Primer on European Union's Right To Be Forgotten*, TECH. & MKTG. L. BLOG (21 Aug. 2014) ("The ECJ ruling shocked many Americans because American law would not permit a similar result.").

[7] *See, e.g.,* Jeffrey Toobin, *The Solace of Oblivion*, NEW YORKER (29 Sept. 2014) ("The American regard for freedom of speech, reflected in the First Amendment, guarantees that the Costeja judgment would never pass muster under U.S. law.");

[8] See text accompanying notes 54 – 64.

[9] See text accompanying notes 65 – 95.

[10] See text accompanying notes 64 – 92.

information about them removed from search engine results is therefore not necessarily inconsistent with substantive First Amendment freedoms.

The privacy protections recognized in the *Google Spain* decision are not necessarily incompatible with the *substantive* protections provided by U.S. free speech law and the balance U.S. courts have struck over time between privacy and free speech. Yet, as implemented, these privacy protections fail to comport with the *procedural* protections required under the U.S. Constitution. The U.S. Constitution requires that "sensitive tools"[11] be used to distinguish between protected speech and unprotected speech. In particular, the party whose speech is being censored must be provided with notice and an opportunity to be heard by an impartial decision-maker before such censorship occurs. Under the *Google Spain* decision, search engine operators like Google are required to remove links to information about a data subject without affording the publisher or content provider notice or an opportunity to be heard before such a removal decision is implemented. The European "right to be forgotten," as it is currently implemented, is inconsistent with the procedural safeguards for speech required under the United States Constitution.

B. The CJEU's "Right to be Forgotten"

The *Google Spain* case originated in 2010, when Spanish attorney Mario Costeja González became aware that a Google search of his name returned links to a Spanish newspaper's 1998 archives containing a notice about the foreclosure of his home.[12] Costeja González claimed that this search result was in violation of his rights under the EU Data Protection Directive, which requires that personal data only be processed by data controllers insofar as the data is adequate, relevant, and not excessive in relation to the purpose for which the data is collected and processed.[13] Costeja González initiated proceedings against the newspaper *La Vanguardia* (in which the foreclosure notice originally appeared) and against Google Spain and Google Inc. before the Agencia Española de Protección de Datos (Spanish Data Protection Agency). Costeja González advanced two arguments. First, he argued that the archived notice itself should be removed by the newspaper or altered so that his personal data no longer appeared in connection with the notice.[14] Second, in the alternative, he argued that Google Spain and Google Inc. should be required to remove links to the notice when a search was performed on his name.[15]

The Spanish Data Protection Agency rejected Costeja González's complaint against *La Vanguardia*, observing that the publication of the notice was legally justified and indeed legally required by order of the Ministry of Labour and Social Affairs, which mandated the publication of the auction notice so as to secure as many bidders as possible

[11] *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963).
[12] *See Google Spain*, *supra* note 1, para. 7.
[13] *See id.*, para. 14.
[14] *See id.*, para. 15.

[15] *See id.*

on Costeja González's foreclosed home.[16] Accordingly, the actual content regarding Costeja González's home foreclosure was not removed from the newspaper's web site (and indeed remains there to this day[17]). But the Agency upheld the complaint against Google Spain and Google Inc., and required these search engines to stop linking to the *La Vanguardia* notice when Costeja González's name was searched.[18] Google Spain and Google Inc. brought actions challenging the Agency's decision before the Audiencia Nacional (National High Court) of Spain, and that court stayed those proceedings and referred the relevant questions to the Court of Justice of the European Union.[19]

On the questions referred regarding the application of the EU Data Protection Directive, the CJEU reached three conclusions. First, the Court concluded that the search engine operators' activities fell within the scope of "processing personal data."[20] Second, it held that a search engine operator is a "data controller."[21] And third, it concluded that the Directive applies to search engines based outside of Europe whose business operates and profits within Europe.[22] On the basis of these rulings the Court held that Google Inc. and Google Spain were bound by the Directive to process personal data of European data subjects only insofar as the processing was "adequate, relevant, and not excessive in relation to the purpose for which it is collected and/or further processed."[23] Therefore, the Court held, a data subject may require a search engine to remove information that does not comply with these requirements.[24] The Court concluded:

> [I]f it is found, following a request by the data subject . . . , that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at this point in time, incompatible with . . . the directive because that information appears, having regard to all the circumstances of the case, to be *inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue* carried out by the operator of the search engine, *the information and links concerned in the list of results must be erased*.[25]

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[16] *See id.*, para. 16.
[17] *See Subhasta D'immobles* [Auction of Properties], LA VANGUARDIA (19 January 1998), available at http://hemeroteca.lavanguardia.com/preview/1998/01/19/pagina-23/33842001/pdf.html.
[18] *See Google Spain*, *supra* note 1, para. 17.
[19] *See id.*, para. 18.
[20] *Id.*, para. 41.
[21] *Id.*
[22] *See id.*, para. 60.
[23] *Id.*
[24] *See id.*, para. 88.
[25] *Id.*, para. 94 (emphasis added).

The Court qualified its ruling by observing that, in certain cases, the public's interest in accessing information about an individual who has a role in public life may outweigh the data subject's interest in having the link removed.[26] It noted: "[i]f it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with the [data subject's] fundamental rights is justified by the preponderant interest of the general public in having … access to the information in question," then the links should not be removed.[27] Accordingly, the Court established a balancing test pursuant to which the search engine operator is required to weigh the data subject's interests in removal against the interests of the general public in accessing information of genuine import to the public.[28] In applying its balancing test, the Court concluded that the interests of the general public in accessing the information about Costeja González in this case did not outweigh his interests in securing removal of this information. The Court explained: "[S]ince in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information . . . , the data subject may. . . require those links to be removed from the list of results."[29]

On the issue of how exactly a search engine operator is to implement delisting requests from data subjects, the Court ruled that European data subjects have the right to approach the search engine operator directly with their delisting claims under the Directive and that the search engines must then make a determination whether to grant or deny the delisting request.[30] For this reason, the Court's decision does not merely provide a right of action for data subjects to raise in courts of law; rather, it provides a right of action for data subjects to bring directly to the search engines themselves. The search engines are required to implement a system for evaluating and complying with such requests. As the Court explained, "the data subject may address such a request directly to the operator of the search engine (the controller), which must then duly examine its merits [and determine whether to grant or deny the request]."[31] The Court's decision requires search engines like Google to act as the decision-maker to determine whether to grant or deny a data subject's delisting request in the first instance.[32]

C. Google's Interpretation and Implementation of the Decision

The *Google Spain* decision left a number of issues unresolved, even while search engine operators such as Google were expected to immediately implement a system to allow data subjects to submit delisting requests directly to the operators. In an attempt to

[26] *See id.*, para. 97.
[27] *Id.*
[28] *See id.*, para. 98.
[29] *Id.*
[30] *See id.*, para. 77.
[31] Court of Justice of the European Union Press Release No. 70/14, Luxembourg (13 May 2014), Judgment in Case C-131/12, Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf.
[32] *See* Massing chapter in this volume.

secure further guidance on the substantive question of how to balance privacy interests against free speech interests, Google constituted a group of experts—the Advisory Council to Google on the Right to be Forgotten—and charged them with identifying a list of factors that Google should take into account in responding to data subjects' delisting requests.[33] The Council proposed a list of criteria that Google should consider in implementing the CJEU's decision. These criteria include: (1) the data subject's role in public life (with private figures meriting greater privacy protection than public figures);[34] (2) the nature of the information (with information in the public interest—such as information relevant to political disclosure or relating to criminal activity—meriting greater free speech protections);[35] (3) the source of the content and the motivation to publish it (with information provided by recognized bloggers or professional journalistic entities meriting greater free speech protections);[36] and (4) the severity of a crime and the time that has elapsed since the crime occurred, in cases involving criminal activity (with the recentness and severity of crimes militating against delisting).[37]

Google also sought guidance on the procedures it should follow when administering the delisting regime, including whether to provide the affected content provider with notice and an opportunity to be heard in the context of Google's decision whether to delist the web site.[38] The CJEU's decision was silent on these matters, other than to insist that the search engine operator must duly examine the merits of the issue when the data subject brings a delisting request directly to the search engine operator.[39] The European advisory body on data protection and privacy—the Article 29 Data Protection Working Party—has determined that search engine operators should not inform content providers about an adverse decision even *after* it has been reached and has found that that there is "no legal basis" for giving notice in most circumstances.[40] The Google Advisory Council acknowledged that it had received conflicting advice on the question of notice. Still, the Google Advisory Council concluded that, as a matter of good practice, "the search engine should notify the publishers [of adverse delisting decisions that it had reached] to the extent allowed by law."[41] Google is apparently

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[33] *See* Final Report, Advisory Council to Google on the Right to be Forgotten, 6 Feb. 2015 [hereinafter Google Advisory Report], available at https://www.google.com/advisorycouncil.
[34] *See id.* at 7.
[35] *See id.* at 9.
[36] *See id.* at 13.
[37] *See id.* at 14; *see also* Jodie Ginsburg, Advisory Council Meeting Brussels (Nov. 4, 2014) ("The current ability of searchers to find information about individuals who have had their conviction spent is incompatible with laws about rehabilitation, such as those in the UK.").
[38] *See* Google Advisory Report, *supra* note 33, at 17.
[39] See text accompanying notes 16 – 32.
[40] Article 29 Data Prot. Working Party Guidelines*, supra* note 4, at 10 ("Search engines should not as a general practice inform the webmasters of the pages affected by de-listing of the fact that some webpages cannot be acceded from the search engine in response to specific queries… No provision in EU data protection law obliges search engines to communicate to original webmasters that results relating to their content have been de-listed. Such a communication is in many cases a processing of personal data and, as such, requires a proper legal ground in order to be legitimate.").
[41] Google Advisory Report, *supra* note 33, at 17.

adhering to this practice, and indicates in its Transparency Report that "[i]t is Google's policy to notify a webmaster when pages from their site are removed from our search results based on a legal request."[42] Notably, the CJEU's decision does not require search engine operators to provide notice of their delisting decisions. The Court also did not require that the content provider be given an opportunity to be heard before a delisting decision is made. The Article 29 Data Protection Working Party has indicated that notice, even if provided after the fact, would not be authorized by law in most circumstances.[43] This lack of emphasis on notice to affected content providers is in sharp contrast to the emphasis that the European privacy regime generally places on notice in the context of actions affecting privacy rights.[44]

Since the *Google Spain* decision was handed down in May 2014, Google has received requests to remove links to over one million URLs, and has complied with approximately 40% of such requests, removing links to nearly 500,000 URLs.[45] In its transparency report, Google has provided only general information about the types of removal requests it grants and the types that it denies. Specific information about removal requests granted by Google is difficult to acquire, but can be obtained from some sources. BBC News, for example, has created an archive of BBC web sites that have been delisted by Google upon request from data subjects.[46] A review of Google's transparency report and the BBC News archives of delisted websites provide a representative sample of the types of delisting requests Google has granted.

Google has granted data subjects' requests to remove links to websites containing

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[42] EUROPEAN PRIVACY REQUESTS FOR SEARCH REMOVALS: FREQUENTLY ASKED QUESTIONS, available at http://www.google.com/transparencyreport/removals/europeprivacy/faq.

[43] *See* Article 29 Data Prot. Working Party Guidelines, *supra* note 4, at 10.

[44] *See, e.g.,* Directive 95/46/EC of the European Parliament and the Council 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, Article 2, section h, ("For the purposes of this Directive… 'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed."), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=en; Christine Nicholas, *A Select Survey of International Data Privacy Laws*, page 9, ("EU data controllers must tell data subjects what information will be and has been collected, why it was collected, who collected it and who can access it."), available at http://www.moffatt.com/wp-content/uploads/2014/05/InternationalDataPrivacyLaws.pdf; Antonella Galetta and Paul de Hert, *A European Perspective on Data Protection and Access Rights*, page 7, ("…a proper protection of the data subjects' rights is not only linked to the exercise of access rights, but also to the obligation of data controllers to notify data subject[s] about the processing of their personal data."), available at http://irissproject.eu/wp-content/uploads/2014/06/European-level-legal-analysis-Final1.pdf.

[45] *See* EUROPEAN PRIVACY REQUESTS FOR SEARCH REMOVALS, available at http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en (last updated October 14, 2015).

[46] *See* Neil McIntosh, *List of BBC web pages which have been removed from Google's search results* [hereinafter BBC Delistings], available at http://www.bbc.co.uk/blogs/internet/entries/1d765aa8-600b-4f32-b110-d02fbf7fd379.

various types of personal information about them, including information about their criminal, medical, sexual, and reproductive histories. In the area of crime reporting, for example, Google has removed links to web pages about an individual who had been convicted of a serious crime but whose conviction was quashed on appeal.[47] It has removed links to articles discussing a crime with the victim's name listed, upon request from the victim of the crime.[48] Google has removed links to news stories identifying a lesbian couple who conceived their children from sperm from an anonymous sperm donor.[49] It removed links to a news story identifying a young woman with facial palsy, which included her first name and an accompanying picture of her and disclosed the fact that she attempted suicide.[50] It removed links to an article identifying a woman who suffered from diabetes during her pregnancy and who did not receive proper prenatal care for this disease.[51] It removed links to news stories about the experience of living with HIV that named and highlighted the experience of two individuals living with the virus.[52] It removed links to several articles quoting and describing the personal experiences and reproductive histories of individuals who had been diagnosed with testicular cancer.[53]

Google appears to be working diligently to implement the delisting process mandated by the CJEU's decision. And, in many cases, as I explore below, Google's determination that the data subject's privacy rights prevail over the content provider's free speech interests might well comport with the outcome that would be reached under substantive U.S. law. The First Amendment does not grant the public an absolute right to access information about other private individuals on matters that are not of public importance, and privacy law in the United States grants private individuals rights and remedies against the publication of embarrassing, harmful content that invades their privacy. As I explain below, however, the *process* through which Google has implemented the CJEU's decision fails to provide the procedural safeguards necessary for the protection of speech under the U.S. Constitution – and indeed under fundamental notions of due process shared by both the U.S. and the European legal systems.

D. Substantive Law: Balancing Privacy and Free Speech Rights within the United States

The United States' regime for protecting individual privacy—and for protecting freedom of expression—includes meaningful tools to protect individual privacy. Courts have frequently held that individuals' privacy rights under state or federal law trump publishers' free speech rights.[54] Indeed, individuals' privacy rights have prevailed over

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[47] *See* EUROPEAN PRIVACY REQUESTS FOR SEARCH REMOVALS, supra note 45.
[48] *See id.*
[49] *See* BBC Delistings, supra note 46 (delisting http://news.bbc.co.uk/2/hi/uk_news/8229401.stm).
[50] *See id.* (delisting http://www.bbc.co.uk/newsbeat/article/20357076/facial-palsy-left-me-isolated-and-bullied).
[51] *See id.* (delisting http://news.bbc.co.uk/2/hi/health/6390421.stm).
[52] *See id.* (delisting http://www.bbc.com/news/health-15982608).
[53] *See id.* (delisting http://www.bbc.co.uk/wales/bllcks/me_and_mine).
[54] See text accompanying notes 54 - 92.

free speech rights in circumstances similar to those in which Google is now granting delisting requests pursuant to its obligations under the *Google Spain* decision. First, federal laws such as the Fair Credit Reporting Act restrict the ability of consumer reporting agencies to report on bankruptcies and criminal proceedings that are beyond a certain number of years old.[55] Second, expungement laws in almost every state allow individuals to have certain criminal records expunged—such that all records of the arrest or court case involving the crime are destroyed, sealed, or otherwise removed from the public record.[56] Third, the common law of defamation grants private individuals meaningful rights and remedies against the publication of false information about them that damages their reputation.[57] Fourth, and most significantly, common law privacy protections provide individuals with the power to effectively combat the publication of information about them that is embarrassing, harmful, or otherwise invasive of their privacy.[58] Such privacy protections have been rendered compatible with the strong free speech and free press rights provided by the First Amendment.[59]

The First Amendment does not erect a barrier to liability for publishing embarrassing, offensive, or other harmful private information about another, where that information is not a matter of legitimate public concern. The Supreme Court has made clear that, in balancing an individual's privacy and reputational interests against free speech interests, the First Amendment's strongest protections extend to information on matters of legitimate public concern, as distinguished from information of purely private concern.[60] While the Court has held that the state may not "constitutionally punish publication of [truthful] information . . . about a matter of public significance,"[61] it has also emphasized that the First Amendment's strongest protections are reserved for information on matters of public significance or concern—not on matters of private significance or concern: "Speech on matters of purely private concern is of less First Amendment concern [than speech on matters of public concern]."[62] In cases involving liability for or regulation of speech on matters of private concern the Court has ruled that "[t]here is no threat to the free and robust debate of public issues [and] there is no potential interference with a meaningful dialogue of ideas concerning self-government."[63] Accordingly, the Court has concluded that "[w]hile speech [on matters of private

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[55] *See* 15 U.S.C. § 1681 et seq. *See generally* Daniel J. Solove, Access and Aggregation: Privacy, Public Records, and the Constitution, 86 Minn. L. Rev. 6 (2002) (arguing that attempts to limit the use and accessibility of public records do not violate the First Amendment rights to access government information and to freedom of speech and press).

[56] George L. Blum, Annotation, *Judicial Expunction of Criminal Record of Convicted Adult Under Statute*, 69 A.L.R. 6th 1 (2011).

[57] *See Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985).

[58] See text accompanying notes 64 - 92.

[59] See text accompanying notes 60 - 95.

[60] *See, e.g., Dun & Bradstreet v Greenmoss Builders,* 472 U.S. 749 (1985); Daniel J. Solove, The Virtues of Knowing Less: Justifying Protections Against Disclosure, 53 Duke L.J. 967 (2003) (speech of private concern is less valuable than speech of public concern).

[61] *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979).

[62] 472 U.S. 749, 759 (1985).

[63] *Id.* at 760.

concern] is not totally unprotected by the First Amendment, . . . its protections are less stringent."[64]

Today, under the privacy laws of most of the American states, the publication of offensive content about an individual on a matter of private concern constitutes an actionable invasion of privacy under the tort claim referred to as "the public disclosure of private fact." As set forth in the Restatement (Second) of Torts:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter is of a kind that:
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> (a) would be highly offensive to a reasonable person and
> (b) is not of legitimate concern to the public.[65]

Importantly, truth does not serve as an affirmative defense to a claim brought under this tort claim.[66] Further, the First Amendment does not provide a defense to this tort where the content at issue is on a matter of private concern and is not of legitimate concern to the public or legitimately "newsworthy."[67]

This tort claim encompasses various types of invasions of privacy, including the making available of offensive personal information about an individual's criminal, medical, or sexual history, or other aspects of one's private life, if such information is not of legitimate concern to the public and if publication would be offensive to a reasonable person.[68] There are many court decisions involving individuals who have successfully recovered damages for[69] (or secured an injunction to prevent[70]) the publication of truthful, non-newsworthy, offensive information about them.[71] An examination of representative recent cases demonstrates that the result reached by Google in balancing privacy against free speech interests in implementing its delisting regime is not

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[64] *Id.*

[65] Restatement (Second) of Torts § 652D (Am. Law Inst. 1977).

[66] *See* 62A AM. JUR. 2D *Privacy* § 175 (2011) ("Truth, while a defense to an action of libel, is not a defense to an action for an invasion of the right of privacy.") (footnotes omitted).

[67] *See, e.g.*, Amy Gajda, Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press, 97 Calif. L. Rev. 1039 (2009).

[68] Restatement (Second) of Torts § 652D cmt. b (Am. Law Inst. 1977) ("Sexual relations… are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses,… most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.").

[69] *See* text accompanying notes 74 – 94.

[70] *See, e.g.*, *Commonwealth v. Wisemen*, 249 N.E.2d 610 (Mass. 1969) (Court restrains the distribution of documentary film "Titicut Follies," which showed inmates of state hospital for the criminally insane nude and in otherwise embarrassing detail, on the grounds that the documentary needlessly invaded the privacy of the mentally ill subjects).

[71] See text accompanying notes 74 - 94.

inconsistent with the balance that might be struck by courts in the United States in similar cases, notwithstanding the protections of the First Amendment. U.S. courts have repeatedly held that the publication of embarrassing medical, sexual, reproductive, financial, or other private personal information may constitute the basis of a "public disclosure of private fact" tort claim and that such publication is not protected by the First Amendment.[72] Plaintiffs may secure injunctive relief or damages for violation of their privacy rights in such circumstances.[73]

The case of *Doe v. Mills* is illustrative.[74] In that case, several women who were about to undergo abortions brought suit against individuals who were protesting outside an abortion clinic and who displayed plaintiffs' names on large signs, indicating that the women were about to undergo this procedure while imploring them not to "kill their babies." Ruling in the plaintiffs' favor on their "public disclosure of private fact" tort claim, the court held that matters involving an individual's reproductive decisions and medical treatment were private, and that, despite the fact that the subject of abortion in general was a matter of public concern, the identity of these women was a matter of private concern and defendants had no right to publish such information about them.[75]

Similarly, courts have held that publication of matters involving an individual's romantic or sexual relationships may form the basis of a "public disclosure of private fact" tort claim. In *Benz v. Washington Newspaper Publishing Co.*, the plaintiff—a CNN assignment editor—brought suit against a Washington newspaper for publishing a story in its gossip column about the plaintiff's romantic and sexual relations.[76] The court rejected the newspaper's newsworthiness/First Amendment defense and ruled in the plaintiff's favor on her "public disclosure of private fact" tort claim, holding that the plaintiff's personal romantic life was not a matter of public concern. Again, in *Winstead v. Sweeney*, the plaintiff brought a "public disclosure of private fact" tort action against a newspaper for its publication of a feature article on "unique love relationships" in which the plaintiff's ex-husband was quoted revealing personal facts about her sexual and reproductive history, including that she had had several abortions and had joined him in "swapping" partners with another couple.[77] Reversing the trial court's holding that the First Amendment protected the newspaper's publication of the story, the appellate court held that the article at issue was not necessarily newsworthy.[78]

Courts have also held that the publication of information about an individual's medical treatment can form the basis of a "public disclosure of private fact" tort claim. A recent case from Georgia involving the publication of hair transplant photographs is illustrative. In *Zieve v. Hairston*, Celento Hairston sued Ronald Zieve and the National

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[72] See text accompanying notes 72 - 92.
[73] *See* 249 N.E.2d 610 (Mass. 1969) (granting injunctive relief) and text accompanying notes 74 – 92 (discussing cases granting damages).
[74] 212 Mich. App. 73, 77 (1995).
[75] *See id.* at 84.
[76] *See* 34 Media L. Rep. 2368 (2006).
[77] 205 Mich. App. 664, 677 (1994).
[78] *Id.* at 674.

Hair Transplant Specialists for airing television commercials depicting before and after pictures of Hairston's hair replacement treatments.[79] Although Hairston had consented to the pictures being broadcast in a limited geographic area, he did not consent to their broadcast near his Georgia home where he had taken steps to keep his hair replacement treatments a secret.[80] Ruling in Hairston's favor, the court held that all three elements of the "public disclosure of private fact" tort claim had been met: "(1) the disclosure of private facts was a public one; (2) the facts disclosed were private, secluded, or secret facts; and (3) the matter made public was offensive and objectionable to a reasonable person of ordinary sensibilities under the circumstances."[81]

In a similar case involving the broadcast of truthful but embarrassing information, a Florida court in *Doe v. Universal Television Group* ruled in favor of a woman who had undergone a botched facelift.[82] In that case Doe had agreed to be interviewed on camera in the context of a program about overseas facelift surgeries that had gone wrong, on the condition that her identity—including her image and her voice—be rendered unidentifiable.[83] When the broadcast instead revealed her face and voice in a manner that made it possible to identify her, *Doe* brought a "public disclosure of private fact" tort action against the broadcaster. The court ruled in her favor, rejecting the broadcaster's newsworthiness/First Amendment defense.[84]

In another case involving the broadcast of an individual's likeness, in *Multimedia WMAZ v. Kubach*, an AIDS patient prevailed against a television station that aired seven seconds of his face in the context of a story about AIDS, in violation of the station's express promise to depict his face in a manner that was unrecognizable.[85] The case *Huskey v. NBC* also fits with this jurisprudence.[86] In that case the court ruled that a prisoner in a federal penitentiary could proceed with his "public disclosure of private fact" lawsuit against NBC for filming him working out in the prison's exercise room wearing only shorts and with several distinctive tattoos exposed.[87] The court rejected NBC's newsworthiness/First Amendment defense and ruled that Huskey, although a prisoner, did not forgo his privacy rights in his image.[88]

Individuals have also successfully brought "public disclosure of private fact" cases in U.S. courts based on the publication of information about their reproductive and sexual practices and choices. For example, in *Y.G. v. Jewish Hospital of St. Louis*, the plaintiffs brought suit against a hospital and a television station for broadcasting images of them attending a hospital function commemorating the success of an *in vitro*

[79] *See* 266 Ga. App. 753 (2004).
[80] *Id.* at 757.
[81] *Id.* at 756.
[82] *See* 717 So. 2d 63 (1988).
[83] *Id.* at 64.
[84] *Id.* at 65.
[85] *See* 212 Ga. App. 707 (1994).
[86] *See* 632 F. Supp. 1282 (N.D.Ill. 1986).
[87] *See id*. at 1292.
[88] *See id*.

fertilization program in which they had participated.[89] Although the plaintiffs openly attended the function, they had been assured by the hospital that only persons involved in the IVF program would attend and that no publicity would result.[90] Rejecting the station's newsworthiness/First Amendment defense, the court ruled in favor of the plaintiffs on their public disclosure of private fact claim.[91]

U.S. courts have also held that the publication of personal financial information can form the basis of a "public disclosure of private fact" claim. In *Johnson v. Sawyer*, for example, Johnson successfully sued the Internal Revenue Service (IRS) and the United States government for the disclosure of information from Johnson's tax returns.[92] Johnson had pleaded guilty to crimes involving financial impropriety and had disclosed the financial information at issue to the IRS.[93] Still, the court held that he had not waived his privacy interest in such information and that his financial information was not of legitimate concern to the public.[94]

In sum, privacy law in the United States generally provides individuals with meaningful rights and remedies in circumstances where their personal information has been disclosed or published by another in a manner that is offensive, notwithstanding the protections accorded by the First Amendment. Individuals have successfully invoked the "public disclosure of private fact" tort in many instances to vindicate their privacy interests in their medical, sexual, reproductive, financial and other personal information, and the First Amendment provides no defense for those who publish[95] or disclose information that would be highly offensive to the reasonable person and is not of legitimate concern to the public. The balance struck by Google in responding to hundreds of thousands of delisting requests after the *Google Spain* decision is not necessarily dissimilar to or inconsistent with the balance that has been struck by U.S. courts in weighing privacy and free speech rights.

E. Procedural Law: According Due Process to Parties Whose Free Speech Rights Are Affected

The balance Google has struck between privacy and free speech rights when responding to delisting requests under the *Google Spain* decision may not be inconsistent

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[89] *See* 795 S.W.2d 488 (Mo. Ct. App. 1990).
[90] *See id.* at 492.
[91] *See id.* at 503.
[92] *See* 129 F.3d 1307 (5th Cir. 1997).
[93] *See id.* at 1309.
[94] *See id.* at 1324.
[95] Notably, U.S. *statutory* law provides search engines and other Internet intermediaries with immunity for hosting content that invades the privacy of others. See Communications Decency Act, 47 U.S.C. Sec. 230(c); Carafano v. Metrosplash, 339 F.3d 1119 (9th Cir. 2003) (interpreting Section 230(c) to require dismissal of plaintiff's invasion of privacy claim against dating website). But this statutory immunity accorded under Section 230(c) is not mandated by the First Amendment, and may be amended. *See, e.g.*, Petition to Amend Communications Decency Act Section 230, available at https://www.change.org/p/the-u-s-senate-amend-communications-decency-act-section-230.

with substantive First Amendment freedoms. But the procedures Google has followed when implementing the CJEU's *Google Spain* decision are inconsistent with the due process provisions of the U.S. Constitution[96] -- and with fundamental, shared notions of due process generally.[97] A fundamental component of due process is that individuals be accorded *notice* and an *opportunity to be heard* by an impartial decision-maker *before* a decision affecting their rights is rendered.[98] Even assuming that Google is such an impartial decision-maker,[99] the procedure by which it is administering delisting decisions is deficient because—pursuant to the guidance provided by European data protection authorities—Google provides neither notice nor an opportunity to be heard to the affected content providers before their free speech rights are determined. The Article 29 Data Protection Working Party concluded that the provision of notice to affected content providers regarding a delisting decision is problematic and has no basis in law.[100] While Google is apparently attempting to provide notice to affected content providers *after* it

[96] *See* U.S. CONST. amend. V ("[N]or shall any person… be deprived of life, liberty, or property, without due process of law…"); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law…"); and text accompanying notes 105 – 128 (setting forth procedures required under the Due Process Clauses before fundamental rights – including free speech rights – may be abridged).

[97] See text accompanying notes 109 – 113 (discussing due process rights under the Universal Declaration of Human Rights and the European Convention on Human Rights).

[98] *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) ("In most circumstances procedural due process principles require the state to provide an individual with notice and a hearing before an impartial decision-maker prior to the deprivation of a life, liberty, or property interest."); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)*("*[w]hen someone's . . . liberty . . . interest is going to be taken by the government, procedural due process principles normally will require that the person receive notice and a hearing prior to the deprivation of the constitutionally protected interest")*; Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[99] Impartial decision-makers are those that do not have bias or predisposition against either affected party or side. *See*, *e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases… ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."); 3 Treatise on Const. L. § 17.8(g) ("Decision makers are constitutionally unacceptable where they have a personal monetary interest in the outcome of the adjudication or where they are professional competitors of the individual").

[100] *See* Article 29 Data Prot. Working Party Guidelines, *supra* note 4, at 3. The Article 29 Working Party has concluded that *no notice or opportunity to be heard* can or should be provided to the content providers. In its guidelines, the Working Party concluded that "[s]earch engines should not as a general practice inform the webmasters of the pages affected by de-listing of the fact that some web pages cannot be accessed from the search engine in response to a specific name-based query. There is no legal basis for such routine communication under EU data protection law." *Id.*

has reached an adverse decision,[101] such after-the-fact notice is insufficient to satisfy the requirements of due process.

This lack of prior notice to individuals whose free speech rights are implicated is problematic and indeed is in sharp contrast to the emphasis European privacy law places on according notice to individuals before their *privacy* rights are implicated. Under European law, those responsible for controlling data are required to provide meaningful notice to a data subject before processing a data subject's personal data – including what data will be collected, why it was collected, who collected it, and who can access it.[102] Indeed, the pre-eminent value on which the EU Data Protection Directive was founded is the principle of notice to affected data subjects.[103] It is therefore particularly problematic that decision-makers like Google, in the context of implementing the CJEU's *Google Spain* decision, are not required to provide notice to affected individuals before their free speech rights are implicated.

Providing notice *after the fact* to individuals or entities whose rights are adversely affected without according them an opportunity to be heard before a decision affecting their rights is rendered—while better than no notice at all—is inconsistent with the fundamental requirements of the rule of law and principles of due process. A fundamental component of living under the rule of law is that an individual should be accorded due process in connection with the determination of his or her rights. Due process of law requires that an individual be granted the opportunity to be heard and to state her case to an impartial decision-maker before she is deprived of her fundamental rights—including her right to freedom of expression.[104] The United States Constitution's Due Process provisions require that individuals be provided with fundamental protections before the state can abridge their right to freedom of expression. Fundamental principles

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[101] *See* EUROPEAN PRIVACY REQUESTS FOR SEARCH REMOVALS: FREQUENTLY ASKED QUESTIONS, available at http://www.google.com/transparencyreport/removals/europeprivacy/faq.

[102] *See, e.g.,* Directive 95/46/EC of the European Parliament and the Council 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, Article 2, section h, ("For the purposes of this Directive… 'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.") available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=en; Christine Nicholas, *A Select Survey of International Data Privacy Laws*, page 9, ("EU data controllers must tell data subjects what information will be and has been collected, why it was collected, who collected it and who can access it.") available at http://www.moffatt.com/wp-content/uploads/2014/05/InternationalDataPrivacyLaws.pdf; Antonella Galetta and Paul de Hert, *A European Perspective on Data Protection and Access Rights*, page 7, ("…a proper protection of the data subjects' rights is not only linked to the exercise of access rights, but also to the obligation of data controllers to notify data subject[s] about the processing of their personal data.") available at http://irissproject.eu/wp-content/uploads/2014/06/European-level-legal-analysis-Final1.pdf.

[103] *See* Margaret Rouse, *EU Data Protection Directive (Directive 95/46/EC)*, available at http://searchsecurity.techtarget.co.uk/definition/EU-Data-Protection-Directive.

[104] See text accompanying notes 114 – 128.

of due process require that any such deprivation of individuals' right to freedom of expression occur only as a result of a fair, independent, and impartial decision-making process in which affected parties are provided with meaningful notice and an opportunity to be heard before a decision is rendered.

The right to due process of law in general is of ancient origin and has its roots in early English and American law. The right can be traced to Magna Carta, which provides that "No freeman shall be … disseised … of his liberties…except … by the law of the land."[105] One of the earliest express provisions for such procedural protections of individual rights is provided in the Fifth Amendment to the U.S. Constitution, which provides that "no person shall … be deprived of . . . liberty … without due process of law."[106] Similar language was included in the Fourteenth Amendment to the U.S. Constitution, providing that "No State shall . . . deprive any person of . . . liberty …, without due process of law."[107] Since the 1800s, procedural due process has been linked to the concept of the rule of law, in both the U.S. Constitution and subsequently in international and European instruments as well.[108]

In the mid-twentieth century, the drafters of the Universal Declaration of Human Rights recognized the importance of protecting due process rights, providing in Article 10 that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations . . . ."[109] The European Convention on Human Rights was the first international human rights instrument to set forth detailed protections for due process and fair trial rights. With respect to the determination of civil rights and obligations, Article 6 of the European Convention provides for the general right to procedural fairness, including a hearing before a fair, independent, and impartial tribunal that provides a reasoned judgment. Specifically, Article 6(1) states that "In the determination of his civil rights and obligations . . ., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[110] Article 14 of the International Covenant similarly provides, "[i]n the determination of . . . his rights and obligations . . . , everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[111] In each of these foundational documents and instruments, procedural due process rights and the right to independent, impartial, and fair judicial determinations of one's civil and human rights are recognized as necessary for the meaningful protection of substantive rights, including the right to freedom of expression. Article 6 of the European Convention guarantees procedural

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[105] RICHARD CLAYTON QC & HUGH TOMLINSON QC, THE LAW OF HUMAN RIGHTS 708 (2009) (quoting clause 39 of Magna Carta of 1215) [hereinafter Clayton & Tomlinson].
[106] U.S. CONST. amend. V.
[107] U.S. CONST. amend. XIV, § 1.
[108] *See* Clayton & Tomlinson, supra note 105, at 709.
[109] The Universal Declaration of Human Rights, G.A. Res. 217A, art. 10, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/810 (1948).
[110] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222.
[111] International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

fairness "whenever there is a 'determination' of a 'civil right or obligation.'"[112] The European Court of Human Rights has emphasized the centrality of the rights of procedural due process articulated in Article 6(1) and has affirmed that an expansive view of these rights is fundamental to protecting civil and human rights:

> In a democratic society within the meaning of the Convention the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision.[113]

U.S. courts have repeatedly emphasized the importance of due process protections and have held that such protections apply specifically in the context of the deprivation of one's right to freedom of expression. As constitutional commentators Rotunda and Nowak explain,

> In their procedural aspects, the due process clauses require that the government not restrict a specific individual's freedom to exercise a fundamental constitutional right without a process to determine the basis for the restriction. . . . [In particular,] whenever the government seeks to restrain speech, there must be a prompt procedure to determine whether the speech may be limited in conformity with First Amendment principles.[114]

Before the state deprives an individual of a substantial liberty interest such as the right to freedom of expression, the individual must be accorded: adequate notice of the basis for government action; an opportunity to be heard by the decision-maker; and a determination by an impartial decision-maker.[115] Importantly, when the state seeks to authorize a restriction on an individual's freedom of expression, prior notice to that individual must be provided: "An elementary and fundamental requirement of due process in any proceeding … is notice reasonably calculated, under all the circumstances, to appraise interested parties of the . . . action and afford them an opportunity to present their objections."[116] In summary, a basic requirement of due process of law is that individuals be accorded notice and an opportunity to be heard by an impartial decision-maker before a decision adversely affecting their rights is rendered.

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[112] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 222.

[113] *See Delcourt v. Belgium* (1970), 1 EHRR 355, para. 25, cited in Clayton & Tomlinson, supra note 105, at 824.

[114] Treatise on Constitutional Law-Substance & Procedure Database updated June 2013, Ronald D. Rotunda, John E. Nowak, Chapter 17. Procedural Due Process—The Requirement of Fair Adjudicative Procedures/ II. Deprivations of "Life, Liberty, or Property" for Which Some Process Is Due § 17.4. Liberty, 17.4(c) Fundamental Constitutional Rights.

[115] *See id.*

[116] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In addition, First Amendment jurisprudence embodies its own requirements of due process. The First Amendment's protection for freedom of expression not only embodies a substantive dimension of which categories of speech to protect; it also embodies procedural dimensions, which require that "sensitive tools" be implemented by decision-makers to determine whether the speech at issue is protected or unprotected.[117] As free speech theorist Henry Monaghan explains, "procedural guarantees play an equally large role in protecting freedom of speech; indeed, they assume an importance fully as great as the validity of the substantive rule of law to be applied."[118] U.S. courts have constructed a powerful "body of procedural law which defines the manner in which they and other bodies must evaluate and resolve [free speech] claims — [establishing] a First Amendment due process."[119] In implementing the First Amendment's protections for free speech, courts have developed "a comprehensive system of procedural safeguards designed to obviate the dangers of a censorship system."[120]

Under the Supreme Court's First Amendment jurisprudence, any government-mandated restriction of speech must be accompanied by review by an impartial decision-maker and such review must afford the affected parties notice and an opportunity to be heard before the decision-maker renders its decision.[121] The Court's decision in *Bantam Books v. Sullivan* is illustrative.[122] This case involved a system for determining which books were legal and which were illegal—in the absence of a procedure that accorded the affected speakers notice and an opportunity to be heard by an impartial decision-maker. In that case, the Rhode Island Commission to Encourage Morality in Youth was charged with investigating and recommending prosecution of booksellers for the distribution of obscene or indecent printed works.[123] The Commission reviewed books and magazines in circulation, and notified distributors in cases in which a book or magazine had been distributed that the Commission found objectionable and for which removal from distribution was ordered.[124] In reviewing the constitutionality of this scheme, the Supreme Court first explained that "the separation of legitimate from illegitimate speech calls for . . . . sensitive tools" and insisted that any such restriction on expression must "scrupulously embody the most rigorous procedural safeguards."[125] The Court condemned the fact that, under the scheme at issue, "the publisher or distributor is not even entitled to *notice and hearing* before his publications are listed by the Commission as objectionable [and ordered for removal]," as well as the fact that there was "no provision whatever for *judicial superintendence* before notices issue or even for *judicial*

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[117] *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963).
[118] Henry Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970) (internal quotations omitted).
[119] *Id.*
[120] *Id*. (internal quotations omitted).
[121] *See United States v. Thirty-Seven Photographs*, 402 U.S. 363, 372-74; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).
[122] *See* 372 U.S. 58 (1963).
[123] *See id.* at 59.
[124] *See id.* at 61.
[125] *Id.* at 66.

review of the Commission's determinations of objectionableness."[126] The Court concluded that, in the absence of these essential procedural safeguards, the "procedures of the Commission are radically deficient" and unconstitutional.[127] Courts have similarly held that restrictions on Internet speech that fail to accord these procedural safeguards are constitutionally deficient. In *CDT v. Pappert*, for example, the court held unconstitutional a statute that required the blocking of web sites that allegedly hosted child pornography, where the affected content provider was not provided with notice and an opportunity to be heard by an impartial decision-maker before the blocking became effective.[128]

The Supreme Court has consistently emphasized the importance of providing affected individuals with notice and an opportunity to be heard by an impartial decision-maker before an individual's right to free speech is abridged. Absent such procedural safeguards, state-authorized restrictions on expression are unconstitutional. Under the First Amendment, notice, opportunity to be heard, and a fair determination of one's free speech rights by an impartial decision-maker are essential procedural safeguards.

In summary, both the Due Process Clause of the United States Constitution and the First Amendment itself require that *before* an individual's speech is restricted through a state-authorized process—including the regime being implemented by Google pursuant to the mandates of the CJEU's *Google Spain* decision—affected parties must be accorded notice and have an opportunity to be heard in an impartial decision-making proceeding. European data privacy law similarly recognizes the importance of providing notice to parties whose civil rights are implicated. Indeed, the requirement of prior notice is an essential element of fundamental conceptions of due process shared by both the U.S. and European legal systems. Even if—and this is a big if—Google is considered to be an impartial decision-maker, the current process for evaluating and implementing data subjects' removal requests is radically deficient because it fails to provide affected content providers with notice and an opportunity to the heard before an adverse decision is rendered – foundational requirements of due process under both the U.S. and European systems.

F. Conclusion

Most U.S. commentators on the CJEU's right to be forgotten decision have contended that such a right is incompatible with the First Amendment because they mistakenly believe that free speech rights always outweigh privacy rights in the United States. These commentators misunderstand the balance that U.S. courts have struck between privacy rights and free speech rights. They fail to recognize that courts in the U.S. have protected individuals' privacy rights under the "public disclosure of private fact" tort and that such protections for privacy have been held to be compatible with the First Amendment's protections for free speech. In this chapter, I have highlighted a

[126] *Id.* at 71 (emphasis added).
[127] *Id.*

[128] *See CDT v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004).

different incompatibility between the CJEU decision and U.S. constitutional rights—one that emphasizes the procedural protections required under the U.S. Constitution for individuals' fundamental rights – and indeed under fundamental requirements of due process shared by both the U.S. and European legal systems. The privacy protections recognized in the CJEU's decision are not necessarily incompatible with the *substantive* protections provided by U.S. free speech law and the balance U.S. courts have struck between privacy and free speech. But the CJEU's mandate regarding search engine operators' implementation of these protections fails to comport with the fundamental requirements of due process -- that the party whose speech is affected be provided with notice and an opportunity to be heard by an impartial decision-maker before a decision adversely affecting such rights is rendered. As the *Google Spain* decision's privacy protections are currently being implemented, search engine operators like Google are required to remove links to information about a data subject without affording the affected speaker notice or an opportunity to be heard before such a removal decision is implemented. The right to be forgotten, as implemented, is therefore inconsistent with fundamental, shared notions of due process.