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The European “Right to Be Forgotten”
A Solution to the Nonconsensual Pornography Problem in the United States?

Introduction

Nonconsensual pornography—the online posting of nude or nearly nude photographs or videos of individuals without their consent—is an increasingly common form of online harassment. Nonconsensual pornography can take a variety of forms. Often, the images are published online by a former partner after a break-up as a means of “getting revenge,” hence the colloquial name “*revenge pornography*.” Another increasingly common form of nonconsensual pornography occurs when someone (perhaps even a stranger) hacks into a private online space to steal the explicit images and subsequently posts them.¹ Postings often include the victim’s identifying information. As a result, victims are frequently contacted, harassed, and even stalked by strangers.² Because these postings are public and easy to find, they almost inevitably result in devastating psychological and reputational damage for victims.³

Due in no small part to the large number of celebrities victimized by these postings, nonconsensual pornography has gained national prominence as a serious problem in the past

¹ See Data & Society Research Institute & Center for Innovative Public Health Research, *NonConsensual Image Sharing: One in 25 Americans Has Been A Victim of “Revenge Porn,”* (Dec. 13 2016), [https://c-7npsfqifvt34x24ebubtpdjfuzx2eofu.g00.cnet.com/g00/3_c-7x78x78x78.dofu.dpn_/c-7NPSFQIFVT34x24iuuqtx3ax2fx2febubtpdjfuz.ofux2fqvctx2fpix2fOpodpotfotvbm_Jnbhf_Tibsloh_3127.qeg_\\$\\$/\\$/\\$?i10c.ua=1&i10c.dv=13](https://c-7npsfqifvt34x24ebubtpdjfuzx2eofu.g00.cnet.com/g00/3_c-7x78x78x78.dofu.dpn_/c-7NPSFQIFVT34x24iuuqtx3ax2fx2febubtpdjfuz.ofux2fqvctx2fpix2fOpodpotfotvbm_Jnbhf_Tibsloh_3127.qeg_$$/$/$?i10c.ua=1&i10c.dv=13).

² See Erica Goode, *Victims Push Laws to End Online Revenge Posts*, New York Times (Sept. 23, 2013), <http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html>.

³ See Janet Portman, *Revenge Porn: Laws & Penalties*. Criminal Defense Lawyer (last visited Apr. 28, 2019), <http://www.criminaldefenselawyer.com/resources/revenge-porn-laws-penalties.htm>.

several years.⁴ But these postings do not just target celebrities—a 2016 study co-published by the Data & Society Research Institute and the Center of Innovative Public Health Research found *that one in every twenty-five Americans* have either had explicit images posted of them online without their permission or have had someone threaten to post such photos.⁵

In the United States, more than 40 states have now passed legislation attempting to define and criminalize revenge pornography.⁶ While federal bills have been repeatedly introduced in Congress, no bill has yet been passed.⁷ The principle objection to the passage of such a federal law is the First Amendment. First Amendment objectors typically argue that criminalizing revenge porn would have the effect of silencing other sorts of speech unintentionally.⁸ Given the strength of the First Amendment in the United States, this objection is no small one.

By contrast, European law—one intensely focused on protecting the privacy of individuals—provides an interesting comparison to the speech-oriented regime in the United States. The recent implementation of the General Data Protection Regulation (commonly known

⁴ See *10 Need-to-Know Facts About How Common Revenge Porn Is*, Fight The New Drug (July 11, 2018), <https://fightthenewdrug.org/need-to-know-facts-about-revenge-porn/>; Keith Perry, *Revenge porn: some of the biggest celebrity victims*, The Telegraph (Sept. 30, 2014, 12:17 AM), <https://www.telegraph.co.uk/news/celebritynews/11129357/Revenge-porn-some-of-the-biggest-celebrity-victims.html>; *Here Are Four Other Cases of Celebrity Revenge Porn*, BET (July 5, 2017), <https://www.bet.com/style/2017/07/05/blac-chyna-rob-kardashian-revenge-porn.html>.

⁵ Data & Society Research Institute & Center for Innovative Public Health Research, *NonConsensual Image Sharing: One in 25 Americans Has Been A Victim of “Revenge Porn.”*

⁶ See *43 States+ DC Now Have Revenge Porn Laws*, Cyber Civil Rights Initiative (last visited Apr. 28, 2019) <https://www.cybercivilrights.org/revenge-porn-laws/>.

⁷ See *H.R. 5896-Intimate Privacy Protection Act of 2016*, Congress.Gov (last visited Apr. 28, 2019) <https://www.congress.gov/bill/114th-congress/house-bill/5896> (listing the current status of the bill); *S.2162-ENOUGH Act*, Congress.Gov (last visited Apr. 28, 2019), <https://www.congress.gov/bill/115th-congress/senate-bill/2162> (listing the current status of the bill). See also Chris Morris, *Revenge Porn Law Could Make It A Federal Crime to Post Explicit Photos Without Permission*, Fortune (Nov. 28, 2017), <http://fortune.com/2017/11/28/revenge-porn-law/>; Mario Trujillo, *Revenge porn bill unveiled after struggle to bring tech on board*, The Hill (July 14, 2016, 2:40 PM), <https://thehill.com/policy/technology/287773-revenge-porn-bill-unveiled-after-struggle-to-bring-tech-on-board>.

⁸ See Anne Harrison, *Revenge Porn: Protected by the Constitution?*, J. Gender Race & Just. Blog (last visited Apr. 28, 2019), <https://jgrj.law.uiowa.edu/article/revenge-porn-protected-constitution>.

as the “GDPR”) and, in particular, the “right to be forgotten” suggests one possible way the problem of revenge pornography in the United States might be remedied.

This research paper will provide an overview of the problem of revenge pornography in the United States. The paper will then outline the solutions that have been suggested to remedy this problem, and will summarize the First Amendment objections that advocates of a nonconsensual pornography law have confronted. The paper will then provide an overview of the European privacy regime and assess the feasibility of instituting a “right to be forgotten” in the United States; ultimately concluding that such a privacy-protective right would not be implementable here due to the overriding prevalence of the First Amendment. Despite the likely inapplicability of instituting such a right here, the paper argues that a comparison with the European system still provides an important insight for the American debate—namely, for considering a remedy that make victims whole again.

Nonconsensual “Revenge” Pornography

Nonconsensual pornography is an online tactic often used by ex-partners to “shame, extort and harm” individuals online, in a very public way.⁹ The Cyberbullying Research Center has defined nonconsensual pornography as the act of distributing intimate photography through different means without the individual’s consent.¹⁰ In addition to the posting of photos, revenge pornography is also commonly thought to include the posting of illicit videos without the consent of the victim.¹¹ Revenge pornography, therefore, encompasses the act of posting (1) photographs

⁹ See Laura Hilly and Kira Allmann, *Revenge porn does not only try to shame women—it tries to silence them too*, *The Guardian* (June 22, 2015), <https://www.theguardian.com/technology/2015/jun/22/revenge-porn-women-free-speech-abuse>.

¹⁰ See *Why Revenge Porn Is Not Just Celebrity Gossip, it’s a Societal Issue*, *Fight The New Drug* (July 13, 2017), <https://fightthenewdrug.org/revenge-porn-is-not-just-celebrity-gossip/>.

¹¹ See, e.g., Perry, *Revenge porn: some of the biggest celebrity victims*, *The Telegraph*; *Here Are Four Other Cases of Celebrity Revenge Porn*, *BET*.

or videos taken by an ex-partner *without* the victim's knowledge, (2) images or videos taken of the victim by an ex-partner *with* the victim's knowledge and (3) even the posting of images and videos *taken* by the victim and sent to the ex-partner during the course of a relationship. The inquiry therefore turns on whether the video or photograph was posted on the internet without the consent of the victim.

Nonconsensual pornography postings have become so common that they have been described as “an epidemic.”¹² Studies have found that women are twice as likely as men to be threatened with revenge porn.¹³ And young people (defined as those between the ages of 15–29) are the group most likely to report being threatened with the potential sharing of nude or nearly nude images.¹⁴ For young women specifically the numbers are staggering: *one in every ten* women under the age of 30 have experienced threats of nonconsensual image sharing.¹⁵ The statistics become more grim for internet users who identify as lesbian, gay, or bisexual—*fifteen percent* reporting that they have been threatened with revenge porn.¹⁶ Studies have also shown that victims are more likely to come from racial minority groups and from low-income households.¹⁷

The nonconsensual posts often include specific identifying information about the victim.¹⁸ This might include information such as the name or address of the victim's place of

¹² Erica Fink & Laurie Segall, *Revenge porn victim: My naked photos were everywhere*, CNN Business (Mar. 7, 2016, 7:02 PM), <https://money.cnn.com/2015/04/26/technology/revenge-porn-victim/index.html>.

¹³ *See 10 Need-to-Know Facts About How Common Revenge Porn Is*, Fight The New Drug.

¹⁴ Data & Society Research Institute & Center for Innovative Public Health Research, *NonConsensual Image Sharing: One in 25 Americans Has Been A Victim of “Revenge Porn,”* (explaining that 7% of internet users under the age of 30 have been threatened with revenge porn postings, whereas only 2% of adult internet users aged 30 and older have experienced similar threats).

¹⁵ Data & Society Research Institute & Center for Innovative Public Health Research, *NonConsensual Image Sharing: One in 25 Americans Has Been A Victim of “Revenge Porn.”*

¹⁶ *Id* (comparing this number to the 2% rate for heterosexual internet using individuals).

¹⁷ *See 10 Need-to-Know Facts About How Common Revenge Porn Is*, Fight The New Drug.

¹⁸ *See, e.g.* Goode, *Victims Push Laws to End Online Revenge Posts*, New York Times.

work, their home address, or hyperlinks to their social media accounts.¹⁹ Vile comments and/or threats are often made by the poster alongside the posting, and it is typical for countless numbers of strangers viewing the content online to follow suit.²⁰ There have even been reports of viewers directly forwarding the images to the victim’s family members, friends or business contacts.²¹ In publishing such intimate information about the victim to a potentially unlimited online audience, revenge porn posters attempt to make victims “unemployable, undatable and potentially at physical risk.”²²

The American Bar Association has described the consequences of revenge porn as “extremely negative.”²³ Victims are branded as “sluts” and “home-wreckers” by former friends and fellow community members.²⁴ The Cyber Civil Rights Initiative, a non-profit, found in a 2015 survey that 82% of victims report suffering significant impairment in social, occupational or other important areas of functioning.²⁵ And many victims have reported actually losing their jobs as a result of revenge porn postings.²⁶ But the harms are not just reputational or occupational—the survey also found that 49% of revenge porn victims have been harassed or stalked online by users who saw the posting.²⁷ Many victims change their names or physically

¹⁹ See e.g., *id.*

²⁰ Bethan McKernan, *A journalist uploaded her own naked pictures to a revenge porn website. What happened next is awful*, *Indy100* (Aug. 12, 2015, 17:50), <https://www.indy100.com/article/ajournalist-uploaded-her-own-naked-pictures-to-a-revenge-porn-website-what-happened-next-is-awful--b1NCOYHDEI>.

²¹ See Charlotte Laws, *One Woman’s Dangerous War Against the Most Hated Man on the Internet*, *Jezebel* (Nov. 22, 2013, 3:20PM), <https://jezebel.com/one-womans-dangerous-war-against-the-most-hated-man-on-1469240835>.

²² See Goode, *Victims Push Laws to End Online Revenge Posts*, *New York Times*.

²³ See Nova I. Levant, *Revenge Porn: How Tech Lawyers Are Helping Women*, *American Bar Association* (May 8, 2018), <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/revenge-porn-how-tech-lawyers-are-helping-women/> (summarizing the survey results).

²⁴ See, e.g., Lilian Edwards, *Revenge porn: why the right to be forgotten is the right remedy*, *The Guardian* (July 29, 2014), <https://www.theguardian.com/technology/2014/jul/29/revenge-porn-right-to-be-forgotten-house-of-lords>.

²⁵ See Nova I. Levant, *Revenge Porn: How Tech Lawyers Are Helping Women*, *American Bar Association*.

²⁶ See Alex Ronan, *Could All These New Revenge-Porn Laws Actually Be A Bad Thing?*, *The Cut* (Apr. 16, 2015), <https://www.thecut.com/2015/04/why-regulating-revenge-porn-is-so-tricky.html>.

²⁷ See Sameer Hinduja, *Revenge Porn Research, Laws, and Help for Victims*, *Cyberbullying Research Center*, <https://cyberbullying.org/revenge-porn-research-laws-help-victims>.

alter their appearances.²⁸ 51% indicate that they had contemplated suicide and 93% report significant emotional distress.²⁹³⁰ Panic attacks, anxiety, anorexia nervosa, and depression are common consequences.³¹ The effects of these postings can be so damaging and harmful, in fact, that many victims report remaining in abusive relationships out of fear that their partner would post images online should they try to leave.³²

Free Speech Oriented Regime in the United States

Current Legislation

While a whopping 43 states now have laws criminalizing the posting of revenge porn, there is incredible inconsistency among them. Very few states have instituted a specific law targeting revenge pornography. Rather, most states have criminalized these postings by classifying them under existing state statutes. Revenge pornography is, therefore, treated differently in almost every state. Some statutes classify the postings as “harassment,” while others deem them “disorderly conduct,” “distribution of private images,” a “violation of privacy,” “sexual cyberharrassment,” or “video voyeurism,” among others.³³ State statutes also range in the severity with which they classify the posting of these images—for some states, posting is merely a misdemeanor, and in others it’s a felony.³⁴ Some statutes even alter the severity of the penalty based on the characteristics of the poster.³⁵ New Mexico, for example, treats recidivist posters more severely than non-recidivists, while adult posters receive harsher treatment than minors in

²⁸ See Goode, *Victims Push Laws to End Online Revenge Posts*, New York Times.

²⁹ See Hinduja, *Revenge Porn Research, Laws, and Help for Victims*, Cyberbullying Research Center.

³⁰ See Nova I. Levant, *Revenge Porn: How Tech Lawyers Are Helping Women*, American Bar Association.

³¹ Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 351 (2014).

³² See Ronan, *Could All These New Revenge-Porn Laws Actually Be A Bad Thing?*, The Cut.

³³ See *43 States+ DC Now Have Revenge Porn Laws*, Cyber Civil Rights Initiative, <https://www.cybercivilrights.org/revenge-porn-laws/>.

³⁴ *Id.*

³⁵ *Id.*

Pennsylvania.³⁶ And it is, of course, worth noting that posting revenge pornography remains perfectly legal in seven states.

Because of the inherently interstate nature of posting images on the internet, there is much confusion about which laws apply in any given case of revenge porn.³⁷ Does the law of the state in which the images were posted govern? Or is it the state where the victim resides? To remedy this confusion, numerous federal laws have been proposed in Congress, but none to date have even reached a vote.³⁸

First Amendment Criticism

The American Civil Liberties Union (ACLU), among other free speech advocates, has been a vocal opponent of laws criminalizing nonconsensual pornography.³⁹ The ACLU argues that such laws are overly broad and will have the effect of chilling constitutionally protected speech.⁴⁰ In a successful 2014 challenge to Arizona's nonconsensual pornography statute, the ACLU argued that the law would unintentionally subject parents who post naked photos of their babies in bathtubs or news reporters who publish photographs of prisoners of war to prosecution.⁴¹

³⁶ *Id.*

³⁷ See, e.g., Nova I. Levant, *Revenge Porn: How Tech Lawyers Are Helping Women*, American Bar Association.

³⁸ See *H.R. 5896-Intimate Privacy Protection Act of 2016*, Congress.Gov (last visited Apr. 28, 2019), <https://www.congress.gov/bill/114th-congress/house-bill/5896> (listing the current status of the bill); *S.2162-ENOUGH Act*, Congress.Gov (last visited Apr. 28, 2019), <https://www.congress.gov/bill/115th-congress/senate-bill/2162> (listing the current status of the bill).

³⁹ Daysia Tolentino, *Revenge porn laws face an unexpected civil rights obstacle: The First Amendment*, Muckrock (Dec. 6, 2018), <https://www.muckrock.com/news/archives/2018/dec/06/first-amendment-vs-revenge-porn-laws/>

⁴⁰ *Id.* See also Lee Rowland, *VICTORY! Federal Judge Deep-Sixes Arizona's Ridiculously Overbroad 'Nude Photo' Law*, ACLU (July 10, 2015), <https://www.aclu.org/blog/free-speech/internet-speech/victory-federal-judge-deep-sixes-arizonas-ridiculously-overbroad>

⁴¹ See Steven Nelson, *Lawsuit: Arizona Law Makes Bathtub Baby Photos a Felony*, US News (Sept. 24, 2014), <https://www.usnews.com/news/articles/2014/09/24/arizona-revenge-porn-law-bathtub-baby-photos-felony>. See also *Judge Halts Enforcement of Unconstitutional Nude Photo Law in Arizona*, ACLU (July 10, 2015), <https://www.aclu.org/news/judge-halts-enforcement-unconstitutional-nude-photo-law-arizona>.

Though the Supreme Court has never considered a nonconsensual pornography case, it did consider a First Amendment challenge to a law in a somewhat similar context. In *United States v. Stevens*, 559 U.S. 460 (2010), the court overturned a federal law criminalizing “the creation, sale, or possession” of “crush videos”—videos depicting the intentional torture and killing of helpless animals, often meant to appeal to persons with a specific sexual fetish.⁴² The Court held that the statute was substantially overbroad, as it had the effect of outlawing protected speech with educational value.⁴³ Instructional hunting videos, for example, could be criminalized under a reasonable reading of the statute.⁴⁴ The statute was, thus, facially invalid under the First Amendment.⁴⁵

First Amendment challenges to nonconsensual pornography claims specifically have had various degrees of success with lower courts in recent suits. In September 2018, the Vermont Supreme Court upheld the state’s revenge porn law against a First Amendment challenge, finding that the law survived strict scrutiny and was thus constitutional on its face.⁴⁶ The court explained its decision by noting that “nonconsensual pornography is remarkably common, and the injuries it inflicts are substantial.”⁴⁷ But in the same year, a Texas Court of Appeals struck down a similar state law as both a content-based restriction on speech and as substantially overbroad.⁴⁸ The court was concerned that the law violated the rights of too many third parties by restricting more speech than permitted by the Constitution, thereby mirroring the Court’s reasoning in *Stevens* and the ACLU’s arguments in the Arizona case.⁴⁹

⁴² 559 U.S. at 465–66.

⁴³ *Id.* at 478–79.

⁴⁴ *Id.*

⁴⁵ *Id.* at 481–82.

⁴⁶ *Vermont v. VanBuren*, 2018 VT 95, ¶ 1 (Vt. 2017).

⁴⁷ *Id.* at ¶ 55.

⁴⁸ *Ex parte Jones*, 2018 WL 2228888, *8 (Tex. App. May 16, 2018).

⁴⁹ *Id.*

While the American case law on revenge pornography laws is currently sparse, what exists does suggest that a federal law might very well be challenged as antithetical to the First Amendment, particularly if it's broad in scope. The First Amendment thus poses a substantial obstacle to the future passage of any federal law criminalizing the posting of nonconsensual pornography.

Privacy Protective Regime in the European Union

The European Union has recently enacted a state-of-the-art privacy regulation—one that some have called “the most contested law in the E.U.’s history.”⁵⁰ Due to its acute focus on privacy protections for European citizens in the digital age, consideration of this regulation adds color to the revenge pornography debate in the United States.

GDPR

The European Union’s General Data Protection Regulation (“GDPR”) is a legal framework that requires businesses to protect the personal data and privacy of European Union citizens for transactions that occurs within member states.⁵¹ The GDPR was intended to “harmonize data privacy laws across Europe, to protect and empower all EU residents’ data privacy, and to reshape the way organizations across the region approach data privacy for EU residents wherever they work in the world.”⁵² The GDPR applies to (1) any organization conducting business in the European Union and (2) any organizations outside of the European

⁵⁰ Julia Powles, *The G.D.P.R., Europe’s New Privacy Law, and the Future of the Global Data Economy*, *The New Yorker* (May, 25, 2018), <https://www.newyorker.com/tech/annals-of-technology/the-gdpr-europes-new-privacy-law-and-the-future-of-the-global-data-economy>.

⁵¹ See Andrew Rossow, *The Birth of GDPR: What Is It and What You Need to Know*, *Forbes* (May 25, 2018, 7:32 AM), <https://www.forbes.com/sites/andrewrossow/2018/05/25/the-birth-of-gdpr-what-is-it-and-what-you-need-to-know/#34790d8b55e5>.

⁵² See Elie Auvrey & Kristina Podnar, *An Introduction to the GDPR*, *CMS Wire* (Mar. 22, 2018), <https://www.cmswire.com/customer-experience/an-introduction-to-the-gdpr/>.

Union that collect, process, or store information on European citizens or of non-European citizens while they reside in the European Union.⁵³ The GDPR is designed to address technological and societal changes that have taken place over the last twenty years.⁵⁴

The GDPR went into effect on May 24, 2016.⁵⁵ Enforcement, though did not begin until May 25, 2018, in order to provide organizations with time to ensure compliance with the regulation.⁵⁶ And compliance is important, because penalties for failing to adhere with the GDPR are steep—companies are subject to a fine of up to €20 million, or 4% of global annual turnover, whichever is higher.⁵⁷

Right to be Forgotten

In 1998, Mario Costeja González was struggling financially. As a result, a property he owned was put up for auction. A newspaper covered the sale and the details of it were published online. Flash forward sixteen years, the article of the auction still popped up on Google if you searched for Mr. González’s name. Mr. González wanted the hyperlink removed from Google, and he sued when Google refused to remove it.⁵⁸

The European Union’s Court of Justice agreed with Mr. González in *Google Spain SL v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12, ECLI:EU:C:2014:317 (“*Google Spain*”). In *Google Spain*, the European Court of Justice held that Google must delete “inadequate, irrelevant, or no longer relevant” search results when a

⁵³ *Id.*

⁵⁴ See Detlev Gabel, *Chapter 1: Introduction – Unlocking the EU General Data Protection Regulation*, White & Case (April 5, 2019), <https://www.whitecase.com/publications/article/chapter-1-introduction-unlocking-eu-general-data-protection-regulation>

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ See, e.g., Rossow, *The Birth of GDPR: What Is It and What You Need to Know*.

⁵⁸ See Dave Lee, *What is the ‘right to be forgotten’?*, BBC News (May 13, 2014), <https://www.bbc.com/news/technology-27394751>.

member of the public requests that it be deleted.⁵⁹ It was Mr. González's right, according to the Court, for the information to be confined to the past.⁶⁰

The right to be forgotten was later formalized in GDPR Article 17.⁶¹ Also known as the right to data erasure, the right to be forgotten under the GDPR provides an individual with the right to request verbally or in writing that “the data controller erase his/her personal data, cease further dissemination of the data, and potentially have third parties halt processing the data.”⁶² The right to *request removal* of a search link is not the same as mandating that a data controller remove the information upon receiving a request, though. Rather, personal data *must* only be removed when: (a) the personal data is no longer necessary in relation to the purposes for which they were collected or processed; (b) the data subject withdraws consent on which processing was based; (c) the data subject has objected and there are no overriding legitimate grounds for the data processing; (d) the data was unlawfully processed in the first place; or (e) the data must be erased for compliance with some legal obligation required by the EU or a member state.⁶³ Of note here, the right to data erasure is limited to the extent that processing is necessary for exercising the right of freedom of expression and information.⁶⁴

⁵⁹ Judgement of May 13, 2014, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12, ECLI:EU:C:2014:317, paragraph 94. See also Alan Travis & Charles Arthur, *EU Court backs 'right to be forgotten': Google must amend results on request*, The Guardian (May 13, 2014), <https://www.theguardian.com/technology/2014/may/13/right-to-be-forgotten-eu-court-google-search-results>.

⁶⁰ Lee, *What is the 'right to be forgotten'?*, BBC News.

⁶¹ See, e.g., *Art. 17 GDPR Right to erase ('right to be forgotten')*, gdpr-info.eu, <https://gdpr-info.eu/art-17-gdpr/>

⁶² See generally *GDPR Key Changes*, EUGDPR.org, <https://eugdpr.org/the-regulation/>.

⁶³ See *Art. 17 GDPR Right to erase ('right to be forgotten')*, gdpr-info.eu.

⁶⁴ *Id.*

Since the right to be forgotten was created in the European Union, Google has delisted 43% of the 2.3 million URL removal requests that it has received.⁶⁵ Approximately 90% of the requests were submitted by private individuals.⁶⁶

The future reach of the right to be forgotten remains unclear. The European Court of Justice is currently considering a case, again involving Google, to determine how far the right should extend—i.e., whether hyperlinks to information must not only be removed within the borders of the European Union, but *worldwide* when a request is submitted.⁶⁷ Some speculate that if the Court of Justice does find that the right extends beyond the EU, the United States will likely challenge the decision as an infringement of the First Amendment.⁶⁸

Comparison of the European Regime with the American Regime

While 88% of Americans support implementing a right to be forgotten of some kind in the United States, the odds that a similar statute is implemented here are low.⁶⁹ The principle objection lodged against the creation of this right, not altogether surprisingly, is the First Amendment.

“Where Europeans see the ‘right to be forgotten,’ many Americans see George Orwell’s memory hole.”⁷⁰ The oft-vocalized American concern is that the right to be forgotten will be

⁶⁵ See Rebecca Heilweil, *How Close Is An American Right-To-Be-Forgotten?*, Forbes (Mar. 4, 2018, 10:24 PM), <https://www.forbes.com/sites/rebeccaheilweil/2018/03/04/how-close-is-an-american-right-to-be-forgotten/#7946d1dc626e>.

⁶⁶ *Id.*

⁶⁷ See, e.g., Mark Scott, *In Google privacy case, Europe’s highest court to decide on the future of the web*, Politico (Sept. 11, 2018, 4:51 PM), <https://www.politico.eu/article/google-europe-privacy-right-to-be-forgotten-european-court-of-justice/>

⁶⁸ *Id.*

⁶⁹ Heilweil, *How Close Is An American Right-To-Be-Forgotten?*, Forbes.

⁷⁰ Daniel Fisher, *Europe’s ‘Right To Be Forgotten’ Clashes with U.S. Right to Know*, Forbes (May 16, 2014, 8:45 AM), <https://www.forbes.com/sites/danielfisher/2014/05/16/europes-right-to-be-forgotten-clashes-with-u-s-right-to-know/#7ff9f7de1ff5>.

used as the “power to suppress speech”⁷¹ or “the power to force people (on pain of financial ruin) to stop talking about other people, when some government body decides that they should stop.”⁷²

Anette Beebe, an attorney specializing in internet law vocalizes further criticism:

"In the EU, under The Right to Be Forgotten, people who were once bad actors have been able to sweep their history of wrong doing under the rug. However, in the U.S., we value the freedom of speech and providing people with more information, rather so they can make informed decisions, rather than hiding it. I can understand privacy and respect that, but I don't respect a law that helps unscrupulous people being able to hide from their misdeeds or have truthful, but unflattering information taken down just because someone doesn't like it."⁷³

It would seem strange indeed to grant one individual the power to control the rest of the world's ability to access a certain piece of information.⁷⁴ And given the oft-repeated American fear of chilling speech,⁷⁵ such an objection seems not only strong, but almost certainly fatal.

⁷¹ Heilweil, *How Close Is An American Right-To-Be-Forgotten?*, Forbes.

⁷² *Id.* See also *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (expressing concern with director discretion in a first amendment challenge).

⁷³ See, e.g., Rossow, *The Birth of GDPR: What Is It and What You Need to Know*, Forbes.

⁷⁴ *Id.* See also Kate Tummarello, *We Won't Let You Forget It: Why We Oppose French Attempts to Export the Right To Be Forgotten Worldwide*, EFF (Nov. 29, 2016), <https://www.eff.org/deeplinks/2016/11/we-wont-let-you-forget-it-why-we-oppose-french-attempts-export-right-be-forgotten>.

⁷⁵ See, e.g., *Stevens*, 559 U.S. 460 (2010). See also *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985).

The New York State Assembly proposed a 2017 bill aimed at securing a right to be forgotten in that state.⁷⁶ After confronting a barrage of constitutional criticism,⁷⁷ the bill was withdrawn in the New York State Senate.⁷⁸ No other American state has proposed a similar bill.

While it seems almost inevitable that a right to be forgotten will be rejected in the United States—at least given First Amendment doctrine as it stands now and the current composition of the Supreme Court—this European right still adds an important insight to the nonconsensual pornography debate in the United States. Creating a right entitling the victim to ask that the hyperlinks to the illicit photos be deleted from search engines, as opposed to merely criminalizing the posting of the photos, provides victims of revenge pornography a remedy to their harm.⁷⁹ While prosecuting the poster is certainly a step forward in making these harmful posts less prevalent, prosecution alone doesn't remove the photos that have already been seen by the world or resolve the harm that has already been inflicted. American lawmakers would do well to think creatively about how to remedy these harms for victims in light of the European right to be forgotten.

Conclusion

The posting of nonconsensual pornography on the internet is a malicious practice designed to humiliate, harass and intimidate. The consequences of these postings are devastating

⁷⁶ Heilweil, *How Close Is An American Right-To-Be-Forgotten?*, Forbes.

⁷⁷ See, e.g., Eugene Volokh, *N.Y. bill would require people to remove 'inaccurate,' 'irrelevant,' 'inadequate,' or 'excessive' statements about others*, The Washington Post (Mar. 15, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/15/n-y-bill-would-require-people-to-remove-inaccurate-irrelevant-inadequate-or-excessive-statements-about-others/?utm_term=.e10e8aa23bc0; Editorial Board, *'Right to be forgotten' laws misguided*, Los Angeles Daily News (June 7, 2017, 7:09 PM), <https://www.dailynews.com/2017/06/07/right-to-be-forgotten-laws-misguided/>; Andrea Gallinucci-Martinez, Note, *Is the European Right to Be Forgotten Viable in the Land of the First Amendment?*, 122 Penn. St. L. Rev. 1. (2018).

⁷⁸ Volokh, *N.Y. bill would require people to remove 'inaccurate,' 'irrelevant,' 'inadequate,' or 'excessive' statements about others*, The Washington Post.

⁷⁹ See Edwards, *Revenge porn: why the right to be forgotten is the right remedy*, The Guardian.

for victims—often resulting in long-term psychological, reputational, and occupational damage. Despite widespread national attention and bipartisan consensus about the harmful nature of this activity, no federal law has yet been passed criminalizing it.

The European Union’s privacy-protective regime provides an interesting source of comparison in the wake of the U.S.’s inability to reach a consensus about how to address the problem of nonconsensual pornography. A similar right to be forgotten will likely not be implementable in the United States due to First Amendment objections; namely, overbreadth and unintentional chilling. But I would urge legislators in the United States to consider the remedy the right to be forgotten puts at the forefront of the conversation—how to reverse the damage this vile, *revengeful* practice inflicts upon victims.