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Nuts About NETZ: The Network Enforcement Act and Freedom of Expression

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NOTE

NUTS ABOUT NETZ:

THE NETWORK ENFORCEMENT ACT AND
FREEDOM OF EXPRESSION

Rebecca Zipursky*

ABSTRACT

In the wake of scandals about the radicalization of hate groups online, Germany passed the Network Enforcement Act (“NetzDG”) to prevent hate speech online. In the months after NetzDG went into effect, social media platforms began engaging in overcorrection of hate speech online. This includes censorship and a new commitment to adhering to the strictest speech laws. In response, German and global citizens alike have answered with backlash against the rise of censorship in Europe. Despite this, Germany continues to stand by its laws as a steadfast protection of the rights and dignity of the German people. The conflict of these protections finds itself in the International Covenant on Civil and Political Rights, particularly Article 19. The Human Rights Council has called into question NetzDG, arguing that the measure violates the freedom of expression. This Note will review the Network Enforcement Act for violations of freedom of expression law. After thorough analysis, this Note will suggest remedies to correct any potential violations.

ABSTRACT.....1325
I. INTRODUCTION.....1327

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II.	FREEDOM OF EXPRESSION AND THE INTERNET.....	1330
	A. German Compliance with Article 19 of the ICCPR	1331
	B. Article 19 and Its Limitations.....	1336
	C. Freedom of Expression on the Internet	1338
	1. The HRC and Online Speech.....	1339
	2. The European Union and the Right to be Forgotten.....	1341
	3. American Free Speech and Internet Jurisprudence	1343
	4. Comparing European, International, and United States Internet Speech Policy.....	1345
III.	AN ANALYSIS OF NETZDG AND GERMAN HATE SPEECH LAW	1346
	A. Inviolable Dignity	1346
	B. NetzDG Itself	1351
	1. The Text.....	1351
	2. Enforcement.....	1352
IV.	NETZDG AS A PROPORTIONALITY ANALYSIS	1354
	A. Germany’s Legitimate Aim.....	1354
	1. Loss of Dignity Online.....	1354
	2. Terrorism Recruitment Online.....	1357
	B. The Problems of Proportionality	1358
	1. Facebook and Twitter: Public Actors.....	1358
	2. The Chilling of Political Speech	1359
	C. NetzDG: A Violation of the ICCPR.....	1363
	1. Protected Use of Technology.....	1363
	2. “Manifestly Unlawful” Is Unacceptably Vague	1364
	3. Private Actors and Overreach	1364
V.	AMERICAN STAKE IN NETZDG.....	1364
	A. Section 230.....	1364
	B. Failings to Protect People Under the American Approach	1365
VI.	SOLUTIONS	1367
	A. Litigation Solutions.....	1368
	1. Federal Constitutional Court.....	1368

2.	Regional European Courts	1369
3.	The Optional Protocol.....	1369
4.	Public Pressure.....	1370
B.	Tailor the Law	1370
1.	Defining “Manifestly Unlawful”	1370
2.	Protecting Art and Political Dissent.....	1371
C.	Collaboration Between Sovereign and Twitter	1372
D.	Private Solutions	1373
VI.	CONCLUSION	1373

I. INTRODUCTION

In January of 2018, Beatrix von Storch found herself under investigation for inciting hate speech on Twitter.¹ She also found herself and her colleague Alice Weidel temporarily blocked from the platform.² The women, both members of Germany’s far right Alternative for Germany (“AfD”) party, had condemned the Cologne police for tweeting a New Year’s greeting in Arabic.³ Twitter removed the tweets within twenty-four hours, stating that each was manifestly unlawful.⁴ In the same fell swoop, Twitter removed several tweets from the satirical magazine *Titanic* that had parodied von Storch and Weidel for their regressive views on Islam.⁵ Despite criticism, the offending tweets stayed down.⁶

1. Linda Kestler, *Germany’s Attempt to Fix Facebook Is Backfiring*, ATLANTIC (May 18, 2018), <https://www.theatlantic.com/international/archive/2018/05/germany-facebook-afd/560435/> [https://perma.cc/VBE9-P2W6]. An English translation of the tweet reads: “What the hell is going on in this country? Why is an official police page from NRW tweeting in Arabic? Do you think you’ll appease the barbarian, Muslim, gang-raping hordes of men?” Shona Gosh, *Germany’s Strict New Law About Hate Speech Has Already Claimed Its First Victim*, BUS. INSIDER (Jan. 2, 2018), <https://www.businessinsider.com/germany-is-investigating-far-right-mp-beatrix-von-storch-after-a-strict-social-media-hate-speech-law-2018-1> [https://perma.cc/VK27-ESBV].

2. Gosh, *supra* note 1.

3. Kestler, *supra* note 1.

4. Kestler, *supra* note 1.

5. Attila Mong, *As German Hate Speech Law Sinks Titanic Twitter Post, Critics Warn New Powers Go Too Far*, COMMITTEE TO PROTECT JOURNALISTS (Jan. 23, 2018), <https://cpj.org/blog/2018/01/as-german-hate-speech-law-sinks-titanics-twitter-p.php> [https://perma.cc/ND67-ZN8X]; Kestler, *supra* note 1.

6. Kestler, *supra* note 1.

Twitter removed these German tweets as part of its enforcement of Netzwerkdurchsetzungsgesetz (“NetzDG”).⁷ The law has gained notoriety as the most comprehensive response to the problems of radicalization on social media yet enacted in a democratic country.⁸ Under NetzDG, Germany compels social media platforms to remove any content deemed unlawful within seven days of its appearance online.⁹ For content that is “manifestly unlawful,” platforms have twenty-four hours to remove the content.¹⁰ Non-compliance with these terms could make platforms criminally liable for up to EU€5 million.¹¹

In fear of NetzDG, social media platforms have overcorrected the hate speech crisis on the internet. Germany began enforcing NetzDG in January of 2018, yet there is a very small amount of reported content.¹² However, according to Facebook’s transparency report in July 2018, the networking site had deleted over two million posts in six months worldwide.¹³ In response, the German population has documented exactly which posts Facebook is removing.¹⁴ While some of the removed posts could be manifested hate speech, arguably like Beatrix von Storch’s tweet about Muslims, others are valuable artistic and political critiques, such as *Titanic*’s tweets satirizing the exchanges.

NetzDG raises the issue of whether or not Germany is violating Article 19 of the International Covenant on Civil and Political Rights (“ICCPR” or “the Covenant”).¹⁵ Article 19 guarantees freedom of

7. Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], July 12, 2017, available at https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2 [<https://perma.cc/D8MY-5ASG>] [hereinafter NetzDG].

8. *Germany: Flawed Social Media Law*, HUM. RTS. WATCH (Feb. 14, 2018), <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law> [<https://perma.cc/325N-6QQR>]; *Germany Looks to Revise Social Media Law as Europe Watches*, CNBC (Mar. 8, 2018, 6:30 PM), <https://www.cnn.com/2018/03/08/germany-looks-to-revise-social-media-law-as-europe-watches.html> [<https://perma.cc/2MPZ-AD2A>].

9. NetzDG, *supra* note 7, § 3 no. 2.3.

10. *Id.* § 3 no. 2.2.

11. *Id.* § 4 no. 2.

12. Reporters Without Borders, *The Network Enforcement Act Apparently Leads to Excessive Blocking of Content*, REPORTERS WITHOUT BORDERS (Aug. 3, 2018), <https://rsf.org/en/news/network-enforcement-act-apparently-leads-excessive-blocking-content> [<https://perma.cc/F92A-XQ9U>].

13. *Id.*

14. FACEBOOK – SPERRE [FACEBOOK WALL OF SHAME], <https://facebook-sperre.steinhoefel.de/> [<https://perma.cc/45S4-5T74>].

15. See International Covenant on Civil and Political Rights, art. 19, G.A. Res. 2200A, at 49, U.N. Doc A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR].

expression, but explicitly carves out an exception for speech targeted at another person's dignity.¹⁶ However, NetzDG overregulates what should be a very narrowly tailored provision.¹⁷ The law thus has a chilling effect on political speech, and censorship is a real risk.¹⁸

In June of 2017, David Kaye, Special Rapporteur of the Promotion and Protection of the Right to Freedom of Opinion and Expression, issued a mandate expressing concern over Germany's most recent law regulating internet speech.¹⁹ Germany in turn responded to Kaye's letter by defending its legislation.²⁰ It argued that such measures were necessary in the wake of the fake news era,²¹ Russian interference in foreign elections through social media, and rampant radicalization of hate groups online.²² Indeed, much of Germany's new law is consistent with prior hate speech legislation deemed acceptable by the Human Rights Committee ("HRC").²³ Ultimately, this law is

16. *Id.*

17. *See infra* Section III.B.

18. *See* Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1048 (2018) (referencing NetzDG as part of the scope of greater censorship on the internet in Europe).

19. *See* Special Rapporteur on the Promotion and Protection of the Right of Freedom of Opinion and Expression, Letter dated June 1, 2017 from the Special Rapporteur to the Federal Government of Germany, U.N. Doc. OL/DEU/1/2017 (June 1, 2017), <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf> [<https://perma.cc/7WNL-ML9A>] [hereinafter Kaye Letter].

20. German Government response to the Special Rapporteur (Aug. 9, 2017), <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/GermanyReply9Aug2017.pdf> [<https://perma.cc/8K9B-3YC8>] [hereinafter German Kaye Response].

21. "Fake news" refers to the phenomenon of false, uncorroborated information spreading around the internet. This misinformation can have disastrous consequences. Shankar Vendatam et al., *Fake News: An Origin Story*, NPR (June 28, 2018), <https://www.npr.org/2018/06/25/623231337/fake-news-an-origin-story> [<https://perma.cc/S3KE-SYFS>]. For example, there was an online theory that Hillary Clinton was running a child sex traffic ring underneath a pizzeria. Marc Fisher et al., *Pizzagate: From Rumor, To Hashtag, To Gunfire In D.C.*, WASH. POST (Dec. 6, 2018), https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html?utm_term=.4e3d4f24821a [<https://perma.cc/X63G-MMDQ>]. A man who believed this "fake news" opened fire on the pizzeria in question. *Id.* But see Jessica Stone-Erdman, *Just the (Alternative) Facts, Ma'am: The Status of Fake News Under the First Amendment*, 16 FIRST AMEND. L. REV. 410, 412 (2017) (discussing the dangers of Trump devaluing journalism).

22. *Id.*

23. *See* Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1118 (2011) (asserting the ICCPR values dignity as a human right). *See generally* Ryan Kraski, *Combating Fake News in Social Media: U.S. and German Legal Approaches*, 91 ST. JOHN'S L. REV. 923, 931, 939 (2017) (arguing that Germany's social media policies are driven by the civil right of dignity).

Germany's attempt to curtail the ominous effects of the "disinformation wars" perpetuating over the internet.²⁴

This Note will outline NetzDG's violations of international human rights law, but also reiterate that that is not the end of the discussion. NetzDG is a potentially powerful tool to fight the onslaught of radicalization online; thus, it is important to acknowledge its successes and strive to preserve them. Part II of this Note examines how international human rights law operates in relation to speech.²⁵ Part III of this Note outlines the reasons for NetzDG, as well as its place amongst German hate speech law.²⁶ Part IV of this Note analyzes NetzDG's problems with proportionality, contrasted with the important protections it strives to bring.²⁷ Part V of this Note briefly compares Germany's efforts to protect users from online hate speech to the failures in the United States to protect users from the same.²⁸ Finally, Part VI suggests ways in which Germany could narrow NetzDG, collaborate with social media platforms, and set an example for how to best deal with hate speech on the internet and protect the rights of its own citizens.²⁹

II. FREEDOM OF EXPRESSION AND THE INTERNET

In order to determine whether NetzDG is in violation of international human rights law, it is important to understand the foundations of international freedom of expression guarantees. Section II.A explains some of the enforcement mechanisms available under the International Covenant on Civil and Political Rights, particularly Germany's commitment to it.³⁰ Section II.B evaluates Article 19 and its limitations amongst the other articles.³¹ Section II.C explores the particular emphasis the HRC recently placed on the internet in relation to international human rights.³²

24. Waging War with Disinformation, *THE ECONOMIST* (Jan. 25, 2018), <https://www.economist.com/special-report/2018/01/25/waging-war-with-disinformation> [https://perma.cc/BR73-NS5T].

25. *See infra* Part II.

26. *See infra* Part III.

27. *See infra* Part IV.

28. *See infra* Part V.

29. *See infra* Part VI.

30. *See infra* Section II.A.

31. *See infra* Section II.B.

32. *See infra* Section II.C.

A. German Compliance with Article 19 of the ICCPR

The ICCPR is a treaty that governs most of international human rights law across multiple continents.³³ Entered into force in 1976, the ICCPR provides expansive protections for dignity, liberty, and the right to life.³⁴ As of August 2017, there are 172 signing parties to the ICCPR.

The ICCPR primarily operates through the countries that enforce it.³⁵ This approach is called “domestic primacy.”³⁶ Article 2(2) of the ICCPR provides language granting states the discretion to implement the covenant into their own laws.³⁷ This means that like many other international treaties, the ICCPR relies on nations to incorporate the terms of the treaty into their own domestic laws.³⁸ For example, the United States implements Article 19 through the First Amendment to its constitution,³⁹ New Zealand incorporated the ICCPR itself into its own bill of rights,⁴⁰ and Germany expressly incorporated the Universal Declaration of Human Rights into its constitution.⁴¹ This is to prevent overreach into the sovereignty of states. Thus, each of these states provides a mechanism for private citizens to enforce their own rights under their national law.⁴²

Despite the deferential nature of international human rights law, the ICCPR provides ample mechanisms for enforcement on a global

33. ICCPR, *supra* note 15.

34. Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1, 25 (2006).

35. *Id.*

36. *Id.* at 15.

37. ICCPR, *supra* note 15, art. 2(2) (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”).

38. A prevalent critique of domestic primacy argues that it is too deferential to many countries that would fall short of providing its citizens with the full human rights protections. *See, e.g.,* Ronald B. Hurdle & Walter J. Champion, Jr., “*The Life and Times of Napoleon Beazley: The Effect (If Any) of the International Covenant on Civil and Political Rights on Texas’ 17 & Up Execution Standard*,” 28 T. MARSHALL L. REV. 1, 2 (2002).

One salient example would be the United States’ use of the death penalty on minors.

39. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 (AM. LAW INST. 1987).

40. New Zealand Bill of Rights Act 1990 (N.Z.), <https://drive.google.com/file/d/1go5yOZcZbmH4oknQs8XVxr5CI0CjkvxA/view?ts=5c9942b6> [<https://perma.cc/GV68-TPH7>].

41. GRUNDGESETZ [GG] [BASIC LAW], *translation at* <https://www.btg-bestellservice.de/pdf/80201000.pdf>. The Declaration served as a precursor to the ICCPR.

42. Philip Chwee, *Bringing in a New Scale: Proposing a Global Metric of Internet Censorship*, 38 FORDHAM INT’L L.J. 825, 864 (2015).

scale.⁴³ The Human Rights Committee, a United Nations designated enforcement body,⁴⁴ oversees the enforcement of these laws.⁴⁵ The HRC requires each nation to provide it with compliance reports upon ratification and then any time after when the HRC so requests.⁴⁶ The HRC will comment on each nation's ability to provide for each right in the ICCPR.⁴⁷ The reports must specifically reference the ways in which domestic law is affecting the rights in question.⁴⁸

The ICCPR also provides mechanisms for other countries to enforce human rights actions against each other.⁴⁹ Any party to the Covenant may bring an action for enforcement against another party to the covenant.⁵⁰ These actions, however, are difficult to bring because they require extensive procedure before the moving state may even bring the action.⁵¹

The most novel tool of the ICCPR is Optional Protocol.⁵² Optional Protocol is a mechanism that allows private citizens to petition to the International Court of Justice for violations of their own rights.⁵³ It is one of the only mechanisms by which private citizens can enforce international law against their own countries.⁵⁴ The mechanism is not

43. JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 440 (Vicki Been et al. eds., 3d ed. 2010); JOHN CURRIE, *PUBLIC INTERNATIONAL LAW* 377 (Irwin Law ed., 2001).

44. GREGORY GISVOLD & SCOTT N. CARLSON, *PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 4-5 (Transnational Publishers 2003).

45. Donoho, *supra* note 34, at 25

46. Donoho, *supra* note 34, at 17 n.47.

47. ICCPR, *supra* note 15, art. 40(4) ("The Committee shall study the reports submitted by the States Parties to the present Covenant."); *see also* GISVOLD & CARLSON, *supra* note 44, at 5-6.

48. ICCPR, *supra* note 15, art. 40(4) ("Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.").

49. GISVOLD & CARLSON, *supra* note 44, at 12-13.

50. *Id.*

51. Article 41 of the ICCPR articulates the process by which a state may use Article 40. *See* ICCPR, *supra* note 15, art. 41.

52. Human Rights Comm., General Comment No. 33 on Article 19: Freedoms of Opinion and Expression, ¶ 15, U.N. Doc. CCPR/C/GC/33 (Nov. 5, 2008), <https://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.pdf> [<https://perma.cc/3D4B-L5YC>]; *see also* Antoine L. Collins, *Caging the Bird Does Not Cage the Song: How the International Covenant on Civil and Political Rights Fails to Protect Free Expression over the Internet*, 21 J. MARSHALL J. COMPUTER & INFO. L. 371, 383 (2003).

53. Collins, *supra* note 52, 383; Donoho, *supra* note 34, at 25.

54. Collins, *supra* note 52, at 383.

a perfect one,⁵⁵ but it can be a powerful tool for individuals to vindicate their rights in against a country in violation.⁵⁶

While some countries have been inconsistent with their compliance,⁵⁷ Germany remains committed to providing comprehensive proof of its compliance to human rights norms.⁵⁸ Indeed, Germany willingly participates in Optional Protocol.⁵⁹ This is an affirmative commitment that German citizens will have recourse if their rights are violated.⁶⁰ Germany's submission is one of many indications of Germany's dedication to protecting the human rights of its citizens.⁶¹

Germany is also subject to international human rights law through the European Court of Human Rights.⁶² Specifically, Europe protects freedom of expression through the European Convention on Human Rights ("ECHR").⁶³ Article 10 of the ECHR has very similar language as Article 19 of the ICCPR.⁶⁴

55. In order to bring an action against a country under Optional Protocol, a country must have opted in to the procedure. *See* Chwee, *supra* note 45, at 831. Thus far, of the 160 ratifying parties to the ICCPR, only 111 have opted in to Optional Protocol.

56. *See* GISVOLD & CARLSON, *supra* note 44, at 9-10.

57. *See, e.g.*, Hurdle & Champion, Jr., *supra* note 38, at 6 (noting the failure of the United States to comply with the ICCPR's ban on executing minors). *See also* DUNOFF, *supra* note 43, at 443.

58. Participants of the ICCPR's Optional Protocol, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en [<https://perma.cc/48JA-HA2P>].

59. *Id.*

60. Donoho, *supra* note 34, at 25.

61. Many eligible countries have not assented to Optional Protocol. Participants of the ICCPR's Optional Protocol, *supra* note 58. Further, a person must prove that he or she has exhausted "all domestic remedies" before he or she may pursue Optional Protocol.

62. JAN OSTER, EUROPEAN AND INTERNATIONAL MEDIA LAW 29 (Cambridge Univ. Press, 2017). To an extent, the European Court of Justice also protects the fundamental rights of Europeans. *See* ELISA RAVASI, HUMAN RIGHTS PROTECTION BY THE ECtHR AND THE ECJ (Brill Nijhoff ed., 2017).

63. The ECtHR and ECJ has had success with regional implementation of human rights law. Donoho, *supra* note 34, at 44.

64. *Compare* ICCPR, *supra* note 17, art. 19(2) ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.") with Article 10 of the Y.B. Eur. Conv. on H.R., https://www.echr.coe.int/Documents/Convention_ENG.pdf [<https://perma.cc/8F2M-FLGU>] ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.") [hereinafter ECHR]. *See also* Charter of Fundamental Rights of the European Union, art. 11(1) ("Everyone has the right to freedom of expression. This

Germany does exhibit some concerning behavior on matters of freedom of expression,⁶⁵ but has proven itself sensitive to public backlash and questions of its human rights reputation. In 2016, satirist Jan Böhmermann published a poem about Turkish President Recep Tayyip Erdoğan online.⁶⁶ Among other things, the poem made fun of Erdoğan's genitalia and said that he had sexual relations with goats.⁶⁷ The speech technically violated Section 103 of Germany's criminal code, which outlaws insulting foreign leaders.⁶⁸ Erdoğan demanded action from the German government, and, in a controversial move, Chancellor Angela Merkel approved a criminal prosecution against the comedian.⁶⁹

The jump to criminal prosecution under archaic speech law exhibits extreme measures against predominantly innocuous offenses. The poem did not incite violence or use racial slurs.⁷⁰ It was, however, mostly a thorny, rude attack on a somewhat thin-skinned foreign leader.⁷¹ If anything, this was Böhmermann's attempt to critique German slander law.⁷²

right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority regardless of frontiers.”).

65. See, e.g., David Shimer, *Germany Raids Homes of 36 People Accused of Hateful Postings Over Social Media*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/world/europe/germany-36-accused-of-hateful-postings-over-social-media.html> (last visited Mar. 18, 2019).

66. Alison Smale, *Comedian's Takedown of Turkish President Tests Free Speech in Germany*, N.Y. TIMES (Apr. 11, 2016), <https://www.nytimes.com/2016/04/12/world/europe/jan-bohmermann-erdogan-neo-magazin-royale.html> (last visited Mar. 18, 2019).

67. Dr. Manfred Dauster, *The German Court System in Combatting State Security Matters, in Particular Terrorism*, 42 S. ILL. U. L.J. 31, 54 (2017). The poem has not been translated into English, but a German copy can be found here: Justiz-Portal, HAMBURG, DE, <http://justiz.hamburg.de/contentblob/6103298/6b1b7ae264e23809630af9d7716ef2fd/data/schmaehgedicht-jan-boehmermann-pdfanhang.pdf> [<https://perma.cc/HVN8-AZ8A>].

68. STRAFGESETZBUCH [STGB] [PENAL CODE], §103 http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1035 [<https://perma.cc/A6EV-LPWZ>]. (“Whosoever insults a foreign head of state . . . shall be liable to imprisonment . . . or a fine . . . in a case of a slanderous insult to imprisonment from three months to five years.”).

69. Ashley Cowburn, *Angela Merkel Accepts Turkish Request to Seek Prosecution of German Comedian*, POLITICO (Apr. 15, 2016), <https://www.independent.co.uk/news/world/europe/angela-merkel-accepts-turkish-request-to-seek-prosecution-of-german-comedian-a6985686.html> [<https://perma.cc/9EK2-685X>].

70. See Jan Böhmermann Erdoğan Poem, VIMEO, <https://vimeo.com/163537121> [<https://perma.cc/6QPE-GEG3>].

71. Konstantin Richter, *Is Jan Böhmermann Funny?*, POLITICO (Apr. 27, 2016), <https://www.politico.eu/article/is-jan-bohmermann-funny/> [<https://perma.cc/4FRK-BLDS>].

72. *Id.*

The backlash to the “Böhmermann affair” was immediate and sharp.⁷³ Many criticized Merkel for enacting prosecution,⁷⁴ while many more questioned why a democratic country such as Germany could have a law that criminalized insulting foreign leaders.⁷⁵ Eventually, the Human Rights Watch even expressed its concern about the censorship implications of Böhmermann’s arrest.⁷⁶

These critiques did not fall on deaf ears. Germany eventually dropped the prosecution against Böhmermann.⁷⁷ That next year, Germany’s parliament repealed the law, attempting to fix some of the damage it had done.⁷⁸ There remained one troubling piece, however: a civil law suit aimed at Böhmermann sought to prevent him from repeating the poem.⁷⁹ The suit successfully barred him from repeating all but six lines of the poem.⁸⁰

In international law, such measures must be considered. Silencing of citizens must be considered a matter of public safety and wellbeing.⁸¹ Böhmermann’s arrest provides proof that Germany has

73. Justin Huggler, *Merkel Faces Backlash After Collapse of Case Against German Comedian for Insulting Erdogan*, TELEGRAPH (Oct. 5, 2016), <https://www.telegraph.co.uk/news/2016/10/05/merkel-faces-backlash-after-collapse-of-case-against-german-come/> [https://perma.cc/8GXV-PFPQ].

74. Stefan Kuzmany, *Merkel Falls Flat Over a Satirical Poem*, SPEIGEL (Apr. 12, 2016), <http://www.spiegel.de/international/germany/the-erdogan-affair-poses-serious-threat-to-merkel-power-a-1086813.html> [https://perma.cc/878K-PTB4].

75. Lizzie Dearden, *Erdogan Poem: Court bans German comedian Jan Böhmermann from repeating controversial verses*, INDEPENDENT (May 18, 2016), <https://www.independent.co.uk/news/world/europe/erdogan-poem-court-bans-german-comedian-jan-boehmermann-from-repeating-sexual-verses-a7035896.html> [https://perma.cc/BT3E-HUVY].

76. *Germany: Prosecuting Satirists Mocks Freedom of Speech*, HUM. RTS. WATCH (Apr. 16, 2016), <https://www.hrw.org/news/2016/04/16/germany-prosecuting-satirist-mocks-freedom-speech> [https://perma.cc/7P4E-FQD4].

77. Associated Press, *German Prosecutors Drop Probe of Comedian Over Insulting Turkish President*, L.A. TIMES (Oct. 4, 2016), <http://www.latimes.com/world/la-ig-german-comedian-dropped-investigation-20161004-snap-story.html> [https://perma.cc/R69C-JPAM].

78. Katie Forster, *Germany abolishes law that bans insulting foreign leaders*, INDEPENDENT (Jan. 25, 2017), <https://www.independent.co.uk/news/world/europe/germany-law-insulting-foreign-leaders-erdogan-jan-boehmermann-comedian-sketch-outdated-lifts-ban-a7546341.html> [https://perma.cc/4GAY-9YSJ].

79. Uri Friedman, *The Thinnest Skinned President in the World*, ATLANTIC (Apr. 26, 2016), <https://www.theatlantic.com/international/archive/2016/04/turkey-germany-erdogan-bohmermann/479814/> [https://perma.cc/KYE6-WVVH].

80. Alison Smale, *German Comedian Is Told Not to Repeat Lewd Lines About Erdogan*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/world/europe/jan-bohmermann-recep-tayyip-erdogan-poem.html> [https://perma.cc/L3EC-6EWC].

81. JOHANN BAIR, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND ITS (FIRST) OPTIONAL PROTOCOL 91 (Peter Lang GmbH ed., 2005).

been non-compliant on its Article 19 duties, but the subsequent repeal of the law and dismissal of the prosecution shows Germany as a country committed, even if only for the public opinion, to compliance with human rights law.

B. Article 19 and Its Limitations

Article 19 has given birth to confusing doctrine on freedom of expression.⁸² The freedom of expression doctrine is necessarily marred by different values in different countries. As the European Court of Justice (“ECJ”) noted extreme examples of differing speech values: “Saudi Arabia does not allow criticism of its leadership nor questioning of Islamic beliefs; Singapore bans speech that ‘denigrates Muslims and Malays;’ and Thailand prohibits insults to the monarchy. Expression supporting gay rights authored by a European writer for a European audience violates the law in Russia.”⁸³ International law compensates for differing values by providing flexibility to states to decide which speech to regulate.⁸⁴

This is not to say that the HRC does not value freedom of expression.⁸⁵ On the contrary, it is considered one of the most fundamental rights to human beings.⁸⁶ This makes any inquiry into freedom of expression complicated because it is simultaneously incredibly important to defer to nation’s evaluations of speech while also crucial to treat restrictions on valuable speech with scrutiny.⁸⁷

Article 19(2) reads: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁸⁸ Over the years, the HRC has interpreted Article 19(2) to mean that Article 19(2) protects the liberal political ideals of freedom of speech and expression.⁸⁹ The HRC also generally interprets Article

82. GISVOLD & CARLSON, *supra* note 46, at 119.

83. *See* Case C-507/17, *CNIL v. Google* ¶. 20.

84. Citron, *supra* note 18, at 1063.

85. Oster, *supra* note 62, at 40.

86. *See id.* at 40-41 (describing the value of freedom of expression in different democratic countries).

87. Bair, *supra* note 81, at 91.

88. ICCPR, *supra* note 14, art. 19(2).

89. Collins, *supra* note 52, at 389.

19 to dictate that any limitation on speech or expression must be narrow and justifiable.⁹⁰

In determining whether a law falls within the confines of Article 19, the Human Rights Committee has established a three-part proportionality test. Under this framework, the HRC considers (1) whether the interference was suitable to achieve the legitimate aim pursued;⁹¹ (2) whether the interference was the least intrusive instrument among those which might achieve the legitimate aim;⁹² and (3) whether the interference was strictly proportionate to the legitimate aim pursued.⁹³ The test is similar to the American Supreme Court's "strict scrutiny" test, albeit somewhat more lenient.⁹⁴

Article 19(3) acts as a natural limitation on Article 19(2).⁹⁵ Article 19(3) allows for restrictions on speech that violate the rights of others or threaten national security or public order.⁹⁶ It also carves out restrictions based on morality.⁹⁷ Thus, in order to deprive someone of his or her right to free expression, a government must prove that one of these factors is crucially at play.⁹⁸

A somewhat extreme illustration of Article 19(3)'s narrow limitation is *Alberto Grille Motta v. Uruguay*.⁹⁹ In this case, Uruguay arrested Motto for his connections to the communist party.¹⁰⁰ The Uruguayan government was unable to provide evidence that Motto's political dissent was a threat to the public.¹⁰¹ The International Court

90. Collins, *supra* note 52, at 389.

91. Oster, *supra* note 62, at 69.

92. Oster, *supra* note 62, at 69.

93. Oster, *supra* note 62, at 69; *see also* Human Rights Committee, Ballantyne and others v. Canada [1993] Communication no. 359, 385/389 [11.4].

94. Despite Supreme Court protest, many legal scholars consider strict scrutiny "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995).

95. ICCPR, *supra* note 17, art. 19(3) ("The exercise of the rights provided for in [19(2)] of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) for the protection of national security or of public order . . . or of public health or morals.").

96. *See* ICCPR, *supra* note 17, art. 19(3). *See also* Bair, *supra* note 77, at 91.

97. ICCPR, *supra* note 15, art. 19(3).

98. Bair, *supra* note 81, at 92 (stating limitations on free expression must "be shown as necessary and proportionate to the goal in question and not arbitrary.").

99. *See* Alberto Grille Motta v. Uruguay, Selected Decisions Under Optional Protocol, ¶¶ 54-57, https://www.ohchr.org/Documents/Publications/SelDec_1_en.pdf [<https://perma.cc/8AEX-4TY4>].

100. *Id.* ¶ 16.

101. *Id.*

of Justice found that subversive association allegations were not sufficiently narrow to justify Motta's arrest.¹⁰²

Article 20 is another limitation on Article 19.¹⁰³ Article 20 limits hate speech or speech that incites violence.¹⁰⁴ Finally, Article 17 protects people from "unlawful attacks on [their] honor or reputation."¹⁰⁵ Countries in Europe tend to use dignity interests to justify their laws limiting speech.¹⁰⁶ However, the ICCPR has been interpreted by the HRC to be limited in this scope.¹⁰⁷ Predominantly, limits on hate speech must truly only limit hate speech.¹⁰⁸ This is problematic because there is no universal definition of hate speech, thus there is no way for government to know exactly what may be censored.¹⁰⁹

C. Freedom of Expression on the Internet

International bodies invested in human rights law have shown particular interest in protecting free speech on the internet.¹¹⁰ In fact,

102. *Id.*

103. Johann Bair, *supra* note 81, at 96.

104. See ICCPR, *supra* note 15, art. 20(2) ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. . . .").

105. ICCPR, *supra* note 15, art. 17(2). This Note primarily focuses on Article 19. *Id.* art. 19.

106. See, e.g., Jennifer Daskal, *Speech Without Borders: The Rise (And Risk) of Global Censorship Online* (2018) (on file with the author) (detailing an Austrian case where Facebook was compelled to take down posts referring to a Green Party candidate for her dignity).

107. Bair, *supra* note 81, at 93-94.

108. Bair, *supra* note 81, at 93-94.

109. Roger Kiska, *Hate Speech: A Comparison Between the European Court of Human Rights and the United States Supreme Court Jurisprudence*, 25 REGENT U. L. REV. 107, 111 (2013).

110. See Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Fifth Annual Report, General Assembly, U.N. Doc. A/70/371 (Sept. 18, 2015) (by Ben Emmerson); Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Human Rights Council, U.N. Doc. A/HRC/29/32 (May 22, 2015) (by David Kaye); Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, General Assembly, U.N. Doc. A/69/397 (Sept. 23, 2014) (by Ben Emmerson); Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Human Rights Council, U.N. Doc. A/HRC/23/40 (Apr. 17, 2013) (by Frank La Rue); Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Human Rights Council, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue); Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Human Rights Council, U.N. Doc. A/HRC/13/37 (Dec. 28, 2009) (by Martin Scheinin).

there are many indicators that the HRC has taken affirmative steps to prioritize free expression on the internet. On the other hand, European human rights law has taken aims at protecting a different right on the internet at any cost: dignity. This portion of this Note will observe the different initiatives under both International and European Human Rights law.

1. The HRC and Online Speech

The internet era presents unprecedented technology that has led to unprecedented questions.¹¹¹ As far as it creates a novel ability to spread information, many scholars equate the invention to that of the printing press.¹¹² Like the printing press, the internet exponentially increased the ease of information flow.¹¹³ Now more than ever, people have the entire wealth of knowledge of the world at their fingertips.¹¹⁴ The HRC recognizes this, and has taken this new technology in stride.¹¹⁵

Former Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, made it a priority to define the rights of Article 19 in particular as crucial in defining Human Rights on the Internet.¹¹⁶ In particular, he released HRC General Comment Number 34, which was a mandate creating an obligation on countries to protect the human being's right to the internet under Article 19 of the ICCPR.¹¹⁷ The report was a firm clarification of the need to protect the internet as a matter of human rights: "facilitating access to the Internet for all individuals, with as little restriction to online content as possible, should be a priority for all States."¹¹⁸

The Special Rapporteur is deemed a "scholar," or someone who gathers information on behalf of the citizens of the world so that their

111. Kraski, *supra* note 23, at 924.

112. Collins, *supra* note 52, at 373.

113. Collins, *supra* note 52, at 373.

114. Collins, *supra* note 52, at 373.

115. Collins, *supra* note 52, at 373.

116. *See, e.g.*, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, Human Rights Council, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue).

117. Human Rights Comm., General Comment No. 34 on Article 19: Freedoms of Opinion and Expression, ¶15, U.N. Doc. CCPR/C/GC/34 (Sep. 12, 2011).

118. *Id.*

rights may be enforced.¹¹⁹ This is a history that dates back to the formation of the Human Rights Council in 2006.¹²⁰ While there is not an official mechanism of the Special Rapporteur to prosecute any country, the word of the Special Rapporteur is seen to have some authority on interpretations of human rights law.¹²¹

In 2011, Special Rapporteur LaRue explicitly expanded Article 19 to include discourse over the internet.¹²² He explicitly stated that the Committee would have even more cause for concern for restrictions on political speech, including the following language: “the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties”¹²³

David Kaye further acknowledged the problematic role of Internet Service Platforms in this process.¹²⁴ “Private intermediaries are typically ill-equipped to make determinations of content illegality”¹²⁵ The HRC disincentivizes legislation that forces intermediaries to make arbitrary determinations about the illegality of a post.¹²⁶

LaRue’s report acknowledges Article 19(3), but also emphasizes its limited scope.¹²⁷ Despite the inconsistencies of past decisions pertaining to Article 19(3), the HRC intends for the internet to remain as free a place for expression as possible.¹²⁸

Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law;” they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3;

119. See HUGH THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 17 (1972). See also James D. Fry, *Privacy, Predictability and Internet Surveillance in the U.S. and China: Better the Devil You Know?*, 37 U. PA. J. INT’L L. 419, 431 (2015).

120. Ved P. Nanda, *The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm “Responsibility to Protect” Make A Difference?*, 35 DENV. J. INT’L L. & POL’Y 353, 357 (2007); G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Mar. 15, 2006).

121. See Donoho, *supra* note 34, at 18.

122. Human Rights Comm., General Comment No. 34 on Article 19: Freedoms of Opinion and Expression, ¶15, U.N. Doc. CCPR/C/GC/34 (Sep. 12, 2011).

123. *Id.*

124. Gabor Rona & Lauren Aarons, *State Responsibility to Respect, Protect and Fulfill Human Rights Obligations in Cyberspace*, 8 J. NAT’L SECURITY L. & POL’Y 503, 509 (2016).

125. *Id.*

126. *Id.*

127. *Id.*

128. See Human Rights Comm., General Comment No. 34, ¶¶ 12, 43.

and they must conform to the strict tests of necessity and proportionality . . . Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.¹²⁹

Scholars expanded upon LaRue's imagining of Article 19.¹³⁰ For example, Professor Molly Land tied LaRue's report to a history of Article 19.¹³¹ She argues that the Framers of Article 19 meant for expression through new technologies to be incorporated into the right.¹³² Her analysis concludes that there is no affirmative right to provide the internet to citizens, but that Article 19 is triggered when nations seek to deprive their citizens of access.¹³³

No item further articulates the commitment the HRC has to free speech on the internet like the Declaration of freedom of expression, released in March of 2017.¹³⁴ In the document, Special Rapporteur David Kaye spoke explicitly of the dangers that Fake News could pose to freedom of expression.¹³⁵ Indeed, the declaration explicitly states that the HRC's strong commitment to free speech on the internet was directly preempting possible measures to stop fake news.¹³⁶

2. The European Union and the Right to be Forgotten

The European Union has notably taken a different approach to human rights on the internet by prioritizing Data Privacy.¹³⁷ The HRC's primary response to concerns about the internet have been about censorship, while Europe recently has gone to great lengths to protect the "right to be forgotten."¹³⁸

129. *Id.* at ¶ 22; *see also* Communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005, U.N. Doc. CCPR/C/85/D/1022/2001 (Oct. 20, 2005).

130. Oster, *supra* note 62, at 24.

131. *See* Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT'L L.J. 393, 426 (2013).

132. *Id.*

133. *See id.* ("[A]lthough there may not be a right to access Twitter per se, a decision to cut off access to Twitter would trigger the requirements of Article 19(3).")

134. Joint Declaration on Freedom of Expression And "Fake News", Disinformation and Propaganda, FOM.GAL/3/17, available at <https://www.osce.org/fom/302796?download=true> [<https://perma.cc/KS99-PT7H>] (official English version) [hereinafter Joint Declaration].

135. *Id.*

136. *Id.*

137. Paul M. Schwartz & Karl-Nikolaus Peifer, *Transatlantic Data Privacy Law*, 106 GEO. L.J. 115, 123 (2017).

138. Oster, *supra* note 62, at 54.

The right to be forgotten found its roots in European notions of dignity.¹³⁹ It is, at its core, a human rights response to the internet.¹⁴⁰ In 2010, with the proliferation of online information, Viviane Reding released a statement as European Commissioner for Justice, Fundamental Rights, and Citizenship.¹⁴¹ She stated that Europeans would have control over what they posted online.¹⁴² So duly named, the right to be forgotten allows Europeans the luxury of controlling their own image online against defaming content.¹⁴³ This right, as told by Land, also falls under the protections of Article 19(2).¹⁴⁴

The right to be forgotten can come into direct conflict with freedom of expression.¹⁴⁵ It necessarily means that any content posted about another person is subject to the right.¹⁴⁶ Consider, for example, *Axel Springer AG v. Germany*.¹⁴⁷ In *Axel Springer*, a television actor had been arrested at a beer festival for possession of cocaine.¹⁴⁸ Axel Springer published an article with details of the actor's arrest.¹⁴⁹ The actor sued for violations of his right to privacy and prevailed in the German Courts.¹⁵⁰ The ECtHR found that Germany violated the newspaper's rights to free expression.¹⁵¹

Axel Springer lays out the ultimate conflict between human rights online. The actor has interest in keeping his dignity. The newspaper has an interest in informing the public on matters of general interest. These two human rights interests are in conflict in *NetzDG* as well. Germany

139. *Id.*

140. Steven C. Bennett, *The "Right to Be Forgotten": Reconciling EU and US Perspectives*, 30 *BERKELEY J. INT'L L.* 161, 161 (2012).

141. See Press Release, Building Trust in Europe's Online Single Market, June 22, 2010, (text of Reding speech), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/327> [<https://perma.cc/T5BQ-AMAV>]; see also Bennett, *supra* note 140, at 161.

142. See Building Trust in Europe's Online Single Market, *supra* note 141.

143. See Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 *DUKE L.J.* 981, 1046 (2018).

144. Land, *supra* note 131, at 432.

145. See *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (noting that America does not recognize a right to be forgotten, and emphasizing free speech as the right at stake).

146. Oster, *supra* note 62, at 73.

147. *Axel Springer Ag v. Germany*, (Application no. 39954/08) [2012] App. No. 39954/08 [89-95], <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2017/10/CASE-OF-AXEL-SPRINGER-AG-v.-GERMANY.pdf> [<https://perma.cc/2DD3-SYWR>] [hereinafter *Axel Springer*].

148. *Id.* at ¶ 11.

149. *Id.* at ¶ 13.

150. *Id.* at ¶ 20.

151. *Id.* at ¶ 70.

wants to protect the rights of those even more vulnerable members of society than a well-known actor, at the expense of speech that is arguably less valuable than a factual report on an embarrassing arrest.

Despite protecting the actor in Axel Springer, Europe has worked tirelessly to protect dignity online.¹⁵² In 2016, the European Union enacted the General Data Protection Regulation (“GDPR”), and it went into force May of 2018.¹⁵³ In doing so, Europe codified the right to be forgotten, and compelled internet platforms to delete millions of posts and websites.¹⁵⁴ In 2017, the European courts dealt with Google which fought the compelled deletions under speech law.¹⁵⁵ The ECJ held that the GDPR created an obligation for Google to hide or remove content from millions of users through the continent.¹⁵⁶ Google now must protect the rights of millions of internet users to erase themselves from the internet.¹⁵⁷

3. American Free Speech and Internet Jurisprudence

America has a famously robust conception of free speech. While the first right protected in the German Basic Law is human dignity, the First Amendment of the Bill of Rights protects the freedom to speak.¹⁵⁸ When the right to speak is implicated in any state action, any restriction on said right is held to the highest level of scrutiny.¹⁵⁹ The restriction must be narrowly tailored to achieving a compelling state interest.¹⁶⁰ Over the last few decades, this right has expanded to the protections of many different forms of speech. Specifically, the Supreme Court seeks to protect political speech. Primarily, free speech doctrine holds that

152. See Daskal, *supra* note 102, at 63.

153. See Post, *supra* note 143, at 987.

154. Commission Regulation 2016/679, 2016 O.J. (L119), art. 17 [hereinafter GDPR].

155. See Post, *supra* note 143, at 997.

156. *Id.*

157. Aliya Ram, *Google Receives 2.4m Requests to Delete Search Results*, IRISH TIMES (Feb. 27, 2018), <https://www.irishtimes.com/business/technology/google-receives-2-4m-requests-to-delete-search-results-1.3407979> [<https://perma.cc/2SSS-5S7B>]. This is not to say the European Union does not care for Free Speech. In *CNIL v. Google*, the ECJ makes a concerted effort to balance expression and speech, favoring speech. See *infra* notes 364-68.

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

159. See *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 799 (2011) (“Because the Act imposes a restriction on the content of protected speech, it is invalid unless [the government] can demonstrate that it passes strict scrutiny.”).

160. If the speech is not protected by the First Amendment, it is subject to rational basis review, which is the Court’s most deferential standard of review. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

the speaker has the right to determine his or her own speech content.¹⁶¹ American law also protect speech the most when it is a “public issue.”¹⁶²

American free speech jurisprudence also does not discriminate as to the content of the speech.¹⁶³ To do so is considered “viewpoint discrimination.”¹⁶⁴ Justice Brennan referred to viewpoint discrimination as “censorship in its purest form” and warned that “government regulation that discriminates among viewpoints threatens the continued vitality of ‘free speech.’”¹⁶⁵ It is in this standard that the United States takes the largest departure from European laws on speech.

Like the HRC, the Supreme Court in the United States has attached free speech heavily to the Internet. As with all Constitutional rights in America, only public actors are bound by the First Amendment.¹⁶⁶ This means that social media providers, as private companies, have the rights to restrict content on their platforms. That is not to say that the Supreme Court has been silent on the issues of speech on the Internet. On the contrary, the Supreme Court has touched Internet speech a few times since its inception.

One of the earlier examples is *Reno v. ACLU*.¹⁶⁷ The Court struck down portions of the CDA that Congress had aimed at protecting minors from pornography.¹⁶⁸ Although Justice Stevens did not hold that the Internet is subject to any specific Internet-only protections, he describes it as “diverse as human thought.”¹⁶⁹ He then summarizes that the Court’s precedent “provide[s] no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”¹⁷⁰ In 2014, a court in the Southern District of New York gave a search

161. Leslie Gielow Jacobs, *Clarifying the Content-Based/content Neutral and Content/viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 635 n.28 (2003).

162. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011).

163. Jacobs, *supra* note 154, at 599.

164. Maura Douglas, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA. J. CONST. L. 727, 730 (2018).

165. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

166. *Sharp Corp. v. Hisense USA Corp.*, 292 F. Supp. 3d 157, 175 (D.D.C. 2017), (“It is axiomatic that to elicit First Amendment protection, the infringement upon speech or petition rights must have arisen from state action of some kind.”), *dismissed*, No. 17-7158, 2017 WL 9401061 (D.C. Cir. Dec. 26, 2017).

167. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

168. *Id.* at 859.

169. *Id.* at 870.

170. *Id.*

engine free speech rights in its search results in *Baidu*.¹⁷¹ The court held that an Internet service provider has a free speech interest in its ability to filter search results, as an editor of the content.¹⁷²

Recently, in *Packingham v. North Carolina*, Justice Kennedy referred to the Internet as today's public forum for ideas.¹⁷³ The Supreme Court has not expressly held that Internet speech has more protection than any other speech, but the language in *Packingham* indicates that the Court hopes to keep speech on the Internet as unregulated as possible.¹⁷⁴ This approach could lead to dangerous consequences. Justice Alito alludes to the consequences of the Court's "undisciplined dicta" in his dissent.¹⁷⁵

4. Comparing European, International, and United States Internet Speech Policy

The difference in priority between the European and International Law speaks to Germany's conception of its duty to regulate the Internet. Germany seems to have aligned with the European conception of what to protect online, because the stated purpose of NetzDG is to protect against hate speech and fake news.¹⁷⁶ However, as the international body designated to speak on human rights norms, the HRC has prioritized the prevention of censorship.¹⁷⁷ As the Internet continues to change the world in which we live, it is important to

171. Jian Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014).

172. *Id.* Interestingly, Section 230 of the Communications Decency Act specifically shields internet platforms for liability on their sites *because* they are not publishers. Thus, Internet companies have all the protections and none of the liability of publishers.

173. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). ("Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind . . . 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.").

174. Brian P. Kane, *Social Media Is the New Town Square: The Difficulty in Blocking Access to Public Official Accounts*, 60 *ADVOC.* 31, 32 (2017).

175. *Packingham*, 137 S. Ct. at 1737 (Alito, J., dissenting).

176. Linda Kinstler, *Germany's Attempt to Fix Facebook is Backfiring*, *ATLANTIC* (May 18, 2018), <https://www.theatlantic.com/international/archive/2018/05/germany-facebook-afd/560435/> [<https://perma.cc/JM65-69CB>]; Bernand Rohleder, *Germany Set Out to Delete Hate Speech Online. Instead, It Only Made Things Worse*, *WASH. POST* (Feb. 20, 2018), https://www.washingtonpost.com/news/theworldpost/wp/2018/02/20/netzdg/?utm_term=.58bb3a6fb06d [<https://perma.cc/6J5N-JZFN>].

177. Joint Declaration, *supra* note 129.

understand that both rights are implicated when discussing restrictions on internet platforms.

III. AN ANALYSIS OF NETZDG AND GERMAN HATE SPEECH LAW

Germany claims that their law is narrowly tailored as to only prosecute hate speech, and that in the process they are promoting important human rights aims.¹⁷⁸ Part III of this Note will explore Germany's law pertaining to speech.¹⁷⁹ Section III.A will evaluate the historical context for Germany's hate speech law.¹⁸⁰ Section III.B will evaluate NetzDG itself as connected to this history.¹⁸¹ Section III.C will observe Germany's justification for the law.¹⁸²

A. Inviolable Dignity

NetzDG is written to capture the proliferation of hate speech and fake news online.¹⁸³ The prohibition of hate speech is consistent with Germany's past laws on expression.¹⁸⁴ Germany's hate speech law derives both from ancient laws protecting "honor" and "social status" and laws enacted after World War II for comprehensive protection of minorities.¹⁸⁵ The result is one of the most heavily regulated arenas for speech amongst democratic nations.¹⁸⁶

Germany, like the United States, protects the right of their people to speak freely and to be "free from censorship."¹⁸⁷ Germany protects this right in Article 5 of their Constitution.¹⁸⁸ However, unlike its First

178. German Government response to the Special Rapporteur, 8/2017, <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/GermanyReply9Aug2017.pdf> [<https://perma.cc/QF6X-4X6F>] [hereinafter German Kaye Response].

179. *See infra* Part III.

180. *See infra* Section III.A.

181. *See infra* Section III.B.

182. *See infra* Section III.C.

183. *See* NetzDG, *supra* note 7.

184. *See* STRAFGESETZBUCH [StGB] [PENAL CODE], as amended Dec. 31, 2007 (trans. by Michael Bohlander) (Ger.); Deborah Levine, Note, *Sticks and Stones May Break My Bones, But Words May Also Hurt Me: A Comparison of United States and German Hate Speech Laws*, 41 *FORDHAM INT'L L.J.* 1293, 1318 (2018).

185. Levine, *supra* note 184.

186. Fleming Rose, *Germany's Attack on Free Speech*, CATO INST. (May 30, 2017), <https://www.cato.org/blog/germanys-attack-free-speech> [<https://perma.cc/A6GE-2E6N>].

187. GRUNDGESETZ [GG] [BASIC LAW], *translation at* <https://www.btg-bestellservice.de/pdf/80201000.pdf> [<https://perma.cc/WB5D-4CWQ>].

188. *Id.*

Amendment counterpart, Article 5 contains express carve outs for hate speech.¹⁸⁹ While American jurisprudence treats hate speech with strict scrutiny, Germany sees hate speech as a phenomenon that should receive no legal protection.¹⁹⁰

Germany's constitution highlights the oft cited European right to "dignity,"¹⁹¹ which comes into contact with speech online quite a bit.¹⁹² The highest Constitutional Courts in Germany have deemed human dignity to be the center of all basic rights in Germany. It is Article 1 in their Basic Law.¹⁹³

This right diverges from the American right to privacy somewhat.¹⁹⁴ James Whitman argues that this discrepancy reaches to the core of what each culture tries to protect.¹⁹⁵ In continental Europe, matters of privacy and dignity are about the protection of one's name, image, and reputation.¹⁹⁶ In America, privacy is about freedom from government surveillance.¹⁹⁷ These distinctions become clear in the different continental approaches towards privacy protection. For example, in America there is emphasis on the need for a warrant before the government may search your home.¹⁹⁸ On the other hand,

189. Ryan Kraski, *supra* note 23, at 930–31 (2017) ("These rights shall find their limits in the provisions of general laws . . . and in the right to personal honor.").

190. GRUNDGESETZ [GG] [BASIC LAW], *translation at* <https://www.btg-bestellservice.de/pdf/80201000.pdf> [<https://perma.cc/WB5D-4CWQ>].

191. Jennifer Daskal, *supra* note 102.

192. Jennifer Daskal, *supra* note 102.

193. DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 355 (2012) ("[T]his provision expresses the highest value of the Basic Law, informing the substance and spirit of the entire document."). The authors also note that the clause on human dignity has served a similar purpose in German constitutional law that the Due Process clauses in the Fifth and Fourteenth Amendments have served in U.S. constitutional jurisprudence. *Id.*

194. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151, 1161 (2004).

195. *Id.* at 1160 ("At least as far as the law goes, we do not seem to possess general 'human' intuitions about the 'horror' of privacy violations. We possess something more complicated than that: We possess American intuitions—or, as the case may be, Dutch, Italian, French, or German intuitions.").

196. *Id.* at 1161.

197. *Id.* at 1161–62 ("[T]he prime danger, from the American point of view, is that the 'sanctity of [our] home[s]' . . . American anxieties thus focus comparatively little on the media. Instead, they tend to be anxieties about maintaining a kind of private sovereignty within our own walls.").

198. *See Johnson v. United States*, 333 U.S. 10 (1948) (holding that a warrant is necessary to prevent unreasonable searches by officers who abuse the power of the law).

Europeans are far more accepting of government interference,¹⁹⁹ but far less tolerant of defaming someone and ruining their lives.²⁰⁰

The internet endangers both rights to privacy, and both continental Europe and America have sought to protect those rights. In 2018 in *Carpenter v. United States*, the Supreme Court held that the government would need a warrant to access cell site data, effectively ruling that in the new age of the internet, privacy needed heightened protection from government forces.²⁰¹ The Court acknowledged that as digital technology expanded, our notions of it was important to protect citizens from government surveillance.²⁰² Given the amount of data that internet platforms accumulate, allowing the government unencumbered access to that data would give the government the ability to track all citizens at any given point.²⁰³

The right to one's control over one's personal image is a recognized right throughout Europe, and subtly diverges from the right to privacy.²⁰⁴ NetzDG can promote this goal for the large portion of private citizens affected by online harassment, many who are not public figures and should be legally protected from a large amount of online hate speech and defamation.

Germany's law on free speech is particularly tied to the ethics of the speech itself.²⁰⁵ *Lüth* was the pivotal case on Germany's freedom of expression.²⁰⁶ Harlan, a Nazi propagandist filmmaker, escaped the mass of criminal penalty that followed World War II.²⁰⁷ He made an effort after the war to recreate a career for himself.²⁰⁸ Luth, appalled by Harlan's reemergence in decent society, organized a boycott of the film.²⁰⁹ Harlan sued Luth for an injunction against the boycott.²¹⁰ After initially losing at the trial level and on appeal, Lüth appealed to the

199. See Whitman, *supra* note 194, at 1216 (describing European laws where a government has control over ability to name a baby).

200. *Id.* at 1155-56.

201. 138 S. Ct. 2206, 2219 (2018).

202. *Id.*

203. *Id.* ("The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years.").

204. Whitman, *supra* note 194, at 1161.

205. KOMMERS & MILLER, *supra* note 193, at 441.

206. KOMMERS & MILLER, *supra* note 193, at 442.

207. KOMMERS & MILLER, *supra* note 193, at 442.

208. KOMMERS & MILLER, *supra* note 193, at 442.

209. KOMMERS & MILLER, *supra* note 193, at 442.

210. KOMMERS & MILLER, *supra* note 193, at 443.

Federal Constitutional Court, claiming that his rights to free speech under Article 5 had been violated.²¹¹ The court held in favor of Lüth, holding that Constitutional decisions did not exist in a vacuum.²¹² They found Lüth's good faith effort to prevent a Nazi from reemerging in the public eye outweighed any claim Harlan had to his future career.²¹³

The court took a decidedly less sympathetic stance towards a political boycott in *Blinkfüer*.²¹⁴ *Blinkfüer*, a small, pro-communist newspaper, sought distribution of their writing throughout shops in Germany.²¹⁵ A far larger newspaper, Axel Springer, essentially blacklisted *Blinkfüer* by threatening to pull its products from many stores carrying the smaller magazine.²¹⁶ In the *Blinkfüer* decision, the court waxed poetic about the importance of intellectual debate in democracy.²¹⁷ The court even went so far as to distinguish the case and hand from *Lüth*: "Lüth's call for a boycott was simply an appeal to the moral and political responsibility of his audience"²¹⁸ A movement against Nazis was more protected in the court's eye than a movement against communist views. The discrepancy between these two cases show Germany's perception of speech is inextricably tied to the morality of the speech itself.

Lüth particularly exhibits Germany's more cherry-picked view on free speech. Unlike in the United States, where the court system holds fast that speech cannot be judged by its substance,²¹⁹ German courts allow for judgments about the content of the material when it comes to unsavory material.²²⁰ Another particularly crude example would be a lawsuit in which a politician protested comments made about him.²²¹ Those comments compared him to a "rutting pig," and were sexual in

211. KOMMERS & MILLER, *supra* note 193, at 443.

212. KOMMERS & MILLER, *supra* note 193, at 444 ("[The] Basic Law is not a value neutral document . . . the content of the existing law must also be brought into harmony with this system of values.").

213. KOMMERS & MILLER, *supra* note 193, at 448.

214. KOMMERS & MILLER, *supra* note 193, at 454.

215. KOMMERS & MILLER, *supra* note 193, at 454-55.

216. KOMMERS & MILLER, *supra* note 193, at 454-55

217. KOMMERS & MILLER, *supra* note 193, at 456 ("[T]he freedom of intellectual debate is an absolute prerequisite for the functioning of a free democracy. . . .").

218. KOMMERS & MILLER, *supra* note 193, at 456

219. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

220. KOMMERS & MILLER, *supra* note 193, at 462.

221. KOMMERS & MILLER, *supra* note 193, at 462.

nature.²²² The German court held that the politician's dignity considerations outweighed the importance of expressing opinions about him.²²³

Germany's laws show a country that prioritizes the morality of the speech it censors far more than other countries. The ICCPR provides for such hate speech and dignity considerations.²²⁴ As NetzDG is a bill targeted directly at content like a "rutting pig" comment, this context is important in understanding why and how Germany enacted NetzDG.

Germany has staunchly defended NetzDG against multiple international attacks by arguing that NetzDG is a protection of German civil rights.²²⁵ The German government was forced to grapple with the repercussions of this legislation when the Special Rapporteur published his letter.²²⁶ Germany's reply shows its commitment to the measure to prevent hate speech online by pointing out (1) the narrowing tactics it used revising the bill; (2) the relevance of the law to problems today; and (3) the already present obligation on social media sites to remove criminal content.²²⁷

Germany's language in support of its bill to the Human Rights Watch shows their commitment to the idea that NetzDG protects the dignity of its citizens.²²⁸ It goes on to criticize social media companies for being slow to react to the pressing issues of online criminal activity.²²⁹ These legitimate concerns have plagued governments and scholars alike, and Germany's efforts to combat these problems are amongst the most extreme responses.

222. KOMMERS & MILLER, *supra* note 193, at 462.

223. KOMMERS & MILLER, *supra* note 193, at 464.

224. *See infra* Part III.

225. *See Tough new German law puts tech firms and free speech in Spotlight*, IRISH TIMES (Jan. 5, 2018), <https://www.irishtimes.com/business/technology/tough-new-german-law-puts-tech-firms-and-free-speech-in-spotlight-1.3346155> [<https://perma.cc/7ZP8-62AZ>] (quoting Justice minister Heiko Mas saying, "Incitement to murder, threats, insults and incitement of the masses or Auschwitz lies are not an expression of freedom of opinion but rather attacks on the freedom of opinion of others.").

226. *See generally* Kaye Letter, *supra* note 19.

227. German Kaye Response, *supra* note 20.

228. German Kaye Response, *supra* note 20 ("In 2015, the increasing spread of hate crime on the internet (especially on social networks such as Facebook, YouTube and Twitter) became ever more serious. Not only hate speech, defamation and malicious gossip were an issue but also the spread of 'fake news.'").

229. German Kaye Response, *supra* note 20.

B. NetzDG Itself

1. The Text

NetzDG operates to criminally penalize social media operators for the content on their websites.²³⁰ The law targets social media in particular, as opposed to other internet platforms.²³¹ Specifically, it seeks to hinder social media giants.²³² It specifically seeks to remove slanderous and hateful speech in violation of German law.²³³ The law gives a window of roughly seven days after the post is reported for social media providers to decide whether or not a post is in violation of NetzDG, and then subsequently to remove it.²³⁴ However, if the post is “manifestly unlawful,”²³⁵ then media providers have twenty-four hours to remove the content.²³⁶ The bill makes no attempt to define exactly what “manifestly unlawful” means.²³⁷ NetzDG does cite twenty-one different criminal statutes,²³⁸ but it makes no attempt to differentiate between them.²³⁹ For example, the bill does not specify if there is any more urgency to removing content propagating terrorist groups than content insulting another person. Such key nuances would help social media companies and the German public understand which content should be prioritized.

230. NetzDG, *supra* note 7.

231. NetzDG, *supra* note 7. The bill targets websites that “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. . . .” NetzDG, *supra* note 7. The legislation also specifically carves out “[p]latforms offering journalistic or editorial content . . . [and] platforms which are designed to enable individual communication or the dissemination of specific content.” *Id.* As a result, sites like Facebook and Youtube are held liable, but not LinkedIn or Whatsapp.

232. The bill, for example, only requires social media websites who receive more than 100 complaints per year to report their deletions to the government. *See* German Kaye Response, *supra* note 20, at 2 (“The obligation to report . . . only applies to platform operators who receive more than 100 complaints per year. . . .”).

233. The bill references several other sections of the German criminal code. They pertain to, among other things, dissemination of propaganda for an illegal political party, treasonous forgery, incitement of hatred, and defamation. *See* STRAFGESETZBUCH [StGB] [PENAL CODE], as amended Dec. 31, 2007 (trans. by Michael Bohlander) (Ger.).

234. NetzDG, *supra* note 7.

235. NetzDG, *supra* note 7. It should be noted that the original German words have been translated in several different forms, including, “obviously illegal.”

236. NetzDG, *supra* note 7.

237. *See generally* NetzDG, *supra* note 7.

238. NetzDG, *supra* note 7, art. 1, § 1.3.

239. NetzDG, *supra* note 7, art. 1, § 1.3.

NetzDG carries heavy penalties for failure to comply.²⁴⁰ They can reach up to EU€5 million.²⁴¹ Scholars speculate that resulting fines could be multiplied to up to even EU€57 million.²⁴² NetzDG also includes a reporting requirement.²⁴³ Every six months, social media providers must submit detailed, public reports on all of the deleted content from the last six months.²⁴⁴

Noticeably lacking in NetzDG is a mechanism for users to challenge platforms' decisions to remove their content.²⁴⁵ The law explicitly carves out a mechanism for administrative bodies to review social media platforms' decisions, but no formal mechanism is in place for lawful content that has been removed.²⁴⁶ Notably, the users who posted the removed materials are not given any way to defend their content.

2. Enforcement

The news cycle is fast moving, and there is no simple way for internet platforms to keep up with the number of hateful comments that arise in twenty-four hours without censorship.²⁴⁷ In their six-month reports, social media providers overwhelmingly say they have seen small numbers of complaints, each site stating it is deleting between twenty percent and twenty-five percent of reported content.²⁴⁸ By the standards of the German government, it would seem that these platforms are doing a careful job monitoring their sites for violations of free speech.²⁴⁹

240. NetzDG, *supra* note 7, art. 4, § 2.

241. NetzDG, *supra* note 7, art. 4, § 2.

242. *See, e.g.*, Citron, *supra* note 18, at 1049.

243. NetzDG *supra* note 7, art. 1, § 2.

244. NetzDG *supra* note 7, art. 1, § 2.

245. *See* NetzDG *supra* note 7, art. 1, § 2.

246. Kaye Response, *supra* note 19.

247. *See* Citron, *supra* note 18, at 1055 (noting that the expenses of content review may push internet platforms towards a “presumption of deletion”).

248. *NetzDG Transparency Report*, FACEBOOK, https://fbnewsroomus.files.wordpress.com/2018/07/facebook_netzdg_july_2018_english-1.pdf [<https://perma.cc/4T4R-WHXE>]; *NetzDG Transparency Report*, GOOGLE, <https://transparencyreport.google.com/netzdg/youtube> [<https://perma.cc/8VQA-WW9A>]; *NetzDG Transparency Statistics*, TWITTER, <https://transparency.twitter.com/en/countries/de.html> [<https://perma.cc/XF43-HZYJ>].

249. Lucina Southern, “*Before, It Was A Black Box*”: *Platforms Report How They Delete Illegal Content in Germany*, DIGIDAY (Aug. 2, 2018), <https://digiday.com/media/black-box-platforms-report-delete-illegal-content-germany/> [<https://perma.cc/6CMC-RP77>].

These numbers tell an incomplete story because they do not account for the number of posts deleted before reporting.²⁵⁰ A recent report documents that from January to June of 2018, Facebook removed over two and a half million posts for “violating community standards.”²⁵¹ A sixth of Facebook’s global moderation team is committed to the practice, working in what are known as “deletion centers.”²⁵² This means Facebook has been removing approximately 14,000 posts per day since NetzDG went into enforcement. While there is not enough transparency to determine how many deletions were German deletions, Facebook has confirmed that this number is a direct result of “paying attention to the German law.”²⁵³

Thus far, there is little adjudication on the issue, but one example shows that courts are amenable to the nuance of the German law.²⁵⁴ Recently, a poster won a victory against Facebook over a deleted comment.²⁵⁵ The Facebook user had posted a newspaper article about Hungarian Prime Minister Victor Orban’s comments on immigrants.²⁵⁶ The user added his own view that Germans were being “stupid” about immigrants and were brainwashed by the media.²⁵⁷ Facebook removed

250. *Id.*

251. Douglas Busvine, *Facebook Deletes Hundreds of Posts Under German Hate Speech Law*, REUTERS (July 27, 2018), <https://www.reuters.com/article/us-facebook-germany/facebook-deletes-hundreds-of-posts-under-german-hate-speech-law-idUSKBN1KH21L> [<https://perma.cc/4JY2-HDG8>].

252. Phillip Oltermann, *Tough New German Law Puts Tech Firms and Free Speech in Spotlight*, THE GUARDIAN (Jan. 5, 2018), <https://www.theguardian.com/world/2018/jan/05/tough-new-german-law-puts-tech-firms-and-free-speech-in-spotlight> [<https://perma.cc/A9M6-PBJ2>].

253. *Id.*

254. Christof Kerman & Johannes Steger, *German Court Overturns Facebook ‘Censorship’*, HANDLESBLATT GLOBAL (Apr. 13, 2018), <https://www.handelsblatt.com/today/politics/free-speech-german-court-overturns-facebook-censorship/23581834.html> [<https://perma.cc/3GZM-AS2Z>]; Peter Muehlbauer, *Interim Injunction: Facebook May Neither Delete Nor Suspend Legal Comment*, TELEPOLIS (Apr. 12, 2018), <https://www.heise.de/tp/features/Einstweilige-Verfuegung-Facebook-darf-legalen-Kommentar-weder-loeschen-noch-sperren-4022958.html> [<https://perma.cc/YU29-K6YG>]; David Meyer, *Court Tells Facebook: Stop Deleting ‘Offensive’ Comments*, ZDNET (Apr. 13, 2018), <https://www.zdnet.com/article/court-tells-facebook-stop-deleting-offensive-comment/> [<https://perma.cc/UPW9-J3WJ>].

255. Kerman & Steger, *supra* note 254; Muehlbauer, *supra* note 254; Meyer, *supra* note 254.

256. Kerman & Steger, *supra* note 254; Muehlbauer, *supra* note 254; Meyer, *supra* note 254.

257. Kerman & Steger, *supra* note 254; Muehlbauer, *supra* note 254; Meyer, *supra* note 254.

the post and blocked the user.²⁵⁸ The documentation of the case (including the identity of the Facebook user) remains confidential, but the German court granted a temporary injunction against Facebook, reinstating the user's account.²⁵⁹ The court cited German freedom of expression rights as the reason for reinstating the post.²⁶⁰ The victory, though one in a sea of uncertainty, may provide a window to the power of an enforcement mechanism on the law.²⁶¹

IV. NETZDG AS A PROPORTIONALITY ANALYSIS

In order to determine whether or not NetzDG is in violation of Article 19, it is important to weigh the proportionality of the legislation.²⁶² Part III of this Note evaluates Germany's legitimate aim with this legislation,²⁶³ and detail the consequences of the legislation being too broad.²⁶⁴ It will evaluate whether the consequences of this legislation outweigh the legitimate concerns of the German government.²⁶⁵

A. Germany's Legitimate Aim

1. Loss of Dignity Online

The core of NetzDG is based on the right to one's own dignity and honor.²⁶⁶ The right to control one's personal image is a recognized right throughout Europe, and subtly diverges from the right to privacy.²⁶⁷ NetzDG can promote this goal for the large portion of private citizens affected by online harassment, many of whom are not public figures and should be legally protected from a large amount of online hate speech and defamation.

258. Kerman & Steger, *supra* note 254; Muehlbauer, *supra* note 254; Meyer, *supra* note 254.

259. Kerman & Steger, *supra* note 254; Muehlbauer, *supra* note 254; Meyer, *supra* note 254.

260. Kerman & Steger, *supra* note 254; Muehlbauer, *supra* note 254; Meyer, *supra* note 254.

261. Kerman & Steger, *supra* note 254; Muehlbauer, *supra* note 254; Meyer, *supra* note 254.

262. See *infra* Part IV.

263. See *infra* Section IV.A.

264. See *infra* Section IV.B.

265. See *infra* Section IV.C.

266. Whitman, *supra* note 194, at 1161.

267. Whitman, *supra* note 194, at 1162.

Indeed, under-regulation of the internet has disastrous consequences, as one can see in the United States, a country that does not recognize dignity as a right.²⁶⁸ Internet platforms enjoy immunity in the United States for the content posted to their sites.²⁶⁹ Because of this immunity, anonymous posters may get away with rampant mistreatment.²⁷⁰ The individual harassment of people online can be emotionally devastating and can lead to severe, and sometimes instant, consequences.²⁷¹

Beyond the personal consequences of unregulated vitriol online, there are broad sweeping consequences for the rise of political groups voicing hate speech online.²⁷² Recently in America, there have been instances of domestic terrorism that stem directly from online instigation.²⁷³ For example, in October of 2018 a man walked into a synagogue in Pennsylvania and executed the deadliest attack on Jewish people in American history.²⁷⁴ The evidence suggests that he was riled up by online anti-Semitism.²⁷⁵

268. Whitman, *supra* note 194, at 1193.

269. See Communications Decency Act, 47 U.S.C.A. § 230 (West).

270. See, e.g., DANIELLE CITRON, HATE CRIMES IN CYBERSPACE (2014) (articulating the protections that revenge porn sites have under section 230) [hereinafter Hate Crimes].

271. See, e.g., *id.* (detailing a woman's experience of being plagued by online mobs and her struggles to find employment); Ian Parker, *The Story of a Suicide*, THE NEW YORKER (Feb. 6 2012), <https://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide> [https://perma.cc/4R65-88HD] (describing a young man's suicide after his roommate secretly recorded him having sex with a man and published the video).

272. See, e.g., Pamela A. Maclean, *Google Resists Becoming Digital 'Town Square' in Censorship Spat*, BLOOMBERG (Mar. 15, 2018, 5:00 AM), <https://www.bloomberg.com/news/articles/2018-03-15/google-resists-becoming-digital-town-square-in-censorship-spat> [https://perma.cc/TYC9-RMDW] ("Silicon Valley's social media giants are under attack from both the left and the right for not doing enough to police hate speech, terrorist propaganda and Russian election meddling.").

273. See, e.g., Deanna Paul & Kellie Gormly, *An attack on a tight-knit Jewish community has left it shellshocked*, THE WASHINGTON POST (Oct. 27, 2018), https://www.washingtonpost.com/nation/2018/10/27/close-knit-community-squirrel-hill-shock-confusion/?utm_term=.4d4995c27062 [https://perma.cc/U5DP-K8J8].

274. Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [https://perma.cc/93EA-XNVM].

275. See Saeed Ahmend & Paul P. Murphy, *Here's What We Know So Far About Robert Bowers, The Pittsburgh Synagogue Shooting Suspect*, CNN (Oct. 28, 2018), <https://www.cnn.com/2018/10/27/us/synagogue-attack-suspect-robert-bowers-profile/index.html> [https://perma.cc/9FKM-BJD9]; Renatta Signorini & Natasha Lindstrom, *Suspected Squirrel Hill Synagogue Gunman: 'Jews are the Children of Satan'*, TRIBLIVE (Oct. 27, 2018), <https://triblive.com/local/allegheeny/14220087-74/alleged-synagogue-shooter-jews-are-the-children-of-satan> [https://perma.cc/5BQG-9BZG].

Further, the evermore complicated question arises: what to do about “fake news.”²⁷⁶ Fake news rocked the world in 2016 when both the United Kingdom and the United States fell prey to mass disinformation attacks.²⁷⁷ After thorough investigation, it became clear that Russia had targeted both countries, primarily through Facebook, in pivotal elections, possibly altering the results.²⁷⁸

These examples would all present violations of human dignity under German law.²⁷⁹ Defaming content is at the heart of German constitutional jurisprudence, so the vicious online attacks are definitely in violation of those laws.²⁸⁰ Further, the First Amendment may be the central protection under American law,²⁸¹ but protection against hate would be of utmost importance to protect against in German law.²⁸² Even fake news would be in violation. NetzDG claims a reach-around sort of protection against fake news, and thus protects against fake news aimed at harming minorities.²⁸³ Given that human dignity rights protect a person’s ability to protect his or her image, the dissemination

276. Ashley Smith-Roberts, *Facebook, Fake News, and the First Amendment*, 95 DENV. L. REV. ONLINE 118, 119-20 (2018). “Fake news” is now commonly used to refer to the proliferation of misinformation on the internet. Fake news has more of an ability to spread and seem convincing because the internet algorithms prioritize “popular” posts, as opposed to well researched ones. See James Carson, *What Exactly Is Fake News, And How Can You Spot It?*, TELEGRAPH (Feb. 18, 2019), <https://www.telegraph.co.uk/technology/0/fake-news-exactly-has-really-had-influence/> [<https://perma.cc/M2GY-8GQA>].

277. Smith-Roberts, *supra* note 276, at 119.

278. See Smith-Roberts, *supra* note 276, at 119.

279. Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity As A Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1584 (2004). These would also violate several sections of Germany’s criminal code. The German Penal Code (as amended Dec. 19, 2001) (trans. Stephen Thaman, 2002).

280. KOMMERS & MILLER, *supra* note 193, at 355.

281. See, e.g., *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (“[A]ny person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox . . . the same individual can become a pamphleteer . . . ‘the content on the Internet is as diverse as human thought.’”).

282. Basic Law art. 1(1) (“Human dignity is inviolable. To respect and protect it is the duty of all state authority.”); See also Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity As A Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1553 (2004) (“[F]ree speech simply is not the most important constitutional value in the German legal order; instead, pursuant to the first clause of the Basic Law, human dignity holds this position”).

283. See *Questions and Answers on the Network Enforcement Act*, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, <https://www.bmjv.de/SharedDocs/FAQ/EN/NetzDG/NetzDG.html> [<https://perma.cc/84J4-85CW>] (where Germany claims the law combats fake news). It is worth noting that there are no provisions of NetzDG that expressly combat fake news. See generally NetzDG, *supra* note 7.

of inaccurate news about minority groups implicates human dignity rights.²⁸⁴ To this extent, NetzDG is permissible as a protection of human rights.²⁸⁵

2. Terrorism Recruitment Online

The European Union, the United States, and several other countries have struggled to deal with terrorists' use of the internet for recruitment purposes and dissemination of violent content.²⁸⁶ Terrorism recruitment became a large problem online well before NetzDG was enacted.²⁸⁷ The Islamic State in Iraq and Syria ("ISIS"), for example, has been using social media to globally recruit for almost a decade. In 2015, the Brookings Institute estimated that ISIS supporters used somewhere between 46,000 and 70,000 twitter accounts in the last three months of 2014.²⁸⁸ In 2018, Rukmini Callimachi, the journalist who dedicates her life to covering ISIS, noted that there are more terrorists in Iraq and Syria alone right now than there were worldwide on the eve of 9/11.²⁸⁹

The evidence suggests that internet companies, for years, were negligent in tracking terrorism on their platforms.²⁹⁰ For example, when Tashmin Malik posted about her allegiance with ISIS in 2014, Facebook removed the post but did not alert the authorities.²⁹¹ Soon after, Malik killed fourteen people in San Bernadino, California.²⁹² Facebook is even one of the few social media sites proactively removing terrorism from their platform in the United States.²⁹³

284. See Kraski, *supra* note 23, at 938 (claiming that insult law would be the best way to combat fake news online).

285. Oster, *supra* note 62, at 93.

286. Citron, *supra* note 18, at 1042.

287. Fleming Rose participates in the panel, "Panel: Fake news and free speech," hosted by the Alliance of Democracies, CATO INST. (June 22, 2018), <https://www.cato.org/multimedia/media-highlights-tv/flemming-rose-participates-panel-panel-fake-news-free-speech-hosted> [<https://perma.cc/Y5KT-N2HW>].

288. J.M. BERGER & JONATHAN MORGAN, THE ISIS TWITTER CENSUS: DEFINING AND DESCRIBING THE POPULATION OF ISIS SUPPORTERS ON TWITTER (2015).

289. Caliphate: Chapter One: The Reporter, N.Y. TIMES (Sept. 20, 2018) (downloaded using iTunes).

290. Susan Klein & Crystal Flinn, *Social Media Compliance Programs and the War Against Terrorism*, 8 HARV. NAT'L SEC. J. 53, 56 (2017).

291. *Id.*

292. *Id.*

293. *Id.* at 72.

Laws like NetzDG incentivize platforms to shut down online terrorism immediately.²⁹⁴ The companies must track an illegal content on their platforms, including propagating hate groups.²⁹⁵ Because of this requirement, hate groups have no way of congregating online in Germany, nor can one read posts from ISIS within German borders.²⁹⁶ Thus, NetzDG would protect Germany from online radicalization that plagues other countries.

B. The Problems of Proportionality

1. Facebook and Twitter: Public Actors

Social media platforms yield the majority of the control over which content gets deleted as “hate speech” and which content is allowed to remain.²⁹⁷ Traditionally, internet companies tend to subscribe to the most radical definitions of free speech.²⁹⁸ At the start, the internet pioneers considered their new toy a wild west of speech.²⁹⁹ John Parry Barlow, one of the original internet crusaders, even went so far as to establish an Internet Declaration of Independence.³⁰⁰ Still today, many Silicon Valley techies believe they are the true arbiters of the market of information.³⁰¹

294. Alexander Tsesis, *Foreword: Terrorist Incitement on the Internet*, 86 *FORDHAM L. REV.* 367, 368 (2017).

295. NetzDG *supra* note 7, at § 1.3.

296. NetzDG *supra* note 7, at § 1.3. (“Unlawful content shall be content within the meaning of subsection . . . which fulfils the requirements of the offences described in sections 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b in connection with 184d, 185 to 187, 241 or 269 of the Criminal Code and which is not justified.”).

297. VIDUSHI MARDÁ ET AL., *WISDOM OF THE CROWD: MULTISTAKEHOLDER PERSPECTIVES ON THE FAKE NEWS DEBATE* (Internet Policy Observatory at the Annenberg School for Communication, Univ. Penn, eds., 2018). *See also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 *HARV. L. REV.* 1598, 1608 (2018).

298. JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?* (Oxford University Press, Inc.) (2006).

299. *Id.* at 16.

300. *Id.* at 20 (citing John Perry Barlow, *A Declaration of the Independence of Cyberspace*, <http://homes.eff.org/~barlow/Declaration-Final.html> [<https://perma.cc/GVC8-DBN8>]).

301. *See* Ashley Smith-Roberts, *Facebook, Fake News, and the First Amendment*, 95 *DENV. L. REV. ONLINE* 118, 124–25 (2018) (“Twitter has declared itself to be the ‘free speech wing of the free speech party;’ Facebooks says it is ‘in the business of letting people share stuff they are interested in;’ and Reddit promotes itself as a ‘free speech site with very few exceptions.’”)

This changed in the midst of scandals and pressure from regulators (particularly European ones) to reform.³⁰² Internet companies suddenly found themselves in the midst of new and decisive regulations (NetzDG amongst them).³⁰³ As a result, many high-profile platforms have publicly committed to enhancing their moderation of content.³⁰⁴

This presents large problems in the context of human rights law for several reasons: (1) there is little transparency to which content gets deleted and why; and (2) because NetzDG's definitions are so vague, social media platforms must make the decisions themselves as to which content gets deleted.³⁰⁵

The HRC is highly deferential to moral differences amongst nation states.³⁰⁶ NetzDG, however, presents a novel problem of international internet law; it is not the German government, but the intermediaries, that are making the decisions of what can be deleted.³⁰⁷ 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. The intermediaries are some of the most powerful actors in the world of information today, governmental or private.³⁰⁸

2. The Chilling of Political Speech

NetzDG has a chilling effect on political speech. The extremity with which Germany penalizes hate speech may lead those with unpopular or inflammatory opinions to refrain from posting. Recently,

302. Citron, *supra* note 18, at 1038. On May 31, 2016, Facebook, Microsoft, Twitter, and YouTube entered into an agreement with the European Commission to remove "hateful" speech within twenty-four hours if appropriate under terms of service.

303. Citron, *supra* note 18, at 1038.

304. See e.g., *Facebook CEO Mark Zuckerberg Meeting With European Parliament*, C-SPAN (May 22, 2018), <https://www.c-span.org/video/?446000-1/facebook-ceo-mark-zuckerberg-testifies-eu-lawmakers> [<https://perma.cc/5YHB-BAH4>] (documenting Mark Zuckerberg's address to Parliament that Facebook would be "fully compliant" with the GDPR).

305. ARTICLE 19, GERMANY: THE ACT TO IMPROVE ENFORCEMENT OF THE LAW IN SOCIAL NETWORKS (2017).

306. See Siracusa Principles of the ICCPR para. 27, <https://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/SiracusaPrinciples.pdf>

[<https://perma.cc/Z3KS-48U8>] ("Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.").

307. Article 19, *supra* note 285, at 16.

308. Klonick, *supra* note 297, at 1657.

Germany has gone as far as to use its law enforcement to raid the houses of posters.³⁰⁹ As part of a pattern of chilling political speech, a Green Party candidate in Austria was insulted online and the European courts held that the content was illegal and had to be removed.³¹⁰

Similarly, under NetzDG, Beatrix Von Storch was insulted online and that content was taken down.³¹¹ Beatrix Von Storch herself was censored for hateful comments against Muslims on Twitter.³¹² While in itself this is not sympathetic, many German ended up running to her side.³¹³ The effect is not only the chilling of political speech, but also the creation of a sympathetic character on the far right, thus further solidifying her views as part of the zeitgeist.³¹⁴ More sympathetically, satirists mocking Beatrix Von Storch had their content taken down, chilling creative *and* political speech.³¹⁵

Recently, countries with less noble goals have taken inspiration from NetzDG.³¹⁶ NetzDG can seem acceptable as legislation in a country like Germany, which holds itself to a high standard of human rights.³¹⁷ The law is so vague, however, that its language has now been co-opted by less good faith users.³¹⁸

309. Ruth Bender, *German Police Carry Out a Nationwide Crackdown on Internet Hate Speech*, WALL STREET J. (July 12, 2016), <https://www.wsj.com/articles/german-police-carry-out-nationwide-crackdown-on-internet-hate-speech-1468429275> [https://perma.cc/APR7-C5PH].

310. *See, e.g.*, Jennifer Daskal, *supra* note 102.

311. *See supra* notes 1-5.

312. *See supra* notes 1-5.

313. *See supra* notes 1-5.

314. *See supra* notes 1-5.

315. *See supra* notes 1-5.

316. Vidushi Marda & Stephania Milan, *Wisdom of the Crowd: Multistakeholder Perspectives on the Fake News Debate*, U. PENN. INTERNET POL'Y OBSERVATORY (May 21, 2018), http://globalnetpolicy.org/wp-content/uploads/2018/05/Fake-News-Report_Final.pdf [https://perma.cc/Q5UK-CF5F].

317. *See* Beate Rudolf, *Human Rights in Germany—A View from Germany's National Human Rights Institution*, 44 INT'L J. LEGAL INFO. 50, 52 (2016); Stefan Oeter, *International Human Rights and National Sovereignty in Federal Systems: The German Experience*, 47 WAYNE L. REV. 871, 873 (2001).

318. *Germany: Flawed Social Media Law*, HUM. RTS. WATCH (Feb. 14, 2018), <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law> [https://perma.cc/B2U6-8ZEA]; Dorothee Baumann-Pauly, *German Companies Report Implementation of New Hate Speech Law*, N.Y.U. STERN CTR. FOR BUS. RTS. (Aug. 7, 2018), <https://bhr.stern.nyu.edu/blogs/2018/8/7/german-companies-report-on-the-implementation-of-new-hate-speech-law> [https://perma.cc/X7XG-T7WE].

Soon after the passage of NetzDG, Russia adopted a law similar to the German law.³¹⁹ “Manifestly unlawful” takes on new meaning when it is paired with the intent of the Kremlin.³²⁰ Russia, Singapore, and the Philippines have all cited NetzDG in pending legislation that will limit speech online.³²¹

These examples grow into even more extreme legislation. Poland has passed a law banning speech about Poland’s role in the Holocaust.³²² Poland, the country famously devastated by invading Nazi forces during World War II, has been heavily criticized by the international community for its complicity in deaths of the Jewish people.³²³ One of three Jews who died during the Holocaust was Polish.³²⁴ In 2017, the Polish government passed legislation forbidding this criticism.³²⁵ After public backlash (including massive outcry from Israel), Poland amended the law.³²⁶ It removed criminal penalties from the statute, but it remains illegal still to speak against Polish involvement in the Holocaust.³²⁷

NetzDG has become the impetus not only for troubling censorship in Germany itself, but also for global censorship around the world. As was specified by the HRC in 2010, protection of free speech on the internet is crucial in this day and age to the protection of expression to

319. Vanessa Strizh et al., *Russia Introduces New Draft Law on Social Networks*, MORGAN, LEWIS & BOCKIUS LLP (Apr. 20, 2018), <https://www.morganlewis.com/pubs/russia-introduces-new-draft-law-on-social-networks> [<https://perma.cc/Q793-3ASM>].

320. Bauman-Pauly, *supra* note 298; *Don’t Pass Fake News Bill, Kremlin Human Rights Council Urges Parliament*, RADIO FREE EUROPE RADIO LIBERTY, (Mar. 11, 2019), <https://www.rferl.org/a/dont-pass-fake-news-bill-kremlin-human-rights-council-urges-parliament/29815217.html> [<https://perma.cc/BWW8-P35T>].

321. Human Rights Watch, *supra* note 298.

322. Vanessa Gera, *Polish Law Criminalizing Some Holocaust Speech Takes Effect*, ASSOC. PRESS (Mar. 1, 2018), <https://www.apnews.com/2a09f2c3d4ef4915b94aa6be620c9205> [<https://perma.cc/64MU-AZ3X>]; Barbora Cernusakova, *Poland’s Holocaust Law Is A Dangerous Threat to Free Speech*, TIME (Mar. 9, 2018), <http://time.com/5193301/poland-holocaust-law-freedom-speech-amnesty/> [<https://perma.cc/QU2T-G6NZ>].

323. Edna Friedberg, *The Truth About Poland’s Role in the Holocaust*, ATLANTIC (Feb. 6, 2018), <https://www.theatlantic.com/international/archive/2018/02/poland-holocaust-death-camps/552455/> [<https://perma.cc/PD3M-X5FS>].

324. *Id.*

325. Wojciech Moskwa, *Poland Softens Holocaust Law That Sparked International Fury*, BLOOMBERG (June 27, 2018), <https://www.bloomberg.com/news/articles/2018-06-27/poland-to-amend-holocaust-law-upending-ties-with-israel-u-s> [<https://perma.cc/VXB3-R5X2>].

326. Jennifer Rubin, *Poland Amends Holocaust Speech Law, Scrapping Jail Terms*, FRANCE 24 (Jun. 27, 2018), <https://www.france24.com/en/20180627-polish-pm-backs-down-holocaust-speech-law-pis-anti-semitism> [<https://perma.cc/E3S7-9MR7>].

327. *Id.*

all.³²⁸ Media Platforms have become more concerned about limiting fake news and hateful content from both an economic and moral standpoint.³²⁹ NetzDG is an extreme example of how non-American jurisdictions have taken aim at widespread, transnational concerns of illegal internet content. Another indication of this trend is the recent European recent effort to codify the right to be forgotten through the GDPR.³³⁰ The GDPR has created mass liability for content that begs deletion not simply in one country, but worldwide.³³¹

American speech online also faces more direct challenges in foreign courts. Courts in Canada and the United States have seemingly gone to war over the issue. *Google LLC v. Equustek Solutions Inc.*, a California court held that a Canadian order to make content globally inaccessible was unenforceable in the United States, and ordered an injunction.³³² When Google returned to Canada with the injunction, the Canadian judge held it was still enforceable because it did not compel Google to “violate the law.”³³³

NetzDG presents the biggest challenge through the internet companies’ terms of service.³³⁴ The terms of service used by social media platforms further show the effect of transnational law on global censorship.³³⁵ The European Union recently signed a deal with social media providers to ensure the exclusion of Terrorism and Radicalized, hateful content on their sites.³³⁶ These terms of service to not simply apply in the European Union, but globally.³³⁷ This is in stark contrast to the initial stance of social media companies.³³⁸ From the most virulent defenders of free speech, to actual requests for self-regulation, internet companies have shown a change of heart in the arena of regulation.

328. See Land, *supra* note 131, at 54.

329. See, e.g., Charles Riley, *This Is the Regulation Mark Zuckerberg Wants for Facebook*, CNN (Mar. 22, 2018), <https://money.cnn.com/2018/03/22/technology/regulation-political-ads-facebook-zuckerberg/index.html> [<https://perma.cc/Y3PZ-7TT7>]; Citron, *supra* note 270.

330. Post, *supra* note 153, at 986-87.

331. See Post, *supra* note 153, at 983 (critiquing the ECJ’s harsh analysis of Google’s duties under the Right to be Forgotten).

332. *Google LLC v. Equustek Solutions Inc.*, No. 5:17-CV-04207-EJD, 2017 WL 5000834, at *3 (N.D. Cal Nov. 2, 2017).

333. *Equustek Solutions Inc. v. Jack*, 2018 BCSC 610, ¶ 20 (Can.).

334. Citron, *supra* note 18, at 1038.

335. Citron, *supra* note 18, at 1038.

336. Citron, *supra* note 18, at 1046.

337. Citron, *supra* note 18, at 1046.

338. Goldsmith & Wu, *supra* note 278, at 14.

Facebook claims that it looks to whether something is in violation of its “community guidelines” and *then* it evaluates whether it is unlawful under NetzDG (in which case it would only be blocked in Germany).³³⁹ Presuming that that is true, NetzDG still could lead to mass international censorship.³⁴⁰ As countries grow more willing to regulate internet platforms, social media providers have economic incentive to push their terms of services more and more conservative.³⁴¹ Many providers rely partially on geo-blockers,³⁴² but prefer to use the mutual assent of a form contract.³⁴³ As a result, online content grows progressively more censored.³⁴⁴

C. NetzDG: A Violation of the ICCPR

In evaluating NetzDG through a balancing test, it seems that it is in violation of human rights law because (1) The HRC has specifically sought to protect the internet; (2) The statute is not narrow in its speech limitation; and (3) It gives all of the power to censor to private actors.

1. Protected Use of Technology

The Human Rights Council emphasizes that exceptions to Article 19 from 19(3) must be narrow, and the main problem with NetzDG is that it is vast.³⁴⁵ It does not provide enough guidance for what illegal speech is.³⁴⁶ It is vague in its language towards penalties, offenses, and reporting requirements.³⁴⁷

339. Network Enforcement Act (“NetzDG”), FACEBOOK, <https://www.facebook.com/help/285230728652028> [<https://perma.cc/8GQA-CXBB>].

340. Citron, *supra* note 18, at 1038.

341. Citron, *supra* note 18, at 1038.

342. This is how some content in violation of NetzDG is removed solely in Germany. Network Enforcement Act (“NetzDG”), FACEBOOK, <https://www.facebook.com/help/285230728652028> [<https://perma.cc/8GQA-CXBB>].

343. Objectionable Content, FACEBOOK, https://www.facebook.com/communitystandards/objectionable_content [<https://perma.cc/J7W8-NDCB>]; *Removal of online hate speech in numbers*, LONDON SCHOOL OF ECONOMICS (Aug. 16, 2018), <http://blogs.lse.ac.uk/mediapolicyproject/2018/08/16/removals-of-online-hate-speech-in-numbers/> [<https://perma.cc/B38E-W6JY>].

344. Citron, *supra* note 18. *But see Twitter Community Standards*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/TM4X-L6C6>]; *Twitter European Community Standards*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [<https://perma.cc/5HBE-8XHX>]. Twitter’s standards are different between Europe and the United States.

345. *See* NetzDG, *supra* note 7.

346. *See* NetzDG, *supra* note 7.

347. *See* NetzDG, *supra* note 7.

2. “Manifestly Unlawful” Is Unacceptably Vague

The German legislature did not elaborate on the meaning of “manifestly unlawful within NetzDG.”³⁴⁸ It is not a phrase on which there is any elaboration in the document. “Manifestly unlawful” could thus apply as narrowly as excluding child pornography immediately or apply as broadly as excluding Beatrix Von Storch’s comments about Muslims. The danger in the vague term lies in its influence on platforms; without a clear definition of what must be removed within twenty-four hours, social media platforms will over-correct.

3. Private Actors and Overreach

Social media providers do not have a clear definition of “manifestly unlawful,” and reporting requirements on NetzDG are vague. The text leaves room for opaque practices. Social media platforms are thus making the decisions about what constitutes “manifestly unlawful” speech, or other speech generally. The German government has effectively delegated the task of defining what speech is legal to private, transnational actors who are quick to avoid fines. This delegation of power means that social media companies are determining which speech is legal and which speech is not.

V. AMERICAN STAKE IN NETZDG

In order to firmly understand what is at stake in NetzDG, it is important to understand the failures of the United States system of internet regulation. The United States has underregulated the internet purposefully, but the global nature of social media makes it difficult to escape the consequences of foreign regulation. Section V.A of this Note will explain the American approach to regulation.³⁴⁹ Section V.B will explore the transnational problems of social media speech regulation.³⁵⁰

A. Section 230

Section 230 of the Communications Decency Act indemnifies internet companies from any liability for third party content on their

348. See NetzDG, *supra* note 7.

349. See *infra* Section V.A.

350. See *infra* Section V.B.

platforms.³⁵¹ Initially, this provision meant to protect good faith platforms from liability of plagiarized materials on their sites.³⁵² The result reaches much farther.³⁵³

This system presents large problems for accountability on the internet.³⁵⁴ Many websites allow for anonymous posting. While this allows for many benefits, it also means those involved in illegal posting may never be tracked down.³⁵⁵ Generally, this is why countries like Germany have targeted internet platforms: the platforms are in the best position to prevent the harms.

B. Failings to Protect People Under the American Approach

NetzDG effectively censors within German borders, but it is likely the chilling nature of the legislation will have a transnational effect. Thus, American law may come to clash with NetzDG. For years, platforms have worked closer to using internet borders,³⁵⁶ but it is becoming increasingly unavoidable to contain one nation's law against another's.

Most social media platforms are based in America, and for years they have striven to keep themselves in line with free speech laws in America, well known as the most liberal with such laws.³⁵⁷ Primarily, many internet companies seek to take advantage of Section 230 of the Communications Decency Act, which indemnifies internet companies in the United States from facing liability for unlawful content on their platforms.³⁵⁸

351. 47 U.S.C.A. § 230 (West).

352. Patricia Spiccia, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 379 (2013).

353. *Id.*

354. Kristine L. Gallardo, *Taming the Internet Pitchfork Mob: Online Public Shaming, the Viral Media Age, and the Communications Decency Act*, 19 VAND. J. ENT. & TECH. L. 721, 728 (2017).

355. *Id.*

356. Goldsmith & Wu, *supra* note 278, at 54.

357. Ashley Smith-Roberts, *Facebook, Fake News, and the First Amendment*, 95 DENV. L. REV. ONLINE 118, 123 (2018).

358. 47 U.S.C.A. § 230 (West) (“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. . . .”)

The seminal case on this issue is *Yahoo! v. La Ligue Contre Le Racisme Et L'Antisemitisme*.³⁵⁹ In 2006, Yahoo! found itself subject to French laws prohibiting Holocaust denial when it was compelled to remove a Nazi memorabilia auction site from any URL accessible in France.³⁶⁰ This included yahoo.fr and yahoo.com itself.³⁶¹ Yahoo! sought declaratory relief in the United States to establish that the French law was unenforceable in America due to free speech laws.³⁶² The Ninth Circuit held that Yahoo! had an obligation to make “all reasonable (or available) measures” to block the content in France, but that the ban was unenforceable in the United States.³⁶³

The fears of global norms on the internet in the *Yahoo!* court were again visited in the *Google v. CNIL* in the ECJ.³⁶⁴ The French data protection authority sought to not only have Google delist websites within France, but also worldwide.³⁶⁵ The court rejected France’s attempt, stating “there would be nothing to prevent other jurisdictions from claiming the same global scope of application for their own laws. The result would be a ‘race to the bottom,’ as speech prohibited by any one country could effectively be prohibited for all, on a worldwide basis.”³⁶⁶

Yahoo! and *CNIL* are cases that seek to protect international differences on a platform that is increasingly changing.³⁶⁷ Today, these goals grow even less realistic as the internet becomes more global.³⁶⁸ Media platforms have become more concerned about limiting fake news and hateful content from both an economic and moral standpoint.³⁶⁹ NetzDG is an extreme example of how non-American jurisdictions have taken aim at widespread, transnational concerns of illegal internet content. Another indication of this trend is the recent European recent effort to codify the right to be forgotten through the

359. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1202 (9th Cir. 2006).

360. *Id.* at 1203.

361. *Id.*

362. *Id.* at 1225.

363. *Id.* at 1203 n.1.

364. Case C-507/17, *CNIL v. Google*.

365. *Id.* at ¶ 4.

366. *Id.* at ¶ 18.

367. *Id.* at ¶ 20.

368. See, e.g., Daskal, *supra* note 102.

369. See, e.g., Riley, *supra* note 329; Citron, *supra* note 270.

GDPR.³⁷⁰ The GDPR has created mass liability for content that begs deletion not simply in one country, but worldwide.³⁷¹

Domestic sovereignty over online content is also facing more direct challenges in international courts. Courts in Canada and the United States have seemingly gone to war over the issue. In *Google LLC v. Equustek Solutions Inc.*, a California court held that a Canadian order to make content globally inaccessible was unenforceable in the United States, and ordered an injunction.³⁷² When Google returned to Canada with the injunction, the Canadian judge held that the original Canadian order was still enforceable because it did not compel Google to “violate the law.”³⁷³

The greatest threat to national ability to control content online comes from internet companies’ terms of service.³⁷⁴ The terms of service that create “community guidelines” for each website do not create de jure international norms, but de facto ones. The terms of service used by social media platforms further show the effect of transnational law on global censorship.³⁷⁵ The European Union recently signed a deal with social media providers to ensure the exclusion of terrorism and radicalized, hateful content on their sites.³⁷⁶ These terms of service do not simply apply in the European Union, but globally.³⁷⁷

VI. SOLUTIONS

Given the overbroad effects of NetzDG, it seems it is in violation of Article 19. While Germany’s goals are compelling, they have not sufficiently tailored the law to illegal content.³⁷⁸ However, NetzDG is legislation attempting to curtail one of the most pressing transnational

370. Post, *supra* note 153, at 986-87.

371. *See id.* at 983 (critiquing the ECJ’s harsh analysis of Google’s duties under the right to be forgotten).

372. *Google LLC v. Equustek Solutions Inc.*, No. 5:17-CV-04207-EJD, 2017 WL 5000834, at *3 (N.D. Cal. Nov. 2, 2017).

373. *Equustek Solutions Inc. v. Jack*, 2018 BCSC 610, ¶ 20 (Can.).

374. Citron, *supra* note 18, at 1041.

375. Citron, *supra* note 18, at 1038.

376. Citron, *supra* note 18, at 1038.

377. Citron, *supra* note 18, at 1038.

378. Jeffrey L. Dunoff et al., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 440 (Vicki Been et al. eds., 3d ed. 2010); John Currie, *PUBLIC INTERNATIONAL LAW* 377 (Irwin Law ed., 2001).

issues of the twenty-first century.³⁷⁹ While the law must be challenged, there is value in preserving parts of it. Part V of this Note will explore the different ways to attack NetzDG, as well as the ways Germany could tailor the law to come more in line with human rights norms.³⁸⁰ If Germany can create a nuanced approach to hate speech online, it may set a precedent for other countries to follow suit and tackle the growing internet radicalization.

A. Litigation Solutions

1. Federal Constitutional Court

Germany's Federal Constitutional Courts present Germans with the opportunity to challenge the bill.³⁸¹ Under German Basic Law, a German citizen could challenge this breach of rights with a civil suit.³⁸² The suit would give Germany the opportunity to work through the problems with NetzDG on its own.

It seems unlikely the courts in Germany will entirely strike down NetzDG. German courts are far more deferential to the legislature than American courts.³⁸³ In fact, it is explicit that German Constitutional Courts do not have the power to make law.³⁸⁴ As such, the Federal Constitutional Courts are more ambivalent about striking down legislation.

German courts also are likely to make the type of value judgments that would prioritize Germany's hate speech laws over free expression law in the context of bigoted actors.³⁸⁵ NetzDG primarily takes aim at speech that German courts do not prioritize.³⁸⁶ It seems unlikely that German courts would prove sympathetic to the inflammatory speech often at play on social media.³⁸⁷

379. Siva Vadhyanathan, *ANTISOCIAL MEDIA* (Oxford Univ. Press 2018) (detailing the ever mounting problem of social media platforms and human rights violations).

380. See *infra* Section VI.B.1.

381. KOMMERS & MILLER, *supra* note 193, at 355.

382. GRUNDGESETZ [GG] [BASIC LAW], *translation at* <https://www.btg-bestellservice.de/pdf/80201000.pdf> [<https://perma.cc/688H-KSP9>].

383. KOMMERS & MILLER, *supra* note 193, at 160.

384. KOMMERS & MILLER, *supra* note 193, at 164 (noting that Germany vests the entirety of lawmaking authority in the legislature). It should be noted that German Courts have taken the authority to step further into a lawmaking role, when justice requires creative judging. See *The Princess Soraya Case* (1973) 34 BVerfGE 269 (Ger.).

385. See KOMMERS & MILLER, *supra* note 193, at 355.

386. See NetzDG, *supra* note 7.

387. See KOMMERS & MILLER, *supra* note 193, at 362.

2. Regional European Courts

EU courts could also present an enforcement mechanism that would be useful.³⁸⁸ As a regional court of human rights, ECtHR has proven effective as a check on the powers of independent nations to control the human rights of their people.³⁸⁹ Indeed, some tout the European Union as a model for international regional control.³⁹⁰ The European court system has more enforcement mechanisms than the international court system, and could be a more effective check on the power of the German government.

The European Union has recently proven that protection of dignity and privacy is of greater importance than protection of inflammatory speech.³⁹¹ The European Union is also working with social media companies to establish measures similar to those in NetzDG. The European courts have also established deferential treatment of speech laws within each territory.³⁹²

3. The Optional Protocol

The International Court of Justice (“ICJ”) also presents a solution because Germany assented to the Optional Protocol.³⁹³ This solution would give any German citizen with standing the ability to protest the new law directly under Article 19.³⁹⁴ Further, in light of the HRC’s new emphasis on preventing censorship on the internet, there is a high chance that they will be less receptive to NetzDG than any European court.³⁹⁵

However, even if the ICJ enforce this action against Germany, the Optional Protocol does not present easy enforcement mechanisms.³⁹⁶ ICJ rulings do not have the sovereign rule of law of nation states.³⁹⁷ As such, enforcement of the ICCPR can range from greatly effective to mere formality.³⁹⁸

388. Donoho, *supra* note 34, at 45.

389. Donoho, *supra* note 34, at 45.

390. Donoho, *supra* note 34, at 44.

391. Post, *supra* note 153, at 991.

392. See Case 121/85 [1986], *Conegate v. HM Customs Excise*.

393. See *supra* note 58.

394. See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171.

395. Rudolf, *supra* note 317, at 53.

396. See Donoho, *supra* note 34, at 26.

397. Nanda, *supra* note 120, at 364.

398. *Id.*

4. Public Pressure

Despite difficulties of challenging NetzDG in an enforceable action to repeal the bill, it is likely Germany will respond to intense pressure from international organizations and foreign governments.³⁹⁹ Germany is deeply committed to individual rights, partially because of its history.⁴⁰⁰ Germany is also committed to maintaining its image as the arbiter of human rights.⁴⁰¹ This commitment to its image may cause Germany to take stock of the public reaction to the bill. Indeed, Germany is already considering revising the bill.⁴⁰²

B. Tailor the Law

One of the most important ways Germany could solve these issues is to tailor the law. If complying with human rights standards requires a balancing test, then Germany may be able to narrow the terms of NetzDG so that it only regulates the targeted speech necessary to promote the dignity interests of German citizens. This could preserve the successful aspects of the law while limiting censorship damage.

1. Defining “Manifestly Unlawful”

The most ambiguous and dangerous portion of NetzDG is the lack of description of “manifestly unlawful” content.⁴⁰³ This is the only content subject to the twenty-four hour removal clause, and therefore the most prone to the chilling effects of overcorrection.⁴⁰⁴ While NetzDG defines the statutes which govern hate speech, it gives no indication of when something “manifestly” violates one of these laws.

399. Article 1 of Germany’s Basic Law specifically references human rights, and the ICCPR is incorporated into the Basic Law. See GRUNDGESETZ [GG] [BASIC LAW], translation at <https://www.btg-bestellservice.de/pdf/80201000.pdf> [<https://perma.cc/EV42-Z53S>].

400. See Rudolf, *supra* note 317, at 55 (acknowledging Germany’s commitment to “never again”); Zachary Pall, *Light Shining Darkly: Comparing Post-Conflict Constitutional Structures Concerning Speech and Association in Germany and Rwanda*, 42 COLUM. HUM. RTS. L. REV. 5, 14 (2010) (noting the postwar commitment to human rights). But see Oeter, *supra* note 317, at 872 (arguing that Germany does not exhibit the commitment to Human Rights law for which it is so famous).

401. See Oeter, *supra* note 317, at 887.

402. See Emma Thomasson, *Germany looks to revise social media law as Europe watches*, REUTERS (Mar. 8, 2018), <https://www.reuters.com/article/us-germany-hatespeech/germany-looks-to-revise-social-media-law-as-europe-watches-idUSKCN1GK1BN> [<https://perma.cc/K7LH-4Q8H>].

403. See *supra* Section III.B.

404. See NetzDG, *supra* note 7.

Considering NetzDG is a law based in policing speech, a lack of specificity can be fatal.

Germany should clarify in the statute what it means by “manifestly unlawful.” This could, for example, pertain to child pornography, terrorist recruitment videos, and specific threats. These definitions would help social media providers pare down the content they delete before reporting, and thus make it easier to distinguish what they have time to consider taking down.

Germany could base the definition of “manifestly unlawful” in Article 1 of the Basic Law and to Article 19(3) of the ICCPR. Article 1 holds human dignity as “inviolable.”⁴⁰⁵ Article 19(3) allows for restrictions on expression when there is a threat to security and the public order.⁴⁰⁶ If the German legislature uses this language, their commitment to upholding freedom of expression and dignity will be explicit. Further, it will attach NetzDG to previous Court rulings, because there is a constitutional history of protecting dignity. Thus, “manifestly unlawful content” should be defined as “content that violates dignity in such an egregious manner that it materially disrupts national security or public order.” Such a definition would give internet companies the guidance to delete content that involves violence or hateful propaganda, but let them consider more carefully before they remove mere insults and satire.

2. Protecting Art and Political Dissent

Expressly carving out and protecting artistic expression could protect NetzDG as a matter of human rights law. The ICCPR is carries extra weight with political speech and artistic expression.⁴⁰⁷ This speech adds value to society.⁴⁰⁸ Expressly identifying more heavily protected speech in the statute could incentivize social media companies to proceed with more caution as they delete content, particularly that of artists. Arguably the vulgarity of Jan Böhmermann and the Titanic are crucial to political discourse online.⁴⁰⁹

405. GRUNDGESETZ [GG] [BASIC LAW], *translation at* <https://www.btg-bestellservice.de/pdf/80201000.pdf> [<https://perma.cc/58LS-MGS4>].

406. ICCPR, *supra* note 15, art. 19(3).

407. ICCPR, *supra* note 15, art. 19(2) (expressly applying expression protection to artists in particular).

408. Oster, *supra* note 62, at 43.

409. KOMMERS & MILLER, *supra* note 193, at 355.

C. Collaboration Between Sovereign and Twitter

The European Union has entered into an agreement with social media platforms to attempt to curb the deeper issues of fake news.⁴¹⁰ While this agreement is far from perfect,⁴¹¹ active collaboration between social media companies and government entities could be a more beneficial way to regulate the internet.⁴¹² Mass internet providers and social networks are under even more pressure than the government to regulate their content.⁴¹³

Social media providers also have the option of working on technology that better targets hate speech.⁴¹⁴ Processes like the ones being worked on at the Anti-Defamation League in the United States to filter out hate speech more specifically without filtering political satire or legal political speech.⁴¹⁵ If computer programs can gain sufficient nuance to distinguish true hate speech as defined by German law, it would save social media providers from the task of deciding what speech is illegal themselves.⁴¹⁶

The more extreme solution to this problem is the advent of the collective governance solutions – or a collaboration between governments and internet companies. As of recent years, there is a deficit of government information on the operations online platforms, and internet companies, despite hiring counsel, do not have the clarity of regulations to help them make determinations.⁴¹⁷ This could be remedied by more active collaboration between the government and the internet platforms creating a system that allows for government conceptions of privacy to match with true understanding of the internet. Partnering with good faith actors could lead to better remedies for the root problem of protecting people online.

410. Citron, *supra* note 18, at 1047.

411. *Id.* at 1049-50.

412. Klonick, *supra* note 297, at 1667.

413. Klonick, *supra* note 297, at 1667 (noting that Facebook was forced to start regulating itself based on mounting pressure to do so).

414. *See* Klonick, *supra* note 297, at 1667.

415. *The Online Hate Index*, ANTI-DEFAMATION LEAGUE (Jan. 2018), <https://www.adl.org/resources/reports/the-online-hate-index#introduction> [<https://perma.cc/F8XM-A4VG>].

416. Deletion centers themselves present problems, particularly with rate of Post-Traumatic Stress Disorder amongst workers there. For more information on this, see Andrew Arshat & Daniel Etcovitch, *The Human Cost of Online Content Moderation*, HARV. J. L. & TECH (Mar. 2, 2018), <https://jolt.law.harvard.edu/digest/the-human-cost-of-online-content-moderation> [<https://perma.cc/HAR3-ML9Z>].

417. *See* Klonick, *supra* note 297, at 1667.

D. Private Solutions

Internet companies are creating their own solutions to the difficulties of content moderation as well. In the last month, Facebook suggested that it could create its own tribunals for users to turn to when they wished to have their content restored.⁴¹⁸ Facebook suggests the body would be independent from the company, and it would render judgments as a neutral arbiter.⁴¹⁹ This appellate system would solve many of the problems with NetzDG.⁴²⁰ Currently, there is not enough oversight of content deletion. A tribunal could bring transparency to Facebook's process of deleting, and citizens could have a way to access their rights online. However, such a solution would continue to give private companies the ability to determine the law.⁴²¹ It would also not solve these problems with Twitter, Google, Youtube, or any other massive internet company. It would also be difficult to make it completely independent.⁴²² Thus, as a solution it is ultimately flawed.

VI. CONCLUSION

In the brave new world of the internet, human beings have access to more information and connection than ever. Bodies of human rights law have recognized the inevitable effect of this revolution on our human rights. NetzDG is a law that challenges human rights on Internet platforms. It also seeks to protect the German people from the fast radicalizing hate speech online. These issues around speech require an evaluation of human rights law in relation to a new forum of expression for the century. Germany, a country deeply committed to the human rights of its people, must take care to create a more nuanced approach to this law. As of December 2018, the German government has claimed modest success with NetzDG, citing the reports from social media companies of low deletion rates.⁴²³ At the same time, the first

418. Kate Klonick, *How To Make Facebook's 'Supreme Court' Work*, N.Y. TIMES (Nov. 17, 2018), <https://www.nytimes.com/2018/11/17/opinion/facebook-supreme-court-speech.html> [<https://perma.cc/7F2Z-FSJ2>].

419. *Id.*

420. Evelyn Douek, *Facebook's New 'Supreme Court' Could Revolutionize Online Speech*, LAWFARE (Nov. 19, 2018), <https://www.lawfareblog.com/facebooks-new-supreme-court-could-revolutionize-online-speech>.

421. Klonick, *supra* note 297.

422. Klonick, *supra* note 297.

423. Dietmar Neurer, *Minister of Justice Is Satisfied With NetzDG*, HANDELSBLATT (Dec. 13, 2018), <https://www.handelsblatt.com/politik/deutschland/gesetz-gegen-hass-im-netz-nicht-alles-perfekt-aber-vieles-gut-justizministerium-zeigt-sich-zufrieden-mit-dem-netzdg/>

constitutional challenge to NetzDG is making its way through the Federal Constitutional Court in Germany.⁴²⁴ As the debate continues, the international community must watch and see if freedom of expression on the internet will prevail in one of its toughest battles yet.

23752306.html?share=twitter&ticket=ST-826720-6CCY1C14ckRNGMF4wfhD-ap1
[<https://perma.cc/JXD9-5WFZ>].

424. *Facebook-Gesetz soll in Karlsruhe gekippt werden*, DIE TAGESPOST (Nov. 24, 2018), <https://www.die-tagespost.de/feuilleton/online/Facebook-Gesetz-soll-in-Karlsruhe-gekippt-werden;art4690,193729> [<https://perma.cc/6BSH-8Z3G>]; *Verfassungsbeschwerde gegen NetzDG wird geprüft*, DIE TAGESPOST (Dec. 12, 2018), <https://www.die-tagespost.de/feuilleton/online/Verfassungsbeschwerde-gegen-NetzDG-wird-geprueft;art4690,194145> [<https://perma.cc/4PCE-59RJ>].