

A Posthuman Data Subject? The Right to Be Forgotten and Beyond

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Abstract

The general assumption in the West is that there still is an inherent difference between persons and things. This divide informs how “the human” and human subjectivity are constructed as distinct from all others. Recently, the distinction has been challenged in posthumanist theory, where it has been argued that the divide between human and nonhuman agents—or rather, bodies—is always an effect of a differential set of powers. For this reason, the boundaries between human and nonhuman are always in flux. As posthumanist theorists have argued, this change in boundaries may be specifically visualized in relation to digital technology. Today, such technologies obfuscate the boundaries between persons and things, and the extensive utilization of smartphones, social media, and online search engines are just three common examples.

In parallel to the continuous expansion of digital technologies, critical understandings of how “data” and human personhood are produced are increasingly raised in legal theory. Recent developments establishing increased privacy online through EU law, including the new General Data Protection Regulation and the famous Right to Be Forgotten case could possibly be understood to have struck a balance between interests of the human—in the form of privacy—and the digital—in the form of information diffusion. In this Article, a posthumanist theoretical perspective is utilized to show how the new data protection legislation, with a focus on the Right to Be Forgotten, produces such protection yet continuously withdraws data as a separate body from human bodies. For this reason, it is argued that the construction of new human rights, such as those considering data protection, would benefit from understanding how the separation is, in itself, an effect of advanced capitalism.

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A. Introduction

It is now widely acknowledged that the idea of human existence faces a dramatic reconceptualization. This Special Issue is not the least proof of such change. These developments are mirrored in the way *human* rights, as a construction, now face a number of entirely new areas.¹ As Selkälä and Rajavuori write in the Introduction to this issue, “legal personhood has been extended past the sphere of persons commonly held to such standard in the West.” In this sense, an expansion of personhood has taken place to produce a “legal response” to different types of questions where a need for protection has been identified. Subsequent developments have included the granting of personhood to “nature.” New Zealand now recognizes a right to personhood for a river,² India acknowledges rights of waterfalls,³ and Ecuador grants rights to the environment as a whole.⁴ An additional but contested development in legal personhood concerns the scope of rights enjoyed by corporations.⁵

Another area of interest is how rights to communication and privacy, in their capacity as fundamental human rights, can be understood and developed in relation to the digital sphere.⁶ This article explores the specific right construct conceived with the concept of “the data subject” in the law of the European Union (EU). The data subject, articulated through the Data Protection Directive (DPD) that was adopted by the EU in 1995⁷ and reiterated in the recent General Data Protection Regulation⁸ (GDPR), has recently developed into what has commonly been referred to as the “Right to be Forgotten” (RTBF) online. These developments are also reflected in the new directive where such a right is made explicit in the Article 17 as a *right to erasure*. In brief, the legislation implies that “natural persons” as “data subjects” have, under certain conditions, the right to ask companies to remove links with personal data about them on the internet.

¹ See, e.g., UPENDRA BAXI, *HUMAN RIGHTS IN A POSTHUMAN WORLD* (2009).

² Abigail Hutchison, *The Whanganui River As a Legal Person*, 39 *ALTERN. L. J.* 179, 179–82 (2014).

³ Lalit Miglani v. State of Uttarakhand and others, Writ Petition No. 140 of 2015, High Court of Uttarakhand at Nainital (India), MCC 139/2017.

⁴ Rickard Lalander, *The Ecuadorian Resource Dilemma: Sumak Kawsay or Development?*, 42 *CRITICAL SOC.* 623 (2016).

⁵ Toni Selkälä & Mikko Rajavuori chapter in this volume, 18 *GERMAN L.J.* (2017).

⁶ See, e.g., J. Richardson, *The Changing Meaning of Privacy, Identity, and Contemporary Feminist Philosophy*, 21 *MIND MACH.* 517 (2011) (treating the link between online and offline identity in relation to a move towards a more relational understanding of privacy in general).

⁷ Council Directive 95/46, 1995 O.J. (L 281) 31 (EC) [hereinafter DPD].

⁸ Commission Regulation 2016/679, 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR].

This right is also specifically aligned to the developments in the more recent practice of the European Court of Justice (ECJ), particularly in the *Google Spain* case (the RTBF case).⁹ Following that case, there has been much discussion on whether the right to have one's personal data erased from a digital setting can be understood as either too progressive or not radical enough.¹⁰ In this Article, I will, however, argue that in order to make such an evaluation of the "new" human rights, particularly in the digital setting, we first need to consider in greater depth who *the human* is. Such theorization has, in more recent times, been pursued specifically in what may be termed the posthumanist stream. In this line of theory, it has been suggested that humanity now stands before a posthuman condition and has, indeed, turned itself posthuman.¹¹

The development towards the posthuman condition may in turn be understood to capture a stage of crisis for the human. In this crisis, several of the assumptions in relation to the dominating concept of the human are challenged. In posthumanist theory, the crisis is captured partly in relation to what is referred to as "the anthropocene,"¹² as well as partly in relation to the "capitalocene"¹³ or "advanced capitalism."¹⁴ In short, the first concept captures the idea that the human species has affected the earth to a degree that is geologically irreversible.¹⁵ Thus, the centrality of "the human" has come to directly affect the place where humanity is supposed to reside. Second, the concepts of capitalocene and advanced capitalism are utilized to show that capitalism now informs and subordinates the possibility of thinking about what a human *is* to an excessive extent.¹⁶

Posthumanist theories aim to produce critiques of as well as counter-narratives to these developments. In relation to such critical interest, information and communication

⁹ Case C-131/12, *Google Spain v. Agencia Española de Protección de Datos (AEPD)*, (May 13, 2014) <http://curia.europa.eu/> [hereinafter *Google Spain*].

¹⁰ See, e.g., R. H. Weber, *The Right to Be Forgotten: More than a Pandora's Box?*, 2 JIPITEC 120, 121–22 (2011); Susanna Lindroos-Hovinheimo, *Legal Subjectivity and the 'Right to be Forgotten': A Rancièrian Analysis of Google*, 27 LAW & CRITIQUE 289 (2016).

¹¹ DONNA HARAWAY, *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 210 (1991); N. KATHRENE HAYLES, *HOW WE BECAME POSTHUMAN, VIRTUAL BODIES IN CYBERNETICS, LITERATURE, AND INFORMATICS* (1999); and ROSI BRAIDOTTI, *THE POSTHUMAN* (2013).

¹² DONNA HARAWAY, *STAYING WITH THE TROUBLE-MAKING KIN IN THE ANTHROPOCENE* 30, 36, 44 (2016); see also, e.g., Dipesh Chakrabarty, *The Climate Of History: Four Theses*, 35 NO. 2 CRITICAL INQUIRY (2009).

¹³ *Id.* at 47.

¹⁴ BRAIDOTTI, *supra* note 11, at 7.

¹⁵ *C.f.*, e.g., Andreas Philippopoulos-Mihalopoulos, *Lively Agency: Life and Law in the Anthropocene*, in *ANIMALS, BIOPOLITICS, LAW* (Irus Braverman ed., 2016).

¹⁶ BRAIDOTTI, *supra* note 11, at 7; HARAWAY, *supra* note 12, at 47.

technologies have given rise to a specific thread on how to think the human in new ways.¹⁷ Following such a thread, this Article aims to provide a critical narrative of “data subject” construed through EU data protection law, and also expose its potential.¹⁸ In this endeavor, it is argued that by understanding the data subject through the posthumanist theory, new ways to think about the need for privacy online emerge. Further, such reconsideration of privacy can be understood both as having reached beyond as well as having affirmed the humanist endeavor vested in treating privacy—on and offline—as a human right.

To structure the discussion, I will specifically align this aim with the concepts of dematerialization and rematerialization of human and digital technology, as proposed by Katherine Hayles in *How We Became Posthuman*. In this book, published already in 1999, Hayles argues that the terminology of dematerialization can be utilized to show a “change in the body (the material substrate)”¹⁹ as well as a “change in the message (the codes of representation).”²⁰ Thus, dematerialization can be understood as a concept for describing how the human body, as well as knowledge or information, undergoes shifts in materiality through specific narratives for objectifying information. In this way, she produces a theory for appraising in-depth how the construction of the human person, as well as of data, occurs in cybernetic discourses, for example. The larger aim when utilizing such a perspective is to follow the posthumanist thread to conceptualize how human, as well as nonhuman, bodies are continuously being composed, never forming a firm point from which to reflect the rights connected to the human.²¹ Here, this will be pursued specifically in relation to showing how the human body can be considered to have metamorphosed into a posthuman type of personhood. The focus on the changing materialities and connections of and between bodies aligns posthumanist theory with other theories in the new materialist stream. The aim here is also to steer away from entirely dystopic notions of potential posthuman bodies.²² Specifically, this potential is pursued as a way to produce theory able to assess the potential of human rights that relate to privacy online. Before embarking on such endeavor, I will shortly introduce posthumanist theories and in particular the stream of posthumanism as it is advanced here.

¹⁷ Possibly the most well-known example is Donna Haraway’s creation of the cyborg as a figure to think resistance in new ways. HARAWAY, *supra* note 12, at 149–81.

¹⁸ *C.f.* Selkälä & Rajavuori, *supra* note 5.

¹⁹ HAYLES, *supra* note 11, at 29.

²⁰ *Id.* at 29.

²¹ *See, e.g.*, JANNICE KÄLL, CONVERGING HUMAN AND DIGITAL BODIES, POSTHUMANISM, PROPERTY, LAW 98–108 (2017).

²² Compare with Mika Viljanen chapter in this volume, 18 GERMAN L. J., and his conception of the production of cyborg law. In his description of the cyborg, Viljanen points out that this concept has its roots “in our popular imagination, the cyborg typically emerges in apocalyptic dystopias. They are frightening things, evil man-machine hybrids . . . and [e]nmeshings of flesh and electronics are the best-known imaginaries for cyborg existence.” Such a modular perception of the human is also a strand of posthumanist theory.

B. A Brief Introduction to Posthumanist Theory

Posthumanism has recently become a subject of great interest in several fields spanning from philosophy to political theory, art, natural sciences, and law—or at least critical legal theory.²³ Yet, as Carey Wolfe points out, the terminology utilized to describe posthumanism is still ambiguous.²⁴ To set the bearings of this article clearly, it therefore needs to be noted that when posthumanism is engaged here, the theory will be built mainly on the works of Donna Haraway, Rosi Braidotti, and Katherine Hayles. This stream is furthermore affiliated with the critical insights into “the human” developed by philosophers such as Friedrich Nietzsche, Michel Foucault, Gilles Deleuze, and Félix Guattari, particularly their questioning of *Man*.²⁵ All these theorists may, further, largely be sorted under what has been called the “French” reading of the works of Baruch Spinoza.²⁶ What distinguishes Haraway, Braidotti, and Hayles from other posthumanist theorists is that they combine these philosophical commitments with an understanding of recent developments in technology. They also refine the theories of power identified already through the French readings of Spinoza.²⁷

Today, these posthumanist theorists are also explored under the slightly different theoretical stream of the so-called “new materialism(s).”²⁸ The posthumanist stream of the new materialist theory shares the belief that binary boundaries between matter such as subjects and objects are too rudimentary, and also directly harmful for the construction of radically sustainable worlds. Specific to the posthumanist theorists that I will utilize is, however, the way in which they align such commitment with convergences between matter, or bodies, in order to question the assumptions of humanism, which includes notions of legal objects, spaces, and legal subjects.²⁹

The focus on materiality also implies considering matter more profoundly as assemblages or entanglements of bodies rather than as humans or nonhumans divided into dichotomies

²³ CARY WOLFE, WHAT IS POSTHUMANISM? xi (2010).

²⁴ *Id.*

²⁵ An example of such a theory is the history of man pursued by Michel Foucault where he points out that “man is an invention of recent date. And one perhaps nearing its end.” MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHEOLOGY OF HUMAN SCIENCES (1966) and WOLFE, *supra* note 23, at xii.

²⁶ For such readings of Spinoza, see, e.g., BRAIDOTTI, *supra* note 9, at 85–86.

²⁷ *Id.* at 55–56. See also HARAWAY, *supra* note 12, at 150 (making use of Foucault and, in latter works, Félix Guattari who worked closely with Gilles Deleuze); *id.* at 34.

²⁸ See, e.g., RICK DOLPHIJN & IRIS VAN DER TUIN, NEW MATERIALISM: INTERVIEWS & CARTOGRAPHIES (2011).

²⁹ *C.f.* WOLFE, *supra* note 23, at xiii.; Philippopoulos-Mihalopoulos, *supra* note 15.

such as those between humans and technology or subjects and objects.³⁰ The way to see matter as unified in this way aligns posthumanist theory with the more general stream of “object oriented ontologies” or OOOs. Rather than pursuing such a thread, the posthumanist stream used in this Article, however, follows more closely the Spinozan understanding of the body. The most significant implication of this is that the Spinozan understanding appears to give more precedence to theorizing power as separate regimes of affects whereas the OOO-stream leans more towards objectivist empiricism.³¹

This implies that the concept of the body in the posthumanist understanding is further used for explicating what exactly produces the connections and boundaries between bodies. These relations may furthermore be understood to give rise to very specific forms of desires that keep bodies fixed or moving in specific directions. In relation to this, Deleuze therefore argues that we need to ask: “Of what is a body capable? Of what affections, passive as well as active? How far does its power extend?”³² in order to understand the production of subjectivity beyond a humanist perception of capabilities built, for example, on divides between human and nonhuman subjects and objects. Through these questions, we subsequently begin to understand matter, including the “human” body, in new ways, which align with the understanding of matter in Spinoza as interpreted by Deleuze. The same understanding is obtained, for instance, in the connected analysis of bodies and power shared by posthumanist theorists. This trait is potentially the most significant in Braidotti’s theory, yet it seems pertinent to ascribe it to Donna Haraway as well, through their respective developments of Foucault’s theories on bio-power.³³ What unifies these positions is the understanding of the construction of bodies as always related to forms of power.

Posthumanist theories have identified “the capitocene”³⁴ or “advanced capitalism,”³⁵ a form of power regimes that has already been discussed. The idea of capitalism as a form of intense power that shapes and reshapes bodies is, furthermore, specifically linked to a view where the production of capital is increasingly connected to production of information as a commodity. Rosi Braidotti even argues that in the current forms of capitalism, “[l]ife itself” is the main capital.³⁶ Donna Haraway further develops, in the terminology of the informatics

³⁰ Philippopoulos-Mihalopoulos, *supra* note 15, at 193.

³¹ *C.f.* ANDREAS PHILIPPOPOULOS-MIHALOPOULOS, *SPATIAL JUSTICE: BODY, LAWSCAPE, ATMOSPHERE 3* (2016); BRUNO LATOUR, *REASSEMBLING THE SOCIAL, AN INTRODUCTION TO ACTOR-NETWORK-THEORY 1* (2005).

³² GILLES DELEUZE, *EXPRESSIONISM IN PHILOSOPHY: SPINOZA* 256 (1992).

³³ HARAWAY, *supra* note 12, at 150; BRAIDOTTI, *supra* note 11, at 26–27.

³⁴ HARAWAY, *supra* note 12, at 11.

³⁵ BRAIDOTTI, *supra* note 11, at 7.

³⁶ *Id.* at 61.

of domination, understanding of increased commodification of life under advanced capitalism as a machine of biopolitical control.³⁷ Both authors subsequently argue for the capitalization of information to imply that information is not only commoditized in order to produce economic value but also to control *bios* or life to a more intensified degree than previously done.³⁸ In relation to this view, it is interesting to note how Upendra Baxi argues that one could claim that “the law *invented* the posthuman which the contemporary discourse on the emergent posthuman now *discovers*” when capitalist interests were, from the beginning, combined with human rights.³⁹ Baxi also notes that we today witness a human rights paradigm of “trade-related, market-friendly human rights, in which the human rights of multinational corporations and other business entities begin to enjoy autonomy and priority over human rights of human beings.”⁴⁰

Here, this kind of power will, however, be specifically explored as a form of “dematerialization” of human bodies. This process will subsequently be understood as a force that reshapes both what we perceive as humans as well as what we perceive as data. Furthermore, dematerialization will be used to show how these processes are utilized in order to produce bodies as separable from each other. Thus, these narratives will be applied to consider, in more detail, the general societal processes through which the notion of the “data subject” may be contextualized from a posthumanist perspective.

C. Dematerialization of Human Bodies and Materialization of Digital Bodies

The point where humans appear to have become posthuman may, as discussed by Katherine Hayles, be significantly connected to processes of “dematerialization” of the human body. According to Hayles, such dematerialization processes have functioned as a means to materialize digital elements as independent matter through cybernetic discourse. Such narratives are, for example, formulated in a method where data is viewed as a pattern that may flow freely across time and space, or as extracted memories from human brains that may be downloaded on computer disks. As she expresses it, narratives of dematerialization may be summarized as follows: “[T]he great promise of information is that it can be free from the material constraints that govern the mortal world.”⁴¹

³⁷ HARAWAY, *supra* note 12, at 161–62.

³⁸ *Id.*

³⁹ BAXI, *supra* note 1, at 201.

⁴⁰ *Id.* at 199.

⁴¹ HAYLES, *supra* note 11, at 13.

As pointed out by Hayles, the rationale behind such a move is that the accumulation of data is needed in order to create “progress” in society.⁴² This is also mirrored in narratives that advocate the possibility and need for “flows of information” in society.⁴³ In a similar vein, both Lisa Nakamura and Danah Boyd have pointed out that there is a tendency in general to disconnect technology from human constraints.⁴⁴ Moreover, Ella Briens has also pointed out how cyberspace as a place narratively evolved as “a place where the user would be free of the material limits of the body, while also exercising an enhanced control over this virtual environment.”⁴⁵

Another example of dematerialization narratives and practices may be identified in the business models related to the so-called “harvesting” of *Big Data*.⁴⁶ Such harvesting of data implies that the goal is precisely the collection and aggregation of data, more or less “personal,” into big data pools.⁴⁷ A market actor may therefore automatically acquire personal data when private persons enter search terms into a search engine. This automatically transmitted data can include a great deal of information such as IP addresses, user preferences, language, and the search terms themselves, which, in the case of searches made by a user with his own name, easily reveal the user’s identity. Moreover, with regards to persons who have user accounts, their names, e-mail addresses, and telephone numbers almost invariably end up in the hands of the search engine service provider.⁴⁸ Thus, one can argue that persons—or at least the “traces” that can be dematerialized from persons—function as property in business models related to search engines and other digital platforms.

In relation to such narratives, it is interesting to note that the DPD as well as the GDPR also tells a particular story about the need for “the free movement of personal data.”⁴⁹ This

⁴² *Id.* at 8–12. See also Margaret Chon, *Postmodern Progress: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

⁴³ HAYLES, *supra* note 11, at 1–24; Chon, *supra* note 42.

⁴⁴ Lisa Nakamura, *Head-hunting on the internet: Identity tourism, avatars and racial passing in textual and graphic chat spaces*, in LISA NAKAMURA, CYBERTYPES, RACE, ETHNICITY, AND IDENTITY ON THE INTERNET 31 (2002); Danah Boyd, *White Flight in Networked Publics? How Race and Class Shaped American Teen Engagement with MySpace and Facebook*, in RACE AFTER THE INTERNET 203 (Lisa Nakamura & Peter Chow-White eds., 2011).

⁴⁵ Ella Briens, *The “Virtual” Body and the Strange Persistence of the Flesh: Deleuze, Cyberspace and the Posthuman*, in DELEUZE & THE BODY, 121 (Laura Guillaume & Joe Hughes eds., 2011).

⁴⁶ Rob Kitchin, *Big Data, New Epistemologies and Paradigm Shifts*, BIG DATA & SOC., 1–2 (2014).

⁴⁷ *Id.* at 4.

⁴⁸ This was discussed directly by the Advocate General in the RTBF case, see Opinion of Advocate General Jääskinen in *Google Spain*, *supra* note 9.

⁴⁹ See, e.g., GDPR, *supra* note 8, at 4.

understanding is, however, also annexed to an idea that such a flow should be balanced against a high level of protection for the privacy of individuals. In the GDPR this is expressed strongly already in the preamble, which states that: “The protection of natural persons in relation to the processing of personal data is a fundamental right.”⁵⁰

In the DPD, as well as in the GDPR, it is, however, also directly pointed out that in accordance with fundamental commitments underpinning the EU, the free movement of goods, persons, services, and capital also requires that personal data should be able to flow freely from one Member State to another.⁵¹ As will be made visible below, the need for such a “flow” of information to be continuously sustained was also put forward as a defense from Google in the recent RTBF case. Yet, in the end, it was the personal interests of private persons that prevailed.

In light of this, the following discussion illustrates how data protection establishes a new form of human rights for data subjects while keeping up the narrative of a dematerialized conception of data as separate and separable from humans. Following posthumanist theory, this process creates an opening to argue that a form of double movement where dematerialization of persons to data and data to persons can be identified in the RTBF case and, as later effectuated, in the GDPR. Furthermore, possible rematerialization of personhood can create the potential to consider data protection as a new, or at least strengthened, human—or perhaps even cyborgian—right of EU citizens.

D. Rematerialization of the Human Through the Birth of the Data Subject?

While recognizing the need for personal data to flow freely, the previous data directive also clearly expressed the need to balance such flows so that “the fundamental rights of individuals should be safeguarded.”⁵² Thus, apart from sustaining the free flows of data as part of trade inside the EU, it was also recognized early on that at least some data is to some degree more connected to persons—or rather “data subjects”—than other types of data. This double purpose is expressed, for example, in the following manner:

“[P]ersonal data” shall mean any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by

⁵⁰ *Id.* at 1.

⁵¹ DPD, *supra* note 7, at 3. See also GDPR, *supra* note 8, Article 1 (assuring the free movement of data within the Union). *Cf., e.g.*, Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Building A European Data Economy*, COM/2017/09 final (Jan. 1, 2017).

⁵² DPD, *supra* note 7, at 3.

reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity . . .⁵³

In the GDPR, this subject construction is articulated in the following manner:

“[P]ersonal data” means any information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

A subject construction is thus established through the possibility of claiming “personal data.” Furthermore, this possibility is based derivatively on the construction of data as an object, or more specifically “personal data,” and its entanglement with the so-called natural person. One aspect of this established connection between some data and some persons is furthermore sustained in the manner in which a data subject was given control over personal data in the sense that she could ask to have it erased. A “data subject could ask for such removal.”⁵⁴

For the purposes of this article, it is important that the RTBF proceedings spurred the possibility of making the DPD applicable to data that has been processed by market actors such as Google. In legal terms, this was a question of whether Google could be viewed as a controller of data and thus responsible for its use under the DPD, article 2(d).⁵⁵ This form of privacy online is generally understood to have been established through a series of developments at the EU level, where the Commission and the ECJ have proposed strengthened human rights with regards to privacy on the internet. At the end of January 2012, Viviane Reading, the European Commissioner for Justice, Fundamental Rights, and Citizenship, announced the Commission’s proposal to create a new privacy right as a

⁵³ DPD, *supra* note 7, Article 2; *c.f.* DPD, *supra* note 7, Article 1.

⁵⁴ DPD, *supra* note 7, Article 12; *c.f.* GDPR, *supra* note 8, Article 17.

⁵⁵ See European Commission, Factsheet on the Right to Be Forgotten (2012), available at: http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf. [hereinafter Factsheet].

consequence to this. This right was explicitly referred to as “the right to be forgotten” or the “right to erasure.”⁵⁶

Parallel to this development, the RTBF case was still being decided. The RTBF case, initiated in 2010, involved a Spanish citizen lodging a complaint with the national Data Protection Agency against a Spanish newspaper and Google Spain and Google, Inc. His complaint concerned an appearance of what he claimed to be private information in the Google search results. He requested Google Spain or Google, Inc. to remove the data related to him so that it would no longer appear in the search results. The personal information involved was related to an announcement for a real estate auction connected to attachment proceedings for the recovery of social debts and the Spanish Citizen had originally been in 1998.⁵⁷

On 13 May 2014, the ECJ settled on the RTBF case. The result was that the publication of data was considered to have interfered with the person’s right to privacy or data protection. In short, the court reasoned that the economic interest of a search engine was not enough to motivate side-stepping from the right to have personal data removed.⁵⁸ Thus, in order to settle the extent to which a person was entitled to the right to be forgotten, the ECJ argued that a case-by-case assessment had to take place. As expressed in the factsheet on the ruling,⁵⁹ this right subsequently applies where the information is inaccurate, inadequate, irrelevant, or excessive in relation to the data processing.⁶⁰ This assessment thus aims to consider the sensitivity for the individual’s private life and the interest of the public in having access to that information.

In this evaluation, it was further argued that the role played in public life by the person requesting the deletion might also be relevant.⁶¹ The notion of a right to one’s personal information as a form of rematerialization of “the human” as a subject separate from, yet in control over her data, could therefore be understood as conditioned by e.g. the public’s interest in certain types of information. In the case of public persons, such conditionality furthermore concerns not only the right of data controllers to keep data available but of a

⁵⁶ European Commission Press Release IP/12/46, Commission Proposes a Comprehensive Reform of Data Protection Rules to Increase Users' Control of their Data and to Cut Costs for Businesses (Jan. 25, 2012) available at http://europa.eu/rapid/press-release_IP-12-46_en.htm.

⁵⁷ *Google Spain*, *supra* note 9, at 14.

⁵⁸ *Id.* at 85.

⁵⁹ Factsheet, *supra* note 55.

⁶⁰ *Google Spain*, *supra* note 9, at 93.

⁶¹ Factsheet, *supra* note 55.

third party, or rather of a collective of humans in the form of a “public,”⁶² to exercise such a right.

This kind of an argument clearly aligns with the notion of the “persona” as a form of mask that may be disconnected from one’s body and treated as a form of intellectual property.⁶³ As Margaret Davies and Ngaire Naffine argue, this kind of construction may be understood to have introduced a connection between a human person and a thing in the form of the construction of property as in a person.⁶⁴ Thus, one may argue that in the cases where the human has already been partly rendered into a thing, as, for instance, in the form of a commercial persona, the need to have data subjectivity in accordance with the RTBF is less pressing than it otherwise would be. As a consequence, the fact that a representation of a human body has already had a marketable value in the sense of a persona is thus treated as an assumption for continuously portraying this “mask” as being dematerialized from the human. Where a person is not as explicitly dematerialized from her personal data, it is, as discussed with reference to the RTBF case and the RTBF guidelines, also made explicit that the right to have personal data erased needs to be assessed in relation to economic interests in general. More concretely, on the basis of an understanding of how advanced capitalism works, as explicated in posthumanist theory, one may also suspect that the boundary between a commercial persona and a private persona is not made as concrete and explicit as one may think.⁶⁵ Furthermore, as argued by Wendy Brown, capitalist logics today explicitly make private persons behave on market terms as if they themselves, including their personae, were market assets.⁶⁶

As further discussed by Selkälä and Rajavuori in line with Upendra Baxi, this implies that even if there is a blurring of the boundaries between the ontological constructions of biological humanity in science and technology, such blurring implies that both the body and mind are understood as coded programs of information. Personhood, subsequently, emerges in new ways, overlapping previous humanist boundaries between body and mind but also reinstating, and even reinforcing, the divide between personhood and thingness.⁶⁷ The question therefore becomes whether there is still potential in considering the development

⁶² C.f. Janice Richardson, *Spinoza, Feminism and Privacy: Exploring an Immanent Ethics of Privacy*, 22 FEM. LEG. STUD. 225 (addressing this perspective from a Spinozan perspective, which thus is very related to the stream of posthumanist theory pursued here).

⁶³ Compare with Selkälä & Rajavuori, *supra* note 5. See also Ukri Soirila chapter in this volume, 18 GERMAN L.J. (2017).

⁶⁴ MARGARET DAVIES & NGAIRE NAFFINE, *Are PERSONS PROPERTY? LEGAL DEBATES ABOUT PROPERTY AND PERSONALITY* 125–29 (2001).

⁶⁵ See *supra* Section B.

⁶⁶ WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* 78 (2015).

⁶⁷ Selkälä & Rajavuori, *supra* note 5.

of data protection as human rights in the posthumanist sense. One needs to ask—even if it appears that the rematerialization of “the human” is conditioned on advanced capitalist terms—whether we can still understand the establishment of the “data subject” as a positive answer to such processes.

E. Entanglements Between Human and Digital Bodies: A Posthuman Subject?

Keeping in mind the different processes of materialization that occur when construing the data subject, we may now return to the posthumanist theory in greater depth. As discussed above, one of the main points with this theoretical framework is to conceive of “the body” in ways that bridge the dominant understandings of what constitutes a human. The aim with such processes, as discussed by Braidotti, is to contemplate more critically the material that could come to constitute a posthuman subject.⁶⁸ As such, the question for this part is whether the construction of data privacy and the RTBF may be perceived as a step towards such subjectivity. The question is rendered even more prevalent when considering the strong emphasis on human rights to personal privacy embedded in the new GDPR framework.⁶⁹

As a starting point in this inquiry, it needs to be affirmed that the construction of a right that pertains to data subjectivity itself disrupts the notion of a human person as basis for human rights. Following posthumanist theory in general, one could subsequently argue that the idea of a hybrid human subject is injected as a basis for human rights. This form of hybridity is, of course, visible already in the collapsed construct under the moniker of the “data subject.” Even if this construct is pursued in a fairly narrow manner so as to sustain personal information as “data” related to a “natural person” as a new body, the form of a right construct still recognizes the connection between data and the person. This connection—while at the same time a complex disconnection—may, in accordance with the posthumanist theoretical framework, be related to the continuous dematerialization processes of information as identified by Hayles.⁷⁰ Situating these narratives in this way makes visible the complexities at stake in producing an altered form of subjectivity as basis for human rights rather than simply injecting a collapsed perspective of “data” and “subject” or nonhuman-human bodies as a basis for constructing online personhood. For this reason, the rematerialization of the human—and of human rights online—may, to a degree, imply a step toward something “less human” than previously is recognized as entangled with the production of human subjectivity. This is so since the production of hybridity, as described by Hayles, is also embedded in the broader dematerialization of human bodies.

⁶⁸ BRAIDOTTI, *supra* note 11, at 12.

⁶⁹ *C.f.* GDPR, *supra* note 8, at 1.

⁷⁰ *Id.*; HAYLES, *supra* note 11, at 1–24.

From the perspective of posthumanist theory, the idea of sustaining a link between a person and information is particularly interesting because of its right construct, which applies to an online environment. These environments, closely following the idea of dematerialization narratives, have been considered spaces where there is no body. Thus, such spaces are entirely neutral areas beyond the material constraints of the offline world. Yet, as has been pointed out by others, embodiment also occurs online. This implies that race and gender, for instance, are continuously produced and reproduced online.⁷¹ In the RTBF case, one may see how establishment of a right to have one's information delinked increasingly sustains the linkage between the human body and the digital environment. In the RTBF case, this link was specifically pursued because the information available online was directly connected to the plaintiff's life offline. Thus, his difficulty with receiving job offers was limited due to the availability of online information. In the new GDPR, the link between online and offline materialities is directly emphasized with regard to data that may identify a specific "racial origin" which merits a specifically cautious treatment.⁷²

As discussed above, from a posthumanist perspective a further important aspect in reconsidering the divide between persons and things is informed by the role that market actors play in shaping the posthuman. Here, too, one may argue that the ECJ recognizes the significance of market actors in the transformation by attributing to them direct responsibility to remove information upon request. Imposing responsibility on companies like Google implies a step away from another existing narrative where these actors are seen as mere "mediators of information."⁷³ Considering how mediation of information implies the potential to collect and aggregate data into "Big Data," this move should be considered an important way to connect the human body to data—in other words, to rematerialize the human.

Yet, the rights construction leaves, of course, room for questioning, also from a posthumanist perspective. One significant and clear opening for critical inquiry of embodiment is the way in which the right is connected to a "natural person." Both nature as well as person are, of course, concepts to be wary of if one aims to bridge dualisms vested in the dominant idea of the subject.⁷⁴ The reason for such precaution is founded on the perception of nature as a fixed state of being.⁷⁵ Implicit in the posthumanist notion of the human is furthermore also a critique against understanding any human as an entirely individual person separate from other persons but also from other things and environments.

⁷¹ NAKAMURA, *supra* note 4; Boyd, *supra* note 42.

⁷² GDPR, *supra* note 8, at 51.

⁷³ *C.f.*, e.g., *Google Spain*, *supra* note 9, at 17.

⁷⁴ See Selkälä and Rajavuori, *supra* note 5.

⁷⁵ *C.f.*, e.g., DONNA HARAWAY, *THE COMPANION SPECIES MANIFESTO* (2003) (coining the term *nature cultures*).

In this case, the notion of a natural person is implausible because the entire cause of personality is related to a form of entangled subjectivity. “Data” is however also continuously understood as separable, to a large extent, from the person. This is also obvious in the way that public persons are perceived as distinguished from their “data” to a degree greater than other persons. Obviously, then, the kind of personhood emerging as data subjectivity cannot be perceived as natural nor as singular.

Furthermore, the construct of assigning rights of privacy to a person in general needs to be criticized because it individualizes the need for online privacy. This individuality is also expressed in the manner in which the court argues that the level of privacy that a data subject could claim should be decided on a case-by-case basis. Such individualist notion of “the human” stands in stark contrast to the way that subjectivity is constructed as an ethical response to power under posthumanist theoretical frameworks. As Braidotti, for instance, points out, the construction of a posthumanist subjectivity makes it possible to think in radically relational ways.⁷⁶ These deep relational concepts necessarily require further consideration of how various power regimes affect the kind of personal information that is made available on the internet but also the kind of posthuman subjectivities that are made possible.⁷⁷ The emphasis on sensitivity towards data that may point out “racial origin,” as expressed in the GDPR, may imply a better way to account for the non-abstract sense in which the human and nonhuman are produced as entangled with technology. Thus, the recognition and deterrence from registering race as “data” visualizes that technology, or “data” is not a neutral, entirely dematerialized body that just wants to flow. Instead, as pointed out in the GDPR,⁷⁸ some data collection requires specific protection. The GDPR also goes even further in recognizing this connection where the processing of data may cause damage to data subjects.⁷⁹ Very much in line with the critical interests of posthumanist theory, it makes explicit that physical, material, or non-material damage in particular could take place when personal data are processed, as detailed below:

[W]here personal data are processed which reveal racial or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, and the processing of genetic data, data concerning health or data concerning sex life or criminal convictions and offences or related security measures; where personal aspects are evaluated, in particular analysing or predicting aspects concerning performance at work,

⁷⁶ BRAIDOTTI, *supra* note 11, at 190–94.

⁷⁷ *Id.* at 26–27.

⁷⁸ GDPR, *supra* note 8, at 75.

⁷⁹ *Id.*

economic situation, health, personal preferences or interests, reliability or behavior, location or movements, in order to create or use personal profiles; where personal data of vulnerable natural persons, in particular children, are processed; or where processing involves a large amount of personal data and affects a large number of data subjects.⁸⁰

This linkage between data and what constitutes vulnerable data underscores the question of what kind of boundary should be drawn when constituting the human and nonhuman through “fundamental rights” to online privacy. The fundamental underpinnings of human rights are, however, not necessarily altered just because data protection is enforced.⁸¹ As argued by Janice Richardson in a more strictly Spinozan vein, a way to move forward beyond the individualist notions of rights in the online—and offline—sphere could be to distinguish communication supporting knowledge in a democratic society from communication that harms both communication and life in general. In this manner, she argues that revenge porn, for example, could be considered as a specific form of communication that has no form of democratic value as it reproduces power in a manner detrimental to a democratic society.⁸² This kind of understanding also appears to align at least to some degree with the more recent developments of data protection in the EU. As will be argued in the conclusion, however, from a posthumanist perspective one needs to align such understanding even further with the way subjectivity is produced offline.

F. Summary and Concluding Remarks

Posthumanist theory shows, to a significant degree, that in order to be able to think subjectively beyond the human one also needs to be able to consider new forms of materialities as connected to the human. As discussed by Selkälä and Rajavuori, the posthuman condition returns elements of legal personhood to its constitutive parts. In this condition, technological encounters with “the human,” for instance, give rise to new constructions of persons that may be perceived as both adjacent to and overlapping with the traditional legal person.⁸³ This includes treating the dematerialization as well as rematerialization of data as directly linked to the construction of a “posthuman” form of subjectivity. The posthumanist theory also stresses the need to think of these entangled subjectivities through a critical lens that has the capacity to make visible the power regimes that constitute the dominant understanding of the human and the posthuman. Within this

⁸⁰ *Id.*

⁸¹ *C.f.* Selkälä & Rajavuori, *supra* note 5.

⁸² Richardson, *supra* note 60.

⁸³ Selkälä & Rajavuori, *supra* note 5.

framework, it has been specifically argued that anthropocentric and capitalist regimes produce a notion of the human which naturalizes a very specific form of the human. This form could, in accordance with posthumanist theory, be countered by introducing deeper relational terms. This implies, for instance, the need to understand the human as more intensely related to “the nonhuman” than previously thought. With regard to the development of data subjectivity online, this could, for example, imply the need to consider the human as increasingly connected to an online identity. The rights to privacy online or the RTBF, in particular, may be understood as rights sustaining such understanding. Following posthumanist theorists, however, what remains in such a rights construction is a need to connect such rights beyond the dominant perception of the human.

From the perspective of posthumanist theory, this calls for a new understanding of responsibility related to all that lives in this world. To make the connection between the human and technological body in the sense increasingly made through data protection laws and cases, as well as to the specific degrees to which we become, or do not become, human, may be understood as first steps along such lines. In order to reach the ethical implications of pursuing a posthumanist perspective of subjectivity, a more radical deconstruction of subjectivity needs to be carried out. Subsequently, in order to be able to speak of data subject rights as posthumanist rights, or rights of cyborgs in the posthumanist vein, our notion of the body as always ready and non-individual needs to be enforced. Therefore, this understanding implies that a right of the body is directly linked to what a body can do. It will never be smaller or bigger than the actual movements that a body carries out. This, in turn, implies that a collapse between rights and bodies—as a right becomes the same, or possibly the drive of a body, to continuously exist.⁸⁴ The effectuation of rights also implies that forms of power that produce unsustainable possibilities for bodies to remain in their being need to be abolished. In relation to identifying which power regimes that produce in unsustainable power today, Braidotti, Haraway, and Hayles, have all singled out advanced capitalism, cybernetics and, or the capitolocene as unsustainable.⁸⁵

In order to produce “data subjectivity” as a form of posthumanist subjectivity, it is therefore argued that such construction needs to be able to link harmful regimes of power caused to “natural persons” to online environments as well. This also includes a continuous—general—delinkage of data as a dematerialized product solely controlled by information companies. The development, and subsequent discussions, of the RTBF both make visible and refute several assumptions of law and its engagement with the person or thing divide. Notably, it is perceived as a human right construction, which is vested in a “data subject” and made efficient only through compliance of companies rather than as directly through states. The potential to be a person, to be a “data subject,” both with regards to what one may express as well as what one might withdraw from, is in this way highly conditioned by

⁸⁴ DELEUZE, *supra* note 32, at 255–72.

⁸⁵ See *supra* Section B.

the “thing” holders. The divide between persons and things is clearly distorted in this sphere. The enforceable rights vested in the GDPR notwithstanding it becomes obvious that companies such as Google, as controllers of data, will have the prerogative to refuse delinking of personal data. In order to move towards a more radical understanding of data subject rights as potential posthumanist rights, it is therefore suggested that the control over data as a commodity controlled, to any extent, by market actors, needs to be continuously questioned and ultimately abolished.