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The German NetzDG as Role Model or Cautionary Tale? Implications for the Debate on Social Media Liability

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Cover Page Footnote

Dr. iur., LL.M. (Stanford). Postdoctoral Fellow at the Chair for Private Law and Intellectual Property Law with Information- and IT-Law (GRUR-chair) (Prof. Dr. Matthias Leistner, LL.M. (Cambridge)) at Ludwig Maximilian University of Munich, Germany. Thanks to Professor David Freeman Engstrom, Abhilasha Vij, Jasmin Hohmann, Shazana Rohr, and the editorial board of the Fordham Intellectual Property, Media and Entertainment Law Journal for helpful comments and assistance.

The German NetzDG as Role Model or Cautionary Tale? Implications for the Debate on Social Media Liability

Patrick Zurth*

What can be done against discrimination, bullying, insults, and the spread of dangerous fake news on social media platforms? While platforms in the United States enjoy broad discretion on how to approach that issue, there are both legal and political debates regarding social media regulation. Germany, by contrast, advances the opposite approach: requiring social media providers to block or remove illegal content. The Netzwerkdurchsetzungsgesetz (“NetzDG,” “Network Enforcement Act,” the “Act”) of 2017 outlines a specific procedure for implementing such a claim. The Act is the first of its kind in the western democratic states. Other countries have invoked or discussed whether to follow the German example, which could make NetzDG a pioneer in its strategy of combating hate speech and fake news. This Article is intended to explain the background, mode of operation, and reception of the NetzDG. Furthermore, this Article will attempt to clear up misunderstandings and discuss current developments around this Act. A main purpose of this Article is to examine whether the Act is a suitable prototype for the United States Congress to introduce regarding platform liability and to determine which alternatives are available at hand. To that end, the Article evaluates the constitutional leeway for a regulation of social media. The Article concludes that Congress

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could establish principles and mechanisms similar to the NetzDG which, despite its room for improvement, is better than its reputation. Data and recent judgments indicate that the debate surrounding this system, however, was based on exaggerated assumptions and misunderstandings. Therefore, it is hopeful that the United States averts the defected discussion surrounding the NetzDG and draws positive and negative lessons from it.

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INTRODUCTION

When Samantha Jespersen googled her name, the very first result that appeared was a Facebook business page called “Samantha Rae Anna Jespersen’s Butthole.”¹ Even though Jespersen reported this unfortunate page several times, the forum remained on Facebook until January 2020 when the social media platform finally took it down.² The Facebook page was created in 2012 when Jespersen was fifteen years old; however, she did not discover it until 2015.³ The page said, “This unofficial Page was created because people on Facebook have shown interest in this place or business. It’s not affiliated with or endorsed by anyone associated with Samantha Rae

¹ See Katie Notopolous, *Facebook Won’t Remove This Woman’s Butthole as a Business Page*, BUZZFEED NEWS (Jan. 29, 2020), <https://www.buzzfeednews.com/article/katienotopoulos/facebook-butthole-business> [<https://perma.cc/PTW2-9959>].

² *Id.*

³ *Id.*

Anna Jespersen’s Butthole.”⁴ A pin on the map indicated the correct location of her former home.⁵ Everyone interested in her, whether for personal or business reasons, would see this as the first Google Search result.⁶ It is troubling that it took Facebook eight years to take action.

Cases like Samantha Jespersen’s seem to call for strict regulation of social media. The fact that platforms introduced self-imposed guidelines about impermissible content on their sites and perform content moderation (i.e., monitoring posts and comments for compliance with their rules) does not solve the problem in cases where they simply do not act. For these cases, German law provides for a special complaint procedure. Social networks had until January 1, 2018 to implement all required procedures.⁷ The novel NetzDG imposes further obligations on large social media platforms, such as requiring publication of user complaint transparency reports.⁸

This regulatory approach has attracted attention in many other countries, including the United States.⁹ After the first experiences

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ According to *Netzwerkdurchsetzungsgesetz* [NetzDG] [Network Enforcement Act], July 12, 2017, Art. 3, the Act came into force on Oct. 1, 2017. According to Art. 1, § 6, para. 2, the procedures pursuant to section 3 had to be introduced within three months after that. In this Article, quotations of NetzDG are taken from the English translation, available at <https://perma.cc/UE9G-E9VB>. However, it is neither an official nor an optimal translation. It omits, for example, *STRAFGESETZBUCH* [STGB] [PENAL CODE], § 201a in the list of provisions in NETZDG § 1, para. 3.

⁸ See *Netzwerkdurchsetzungsgesetz* [NetzDG] [Network Enforcement Act], July 12, 2017, §§ 2, 3 [hereinafter “NetzDG”], available at https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2 [<https://perma.cc/56SV-UY46>].

⁹ See, e.g., Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2012–13, 2016, 2018, 2030 (2018); Imara McMillan, *Enforcement Through the Network: The Network Enforcement Act and Article 10 of the European Convention on Human Rights*, 20 CHI. J. INT’L L. 252 (2019); Laura E. Moon, Note, *A New Role for Social Network Providers: NetzDG and the Communications Decency Act*, 28 TRANSNAT’L L. & CONTEMP. PROBS. 623 (2019); Dawn C. Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1521–22, 1533–38 (2019); Mark Scott & Janosch Delcker, *Free Speech vs. Censorship in Germany*, POLITICO (Jan. 4, 2018), <https://www.politico.eu/article/germany-hate-speech-netzdg-facebook-youtube-google-twitter-free-speech/> [<https://perma.cc/D2VF-LWLF>]; Rebecca Zipursky, Note, *Nuts About Netz: The Network Enforcement Act and Freedom of Expression*, 42 FORDHAM INT’L L.J. 1325 (2019).

with NetzDG and demands from a member of parliament, the United Kingdom debated copying the German act.¹⁰ On May 13, 2020, the French lower house parliament¹¹ partially followed the German example and passed a law obliging social media platforms to render content inaccessible that manifestly infringes specified provisions within twenty-four hours of notification.¹² The EU intends to harmonize the duty of platforms to take down content with its proposed Digital Services Act.¹³ This draft regulation proposed on December 15, 2020 is intended to compel online intermediaries, including social networks, to remove illegal content and provide, among many other things, not only a notice and action mechanism but also an internal complaint handling system.¹⁴ Less like the NetzDG, however, is the EU Commission's proposal for a regulation on preventing the dissemination of terrorist content online by allowing governments to order the removal of such content.¹⁵ On January 1, 2021, the *Kommunikationsplattformen-Gesetz* (“KoPl-G”, “Communication Platform Act”) came into force in Austria, obliging social media providers to remove illegal content, as well as to

¹⁰ See Laurence Dodds, *British MPs Call for German-Style Law to Block Hate Speech on Social Media*, TELEGRAPH (July 28, 2018), <https://www.telegraph.co.uk/technology/2018/07/28/british-mps-call-german-style-law-block-hate-speech-social-media/> [https://perma.cc/9DJB-BLS6].

¹¹ Assemblée nationale (National Assembly).

¹² See Marc Schuler and Benjamin Znaty, *New Law to Fight Online Hate Speech to Reshape Notice, Take Down and Liability Rules in France*, TAYLORWESSING (May 21, 2020), <https://www.taylorwessing.com/en/insights-and-events/insights/2020/05/new-law-to-fight-online-hate-speech-in-france> [https://perma.cc/UB74-FMGZ]. Various language versions of the initial draft from July 9, 2019 are available at <https://ec.europa.eu/growth/tools-databases/tris/en/index.cfm/search/?trisaction=search.detail&year=2019&num=412&mLang=EN> [https://perma.cc/DYG6-5W2P].

¹³ See *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC*, COM (2020) 825 final (Dec. 15, 2020).

¹⁴ *Id.*

¹⁵ See *Proposal for a Regulation of the European Parliament and of the Council on Preventing the Dissemination of Terrorist Content Online*, COM (2018) 640 final (Sept. 12, 2018). On December 10, 2020 the European Parliament and the Council (the body representing the 27 Member States) agreed on that proposal. European Commission Press Release IP/20/2372, Security Union: Commission Welcomes Political Agreement on Removing Terrorist Content Online (Dec. 10, 2020), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2372 [https://perma.cc/VE74-LG8T]. The regulation must now be formally adopted by those two legislative bodies. *Id.*

supply reporting and verification procedures resembling those of NetzDG.¹⁶

As was to be expected, the NetzDG triggered a major debate in Germany and other countries. Sharp criticism included referring to Germany's overall agenda on dealing with propaganda on the Internet as a "cautionary tale."¹⁷ Unfortunately, some criticism was partly based on misconceptions. The misleading summary of the Act, issued by UN Special Rapporteur David Kaye on the promotion and protection of the right to freedom of opinion and expression, cautioned that the NetzDG "would impose fines up to 50 million EUR on social media companies that fail to remove undesirable content from their platforms."¹⁸ By the same token, referring to the NetzDG as "drastic legislation requiring social media sites like Facebook and Twitter to remove false news, defamatory hate speech, and other unlawful content within twenty-four hours of receiving notice of the same, upon pain of multi-million-euro fines"¹⁹ is fallacious for several reasons, as this Article will explain.

The purpose of this Article is to prevent misunderstandings in the debate on a change of law in the United States and draw conclusions from Germany's experiences. Currently, in the United States, Internet platforms are protected against any liability for user posts. According to Section 230 of the Communications Decency Act

¹⁶ See KOMMUNIKATIONSPLATTFORMEN-GESETZ [KOPL-G] [COMMUNICATION PLATFORMS ACT] BUNDESGESETZBLATT [BGBl] No. 151/2020 (Austria), available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20011415> [<https://perma.cc/AQ3W-83BM>]. On the law in general and its similarities with NetzDG, see Gregor Fischer et al., *Così fan tutte: Some Comments on Austria's Draft Communications Platforms Act* (Graz Law, Working Paper No 05-2020, 2020).

¹⁷ See Lisa-Maria N. Neudert, *Germany: A Cautionary Tale*, in COMPUTATIONAL PROPAGANDA: POLITICAL PARTIES, POLITICIANS, AND POLITICAL MANIPULATION ON SOCIAL MEDIA 153, 179 (Samuel C. Woolley & Philip N. Howard eds., 2018) ("Germany has emerged as a cautionary authority on concerns over computational propaganda.").

¹⁸ See David Kaye (Special Rapporteur on Freedom of Opinion and Expression), *Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Reference OL DEU 1/2017, at 1 (June 1, 2018), available at <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf> [<https://perma.cc/JGE2-2HNY>].

¹⁹ Nunziato, *supra* note 9, at 1521–22; accord Balkin, *supra* note 9, at 2013 ("It requires social media companies to take down many different kinds of speech, including hate speech, within twenty-four hours of a complaint.").

(“CDA”),²⁰ these platforms have broad discretion on how to engage in content moderation. Both legal scholars and policymakers from both sides of the aisle, for different reasons, are attacking the CDA’s approach. Recent events fueled the debate on this provision.

After large social networks were criticized for being too lenient on former President Donald Trump,²¹ a debate among those providers arose about how to deal with the President’s posts.²² On May 26, 2020, Twitter, for the first time, took action by flagging a post for fact-checking when the President made unsubstantiated claims about mail-in voting.²³ The President’s fury about commenting on his post resulted in an executive order, targeting social media’s blanket immunity from liability for its users’ posts and causing a political debate about CDA section.²⁴ The order, issued on May 28, 2020, mandates a proposal for legislation and aims to fight “online censorship” by restricting leeway under CDA section.²⁵ As a result, on September 23, 2020, the Department of Justice (“DOJ”) sent draft legislation to Congress to reform CDA Section 230 so platforms could not be shielded from promoting, soliciting, and facilitating

²⁰ 47 U.S.C. § 230 [hereinafter CDA Section 230].

²¹ *E.g.*, Facebook apparently privileged then-presidential candidate Donald Trump during his 2016 campaign by leaving posts untouched that actually had violated the platform’s standards; Facebook was severely criticized for being too lenient with him. *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1655 (2018).

²² *See* Quint Forgy, *Zuckerberg, Dorsey Spar Over Twitter’s Flagging of Trump’s Tweets*, POLITICO (May 28, 2020), <https://www.politico.com/news/2020/05/28/zuckerberg-dorsey-spar-over-twitters-flagging-of-trumps-tweets-286881> [<https://perma.cc/L8AS-67SL>]; Dylan Byers & Jason Abbruzzese, *Facebook Employees Go Public with Disagreement over Zuckerberg’s Handling of Trump*, NBC NEWS (June 1, 2020), <https://www.nbcnews.com/tech/tech-news/facebook-employees-go-public-disagreement-over-zuckerberg-s-handling-trump-n1220961> [<https://perma.cc/7EG4-WRDZ>].

²³ *See* Jason Silverstein, *Twitter Flags Trump Tweet with Fact-Checking Label for First Time*, CBS NEWS (May 27, 2020), <https://www.cbsnews.com/news/twitter-adds-fact-check-warning-trump-tweets/> [<https://perma.cc/6RKH-ZU3J>].

²⁴ *See* Brian Fung et al., *Trump Signs Executive Order Targeting Social Media Companies*, CNN (May 28, 2020), <https://www.cnn.com/2020/05/28/politics/trump-twitter-social-media-executive-order/index.html> [<https://perma.cc/P9LM-FC2U>].

²⁵ *See* Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

harmful criminal activity and have limited leeway in removing content.²⁶ Interactive computer service providers would now even be required “to offer easily accessible and apparent mechanisms for users to notify providers of unlawful content.”²⁷

Since the draft legislation, Congress has not debated on abolishing or amending CDA Section 230. Congress even overruled President Trump’s veto against the National Defense Authorization Act (“NDAA”), an annual defense funding bill, which was intended to wring abolition of CDA Section 230, without taking any legislative action on that provision.²⁸ Given that several congressional lawmakers already made proposals to amend CDA Section 230,²⁹ and President Biden criticized and advocated revoking it,³⁰ further legislative action can be expected in the upcoming term. Regardless, the political debate was recently fueled by Twitter and Facebook’s permanent suspension of President Trump’s accounts in response to his numerous claims of election fraud and his role in the storming of the

²⁶ See U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE’S REVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT OF 1996 (Sept. 23, 2020), <https://www.justice.gov/archives/ag/departments-justice-s-review-section-230-communications-decency-act-1996> [<https://perma.cc/J265-H8CM>]. The DOJ also provided a document detailing its edits section by section. U.S. DEP’T OF JUSTICE, SECTION BY SECTION (Sept. 23, 2020), available at <https://www.justice.gov/file/1319326/download> [<https://perma.cc/2X7S-SEJ3>] [hereinafter SECTION BY SECTION].

²⁷ See SECTION BY SECTION, *supra* note 26, at 2.

²⁸ See Grace Segers, *Senate Overrides Trump’s Veto of Defense Bill*, CBS NEWS (Jan. 2, 2021), <https://www.cbsnews.com/news/senate-overrides-trump-veto-defense-bill/> [<https://perma.cc/XQ2U-F7ET>]. On January 1, 2021, the Senate voted 81 to 13, with a two-thirds vote required to overturn the veto. On December 28, 2020, the House had already voted to overturn the veto with a majority of 322 to 87.

²⁹ See *infra* Section I.B.

³⁰ See Interview by N.Y. Times Editorial Board with President Joe Biden (Jan. 17, 2020), <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html> [<https://perma.cc/TKQ4-ARP5>] (“The idea that it’s a tech company is that Section 230 should be revoked, immediately should be revoked, number one. For Zuckerberg and other platforms.”).

Capitol on January 6, 2021.³¹ Those decisions, once again, ignited a dispute on social media's power and free speech.³²

Thus, after twenty-five years of total immunity for Internet platforms,³³ the United States vigorously debates social media's legal and social responsibility in a modern Internet. This Article contributes to that debate by discussing the German approach as a potential role model for a new US federal law. To that end, the Article addresses two different ways to regulate networks: (1) imposing rules externally, as the NetzDG does, and (2) promoting internal regulation by means of provider-imposed standards. Both shape the legal *status quo* in Germany.

Part I expounds upon the contemporary broad immunity accorded to social media providers in the United States. Next, Part II and III frame Germany's approach with the NetzDG. Subsequently, Part IV addresses platforms' self-imposed standards and explains how German law deals with them. Part V goes on to discuss the different policy issues on the regulation of social media. Finally, Part VI describes the constitutional framework for a potential reform in the United States and makes proposals drawn from the NetzDG.

I. "GOOD" SAMARITANS UNDER CDA § 230

This Article will first outline how differently the United States currently regulates social network liability and what discussions are taking place before examining how the NetzDG may affect this debate. Under current US law, Internet platforms are not exposed to any obligations. First, the statute negates a platform's duty to take

³¹ See Twitter Inc., *Permanent Suspension of @realDonaldTrump*, TWITTER (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension.html [<https://perma.cc/DCT7-WM8L>]; Mark Zuckerberg, FACEBOOK (Jan. 7, 2021, 7:47 AM), <https://www.facebook.com/zuck/posts/10112681480907401> [<https://perma.cc/TW56-MYS7>].

³² See Lauren Aratani, *Trump Twitter: Republicans and Democrats Split Over Freedom of Speech*, THE GUARDIAN (Jan. 9, 2021), <https://www.theguardian.com/us-news/2021/jan/09/trump-twitter-republicans-democrats> [<https://perma.cc/X6E4-B4ZS>].

³³ CDA Section 230 was enacted in 1996. See *supra* note 48 and accompanying text. On its broad protection, see *supra* Section I.A.

down illegitimate content. It reads, “[n]o provider or user of an interactive computer service³⁴ shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁵

Second, social networks cannot be held accountable for taking down content they do not want to post, irrespective of the providers’ intentions or reasons—so users do not have any remedies at their disposal if an Internet platform, acting in good faith, bans content:

No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.³⁶

Thus, CDA Section 230’s protection is twofold: (1) it grants “immunity both for the content they moderate” and (2) “the content they miss.”³⁷ The statute provides for blanket immunity against civil claims in various fields³⁸ only excluding criminal law, intellectual

³⁴ An interactive computer service is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” CDA § 230(f)(2).

³⁵ CDA § 230(c)(1). An “information content provider” is one who creates or develops content. *See id.* § 230(f)(3) (whereas an “interactive computer service” then provides or enables access).

³⁶ *Id.* § 230(c)(2)(A).

³⁷ *See* James Grimmelman, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42, 103 (2015).

³⁸ *See id.*; Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001, 2009 (2019).

property law, electronic surveillance law, and sex trafficking law.³⁹ Thus, the provision is all-encompassing.⁴⁰

Congress took a different approach to determining what Internet content violates copyright law. According to Section 512(c)(1) of the Copyright Act, a service provider's⁴¹ immunity necessitates that it "does not have actual knowledge" of the infringement, "is not aware of facts or circumstances from which infringing activity is apparent," and upon notification of an infringement "acts expeditiously to remove, or disable access to, the material" and does not, despite control over the activity, "receive a financial benefit directly attributable to the infringing activity."⁴² Hence, the infringed party can notify the Internet platform which *de facto* leads to the provider's obligation to take down illegal content—a notice-and-takedown system.⁴³ On the contrary, under the CDA, a notice does not compel any action by the platform.⁴⁴

A. *Internet's Footing: Trajectory, Purpose, and Scope of the Blanket Immunity*

Many consider CDA Section 230 to be of paramount importance for the past and future development of the Internet,⁴⁵ culminating in

³⁹ See CDA §§ 230(e)(1)–(5). The DOJ's draft in September 2020 proposed to further exempt antitrust law from CDA Section 230 immunity. See SECTION BY SECTION, *supra* note 26, at 2.

⁴⁰ See *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (refusing to exclude violations of the Fair Housing Act from the immunity's scope).

⁴¹ A service provider is "a provider of online services or network access, or the operator of facilities therefor." 17 U.S.C. § 512(k)(1)(B).

⁴² *Id.* § 512(c)(1).

⁴³ The notification must meet several requirements. See *id.* § 512(c)(3). As to the proceeding after receiving the notice and removing the content, see *id.* §§ 512(g)(2)–(3).

⁴⁴ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331–33 (4th Cir. 1997) (considering a distributor as a "publisher" under CDA section 230(c)(1)); Felix Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 318 (2011) ("Except for a brief interlude in the California courts, no court has specifically adopted the view that notice undermines immunity.").

⁴⁵ See, e.g., Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 436–37 (2009) ("Without something like the Section 230 immunity, it would be very risky to create social software that allows others to blog or publish, much less create a social networking site....The Internet's largely open networks and legal rules, like

a characterization of the provision's wording as "The Twenty-Six Words That Created the Internet."⁴⁶ The section's relevance and positive effects are so evident that even its critics concede that such benefits exist.⁴⁷ The legal situation prior to CDA Section 230's enactment in 1996⁴⁸ sheds light on the assumption that the statute played a major role in watering the delicate little plant that was the early stages of the Internet industry. After the Southern District of New York initially held that a provider was not liable for defamatory content because it was a mere distributor with neither knowledge nor reason to know of the statements since it had not engaged in any content moderation,⁴⁹ *Stratton Oakmont, Inc. v. Prodigy Services Co.* later made lawmakers sit up and take notice.⁵⁰ Even though delivered by a lower state court, a major threat was identified in this

Section 230, have helped ensure a remarkably diverse ecology of applications, services, and content."); Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2039 (2018); Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL'Y 123, 125 (2010) ("Section 230 has allowed the Internet to flourish as an open medium in which all consumers—rather than just the websites' employees—provide content. If websites were not immune for third-party content, the Internet likely would not be as open as it is today."); Elizabeth Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want to Take It Away*, REASON (July 29, 2019), <https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/> [<https://perma.cc/CRA9-9JHB>] ("The future of free speech—and a lot more—may depend on preserving Section 230.").

⁴⁶ See generally JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (1st ed. 2019).

⁴⁷ E.g., Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 404, 412–13 (2017) ("Section 230 immunity has enabled innovation and expression beyond the imagination of the operators of early bulletin boards and computer service providers the provision was designed to protect."); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 985, 1009 (2008) ("[A]n important protection against unanticipated and practically uncontrollable liability for torts committed by individual users.").

⁴⁸ See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1026–27 (9th Cir. 2003); Klonick, *supra* note 21, at 1604–05; Citron & Wittes, *supra* note 47, at 404–06; Madeline Byrd & Katherine J. Strandburg, *CDA 230 for a Smart Internet*, 88 FORDHAM L. REV. 405, 407–08 (2019); Wu, *supra* note 44, at 315–17; Kosseff, *supra* note 45, at 128–31.

⁴⁹ *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

⁵⁰ See generally *Stratton Oakmont Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

decision. The New York Supreme Court treated a provider as a publisher because it “exercised editorial control over the content of messages posted on its computer bulletin boards.”⁵¹ Because of this holding, Internet providers faced an intricate dilemma: exercising absolutely no moderation opened the door to illegal activities on their platforms, yet any (unsuccessful) attempt to prevent that could expose them to liability.⁵² As a result, they were rather discouraged from conducting content moderation.⁵³

Congress found an unambiguous solution for this predicament. The enacted provision’s purpose is twofold: (1) to “encourage platforms to be ‘Good Samaritans’ and take an active role in removing offensive content” and (2) “also to avoid free speech problems.”⁵⁴ On one hand, the purpose of the provision is to promote content moderation.⁵⁵ But on the other hand, statements of opinion must be protected from arbitrary censorship.⁵⁶ Regardless, engaging in content moderation remains CDA Section 230’s purpose and is not a condition for blanket immunity from liability.⁵⁷ Hence, regarding take down claims,⁵⁸ the statute applies to both good and bad Samaritans.⁵⁹ Having knowledge of illegal activity,⁶⁰ encouraging the posting of illegal content,⁶¹ or even running a “meretricious business

⁵¹ *Id.* at 2.

⁵² Note, *supra* note 45, at 2028–29.

⁵³ Grimmelman, *supra* note 37, at 103 (“Taken together, the decisions created a perverse disincentive to moderate.”).

⁵⁴ Klonick, *supra* note 21, at 1602; *see also* *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997); *Jones v. Dirty World Ent. Recordings, LLC*, 755 F.3d 398, 407–08 (6th Cir. 2014); *Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003); *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1122 (9th Cir. 2003).

⁵⁵ Klonick, *supra* note 21, at 1608.

⁵⁶ *Id.*

⁵⁷ The statute does not contain any restrictions in that respect. CDA § 230(c)(2)(A); *see supra* note 36 and accompanying text.

⁵⁸ CDA § 230(c)(1).

⁵⁹ Wu, *supra* note 38, at 2009; *see also* *Citron & Wittes*, *supra* note 47, at 408.

⁶⁰ *See supra* notes 43–44 and accompanying text.

⁶¹ *Jones v. Dirty World Ent. Recordings, LLC*, 755 F.3d 398, 415–17 (6th Cir. 2014) (finding no material contribution to infringements through soliciting gossip); *see also* *Byrd & Strandburg*, *supra* note 48, at 410–11, 435 (“Courts have considered inducement-like arguments against CDA 230 immunity but mostly have not been persuaded by them. This is probably the right result under the current statute....”).

model”⁶² does not suffice to deny immunity under CDA Section 230. Thus, courts tend to apply the provision broadly.⁶³

That being said, CDA Section 230’s shield is not absolute. Most notably, it only safeguards Internet providers against liability for foreign content and leaves accountability for people’s own statements untouched—acting as “information content provider” that creates or develops content.⁶⁴ A website will be found to participate in the development of unlawful content and thus be covered by the CDA Section 230 exception if it “contributes materially” to the unlawful conduct.⁶⁵ A website can carry both the operator’s own content, for which they are responsible as the information content provider, and third parties’ content to which CDA Section 230’s immunity applies.⁶⁶ In that regard, the Ninth Circuit Court of Appeals held that a rental platform was “not entitled to CDA immunity for the operation of its search system, which filters listings, or of its email notification system, which directs emails to subscribers according to discriminatory criteria.”⁶⁷ Yet, this search system was built on discriminatory parameters.⁶⁸ It can be inferred that social media websites qualify for CDA Section 230’s privilege so long as their content moderation algorithms employ unbiased criteria and fairly and equally enforce the standards imposed by the network providers.

⁶² *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016) (protecting a website, which took an active role and was tailored to make sex trafficking easier, from liability).

⁶³ *Id.* at 19 (“There has been near-universal agreement that Section 230 should not be construed grudgingly.”); *Jones*, 755 F.3d at 408 (“[C]ourts have construed the immunity provisions in § 230 broadly.”); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1318 (11th Cir. 2006) (“The majority of federal circuits have interpreted [CDA § 230], to establish broad ‘federal immunity....’”).

⁶⁴ *See* CDA § 230(f)(3); *see also* Note, *supra* note 45, at 2029 (noting that the immunity exemption follows from the term “another” in Section 230(c)(1)).

⁶⁵ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008). This test has been adopted by other circuits. *See Jones*, 755 F.3d at 412–17.

⁶⁶ *Roommates.com, LLC*, 521 F.3d at 1162–63; *Jones*, 755 F.3d at 408–09.

⁶⁷ *Roommates.com, LLC*, 521 F.3d at 1167.

⁶⁸ *Id.* (“Roommate’s search function is similarly designed to steer users based on discriminatory criteria.”).

B. *The Inescapable Debate*

In sum, CDA Section 230 provides for an utterly broad protection, leaving many dubious Internet platforms unaccountable and blocking victims' paths for relief. This raises major questions as to how to restrict the CDA's scope. Shielding bad Samaritans, who deliberately promote illicit actions online while lacking any relation to free speech, from legal remedies seems questionable when considering the provision's initial purpose. Nevertheless, numerous voices still emphasize CDA Section 230's importance and speak against any alterations.⁶⁹

Yet, many things have changed since 1996. Firstly, while many used to advocate and promote an unrestricted "open speech" Internet, the public is now increasingly focused on a "healthy speech" approach—thus inching closer to the European approach.⁷⁰ Some, however, often invoking the implications to freedom of speech, disapprove of stronger content moderation.

Even though CDA Section 230 seemed untouchable for a long time, pressure is now coming from both political sides. In 2018, Democrat Senator Mark Warner from Virginia proposed to "make platforms liable for state-law torts (defamation, false light, public disclosure of private facts) for failure to take down deepfake or other

⁶⁹ E.g., Eric Goldman, *Dear President Biden: You Should Save, Not Revoke, Section 230* at 1 (Santa Clara Univ. Legal Studies Research Paper, Jan. 14, 2021) ("Section 230 has facilitated the emergence of Web 2.0—a universe of Internet services that help us communicate and engage with each other in powerful and novel ways. Many of the top Internet services depend on Section 230, and we rely on Section 230-enabled services hourly."); Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTIONS 33, 34 (2019) ("[R]educing Section 230's immunity poses major risks to online free speech and the associated benefits to society."); Eric Goldman, *Why the State Attorneys General's Assault on Internet Immunity Is a Terrible Idea*, FORBES (June 27, 2013), <https://www.forbes.com/sites/ericgoldman/2013/06/27/why-the-state-attorneys-generals-assault-on-internet-immunity-is-a-terrible-idea/> [<https://perma.cc/UU2J-MZWQ>] ("Even a tiny legal change to Section 230 could upset the delicate balance that facilitated the extraordinary Internet boom over the past 15+ years."); Brown, *supra* note 45 ("Eroding the law would seriously jeopardize free speech for everyone, particularly marginalized groups whose ideas don't sit easily with the mainstream. It would almost certainly kill upstarts trying to compete with entrenched tech giants."); Balkin, *supra* note 45, at 434; H. Brain Holland, *In Defense on Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 391–04 (2008).

⁷⁰ Wu, *supra* note 38, at 2009–10. Twitter is a good example of this shift. *See id.* at 2012; Klonick, *supra* note 21, at 1620–21, 1626–27.

manipulated audio/video content.”⁷¹ Approximately one year later, Republican Senator Josh Hawley from Missouri criticized CDA Section 230 as a “sweetheart deal” and introduced the Ending Support for Internet Censorship Act in order to require large providers to apply to the Federal Trade Commission (“FTC”) for immunity every two years—their “political neutrality” would be a major consideration.⁷²

Additionally, in 2020, several other proposals followed. In March, the bipartisan Eliminating Abusive and Rampant Neglect of Interactive Technologies (“EARN IT”) Act suggested creating a panel consisting of nineteen members, the National Commission On Online Child Sexual Exploitation Prevention, in order to fight child exploitation materials.⁷³ The bill passed the Committee on the Judiciary on July 20, 2020.⁷⁴ In June, several US Republican Senators proposed a Limiting Section 230 Immunity to Good Samaritans Act which would link CDA Section 230’s immunity to a duty of good faith.⁷⁵ In the same month, the bipartisan Platform Accountability and Consumer Transparency (“PACT”) Act aimed to amend the blanket immunity as well—forcing online platforms to remove court-determined illegal content within twenty-four hours, requiring them to provide a complaint system that processes reports within fourteen days, and allowing users to appeal online platforms’ content.⁷⁶ Several Republican politicians then attempted to drive the goal of restricting platforms’ discretion as to content moderation with the Stop the Censorship Act, introduced by eight Congressmen on July 29, 2020⁷⁷ and the Online Freedom and Viewpoint Diversity Act, introduced by three US Senators on September 8, 2020.⁷⁸

⁷¹ MARK WARNER, POTENTIAL POLICY PROPOSALS FOR REGULATION OF SOCIAL MEDIA AND TECHNOLOGY FIRMS 8 (2018), available at <https://perma.cc/7ATN-X473>.

⁷² S. 1914, 116th Cong. (2019); see also *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, SENATE.GOV (June 19, 2019), <https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies> [<https://perma.cc/SR7G-34HN>].

⁷³ S. 3398, 116th Cong. (2020).

⁷⁴ *Id.*

⁷⁵ S. 3983, 116th Cong. (2020).

⁷⁶ S. 4066, 116th Cong. (2020).

⁷⁷ H.R. 4027, 116th Cong. (2020).

⁷⁸ S. 4534, 116th Cong. (2020).

After all, “[c]onservatives claim that Section 230 gives tech companies a license to silence speech based on viewpoint. Liberals criticize Section 230 for giving platforms the freedom to profit from harmful speech and conduct.”⁷⁹ Right-wing political attacks, based on the questionable assertion that social media would silence conservative voices,⁸⁰ have peaked at the executive order of President Trump and the subsequent DOJ’s draft in September 2020.⁸¹

However, even before this political debate, there were already various academic considerations to modernize CDA Section 230. While the criticism of some scholars is rather reserved,⁸² others clearly called for an amendment on a judicial or legislative level.⁸³ The platform’s broad discretion in moderating content is viewed critically.⁸⁴ Several scholars, hence, argue in favor of a (modified) notice-and-takedown procedure.⁸⁵

⁷⁹ Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Speech Reform 2* (Bos. Univ. Sch. of Law, Pub. Law Research Paper No. 20-8, 2020); see also Brown, *supra* note 45 (expounding several political attacks on CDA Section 230 by both Republican and Democratic politicians); Goldman, *Dear President Biden*, *supra* note 69, at 2 (“In general, the Democrats want Internet services to remove more content; the Republicans want Internet services to remove less content.”).

⁸⁰ Citron & Franks, *supra* note 79, at 15–16.

⁸¹ *Supra* notes 25–26 and accompanying text.

⁸² E.g., Klonick, *supra* note 21, at 1669–70 (“[Social media platforms] are private self-regulating entities that are economically and normatively motivated to reflect the democratic culture and free speech expectations of their users. But these incentives might no longer be enough.”).

⁸³ E.g., Arthur Chu, *Mr. Obama, Tear Down This Liability Shield*, TECHCRUNCH (Sept. 29, 2015), <https://techcrunch.com/2015/09/29/mr-obama-tear-down-this-liability-shield/> [<https://perma.cc/UJ2F-XJUK>]; Citron & Wittes, *supra* note 47, at 404, 413 (advocating a reform, not abolition); Heather Saint, Note, *Section 230 of the Communications Decency Act: The True Culprit of Internet Defamation*, 36 LOY. L.A. ENT. L. REV. 39, 65–67 (2015).

⁸⁴ Tushnet, *supra* note 47, at 1009 (“I am arguing that if we limit intermediary responsibility...we should also limit intermediary power to control speech. There is no reason that any speech rights that Internet intermediaries possess should be vested in intermediaries’ management, rather than attributed to users only when those users misbehave.”).

⁸⁵ E.g., *id.* at 1012; Grimmelmann, *supra* note 37, at 106–08 (referring to copyright law and distinguishing between automated and human moderation, proposing to apply blanket immunity only to the former so that “content-specific human curation could be treated as distributors (liable after notice)”); Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 115–18 (2007) (arguing in favor of a

II. THE PATH TO REGULATING SOCIAL MEDIA IN GERMANY: POLITICAL AND LEGAL BACKGROUND

The appropriate approach in Germany is also being evaluated, albeit against a different backdrop. This Part will discuss the path that led to this discussion, illuminating this different background.

A. *Political Background: Polarization, Slander, and Solution Approaches*

Parallel to the ever-increasing spread of social networks, the political discourse in Germany also changed. While the two largest German political parties formed a governing coalition over a long time during the last two decades, diminishing their traditional rivalry, gaps in the political spectrum were filled by others; polarization is no longer between those two parties, but outside them.⁸⁶ The political discourse was shaken by the refugee crisis in 2015, when many refugees fled to Europe.⁸⁷ German Chancellor Angela Merkel's decision to allow about one million refugees to enter Germany for humanitarian reasons was initially met with much approval, but then provoked increasing criticism.⁸⁸ There would be many xenophobic voices⁸⁹ that expressed offensive criticism not only in the pub or in their social circles, but also on social networks. These people were hostile to foreigners and German politicians, who, in their opinion, let too many foreigners enter the country.⁹⁰ Even though there has always been hate speech on social networks, this was a breeding ground for the problem to get out of hand. So far, the court

standardization following the model of trademark law, namely section 32(2) of the Lanham Act); Benjamin Volpe, *From Innovation to Abuse: Does The Internet Still Need Section 230 Immunity?*, 68 CATH. U. L. REV. 597, 620–22 (2019) (advocating for a provision similar to copyright law).

⁸⁶ See Sara Miller Llana, *Grand Coalition? Why Some in Germany Prefer Polarization to a Mushy Middle*, CHRISTIAN SCI. MONITOR (Feb. 26, 2018), <https://www.csmonitor.com/World/Europe/2018/0226/Grand-coalition-Why-some-in-Germany-prefer-polarization-to-a-mushy-middle> [<https://perma.cc/G6BU-P7J8>].

⁸⁷ Neudert, *supra* note 17, at 155.

⁸⁸ See Manuela Bojadžijev, *Migration as Social Seismograph: An Analysis of Germany's 'Refugee Crisis' Controversy*, 31 INT'L J. POL., CULTURE, & SOC'Y 335, 339–41 (2018).

⁸⁹ Neudert, *supra* note 17, at 155.

⁹⁰ See DAVID KAYE, *Wir schaffen das!*, in SPEECH POLICE: THE GLOBAL STRUGGLE TO GOVERN THE INTERNET (Columbia Global Reports, 2019).

decisions handed down on the deletion of posts on social networks are also characterized by xenophobia.⁹¹ According to German police surveys, xenophobic, racist, and anti-Semitic crimes still accounted for most hate crimes in 2018 and 2019.⁹²

Already facing that issue in September 2015, the Federal Ministry of Justice⁹³ set up a committee of Internet service providers, civil society organizations, and media control institutions to solve the problem on a voluntary basis.⁹⁴ But, in the opinion of the government, this approach did not provide for the necessary relief.⁹⁵ The NetzDG's draft was largely based on the fact that hate crime and other punishable content poses a major threat to the peaceful coexistence of a free, open, and democratic society when it cannot be effectively fought and prosecuted.⁹⁶ The referendum in the UK on remaining in or leaving the EU in June 2016 and the US presidential election in November 2016 highlighted the problem of spreading false news on the Internet.⁹⁷

A study commissioned by the government, based on research carried out in January and February 2017, found that there was insufficient removal of reported posts on social networks.⁹⁸ It concluded that, "compared to the last test, YouTube greatly improved the deletion rate for reported criminal content (from 10% to 90%),

⁹¹ See *infra* Section I.A.

⁹² Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]19/17741, 19, <http://dip21.bundestag.de/dip21/btd/19/177/1917741.pdf> [<https://perma.cc/J2VQ-PBBC>] (Ger.).

⁹³ The full name of the agency is the Federal Ministry of Justice and Consumer Protection, or *Bundesministerium der Justiz und für Verbraucherschutz* [BMJV].

⁹⁴ Federal Ministry of Justice, *Gemeinsam gegen Hassbotschaften* [Together Against Messages of Hate], Dec. 15, 2015, https://www.bmjv.de/SharedDocs/Downloads/DE/News/Artikel/12152015_TaskForceErgebnispapier.pdf?__blob=publicationFile&v=2 [<https://perma.cc/FR8B-SHPR>].

⁹⁵ Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 1, <http://dipbt.bundestag.de/dip21/btd/18/123/1812356.pdf> [<https://perma.cc/7J86-Q3YX>].

⁹⁶ *Id.*

⁹⁷ See *id.*

⁹⁸ See *id.* at 1–2.

Facebook deleted less (from 46% to 39%), and Twitter continued to react poorly to user messages (only 1%).”⁹⁹

B. Legislative Procedure and Political Debate

The Federal Ministry of Justice reacted to the 2017 study with a draft law in the same year.¹⁰⁰ After the federal government¹⁰¹ passed this draft, it went through the usual legislative procedure. The *Bundesrat*¹⁰² essentially welcomed the proposal, but had numerous proposed amendments, which are not particularly relevant for this Article.¹⁰³ At the subsequent hearing before the responsible committee in the *Bundestag*, the German federal parliament, considerable doubts were raised by some experts.¹⁰⁴ Among other aspects, the risk of over-blocking and the possible violation of fundamental

⁹⁹ *Löschung rechtswidriger Hassbeiträge bei Facebook, YouTube und Twitter: Ergebnisse des Monitorings von Beschwerdemechanismen jugendaffiner Dienste* [Deletion of Illegal Hate Posts on Facebook, YouTube and Twitter: Results of the Monitoring of Complaint Mechanisms in Youth-Related Services], JUGENDSCHUTZ.NET, https://www.bmju.de/SharedDocs/Downloads/DE/News/Artikel/03142017_Monitoring_jugendschutz.net.pdf;jsessionid=134D5AA175B6063A13AD05F7AC6C2713.2_cid297?__blob=publicationFile&v=3 [<https://perma.cc/WTX2-XTVF>].

¹⁰⁰ For the first version of the draft, see *Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz NetzDG)* [Bill of the Federal Government Draft Law to Improve Law Enforcement in Social Networks (Network Enforcement Act—NetzDG)], https://www.bmju.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_NetzDG.pdf;jsessionid=1FF6F8ED7EBB23C10839EC738041EAC5.2_cid289?__blob=publicationFile&v=2 [<https://perma.cc/7EZV-6HGK>].

¹⁰¹ *Bundesregierung*. The federal government is at the head of the executive branch but plays an important role in the legislative process, with most laws being drafted in the ministries due to their greater competence and staffing.

¹⁰² The *Bundesrat* (Federal Council) is, besides the *Bundestag* (Federal Parliament), the second legislative body. It represents the sixteen states of Germany (*Länder*) at the federal level and is—with varying degrees of power—involved in the enactment of all federal laws.

¹⁰³ The *Bundesrat* was successful, for example, in including STRAFGESETZBUCH [STGB] [PENAL CODE], § 201a in the catalogue of NETZDG § 1, para. 3 and enshrining responses to complaints in NETZDG § 3, para. 2 no. 3a. See *Regierungsentwurf* [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12727, 19–20, <http://dipbt.bundestag.de/dip21/btd/18/127/1812727.pdf> [<https://perma.cc/W2XM-NEDA>].

¹⁰⁴ For a summary of most experts’ opinions, see *Geplante Änderung des Netzwerkdurchsetzungsgesetzes in der Kritik* [Planned Change of the Network Enforcement Law in the Criticism], DEUTSCHER BUNDESTAG, <https://www.bundestag.de/dokumente/textarchiv/2020/kw25-pa-recht-netzwerkdurchsetzung-699188> [<https://perma.cc/7NPU-B6LJ>].

rights were stressed.¹⁰⁵ Subsequently, the bill was amended in the parliament,¹⁰⁶ but in essence left untouched.

The proposed law triggered a major debate. One newspaper, for instance, claimed that the Belarusian autocrat Lukashenko was invoking the German law for his oppressive measures.¹⁰⁷ Moreover, it is assumed that “countries with less noble goals [than Germany] have taken inspiration from NetzDG.”¹⁰⁸ In the early days of NetzDG, Twitter temporarily mistakenly suspended, based on its own standards, the account of a German satirical magazine for mocking a far-right politician’s post on Muslims.¹⁰⁹ It was grist for the NetzDG critics’ mill, as it did seem to prove that platforms may misjudge even obviously legal posts.¹¹⁰ Yet, the act does not provide the sanction of account suspension. It is, therefore, doubtful whether there is a reasonable connection to the NetzDG.¹¹¹

¹⁰⁵ E.g., Reporter Ohn Grenzen Für Informationsfreiheit [Reporters Without Borders for Freedom of Information], *Stellungnahme zum Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken der Fraktionen von CDU/CSU und SPD (BT DS 18/12356)* [Opinion on Draft Law on Enhance Law Enforcement in Social Networks of the CDU/CSU and SPD Parliamentary Groups (BT DS 18/12356)], https://www.bundestag.de/resource/blob/510780/ace6b7be1689e54c1740d78210db5d44/mihr_rog-data.pdf [<https://perma.cc/NR4E-8XN8>]. This Article addresses over-blocking *infra* Section V.C. and fundamental rights *infra* Section II.C.2.

¹⁰⁶ See *Beschlussesempfehlung des Rechtsausschusses* [Resolution Recommendation of the Legal Committee], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/13013, 5–13, <https://dip21.bundestag.de/dip21/btd/18/130/1813013.pdf> [<https://perma.cc/G2TB-HU5U>].

¹⁰⁷ Martin Ferber, *Facebook-Gesetz: Schießt Maas übers Ziel hinaus?*, AUSBURGER ALLGEMEINE (June 20, 2017), <https://www.augsburger-allgemeine.de/politik/Facebook-Gesetz-Schießt-Maas-uebers-Ziel-hinaus-id41792751.html> [<https://perma.cc/ZM3K-9ZRF>].

¹⁰⁸ Zipursky, *supra* note 9, at 1361 (“Russia, Singapore, and the Philippines have all cited NetzDG in pending legislation that will limit speech online....NetzDG has become the impetus not only for troubling censorship in Germany itself, but also for global censorship around the world.”).

¹⁰⁹ David Martin, *German Satire Magazine Titanic Back on Twitter Following ‘Hate Speech’ Ban*, DEUTSCHE WELLE (Jan. 6, 2018), <https://www.dw.com/en/german-satire-magazine-titanic-back-on-twitter-following-hate-speech-ban/a-42046485> [<https://perma.cc/QZ24-ZZLQ>].

¹¹⁰ See *id.*; Andrea Diener, *Storch-Satire ist nicht regelkonform*, FRANKFURTER ALLGEMEINE (Jan. 3, 2018), <https://www.faz.net/aktuell/feuilleton/medien/twitter-sperrt-titanic-magazin-wegen-storch-satire-15371919.html> [<https://perma.cc/3JCM-J9RY>].

¹¹¹ Sandra Schmitz-Berndt & Christian M. Berndt, *The German Act on Improving Law Enforcement on Social Networks: A Blunt Sword?* 30–31 (Working Paper, Dec. 14, 2018).

Meanwhile, the federal government approved two drafts to amend the NetzDG.¹¹² These proposals are intended to enhance NetzDG's regulatory approach. While the first one was signed into law on March 30, 2021, it remains uncertain whether the second one will come into force and, if so, when.¹¹³

C. *Legal Background*

This Article cannot expound all pertinent aspects of the German legal framework. However, two pivotal subject areas—the right of personality and fundamental rights—are addressed below.

1. Right of Personality

The NetzDG was enacted to ensure that claims arising from violations of personal rights were enforced. The right of personality is not expressly regulated anywhere, but is protected by general principles of tort law and is violated, among other subsets, by insults and disparagement.¹¹⁴ It protects the autonomous area of private life, in which everyone can develop and maintain their individuality, so that everyone can, for example, decide for themselves whether and to what extent their life events get publicly presented.¹¹⁵ Violation of the right to personality leads to a claim for injunctive relief.¹¹⁶ This holds unquestionably true for a user who posts infringing content on a social network's platform. On the other hand, because it is the host provider, the platform is not responsible for its user's content.¹¹⁷

¹¹² See discussion *infra* Sections III.B.3–4.

¹¹³ *Id.*

¹¹⁴ See Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], Feb. 26, 2015, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2022 (2015); Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 15, 1989, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3028 (1989). For more on the German Right of Personality, see Ryan Kraski, *Combating Fake News in Social Media: U.S. and German Legal Approaches*, 91 ST. JOHN'S L. REV. 923, 930–35 (2017).

¹¹⁵ Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] June 5, 1973, 35 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 202, 220 (1974).

¹¹⁶ *E.g.*, Oberlandesgericht [OLG] [Higher Regional Court] Nürnberg Nov. 13, 2018, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 190, 191 (2018).

¹¹⁷ Telemediengesetz [TMG] [Teleservices Act], Feb. 26, 2007, BUNDESGESETZBLATT, Tiel I [BGBl. I] at 251, § 10, sentence 1. This provision is based on article 14 of the E-Commerce Directive. See Directive 2000/31/EC of the European Parliament and of the

This protection is afforded to the platforms provided that it has no knowledge of the illegal content and it acts immediately to remove or block access as soon as it becomes aware.¹¹⁸ Nonetheless, this implies that the platform must act upon notice in order to avoid liability. On top of that, the Federal Court of Justice,¹¹⁹ the highest German civil court, held in 2011 regarding an allegation of fact in a blog post:

The host provider is only obliged to take action if the reported information is so specific that the infringement can be easily affirmed on the basis of the allegations of the reporting person, i.e. without a thorough legal and factual examination.... As a rule, the complaint of the reporting person must first be forwarded to the [posting user] for comment. If a statement is not made within a reasonable period of time, the report shall be assumed to be justified and the reported post shall be deleted. If the [user] refutes the complaint in a substantiated manner and if justified doubts arise, the provider is, in general, obliged to inform the reporting party and, if necessary, to demand evidence of the alleged infringement. If the reporting party fails to respond or fails to provide any evidence that may be required, no further investigation will be initiated. If the reporting person's response or the submitted evidence show an illegal violation of the right of personality, even taking into account [the posting user's] statement, the content in question is to be deleted.¹²⁰

Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, art. 14, 2000 O.J. (L 178) 13 [hereinafter E-Commerce Directive].

¹¹⁸ Telemediengesetz [TMG] [Teleservices Act] § 10.

¹¹⁹ *Bundesgerichtshof* (BGH).

¹²⁰ *Bundesgerichtshof* [BGH] [Federal Court of Justice] Oct. 25, 2011, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 148, 150–51 (2012); *aff'd by* *Bundesgerichtshof* [BGH] [Federal Court of Justice] Feb. 27, 2018, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2324, 2327 (2018).

After all, if a violation of personal rights is committed by a user on an Internet platform, the platform may not be directly responsible for the violation.¹²¹ Nevertheless, it was already subject to certain obligations prior to NetzDG.¹²²

2. Fundamental Rights Involved

As in the United States, the legality of a German law is judged by its constitution—the *Grundgesetz*.¹²³ Various fundamental rights granted by it are discussed in relation to the NetzDG. The debate focuses on the Freedom of Expression and Information.¹²⁴ “For a free and democratic state order it is absolutely constitutive.”¹²⁵ Numerous scholars are of the view that NetzDG violates the Freedom of Expression and Information and is, therefore, unconstitutional.¹²⁶ Arguably, this is based on the concern that under the NetzDG the platforms would, in case of doubt, tend to delete content and, thus, prevent legal expressions of opinion.¹²⁷ The UN Special Rapporteur David Kaye had severe concerns for the integrity of both

¹²¹ See *id.* at 150 (holding that the platform neither wrote the blog post nor adopted its content as its own).

¹²² Schmitz-Berndt & Berndt, *supra* note 111, at 11.

¹²³ Grundgesetz [GG] [Basic Law], translation available at https://www.gesetze-im-internet.de/englisch_gg/ [<https://perma.cc/SDG9-FCGM>].

¹²⁴ *Id.* at Art. 5, para. 1.

¹²⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198, 208 (1958). However, false factual claims are not protected. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 3, 1980, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2072, 2073 (1980). Also, the right of personality generally prevails in cases of insults and vilification, i.e., when the defamation of the person is the main focus. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 8, 2017, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1460, 1460–61 (2017).

¹²⁶ E.g., Nikolaus Guggenberger, *Das Netzwerkdurchsetzungsgesetz—schön gedacht, schlecht gemacht*, ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 98, 100 (2017); Marc Liesching, *Die Durchsetzung von Verfassungs- und Europarecht gegen das NetzDG. Überblick über die wesentlichen Kritikpunkte*, 21 MULTIMEDIA UND RECHT [MMR] 26, 27–28 (2018); Fiete Kalscheuer & Christian Hornung, *Das Netzwerkdurchsetzungsgesetz—Ein verfassungswidriger Schnellschuss*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 1721, 1724 (2017).

¹²⁷ See Gerald Spindler, *Rechtsdurchsetzung von Persönlichkeitsrechten. Bußgelder gegen Provider als Enforcement?*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 365, 366 (2018); *infra* Section V.C.

the right to freedom of expression and the right to privacy.¹²⁸ Such violations have yet to be found by a court. In fact, a lawsuit brought by two politicians based on Freedom of Expression already failed for procedural reasons.¹²⁹

Since certain obligations are imposed on platforms, their occupational freedom is also affected.¹³⁰ Although Facebook, in its statement on the NetzDG draft in 2017, opined that the Act is unconstitutional,¹³¹ all affected platforms have let the deadline for a constitutional complaint to the Federal Constitutional Court¹³² expire.¹³³

III. THE APPROACH OF EXTERNAL REGULATION: NETZDG

A. NetzDG's Scope

NetzDG applies to social networks with at least two million users located in Germany.¹³⁴ Moreover, platforms' complaint procedure must only be carried out in case of particularly unlawful content.¹³⁵ Hence, the Act's scope is narrower than some might think.

¹²⁸ Kaye, *supra* note 18, at 4.

¹²⁹ Verwaltungsgericht Köln [VG] [Administrative Trial Court] Feb. 14, 2019, MULTIMEDIA UND RECHT [MMR] 342, 342 (2019).

¹³⁰ Grundgesetz [GG] [Basic Law], Art. 12, para. 1; *see also* Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 21.

¹³¹ *Stellungnahme zum Entwurf des Netzwerkdurchsetzungsgesetzes* [Opinion on the Draft of the Network Enforcement Act], FACEBOOK (May 30, 2017), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2017/Downloads/05242017_Stellungnahme_Facebook_RefE_NetzDG.pdf?__blob=publicationFile&v=2 [<https://perma.cc/7UBL-3ZBR>].

¹³² The *Bundesverfassungsgericht* (BVerfG) is the only German court that can void a federal law.

¹³³ Lena Isabell Löber & Alexander Roßnagel, *Das Netzwerkdurchsetzungsgesetz in der Umsetzung. Bilanz nach den ersten Transparenzberichten*, 22 MULTIMEDIA UND RECHT [MMR] 71, 71 (2019). A constitutional complaint that challenges a law must be lodged within one year of the law entering into force. *See* Bundesverfassungsgerichtsgesetz [BVERFGG] [Act on the Federal Constitutional Court], Aug. 11, 1993, BUNDESGESETZBLATT, Teil I [BGBL. I] at 1473, § 93, para. 3, translation available at https://www.gesetze-im-Internet.de/englisch_bverfgg/englisch_bverfgg.html#p0408 [<https://perma.cc/FCH6-4PPZ>].

¹³⁴ NetzDG § 1, para. 1, sentence 1, para. 2.

¹³⁵ *Id.* § 1, para. 3, § 3, para. 1 and 2.

1. Social Network

Social networks are defined as “telemedia service providers which, for profit-making purposes, operate Internet platforms which are designed to enable users to share any content with other users or to make such content available to the public.”¹³⁶ Neither platforms offering journalistic or editorial content nor platforms which are designed to enable individual communication, such as email services,¹³⁷ or the dissemination of specific content, such as business and employment-oriented platforms,¹³⁸ are considered social networks within the meaning of NetzDG.¹³⁹ This also holds true for online games and sales platforms.¹⁴⁰

Obligations under the NetzDG only arise when the number of registered users in Germany equals or exceeds two million.¹⁴¹ This criterion was criticized as being too imprecise, because it remains vague which users exactly fall under that definition, given that they might disguise their location through a VPN.¹⁴² Moreover, no period of time is indicated within which this criterion must be fulfilled.¹⁴³ However, YouTube, Twitter, and Facebook clearly meet the requirement.¹⁴⁴

¹³⁶ *Id.* § 1, para. 1, sentence 1.

¹³⁷ Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses’ Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 18.

¹³⁸ *Id.* at 19.

¹³⁹ NetzDG § 1, para. 1, sentence 1.

¹⁴⁰ Beschlussempfehlung des Rechtsausschusses [Resolution Recommendation of the Legal Committee], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/13013, 18.

¹⁴¹ NetzDG § 1, para. 2.

¹⁴² Marc Liesching, § 1 *NetzDG Scope of Application*, in STRAFRECHTLICHE NEBENGESETZE (Georg Erbs & Max Kohlhaas, 218th supplement 2018).

¹⁴³ Gerald Spindler, *Das Netzwerkdurchsetzungsgesetz*, 9 KOMMUNIKATION & RECHT [K&R] 533, 534 (2017).

¹⁴⁴ Furthermore, other platforms, such as TikTok, fall within NetzDG’s scope. *See* TIKTOK, TIKTOK TRANSPARENCY REPORT (Feb. 24, 2021), available at <https://perma.cc/NNE4-QCTY>. This Article, however, focuses on the three surely most important and famous social networks: YouTube, Facebook, and Twitter.

2. Unlawful Content

The obligations of social networks under the NetzDG with respect to a certain complaint procedure only refer to unlawful content.¹⁴⁵ This includes the content being indictable pursuant to particular listed statutes in the German Penal Code, e.g., use of symbols of unconstitutional organizations,¹⁴⁶ forming terrorist organizations, incitement of masses (sedition),¹⁴⁷ including denial of the Holocaust,¹⁴⁸ child pornography, insult, malicious gossip, defamation, violation of intimate privacy by taking photographs or other images, and threatening commission of serious criminal offense.¹⁴⁹ For example, the link in a post to the article “*Merkel Regime Wants to Expropriate Land from Citizens in Order to Build Houses for Illegals*” was unlawful.¹⁵⁰ It was illegal because the article incited masses, where refugees and asylum seekers were described as “sex and violence tourists” and as “African drug dealers or rapists” and it was claimed that “no normal person wants to have illegal asylum seekers as direct neighbors.”¹⁵¹

¹⁴⁵ NetzDG § 3, para. 1.

¹⁴⁶ An example of a symbol of an unconstitutional organization is the Nazi swastika. Oberlandesgericht [OLG] [Higher Regional Court] Frankfurt, Mar. 18, 1998, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 356 (1999).

¹⁴⁷ This may include slurs that go beyond mere expressions of rejection and contempt that incite a hostile attitude, such that these expressions constitute the incitement of hatred. An example is insulting someone as a “cheeky Jew functionary”, because the term “cheeky Jew” (“*frecher Jude*”) is part of the characteristic vocabulary of the Nazi language. Oberlandesgericht [OLG] [Higher Regional Court] Hamm, Jan. 28, 2020, 3 RVs 1/20, *aff’d*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 7, 2020, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 297 (2021).

¹⁴⁸ Holocaust denial is indictable under STRAFGESETZBUCH [STGB] [PENAL CODE], § 130, para. 3, translation available at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.pdf [<https://perma.cc/9GDN-WMF4>] (“Whoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6(1) of the Code of Crimes against International Law in a manner which is suitable for causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding five years or a fine.”).

¹⁴⁹ NetzDG § 1, para. 3 (referring to, among other sections, STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 86a, 129a, 130, 184b, 185, 185, 187, 201, and 241). For more on the German Speech-Related Criminal Codes, see Kraski, *supra* note 114, at 938–40.

¹⁵⁰ Oberlandesgericht [OLG] [Higher Regional Court] München, Sept. 17, 2018, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3119, 3121–22 (2018).

¹⁵¹ *Id.*

However, it is important to point out that not everything one might call hate speech or fake news falls within the scope of the NetzDG. One of the listed offenses must necessarily be present.¹⁵² Hence, particularly in the fight against fake news, it was clear from the outset that the NetzDG can only make a limited contribution.¹⁵³ A mere false assertion of a fact is not punishable per se but is only indictable under very specific circumstances.

Furthermore, it is important to emphasize (and is often neglected) that the removal and blocking obligations for platforms, as explained above, already result from general legal principles¹⁵⁴ and that the NetzDG is only intended to regulate practical enforcement (i.e., the procedure).¹⁵⁵ This is expressly provided for in the legislation materials.¹⁵⁶ Thus, the NetzDG does not “introduce a new liability regime nor does it render previously legal speech illegal. It rather sets up a compliance regime [for] complaints managements.”¹⁵⁷ Besides, this is reflected by the Act’s title, Network *Enforcement Act*.

Consequently, in criminal offenses without the involvement of personal rights interests (e.g., use of symbols of unconstitutional organizations), there is no claim for removal or blocking. But in the event of failure to delete the illegal content, potential regulatory consequences through fines may follow.¹⁵⁸

B. Procedure for Handling Complaints

In handling complaints, platforms first check for a violation of their own guidelines.¹⁵⁹ If they find any infringement, they delete

¹⁵² NetzDG § 1, para. 3.

¹⁵³ Löber & Roßnagel, *supra* note 133, at 74.

¹⁵⁴ *Supra* Section II.C.1.

¹⁵⁵ Alexander Schiff, *Meinungsfreiheit in mediatisierten digitalen Räumen. Das NetzDG auf dem Prüfstand des Verfassungsrechts*, 21 MULIMEDIA UND RECHT [MMR] 366, 367 (2018).

¹⁵⁶ Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses’ Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 22.

¹⁵⁷ Schmitz-Berndt & Berndt, *supra* note 111, at 16.

¹⁵⁸ NetzDG § 4.

¹⁵⁹ For those guidelines, see *infra* Part IV.

the content across all countries; if not, they check for blocking on the basis of the NetzDG, which then only takes place in Germany.¹⁶⁰

1. Statutory Standards

NetzDG regulates proceedings to remove or block certain unlawful posts. Removal means that the content is deleted worldwide, whereas blocked content is unavailable only for users with a German IP address.¹⁶¹

Social networks must “maintain an effective and transparent procedure for handling complaints about unlawful content” and provide “users with an easily recognizable, directly accessible and permanently available procedure for submitting complaints.”¹⁶² The procedure must ensure that complaints are immediately addressed and checks are carried out.¹⁶³ The report must be noted by someone who is authorized to delete and block content.¹⁶⁴ Management must monitor the processing of complaints and offer training courses to the concerned employees.¹⁶⁵ Both the complainant and the user who posted the content must be notified about any decision rendered.¹⁶⁶ Every registered user may avail themselves of this complaint procedure. However, people outside the social network cannot, even if they are affected by illegal content—they can only rely on their tort-based claim.¹⁶⁷ As a result, one needs to create an account in order to benefit from the complaint procedure, which seems odd.

¹⁶⁰ E.g., *Removals Under the Network Enforcement Law*, GOOGLE, <https://transparencyreport.google.com/netzdg/youtube?hl=en> [<https://perma.cc/6RY7-6F4Y>] (“If the content violates our YouTube Community Guidelines we remove it globally. If the content does not fall under these policies, but we identify it as illegal according to one of the 21 statutes of the StGB to which NetzDG refers (§ 1 III NetzDG) or any other local law, we locally restrict it.”).

¹⁶¹ Schmitz-Berndt & Berndt, *supra* note 111, at 18. Thus, the social network platforms opt for “blocking” if content does not infringe their self-imposed guidelines, but does infringe Section 1, paragraph 3 of the NetzDG.

¹⁶² NetzDG § 3, para. 1.

¹⁶³ *Id.* § 3, para. 2, no. 1.

¹⁶⁴ Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses’ Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 22.

¹⁶⁵ NetzDG § 3, para. 4.

¹⁶⁶ *Id.* § 3, para. 2, no. 5.

¹⁶⁷ Nikolaus Guggenberger, *Das Netzwerkdurchsetzungsgesetz in der Anwendung*, 36 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2577, 2581 (2017).

Regardless, manifestly unlawful content must get removed or blocked within twenty-four hours of receiving the complaint.¹⁶⁸ According to NetzDG's legislative materials, a post is manifestly unlawful "if an in-depth examination is not necessary to find the unlawfulness."¹⁶⁹ This arguably applies, for instance, to insults using swear words. On the other hand, it is not manifestly unlawful if doubts remain in fact or in law.¹⁷⁰ The social network, however, can also reach an agreement with the competent law enforcement authority to extend the period of time in which they must delete or block any manifestly unlawful content.¹⁷¹

Content that is not manifestly unlawful must be banned immediately—*unverzüglich*—and generally within seven days of receiving the complaint.¹⁷² It is worth mentioning here that *unverzüglich* is an established term in German civil law and defined by the Civil Code as "without culpable delay"—"*ohne schuldhaftes Zögern*."¹⁷³ Depending on the specific circumstances, a period greater than seven days may be deemed appropriate.¹⁷⁴ If the content refers to factual circumstances, the social network can give the user an opportunity to respond to the complaint and exceed the seven-day time limit.¹⁷⁵ If the opportunity for the user to respond remains unused, the social network may assume that the complaint is correct and remove the content; if, on the other hand, the user defends himself, the network must weigh up the credibility of conflicting claims.¹⁷⁶

¹⁶⁸ NetzDG § 3, para. 2, no. 2.

¹⁶⁹ Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 22.

¹⁷⁰ Beschlussempfehlung des Rechtsausschusses [Resolution Recommendation of the Legal Committee], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/13013, 20.

¹⁷¹ NetzDG § 3, para. 2, no. 2.

¹⁷² *Id.* § 3, para. 2, no. 3.

¹⁷³ BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 121, para. 1, sentence 1, translation available at <https://perma.cc/2Z25-2F2K>. The above-mentioned English language version of the NetzDG (*supra* note 7) is unfortunately somewhat imprecise in this respect, as it does not correspond terminologically to the English translation of the BGB published by the Federal Ministry of Justice.

¹⁷⁴ NetzDG § 3, para. 2, no. 3; *see also* Beschlussempfehlung des Rechtsausschusses [Resolution Recommendation of the Legal Committee], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/13013, 20.

¹⁷⁵ NetzDG § 3, para. 2, no. 3a.

¹⁷⁶ Beschlussempfehlung des Rechtsausschusses [Resolution Recommendation of the Legal Committee], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/13013, 21.

2. Data on Previous Bans

In addition to the above, social networks must provide the public with other information, including complaints received, removals, and bans imposed.¹⁷⁷ So far, social networks have published five transparency reports for the two halves of 2018 and 2019, respectively, and the first half of 2020.¹⁷⁸ YouTube also published its report for the second half of 2020.¹⁷⁹

In those years, YouTube counted 1,757,303 reported items.¹⁸⁰ Of these items, it removed 420,307,¹⁸¹ which results in 23.92% of items being removed, most of them “defamation or insults” or “hate speech or political extremism.”¹⁸² In the second half of 2020, YouTube processed 64,774 of 73,477 complaints within twenty-four hours, or 88.15%.¹⁸³ During this period, only 1,865 posts were blocked on basis of NetzDG, whereas 71,612 were blocked on the basis of YouTube’s Community Guidelines,¹⁸⁴ resulting in NetzDG’s share of not more than 2.6%. The NetzDG complaints Facebook received in 2018, 2019, and the first half of 2020 concerned just 14,114 items,¹⁸⁵ 4,431 of which were deleted¹⁸⁶—a rate of 31.39%. Here, too, most of the blockings were carried out within twenty-four hours.¹⁸⁷ Facebook, as opposed to YouTube, does not publish its data on complaints and removals in their NetzDG reports

¹⁷⁷ NetzDG § 2.

¹⁷⁸ This Article focuses on the three most important social networks: YouTube, Facebook, and Twitter. Other platforms fall within NetzDG’s scope as well. *Supra* note 144.

¹⁷⁹ *Removals under the Network Enforcement Law*, *supra* note 160.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ FACEBOOK, NETZDG TRANSPARENCY REPORT § 3 (July 2018–July 2020) <https://www.facebook.com/help/285230728652028> [<https://perma.cc/C9KU-3SVT>]. The number of complaints on Facebook is probably much lower because a report based on the NetzDG cannot be made directly at the post, where, by contrast, a report based on the Community Standards could be made. Schmitz-Berndt & Berndt, *supra* note 111, at 36. After all, the fine imposed on Facebook in 2019 was also motivated by the fact that the reporting form was too hidden. *See infra* Section III.E.

¹⁸⁶ FACEBOOK, *supra* note 185, at § 7.

¹⁸⁷ *See id.* at § 8.

but only on a worldwide basis, because of its Community Standards.¹⁸⁸ This makes a comparison to NetzDG blocking very difficult. Twitter received 2,633,986 complaints¹⁸⁹ with 357,985 of them being successful, or 13.59%.¹⁹⁰ After all, in 2018 and 2019, a total of 2,921,553 complaints were submitted to all social networks affected by the NetzDG, of which about 28% resulted in blockings.¹⁹¹

3. Cooperation with Authorities

On February 19, 2020, the German federal government approved a draft amendment to the NetzDG that primarily introduced an obligation for social media to report removed and blocked content to the Federal Criminal Police Office¹⁹² if some of the offenses listed in NetzDG, section 1, paragraph 3 have been committed.¹⁹³ These offenses include incitement of the masses, but does not include insult.¹⁹⁴ In addition to the posted content, the report shall also include the user's IP address if known.¹⁹⁵ A fine may be imposed on social networks if the procedure for transmitting the reports is not set up.¹⁹⁶ The Federal Criminal Police Office is expected to transmit the information to the locally competent authority for criminal prosecution.¹⁹⁷

¹⁸⁸ See FACEBOOK, COMMUNITY STANDARDS ENFORCEMENT REPORT, <https://transparency.facebook.com/community-standards-enforcement> [<https://perma.cc/H3GE-RXZJ>].

¹⁸⁹ See TWITTER, NETWORK ENFORCEMENT ACT REPORT, (Jan. 2018-June 2020) <https://transparency.twitter.com/de/countries/de.html> [<https://perma.cc/9E63-LCXX>].

¹⁹⁰ *See id.*

¹⁹¹ *See* DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 19/17741, *supra* note 92, at 14.

¹⁹² *See* Frank Jordans, *Germany: Bill Requires Sites to Report Hate Speech to Police*, ASSOCIATED PRESS (Feb. 19, 2020), <https://apnews.com/article/ef38dbeb3c0d026e65f5dde6edeb3837> [<https://perma.cc/PG2L-FB74>].

¹⁹³ *See* Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 19/17741, 13–14. This obligation will be enshrined in the future NetzDG § 3a.

¹⁹⁴ *Id.* at 15. These offences will be enumerated by the future NetzDG § 3a, para. 2, no. 3.

¹⁹⁵ *Id.* at 14. This will be stated by the future NetzDG § 3a, para. 4, no. 2.

¹⁹⁶ *Id.* 16. This will be stated by the future NetzDG § 4, para. 1, no. 6a.

¹⁹⁷ *Id.* at 15.

Some had already postulated that kind of cooperation between social media platform and criminal authorities before.¹⁹⁸ On March 10, 2020, the two governing parties introduced the draft into parliament,¹⁹⁹ where it was passed on June 18, 2020 without amendments to the NetzDG.²⁰⁰ After the draft had been updated,²⁰¹ the German head of state, the *Bundespräsident*, signed it into law on March 30, 2021. Most of the amendments to the NetzDG will come into force on February 1, 2022.²⁰²

4. Review Procedure?

On April 27, 2020, the government followed this first proposal with another draft amendment.²⁰³ Similar to previous proposals, this draft includes an obligation for social networks to provide an easily recognizable procedure by which decisions on complaints can be reviewed.²⁰⁴ Both the user and the complainant can appeal under that procedure within fourteen days of the decision.²⁰⁵ The opposing party must be given the opportunity to respond, and names will not

¹⁹⁸ See Löber & Roßnagel, *supra* note 133, at 75; Jan Christian Sahl & Nils Bielzer, *NetzDG 2.0—Ein Update für weniger Hass im Netz*, ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 2, 3 (2020).

¹⁹⁹ See Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]19/17741, 14.

²⁰⁰ See *Gesetz gegen Rechtsextremismus und Hasskriminalität beschlossen*, DEUTSCHER BUNDESTAG: DRUCKSACHEN, <https://www.bundestag.de/#url=L2Rva3VtZW50ZS90ZXh0YXJjaGl2LzlwMjAva3cyNS1kZS1yZWNoeHNleHRyZW1pc211cy03MDExMDQ=&mod=mod493054> [<https://perma.cc/CUG3-5MHA>].

²⁰¹ See Antwort der Bundesregierung auf eine Kleine Anfrage [Governmental Answer to an Inquiry], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]19/23867, 3, <https://dip21.bundestag.de/dip21/btd/19/238/1923867.pdf> [<https://perma.cc/G4S9-FV46>].

²⁰² See Art. 10(2) Gesetz zur Bekämpfung des Rechtsextremismus und der Hasskriminalität [Law on Combating Right-Wing Extremism and Hate Crime], March 30, 2021, BGBl at 441 (Ger.).

²⁰³ Gesetzentwurf der Bundesregierung [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]19/18792, 1, <https://dip21.bundestag.de/dip21/btd/19/187/1918792.pdf> [<https://perma.cc/59QG-V9XD>].

²⁰⁴ An evaluation commissioned by the Federal Ministry of Justice as well as Sahl & Bielzer had already called for this procedure. See EIFERT ET AL., NETZWERKDURCHSETZUNGSGESETZ IN DER BEWÄHRUNG 195 (1 Aufl. 2020); see also Sahl & Bielzer, *supra* note 198, at 4.

²⁰⁵ See Gesetzentwurf der Bundesregierung [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]19/18792, 9.

be disclosed.²⁰⁶ Thus, the government intends to explicitly enable a put-back claim, which several scholars had been calling for.²⁰⁷ Furthermore, there exists the possibility that disputes be brought before private arbitration boards. The parliament has not discussed that proposal yet.

C. Self-Regulating Institution

The seven-day time limit does not apply if the social network refers the decision to a recognized self-regulating institution within seven days of receiving the initial complaint.²⁰⁸ The social network fulfills its obligation by handing the complaints over to the institution.²⁰⁹ Facebook's recently founded Oversight Board, to which Facebook and its users can refer cases for review and whose decisions are binding, is arguably an example of such an institution.²¹⁰

For the purpose of this alternative procedure, the relevant administrative authority²¹¹ will recognize such an institution under certain conditions.²¹² In January 2020, for the first time, the Federal Office of Justice acknowledged a private organization as a self-regulating institution under the NetzDG.²¹³ In order to determine if an institution fits this definition, it must be reviewed by a panel which

²⁰⁶ *Id.* at 10.

²⁰⁷ See Löber & Roßnagel, *supra* note 133, at 75; Alexander Peukert, *Gewährleistung der Meinungs- und Informationsfreiheit in sozialen Netzwerken. Vorschlag für eine Ergänzung des NetzDG um sog. Put-back-Verfahren*, 21 MULTIMEDIA UND RECHT [MMR] 572, 572 (2018); Schiff, *supra* note 155, at 366. *Contra* Sandra Niggemann, *Die NetzDG-Novelle*, COMPUTER UND RECHT [CR] 326, 330 (2020). So far, such a claim is accorded by the courts based on general principles, but not explicitly stipulated. See discussion *infra* Section IV.B.

²⁰⁸ See NetzDG § 3. This does not apply, however, to manifestly unlawful content. See *Beschlussempfehlung des Rechtsausschusses [Resolution Recommendation of the Legal Committee]*, DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/13013, 21.

²⁰⁹ See *id.* at 21.

²¹⁰ See Brent Harris, *Establishing Structure and Governance for an Independent Oversight Board*, FACEBOOK (Sept. 17, 2019), <https://about.fb.com/news/2019/09/oversight-board-structure/> [<https://perma.cc/56US-2NDK>].

²¹¹ See Press Release, Bundesamt für Justiz [BfJ] [Federal Office of Justice], *Erstmals Selbstregulierung nach dem Netzwerkdurchsetzungsgesetz* (Jan. 23, 2020), available at <https://www.bundesjustizamt.de/DE/Presse/Archiv/2020/20200123.html> [<https://perma.cc/3T76-8BBX>].

²¹² See NetzDG § 3.

²¹³ See BfJ, *supra* note 211.

consists of fifty lawyers, forming committees of three members.²¹⁴ So far, Facebook and Google have joined that institution.²¹⁵

D. Reporting Obligation

Many deplore the lack of transparency with respect to platforms' handling of complaints.²¹⁶ NetzDG aimed to address that issue: if a social network receives more than 100 complaints per calendar year, it must publish in the Federal Gazette—as well as on its website—half-yearly German-language reports on the handling of unlawful content complaints, expounding several enumerated issues.²¹⁷ Platforms' biannual reports must include a description of the established proceedings, staffing numbers, the numbers of incoming complaints, and executed removals or blockings.²¹⁸

E. Regulatory Fines

The relevant administrative authority may impose a regulatory fine for actions or omissions including failure to produce a correct transparency report²¹⁹ or failure to correctly provide a procedure for dealing with complaints under the NetzDG.²²⁰ The central concept of this regulation is that only systematic—or persistent²²¹—violations by social networks can be sanctioned.²²² Thus, a simple error in judging a post does not expose the social network to fines. Nor

²¹⁴ See NetzDG, FREIWILLIGE SELBSTKONTROLLE MULTIMEDIA-DIENSTEBIETER [FSM] [ASSOCIATION FOR VOLUNTARY SELF-REGULATION OF DIGITAL MEDIA SERVICE PROVIDERS], <https://www.fsm.de/en/netzdg#N1> [<https://perma.cc/7P9W-RB45>].

²¹⁵ See WILLIAM ECHIKSON & OLIVIA KNODT, GERMANY'S NETZDG: A KEY TEST FOR COMBATTING ONLINE HATE 12 (Nov. 22, 2018).

²¹⁶ See e.g., *Klonick*, *supra* note 21, at 1665.

²¹⁷ See NetzDG § 2.

²¹⁸ See *id.*

²¹⁹ See NetzDG § 4.

²²⁰ See *id.*

²²¹ See Beschlussempfehlung des Rechtsausschusses [Resolution Recommendation of the Legal Committee], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/13013, 22.

²²² See Spindler, *supra* note 127, at 365; Guggenberger, *supra* note 126, at 99; Echikson & Knodt, *supra* note 215, at 4; Schmitz-Berndt & Berndt, *supra* note 111, at 19; see also DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/12356, *supra* note 95, at 24–25; DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/12727, *supra* note 103, at 27; DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 19/18792, *supra* note 203, at 51.

does a misjudgment of a statement's credibility to justify a complaint or the response cause a fine.²²³

The maximum fine is €50 million, approximately \$55 million as of writing this Article.²²⁴ As stated, this is the maximum, not the rule. The exact fine is determined according to guidelines laid out by the relevant agency.²²⁵ These guidelines are general administrative principles on the exercise of that authority's discretion regarding whether to impose a fine and how to calculate it.²²⁶ According to these guidelines, cases that are difficult to decide legally—e.g., sharp statements in political opinion campaigns—do not result in fines.²²⁷ The calculation of the fine is based on certain parameters, such as network's registered number of users, economic circumstances, and whether the circumstances and consequences of the offense are deemed light, medium, serious, very serious, or extremely serious.²²⁸ In July 2019, the authority imposed a fine on Facebook of €2 million based on its flawed transparency report for the first half of 2018 and the reporting form being “too hidden” for its users.²²⁹

The federal government's draft amendment to the NetzDG from April 2020 proposes that the supervisory administrative authority shall, in addition to its capacity to impose fines, be able to take other

²²³ See *Beschlussempfehlung des Rechtsausschusses* [Resolution Recommendation of the Legal Committee], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/13013, 21.

²²⁴ See NetzDG § 4; GESETZ ÜBER ORDNUNGSWIDRIGKEITEN [OWiG] [ACT ON REGULATORY OFFENSES], § 30, para. 2.

²²⁵ See NetzDG § 4; Bundesamt für Justiz [BfJ] [Federal Office of Justice], *Leitlinien Bußgelder* [NetzDG Fine Guidelines], 1, available at https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/NetzDG/Leitlinien_Geldbussen_de.pdf?__blob=publicationFile&v=6 [<https://perma.cc/8VCF-K9D9>].

²²⁶ *Id.* at 2.

²²⁷ *See id.* at 10.

²²⁸ *See id.* at 13–14.

²²⁹ See Press Release, Federal Office of Justice, Federal Office of Justice Issues Fine Against Facebook (July 3, 2019), available at https://www.bundesjustizamt.de/DE/Presse/Archiv/2019/20190702_EN.html;jsessionid=CD4C0964D478984E72B7794B5BF8EA81.1_cid394?nn=3451904 [<https://perma.cc/D4UX-M9XE>].

“necessary measures” and oblige the platform to remedy the infringement.²³⁰ This way, the authority can refrain from immediately charging fines, and can proceed with caution instead.

IV. THE APPROACH OF INTERNAL REGULATION: SELF-IMPOSED STANDARDS

Facebook’s Community Standards,²³¹ YouTube’s Community Guidelines,²³² and Twitter’s Rules and Policy²³³ contain self-imposed terms of prohibited content. Those may or may not overlap with NetzDG’s regulation of “unlawful content.” Facebook, for example, restricts the display of female breasts if the nipples are visible.²³⁴ German law, in general, does not compel that. Moreover, self-imposed standards apply globally and provide the networks with more potential measures in case of a violation, most notably the blocking of an account or a read-only restriction, which does not exist in the NetzDG. Regardless, the NetzDG does not preclude more stringent regulations.²³⁵

Those self-imposed standards provide both the networks as well as their user communities with advantages compared to external regulation. Self-framed rules will be easier to interpret and apply, which promotes uniform enforcement. They might also enjoy greater acceptance because users consent to them when creating an account. The existing self-imposed standards express a certain social and cor-

²³⁰ Gesetzentwurf der Bundesregierung [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]19/18792, 13.

²³¹ *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/> [<https://perma.cc/DBL5-H294>].

²³² *YouTube’s Community Guidelines*, YOUTUBE, <https://creatoracademy.youtube.com/page/course/community-guidelines> [<https://perma.cc/9HAC-VNGB>].

²³³ *The Twitter Rules*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/8TTZ-U97G>].

²³⁴ *See 14. Adult Nudity and Sexual Activity*, FACEBOOK, https://www.facebook.com/communitystandards/adult_nudity_sexual_activity [<https://perma.cc/S63C-R6QZ>]. However, Facebook does allow images that depict protest actions or breastfeeding women, or photos of scarring after breast amputations. *Id.*

²³⁵ Oberlandesgericht [OLG] [Higher Regional Court] Dresden Aug. 8, 2018, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3111, 3113 (2018); Oberlandesgericht [OLG] [Higher Regional Court] Nürnberg Aug. 4, 2020, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT RECHTSPRECHUNGSDIENST [ZUM-RD] 16, 24 (2021).

porate responsibility and, even more importantly, are based on economic necessities.²³⁶ Platforms pursuing a sound business model simply cannot afford a hostile environment on their sites as it will deter many decent users.²³⁷

A. External Regulation of Internal Regulation

Under German law, the self-imposed standards are regarded as general terms and conditions (“*Allgemeine Geschäftsbedingungen*,” “*AGB*”) in the contractual relationship between user and platform.²³⁸ Such *AGB* are subject to intense regulation by the German Civil Code and can be held void by courts in the event of a violation of the regulations.²³⁹ However, the courts have upheld No. 12 of Face-

²³⁶ Klonick, *supra* note 21, at 1615, 1617–18, 1625 (“[P]latforms have created a voluntary system of self-regulation because they are economically motivated to create a hospitable environment for their users in order to incentivize engagement. This self-regulation involves both reflecting the norms of their users around speech as well as keeping up as much speech as possible. Online platforms also self-regulate for reasons of social and corporate responsibility, which in turn reflect free speech norms.”).

²³⁷ *Id.* at 1627 (“Take down too much content and you lose not only the opportunity for interaction, but also the potential trust of users. Likewise, keeping up all content on a site risks making users uncomfortable and losing page views and revenue.”). Twitter is named an example in that regard. *Id.* at 1629 (“As Twitter’s user growth stagnated, many blamed the site’s inability to police harassment, hate speech, and trolling on its site for the slump.”).

²³⁸ Facebook’s Terms of Service, for instance, explicitly refer to its Community Standards. *Terms of Service*, FACEBOOK, <https://www.facebook.com/legal/terms> [<https://perma.cc/E8DX-REMX>]. Yet, German courts usually do not draw a distinction in that regard, and deem the self-imposed rules as terms and conditions, no matter where they are laid down. *E.g.*, Oberlandesgericht [OLG] [Higher Regional Court] München, Jan. 7, 2020, MULTIMEDIA UND RECHT [MMR] 79, 81 (2021) (referring to No. 5 of Facebook’s Terms of Service); Landgericht [LG] [Regional Court] Frankenthal, Sept. 8, 2020, MULTIMEDIA UND RECHT [MMR] 85, 85–86 (2021) (referring to Facebook’s Community Standards); *see also* Oberlandesgericht [OLG] [Higher Regional Court] Dresden Dec. 11, 2019, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT RECHTSPRECHUNGSDIENST [ZUM-RD] 2, 3–4 (2021) (considering No. 12 of Facebook’s Community Standards and No. 3.2 of its Terms of Service); OLG Nürnberg, ZUM-RD 16, 20 (stating that users’ obligations are circumscribed in Facebook’s Terms of Service and further defined in the Community Standards).

²³⁹ BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], §§ 305–10, translation available at https://www.gesetze-im-internet.de/englisch_bgb/ [<https://perma.cc/BGC6-C7QV>].

book’s Community Standards on hate speech; this provision is neither “surprising,”²⁴⁰ “opaque,”²⁴¹ nor “disproportionate.”²⁴² To name a few examples, Facebook deleted the following posts based on its Community Standards; these deletions were approved by German courts in all five cases:

“From the experience made so far with Islam, the one more other less, it is probably very clear that this human race²⁴³ does not fit into the European culture.”²⁴⁴

²⁴⁰ OLG Dresden, NJW 3111, 3113 (2018); OLG Dresden, ZUM-RD 2, 3–4; Oberlandesgericht [OLG] [Higher Regional Court] Karlsruhe Feb. 28, 2019, MULTIMEDIA UND RECHT [MMR] 52, 54 (2020); *see also* Oberlandesgericht [OLG] [Higher Regional Court] Stuttgart Sept. 6, 2018, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 273, 276 (2019). A “surprising clause” is invalid pursuant to BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 305c, para. 1.

²⁴¹ OLG Dresden, NJW 3111, 3113; OLG Karlsruhe, MMR 52, 54; Oberlandesgericht [OLG] [Higher Regional Court] Nürnberg, Aug. 4, 2020, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT RECHTSPRECHUNGSDIENST [ZUM-RD] 16, 24–25 (2021); Landgericht [LG] [Regional Court] Stuttgart, Aug. 29, 2019, MULTIMEDIA UND RECHT [MMR] 423, 423–24 (2020); Landgericht [LG] [Regional Court] Bremen June 20, 2029, MULTIMEDIA UND RECHT [MMR] 426, 428 (2020); *see also* OLG Stuttgart, ZUM 2019, 273, 276; Oberlandesgericht [OLG] [Higher Regional Court] Dresden, June 16, 2020, MULTIMEDIA UND RECHT [MMR] 58, 59 (2021) (on Facebook’s Terms of Service). An “opaque clause” is invalid pursuant to BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 307, para. 1, sentence 2.

²⁴² OLG Dresden, NJW 3111, 3113–14 (2018); OLG Nürnberg ZUM-RD 16, 24; OLG Karlsruhe, MMR 52, 54; LG Bremen, MMR 426, 428; *see also* OLG Stuttgart, ZUM 273, 277 on Facebook’s Terms of Service). A disproportionate clause is invalid pursuant to BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 307, para. 1, sentence 1.

²⁴³ It is worth mentioning here that the German word “*Rasse*” is arguably used differently in the German language than the word “race” in English. In Germany, that word is rather taboo, probably because it was a frequently used term by the Nazi Regime for its inhuman ideology. This association is why some have called for removing that term from the German constitution. Hui Min Neo, *Row in Germany over ‘Race’ in Constitution*, BARRON’S (June 12, 2020), <https://www.barrons.com/news/row-in-germany-over-race-in-constitution-01591947605> [<https://perma.cc/6NYH-ELCP>]. So, too, the federal government agreed on replacing that term in the constitution (“*Rasse*”-Begriff soll aus dem Grundgesetz gestrichen werden, DUEUTSCHE WELLE (March. 5, 2021), <https://www.dw.com/de/rasse-begriff-soll-aus-dem-grundgesetz-gestrichen-werden/a-56787404> [<https://p.dw.com/p/3qGzs>]).

²⁴⁴ OLG Dresden, NJW 3111, 3112 (confirming the removal, as the statement assumes that the claimed inferiority is related to their uniform genetic disposition and is, therefore, unchangeable).

“Refugees: detain until they voluntarily leave the country!”²⁴⁵

“As Nostradamus said: over the sea they will come like locusts, but they will not be animals...how right was the man.”²⁴⁶

“We owe nothing to the Africans and Arabs. They have destroyed their continents by corruption, sloppiness, unrestrained reproduction, and tribal and religious wars, and now they are taking away from us what we have diligently built.”²⁴⁷

“You [i.e., Chancellor Merkel] have intentionally and unlawfully imported terror, war, poverty, and death by illegal asylum-free-loaders, hundreds of thousands of mercenaries, IS terrorists and other serious criminals into our country.... Public events now have to be massively secured, fenced in and secured by policemen with machine guns because of YOUR ILLEGAL GUESTS. Now there are protection zones for women who seek shelter from those seeking protection, so that they do not continue to become victims of sexual assault through YOUR DISINHIBITED GUESTS. Every day YOUR GUESTS commit violent crimes.”²⁴⁸

However, one court ruled that an expression of opinion permitted by law could not be removed on the basis of community standards which it deemed void.²⁴⁹ Other courts strongly disagree with

²⁴⁵ Oberlandesgericht [OLG] [Higher Regional Court] Karlsruhe, June 25, 2018, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3110, 3111 (2018) (confirming the removal, as the statement went beyond “mere criticism and discussion of the immigration laws”).

²⁴⁶ Oberlandesgericht [OLG] [Higher Regional Court] Stuttgart, Sept. 6, 2018, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 273, 276 (2019) (confirming the removal, because the post equates refugees with locusts, i.e., masses of voracious vermin).

²⁴⁷ OLG Karlsruhe, MMR 52, 53 (confirming the removal, as the statement ascribed moral deficits to these people on the sole basis of their membership of the ethnic group).

²⁴⁸ OLG München, MMR 79, 81–82 (confirming the removal, holding the post an incitement of masses under STRAFGESETZBUCH [STGB] [PENAL CODE], § 130 because all asylum seekers are described without differentiation as freeloaders and serious criminals. Thus, the post denies the social claim to human dignity. Moreover, this statement may, on the one hand, promote aggression towards certain people and, on the other, fear or insecurity among those).

²⁴⁹ Oberlandesgericht [OLG] [Higher Regional Court] München, Aug. 24, 2018, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3115, 3116 (2018). Confirmed by OLG München, ZUM 548, 554–57 (holding valid, however, Facebook’s contractual authority to ban hatred); Oberlandesgericht [OLG] [Higher Regional Court] München, Jan. 7, 2020, MULTIMEDIA UND RECHT [MMR] 79, 81–82 (2021); Oberlandesgericht [OLG] [Higher

this notion because hate speech threatens to “brutalize morals,” which might have a general negative impact on the exchange of opinions via social networks and, thus, also calls the business model of a social network into question.²⁵⁰ Consequently, platforms must be allowed a certain margin of discretion.²⁵¹ German courts are, therefore, somewhat inconsistent as regards the extent to which social media providers can regulate content posted on their platforms.

Provided the self-imposed standards are valid, courts evaluate whether a post infringes those guidelines. One court, for instance, held that the statement, “I cannot compete with you argumentatively, you are unarmed and that would not be very fair of me” does not violate Facebook’s Community Standards.²⁵² Another court interpreted YouTube’s Community Guidelines on hate speech rather narrowly, concluding that the term “knife immigration” (“*Messer-Einwanderung*”) may imply that refugees commit acts of violence using knives but does not stir up hatred against persons on account of their origin.²⁵³ Moreover, a court found the “*Erklärung 2018*” (“Declaration 2018”), a petition criticizing mass immigration, not to be hate speech and, thus, the declaration permissible.²⁵⁴ Likewise, the satiric recommendation for voters of Germany’s far-right party

Regional Court] München, Feb. 18, 2020, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT RECHTSPRECHUNGSDIENST [ZUM-RD] 8, 13 (2021). Nonetheless, the court allowed Facebook to remove hate speech infringing its Community Standards. *Id.* at 85. Other courts agreed that an expression of opinion permitted by law cannot be removed on the basis of community standards but considered those terms and conditions valid nonetheless. Oberlandesgericht [OLG] [Higher Regional Court] Oldenburg, July 1, 2019, MULTIMEDIA UND RECHT [MMR] 41, 42 (2020); Landgericht [LG] [Regional Court] Bamberg Oct. 18, 2018, MULTIMEDIA UND RECHT [MMR] 56, 58 (2019).

²⁵⁰ OLG Karlsruhe, MMR 52, 53; Oberlandesgericht [OLG] [Higher Regional Court] Dresden Aug. 8, 2018, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3111, 3114; *see also* Oberlandesgericht [OLG] [Higher Regional Court] Dresden, Apr. 7, 2020, MULTIMEDIA UND RECHT [MMR] 626, 626 (2020); LG Stuttgart, MMR 423, 425 (2020); Landgericht [LG] [Regional Court] Bremen, June 20, 2020, MULTIMEDIA UND RECHT [MMR] 426, 428 (2020).

²⁵¹ Landgericht [LG] [Regional Court] Frankenthal, Sept. 8, 2020, MULTIMEDIA UND RECHT [MMR] 85, 86 (2021).

²⁵² OLG München, NJW 3115, 3117 (2018). In the case of an unjustified ban, German courts grant a claim for remediation. *See infra* Section IV.B.

²⁵³ Kammergericht [KG] [Higher Regional Court] Mar. 22, 2019, MULTIMEDIA UND RECHT [MMR] 47, 48 (2020).

²⁵⁴ LG Bamberg, MMR 56, 58–59. On the Declaration, see *Erklärung 2018*, WIKIPEDIA, https://en.wikipedia.org/wiki/Erkl%C3%A4rung_2018 [<https://perma.cc/Y95X-MUJ7>].

to sign their ballots (which would void them under German law), ending with a winking emoticon, could not be banned by Twitter.²⁵⁵

After all, German courts have so far been more concerned with validity, interpretation, and application of the self-imposed standards than with the NetzDG, highlighting the greater importance of these questions in legal practice compared to the NetzDG. However, the self-imposed standards do not cancel out the NetzDG. Notably, the social networks must still observe NetzDG's deadlines—e.g., to process a user complaint.

B. *Unjustified Bans*

Even though the deletion of content, which is neither prohibited by the self-imposed standards nor covered by the NetzDG, is to be reduced as much as possible, the question arises whether users can demand remediation. Under current US law, they cannot (provided that the platform acted in good faith),²⁵⁶ whereas the legislative materials on the NetzDG allude to such a claim.²⁵⁷ Although it is not explicitly stated, German courts grant such claims based on general principles of law. If a ban is unjustified, they confer a claim based on the contract between the user and the social network, which is concluded upon the registration of a personal profile on the platform, without evaluating the provider's good faith.²⁵⁸ Additionally, courts can grant an interim injunction in order to enforce the claim

²⁵⁵ Landgericht [LG] [Regional Court] Nürnberg-Fürth, June 7, 2019, MULTIMEDIA UND RECHT [MMR] 541 (2019).

²⁵⁶ CDA § 230.

²⁵⁷ Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 23 (stating that nobody need accept that their legitimate statements are removed from social networks).

²⁵⁸ See e.g., Oberlandesgericht [OLG] [Higher Regional Court] München, Jan. 7, 2020, MULTIMEDIA UND RECHT [MMR] 79, 83 (2021); Oberlandesgericht [OLG] [Higher Regional Court] Dresden, Apr. 7, 2020, MULTIMEDIA UND RECHT [MMR] 626, 626 (2020); Oberlandesgericht [OLG] [Higher Regional Court] München, Jan. 7, 2020, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 548, 560 (2020); KG MMR 47, 47 (2020); Landgericht [LG] [Regional Court] Frankfurt, Sept. 3, 2020, KOMMUNIKATION & RECHT [K&R] 128, 129–30 (2021). On conclusion of contract see Oberlandesgericht [OLG] [Higher Regional Court] Dresden, Aug. 8, 2018, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3111, 3112 (2018); Oberlandesgericht [OLG] [Higher Regional Court] München, Aug. 24, 2018, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3115, 3116 (2018); Oberlandesgericht [OLG] [Higher Regional Court] München, Feb. 18, 2020, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT RECHTSPRECHUNGSDIENST [ZUM-RD] 8, 13 (2021).

rapidly.²⁵⁹ That claim also applies to unjustified blockings based on NetzDG.

V. CONTROVERSIES ABOUT REGULATING SOCIAL MEDIA

Much of the NetzDG criticism reflects concerns over the general external regulation of social media.²⁶⁰ Therefore, it is a suitable forum for discussing this approach.

A. *Deserved Control*

The NetzDG is based mainly on the consideration that illegal circumstances are perpetuated more strongly on the Internet than in traditional media²⁶¹ due to the “effects of defamation on the Internet, especially given the ease, scope and speed of the dissemination of information.”²⁶² Today, this is even more accurate than twenty-five years ago when CDA Section 230 was enacted.²⁶³ Nowadays, many applicants for jobs are first Googled and searched for on social networks.²⁶⁴ “The anonymity, amplification, and aggregation possibilities offered by the Internet have allowed private actors to discriminate, harass, and threaten vulnerable groups on a massive scale.”²⁶⁵ At the same time, a study in 2020 showed that social media may affect real-life actions by proving links between online posts and anti-refugee incidents in Germany.²⁶⁶

²⁵⁹ *E.g.*, OLG München, NJW 3115, 2018; Oberlandesgericht [OLG] [Higher Regional Court] Oldenburg, July 1, 2019, MULTIMEDIA UND RECHT [MMR] 41 (2020); OLG Dresden, MMR 626 (2020); LG Nürnberg-Fürth, MMR 541 (2019).

²⁶⁰ It is, for instance, generally concerned that a legal obligation to ban certain content would result in excessive censorship. *See, e.g.*, McMillan, *supra* note 9, at 265.

²⁶¹ Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses’ Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 21. This is criticized as to CDA Section 230. Saint, *supra* note 83, at 44 (“Internet defamation has a far greater potential to harm than defamation in printed materials.”).

²⁶² Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, App. No. 22947/13 (2016), [<https://perma.cc/QDK6-F9XS>].

²⁶³ *See* Chu, *supra* note 83 (providing several instances for how the Internet and its use have changed over time, concluding that this demands a change in law as well).

²⁶⁴ Citron & Wittes, *supra* note 47, at 412.

²⁶⁵ Citron & Franks, *supra* note 79, at 19.

²⁶⁶ Karsten Müller & Carlo Schwarz, *Fanning the Flames of Hate: Social Media and Hate Crime*, J. EUR. ECON. ASS’N, at 2 (2020).

Unfortunately, sometimes platforms do not treat all users equally, but rather privilege celebrities. For example, Facebook privileged then-presidential candidate Donald Trump during his 2016 campaign by leaving posts which had clearly violated the platform's standards untouched.²⁶⁷ Facebook has since been severely criticized for being too lenient with Trump.²⁶⁸ A law could prevent that. Additionally, it would provide a complementary remedy based on the provider-imposed standards for cases in which the internal regulation fails for whatever reason. And even though some users might be more willing to accept content moderation based on rules they consented to when initially creating an account,²⁶⁹ a law enacted by Congress would put content removals on a democratic footing.²⁷⁰

B. Cheapest Cost Avoider

From an economic point of view, accountability of Internet intermediaries is grounded on the notion of the cheapest cost avoider or least-cost avoider.²⁷¹ It should be noted that the party who can prevent the infringement by the simplest and most convenient means is the posting user.²⁷² However, if that party *de facto* cannot be held

²⁶⁷ *Supra* note 21 and accompanying text.

²⁶⁸ *Id.*

²⁶⁹ *Supra* Part IV.

²⁷⁰ Wu, *supra* note 38, at 2022 (“Nor can we ignore the fact that what counts as acceptable speech for billions of people around the world is currently being decided by a relatively small group of private actors in Northern California.”).

²⁷¹ See Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 307 (2005) (concluding that “[w]hen intermediaries have the technological capability to prevent harmful transactions and when the costs of doing so are reasonable in relation to the harm prevented, they should be encouraged to do so—with the threat of formal legal sanction if that becomes necessary.”); Ronen Perry & Tal Zarsky, *Liability for Online Anonymous Speech: Comparative and Economic Analyses*, 5 J. EUR. TORT L. 205, 205–06 (2014) (concluding that imposing liability on the provider is most efficient if the posting user is unavailable).

²⁷² Gerhard Wagner, *Haftung von Plattformen für Rechtsverletzungen (Teil 1)*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 329, 338 (2020); see also Kosseff, *supra* note 45, at 152 (“Although it is easier—and possibly more lucrative—to sue the website on which defamatory content appeared rather than an anonymous individual, it is fairer to seek compensation from the individual who actually created the allegedly harmful content. . . . Imposing liability on intermediaries, rather than on the parties who created the content, does not adequately accomplish [protecting individuals’ interests and maximizing society’s benefits].”).

liable for reasons of anonymity and/or enforcement difficulties, the service providers are targeted.²⁷³ They must stop the infringement to avert further damage that outweighs the costs of content moderation. Apart from the overall problem that a judgment against the posting user often comes too late and is difficult to enforce in other countries, German law explicitly provides for anonymity on the Internet.²⁷⁴ NetzDG can be regarded as a counterweight of this.

C. Potential Over-blocking (Collateral Censorship)

A major concern about requiring Internet providers to engage in content moderation by law is referred to as collateral censorship: “A censors B out of fear that the government will hold A liable for the effects of B’s speech.”²⁷⁵ Likewise, the most common criticism of NetzDG is the risk of over-blocking due to the threat of fines of up to €50 million, which would provide an incentive for deletion in

²⁷³ Balkin, *supra* note 45, at 434 (“Not only are these entities likely to have deeper pockets, they are also probably easier to find.”); Wu, *supra* note 44, at 300 (“[I]ntermediaries can control the speech they carry. Moreover, they can easily be identified, unlike users, who might use pseudonyms and communicate online without directly identifying themselves. Intermediaries can easily be sued, unlike users who might reside in a foreign jurisdiction, outside the reach of U.S. courts.”).

²⁷⁴ Telemediengesetz [TMG] [Teleservices Act], § 13, para. 4; *see* Wagner, *supra* note 272, at 337; Spindler, *supra* note 127, at 373. One court, however, ruled that a social network is entitled, in order to prevent unlawful behavior, to require the use of real names and to block the user account in the event of violations. OBERLANDESGERICHT [OLG] [HIGHER REGIONAL COURT] München, Dec. 8, 2020, 18 U 2822/19 Pre (2020).

²⁷⁵ Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2296 (1999); *see also* Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) (“Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not.”); Balkin, *supra* note 45, at 436 (“The same is true for online versions of newspapers and magazines which now allow readers to respond by posting comments. Without section 230, many website operators would simply disable these features.”); Note, *supra* note 45, at 2036 (“[E]xposing internet intermediaries to liability for defamation communicated by their users would lead to collateral censorship.”); Wu, *supra* note 44, at 308 (“[W]hen faced with liability for carrying particular content, the intermediary continues to have an incentive to censor when the original speaker would not, because it loses little or nothing for doing so, while the original speaker loses all of the benefits of that content.”).

questionable cases.²⁷⁶ In the legislative process, this concern was already addressed by the *Bundesrat*.²⁷⁷ Nevertheless, the government intended to reduce the risk of over-blocking by allowing social networks to solicit a statement from the user and, if necessary, an external expert's opinion.²⁷⁸

Some have expressed doubts about the thesis of over-blocking early on.²⁷⁹ After all, as shown above, only a systematic violation leads to a fine.²⁸⁰ Besides, the data provided by transparency reports does not indicate an excessive deletion of content.²⁸¹ A study on the effect of NetzDG within the first six months concluded that the Act:

[H]as not provoked mass requests for takedowns. Nor has it forced Internet platforms to adopt a 'take down, ask later' approach.... At the same time, it remains uncertain whether NetzDG has achieved sig-

²⁷⁶ Spindler, *supra* note 127, at 366; Liesching, *supra* note 126, at 27; Guggenberger, *supra* note 167, at 2580; Sebastian Müller-Franken, *Netzwerkdurchsetzungsgesetz: Selbstbehauptung des Rechts oder erster Schritt in die selbstregulierte Vorzensur? – Verfassungsrechtliche Fragen*, ZEITSCHRIFT FÜR DAS GESAMTE MEDIENRECHT [AFP] 1, 8–10 (2018); Karl-Heinz Ladeur & Tobias Gostomzyk, *Das Netzwerkdurchsetzungsgesetz und die Logik der Meinungsfreiheit*, KOMMUNIKATION & RECHT [K&R] 390, 392–93 (2017); Diana Lee, *Germany's NetzDG and the Threat to Online Free Speech*, Yale L. Sch. Media & Freedom Info. Access Clinic (Oct. 10, 2017), <https://law.yale.edu/mfia/case-disclosed/germanys-netzdg-and-threat-online-free-speech> [<https://perma.cc/QT3D-U99K>]; Kaye, *supra* note 18, at 4; Kaye, *Wir schaffen das!*, *supra* note 90; McMillan, *supra* note 9, at 265, 287 (“The Network Enforcement Act is not proportionate because it provides every incentive to over-police content with no oversight, and no equivalent incentive to ensure that lawful content is not deleted....Although no evidence of over-blocking has yet been found, there is a real concern that it may occur.”).

²⁷⁷ Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12727, 16–17.

²⁷⁸ Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 23.

²⁷⁹ E.g., Schiff, *supra* note 155, at 370; Karl-Nikolaus Peifer, *Netzwerkdurchsetzungsgesetz: Selbstbehauptung des Rechts oder erster Schritt in die selbstregulierte Vorzensur? – Zivilrechtliche Aspekte*, ZEITSCHRIFT FÜR DAS GESAMTE MEDIENRECHT [AFP] 14, 19–20 (2018).

²⁸⁰ See discussion *supra* Section III.E.

²⁸¹ See Löber & Roßnagel, *supra* note 133, at 73; Schmitz-Berndt & Berndt, *supra* note 111, at 36.

nificant results in reaching its stated goal of preventing hate speech. Evidence suggests that platforms are wriggling around strict compliance.²⁸²

Similarly, court rulings to date do not indicate that the platforms block excessively or systematically and unjustifiably.²⁸³ Additionally, it should be noted that German courts, generally speaking, grant a claim for remediation,²⁸⁴ which considerably reduces the incentive to delete content in case of doubt. It has been countered that this put-back claim is too weak because it does not accord damages and an interim injunction might come too late for urgent news.²⁸⁵ Yet, several published judgments show that some users take advantage of that claim by suing social networks,²⁸⁶ which puts pressure on those providers. More importantly, social media cannot afford removing content arbitrarily and on too large of a scale.²⁸⁷ For economic reasons, they must find an appropriate balance of banning daunting posts and keeping decent content in order to maintain a pleasant environment.²⁸⁸

In sum, the initial fear appears unfounded.²⁸⁹

²⁸² Echikson & Knodt, *supra* note 215, at i.

²⁸³ See discussion *supra* Section IV.A.

²⁸⁴ See discussion *supra* Section IV.B.

²⁸⁵ Gerhard Wagner, *Haftung von Plattformen für Rechtsverletzungen (Teil 2)*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 447, 452 (2020).

²⁸⁶ See *supra* Section IV.A.

²⁸⁷ But see Wu, *supra* note 44, at 308 (“Thus, within limits, intermediaries can likely obtain all or most of the advertising revenue they would otherwise obtain, while still censoring speech.”).

²⁸⁸ *Supra* notes 236–237 and accompanying text.

²⁸⁹ Christoph Buchert, *Ein Gewinn für den Rechtsstaat*, LEGAL TRIB. ONLINE (Oct. 26, 2019), <https://www.lto.de/recht/hintergruende/h/pro-contra-netzdg-ein-gewinn-fuer-den-rechtsstaat/> [<https://perma.cc/D63N-8VXR>]; Daniel Holznagel, *Put-back-Ansprüche gegen soziale Netzwerke: Quo Vadis?*, COMPUTER UND RECHT [CR] 518, 523 (2019); Rolf Schwartmann & Robin L. Mühlenbeck, *NetzDG und das virtuelle Hausrecht sozialer Netzwerke*, ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 170, 170 (2020); Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses’ Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]19/17741, 42; Gesetzentwurf der Bundesregierung [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]19/18792, 16. An evaluation commissioned by the Federal Ministry of Justice in 2020 came to the same conclusion. EIFERT ET AL., *supra* note 204, at 78–80, 91.

D. Chilling Effect

Others have argued that the NetzDG may have a chilling effect on users, as users may fear removal of their posts and, thus, shy away from making any statements.²⁹⁰ This would be particularly problematic in view of the (fundamental) right to Freedom of Expression.

However, if this effect existed, it would be based on irrational and erratic user behavior because they face liability regardless of the NetzDG, which does not change the assessment of the criminal or other liability for statements.²⁹¹ The risk of criminal prosecution is much more serious than that of blocking a post. It would, therefore, be incomprehensible if users were to refrain from posting content just because of the NetzDG. At best, it is conceivable that users might fear that their accounts will be blocked or suspended. Yet, this measure is not provided for by the NetzDG but can only be imposed on the basis of self-imposed standards.²⁹²

In its recent draft amendment, the German federal government contended that people affected by hate speech on the Internet might get deterred from social or political commitment, or even withdraw from discussions which would have a negative impact on the Freedom of Expression.²⁹³ A Pew Research survey of 4,248 US adults found that 27% of the participants back off from posting online after witnessing the harassment of others and 13% ceased using Internet services after witnessing harassing actions.²⁹⁴ Similarly, according

²⁹⁰ Nunziato, *supra* note 9, at 1535; Müller-Franken, *supra* note 276, at 10; McMillan, *supra* note 9, at 265; Zipursky, *supra* note 9, at 1359.

²⁹¹ Schmitz-Berndt & Berndt, *supra* note 111, at 28; Matthias Friehe, *Löschen und Sperren in sozialen Netzwerken*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1697, 1698 (2020).

²⁹² See discussion *supra* Part IV. One court concluded that even the possibility of user account deactivation due to hate speech and support of hate organizations under a social network's terms and conditions does not create a chilling effect. Oberlandesgericht [OLG] [Higher Regional Court] Dresden, June 16, 2020, MULTIMEDIA UND RECHT [MMR] 58, 60 (2021).

²⁹³ Gesetzentwurf der Bundesregierung [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]19/18792, 1, 15.

²⁹⁴ See 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/H935-DKKE>]; see also Citron & Wittes, *supra* note 47, at 410, 420.

to a 2019 survey by the Institute for Democracy and Civil Society of 7,349 German Internet users, when faced with hate speech on the Internet, 54% of respondents were less likely to express their political opinion and 47% were less likely to participate in discussions on the Internet.²⁹⁵ Given that only 8% of respondents in that study had already been personally affected by hate speech online and 40% had observed it, the study concluded that people are both systematically driven out of online discussions by hate speech and allow themselves to be driven out, even if they have not (yet) been personally attacked.²⁹⁶ However, from the percentage of affected respondents (54%),²⁹⁷ it follows that general knowledge about the mere existence of hate speech might discourage people from expressing their opinion online. This results in the exact opposite chilling effect.

E. Privatization of Decision-Making

A central point of criticism is the privatization of decision-making, since it is not the courts that rule on the admissibility of a post but private companies.²⁹⁸ It is argued that private players are unable to examine facts and engage in a complex balancing of factors, such as Freedom of Expression and Right of Personality, in a short period

²⁹⁵ Daniel Geschke et al., Institut für Demokratie und Zivilgesellschaft, *#Hass im Netz: Der schleichende Angriff auf unsere Demokratie 2* (June 2019), https://www.idz-jena.de/fileadmin/user_upload/_Hass_im_Netz_Executive_Summary.pdf [<https://perma.cc/6P49-YZQU>].

²⁹⁶ *Id.* at 1–2.

²⁹⁷ *Id.* at 2.

²⁹⁸ Guggenberger, *supra* note 126, at 100; Stephan Kološa, *Facebook and the Rule of Law*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 509, 523–24 (2020); Lee, *supra* note 276; Kaye, *Wir schaffen das!*, *supra* note 90; Zipursky, *supra* note 9, at 1359 (“[I]t is not the German government, but the intermediaries, that are making the decisions of what can be deleted. NetzDG does not give social media platforms a clear picture of which content violates German law. As a result, social media providers are the ones making the value judgments on what to delete from their deletion centers.”).

of time.²⁹⁹ That would be associated with a lack of due process.³⁰⁰ In this regard, the UN Special Rapporteur David Kaye also opined, “The liability placed upon private companies to remove third party content absent a judicial oversight is not compatible with international human rights law.”³⁰¹

That said, this criticism does not consider the fact that the companies must make their own decisions, as they already do based on their own guidelines.³⁰² Under CDA Section 230—the antithesis to the NetzDG—platforms also have the power to decide. For instance, within the boundaries of good faith, they can block completely legal and harmless statements.³⁰³ It is not the NetzDG that gives the platforms this power, but their structural characteristic as a platform. Moreover, under German law, the final decision always remains with the courts because users are entitled to remediation for unjustified bans.³⁰⁴ This compensates for a potential deficit in due process. Thus, external regulation should not only be perceived as vesting power in Internet providers—it also imposes restrictions on the providers by significantly limiting their power. Furthermore, with respect to NetzDG, this argument ignores the fact that platforms are obligated to take measures anyway under existing German law and thus completely disregards the Act’s mode of operation.³⁰⁵

²⁹⁹ Daphne Keller & Paddy Leerssen, *Facts and Where to Find Them: Empirical Research on Internet Platforms and Online Speech*, in SOCIAL MEDIA AND DEMOCRACY. THE STATE OF THE FIELD AND PROSPECTS FOR REFORM 220, 221 (Nathaniel Persily & Joshua A. Tucker eds., 2020) (“Evidence suggests that platforms don’t do a great job as enforcers of speech rules. Even when they apply their own, self-defined Community Guidelines, the results often appear erratic.”).

³⁰⁰ Balkin, *supra* note 9, at 2031; *see also* Müller-Franken, *supra* note 276, at 7.

³⁰¹ Kaye, *supra* note 18, at 4.

³⁰² Peifer, *supra* note 279, at 20.

³⁰³ CDA Section 230 does not contain any restriction in that respect. *Supra* note 36 and accompanying text.

³⁰⁴ Martin Eifert, *Rechenschaftspflichten für soziale Netzwerke und Suchmaschinen. Zur Veränderung des Umgangs von Recht und Politik mit dem Internet*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1450, 1451 (2017); *see also* Schiff, *supra* note 155, at 368.

³⁰⁵ Stefan Niggemeier, *Der übertriebene Hass auf das Anti-Hass-Gesetz*, ÜBER MEDIEN (Jan. 8, 2018), <https://uebermedien.de/24310/der-uebertriebene-hass-auf-das-anti-hass-gesetz/> [<https://perma.cc/N9M8-DPSD>].

As an alternative to the NetzDG, some propose to strengthen criminal law enforcement with increased human resources.³⁰⁶ Although this seems generally worth supporting, the question arises as to why this is necessary in relation to social networks. Why should taxpayers be burdened and social networks relieved when such companies are known to be eager to avoid taxes?³⁰⁷ It is not the state or the taxpayers who are at the root of the problem, but the platforms. Therefore, they must also bear the cost of solving it.

As another alternative, it is proposed that the law be amended so that removal and blocking under the NetzDG can only be carried out with the consent of a judge.³⁰⁸ Some countries already take this approach.³⁰⁹ That said, it should be reiterated that, firstly, both the user and the reporting person can bring an action under German law, and, secondly, judicial consent was not required under the law which was already in existence before the NetzDG.³¹⁰ This was neither provided for in the procedure envisaged by the Federal Court of Justice nor by the *Telemediengesetz* on the liability of a host provider.³¹¹ Moreover, this proposal would also cost taxpayers a lot of money.

Similarly, the third proposed alternative is to issue preliminary injunctions rapidly as under unfair competition law.³¹² However, this would pose an additional problem: who should have standing to

³⁰⁶ Guggenberger, *supra* note 126, at 101; *see also* Johanna Spiegel & Britta Heymann, *Ein Minenfeld für Anbieter sozialer Netzwerke – Zwischen NetzDG, Verfassungsrecht und Vertragsfreiheit*, KOMMUNIKATION & RECHT [K&R] 344, 349 (2020) (proposing that platforms may refuse to take action against content which is not manifestly illegal because users could seek help from criminal authorities).

³⁰⁷ *See, e.g.*, Chloe Taylor, *Silicon Valley Giants Accused of Avoiding \$100 Billion in Taxes over the Last Decade*, CNBC (Dec. 2, 2019, 9:44 AM), <https://www.cnbc.com/2019/12/02/silicon-valley-giants-accused-of-avoiding-100-billion-in-taxes.html> [<https://perma.cc/VM5Y-EMPA>].

³⁰⁸ Nima Mafi-Gudarzi, *Desinformation: Herausforderung für die wehrhafte Demokratie*, ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 65, 68 (2019).

³⁰⁹ Keller & Leerssen, *supra* note 299, at 224; Lei No. 12.965, de 23 Abril de 2014, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 4.24.2014, art. 19 (Braz.) (“[T]he provider of Internet applications can only be subject to civil liability for damages resulting from content generated by third parties if, after a specific court order, it does not take any steps to...make unavailable the content that was identified as being unlawful, unless otherwise provided by law.”).

³¹⁰ Schmitz-Berndt & Berndt, *supra* note 111, at 27, 38.

³¹¹ *Telemediengesetz* [TMG] [Teleservices Act], § 10.

³¹² Spindler, *supra* note 127, at 371; Guggenberger, *supra* note 126, at 101.

file an application for an injunction if no individual's legal interests are affected, for instance, in a case of the use of symbols of unconstitutional organizations? If numerous complaints were filed regarding the same post at the same time, different courts might decide differently on a single post. The problem may also arise with unfair competition because any competitor can apply for an injunction.³¹³ However, there are often many more platform users than competitors. If a politician posts something, an exceptionally large number of users might find it offensive. If the decisions were to be made as quickly as according to the NetzDG, courts would be under considerable time pressure in light of the large number of controversial posts. For blocking purposes, it would be sufficient if only one court were to consider the content illegal. This would not prevent over-blocking.

F. Expenditures

Obliging social media providers to take action inevitably comes along with incurring costs. In view of the occasionally stringent regulatory requirements imposed by NetzDG, some feared that the costs for social networks could become too high.³¹⁴ However, after implementation, this has not been found.³¹⁵

In the explanatory part of the initial NetzDG draft, the German government estimated that each social network would face additional annual expenditures of €28 million.³¹⁶ But in reality it is difficult to capture how high this expenditure truly is. Google employed sixty-five people to deal with NetzDG complaints in the second half of 2019 and twice hired an external law firm during that

³¹³ GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB [UWG] [ACT AGAINST UNFAIR COMPETITION], § 8, para. 3, no. 1, translation available at https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.pdf [<https://perma.cc/PB5U-C5JC>].

³¹⁴ *E.g., Opinion on the Draft of the Network Enforcement Act*, *supra* note 131, at 11.

³¹⁵ *See* Löber & Roßnagel, *supra* note 133, at 74.

³¹⁶ Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 2.

period.³¹⁷ Facebook employed 125 people in that period and consulted external lawyers in fourteen cases.³¹⁸ More than seventy people worked for Twitter, some of whom are employed by external service providers; external bodies were consulted on nineteen complaints.³¹⁹

None of this seems unreasonable or undue. After all, it is the platforms that benefit from posted content. For example, “Facebook exercises government-like powers, even though it is not a government: it is a private, for-profit company largely controlled by a single individual, whose primary objective is not necessarily to serve the public interest of his political community.”³²⁰ Moreover, the Internet has left its infancy. While potential liability can burden and inhibit an Internet provider in its initial phase, this danger is now much less compelling.³²¹ The networks have become so large that they can handle the extra effort. In addition, experience in dealing with content moderation has already been gathered from which lessons can be learned. If start-ups need to be protected, they may be exempted from regulation, as outlined in the NetzDG.

G. NetzDG’s Miscellaneous Controversies

Further discussions about the NetzDG, which are not particularly relevant for the regulatory approach as such, are not addressed by this Article. However, this criticism shall not be concealed. The

³¹⁷ See *Removals Under the Network Enforcement Law*, *supra* note 160.

³¹⁸ See *NetzDG Transparency Report*, FACEBOOK (Jan. 2020), https://about.fb.com/wp-content/uploads/2020/01/facebook_netzdg_January_2020_english.pdf [<https://perma.cc/4CK7-X8Y8>].

³¹⁹ See *Twitter Netzwerkdurchsetzungsgesetzbericht: Juli - Dezember 2019* [Twitter Network Enforcement Law Report], TWITTER (Dec. 2019), <https://cdn.cms-twdigitalassets.com/content/dam/transparency-twitter/data/download-netzdg-report/netzdg-jul-dec-2019.pdf> [<https://perma.cc/RXU2-6SGA>].

³²⁰ Francis Fukuyama & Andrew Grotto, *Comparative Media Regulation in the US and Europe*, in *SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD AND PROSPECTS FOR REFORM* 210 (Nathaniel Persily & Joshua A. Tucker eds., 2020).

³²¹ *Citron & Wittes*, *supra* note 47, at 410–11; see also *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) (“The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses.”).

NetzDG controversy also revolved around legislative powers³²² and the Act's compatibility with European law.³²³ Moreover, there are often complaints about problems in the interpretation of the NetzDG, such as the definition of the term "social network."³²⁴

³²² Germany has a federal system with legislative powers accorded to both the federal state and the states. The sixteen states have the right to legislate insofar as the constitution does not confer legislative power on the federal state. GRUNDGESETZ [GG] [BASIC LAW], Art. 70, para. 1. As for the NetzDG, the federal government invokes its competence both for public welfare and for law relating to economic matters. *Id.* at art. 74, para. 1, nos. 7, 11; see Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 13. Most scholars disagree and consider the states competent. See e.g., Spindler, *supra* note 127, at 366; Liesching, *supra* note 126, at 26; Kalscheuer & Hornung, *supra* note 126, at 1724–25; Ladeur & Gostomzyk, *supra* note 276, at 390–91. *Contra* Schiff, *supra* note 155, at 366–67. Nonetheless, in its two proposals to amend the NetzDG from February and April 2020, the government maintains its assertion. See Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]19/17741, 19; Gesetzentwurf der Bundesregierung [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]19/18792, 19.

³²³ In that regard, two questions arise. Firstly, a violation of Art. 3(2) of the E-Commerce Directive is seen in the fact that the NetzDG applies to networks based in other EU member states and lays down stricter rules than the respective country of domicile. E-Commerce Directive, *supra* note 117, at art. 3(2) ("Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State."); see also Spindler, *supra* note 127, at 367; Guggenberger, *supra* note 167, at 2581; Liesching, *supra* note 126, at 29. With respect to YouTube, Facebook, and Twitter, the European country of domicile is Ireland. The German government invokes an exception provided by the directive, claiming the NetzDG is necessary for public policy reasons, "in particular the prevention, investigation, detection and prosecution of criminal offenses, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons." Gesetzentwurf der Fraktionen der CDU/CSU und SPD [Governing Caucuses' Draft] DEUTSCHER BUNDESTAG: DRUCKSACHEN[BT]18/12356, 14; E-Commerce Directive, *supra* note 117, at art. 3(4)(a), no. i.; see also Patrick Nölscher, *Das Netzwerkdurchsetzungsgesetz und seine Vereinbarkeit mit dem Unionsrecht*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 301, 307–11 (2020). Secondly, a potential conflict arises with article 14 of the E-Commerce Directive, according to which a host provider must act "expeditiously to remove or to disable access to the information." E-Commerce Directive, *supra* note 117, at art. 14(1)(b). Some assume that NetzDG's rigid time limit for manifestly unlawful content is repugnant to that provision. Guggenberger, *supra* note 167, at 2579. *Contra* Nölscher, *supra*, at 303–06.

³²⁴ E.g., Spindler, *supra* note 127, at 367–68.

Some even consider NetzDG unconstitutional because of its indeterminacy and vagueness.³²⁵

VI. A NETZDG FOR THE UNITED STATES?

Currently, the United States takes the exact opposite approach of the NetzDG. This continues to be widely supported³²⁶ and aligns with the US legal tradition to reduce regulation and place great emphasis on free speech. The United States may take a different approach in terms of copyright infringement, where the law implies obligations for service providers upon obtaining knowledge, awareness, or notification to act expeditiously to remove or disable access to infringing material.³²⁷ However, social media content moderation concerns the constitutional right of free speech, which is even more significant in the United States than in Germany. As opposed to arguably most Western Democracies, the United States is traditionally reluctant to implement laws against hate speech and, for instance, do not outlaw Holocaust denial, notwithstanding the fact that the cruel mass murder of Jews by the Nazi regime is not in dispute.³²⁸ Many of the statements considered unlawful in Germany might be permissible in the United States under the First Amendment.³²⁹ Accordingly, in 2010, Congress enacted the Securing the Protection of our Enduring and Established Constitutional Heritage (“SPEECH”) Act, declaring foreign judgments based on defamation lawsuits unenforceable in US courts, unless either the foreign legislation offers at least as much free speech protection as the United States or the defendant would have been found liable under US law as well.³³⁰

³²⁵ Marc Liesching, *Was sind “rechtswidrige Inhalte” im Sinne des Netzwerkdurchsetzungsgesetzes?*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 809, 813–14 (2017); Liesching, *supra* note 126, at 26–27. *Contra* Schiff, *supra* note 155, at 371. Some doubt the Act’s constitutionality in that regard. Ladeur & Gostomzyk, *supra* note 276, at 391–92.

³²⁶ See sources cited *supra* notes 45, 69.

³²⁷ 17 U.S.C. §§ 512(c)(1)(A)(iii)–(C).

³²⁸ Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 72 (1997) (arguing that Holocaust denial should not be protected under the First Amendment).

³²⁹ Lee, *supra* note 276; see also Balkin, *supra* note 9, at 2032 (“Americans generally have a much more libertarian free speech policy than the rest of the world.”).

³³⁰ H.R. 2765, 111th Cong. (2010)

Nonetheless, there is a vigorous debate both in legal academia and in politics.³³¹ Politicians from both sides attack, for different reasons, the blanket immunity.³³² Some voices demand complete freedom on social networks, whereas others want exactly the opposite—more regulation. Should the latter prevail, could the current debate result in a “US NetzDG”? In order to pursue this question, the constitutional framework will be examined, mainly shaped by the freedom of speech. Subsequently, this Article makes policy considerations based on experiences with the German NetzDG.

A. “New Governors” under the First Amendment

Guaranteeing free expression, enshrined in the First Amendment,³³³ is one of the most famous, prominent, and important achievements of the US Constitution. “[T]he right to exercise the liberties safeguarded by the First Amendment ‘lies at the foundation of free government by free men.’”³³⁴ The German Federal Constitutional Court found a similar characterization for the Freedom of Expression.³³⁵ Nonetheless, the value attached to this right in the United States exceeds the already remarkable significance in other countries, with many statements that are considered unlawful elsewhere being permissible here.³³⁶ The right to free speech applies to all different kinds of media communication,³³⁷ including the “world of ideas,”³³⁸ i.e., social media. Thus, posts and comments on social network platforms are “entitled to the same First Amendment protections as other forms of media.”³³⁹

³³¹ See discussion *supra* Section I.B.

³³² *Id.*

³³³ U.S. CONST. amend. I (“Congress shall make no law...abridging the freedom of speech....”).

³³⁴ *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)).

³³⁵ See *supra* Section II.C.2.

³³⁶ See *supra* notes 328–329 and accompanying text.

³³⁷ See *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 790 (2011) (holding that video games are protected speech under the First Amendment).

³³⁸ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017) (referring to social media as “world of ideas”).

³³⁹ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) (quoting *Packingham*, 582 U.S. at 1735–36).

What makes social media a little more interesting is whether the First Amendment is also binding the platforms acting as “*de facto* governments.” Thus, social media users could assert their free speech liberty against the platforms. Thus, those “New Governors,”³⁴⁰ being bound by that fundamental right, could not invoke it themselves.³⁴¹

As a matter of principle, only state institutions are committed by constitutional fundamental rights. However, it can be argued that Facebook is tantamount to a government due to its outstanding role over modern communication. Facebook’s CEO Mark Zuckerberg said, “In a lot of ways Facebook is more like a government than a traditional company. We have this large community of people, and more than other technology companies we’re really setting policies.”³⁴² This own insight could support the notion that Facebook resembles a government.

Yet, the Supreme Court is extremely cautious in imposing constitutional obligations on private parties. Through the state action doctrine, the US Constitution applies only to government, and not private, actors.³⁴³ The Court examines private conduct as to whether “the private entity has exercised powers that are ‘traditionally the exclusive prerogative of the State.’”³⁴⁴ In a landmark decision from 1946, *Marsh v. Alabama*, the Court applied the First Amendment to distribution of religious materials on the premises of a privately owned company town.³⁴⁵ Interestingly enough, it held that “[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by

³⁴⁰ Klonick, *supra* note 21.

³⁴¹ *See id.* at 1613.

³⁴² Franklin Foer, *Facebook’s War on Free Will*, THE GUARDIAN (Sept. 19, 2017), <https://www.theguardian.com/technology/2017/sep/19/facebooks-war-on-free-will> [<https://perma.cc/64RL-ME2Y>].

³⁴³ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 360, 411 (2019) (“[T]he Free Speech Clause prohibits only governmental abridgment of speech. The Free Speech Clause does not prohibit private abridgment of speech....”).

³⁴⁴ *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

³⁴⁵ *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

the statutory and constitutional rights of those who use it.”³⁴⁶ And social networks are indeed opening up widely to the public, which suggests that they must respect their users’ rights.

Initially, the Court distinguished traditional media from the Internet, holding that “special justifications for regulation of the broadcast media...are not present in cyberspace” because “the Internet can hardly be considered a ‘scarce’ expressive commodity” so as to the Court’s “cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”³⁴⁷ Albeit this early holding in 1997, the current Supreme Court stresses social media’s impact on free speech matters. Recently, in *Packingham v. North Carolina* from 2017, it ruled that social media was a “protected space” for lawful speech under the First Amendment, voiding a North Carolina statute that prohibited sex offenders from accessing social media platforms which permit minors to become members.³⁴⁸ That state law strove to prevent sex offenders from contacting children online.³⁴⁹ Yet, the mere access to social media is protected under the First Amendment:

Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind.... By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They

³⁴⁶ *Id.* at 506.

³⁴⁷ *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 868, 870 (1997).

³⁴⁸ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

³⁴⁹ *Id.*

allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’³⁵⁰

From those remarks, some might infer a First Amendment commitment, given social media’s special role with respect to statements of opinion.³⁵¹ However, the defendant in that case was the government, not a platform.

Furthermore, in an even more recent decision, the Supreme Court once again narrowed exceptions to its state action doctrine. In *Manhattan Community Access Corp. v. Halleck*, a ruling along ideological lines, the Court’s conservative majority held that public access television, operated through a private nonprofit corporation which had been designated by New York City, is not subject to First Amendment commitment.³⁵² The Court summarized that, according to its case law, a private entity can only be considered a state actor in a few instances, such as when it has an exclusive public function or when the government exerts strong influence.³⁵³ However, “merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.”³⁵⁴ What makes the judgment even more important for social media is that the Court explicitly allows a private party for an “appropriate editorial discretion within [its] open forum.”³⁵⁵ Thus, the *Halleck* precedent speaks not only firmly against social platforms’ obligations under the First

³⁵⁰ *Id.* at 1733.

³⁵¹ *See, e.g.,* Klonick, *supra* note 21, at 1611–13 (“Future litigation might use *Packingham*’s acknowledgment of a First Amendment right to social media access as a new basis to argue that these platforms perform quasi-municipal functions....The Court’s new definition in *Packingham* of online speech platforms as forums...might threaten the viability of arguments that these companies have their own First Amendment rights as speakers.”). However, Klonick concludes that courts are unlikely to treat social media platforms as state actors. *Id.* at 1658–59.

³⁵² *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1933 (2019).

³⁵³ *Id.* at 1928 (“Under this Court’s cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function... (ii) when the government compels the private entity to take a particular action...or (iii) when the government acts jointly with the private entity.”).

³⁵⁴ *Id.* at 1930–31.

³⁵⁵ *Id.*

Amendment but also in favor of an authority to decide which content they ban and which they don't—based on their dominion.

Moreover, the *Halleck* Court ruled that “the fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function.”³⁵⁶ Hence, even if the federal government considered Facebook, for instance, a monopoly under law for sharing user generated content online, that mere fact would not expose the site to a First Amendment commitment.

After all, even if some find it appropriate and desirable from a policy perspective to bring social media providers under free speech scrutiny, there is simply very little indication that the Supreme Court—notwithstanding its contemplation of social media's importance but in the face of its reluctance to expand the state action doctrine—would be willing to take that approach.³⁵⁷ Therefore, it must be acknowledged that *Packingham* was a unanimous judgment whereas *Halleck* was a 5-4 decision. Yet, the three concurring Justices in *Packingham*³⁵⁸ then went on to vote in line with the other two conservative Justices in *Halleck*, who had not participated in *Packingham*,³⁵⁹ building a front against expanding the state action doctrine. This fact stresses *Halleck*'s relevance.

Nevertheless, it is worth mentioning that recent case law does have an impact on governmental content moderation. In *Knight First Amendment Institute v. Trump*, the Second Circuit Court of Appeals

³⁵⁶ *Id.* at 1931.

³⁵⁷ See Eric Goldman, *Private Publishers Aren't State Actors—Manhattan Community Access v. Halleck*, TECH. & MKTG L. BLOG (June 26, 2019), <https://blog.ericgoldman.org/archives/2019/06/private-publishers-arent-state-actors-manhattan-community-access-v-halleck.htm> [<https://perma.cc/5VSH-QRG7>]; see also Evelyn Douek, *COVID-19 and Social Media Content Moderation*, LAWFARE (Mar. 25, 2020), <https://www.lawfareblog.com/covid-19-and-social-media-content-moderation> [<https://perma.cc/Y4PC-YRRW>] (“Of course, platforms are not the government and are not bound by the First Amendment.”); Citron & Franks, *supra* note 79, at 15, 17 (“Attempting to extend First Amendment obligations to private actors is not only constitutionally incoherent, but endangers the First Amendment rights of private actors against compelled speech.”).

³⁵⁸ Being Chief Justice Roberts and Justices Alito and Thomas.

³⁵⁹ Being Justices Gorsuch and Kavanaugh.

held that, pursuant to the First Amendment, the President, acting in their official role and not as a private party, shall not delete comments on their tweets or ban other users from accessing their account.³⁶⁰ However, this judgment only concerned the government acting *on* Twitter, not Twitter itself acting.

B. *Social Media's Free Speech*

Concluding that social media providers' content moderation is not subject to First Amendment scrutiny inevitably results in recognizing platforms' entitlement to free speech. Yet, scope and extent of that right are in dispute.

In that context, one could think of *Miami Herald v. Tornillo*, a Supreme Court decision from 1974, to undergird and enhance social media's shield against any governmental interference.³⁶¹ Here, the Court unanimously struck down the "right of reply" under a Florida statute, which conferred power on political candidates to answer criticism and attacks by a newspaper in that newspaper and, thus, violated the First Amendment's guarantee of a free press.³⁶² An important rationale, on which the Supreme Court grounded its finding, resembles an argument against excessive banning of content: a right of reply could have chilling effects on newspapers since, in the face of potential claims for responses, they might refrain from criticism of politicians, which then "dampens the vigor and limits the variety of public debate."³⁶³ Similarly, some suppose that content moderation prompts users to fear removal and, thus, to shy away from making any statements on social media.³⁶⁴ Yet, this Article has already refuted that assumption.³⁶⁵

Furthermore, negative content moderation can hardly be compared to a right of reply in newspapers. While a newspaper indeed

³⁶⁰ Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 236 (2d Cir. 2019) ("In sum, since he took office, the President has consistently used the Account as an important tool of governance and executive outreach. For these reasons, we conclude that the factors pointing to the public, non-private nature of the Account and its interactive features are overwhelming.").

³⁶¹ *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

³⁶² *Id.* at 258.

³⁶³ *Id.* at 257.

³⁶⁴ *Supra* Section V.D.

³⁶⁵ *Id.*

may have a strong incentive to avoid replies by politicians as those replies take up space on the papers which blocks other articles or advertisements,³⁶⁶ there is no equivalent incentive in social media. More importantly, while a “newspaper is more than a passive receptacle or conduit for news, comment, and advertising,”³⁶⁷ a platform is, by and large, exactly this.³⁶⁸ The resulting newspaper’s right of “choice of material to go into a newspaper,”³⁶⁹ hence, cannot apply to social media providers because platforms do not exercise a positive decision on what content they show but instead mainly render negative decisions on what content *not* to show.

In sum, the broad right accorded by the *Tornillo* Court to newspapers is not applicable to social media providers, since the latter do not face space limitations and publish user-submitted, rather than its own, content.³⁷⁰ In terms of free speech, we must distinguish between one’s own statements and other people’s statements that one allows to be broadcast.

However, some maintain that “the First Amendment protects the right of those platforms to carry whatever content they see fit”³⁷¹ or that “under First Amendment jurisprudence, any state-mandated censorship that occurs outside the context of a judicial determination of the content’s illegality...is an unconstitutional prior restraint on speech.”³⁷² Yet, grounding the latter assertion on *Bantam Books v. Sullivan*³⁷³ seems questionable. That decision, handed down by the

³⁶⁶ See *Tornillo*, 418 U.S. at 256.

³⁶⁷ See *id.* at 258.

³⁶⁸ See Tushnet, *supra* note 47, at 1012 (“Just as a telephone company is not engaging in speech of its own when its users speak, ISPs regularly facilitate others’ speech rather than speaking for themselves. As conduits, ISPs’ concerns are different than those of initial speakers.”); see also Klonick, *supra* note 21, at 1660 (“[P]latforms do not actively solicit specific types of content, unlike how an editorial desk might solicit reporting or journalistic coverage. Instead, users use the site to post or share content independently.”).

³⁶⁹ See *Tornillo*, 418 U.S. at 258 (“A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.”).

³⁷⁰ See Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES L. 487, 502–03 (2016) (distinguishing Google’s business from newspapers privileged by *Tornillo*).

³⁷¹ Fukuyama & Grotto, *supra* note 320, at 209.

³⁷² Nunziato, *supra* note 9, at 1537.

³⁷³ See generally *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); see Nunziato, *supra* note 9, at 1537–38 n.96.

Supreme Court in 1963, concerned allegedly “obscene, indecent or impure language” publications.³⁷⁴ Here, the state of Rhode Island had created a commission to “educate the public[,]...investigate and recommend the prosecution of all violations” in terms of those publications. The Court almost unanimously held that the ultimate purpose “of the Commission’s notices was to intimidate distributors and retailers and that they had resulted in the suppression of the sale of the books listed.”³⁷⁵ Besides the fact that the decision was primarily grounded in Fourteenth Amendment due process concerns,³⁷⁶ distribution of books and other paper publications can hardly be compared to modern social media forums. Admittedly, the Court stated that “[t]he separation of legitimate from illegitimate speech calls for...sensitive tools.”³⁷⁷ Nonetheless, it iterated that the Constitution does not protect obscenity.³⁷⁸

Once again, the Court thus clarified that First Amendment protection is not absolute. If a statement or publication does not fall within the scope of the First Amendment, the publisher or distributor cannot invoke that fundamental right either. It follows that the First Amendment does in no way grant an unrestricted permission to publish or distribute whatever you want. Rather, *Bantam Books*, even though it was decided almost sixty years ago and dealt with paper publications, reminds us that regulating freedom of expression raises due process challenges, especially when determining the “finely drawn line”³⁷⁹ between free and illegitimate speech.

Additionally, the Supreme Court’s ruling in *Halleck* does not stand in the way of a mandatory content moderation. Indeed, the Court conferred “appropriate editorial discretion within [an] open forum,”³⁸⁰ however, upon “all private property owners and private lessees who open their property for speech.”³⁸¹ Thus, the Court did not base its decision on the First Amendment. It rather left open the

³⁷⁴ *Id.* at 59, 72.

³⁷⁵ *Id.* at 58, n.1.

³⁷⁶ *See id.* at 66, 71.

³⁷⁷ *Id.* at 66 (quoting *Speiser v. Randall*, 357 U. S. 513, 525 (1958)).

³⁷⁸ *Id.* at 65.

³⁷⁹ *Id.* at 66.

³⁸⁰ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 (2019).

³⁸¹ *Id.* at 1930–31.

question of whether the First Amendment prevents the government from obliging private parties to open their property for speech by others and referred to *Turner v. FCC* from 1994.³⁸² In that case, the Court found it constitutional to require cable systems to allocate a percentage of their channels to local public broadcast stations since those must-carry provisions were content neutral.³⁸³

Albeit the US policy approach in CDA Section 230 to guard Internet platforms against any liability for users' disparaging speech,³⁸⁴ the First Amendment, according to the majority of US courts and scholars, does not require wholesale protection from all platform liability.³⁸⁵ Rather, the Act "reflects a 'policy choice,' not a First Amendment imperative."³⁸⁶ The opposing view that the First Amendment requires an entire protection in order to avoid collateral censorship since "[w]ithout [that] constitutional rule, Internet intermediaries would limit a significant amount of constitutionally protected speech"³⁸⁷ by opting for "the least costly method" of removing in case of doubt³⁸⁸ remains an unfounded assumption, neither

³⁸² *Id.* at n.2.

³⁸³ *See generally* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

³⁸⁴ CDA § 230.

³⁸⁵ *See, e.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016); *Batzel v. Smith*, 333 F.3d 1018, 1020 (9th Cir. 2003) ("There is no reason inherent in the technological features of cyberspace why First Amendment and defamation law should apply differently in cyberspace than in the brick and mortar world. Congress, however, has chosen for policy reasons to immunize from liability for defamatory or obscene speech...."); *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 421 (S.D.N.Y. 2001); Balkin, *supra* note 44, at 434 ("[Section 230] is not required by First Amendment doctrine."); Nina I. Brown and Jonathan Peters, *Say This, Not That: Government Regulation And Control Of Social Media*, 68 SYRACUSE L. REV. 521, 539 ("This immunity [granted by Section 230] is not a constitutional grant. It comes from Congress, and Congress can take it away."); Citron & Wittes, *supra* note 47, at 419; William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL'Y 17, 48 (2011); Tushnet, *supra* note 47, at 988. For several examples for CDA Section 230 extending beyond First Amendment protection, see Goldman, *supra* note 69, at 36–39.

³⁸⁶ *Gucci Am., Inc.*, 135 F. Supp. 2d at 421.

³⁸⁷ Note, *supra* note 45, at 2035.

³⁸⁸ *Id.* at 2038, 2043 n.140 ("[I]ncreased liability will increase the proportion of protected speech that is removed in an effort to reduce defamation.").

supported by empirical data nor case law from Germany where content moderation is mandatory.³⁸⁹ What is more, a claim for remediation helps decrease the incentive to excessively delete content.

C. *Leeway for Regulation*

Although the broad protection granted by the *Tornillo* Court is not applicable to social media providers, the providers are generally entitled to free speech and not bound by the First Amendment. Hence, with respect to potential regulation of content on social media, both social networks and their users may assert First Amendment protection against government interference. On the other hand, it does not compel an absolute and complete First Amendment protection. Firstly, it is not proven that the Supreme Court's interpretation of that fundamental right enjoins any regulation of social media content. Rather, according to the prevailing view in the United States, the First Amendment does not require protection from all platform liability.³⁹⁰ Secondly, there are several categories of unprotected speech—e.g., obscenity³⁹¹ or fighting words.³⁹² If those actions do not fall within the scope of users' freedom of expression, consequentially, platforms cannot invoke any First Amendment protection either. Otherwise, the First Amendment would safeguard statements which it exempts from its realm at the same time.

On the contrary, private property owners' "appropriate editorial discretion within [their] open forum"³⁹³ lays a solid foundation for social media's entitlement to impose rules and enforce them through content moderation. Moreover, governmental regulation of content moderation on social media platforms must both respect due process

³⁸⁹ Firstly, excessive over-blocking can be discerned neither from the transparency reports' data nor from case law on conducted bans. See discussion *supra* Section III.B.2, Sections IV.A.–B., Section V.C. Rather, judicial control and economic incentives strongly militate against such a phenomenon. See *supra* Section V.C. Secondly, the transparency reports' data also show that the bulk of bans are due to the standards that the networks imposed themselves and not on German law. See *supra* Section III.B.2.

³⁹⁰ *Supra* discussion Section VI.B.

³⁹¹ *Miller v. California*, 413 U.S. 15, 36 (1973) (“[O]bscene material is not protected by the First Amendment.”).

³⁹² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942) (exempting “You are a God-damned racketeer” and “a damned Fascist” from First Amendment protection).

³⁹³ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 (2019).

requirements under the Fifth and Fourteenth Amendment, respectively, and guarantee that legitimate speech is not overly affected by measures against illegitimate speech, as can be inferred from case law. “[T]he Government ‘may not suppress lawful speech as the means to suppress unlawful speech.’”³⁹⁴ At the same time, it is worth noting that the Supreme Court in *Tornillo* stated that media, even though entitled to First Amendment protection, to a certain extent must contribute to an environment of free speech (and, therefore, refrain from collaboration to constrain that freedom).³⁹⁵

As one can see, any potential regulation of social networks’ content moderation lies within this constitutional area. Generally speaking, there is much to suggest that moderate regulation of social media by compelling its providers to remove unlawful content can be reconciled with the First Amendment.

D. Lessons from NetzDG and Potential Developments

What could such a regulation look like? The United States can go two different ways, leading away from CDA Section 230. On the one hand, as called for by mostly conservative voices, the possibilities for intervention by social networks can be limited. However, President Trump’s demands were crooked: he claimed free speech for himself, although he was obliged to grant it on social networks—and had himself violated this fundamental right.³⁹⁶ More importantly, platforms are entitled to free speech. So, if Twitter wants to comment on his post, it is protected by the First Amendment. Furthermore, it would be dangerous not to fill the legal vacuum with voluntary content moderation. Many examples of Internet abuse

³⁹⁴ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002)).

³⁹⁵ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 252 (1974) (“That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.” (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))).

³⁹⁶ *Supra* note 360.

make content moderation indispensable, such as an editorial launched by the Los Angeles Times, allowing Internet users to edit it without limitations and resulting in people posting disparaging content and trolls publishing pornography.³⁹⁷ Without moderation, Internet platforms cannot remain a pleasant and enjoyable place. What is more, there would likely be chilling effects on expressing opinion on social media sites.³⁹⁸

On the other hand, heightened regulation of social networks is conceivable in order to limit their leeway under CDA Section 230 and make content moderation mandatory. The NetzDG can provide some guiding principles and mechanisms in this respect: (1) statutory regulation based on the NetzDG model guarantees a certain equality of treatment among the platform users and (2) a remedy in cases of platforms' failure to enforce their self-imposed standards. A minimum number of users can be made a prerequisite for application in order to protect start-ups. Like the NetzDG, a regulation should oblige providers only with respect to already prohibited content. It might be retorted that this would raise the issue of dealing with fifty different jurisdictions in the United States.³⁹⁹ Therefore, a pragmatic approach could draw on categories of unprotected speech under the First Amendment.⁴⁰⁰ Under the *status quo*, statements which are supposed to be excluded from the First Amendment are actually *de facto* protected—on the Internet of all places, where content can be distributed widely and easily. At the very least, the most terrible content—such as revenge porn—should be excluded from the comprehensive protection.⁴⁰¹ The exception of sex trafficking

³⁹⁷ Grimmelmann, *supra* note 37, at 44–45.

³⁹⁸ *Supra* Section V.D.

³⁹⁹ Note, *supra* note 45, at 2036. To the contrary, in Germany, despite its federal system, all 16 states share the same civil and criminal law because it is enacted on the federal level.

⁴⁰⁰ See Citron & Franks, *supra* note 79, at 21 (restricting immunity under CDA Section 230(c)(1) to “speech” instead of “information”); *supra* Section VI.C.

⁴⁰¹ Unfortunately, revenge porn and nonconsensual pornography are covered by CDA Section 230's blanket immunity. See *Godaddy.com, LLC v. Toups*, 429 S.W.3d 752, 760 (Tex. 2013); see also Citron & Wittes, *supra* note 47, at 413 (listing revenge porn operators among providers who are immunized). An opposing view proposes to exclude websites from immunity that “purposely solicit the posting of revenge porn” as cocreators and invokes *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*; see Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 359 n.86 (2014).

may serve as an example here.⁴⁰² Additionally, these heinous acts have absolutely nothing to do with the First Amendment. In particular, sites that are designed to infringe rights should not be privileged.⁴⁰³ Shielding those business models was not intended by the CDA.⁴⁰⁴ Interestingly enough, the DOJ's September 2020 draft proposed a transfer of the good faith requirement in CDA Section 230, subparagraph (c)(2)(A) to subparagraph (c)(1) and suggested clarification of denying protection for purposefully harmful action providers.⁴⁰⁵

That said, carving out several subject matters from CDA Section 230's immunity shall not result in the tort law dilemma that the act was intended to end.⁴⁰⁶ Therefore, a potential regulation should ensure that providers will only face damages, fines, or government intervention in case of systematic violation. A mere claim for take down would already contribute significantly to help victims stop infringements.⁴⁰⁷

At the same time, any potential regulation on social media liability in the United States should draw its lessons from NetzDG's flaws and shortcomings. For example, a complaint procedure should be open to every affected person, whether or not they are inside the

⁴⁰² CDA § 230(e)(5). The DOJ's September 2020 draft proposed to further exempt terrorism, child sex abuse, and cyber-stalking from CDA Section 230's immunity. SECTION BY SECTION, *supra* note 26, at 2.

⁴⁰³ Citron & Wittes, *supra* note 47, at 417–18; *see also* Citron & Franks, *supra* note 79, at 22.

⁴⁰⁴ Citron & Wittes, *supra* note 47, at 409, 416 (“Extending immunity to Bad Samaritans undermines § 230's mission by eliminating incentives for better behavior by those in the best position to minimize harm.”).

⁴⁰⁵ SECTION BY SECTION, *supra* note 26, at 2. The preceding Executive Order on Preventing Online Censorship had already requested this. Exec. Order No. 13925, 3 C.F.R. § 34079 (2020).

⁴⁰⁶ Citron & Franks, *supra* note 79, at 20–21; *see discussion supra* Section I.A. The DOJ's draft of September 2020 intended to keep the overruling of that dilemma in its proposed paragraph (c)(1)(C). SECTION BY SECTION, *supra* note 26, at 1.

⁴⁰⁷ *See* Batzel v. Smith, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003) (“One possible solution to this statutorily created problem is the approach taken by Congress in the Digital Millennium Copyright Act.”); *cf.* Tushnet, *supra* note 47, at 1013 (“[A] regime that limited available remedies against ISPs to injunctive relief—whether conditioned on compliance with notice-and-takedown, as with the DMCA, or as a blanket rule for ISPs that lacked actual knowledge of illegality—would substantially decrease the chilling effect on ISPs of altering § 230.”); Citron & Wittes, *supra* note 47, at 419.

social network. Furthermore, Congress should pay particular attention to the potential law's scope if it decides to limit the application to only large providers, e.g., through a minimum number of users. In order to squash concerns about over-blocking, the Act should provide for a claim for remediation in case of unjustified bans.⁴⁰⁸ However, above all, the discussion should focus—more than in Germany—on internal regulation because this approach is much more pivotal in practice.⁴⁰⁹ If the government does not want to dictate which statement is permissible and which is not, it can leave the details to the social networks, simply ensuring that standards are set and implemented. It should be noted that the NetzDG guarantees pressure on these providers⁴¹⁰ and has an important complementary function.

CONCLUSION

The German NetzDG takes a different approach to regulating hate speech than is currently seen in the United States. The effects of the Act are limited—both positive and negative. Court decisions as well as the published transparency reports show that, in practice, the provider-imposed standards play a greater role in removing posts on social networks than the NetzDG. Many fears were exaggerated or based on misunderstandings. The NetzDG seems to be a necessary complement to the self-imposed standards of social networks. At the same time, it ensures a certain pressure on these platforms. Hence, the benefits of the Act outweigh its drawbacks.

Therefore, the NetzDG can stimulate the debate in the United States: a regulation would have less dramatic consequences than many fear. Currently, CDA Section 230 appears somewhat outdated. When the law was enacted around twenty-five years ago,

⁴⁰⁸ Tushnet, *supra* note 47, at 1014–15.

⁴⁰⁹ Klonick, *supra* note 21, at 1666, 1670 (“Any proposed regulation...should work with an understanding of the intricate self-regulatory structure already in place in order to be the most effective for users and preserve the democratizing power of online platforms.”).

⁴¹⁰ See Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L. REV. 2418, 2437 (2020) (“[A]s public pressure increased over the last ten years and as European nations, like Germany, forced Facebook to comply with their national speech laws, Facebook’s Community Standards became more restrictive and more similar to European standards.”).

many abuses and developments could not yet be foreseen. A reform initiative would face considerable resistance but would modernize US Internet law. Certain mechanisms of the NetzDG have already been proposed by legal scholars. Experience with the NetzDG supports these proposals. Requiring an upfront judicial consent to every blocking of content on a platform seems neither feasible nor suitable to keep the number of removals low. Rather, a combination of severe consequences for systematic violations and individual takedown claims in cases of legal infringements, securing a content removal in the event of failure of provider-imposed standards, seems desirable. Such a legal claim would possibly have helped Samantha Jespersen considerably.

At the same time, the United States can learn from shortcomings of the NetzDG. Nonetheless, the main cautionary tale is the debate about the NetzDG—a discussion based on misconceptions, biases, and exaggerated assumed impacts.