

REMEDYING ONLINE SHAMING

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**Abstract**

*Shaming is an act of subjecting someone publicly to shame, disgrace, humiliation, or disrepute.<sup>1</sup> This act has challenged many existing legal regimes. Its effects are devastating, and efforts to cope with it within the current legal framework have been largely unsuccessful, mainly due to the challenges posed by anonymous, online shaming. This article rethinks the remedies currently available to handle shaming. It touches upon both civil and criminal remedies and penalties, considering the role that the right to be forgotten can play in handling shaming effectively. The article argues that only by complementing existing remedies with victims' rights can we address the effects of shaming by providing its victims with effective and meaningful ways to overcome its effects.*

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<sup>1</sup> *Shaming*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2020).

## I. INTRODUCTION

Shaming has become a prevalent phenomenon in the online environment.<sup>2</sup> It can take many forms and have devastating effects on its victims, including anxiety and depression that may become so severe as to end in suicide.<sup>3</sup> The victims of shaming are varied. Shaming can affect young, anonymous people as well as senior public figures. Unlike in the pre-internet world, where shaming could not easily reach large audiences, the ability of online communications to “go viral” means that online shaming can spread quickly and easily have a broader, sometimes global, reach. In addition, because it is almost impossible to remove publications permanently from the online environment, victims of shaming must continually monitor the internet to combat new iterations of the offensive material.

This article explores the different legal tools available to address shaming. This article approaches the subject globally, exploring how different legal systems remedy the effects of shaming from the victims’ perspectives. We begin by discussing the different definitions of shaming, a term which can cover many offensive behaviors. We then characterize the damages that shaming causes to its victims before surveying the ways different legal regimes tackle those damages, touching upon criminal law, privacy law, the tort of defamation, and the newly introduced right to be forgotten. We also survey the ways that online platforms address shaming through self-regulation. We then examine the shortcomings of these schemes and introduce a potential alternative that focuses on the right to be forgotten. We propose that when the offender is known, he or she should bear responsibility for ongoing monitoring of the online environment and removal of all further instances of the shaming publications. This remedy respects the victim’s right by transferring the costs of remedying the damage caused by shaming from the victim to the offender.

Our proposed scheme will promote two major goals: First, it will free victims from having to cope with the enduring consequences of shaming. Second, it will promote corrective justice and economic fairness by ensuring that offenders internalize the costs to correct the damage caused by their wrongdoing, providing a significant deterrent

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<sup>2</sup> See Marianna Diomidous, Kostis Chardalias, Adrianna Magita, Panagiotis Koutonias, Paraskevi Panagiotopoulou & John Mantas, *Social and Psychological Effects of the Internet Use*, 24 ACTA INFORMATICA MEDICA 66 (2016).

<sup>3</sup> Allison Kaplan Sommer, *Facebook Shaming-Turned-Suicide Isn’t Just for Teenagers Anymore*, HAARETZ (May 26, 2015), <https://www.haaretz.com/premium-suicide-by-facebook-shaming-1.5366184> [<https://perma.cc/YU43-VGR4>].

effect. The proposed remedy may be applied alongside other legal remedies available to the plaintiff.

## II. DEFINING SHAMING AND ITS EFFECTS

Offensive online publications have become a widespread phenomenon.<sup>4</sup> Combatting the negative effects of such publications is increasingly challenging as it becomes ever easier for individuals to publish damaging information and rely on the power of the internet for its dissemination. Offensive internet publications, especially on social media, can include content that offends or embarrasses the publication's subject. Such publications may be intended to harass or humiliate the subject and may include techniques such as impersonation, deception, extortion, intimidation, and threats.<sup>5</sup> Harmful publications risk violating the subject's rights and negatively impacting his or her mental health. In extreme cases, they may even trigger the subject's suicide.

Some publications that may be harmful are nevertheless justified—such as publications that are in the public interest. Free speech principles may support the publication of harmful statements. Indeed, even publications that may be construed as shaming can sometimes be in the public interest and therefore legally justified.

The last several years have seen an increase in harmful publications on the internet.<sup>6</sup> There is a higher percentage of child victims than adult victims.<sup>7</sup> Likewise, the overall number of adults and children who have been exposed to online shaming, even when they are not the direct victims, has increased. Major western countries have identified this increasing phenomenon and have made efforts to deal with it through special programs, legislation, and education.<sup>8</sup>

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<sup>4</sup> Diomidous, Chardalias, Magita, Koutonias, Panagiotopoulou & Mantas, *supra* note 2.

<sup>5</sup> Sameer Hinduja & Justin W. Patchin, *Bullying, Cyberbullying, and Suicide*, 14 ARCH. SUICIDE RES. 206, 207 (2010).

<sup>6</sup> See Shannon R. Muir, Lynne D. Roberts & Lorraine P. Sheridan, *The Portrayal of Online Shaming in Contemporary Online News Media: A Media Framing Analysis*, COMPUT. IN HUM. BEHAV., Jan.–July 2021, at 1; Eric Afful-Dadzie & Anthony Afful-Dadzie, *Online Health Consumer Behaviour: What Informs User Decisions on Information Quality?*, COMPUT. IN HUM. BEHAV., Jan.–July 2021, at 1.

<sup>7</sup> Maeve Duggan, *Online Harassment 2017*, PEW RSCH. CTR. (July 11, 2017), <https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/> [<https://perma.cc/3ZZB-GBL8>].

<sup>8</sup> Hinduja & Patchin, *supra* note 5, at 217.

The phenomenon of harmful internet publications does not exist in a vacuum. It emerged as more people worldwide have become connected to the internet. Recent statistical data shows that in 2021, close to 4.66 billion people actively use the internet;<sup>9</sup> this is almost fifty-nine percent of the world population.<sup>10</sup> This represents an increase of 319 million people from 2020, a rise of seven percent.<sup>11</sup> Further, most of the internet's users are under the age of forty-four.<sup>12</sup> The rise in online shaming incidents coincides with an overall increase in the extremism of public debate and a rise in hate speech. Commentators have blamed this extremism on the internet generally and on social media specifically.<sup>13</sup>

Researchers have discussed the nature of harmful online publications, including sexual and harassing content, showing that they severely infringe on the reputation and privacy of the victims and result in feelings of shame and humiliation.<sup>14</sup> Cyberbullying has also been found to produce harmful effects on minors—including anxiety, decreased self-esteem, psychosomatic symptoms, decreased social function, impaired concentration, and more.<sup>15</sup>

According to victims, what makes these publications so damaging is that they are likely to appear anytime that someone performs a simple name search.<sup>16</sup> Accordingly, relatives, neighbors, or

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<sup>9</sup> Joseph Johnson, *Worldwide Digital Population as of January 2021*, STATISTA (Sept. 10, 2021), <https://www.statista.com/statistics/617136/digital-population-worldwide> [https://perma.cc/F3CF-VTKT]; *Digital Around the World*, DATAREPORTAL, <https://datareportal.com/global-digital-overview> [https://perma.cc/5RTT-VXNA] (last visited Jan. 26, 2022).

<sup>10</sup> *World Population*, WORLDOMETERS, <https://www.worldometers.info/world-population> [https://perma.cc/ZYE9-ZRD3] (last visited Feb. 2, 2022).

<sup>11</sup> *Digital Around the World*, *supra* note 9.

<sup>12</sup> Joseph Johnson, *Internet Use by Age Group Worldwide as of 2019*, STATISTA (Jan. 27, 2021), <https://www.statista.com/statistics/272365/age-distribution-of-internet-users-worldwide/> [https://perma.cc/Y6LL-2SHU].

<sup>13</sup> Charlie Edwards & Luke Gribbon, *Pathways to Violent Extremism in the Digital Era*, 158 RUSI J. 40, 40–41 (2013); Kaz Ross, *Hate Speech, Free Speech: The Challenges of the Online World*, 2 J. APP. YOUTH STUD. 76 (2018); Alexander Brown, *What Is So Special About Online (As Compared to Offline) Hate Speech?*, 18 ETHNICITIES 297, 307 (2018).

<sup>14</sup> Anne S.Y. Cheung, *Revisiting Privacy and Dignity: Online Shaming in the Global E-Village*, 3 LAWS 301, 304 (2014); Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029, 1034 (2016); DANIELLE K. CITRON, *HATE CRIMES IN CYBERSPACE* 3 (2014).

<sup>15</sup> Hinduja & Patchin, *supra* note 5.

<sup>16</sup> Christine Marie, *The Traumatic Impact of Media Humiliation, Misrepresentation and Victim-Shaming on Narrative Identity and Well-Being* 5–6, 131, 157 (2020) (Ph.D. dissertation, Fielding Graduate University); Jon Ronson, *How One Stupid*

prospective business partners may all easily find these harmful publications. This effect is worsened by the fact that it is almost impossible to delete these publications permanently from the internet.<sup>17</sup>

Indeed, the nature of online communication magnifies the consequences of online shaming. The internet has introduced a major new platform for individuals to communicate with wide audiences. While social media sites have become important democratic tools, the internet has also created unprecedented challenges. The unique characteristics of the online space have transformed the manner in which harmful content is published and distributed, and make it difficult to take action against the publisher and others who contribute to the harm by spreading the shameful information further.<sup>18</sup>

Anyone with an internet connection and a computer or a smartphone can publish almost any content on the internet; usually at no cost beyond the purchase of the devices themselves. In addition, the online environment is characterized by immediacy. While traditional media was not immediately available and most content published in it went through an editorial process, in the internet era, online publications—including the sometimes provocative and sensational content of social media sites—are available immediately and without any editorial filter.<sup>19</sup> Moreover, online publications can reach large audiences quickly.

The internet's design, and the designs of social networks in particular, encourages "viral" distribution of content which spreads quickly and easily across platforms, reaching recipients that the author may not have intended and cannot control. Additionally, when publications "go viral," they often wind up in traditional media sources, which raises the perception of trustworthiness and further spreads the

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*Tweet Blew Up Justine Sacco's Life*, N.Y. TIMES MAG. (Feb. 12, 2015), <https://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html> [<https://perma.cc/GYF3-LMAS>].

<sup>17</sup> Abby Ohlheiser, *Erasing Yourself from the Internet Is Nearly Impossible. But Here's How You Can Try*, WASH. POST (Feb. 10, 2017), <https://www.washingtonpost.com/news/the-intersect/wp/2017/02/10/erasing-yourself-from-the-internet-is-nearly-impossible-but-heres-how-you-can-try/> [<https://perma.cc/XQ3R-ALJP>].

<sup>18</sup> Emily B. Laidlaw, *Online Shaming and the Right to Privacy*, 6 LAWS 1, 21 (2017).

<sup>19</sup> Valerie Edwards, *The Key to World Peace? Sharing More on Facebook 'Makes the World More Understanding', Says Mark Zuckerberg*, DAILY MAIL (Feb. 27, 2016), <https://www.dailymail.co.uk/news/article-3467123/The-key-world-peace-Sharing-Facebook-makes-world-understanding-says-Mark-Zuckerberg.html> [<https://perma.cc/SQR6-ASBA>].

content.<sup>20</sup> When the content of the publication is positive or serves the public interest, the viral effect is incredibly valuable for information-sharing. When damaging content “goes viral,” however, it can have a catastrophic effect on the subject of the publication and on his or her reputation.<sup>21</sup> Importantly, this viral effect can cross borders, complicating efforts to regulate the distribution of damaging publications through domestic legal mechanisms that aim to protect the rights of victims and deter and punish publishers.

Further complicating such efforts is the fact that online publications are often anonymous. When websites do not require authors to identify themselves, authors can use multiple technologies to hide their identities (i.e., virtual private networks, fake profiles, etc.). There are many methods in which an author can post either anonymously or under a pseudonym. In some cases, the option for anonymity is a positive characteristic that, among other things, allows individuals to share criticisms and opinions that are in the public interest without having to identify themselves. There are also those who argue that the right to anonymity is an essential right.<sup>22</sup> At the same time, anonymity can be abused to publish harmful content without fear of retribution or the pressure of accountability. While it is true that every online publication can be traced back to a specific intermediary who may be questioned by law enforcement or private individuals who seek the identity of the publisher, if the individual accounts are created under a pseudonym, it may be hard, or sometimes even impossible, to identify the publisher.

Additionally, many shaming posts on social media are merely the beginning. First, these posts receive comments from other users, resulting in secondary publications that may include additional harmful

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<sup>20</sup> *A New Understanding: What Makes People Trust and Rely on News*, AM. PRESS INST. (Apr. 17, 2016), <https://www.americanpressinstitute.org/publications/reports/survey-research/trust-news/single-page/> [<https://perma.cc/9U4S-Y4DC>].

<sup>21</sup> Justine Sacco’s case could be a prime example of this. Sacco was a woman in marketing who flew to Africa and tweeted, cynically, “Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!” Ronson, *supra* note 16. People who saw that tweet did not understand that it was a cynical tweet and attacked her online. *See id.* Sacco’s story is just one story. *See also* Cavan Sieczkowski, *Lindsey Stone, Plymouth Woman, Takes Photo at Arlington National Cemetery, Causes Facebook Fury*, HUFFINGTON POST (Nov. 27, 2012), [https://www.huffpost.com/entry/lindsey-stone-facebook-photo-arlington-national-cemetery-unpaid-leave\\_n\\_2166842](https://www.huffpost.com/entry/lindsey-stone-facebook-photo-arlington-national-cemetery-unpaid-leave_n_2166842) [<https://perma.cc/KL3M-U4WS>].

<sup>22</sup> Either as a right on its own or as part of the rights to privacy or freedom of speech.

content. Second, social media provides the means for readers of the original publication to easily disseminate the content further by sharing it via Facebook or Instagram, retweeting it via Twitter, or using duet and stitch via TikTok. This magnifies the devastating effects for victims who cannot stop or control those publications.<sup>23</sup> These derivative publications may be widespread, publicly available, and easily retrievable through major search engines that automatically save them, increasing public access to harmful content and exacerbating the harmful effects to the subjects of the publication.

What makes matters worse is that often it is impossible to delete information from the internet.<sup>24</sup> Even if the original harmful publication itself is deleted, a remnant of the post almost always remains on the internet, causing lasting harm to the subject. Additionally, the right of the victim to be forgotten, discussed below in greater detail, is often violated by the inability to fully remove all instances and derivatives of the publication.<sup>25</sup> These characteristics of the online environment reinforce the need for tools tailored to address harmful online publications.

### III. REMEDYING SHAMING: COMPARATIVE ASSESSMENT

This part surveys the legal schemes of several Western countries, reviewing the mechanisms that exist to address harmful publications. This survey includes an examination of the laws and regulations that impose duties on publishers to remove offensive online publications and civil and criminal avenues of redress available to victims.

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<sup>23</sup> Maarten H.W. Selfhout, Susan J.T. Branje, Marc J.M.H. Delsing, Tom F.M. ter Bogt & Wim H.J. Meeus, *Different Types of Internet Use, Depression, and Social Anxiety: The Role of Perceived Friendship Quality*, 32 J. ADOLESC. 819 (2009); Gwenn O'Keeffe & Kathleen Clarke-Pearson, *The Impact of Social Media on Children, Adolescents, and Families*, 127 PEDIATRICS 800 (2011).

<sup>24</sup> See Ohlheiser, *supra* note 17; John Palfrey, Urs Gasser & Danah Boyd, *Response to FCC Notice of Inquiry 09-94: "Empowering Parents and Protecting Children in an Evolving Media Landscape"* 11 (Harvard L. Sch. Pub. L. & Legal Theory Working Paper, Paper No. 10-19, 2010).

<sup>25</sup> This right allows an individual to control what details of their identity are available to the public. This right has received recognition both by the European Court of Justice as well as by the Canadian Supreme Court. See Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja Gonzalez*, ECLI:EU:C:2014:317 (May 13, 2014); *A.T. v. Globe24h.com*, [2017] F.C. 114 (Can.).

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## REMEDYING ONLINE SHAMING

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*A. Responsibility of Publishers and Removal of Content**1. United States*

In the United States, there is no mechanism under either federal or state law to require a website to remove harmful materials from the internet.<sup>26</sup> Indeed, the Communications Decency Act gives publishers immunity from civil suits for harmful publications.<sup>27</sup> In *Zeran v. America Online*, this immunity was expanded to include publications originating from third parties.<sup>28</sup> This immunity reflects Congress's concern that exposing service providers to liability would cause them to censor or regulate publications in a manner inconsistent with free speech principles.<sup>29</sup>

*2. Canada*

In Canada, federal law criminalizes the distribution of intimate images without consent and authorizes courts to issue orders in conjunction with criminal proceedings to remove such content and to confiscate all copies.<sup>30</sup> Federal legislation provides limited authority to compel the removal of offensive publications, providing that "hate propaganda" can be ordered removed as part of a criminal proceeding.<sup>31</sup> Such an order must be approved by the Attorney General.<sup>32</sup> The original publisher is entitled to an opportunity to explain why the content should not be removed.<sup>33</sup> If the original publisher is unknown or cannot be found, the website owner publishes a notice of the content's removal on the site of the original publication.<sup>34</sup> There is no civil mechanism to require the removal of the content.

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<sup>26</sup> In sharp contrast, courts regularly enjoin publications that violate intellectual property rights, suggesting that property interests are better protected than reputational interests.

<sup>27</sup> 47 U.S.C. § 230 (2021).

<sup>28</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

<sup>29</sup> *Id.*

<sup>30</sup> Protecting Canadians from Online Crime Act, S.C. 2014, c 31 (Can.).

<sup>31</sup> Criminal Code R.S.C. 1985, c C-46, §§ 320, 320.1 (Can.).

<sup>32</sup> *Id.* § 320(7).

<sup>33</sup> *Id.* § 320.1(2).

<sup>34</sup> *Id.* § 320.1(4)–(6). *See also* Civil Rights Protection Act, R.S.B.C. 1996, c 49 §§ 2, 3 (Can.).

### 3. *New Zealand*

In New Zealand, the Harmful Digital Communications Act of 2015 establishes a legal mechanism for removing or amending offensive content from the internet.<sup>35</sup> The Act creates criminal and civil liability for the distribution of offensive digital publications.<sup>36</sup> Online content hosts are immune from liability, however, provided they act in accordance with Article 24 of the Act.<sup>37</sup>

The Act was a response to 2011 and 2012 reports by the Law Commission regarding “new media,” which determined that then-existing criminal and civil laws provided inadequate remedies for damage caused by offensive online publications.<sup>38</sup> The 2011 report proposed, among other measures, the appointment of a commissioner for communications matters.<sup>39</sup> The commissioner’s role includes educating citizens about the law and resolving complaints informally, where possible, through means such as mediation; and the commissioner can also provide recommendations to authorities and individuals and refer complaints to the police when appropriate.<sup>40</sup> The 2011 report also recommended creating a new offense regarding offensive digital communications,<sup>41</sup> and legislative amendments to the Harassment Act of 1997, the Human Rights Act of 1993, and the Privacy Act of 1993 to extend their applicability to digital communications.<sup>42</sup>

The Harmful Digital Communications Act also established a mechanism for creating an enforcement agency.<sup>43</sup> The body’s role includes educating the public on safety and rules of online conduct and advising policy makers on the subject.<sup>44</sup> The body is empowered to investigate complaints, advise, and settle disputes through negotiation

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<sup>35</sup> See Harmful Digital Communications Act 2015 (N.Z.).

<sup>36</sup> *Id.* § 23.

<sup>37</sup> *Id.* s 24. Lack of action in accordance with the outlined steps does not by itself establish criminal or civil liability, and this defense does not infringe on the other rights of online content hosts. *Id.* s 23.

<sup>38</sup> *The News Media Meets “New Media”: Rights, Responsibilities and Regulation in the Digital Age*, L. COMM’N (Dec. 2011), <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP27.pdf> [<https://perma.cc/2398-BPHE>].

<sup>39</sup> *Id.* at 15.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 13.

<sup>42</sup> *Id.*

<sup>43</sup> Harmful Digital Communications Act 2015, ss 7–9 (N.Z.).

<sup>44</sup> *Id.* s 8(1)(c)–(e).

and mediation, as well as to interface with website managers and various agencies for the purpose of fulfilling the law's objectives.<sup>45</sup>

#### 4. Australia

In Australia, the Enhancing Online Safety for Children Act was passed in 2015.<sup>46</sup> This law defines cyberbullying as an electronic publication that was likely published with the intent to negatively affect the children of Australia.<sup>47</sup> The law established the Office of the eSafety Commissioner, whose primary responsibility is to handle complaints of cyberbullying against Australian children.<sup>48</sup> The Commissioner is empowered to investigate and handle these complaints by sending the social media website a warning or by requiring action by the website, among other alternatives.<sup>49</sup>

Australian law contemplates the removal of harmful content from the internet when it pertains to minors. After the Commissioner receives a complaint regarding a publication and determines that it constitutes cyberbullying,<sup>50</sup> she is empowered to order the removal of the content.<sup>51</sup> The law distinguishes between two types of social media websites based on a non-exclusive list of considerations.<sup>52</sup> Depending on how the website is classified, the commissioner may send the website either a "request" or a "demand" to remove the harmful content within forty-eight hours.<sup>53</sup>

Additionally, the Commissioner handles proceedings under the Broadcasting Service Act for the removal of "forbidden" publications from the internet,<sup>54</sup> and the Classification Board has the power to determine what content is deemed forbidden.<sup>55</sup> Any person can submit a claim to the Commissioner asserting that a website contains forbidden content,<sup>56</sup> and if the Commissioner determines that the content is in

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<sup>45</sup> *Id.* s 8(1)(a)–(d).

<sup>46</sup> *Enhancing Online Safety for Children Act 2015* (Austl.).

<sup>47</sup> *Id.* s 5(1).

<sup>48</sup> *Id.* ss 14–15. See generally *eSafety Commissioner*, AUTRL. GOV., <https://www.esafety.gov.au> (last visited Jan. 17, 2022).

<sup>49</sup> *eSafety Commissioner*, *supra* note 48.

<sup>50</sup> For the conditions that the publication must meet to be considered cyberbullying, see *Enhancing Online Safety for Children Act* s 5.

<sup>51</sup> *eSafety Commissioner*, *supra* note 48.

<sup>52</sup> *Enhancing Online Safety for Children Act* ss 23, 30, 31(5), 41, 45, 48.

<sup>53</sup> *Id.* ss 23–35.

<sup>54</sup> *The Broadcasting Services Act 1992* (Cth) s 91(1) (Austl.).

<sup>55</sup> *Id.* ss 21, 28.

<sup>56</sup> *Id.* s 37.

fact forbidden and has an “Australian connection,”<sup>57</sup> she will issue a “final take-down notice” to the website.<sup>58</sup> The website must comply with the notice by 18:00 of the following business day.<sup>59</sup> The commissioner may also issue an “interim take-down notice” while investigating “potential prohibited content.”<sup>60</sup>

In 2014, the Australian Law Reform Commission recognized the need to balance courts’ authority to order the removal of private information published online with principles of freedom of expression on the internet, empowering courts to protect the publishers’ freedom of expression.<sup>61</sup>

### 5. *United Kingdom*

In the United Kingdom, the Defamation Act of 2013 includes provisions for the removal or prevention of further distribution of defamatory content, including internet content, by court order as part of a civil proceeding.<sup>62</sup> The law defines a defamatory publication as one containing information that causes or is likely to cause serious harm to a person’s reputation.<sup>63</sup> The explanatory memorandum for the law provides that the intention was to create a strict test inspired by the Court of Appeal’s decision in *Jameel v. Dow Jones & Co.*<sup>64</sup> According to this test, the court must consider whether a “real and substantial tort” has been committed.<sup>65</sup> If the answer is no, the claim should be dismissed because allowing it to continue would result in an abuse of court proceedings, as so little is at stake. For a commercial entity, serious harm is defined as a serious financial loss or the potential for serious financial loss.<sup>66</sup>

A claim for content removal under the Act must include the complainant’s name and email address, an explanation of the harmful publication, an explanation of where the publication is located, and a statement that the complainant does not have enough information about the

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<sup>57</sup> *Id.* s 47.

<sup>58</sup> *Id.* s 47(1)(C).

<sup>59</sup> *Id.* s 53(2).

<sup>60</sup> *Id.* s 47(2).

<sup>61</sup> AUSTRALIAN LAW REFORM COMMISSION, SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL AGE 313, 439 (2014) (Austl.).

<sup>62</sup> Defamation Act 2013, c. 26, § 13 (UK).

<sup>63</sup> *Id.* § 1(1).

<sup>64</sup> *Jameel v. Dow Jones & Co.* [2005] EWCA (Civ) 75 (Eng.).

<sup>65</sup> *Id.* § 70.

<sup>66</sup> Defamation Act, § 1(2).

publisher to act independently.<sup>67</sup> The complainant must also indicate whether he or she consented to providing personal information to the publisher and why the complainant believes that the publication constitutes defamation.<sup>68</sup> If the publisher can be located, the website owner must warn him or her that the content will be removed as a result of a complaint.<sup>69</sup> The publisher then has five days to file an objection.<sup>70</sup> If the publisher cannot be located by reasonable means, or if the court so orders, the website owner must remove the content within forty-eight hours.<sup>71</sup>

Sections 2 through 7 of the Defamation Act exempt specific types of publications.<sup>72</sup> If the court determines that a challenged publication constitutes defamation and that no exemption applies, the court is empowered to order two types of remedies: (1) an order directing the website operator to remove the harmful content; and (2) an order directing third parties “to stop distributing, selling or exhibiting material containing the statement.”<sup>73</sup> Website owners are protected from claims against them if they establish that they are not the authors of the published content and that they followed the procedures set out in the law.<sup>74</sup> This protection applies only to publishers and not to search engines, online communication providers, or websites that simply transmit information.<sup>75</sup>

Notably, all schools in England are required to have procedures in place to address harmful publications, whether such publications concern students or teachers.<sup>76</sup>

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<sup>67</sup> *Id.* § 1(5)–(6).

<sup>68</sup> U.K. MINISTRY OF JUST., COMPLAINTS ABOUT DEFAMATORY MATERIAL POSTED ON WEBSITES: GUIDANCE ON SECTION 5 OF THE DEFAMATION ACT 2013 AND REGULATIONS ¶ 26 (2014).

<sup>69</sup> Defamation Act, § 2.

<sup>70</sup> *Id.* § 2(b).

<sup>71</sup> *Id.* §§ 2(C), 3, 5.

<sup>72</sup> *Id.* §§ 2–7.

<sup>73</sup> *Id.* § 13. It should be noted that the law does not address other remedies such as compensation, however it does not appear to preclude this in another proceeding.

<sup>74</sup> *Id.* § 5.

<sup>75</sup> COMPLAINTS ABOUT DEFAMATORY MATERIAL POSTED ON WEBSITES, *supra* note 68, ¶ 5.

<sup>76</sup> School Standards and Framework Act 1998, c. 31 (UK); The Education (Independent School Standards) Regulations 2014, SI 2014/3283 (UK).

### 6. Italy

In Italy, content removal is restricted. Under a law enacted to combat cyberbullying, a minor or his or her parents can file a claim in court to request the contact information of a publisher or website owner to demand removal of content within forty-eight hours.<sup>77</sup> If the material is not removed during this time frame, or the website owner or publisher cannot be located, the minor or his parents can file a complaint with the Italian Data Protection Authority (“IDPA”).<sup>78</sup> Within forty-eight hours, the IDPA must contact the publisher or the website owner and instruct him to remove the content.<sup>79</sup> However, if the IDPA is not convinced that the content constitutes an offense or believes that its removal is against the public interest, the IDPA may decline to contact the publisher or the website owner.<sup>80</sup>

Italy has also adopted an important anti-cyberbullying program called “*Noncadiamo in trappola!*” (“Let’s not fall into the trap!”) for students aged fourteen to nineteen.<sup>81</sup> As part of the program, dedicated educators are first trained in various topics related to cyberbullying, and then deliver content to students in schools.<sup>82</sup> Since the program was put into place, there has been a substantial reduction in cyberbullying.<sup>83</sup>

### 7. Austria

Austrian law makes defamation a criminal offense, as further discussed in the following section.<sup>84</sup> Upon proof that a publication is false

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<sup>77</sup> Legge 29 maggio 2017, n.71, G.U. June 18, 2017 n.127 (It.).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; Luigi Garofalo, *Cyberbullismo, Approvata la Legge. ‘Minori Vittime Possono Chiedere Rimozione Contenuti dal Web’*, PRIVACY ITALIA (May 17, 2017), <https://www.privacyitalia.eu/cyberbullismo-approvata-la-legge-minori-vittime-possono-chiedere-rimozione-contenuti-dal-web/2782/> [https://perma.cc/H3Y9-WXTQ].

<sup>80</sup> See decreto legge 30 giugno 2003, n.196/2003, G.U. July 29, 2003 n.174 (It.); Paolo Balboni, *Italian Parliament Passes Landmark Law Against Cyberbullying*, LEXOLOGY (June 28, 2017), <https://www.lexology.com/library/detail.aspx?g=a53d766e-5060-4ffc-996f-b0225910a605> [https://perma.cc/G299-54ZS].

<sup>81</sup> Dorothy L. Espelage & Jun Sung Hong, *Cyberbullying Prevention and Intervention Efforts: Current Knowledge and Future Directions*, 62 CAN. J. PSYCHIATRY 374, 377 (2017).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Mediengesetz [Media Act] BUNDESGESETZBLATT [BGBl] No. 314/1981, as amended, §§ 28–42 (Austria).

and is not directly connected to public life,<sup>85</sup> the content may be ordered removed and its publication prohibited.<sup>86</sup> If the publisher believed at the time of publication that the victim gave consent to publish the material, or if the publication is a journalistic publication that meets journalistic ethical standards, then it does not constitute defamation.<sup>87</sup> Additionally, in cases where it is impossible to prosecute the case under criminal law, a person authorized for private prosecution<sup>88</sup> can submit a request for the removal of content within six weeks of the date she discovered it.<sup>89</sup>

### 8. Germany

In Germany, under the 2017 Network Enforcement Act, social media websites that have at least two million users in Germany must have a procedure that allows any user in Germany to submit a complaint regarding offensive content.<sup>90</sup> If the publication is determined to be a “gross violation” of the German Criminal Code,<sup>91</sup> the website has twenty-four hours to remove the content<sup>92</sup> unless the government has granted a longer period of time.<sup>93</sup> If it is not clear whether the publication is subject to mandatory removal, the website may investigate for seven days, including hearing the publisher’s point of view.<sup>94</sup> The law also establishes enforcement mechanisms: in the event that a website does not comply with the provisions of the law,<sup>95</sup> an administrative fine of up to fifty million euros may be imposed.<sup>96</sup>

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<sup>85</sup> Austria, INT’L PRESS INST., <http://legaldb.freemedia.at/legal-database/austria/?target=civil-defamation> [<https://perma.cc/R8EV-AQLH>] (last visited Jan. 26, 2022).

<sup>86</sup> Mediengesetz [Media Act] BGBl No. 314/1981, as amended, § 33(1)–(2).

<sup>87</sup> *Id.* § 6.

<sup>88</sup> *See id.* § 8a.

<sup>89</sup> *Id.* § 33(3).

<sup>90</sup> Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken [NetzDG] [Network Enforcement Act], Oct. 1, 2017, BUNDESGESETZBLATT [BGBl I] at 3352, §§ 1(2), 3(1) (Ger.).

<sup>91</sup> *Id.* § 1(3).

<sup>92</sup> *Id.* § 3(2)(2).

<sup>93</sup> *Id.* (“this shall not apply if the social network has reached agreement with the competent law enforcement authority on a longer period for deleting or blocking any manifestly unlawful content”).

<sup>94</sup> *Id.* § 3(2)(3)(a).

<sup>95</sup> *Id.* § 4(1)(4)–(5).

<sup>96</sup> *Id.* § 4(2).

*B. Criminal and Civil Liability**1. United States*

In the United States, there is no federal law prohibiting the publication of harmful material. In 2009, Congress considered the Megan Meier Cyberbullying Prevention Act,<sup>97</sup> which would have prohibited the repeated use of technology to exert pressure, threaten, harass, or cause significant emotional distress to a person. The bill was not passed, however, due to concerns that it would unduly restrict freedom of expression. Similarly, no federal law prohibits defamatory, harassing, or insulting publications.<sup>98</sup>

Despite the absence of federal legislation, harmful internet publications may give rise to civil liability under state laws prohibiting privacy violations, defamation, and intentional infliction of emotional distress (“IIED”). Legal scholarship suggests that the most relevant tort for challenging shaming online publications is IIED.<sup>99</sup> It has been argued, however, that limitations imposed by the U.S. Supreme Court make it difficult for victims to obtain relief on that theory of liability.<sup>100</sup>

Many states have legislation prohibiting defamation.<sup>101</sup> Forty-eight states have enacted statutes prohibiting electronic harassment.<sup>102</sup> In eight states, criminal statutes have been enacted that prohibit offensive electronic publications, with some offenses being limited by definition to those that harm minors.<sup>103</sup> In 2014, New York’s Court of Appeals struck down a law that prohibited abusive publications on the

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<sup>97</sup> H.R. 1966, 111th Cong. (2009).

<sup>98</sup> Shira Auerbach, Note, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641, 1663 (2008).

<sup>99</sup> *Id.* at 1669.

<sup>100</sup> *Id.*

<sup>101</sup> For example, Florida, Georgia, Idaho, Kansas, Louisiana, Michigan, Minnesota, Nevada, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Utah, Virginia, and Wisconsin. See *Map of States with Criminal Laws Against Defamation*, ACLU, <https://www.aclu.org/issues/free-speech/map-states-criminal-laws-against-defamation> [<https://perma.cc/M2TF-EUJF>] (last visited Jan. 26, 2022).

<sup>102</sup> SAMEER HINDUJA & JUSTIN W. PATCHIN, STATE BULLYING LAWS, <https://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf> [<https://perma.cc/D776-84SL>] (last visited Jan. 26, 2022).

<sup>103</sup> These states are Arkansas, Louisiana, Missouri, Nevada, North Carolina, Tennessee, Washington, and Michigan.

internet, citing concerns that the law was too vague and allowed for arbitrary and selective enforcement.<sup>104</sup>

While there is no federal legislation prohibiting cyberbullying specifically, every state except Montana requires school policies to prevent student bullying and harassment; and fourteen states even allow school authorities to regulate acts that take place off school grounds.<sup>105</sup> In some states, legislation explicitly addresses cyberbullying.<sup>106</sup>

## 2. Canada

In Canada, federal law criminalizes offensive online publications. The Coordinating Committee of Senior Officials Cyber Crime Working Group drafted a report to the federal, provincial, and territorial ministers responsible for justice and public safety, titled *Cyberbullying and the Non-Consensual Distribution of Intimate Images* (“CCSO”).<sup>107</sup> The report recommended amending preexisting legislation to include internet publications.<sup>108</sup> The CCSO found that there was no need to create a specific offense prohibiting internet publications because there existed offenses prohibiting the same types of publications in printed media. Accordingly, the Canadian Criminal Code was amended to reflect that every offense that includes an element of “communication” encompasses communication through electronic media unless otherwise expressly stated.<sup>109</sup>

Regarding the publication of intimate pictures or videos without consent, the CCSO did not find such conduct to be encompassed within a preexisting offense, and thus recommended the creation of a specific offense. This recommendation was implemented through an amendment to the *Protecting Canadians from Online Crime Act*, which states that anyone who knowingly publishes, distributes, broadcasts, sells, or makes an intimate image of another person available,

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<sup>104</sup> *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014).

<sup>105</sup> These fourteen states are Arkansas, California, Connecticut, Florida, Illinois, Louisiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, South Dakota, Tennessee, and Vermont.

<sup>106</sup> These states are California, Nevada, and Connecticut.

<sup>107</sup> CAN. DEP’T JUST., CCSO CYBER CRIME WORKING GROUP REPORT TO THE FEDERAL/PROVINCIAL/TERRITORIAL MINISTERS RESPONSIBLE FOR JUSTICE AND PUBLIC SAFETY: CYBERBULLYING AND THE NON-CONSENSUAL DISTRIBUTION OF INTIMATE IMAGES (2013), <https://www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/pdf/cndii-cdncii-eng.pdf> [<https://perma.cc/GSS9-XA94>].

<sup>108</sup> *Id.* at 2.

<sup>109</sup> Canada Criminal Code, R.S.C. 1985, c C-46, § 4(8).

knowing that the subject has not given his or her consent, or with reckless disregard for whether consent was given, commits an offense punishable by up to five years in prison.<sup>110</sup> The Standing Senate Committee on Human Rights released a 2012 report, titled *Cyberbullying Hurts: Respect for Rights in the Digital Age*, which made additional recommendations regarding harmful publications concerning minors, and suggested that a more collective community approach be undertaken rather than a strictly criminal one.<sup>111</sup>

At the federal level, while there is no specific tort that forbids harmful publications on the internet, it is possible to sue under the tort of slander. There are several defenses to liability for this tort, however, including publicity in the physical world and good faith publications.<sup>112</sup> Third parties can also be held responsible for creating an unsafe environment.<sup>113</sup>

Efforts have been made at the provincial level to criminalize offensive digital publications, but these have been unsuccessful.<sup>114</sup> Moreover, the federal defamation offense, which criminalizes publications that infringe on human dignity, has been held to violate freedom of expression by the Supreme Courts of Alberta,<sup>115</sup> Saskatchewan,<sup>116</sup> Ontario,<sup>117</sup> and New Brunswick.<sup>118</sup>

Similarly, Nova Scotia passed a law authorizing civil lawsuits for harmful internet publications.<sup>119</sup> The law also allowed the injured

<sup>110</sup> *Id.* c C-46, § 3.

<sup>111</sup> STANDING SENATE COMMITTEE ON HUMAN RIGHTS, *CYBERBULLYING HURTS: RESPECT FOR RIGHTS IN THE DIGITAL AGE* (2012).

<sup>112</sup> See Ian Fraser, Louise Bond-Fraser, Dave Korotkov & Shannon Noonan, *Cyberbullying and the Justice System*, ALTA. L. REV. ONLINE F. (Jan. 2012), [https://www.researchgate.net/publication/267330714\\_Cyberbullying\\_and\\_the\\_Justice\\_System](https://www.researchgate.net/publication/267330714_Cyberbullying_and_the_Justice_System).

<sup>113</sup> *Cyberbullying and the Law: How the Law Addresses Cyberbullying*, MEDIA SMARTS, <https://mediasmarts.ca/digital-media-literacy/digital-issues/cyberbullying/cyberbullying-law> [<https://perma.cc/8WEG-U7AG>] (last visited Jan. 26, 2022).

<sup>114</sup> See Chris Tenove, Heidi J.S. Tworek & Fenwick McKelvey, *Poisoning Democracy: How Canada Can Address Harmful Speech Online*, PUB. POL'Y F. (Nov. 8, 2018), <https://ppforum.ca/publications/poisoning-democracy-what-can-be-done-about-harmful-speech-online/> [<https://perma.cc/EN6L-QHYL>] (“These legal measures provide important means for governments and individuals to address some of the most egregious forms of harmful speech. However, as several experts told us, effective use of these measures is limited by legal definitions, operational challenges and obstacles to co-operation across different agencies.”).

<sup>115</sup> *R. v. Finnegan*, [1992] A.J. No. 1208, para. 19 (Can. Alta. Q.B.) (QL).

<sup>116</sup> *R. v. Lucas* (1995), 129 Sask. R. 53 (Can. Sask. Q.B.).

<sup>117</sup> *R. v. Gill*, [1996] O.J. No. 1299 (Can. Ont. Ct. Gen. Div.) (QL).

<sup>118</sup> *R. v. Osborne*, [2004] Cause No. S/CR/08/02 (N.B. Ct. Q.B.) (Can.).

<sup>119</sup> Nova Scotia Cyber-Safety Act, S.N.S. 2013, c 2 (Can.).

party to report the incident to a special division of the Minister of Justice or to file a petition for a protective order directly with a judge.<sup>120</sup> But the Supreme Court of Nova Scotia struck down this law, concluding that it was too vague, disproportionately violated the right to freedom of expression, and granted disproportionate rights to the harmed party at the expense of the rights of the publishing party.<sup>121</sup>

Several provinces have established procedures for educational institutions to handle offensive publications on the internet. Most often, these are education laws, which define cyberbullying as a concrete expression of general bullying<sup>122</sup> and require the educational system to create programs to deal with the phenomenon within the school framework.<sup>123</sup> For example, the law of Alberta imposes an obligation on students to report cases of cyberbullying and imposes sanctions for violating this obligation, which may include suspension and expulsion.<sup>124</sup>

### 3. New Zealand

New Zealand's Harmful Digital Communications Act of 2015 governs all forms of "digital communication," defined as transmitting, sending, posting, uploading to the web, distributing, or any other communication through digital means of information about the victim, whether true or false, including intimate pictures.<sup>125</sup> The law reflects ten principles meant to guide the relevant authorities in enforcing the law: digital communications should not: (1) reveal sensitive facts about a person; (2) be threatening, stressful, or dangerous; (3) constitute a blatant attack on a reasonable person in the victim's condition; (4) be rude or obscene; (5) be used to harass a person; (6) include false claims; (7) include information whose publication is a breach of confidentiality; (8) coerce or encourage the sending of a message to a person with the intent to harm her; (9) coerce or encourage a person to commit suicide; (10) or defame on the basis of skin color, race, ethnic or national origin, religion, gender, sexual orientation, or disability.<sup>126</sup>

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<sup>120</sup> *Id.* § 20.

<sup>121</sup> *Crouch v. Snell*, 2015 CanLII 340 (Can. N.S. S.C.).

<sup>122</sup> These provinces are Ontario, Quebec, Alberta, New Brunswick, and the Northwest Territories.

<sup>123</sup> *See* MEDIA SMARTS, *supra* note 113.

<sup>124</sup> *Id.*

<sup>125</sup> Harmful Digital Communications Act 2015, s 4 (N.Z.).

<sup>126</sup> *Id.* s 6.

As discussed above, the law provides for informal and administrative dispute resolution procedures, but when these are ineffective, the law authorizes a special court proceeding in the District Court.<sup>127</sup> This process allows a victim of harmful digital publications to file a claim in court.<sup>128</sup> The prerequisites for initiating such proceedings are: the exhaustion of administrative procedures before the commissioner; serious or repeated violations of one or more of the principles of communication, or the threat of such violations; and actual or expected harm to a person as a result of the violation.<sup>129</sup> The court is empowered to remand the case to the administrative body or to resolve the dispute on its own.<sup>130</sup> If a verdict is issued, it must be reasoned and available to the public, although the court may refrain from disclosing the identities of the parties involved if appropriate.<sup>131</sup>

Courts can utilize various remedies, including issuing an order to: remove or restrict access to the offending content; prevent third parties from publishing similar publications; and correct the original publication.<sup>132</sup> Courts may also direct the publisher to allow the victim to publish a response, order an apology, disclose the identity of an anonymous publisher, and “make a declaration that a communication breaches a communication principle.”<sup>133</sup>

The Harmful Digital Communications Act also created two new offenses: failure to comply with a court order regarding harmful publications,<sup>134</sup> and causing damage through digital content distribution.<sup>135</sup> The elements of the latter offense are the transmission of digital content intended or expected to cause harm to a reasonable person

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<sup>127</sup> *Id.* ss 8, 11–14.

<sup>128</sup> *Id.* s 11.

<sup>129</sup> *Id.* s 12.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* s 16.

<sup>132</sup> *Id.* s 18.

<sup>133</sup> *Id.* ss 18–19. When issuing its decision, the court must consider: the extent of the damage caused or likely to be caused by the publication; the purpose of publication; the circumstances of the publication and its context; the extent of the distribution; the age and vulnerability of the victim; whether the publication is true; whether there is a public interest in the publication; the conduct of the defendant, including ways in which they mitigate the damage; the conduct of the plaintiff; and practical technical considerations, including cost considerations. *Id.* s 19(5). The law clarifies that the exercise of the court’s jurisdiction to grant relief must be consistent with the rights and freedoms enshrined in the New Zealand Bill of Rights. *Id.* s 19(6).

<sup>134</sup> *Id.* s 21.

<sup>135</sup> *Id.* s 22.

in the victim's position, and the actual imposition of harm to that victim.<sup>136</sup> Both crimes are punishable by fines or incarceration.<sup>137</sup>

Even before the enactment of the 2015 law, New Zealand recognized a number of causes of action through which a victim could sue for damages caused by a harmful publication.<sup>138</sup> First, a victim can file a civil suit for the tort of invasion of privacy,<sup>139</sup> which may entitle her to damages if the average person would have an expectation of privacy in the published information. Second, a victim may sue for intentional infliction of mental harm.<sup>140</sup> Although this tort appears well-suited to provide a remedy in cases of cyberbullying, it has not been used in recent years.<sup>141</sup> Third, a victim can sue for defamation—a well-recognized common law tort—and seek damages for reputational harm caused by the publication of false statements. Fourth, restraining orders are available under the Harassment Act of 1997 and the Domestic Violence Act of 1995.<sup>142</sup> Finally, victims can sue for the tort of breach of trust, although invocation of this tort in New Zealand is not widespread given the existence of the tort of invasion of privacy.<sup>143</sup>

#### 4. Australia

In Australia, multiple offenses in the Criminal Code can apply to cases of cyberbullying.<sup>144</sup> In addition to these designated offenses, the offenses of assault, threat, surveillance, harassment, invasion of privacy, and criminal defamation can be used to address online harmful publications.

In addition, civil remedies may be obtained from the individual responsible for the bullying content or from a third party who did not

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* s 21.

<sup>138</sup> *The News Media Meets "New Media": Rights, Responsibilities and Regulation in the Digital Age*, *supra* note 38, at 12.

<sup>139</sup> See *Hosking v. Runtig* [2005] 1 NZLR 1 (N.Z.).

<sup>140</sup> See *Wilkinson v. Downton* [1897] 2 QB 57 (Eng.); *Stevenson v. Basham* [1922] NZLR 225 (SC) (N.Z.) (a New Zealand court adopted the *Wilkinson* holding for the first time). See also Pita Roycroft, *Wilkinson v Downton After Rhodes and Its Future Viability in New Zealand*, 48 VICTORIA UNIV. WELLINGTON L. REV. 107, 112–13 (2017).

<sup>141</sup> See Auerbach, *supra* note 98, at 1669.

<sup>142</sup> See Harassment Act 1997 (N.Z.); Domestic Violence Act 1995 (N.Z.).

<sup>143</sup> *Hosking v. Runtig* [2005] 1 NZLR 1 at [45].

<sup>144</sup> *Criminal Code Act 1995* (Cth) ss 474.14, 474.15, 474.16, 474.17 (Austl.).

take appropriate measures to prevent the bullying behavior.<sup>145</sup> For example, a threat of violence using electronic means may constitute tortious assault where the plaintiff's reasonable assessment is that the offender has the means to carry out the threat. Nevertheless, the more general the threat and the less likely it is to materialize, the more difficult it will be to establish assault.<sup>146</sup>

One may also bring a civil action for defamation due to cyberbullying where the defamatory expression is made to at least one person other than the victim,<sup>147</sup> and the expression either exposes the plaintiff to hatred, contempt, or ridicule,<sup>148</sup> encourages others to stay away from the plaintiff,<sup>149</sup> or diminishes the plaintiff's value in the eyes of others and shows contempt in the sense of attributing moral culpability for the victim's unpleasant behavior or character.<sup>150</sup> Although the publisher's motive is irrelevant for purposes of proving the elements of the tort, humorous, good-spirited publications and slight mockery are insufficient to sustain such a claim.<sup>151</sup>

Finally, a civil lawsuit alleging negligence may be pursued against a third party (i.e., a school) for failing to take measures to prevent cyberbullying. Victims pursuing this avenue will confront several challenges, however, given the mental-psychological nature of the injury, the likely difficulty of proving causation, and the need to examine the extent of the third party's duty of care toward the injured party.<sup>152</sup>

Additionally, states and territories have adopted targeted measures to address bullying in the educational context. In New South Wales, a person who attacks, follows, harasses, or threatens a student or a member of the school staff commits an offense punishable by up to seven years in prison when bodily harm results, and up to five years

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<sup>145</sup> Des Butler, Sally Kift & Marilyn Campbell, *Cyber Bullying in Schools and the Law: Is There an Effective Means of Addressing the Power Imbalance?*, 16 MURDOCH UNIV. ELEC. J.L. 84, 98 (2009).

<sup>146</sup> *Id.* at 98–99.

<sup>147</sup> *Parmiter v. Coupland* [1840] 151 Eng. Rep. 340.

<sup>148</sup> *See id.*; *Brander v Ryan* (2000) 78 SASR 234, 245 (Austl.).

<sup>149</sup> For a publication saying the plaintiff had a contagious disease, see *Henry v TVW Enterprises* (1990) WAR 475 (Austl.).

<sup>150</sup> *See Sim v Stretch* [1936] 52 TLR 669, 671 (Austl.); *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1 (Austl.); *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 506 (Austl.).

<sup>151</sup> *See Donoghue v Hayes* [1831] Exch 265, 266; *Entienne Pty Ltd v Festival City Broadcasters Pty Ltd* [2001] 79 SASR 19, 28–29 (Austl.).

<sup>152</sup> Butler, Kift & Campbell, *supra* note 145, at 106–11.

in prison where there is no bodily harm.<sup>153</sup> The *actus reus* of the offense must be committed while the victim is present at school, effectively preventing the prosecution of an individual who cyberbullies a classmate if the victim was not present at school.<sup>154</sup>

### 5. *United Kingdom*

In the United Kingdom, there is no specific tort for harmful internet publications. A person who has been harmed by an internet publication may, however, assert claims for relief based on existing torts, including harassment.<sup>155</sup> Nevertheless, the trend is to annul laws perceived as limiting freedom of expression. For example, all defamation-related criminal offenses in the United Kingdom were annulled in 2009.<sup>156</sup>

A 2001 amendment to the Malicious Communications Act created the offense of media misuse.<sup>157</sup> Section 1 of the Act defines the elements of the offense as the sending of a letter, text, or electronic message that contains obscene or offensive content, a threat, false information, or any other content that may be considered in whole or in part to be obscene or offensive, which may cause distress or anxiety to others, and which is sent intentionally to cause such distress or anxiety.<sup>158</sup> In addition, the Communications Act of 2003 created the offense of improper use of a public electronic communications network, which prohibits: (1) the use of a public electronic communications network for the purpose of sending a message or any content of a particularly offensive, obscene, threatening, or abominable nature, or causing the delivery of such a message or content; and (2) the use of a public electronic communications network for the purpose of sending a message or any false content, causing delivery of such message or content, or consistent use of a public electronic communications network, with the intent to cause unnecessary harassment, inconvenience, or anxiety.<sup>159</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> *Assault, Harassment, Stalking and Intimidation of Students and Staff at School*, NEW S. WALES GOV'T, <https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/bulletin-27-assault—harassment—stalking-and-intimidation-of-students-and-staff-at-school> [<https://perma.cc/ZW5N-VGLQ>] (lasted visited Jan. 26, 2022).

<sup>155</sup> Protection from Harassment Act 1997, c. 40 (Eng.).

<sup>156</sup> Coroners and Justice Act 2009, c. 73 (Eng.).

<sup>157</sup> Malicious Communications Act 1998, c. 27 (Eng.).

<sup>158</sup> *Id.* § 4.

<sup>159</sup> Communications Act 2003, c.21, §127 (Eng.).

### 6. Italy

As a result of multiple cases of suicide, Italy passed the Anti-Cyberbullying Law in 2017.<sup>160</sup> The Law provides that the use of the internet as a means to harm, defame, intimidate, or steal the identity of a minor is illegal.<sup>161</sup> Although there is no reference in this law to a specific tort, civil damages are available for harmful publications that satisfy the elements of the tort of defamation.<sup>162</sup> The Anti-Cyberbullying Law requires schools to educate students about responsible internet usage and appoint a staff member to address cases of cyberbullying among students.<sup>163</sup>

### 7. Austria

*Mediengesetz*, the Austrian media law, includes a criminal offense of defamation.<sup>164</sup> Additionally, cases of cyberbullying can fall under existing criminal offenses such as defamation,<sup>165</sup> humiliation/insult,<sup>166</sup> slander,<sup>167</sup> and stalking.<sup>168</sup> Platform owners are among those who may be charged with a criminal offense.<sup>169</sup> Defenses include journalistic responsibility, which may be invoked when the publication is true and in the public interest.<sup>170</sup> The punishments for these offenses range from a fine to imprisonment of up to five years.<sup>171</sup>

A claim against the publisher is also available for a harmful publication that causes actual damage or loss of income, or for the publication of false facts that infringe on the plaintiff's dignity or rights where the publisher knew or should have known that those facts were

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<sup>160</sup> Legge 29 maggio 2017, n.71, G.U. June 3, 2017, n.127 (It.).

<sup>161</sup> Pietro Ferrara, Francesca Ianniello, Alberto Villani & Giovanni Corsello, *Cyberbullying a Modern Form of Bullying: Let's Talk About This Health and Social Problem*, 44 IT. J. PEDIATRICS 2 (2018).

<sup>162</sup> *Italy: Responding to 'Hate Speech'*, ART. 19 (Apr. 6, 2018), <https://www.article19.org/resources/italy-responding-hate-speech> [<https://perma.cc/6JUB-QG3A>].

<sup>163</sup> L. n. 71/2017 (It.).

<sup>164</sup> See *Mediengesetz* [Media Act] BUNDESGESETZBLATT [BGBL] No. 314/1981, as amended, §§ 28–42 (Austria).

<sup>165</sup> STGB [PENAL CODE] § 111 (Austria).

<sup>166</sup> *Id.* § 115.

<sup>167</sup> *Id.* § 297.

<sup>168</sup> See Petra Gradinger, Dagmar Strohmeier & Christiane Spiel, *Motives for Bullying Others in Cyberspace: A Study on Bullies and Bully-Victims in Austria*, in CYBERBULLYING IN THE GLOBAL PLAYGROUND: RESEARCH FROM INTERNATIONAL PERSPECTIVE 6 (Qing Li, Donna Cross & Peter K Smith eds. (2012).

<sup>169</sup> STGB [PENAL CODE] § 28 (Austria).

<sup>170</sup> *Id.* § 29.

<sup>171</sup> *Id.* § 111.

false.<sup>172</sup> Austrian law also contemplates civil liability for damages against the owner of the platform on which an offending publication was made.<sup>173</sup> Damages for defamation, libel, slander, insult, or ridicule may be awarded.<sup>174</sup> Damages are calculated based on the scope of the publication, its effects, the type of platform, and the economic capacity of the platform owner.<sup>175</sup> In 2021, the Communication Platform Act created a new specific offense prohibiting bullying and hate speech on social media.<sup>176</sup>

### 8. Germany

German criminal law prohibits threats, threatening harassment, and invasion of privacy, as these offenses may encompass cyberbullying.<sup>177</sup> Although German law does not recognize a specific civil tort of cyberbullying, it is possible to receive compensation for monetary and non-monetary damages caused by abusive publications that violate statutes prohibiting incitement of hatred, insult, and defamation.<sup>178</sup> Other possible torts include violation of personal rights (*allgemeines Persönlichkeitsrecht*) and intentional immoral damage.<sup>179</sup> In some cases, the victim may also sue for a court order to prevent further publication. In the case of a discriminatory publication, compensation may also be claimed under the Anti-Discrimination Law.<sup>180</sup>

In summary, countries have taken a range of measures to confront the phenomenon of offensive publications, including the establishment of administrative bodies and procedures, the enactment of legislation, and the expansion of tort law to encompass harms caused by cyberbullying and similar online misconduct. In some countries, measures also include the creation of government entities to assist residents and citizens with content removal procedures on online

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<sup>172</sup> *Id.*

<sup>173</sup> Mediengesetz [Media Act] BUNDESGESETZBLATT [BGBl] No. 314/1981, as amended, § 6 (Austria).

<sup>174</sup> *Id.*

<sup>175</sup> STGB [PENAL CODE] § 111 (Austria).

<sup>176</sup> SCOTT GRIFFEN, DEFAMATION AND INSULT LAWS IN THE OSCE REGION: A COMPARATIVE STUDY 30 (2017); Kommunikationsplattformen-Gesetz [KoPI-G] [Communication Platforms Act] BUNDESGESETZBLATT [BGBl] No. 151/2020, as amended (Austria).

<sup>177</sup> ART. 19, GERMANY: RESPONDING TO “HATE SPEECH”: COUNTRY REPORT 28 (2018).

<sup>178</sup> Bürgerliches Gesetzbuch [BGB] [Civil Code] § 823(2) (Austria).

<sup>179</sup> *Id.* §§ 823(1), 826.

<sup>180</sup> See *Italy: Responding to ‘Hate Speech’*, *supra* note 162, at 35–36.

platforms, paying special attention to minors.<sup>181</sup> The majority of countries attach special importance to the educational channel in addressing offensive publication, requiring the adoption of targeted school policies to protect the educational community from shaming online publications.<sup>182</sup>

### C. *Online Platforms' Policies for Dealing with Offensive Publications*

Most major online platforms have policies to assist the public in addressing offensive publications. Popular social media websites have internal protocols concerning the removal or blocking of content. Members of the public (regardless of whether they are the subjects of an offensive publication) may contact the platforms directly with a request to remove the harmful content or to block domestic users from accessing it; yet the availability of this avenue is not always widely known to the public.

#### 1. *Facebook*

It is possible to contact Facebook with a request to remove content or to suspend a specific account that violates Facebook's "Community Standards." These rules prohibit, among other things, publications that constitute bullying and harassment.<sup>183</sup> According to Facebook, posts that constitute bullying or harassment are posts that deliberately target private individuals to humiliate or embarrass them.<sup>184</sup> Facebook defines public individuals as "people who are

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<sup>181</sup> For example, the Italian administrative authority is called *Garante per la Protezione dei Dati Personali* (Guarantor for the Protection of Personal Data) and it was established by legge 31 dicembre 1996, n.675, G.U. Dec. 28, 2001, n. 467 (It.); see generally GARANTE PER LA PROTEZIONE DEI DATI PERSONALI, <https://www.garanteprivacy.it/home> [<https://perma.cc/E6LP-X32R>] (last visited Jan. 26, 2022); Rocco Panetta, *Italian DPA Welcomes Anti-Cyberbullying Law Amid Fears on Resources, Effective Enforcement*, IAPP (June 26, 2017), <https://iapp.org/news/a/italian-dpa-welcomes-anti-cyber-bullying-law-amid-fears-on-resources-effective-enforcement> [<https://perma.cc/89TM-5RQM>].

<sup>182</sup> Panetta, *supra* note 181.

<sup>183</sup> *Bullying and Harassment*, META, <https://transparency.fb.com/policies/community-standards/bullying-harassment/?from=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards%2Fbullying> [<https://perma.cc/S6H7-NGCQ>] (last visited Jan. 26, 2022); see also *How to Report Things*, FACEBOOK, [https://www.facebook.com/help/1380418588640631/?helpref=hc\\_fnav](https://www.facebook.com/help/1380418588640631/?helpref=hc_fnav) [<https://perma.cc/RB2X-CJSA>] (last visited Jan. 26, 2022).

<sup>184</sup> See *Bullying and Harassment*, *supra* note 183.

featured in the news or who have a large public audience.”<sup>185</sup> Facebook lists various types of posts that it has defined as bullying and harassment, including (1) pages that identify and shame private individuals; (2) images modified to humiliate private individuals; (3) photos or videos of physical bullying posted to shame the victim; and (4) repeated membership requests or unwanted messages.<sup>186</sup> Individuals can also contact Facebook for the purpose of removing hate speech (i.e., content that directly attacks others based on race, ethnicity, nationality, religion, sexual orientation, gender, disability, or serious illnesses).<sup>187</sup> An aggrieved user can also block the perpetrator or delete offensive comments from his or her own Facebook page, both of which can be done without contacting Facebook. But these measures are limited in their effect. They do not prevent the abuser from further bullying on their own page or in groups, third-party pages, and similar platforms.

By its own policies, Facebook users must be at least thirteen years old, and accounts that Facebook discovers to belong to younger users are automatically deleted.<sup>188</sup> Similarly, if a photo is posted that violates the privacy of a child under thirteen, the child’s parents can fill out a form to request its removal.<sup>189</sup> Children over the age of thirteen must make such requests on their own unless they are mentally or physically unable to do so.<sup>190</sup>

## 2. YouTube

Similarly, YouTube’s Terms of Use prohibit online harassment. YouTube defines harassment as offensive comments, messages, and videos; disclosure of a person’s personal details; malicious recording of a person without his or her consent; intentional publication of

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See *Hate Speech*, META, <https://transparency.fb.com/policies/community-standards/hate-speech/> [<https://perma.cc/3YTE-UZ8V>] (last visited Jan. 26, 2022).

<sup>188</sup> *Terms of Service*, FACEBOOK, <https://www.facebook.com/legal/terms> [<https://perma.cc/YUA9-WWZZ>] (last visited Jan. 26, 2022).

<sup>189</sup> *How Do I Get a Link (URL) to Report a Piece of Content?*, FACEBOOK, <https://www.facebook.com/help/contact/209046679279097> [<https://perma.cc/83ZX-MNQW>] (last visited Jan. 26, 2022).

<sup>190</sup> *Privacy Violations*, META, [https://transparency.fb.com/policies/community-standards/privacy-violations-image-privacy-rights/?from=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards%2Fprivacy\\_violations\\_image\\_rights](https://transparency.fb.com/policies/community-standards/privacy-violations-image-privacy-rights/?from=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards%2Fprivacy_violations_image_rights) [<https://perma.cc/PBE9-WX25>] (last visited Jan. 26, 2022).

content for the purpose of humiliating someone; uploading abusive and negative comments or videos about another person; inappropriate sexual representation, which includes sexual harassment or sexual bullying in any form; and incitement to harass other users or creators.<sup>191</sup> Similar to Facebook, in the event that a user feels that content is offensive, YouTube allows the user to block the offensive user or to delete or block comments on the offender's video.<sup>192</sup> Users can request the removal of a video by clicking a "Report" button at the bottom of each video.<sup>193</sup> The options available to the complainant are: "sexual content," "violent or repulsive content," "hateful or offensive content," "harmful and dangerous acts," "child abuse," "spam or misleading content," "violates my rights," or "subtitle issue."<sup>194</sup> In some of these options, users can add text of up to five hundred characters, in which they may elaborate upon the basis for reporting the video.<sup>195</sup> In addition, YouTube provides users with tips for maintaining privacy and security on the web.<sup>196</sup>

### 3. Google

Google similarly allows users to request removal of search results.<sup>197</sup> Unless the publication contains sexual content without consent from the subject, Google handles removal requests only after the complainant confirms that she previously contacted the website owner

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<sup>191</sup> *Harassment & Cyberbullying Policies*, GOOGLE, <https://support.google.com/youtube/answer/2802268> [<https://perma.cc/US6Y-2Z9Y>] (last visited Jan. 26, 2022).

<sup>192</sup> *Report Inappropriate Content*, YOUTUBE, <https://support.google.com/youtube/answer/2802027?hl=en&co=GENIE.Platform%3DDesktop> [<https://perma.cc/5T2Q-S9L7>] (last visited Jan. 26, 2022).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Ever Wonder How YouTube Works?*, YOUTUBE, <https://www.youtube.com/howyoutubeworks/#staying-safe> [<https://perma.cc/36QN-NE3M>] (last visited Jan. 26, 2022) *see also* *YouTube Policies*, GOOGLE, <https://support.google.com/youtube/topic/2803176> [<https://perma.cc/CRV4-5C4B>] (last visited Jan. 26, 2022) (page detailing the YouTube policy and the options available to users).

<sup>197</sup> *Remove Your Personal Information from Google*, GOOGLE, <https://support.google.com/websearch/troubleshooter/3111061> [<https://perma.cc/R36J-UZ6Q>] (last visited Jan. 26, 2022).

to request removal.<sup>198</sup> When reporting a search result, the user is requested to report the type of content that she wishes to remove.<sup>199</sup> This includes options such as “A picture I appear in,” “ID document,” “Pornographic site,” and others.<sup>200</sup> For each of these options, the user is required to fill out a structured form with details about the reason for the report, the link to the website that published the offensive content, and additional information.<sup>201</sup>

With respect to personal information, Google may remove financial information; photos of signatures; images of nudity or sexual acts uploaded or shared without consent, and personal and confidential medical information.<sup>202</sup> In addition, users can request removal of content for legal reasons.<sup>203</sup> In such cases, the user must indicate whether he has a legal document to support his claim. In the case of defamatory content, Google requests that the complainant use the “Legal Issue Report” form.<sup>204</sup> This form offers the option to add text, which Google reviews for purposes of determining whether there has been a violation of the Company’s Terms of Use.<sup>205</sup>

#### 4. *Twitter, Instagram, and WhatsApp*

Twitter also has rules prohibiting harassment.<sup>206</sup> To enforce these rules, Twitter examines whether the main purpose of a publication is to harass or bully another; whether the publication includes threats; whether it is one-sided; whether it solicits others to harass, and whether the harassment is conducted through several different

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<sup>198</sup> See *Remove Non-Consensual Explicit or Intimate Personal Images from Google*, GOOGLE, <https://support.google.com/websearch/answer/6302812> [<https://perma.cc/A4GQ-X8JZ>] (last visited Jan. 26, 2022).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*; *Remove Selected Financial, Medical & National ID Information from Google Search*, GOOGLE, <https://support.google.com/websearch/answer/9673730?hl=en> [<https://perma.cc/33R9-SVKE>] (last visited Jan. 26, 2022).

<sup>203</sup> *Report Content for Legal Reasons*, GOOGLE, <https://support.google.com/legal/answer/3110420> [<https://perma.cc/64VA-4UUL>] (last visited Jan. 26, 2022).

<sup>204</sup> *Report a Legal Removal Issue*, GOOGLE, [https://support.google.com/legal/contact/lr\\_legalother?product=websearch&uraw](https://support.google.com/legal/contact/lr_legalother?product=websearch&uraw) [<https://perma.cc/XJ3Z-ZF48>] (last visited Jan. 26, 2026).

<sup>205</sup> *Id.*

<sup>206</sup> *Abusive Behavior*, TWITTER HELP CTR., <https://help.twitter.com/en/rules-and-policies/abusive-behavior> [<https://perma.cc/2T78-3T8K>] (last visited Jan. 26, 2022).

accounts.<sup>207</sup> Twitter also prohibits violent threats, whether direct or indirect, as well as violations of the privacy of another.<sup>208</sup> The publication of nude photos is also prohibited.<sup>209</sup> Any individual, whether or not they are an existing Twitter user, may request the removal of a tweet.<sup>210</sup>

Instagram's Terms of Use also prohibit the harassment or bullying of other users.<sup>211</sup> Posts that violate the Terms of Use can be reported.<sup>212</sup> Violations include posts regarding self-harm, harassment and bullying, sale and advertising of drugs, sale and advertising of weapons, publications containing nudity or pornography, and publications containing violence or encouragement to use violence and hate speech.<sup>213</sup> Instagram also prohibits users under the age of thirteen and underage accounts can be reported.<sup>214</sup> If the complainant does not have an Instagram account, the report can be sent through an online form.<sup>215</sup>

WhatsApp also has Terms of Use and users who violate them will be blocked.<sup>216</sup> Violations include distribution of offensive content that is defamatory, obscene, threatening, harassing, racist, or otherwise infringes on human rights or encourages illegal or inappropriate

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<sup>207</sup> *The Twitter Rules*, TWITTER HELP CTR., <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/ZP8K-3M6W>] (last visited Jan. 26, 2022).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Report a Tweet, List, or Direct Message*, TWITTER HELP CTR., <https://support.twitter.com/articles/20170408> [<https://perma.cc/V9DU-L2XM>] (last visited Jan. 26, 2022).

<sup>211</sup> *Community Guidelines*, INSTAGRAM HELP CTR., <https://help.instagram.com/477434105621119> [<https://perma.cc/B2ND-4Y4E>] (last visited Jan. 26, 2022).

<sup>212</sup> *Terms of Use*, INSTAGRAM HELP CTR., [https://help.instagram.com/581066165581870/?helpref=hc\\_fnav](https://help.instagram.com/581066165581870/?helpref=hc_fnav) [<https://perma.cc/YZ89-V797>] (last visited Jan. 26, 2022).

<sup>213</sup> *Id.*

<sup>214</sup> *Report an Underage User on Instagram*, INSTAGRAM HELP CTR., [https://help.instagram.com/contact/723586364339719?helpref=faq\\_content](https://help.instagram.com/contact/723586364339719?helpref=faq_content) [<https://perma.cc/56HC-EC8J>] (last visited Jan. 26, 2022).

<sup>215</sup> *Report Harassment or Bullying on Instagram*, INSTAGRAM HELP CTR., <https://help.instagram.com/contact/188391886430254> [<https://perma.cc/AWX9-482Q>] (last visited Jan. 26, 2022).

<sup>216</sup> *WhatsApp Terms of Service*, WHATSAPP, <https://www.whatsapp.com/legal/terms-of-service> [<https://perma.cc/P4W7-9NBQ>] (last visited Jan. 26, 2022).

conduct.<sup>217</sup> It is possible to report to WhatsApp directly through the application.<sup>218</sup>

In summary, public entities and online platforms offer various mechanisms for addressing cyberbullying and other harmful online publications through removal mechanisms, support, and guidance, civil and criminal legislation, rules of ethics, and educational initiatives that seek to prevent the phenomenon prophylactically. Nevertheless, these tools are limited in scope and not necessarily known to the public. Accordingly, they provide incomplete relief to victims of online misconduct, so other tools must be introduced.

#### D. Counter-Shaming the Offender

Some scholars have proposed counter-shaming the offender as a remedy to shaming. This solution is based on Dan Kahan's theory that incarceration should be replaced by shaming of the offender by the government.<sup>219</sup> Kahan argued that fines or community service are not sufficient deterrents and suggests that shaming will deter offenders in a similar way to incarceration but with lower costs.<sup>220</sup> Kahan argued that counter-shaming is effective because it embarrasses the offender, and it is a meaningful punishment as evidenced by studies showing that public disgrace is more effective than incarceration at making individuals obey the law.<sup>221</sup>

Such shaming could be performed in a few different ways: publicizing what the offender did in newspapers and online media after a court issues a judgment; placing physical signs on the offender's door; requiring self-debasement in a ceremony that reflects the social denunciation of the offender; and/or requiring contrition by making the offender apologize to the victim either in a public apology or a contrition ceremony.<sup>222</sup>

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<sup>217</sup> *WhatsApp Terms of Service*, WHATSAPP, <https://www.whatsapp.com/legal/terms-of-service> [<https://perma.cc/3ZPA-9WJC>] (last visited Jan. 26, 2022).

<sup>218</sup> For more information on WhatsApp reporting options, see *How to Stay Safe on WhatsApp*, WHATSAPP, <https://faq.whatsapp.com/21197244/#Report> [<https://perma.cc/EA6H-6DY4>] (last visited Jan. 26, 2022).

<sup>219</sup> Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996).

<sup>220</sup> *Id.* at 630–54.

<sup>221</sup> *Id.* at 638.

<sup>222</sup> CHARLES R. TITTLE, *SANCTIONS AND SOCIAL DEVIANCE: THE QUESTION OF DETERRENCE* 196–99, 320–21 (1980); JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

These means of counter-shaming are arguably effective in deterring future shaming by the offender or others in the community. Nevertheless, Kahan later reversed course, concluding that incarceration is better suited to deter potential offenders because it serves a rehabilitative function.<sup>223</sup>

Other scholars such as Kate Klonick suggest that counter-shaming the offender is reintegrative in that it includes elements of forgiveness and acceptance, reinforcing that it is the actions of the offender that are censured rather than the offender.<sup>224</sup> Klonick suggests that the offender should apologize in writing and that the written apology should be publicized by the victim or the government. She also proposes that the government tag offenders to explain that they offended the victim's dignity.<sup>225</sup>

Other scholars have objected to counter-shaming on the ground that its effectiveness as a remedy depends on the existence of a community that reacts to the offender's actions. Moreover, even where a community exists, deterrence may not be effective. It has also been argued that shaming by the government can normalize and legitimize the practice, undermine social norms, and can be interpreted as permission to commit otherwise prohibited acts against those who have been convicted of similar misconduct.<sup>226</sup> On the other hand, however, some scholars have argued that shaming the offenders is undesirable because it affects the offender's dignity.<sup>227</sup>

#### *E. Other Reform Proposals and Initiatives*

A number of countries, including those discussed above, have taken the threat posed by shaming publications seriously and have established committees to consider different means to address this threat. In Israel, the Arbel Committee examined the subject of harmful online publications and made a long list of recommendations aimed at

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<sup>223</sup> See Dan M. Kahan, *What's Really Wrong with Shaming Sanctions?*, 84 TEX. L. REV. 2075 (2006).

<sup>224</sup> Klonick, *supra* note 14, at 1029 (2016).

<sup>225</sup> *Id.* at 1061.

<sup>226</sup> Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL., PUB. POL'Y, & L. 645, 699 (1997).

<sup>227</sup> *Id.* at 645–89; James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1060–68 (1998); ERIC A. POSNER, LAW AND SOCIAL NORMS 93, 109 (2000); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 230–33 (2004).

dealing with the phenomenon of shaming.<sup>228</sup> The Committee's recommendations included the following:

First, the Committee recommended that a centralized body be created to deal with offensive publications and to serve as a resource to assist members of the public.<sup>229</sup> The body, staffed by trained officials from various fields and government ministries, would work to raise awareness of respectful internet usage and could, in certain cases, mediate disputes between publishers and victims and refer victims to relevant resources including psychologists, school caregivers, police officers, or courts.<sup>230</sup> In addition, this body, or anyone acting on its behalf as stipulated by law, would have the ability to assist victims in seeking the removal of offensive content.<sup>231</sup>

Second, the Committee also made several legal recommendations. One recommendation was to create legislation to exempt internet providers from civil liability for offensive posts uploaded on their services, except where it is established that the victim contacted the provider and the provider did not request that the publisher remove or block access to the challenged content.<sup>232</sup> Under this proposed legislation, if the publisher consents to removal, the internet provider would take appropriate steps to remove the content as soon as possible.<sup>233</sup> If the publisher objected, the internet provider would not be held liable for the publication.<sup>234</sup> Another recommendation was for, in appropriate cases, the body created in accordance with the first recommendation or another body acting on its behalf, to contact content publishers to report a post that violates that website's rules of use.<sup>235</sup> However, this would be reserved for cases where the content seriously harms the subject of the publication, amounts to a criminal offense under Israeli law, there is a public interest in removing the content, and there is not a suitable alternative.<sup>236</sup> If the publication created a genuine risk of serious harm to the subject, the body would also have

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<sup>228</sup> ARBEL COMM., THE FORMATION OF PUBLIC PROTECTION MEASURES INCLUDING PUBLIC SERVANTS FROM OFFENSIVE ACTS AND PUBLICATIONS, AS WELL AS ONLINE BULLYING (2020) (Heb.).

<sup>229</sup> *Id.* at 123.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 123–24.

<sup>233</sup> *Id.* at 124.

<sup>234</sup> *Id.* at 123–24.

<sup>235</sup> *Id.* at 124.

<sup>236</sup> *Id.*

the ability to contact publishers in this manner.<sup>237</sup> A third recommendation was for legislation to empower the State to seek a court order to remove or restrict content where there is a genuine risk that it may lead to harm of the subject of the publication.<sup>238</sup> A fourth recommendation was for legislation requiring anonymous publishers of tortious content to disclose their identities such that lawsuits against them may be more easily initiated.<sup>239</sup> Finally, a fifth recommendation called for legislation that is better adapted to our era, either abolishing the criminal offense of defamation or creating a new criminal offense targeting extremely offensive publications.<sup>240</sup>

Third, the Committee made recommendations in the field of communication, including suggesting: (1) a government initiative to encourage proper and respectful online discourse;<sup>241</sup> (2) that the rules of journalistic ethics be updated to regulate content originating on social networks;<sup>242</sup> (3) requiring all media outlets to act in accordance with the rules of journalistic ethics and engage in the fight to eradicate offensive publications on the internet<sup>243</sup>; (4) that the government promote communication literacy and critical media consumption among the general public;<sup>244</sup> (5) that the government should invest in research surrounding communication literacy;<sup>245</sup> (6) the creation of a standard of excellence for websites to foster a culture of respectful discourse;<sup>246</sup> and (7) development and implementation of technological tools to promote appropriate online discourse.<sup>247</sup>

Fourth, the Committee made recommendations in the fields of education, welfare, and ethics, proposing a variety of initiatives, including a national human dignity educational program starting in kindergarten;<sup>248</sup> educational programs on internet use to provide children with technological literacy, encourage respectful use of the online space, and create a uniform convention for schools;<sup>249</sup> creating a

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 125.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 125.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 125–26.

<sup>244</sup> *Id.* at 126.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 127.

<sup>249</sup> *Id.*

school mechanism for coping with distress;<sup>250</sup> teacher training programs on proper internet usage and cyberbullying; conducting programs for parents and educating parents about technological literacy and ways to remove offensive content;<sup>251</sup> providing support for private bodies and associations working to prevent cyberbullying; adopting ethical rules as educational tools, and without sanctions, decreasing the number of offensive publications at the workplace; and developing a psychological treatment system for victims.<sup>252</sup>

Finally, the Committee made recommendations to assist public employees in a variety of ways. Recommendations included to: provide support and psychological assistance to victims of harmful online publications; assist victims with content removal; and promote advocacy.<sup>253</sup> The Committee also recommended expanding the existing arrangement, which currently allows the Attorney General to file civil lawsuits in limited circumstances, to allow every public employee to request representation by the State in any civil tort action that alleges serious and actual harm to the subject of the online publication and in which there is no public interest in publishing the harmful content.<sup>254</sup> Moreover, the Committee recommended launching a public campaign to raise awareness of the importance of public servants and their contribution.<sup>255</sup> Lastly, the Committee recommended extending the scope of individuals who currently benefit from the protections offered to public employees so that the same benefits are available to employees who perform roles of a public nature, even if they are not defined officially as public employees.<sup>256</sup>

In conclusion, countries have explored different responses to harmful and shaming online publications and have made increasing efforts to protect the public and especially minors from their damaging effects. A particular challenge that arises with respect to harmful and shaming publications in the online sphere stems from the viral effect of such publications, which necessitates ongoing efforts to discover and remove them. This article aims to address this concern through the novel proposal detailed below.

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 128.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 129.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

## IV. PROPOSAL

We propose requiring individuals who publish harmful and shaming publications to bear responsibility for the devastating effects of their conduct by imposing upon them an ongoing duty to monitor the online space and remove not only their original post or publication but also all further instances of the offending content. This may be done by the offender or by a third party that the victim authorizes to carry out this task at the offender's expense. This proposal is rooted in and builds upon the newly recognized "right to be forgotten," introduced by the European Court of Justice ("ECJ").<sup>257</sup> This right, recognized for the first time in the 2014 case, *Google Spain v. AEPD and Mario Costeja González*, gives individuals control over their personal data and information about them that is publicly accessible through the use of online search engines.<sup>258</sup> The ECJ recognized the right of European Union data subjects to request the removal of links, holding that a search engine is responsible for the information that it processes and that a search engine should consider requests by individuals to erase content that pertains to them under certain circumstances, such as where the content is inappropriate, irrelevant, or outdated.<sup>259</sup> Individuals may request erasure of such content based on the right to privacy.<sup>260</sup>

In 2016, the European Union adopted a new regulation, the General Data Protection Regulation ("GDPR"), which replaced the European data protection directive and established rules pertaining to the collection and processing of information concerning individuals residing in the European Union.<sup>261</sup> The right to be forgotten is embodied in Article 17 of the GDPR (the right to erasure), which gives individuals the right to ask organizations to delete their personal data.<sup>262</sup> The GDPR governs how personal data must be collected, processed, and erased. It governs both public and private data controllers and does not require legislative action but applies directly to member states.<sup>263</sup> Non-compliance can lead to a variety of sanctions, including high fines that

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<sup>257</sup> See Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja Gonzalez*, ECLI:EU:C:2014:317 (May 13, 2014).

<sup>258</sup> *Id.* ¶ 2.

<sup>259</sup> *Id.* ¶ 94.

<sup>260</sup> *Id.* ¶ 3.

<sup>261</sup> 2016 O.J. (L 119) 43.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

can amount to four percent of the global income of the violating entity or a fine in the amount of twenty million euros.<sup>264</sup>

Article 17 of the GDPR states, “[t]he data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay” if one of a number of conditions applies.<sup>265</sup> This includes when the personal data are no longer needed for the purposes which they were collected or processed for; the data subject withdraws his consent from the processing of the information so there is no longer a legal basis for the processing of the information; the data subject objects to the processing of his personal data; the data have been unlawfully processed; there is a legal obligation that requires the deletion of the data; or the data that were collected is that of a minor.<sup>266</sup> “Undue delay” is considered to be approximately a month.<sup>267</sup> The data controller must take reasonable steps to verify the person requesting erasure is actually the data subject.<sup>268</sup>

Nevertheless, an organization’s right to process an individual’s data might supersede the individual’s right to be forgotten, such as where the data is used in exercising one’s right to free expression; the data is used to comply with a legal ruling or obligation; the data is used to perform a task in the public interest or in the exercise of an organization’s official authority; the data being processed is necessary for public health purposes and serves the public interest; the data being processed is necessary to perform preventative or occupational medicine; the data represents important information that serves the public interest, scientific research, historical research, or statistical purposes and erasure of the data would likely impair or halt such progress; or the data is used to establish a legal claim or defense.<sup>269</sup> As the GDPR imposes a significant compliance burden for some organizations,<sup>270</sup> an organization can deny a request to erase personal data or it can require

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<sup>264</sup> *See id.*

<sup>265</sup> *Id.* art. 17(1).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* art. 12(3).

<sup>268</sup> *Id.* art. 17(2).

<sup>269</sup> *Id.* ¶ 65; *see* Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 181) 17.

<sup>270</sup> Ben Wolford, *Everything You Need to Know About the “Right to be Forgotten”*, GDPR.EU, <https://gdpr.eu/right-to-be-forgotten/> [<https://perma.cc/5WL6-VKXJ>] (last visited Jan. 26, 2022).

payment of a “reasonable fee” to do so if the request is unfounded or excessive.<sup>271</sup>

Building upon the right to be forgotten, we turn to our proposal for protecting the rights of shaming victims. We propose that when the offender’s identity is known, her duty to remedy the harm she caused the victim will include an ongoing obligation to ensure that all online content with the shaming postings and publications are removed. Specifically, we propose that states adopt legislation that protects the right of victims of shaming to be forgotten with regard to those publications. Under this scheme, the offender will be required to monitor the internet on an ongoing basis to ensure that all reiterations of the shaming posting are removed. If it has not been removed or reappears after removal, the offender will bear the burden of taking further steps that may be required to delete (or re-delete) the posting. To this end, offenders may (and perhaps should be required to) engage and bear the cost of the services of third parties who specialize in the removal of online content and are authorized by legislation to act on behalf of the victim.

The offender would also have to publicly apologize to the victim at the victim’s request and report to the victim periodically with respect to her monitoring activities. Additionally, the offender would be required to address any requests the victim may make to remove offending content.

Such a scheme promotes a number of important goals. First and foremost, it transfers to offenders the significant burden of monitoring online publications to detect violations of the victim’s right to be forgotten. Additionally, it gives the victim a certain peace of mind by providing a mechanism to ensure that the online environment is constantly monitored and that the shaming content is removed. Moreover, the scheme serves to deter future offenses as it requires offenders to take long-term responsibility for remedying the harm they cause. In addition, it serves important educational goals by giving offenders an opportunity to apologize and correct their wrongdoing. Indeed, while our proposal may be perceived as punitive, it should also be viewed as an opportunity to promote restorative justice. Finally, transferring the costs of ensuring the removal of shaming publications to offenders is efficient from an economic perspective, as it relieves both the victim and the state authorities of this burden.

The preferred mechanism may be imposing the use of a third-party professional provider, the cost of which will be borne by the

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<sup>271</sup> *Id.*

offender, rather than imposing the duty on the offender herself. This route may be preferred for several reasons. First, many offenders are not equipped with the abilities required to effectively monitor the internet and approach the appropriate parties for every further occurrence of the publication. Second, it is hard to expect the offender to prioritize the issue. Having the victim monitor the offender continuously would defeat the purpose. Third, a professional service may be expected to act diligently and it could be held accountable. This would especially be true if there were several professional services in the jurisdiction competing with one another.

If the law nevertheless allows for the offender to provide the monitoring himself, then there should be an efficient mechanism to enforce any failure by the offender to monitor the additional publications. In such case, the offender should be held liable for the additional harm caused by his failure and the monitoring should be transferred to a professional third party at the offender's expense.

The amount of monitoring (which will affect the price a third-party provider would charge) and the time period may vary from case to case. Although we assume that in many cases the order to the third party to bear the costs will be ordered by the courts, we also suggest a mechanism where if an offender, upon notice from the victim, takes upon herself not only to remove the harmful publication but also to monitor any further occurrences and act for their removal, such actions would be taken into account by a court adjudicating the other remedies available by law. Indeed, such conduct is likely to mitigate the damages that the injured party suffers, and therefore promotes a more efficient and just outcome.

Given the variety of approaches different jurisdictions have taken to balance the expressive rights of publishers with the privacy and other individual rights of the subjects of their publications, the road to embracing a framework that advances the individual right to be forgotten through a content-removal mechanism that places the burden on publishers to monitor and erase shaming publications may be a long one. Nevertheless, the devastating effects of such publications on victims compels consideration of remedies that offer the potential for greater relief for victims than is currently available under existing schemes.