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Fighting Hate with Speech Law: Media and German Visions of Democracy

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ABSTRACT

In Germany, far-right groups have revived Nazi terminology like *Lügenpresse* (lying press) or *Systempresse* (system press) to decry the media today. German politicians, journalists, and the public have turned to numerous methods to try to combat the reinsertion of Nazi language into everyday German life. One key method is the law. Prior to the 2017 German election, the German parliament swiftly passed the *Netzwerkdurchsetzungsgesetz* (Network Enforcement Law, NetzDG for short). While English-language press has often called this act a hate speech law, it actually enforces 22 statutes of extant German speech law online. Spearheaded by the SPD-led Justice Ministry, NetzDG represented the most public effort by the German government to push back against the AfD, the far right, and the rise of hate speech in Germany. NetzDG attracted huge global attention as the first major law to fine American-based social media companies for not adhering to national statutes. This article examines why German politicians turned to law as a way to combat the rise of the far right. I explore how NetzDG represented German political understandings of the relationship between freedom of expression and democracy and argue that NetzDG followed a longer historical pattern of German attempts to use media law to raise Germany's profile on the international stage. The article examines the irony that NetzDG was meant to defend democracy in Germany, but may have unintentionally undermined it elsewhere, as authoritarian regimes like Russia seized upon the law to justify their own curtailments of free expression. Finally, I explain the difficulties of measuring whether NetzDG has achieved its goals and showcase a few other approaches to the problems of information in democracies.

KEYWORDS

Hate speech; Germany; NetzDG; platform governance; democracy; alt-right

Introduction

Over the past five years, far-right groups in Germany have revived Nazi terminology like *Lügenpresse* (lying press) or *Systempresse* (system press) to decry the media.¹ Starting in mid-October 2014, anti-immigration demonstrations occurred every Monday in

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¹On the resurgence of the term, see Volker Lilienthal and Irene Neverla, (eds.), *Lügenpresse. Anatomie eines politischen Kampfbegriffs* (Cologne: Kiepenheuer & Witsch, 2017).

Dresden over the course of several years. The choice of Mondays harkened back to the Monday demonstrations against the GDR in 1989. The demonstrations themselves were organized under the aegis of Pegida (the acronym for the group *Patriotische Europäer gegen die Islamisierung des Abendlandes*, Patriotic Europeans against the Islamization of the West). The events grew in size into 2015, with thousands of demonstrators and counterdemonstrators, particularly after Angela Merkel opened the borders to refugees and Germany accepted over one million asylum seekers. But the revival of Nazi terminology around the press and resurgence of hate speech were not spurred by events in 2015 alone. As political scientist Britta Schellenberg has put it, the use of concepts like *Lügenpresse* show ‘a complex multi-year alienation from collective belief systems.’² Such sentiments seeped into broader politics with the rise of the Alternative für Deutschland (AfD) party, which latched onto anti-immigration views and media critiques to propel its electoral success.³

Alongside public efforts, many German politicians have tried to combat the reinsertion of Nazi language into everyday German life. One key method is the law. Prior to the 2017 German election, the German parliament swiftly passed the *Netzwerkdurchsetzungsgesetz* (Network Enforcement Law, NetzDG for short). While the English-language press has often called this act a hate speech law, it actually enforces 22 statutes of extant German speech law online. Spearheaded by the Social Democratic Party-led Justice Ministry, NetzDG represented the most public effort by the German government to push back against the far-right AfD, neo-Nazis, and the rise of hate speech in Germany. NetzDG attracted tremendous global attention as the first major law to fine social media companies for not adhering to national statutes.

NetzDG has generated substantial literature already. Think tanks produced legal analyses;⁴ I served on the steering committee of a Transatlantic High-Level Working Group on Content Moderation and Freedom of Expression Online that analyzed NetzDG in early 2019 to start a broader exploration of how to combat hate speech, terrorist content, and disinformation online.⁵ Some have considered whether the law achieved its stated goals of reducing hate speech online, finding that there is no clear answer even for such a comparatively narrow question.⁶ Alongside think tanks, scholars of media and communications studies and legal scholars have explored the regulatory mechanisms, provided legal analysis, critiqued its potentially deleterious consequences for freedom of expression, and analyzed the transparency reports mandated by the

²Britta Schellenberg, “‘Lügenpresse’?,” in W. Frindte, D. Geschke, N. Haußecker, and N. Schmidtke, (eds.), *Rechtsextremismus und “Nationalsozialistischer Untergrund”* (Wiesbaden: Springer VS Verlag für Sozialwissenschaften, 2016), p. 309.

³On the AfD and media, see Bernd Gäbler, *AfD und Medien. Analyse und Handreichungen. Ein Diskussionsbeitrag der Otto Brenner Stiftung* (Frankfurt am Main: Otto Brenner Stiftung, 2017). On the AfD in parliaments up to the federal election of 2017, see Benno Hafeneger, Hannah Jestädt, Lisa-Marie Klose, and Philine Lewek, *AfD in Parlamenten. Themen, Strategien, Akteure* (Frankfurt am Main: Wochenschau Verlag, 2018).

⁴See, for example, Article 19, “Germany: The Act to Improve Enforcement of the Law in Social Networks,” August 2017, accessed 21 May 2020, <https://www.article19.org/wp-content/uploads/2017/09/170901-Legal-Analysis-German-NetzDG-Act.pdf>. For an overview of think tank reports, see Heidi Tworek and Paddy Leerssen, “An Analysis of Germany’s NetzDG Law,” 15 April 2019, accessed 21 May 2020, https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf, pp. 2–4.

⁵The working group included politicians, senior company officials, leaders from NGOs, and academics from both sides of the Atlantic. For the working group’s members, see https://www.ivir.nl/twg/leadership_and_members/; for the group’s working papers, see <https://www.ivir.nl/twg/publications-transatlantic-working-group/>.

⁶William Erickson and Olivia Knodt, “Germany’s NetzDG: A Key Test for Combatting Online Hate,” *CEPS Policy Insight* (November 2018), accessed 21 May 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300636.

law.⁷ Some have explored how NetzDG represents a new approach of ‘regulated self-regulation’ by platforms of online speech and whether this has created a reasonable responsibility for preventing illegal speech.⁸ Others are now considering alternative solutions to deletion, such as using artificial intelligence (AI) to ‘quarantine’ hate speech.⁹ But these works remain narrowly focused on the law as a way to regulate communications and, by extension, on tackling online speech to tackle online *and* offline extremism.

The article, by contract, combines history, communication and media studies, public policy, and law to take a broader view on why German politicians focused on hate speech as a central problem within the rise of the Far Right, why they came to see law as a key tool to tackle that problem, and how this approach may have underplayed the broader reasons for the rise of the alt-right. Of course, speech law was not the only area where German officials sought to address rising problems of prejudice. Many other efforts in Germany have addressed the rise of extremism and radicalization; these include the hundreds of projects sponsored under the federal ‘*Demokratie leben!*’ program since 2015, criminal task forces, and the creation of commissioners to combat antisemitism federally and in thirteen states. While this article does not examine all these efforts in depth, it takes the example of NetzDG to denaturalize the assumption that law necessarily represents the first approach to addressing problems of violence and extremism. Rather, scholars can take an interdisciplinary approach to explain why politicians rapidly pushed through a legal remedy like NetzDG in 2017 and widely publicized that effort, even though they simultaneously pursued other avenues.

I will explore how NetzDG represented a new stage in long-standing German political understandings of the relationship between freedom of expression and democracy. I argue that NetzDG followed a longer historical pattern of German attempts to use media law to raise Germany’s profile on the international stage. The article examines the irony that NetzDG was meant to defend democracy in Germany, but may have unintentionally undermined it elsewhere, as authoritarian regimes like Russia and Vietnam copied parts of the law to justify their own curtailments of free expression. Finally, I will briefly suggest why it is so difficult to measure NetzDG’s efficacy.

NetzDG and the turn to law

With just a few months before the German federal election in October 2017, Social Democratic Party (SPD) and Christian Democratic Union (CDU) politicians in the

⁷Amélie Heidt, “Reading between the Lines and the Numbers: An Analysis of the First NetzDG Reports,” *Internet Policy Review*, vol. 8, no. 2 (2019), <https://policyreview.info/articles/analysis/reading-between-lines-and-numbers-analysis-first-netzdg-reports>; Wolfgang Schulz, “Regulating Intermediaries to Protect Privacy Online – The Case of the German NetzDG,” in Marion Albers and Ingo Sarlet, (eds.), *Personality and Data Protection Rights on the Internet* (forthcoming), preprint available: <https://www.hiig.de/wp-content/uploads/2018/07/SSRN-id3216572.pdf>; R. Zipursky, “Nuts about Netz: The Network Enforcement Act and Freedom of Expression,” *Fordham International Law Journal*, vol. 42, no. 4 (2019): pp. 1352–1374. For a short scholarly review, see Danya He, “Governing Hate Content Online: How the *Rechtsstaat* Shaped the Policy Discourse on the NetzDG in Germany,” *International Journal of Communication*, vol. 14 (2020): pp. 3746–3747.

⁸Thomas Wischmeyer, “‘What is Illegal Offline is Also Illegal Online’ – The German Network Enforcement Act 2017,” in Bilyana Petkova and Tuomas Ojanen, (eds.), *Fundamental Rights Protection Online: The Future Regulation of Intermediaries* (Cheltenham, UK: Edward Elgar Publishing, 2020), pp. 28–56.

⁹Stefanie Ullmann and Marcus Tomalin, “Quarantining Online Hate Speech: Technical and Ethical Perspectives,” *Ethics and Information Technology*, 14 October 2019, <https://doi.org/10.1007/s10676-019-09516-z>.

coalition government were confronted with myriad problems: the AfD docking onto anti-refugee sentiment and reaching up to 20 percent in polls at home alongside a dramatically altered international situation with Donald Trump as US president. The most prominent response to these questions was a law about online speech, which was passed by the German cabinet in April 2017 and then comparatively swiftly by the German Bundestag and Bundesrat on 1 September 2017. Although not the only measure taken, the law attracted by far the most international attention, whether praised by those who wanted more action against platforms or criticized by those who feared censorship or incentivizing platforms to stifle free expression. The law's full name is *Gesetz zur Verbesserung der Rechtdurchsetzung in sozialen Netzwerken* (Law to Improve Judicial Enforcement on Social Networks). It is known as the *Netzwerkdurchsetzungsgesetz*, or NetzDG. NetzDG enforces 22 statutes of extant German speech law and has been in full force since 1 January 2018.

While NetzDG became widely known in 2017, the focus on online speech to solve broader problems of right-wing extremism and foreign interference had emerged in 2015. Hate speech was on the rise, as was physical violence against asylum seekers. In 2015, the number of attacks on housing accommodating asylum seekers quadrupled. Even the year before, the politics of such attacks were clear: the Bundeskriminalamt (Federal Criminal Police Office) noted that 177 of the 199 violent acts against asylum seekers' accommodation were motivated by far-right sentiment in 2014.¹⁰ Xenophobia and racism had existed before the refugee crisis, but the amount increased dramatically thereafter. German police noted 2,670 cases of incitement to violence or hatred in 2014; in 2016, the figure more than doubled to 6,514.¹¹ The serial killings by three members of the National Socialist Underground (NSU) also created a 'caesura' in 2015, as one government report put it in 2019.¹²

As these problems became more prominent in 2015, multiple government ministries sought to create new solutions. The Federal Ministry for Family, Seniors, Women, and Youth created the 'Demokratie leben!' program, which funded civil society projects to combat 'radicalizations and polarizations in society.'¹³ The program had three main aims: bolster democracy, foster diversity (*Vielfaltgestaltung*), and prevent extremism. During its first four years, the program received increasing funding, from 40.5 million euros in 2015 to 115.5 million euros in 2019. The funding enabled over 5,000 projects ranging from the very local to the federal. By 2019, the program had the most funding of any federal program to promote democracy and prevent extremism.¹⁴

¹⁰"Bundeskriminalamt: Anschläge auf Asylunterkünfte haben sich 2015 vervierfacht," *Der Spiegel*, 9 December 2015, <https://www.spiegel.de/politik/deutschland/bundeskriminalamt-anschlaege-auf-asylunterkuenfte-haben-sich-2015-vervierfacht-a-1066932.html>.

¹¹Daniel Leisegang, "No Freedom to Hate: Germany's New Law against Online Incitement," *Eurozine*, 29 September 2017, accessed 21 May 2020, <https://www.eurozine.com/no-freedom-to-hate-germanys-new-law-on-online-incitement/>.

¹²"Abschlussbericht Bundesprogramm Demokratie leben! Erste Förderperiode (2015 bis 2019)," Bundesministerium für Familie, Senioren, Frauen und Jugend, 19, 5 January 2021, https://www.demokratie-leben.de/fileadmin/Demokratie-Leben/Downloads_Dokumente/Abschlussbericht_Erste_Foerderperiode_2015_-_2019/Abschlussbericht_Demokratie_leben_2015_-_2019.pdf. On the far longer history of the NSU, see Daniel Koehler, *Right-Wing Terrorism in the 21st Century: The National Socialist Underground and the History of Terror from the Far Right in Germany* (Abingdon: Routledge, 2017).

¹³"Über 'Demokratie leben!,'" accessed 5 January 2021, <https://www.demokratie-leben.de/das-programm/ueber-demokratie-leben>.

¹⁴"Abschlussbericht Bundesprogramm Demokratie leben! Erste Förderperiode (2015 bis 2019)," p. 2.

At the same time, the most prominent effort (at least in national and international media reporting) was an effort to address online speech. The Justice Ministry, headed by the SPD's Heiko Maas, had taken up issues of online speech in particular when the refugee crisis seemed to spur far more incendiary speech on social media. The Justice Ministry convened a task force with representatives from civil society and the major social networks. The social networks committed to improving their complaint mechanisms for illegal speech and to addressing complaints within 24 h. While the Justice Ministry noted improvements, 'these did not suffice, however,' noted the draft of the NetzDG law in April 2017.¹⁵

German politicians had also realized that online speech raised jurisdictional issues. It seemed that German law could no longer be enforced in Germany. Amongst several cases filed, one German lawyer, Chan-jo Jun, had filed a case against Facebook for not removing online content that was illegal under German law. In 2016, a regional court in Hamburg denied the complaint on the grounds that it did not have jurisdiction to adjudicate because Facebook's European operations were headquartered in Ireland. Jun called it 'outlandish' that American companies could operate in Germany without being subject to its jurisdiction.¹⁶ Such concerns fed into the SPD's general desire to 'tame' digital capitalism, symbolized by American-based platforms and companies like Amazon or Facebook.

The election of Donald Trump as US president in November 2016 raised the stakes on such questions considerably by showing how social media networks could be manipulated to spread demonstrably false information and even influence election results (or so politicians feared). Co-director of the digital policy think tank Stiftung Neue Verantwortung Stefan Heumann believed that the rise in violent speech against politicians further incentivized support for a legal solution. Heumann told the *Christian Science Monitor* that NetzDG 'in part came because politicians were so personally affected' by violent speech.¹⁷ Personal fears combined with broader political concerns.

The Justice Ministry commissioned a survey in early 2017 to understand the impact of social media companies' voluntary promises. That survey conducted in January and February 2017 by Jugendschutz.net (the government-funded center to protect young people online) investigated whether Facebook, YouTube, and Twitter had improved their responsiveness to user complaints. YouTube now deleted 90 percent of user complaints when the content was illegal under German law, up from only ten percent in 2016. Facebook, however, had become less responsive, now only deleting 39 percent, seven percent less than in 2016. Twitter remained the same, deleting only one percent in all cases.¹⁸ The

¹⁵Bundesministerium der Justiz und für Verbraucherschutz, "Geszentwurf der Bundesregierung. Entwurf eines Gesetzes zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz - NetzDG)" (2017), 1, accessed 21 May 2020, https://www.bmfv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_NetzDG.pdf;jsessionid=68356F339C331BFF360D5638AF5D4A6F.1_cid297?__blob=publicationFile&v=2.

¹⁶"Stellungnahme von Rechtsanwalt Chan-jo Jun zur Einstellung des Verfahrens gegen Facebook durch die Staatsanwaltschaft Hamburg," 8 April 2016, accessed 27 May 2020, https://www.junit.de/images/Presse/Stellungnahme_Jun_zur_Einstellung_gegen_Facebook_durch_StA_Hamburg.pdf.

¹⁷Kristen Chick and Sara Miller Llana, "Is Germany's Bold New Law a Way to Clean up the Internet or is it Stifling Free Expression?," *Christian Science Monitor*, 8 April 2018, accessed 27 May 2020, <https://www.csmonitor.com/World/Europe/2018/0408/Is-Germany-s-bold-new-law-a-way-to-clean-up-the-internet-or-is-it-stifling-free-expression>.

¹⁸"Themenpapier: Löschung rechtswidriger Hassbeiträge bei Facebook, YouTube und Twitter," *Jugendschutz.net*, 2017, accessed 21 May 2020, http://www.jugendschutz.net/fileadmin/download/pdf/17-06_Ergebnisse_Monitoring_Beschwerdemechanismen_Hassbeitraege_jugendschutz.net.pdf.

German Justice Ministry took this as evidence that voluntary agreements and task forces alone could not protect German citizens from hate speech. It was time to turn to law.

Up to that point, social media companies were mostly exempted from liability for the content that they distributed. Because the companies, like other platforms, distribute content that they do not themselves create, they are known as intermediaries. Any responsibility for content is thus called intermediary liability. Social media companies were able to scale so quickly partly because they were generally protected from intermediary liability in the United States by Section 230 of the Communications Decency Act (1996). This section contains what Jeff Kosseff calls ‘the 26 words that made the internet.’¹⁹ It states: ‘No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.’ This essentially means that platforms cannot be held liable for content posted on them. In Europe, Articles 12–15 of the e-Commerce Directive allowed similar protections.²⁰ Social media companies had started to remove content not because of legal responsibility, but because of user complaints and PR concerns.

German legal efforts represented a significant departure from prior regimes by imposing legal responsibility on social media companies for the content they distributed. NetzDG focused on ensuring companies’ responsiveness to complaints by users and by government authorities. It placed the onus on social media companies to enforce German speech law online swiftly and uniformly. Companies were required to resolve user complaints around those 22 statutes of German speech law within 24 h or face a fine of up to 50 million euros per post. The law addressed the jurisdictional issues raised by Jun’s case by mandating each social media platform to designate a legal entity responsible for the social network in Germany. It also required companies to produce transparency reports every six months if they received more than 100 complaints per year.²¹

There have been two major aspects of confusion around this law. First, it did not create new statutes around illegal content. Instead, it created new mechanisms to hold social media companies liable for enforcing 22 extant categories of content deemed illegal in the German criminal code. The 22 categories incorporate aspects such as ‘dissemination of depictions of violence’ or ‘forming terrorist organizations.’²² Other statutes relate to Germany’s stringent prohibitions on Nazi symbols, such as ‘the use of symbols of unconstitutional organizations.’ But others range widely from protecting young people (‘distribution of child pornography’) and women (‘violation of intimate privacy by making photographs’) to issues dating back to the late-nineteenth century (‘defamation

¹⁹Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Ithaca, NY: Cornell University Press, 2019).

²⁰For a comparison of European and American intermediary liability regimes, see Joris van Hoboken and Daphne Keller, “Design Principles for Intermediary Liability Law,” 8 October 2019, accessed 27 May 2020, https://www.ivir.nl/publicaties/download/Intermediary_liability_Oct_2019.pdf.

²¹For the full law as well as regulatory fining guidelines, see https://www.bmjv.de/DE/Themen/FokusThemen/NetzDG/NetzDG_node.html. As foreseen in the original law, NetzDG was reviewed after two years and updates were tabled in April 2020. The discussion has stalled given the COVID-19 pandemic. For a summary of the suggested changes, see “Gesetzesentwurf zur Änderung des Netzwerkdurchsetzungsgesetzes,” April 2020, accessed 28 May 2020, https://www.bmjv.de/SharedDocs/Downloads/DE/News/PM/040120_Zusammenfassung_NetzDG.pdf?__blob=publicationFile&v=5.

²²For news reporting calling NetzDG a “hate speech law,” see, for example, “Germany Starts Enforcing Hate Speech Law,” *BBC News*, 1 January 2018, accessed 20 May 2020, <https://www.bbc.com/news/technology-42510868>.

of religions, religious and ideological associations in a manner that is capable of disturbing the public peace’).

Second, the law did not require companies to search actively for illegal content, but rather mandated that the companies respond within 24 h to complaints submitted. The law only applied to companies with over two million unique users located in Germany. Companies were required to create a mechanism for users to log complaints about content that they believe is illegal. Once a complaint was received, companies were required to react swiftly. If the content was ‘manifestly illegal,’ it had to be deleted within 24 h of receiving the complaint. If the legal status of the content was complex or unclear, the companies were required to reach a decision within one week. The law foresaw fines of up to 50 million euros per post for non-compliance.

The law sparked controversy and exposed a division between expert opinion and the general public. According to one poll in March 2018, 87 percent were in favor, including 67 percent who ‘strongly approved’ of the law, while only five percent disapproved.²³ The majority of experts, however, worried about the law’s broader implications. In response to the German cabinet passing the first draft of NetzDG, a broad coalition of civil rights activists, academics, lawyers, and the German Journalists Association published a joint statement warning that the law ‘jeopardizes the core principles of free expression.’²⁴ In a letter to the German government in June 2017, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, highlighted that the law ‘raises serious concerns about freedom of expression and the right to privacy online.’²⁵

As I have detailed with Paddy Leerssen in a policy report analyzing NetzDG, critics highlighted five major concerns.²⁶ First, they feared that the fines would incentivize companies to err on the side of deletion because they feared the financial penalties. In other words, critics worried that companies would delete first and not ask questions later. Second, the law seemed to further privatize the enforcement of speech law. NetzDG required companies, rather than the judicial system, to make legal decisions.

Third, NetzDG revived some provisions of speech law that ‘should not be criminal offences in the first place,’ according to the free speech advocacy organization Article 19.²⁷ These included blasphemy and defamation of religions. Other experts on freedom of expression and human rights argued that a category like ‘defamation of religions’ contravened international human rights standards around freedom of expression, particularly Article 19 of the International Covenant on Civil and Political Rights, which guarantees the ‘freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.’²⁸

²³Athena Lam, “87% of Germans Approve of Social Media Regulation Law,” *Dalia Research*, 17 April 2018, accessed 27 May 2020, <https://daliaresearch.com/blog/blog-germans-approve-of-social-media-regulation-law/>.

²⁴“Declaration on Freedom of Expression in Response to the Adoption of the Network Enforcement Law (Netzwerkdurchsetzungsgesetz) by the Federal Cabinet on 5 April 2017,” accessed 21 May 2020, <http://deklaration-fuer-meinungsfreiheit.de/en/>. A wide range of groups have published papers or critiqued NetzDG within Germany, such as Netzpolitik and Digitale Gesellschaft, as well as internationally such as the Center for Democracy and Technology, Access Now, Article 19, and European Digital Rights (EDRI), Reporters Without Borders, and Human Rights Watch.

²⁵Letter from David Kaye, Reference OL DEU 1/2017, June 2017, accessed 21 May 2020, <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf>.

²⁶Tworek and Leerssen, “NetzDG.”

²⁷Article 19, “Germany: The Act to Improve Enforcement of the Law in Social Networks,” August 2017, accessed 27 May 2020, <https://www.article19.org/wp-content/uploads/2017/09/170901-Legal-Analysis-German-NetzDG-Act.pdf>, p. 2.

²⁸Joelle Fiss and Jacob Mchangama, “Germany’s Online Crackdowns Inspire the World’s Dictators,” *Foreign Policy*, 6 November 2019, <https://foreignpolicy.com/2019/11/06/germany-online-crackdowns-inspired-the-worlds-dictators-russia-venezuela-india/>.

Fourth, far-right politicians might weaponize the law to bolster their claims that the media and politicians were suppressing ‘the truth’ and their viewpoints. Deleting any comments might actually raise the profile of those comments. This phenomenon is known as the Streisand effect. The same day NetzDG came into full force, in January 2018, prominent AfD politician Beatrix von Storch posted an Islamophobic tweet in response to a tweet by the North-Rhine Westphalia police offering New Year’s Eve greetings in Arabic as well as German, French, and English. The satirical publication *Titanic* then parodied von Storch’s tweet. Von Storch’s tweet was removed, but the issue received widespread media coverage that included the deleted tweet, highlighting its content. The incident seemed to confirm fears of the Streisand effect, or what one journalist called the ‘Storch effect.’²⁹ The AfD has marshalled NetzDG as part of a broader argument that its voice and opinions are being silenced. But *Titanic*, too, was removed from Twitter, raising a further concern that companies would over-delete to avoid fines and thus suppress parody and satire. Fifth, human rights and democracy activists feared that authoritarian regimes might copy parts of the law to justify suppressing speech, while justifying their approach by pointing to a democratic country’s use of the same provisions.

Since NetzDG was implemented, companies with over 100 complaints (Facebook, Twitter, YouTube, Change.org, and, starting in 2019, Instagram) have issued semi-annual transparency reports. Companies like Twitter and YouTube addressed hundreds of thousands of complaints. Facebook initially seemed only to have a few thousand until it became clear that the complaint form was more complicated to access. The only fine issued thus far under the law was a five-million-euro fine to Facebook for underreporting complaints.³⁰ In June 2020, the Bundestag approved an update to NetzDG that now requires platforms to send information about suspected illegal content to the Bundeskriminalamt.³¹

Despite the law, it remains unclear whether NetzDG has made significant headway in stopping hate speech, which was one of its main stated aims.³² More broadly, support for the AfD continues, as do offline violent attacks against politicians and non-white citizens. In January 2020, for example, someone shot at the office of Karamba Diaby, the first black SPD politician to sit in the Bundestag. Online social media networks became a place to organize those who disagreed with COVID-19 restrictions, including a group that attempted to storm the Bundestag after a demonstration in Berlin in the summer of 2020. With so many issues unsolved by speech law, the question is why German politicians opted to turn to this solution to address broader societal problems. Here, we have to look to history to trace German understandings of the relationship between freedom of expression and democracy, as well as to explain why law seemed a way to create prominence for German solutions on the world stage.

²⁹Götz Hamann, “Der Storch-Effekt,” *ZEIT Online*, 9 January 2018, accessed 27 May 2020, <https://www.zeit.de/digital/2018-01/netzdg-meinungsfreiheit-internet-soziale-medien-debatte>.

³⁰“Bundesamt für Justiz erlässt Bußgeldbescheid gegen Facebook,” 3 July 2019, accessed 27 May 2020, <https://www.bundesjustizamt.de/DE/Presse/Archiv/2019/20190702.html>.

³¹For the draft law, see “Entwurf eines Gesetzes zur Bekämpfung des Rechtsextremismus und der Hasskriminalität,” 10 March 2020, accessed 7 July 2020, <https://dip21.bundestag.de/dip21/btd/19/177/1917741.pdf>.

³²Erickson and Knodt, “Germany’s NetzDG: A Key Test for Combatting Online Hate.”

The historical roots of the turn to law

Shortly after NetzDG came into force in January 2018, Heiko Maas defended NetzDG as a law that enforced German criminal statutes, but did not suppress speech, saying, ‘The freedom of expression also protects offensive and hateful statements. But it is not an excuse to commit crimes.’³³ Maas and other German politicians often presented the law as evidence of Germany learning from its Nazi and Stasi pasts. While this was undoubtedly one part of the equation, NetzDG also drew on three other, intertwined strands of the German past: speech statutes from the 1870s, speech law as a political solution to democratic problems, and law as a way to raise Germany’s international profile. These strands help to explain structural reasons underlying NetzDG’s prominence, alongside politicians’ stated historical inspiration.

First, NetzDG revived speech statutes that sometimes dated back to the mid-nineteenth century. Ann Goldberg has argued that unified Germany’s hate speech laws are grounded in German legal concepts stemming from the nineteenth century, such as individual dignity and honor. In the counter-revolutionary world of the 1850s, the Prussian government passed legislation in 1851 outlawing speech that might incite violence. This provision, in turn, became Article 130 of Imperial Germany’s criminal code and would be used by Jews in the 1890s to fight antisemitism. Spearheaded by the SPD in the 1950s, Article 130 eventually became West German law in 1960, after a reformulation to incorporate concepts from human rights, such as *Menschenwürde* (human dignity).³⁴ Maas thus drew on a longer tradition of his political party pushing for speech law to protect minority and human rights.

Some speech provisions themselves emerged in the nineteenth century, meaning that NetzDG built on much older traditions than Maas mentioned. The Imperial Press Law (*Reichspressegesetz*) of May 1874 guaranteed freedom of the press and removed prepublication censorship. Still, the semi-authoritarian, semi-democratic government could use the Imperial Criminal Code (May 1871) to punish people for printed material after the fact. The Imperial Criminal Code made incitement to violence or slander illegal in speech or print. Other provisions in the Criminal Code forbade blasphemy, obscenity, and *lèse-majesté* (insulting or defaming heads of state). Such provisions enabled the government to prosecute opponents and writers, exercising a form of post-publication censorship.³⁵

Ironically, just a few months after the German cabinet approved a draft of NetzDG—a law enacted to enforce older statutes of speech law—the Bundestag recognized the anachronistic nature of some German speech law. It voted unanimously to abolish another provision from the 1870s: *lèse-majesté*. Turkish president Recep Tayyip Erdoğan had filed a case against German comedian Jan Böhmermann for insulting him with a poem on his ZDF show in March 2016. Erdoğan used Paragraph 103 of the German

³³“Maas verteidigt Gesetz gegen Hass im Internet,” *Der Spiegel*, 4 January 2018, accessed 27 May 2020, <https://www.spiegel.de/netzwelt/netzpolitik/netzdg-heiko-maas-verteidigt-netzwerkdurchsetzungsgesetz-gegen-kritik-a-1186118.html>.

³⁴Ann Goldberg, “Hate Speech and Identity Politics in Germany, 1848–1914,” *Central European History*, vol. 48, no. 4 (2015): pp. 480–497.

³⁵Kara Ritzheimer, “Trash,” *Censorship and National Identity in Early Twentieth-Century Germany* (New York: Cambridge University Press, 2016); Gary Stark, *Banned in Berlin: Literary Censorship in Imperial Germany, 1871–1918* (New York: Berghahn Books, 2009).

Criminal Code, which forbids insults of foreign heads of state. Paragraph 103 was officially abolished as of 1 January 2018. That same day, NetzDG came into force. The German government had recognized the anachronism of older speech law, while simultaneously reviving other statutes that had long lain dormant. Historical speech law was remade, but also revived.

Second, NetzDG built upon German approaches of seeing speech law as a political solution to democratic problems, especially concerns about the inability of citizens to protect themselves from dangerous readings. In the Weimar Republic, groups deemed 'vulnerable,' such as women or children, were seen as particularly susceptible to content.³⁶ The *Schmutz – und Schundgesetz* (Law Against Filth and Smut) of 1926 enabled censorship of material and film production, ostensibly to protect such vulnerable groups. These attitudes also extended to gay and lesbian publications, with fears that reading such materials would 'turn' people homosexual.³⁷ Some of these attitudes continued after World War II, with the banning of *Mein Kampf*.

Germany is, of course, far from the only democracy that has banned books purportedly for the good of its own citizens. An obvious example is D. H. Lawrence's *Lady Chatterley's Lover*, banned in Britain until 1960.³⁸ In postwar West Germany, though, banning took on a new valence. Right-wing extremism and neo-Nazism were a constant source of anxiety. That anxiety helped to motivate a central paradox in the West German federal constitution, also known as the Basic Law or *Grundgesetz*. According to Article 18, anyone abusing rights like freedom of speech to undermine a free democratic order risks forfeiting those basic rights. As Udi Greenberg has put it, 'Curbing rights became synonymous with the democratic order.'³⁹ This idea is often encapsulated in the phrase 'defensive democracy' (*wehrhafte Demokratie*, literally 'militant democracy'). The phrase is generally associated with Karl Loewenstein, an émigré from the Weimar Republic to the United States, who believed that democracies sometimes had to restrict freedom of expression and assembly to prevent extremism. Undemocratic means justified democratic ends.

Inspired by such sentiments, West Germany was the only country in postwar Europe to ban both nationalist parties and the Communist Party in the early 1950s.⁴⁰ The state also secretly constrained the free movement of information, though this happened through collaboration with and under pressure from the occupying Allied powers, too. In the 1950s and early 1960s, the West German state tapped hundreds of telephones and telegraph lines and opened thousands of letters sent from East Germany. From 1950 until Ostpolitik, the West German domestic intelligence agency censored up to 17.2 million pieces of publications it deemed seditious each year.⁴¹ These practices

³⁶Gideon Reuveni, *Reading Germany: Literature and Consumer Culture in Germany Before 1933* (New York: Berghahn Books, 2006).

³⁷Laurie Marhoefer, "'The Book Was a Revelation, I Recognized Myself in It': Lesbian Sexuality, Censorship, and the Queer Press in Weimar-Era Germany," *Journal of Women's History*, vol. 27, no. 2 (2015): pp. 62–86.

³⁸Christopher Hilliard, "'Is It a Book That You Would Even Wish Your Wife or Servants to Read?' Obscenity Law and the Politics of Reading in Modern England," *American Historical Review*, vol. 118, no. 3 (2013): pp. 653–678.

³⁹Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton: Princeton University Press, 2014), p. 204.

⁴⁰For a historiography on far-right extremism in West Germany, see Clemens Gussone, *Reden über Rechtsradikalismus. Nicht-staatliche Perspektiven zwischen Sicherheit und Freiheit (1951–1989)* (Göttingen: Vandenhoeck & Ruprecht, 2019), pp. 10–11.

⁴¹Josef Föschepoth, *Überwachtes Deutschland: Post- und Telefonüberwachung in der alten Bundesrepublik* (Göttingen: Vandenhoeck & Ruprecht, 2012).

subsided substantially after the *Spiegel* affair in the early 1960s. Even after 1971, however, intelligence agencies checked about 1.6 million letters mailed from the GDR annually. Heiko Maas drew on long-standing traditions when he justified NetzDG with the claim that ‘freedom of speech has boundaries.’⁴² These included the German focus on the *Rechtsstaat* while developing NetzDG.⁴³ But the traditions also included a more uncomfortable and unacknowledged past of suppressing and surveilling speech in the name of saving democracy.

Third, since the 1880s, exporting law enabled Germans to raise the country’s international profile. During the comparatively brief age of the overseas German empire from 1884 to 1915, Germans conveyed colonial knowledge not just through direct colonization, but also through global frameworks. For example, German medical knowledge circulated through both educating Japanese medical students in Germany and through dozens of German physicians creating medical infrastructure in Japan at the behest of the Meiji government.⁴⁴ Law represented another mode of conveying colonial knowledge and shaping other parts of the world. Inspired by the Prussian constitution of 1850, the Meiji government decided that German constitutionalism would be the model for the new Japanese constitution in 1881 and invited Germans to advise. During what one historian has called the ‘*Deutsche Dekade*’ of the 1880s, German legal advisors in Japan such as Albert Mosse, Otto Rudorff, and Karl Rathgen shaped the Japanese constitution and Japanese legal education.⁴⁵ This was not wholesale adoption, but rather an assimilation and adaptation of German constitutionalism to the Japanese context.⁴⁶ Still, such developments influenced German thinking about how legal advising and laws offered a route to international influence.

In the Weimar Republic, bureaucrats believed that enacting a German law to protect copyright in news would establish an international precedent for other countries to copy. Although ultimately the law was never enacted, the episode represented an attempt at journalistic statesmanship.⁴⁷ Only in recent years has unified Germany returned to an implicit policy of seeking to export its media laws. This started with passing an ancillary copyright law designed to require Google to pay publishers for using snippets of their stories in Google News.⁴⁸ While the law became dead letter for a variety of reasons, German legislators effectively uploaded it to the European level with Europe’s draft

⁴²“Die Meinungsfreiheit hat auch Grenzen,” *Medienpolitik.net*, 9 January 2017, accessed 27 May 2020, <https://www.medienpolitik.net/2017/01/medienpolitik-die-meinungsfreiheit-hat-auch-grenzen/>.

⁴³He, “Governing Hate Content Online.”

⁴⁴Hoi-eun Kim, *Doctors of Empire: Medical and Cultural Encounters between Imperial Germany and Meiji Japan* (Toronto: University of Toronto Press, 2014). On how German colonial knowledge circulated globally, see Sebastian Conrad, “Rethinking German Colonialism in a Global Age,” *The Journal of Imperial and Commonwealth History*, vol. 41, no. 4 (2013): pp. 543–566.

⁴⁵Paul-Christian Schenck, *Der deutsche Anteil an der Gestaltung des modernen japanischen Rechts- und Verfassungswesens: deutsche Rechtsberater im Japan der Meiji-Zeit* (Stuttgart: Franz Steiner Verlag, 1997), p. 15. On Karl Rathgen, see Erik Grimmer-Solem, *Learning Empire: Globalization and the German Quest for World Status, 1875–1919* (New York: Cambridge University Press, 2019), ch. 2.

⁴⁶Ando Junko, *Die Entstehung der Meiji-Verfassung: Zur Rolle des deutschen Konstitutionalismus im modernen japanischen Staatswesen* (Munich: IUDICIUM Verlag, 2000).

⁴⁷Heidi J. S. Twarek, “Journalistic Statesmanship: Protecting the Press in Weimar Germany and Abroad,” *German History*, vol. 32, no. 4 (2014): pp. 559–578.

⁴⁸Heidi J. S. Twarek and Christopher Buschow, “Changing the Rules of the Game: Strategic Institutionalization and Legacy Companies’ Resistance to New Media,” *International Journal of Communication*, vol. 10 (2016): pp. 2129–2139, <http://ijoc.org/index.php/ijoc/article/view/5179>.

copyright legislation in 2016.⁴⁹ NetzDG, too, symbolizes a return to older German modes of international influence through law.

International ramifications

From the start, German politicians like Heiko Maas hoped that the law would serve as a precedent for other democracies to combat social media platforms' seeming impunity. During his presidential campaign in 2017, Emmanuel Macron said that he wanted to stop fake news and 'regulate the Internet because today certain players are activists and have a very important role in the campaign.'⁵⁰ After forming a minority government, the Liberal Party of Canada issued mandate letters in December 2019 instructing ministers to consider a law on hate speech that required social media companies to remove that speech within 24 h. The 24-hour limit and focus on hate speech law clearly drew inspiration from Germany. Other German efforts have received little to no coverage. The 'Demokratie leben!' program included support for civil society efforts to create a 'community of counterspeech,' including an online helpdesk to develop effective approaches against hate speech.⁵¹

By contrast, NetzDG seemed to create a 'domino effect,' as Human Rights Watch predicted in February 2018.⁵² By November 2019, over a dozen countries and the European Commission had taken inspiration from NetzDG. A report by Justitia, a Copenhagen-based think tank focused on human rights and the rule of law, examined the proposals in those thirteen countries.⁵³ Nine of the thirteen proposals explicitly referenced NetzDG. (Those of India, Kenya, Vietnam, and Australia did not.) Most of these countries are not democracies, and some, like India, engage in anti-democratic tactics online, such as blocking Internet access to Kashmir. Only three countries (France, the United Kingdom, and Australia) are ranked as 'free,' according to Freedom House's assessment of freedom on the Internet.

Some of the fears around NetzDG seem to be realized in the laws enacted or being considered by authoritarian or semi-democratic countries. First, there is the expansion of the speech covered by such acts. Some bills, including in Malaysia, Kenya, Venezuela, and Vietnam, invoke broad and elastic categories such as 'fake news' or 'anti-government propaganda.' Some include the category of 'defamation of religions,' a statute also enforceable under NetzDG, but one that has even more problematic ramifications in countries that already suppress freedom of religion in other ways. Others, like Vietnam's Law on Cybersecurity (2018), banned sweeping categories such as

⁴⁹Heidi J. S. Tworek, "The European Union Clashes with Google over Copyright," *German Marshall Fund Transatlantic Take*, 11 October 2016, accessed 27 May 2020, <https://www.gmfus.org/blog/2016/10/11/european-union-clashes-google-over-copyright>.

⁵⁰John Follain and Helene Fouquet, "France's Macron Says He'll Stop Fake News Hurting His Campaign," *Bloomberg*, 4 May 2017, accessed 27 May 2020, <https://www.bloomberg.com/news/articles/2017-05-04/france-s-macron-says-he-ll-stop-fake-news-hurting-his-campaign>.

⁵¹The initiative was known as "Das NETTZ – Vernetzungsstelle gegen Hate Speech" and will be supported until 2023. "Abschlussbericht Bundesprogramm Demokratie leben! Erste Förderperiode (2015 bis 2019)," pp. 72–73.

⁵²Human Rights Watch, "Germany: Flawed Social Media Law," 14 February 2018, accessed 20 May 2020, <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law>.

⁵³Jacob Mchangama and Joelle Fiss, "Analysis: The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship," *Justitia - Danmarks Første Uafhængige Juridiske Tænketa*, 5 November 2019, accessed 22 May 2020, <http://justitia-int.org/en/the-digital-berlin-wall-how-germany-created-a-prototype-for-global-online-censorship/>.

‘insulting the [Vietnamese] people, the national flag, national emblem, national anthem, great men, leaders, famous people or national heroes.’⁵⁴ Most scholars would be in trouble under such a law, let alone ordinary citizens seeking to engage in online conversation.

Second, some authoritarian governments have referenced NetzDG either explicitly or implicitly to justify far more sweeping measures. Singapore, a state that has often used criminal law to suppress speech, stated that NetzDG served as an example in drafting its law to tackle fake news. One Russian internet bill explicitly cites NetzDG.⁵⁵ Russia’s bills require platforms to remove ‘unreliable information,’ a concept that is broadly and vaguely defined and that could easily encompass criticisms of the current government. When responding to condemnations of Russia’s law (signed by President Vladimir Putin in March 2019), government spokesman Dmitry Peskov was quoted as saying, ‘This sphere of fake news, insulting and so on, is regulated fairly harshly in many countries of the world including Europe. It is therefore of course necessary to do it in our country too.’⁵⁶ Such justifications instrumentalized NetzDG to justify more restrictive policies.

Jacob Mchangama and Joelle Fiss, authors of the Justitia report, concluded that ‘all these developments suggest that the Network Enforcement Act has provided an important impetus for, and legitimacy to, models of intermediary liability that violate freedom of expression as set out in Article 19 of the International Covenant on Civil and Political Rights.’⁵⁷ While the authors note that NetzDG incorporates democratic safeguards and that many authoritarian countries would likely have proceeded on this path anyway, they note that NetzDG ‘seems to have provided several states with both the justification and the basic model for swift and decisive action.’⁵⁸ Some policymakers have argued that authoritarian states will censor and limit speech regardless of how democracies act. Others believe that democracies should create solutions that are democracy proof, meaning that NetzDG’s very construction lent itself to adaptation by authoritarian states seeking to restrict legitimate critique.⁵⁹ While many authoritarian countries were already pursuing such censorship measures, it is important to consider how democratic countries might have set a higher standard of democratic accountability that is harder to co-opt for authoritarian purposes. It also raises the question of whether NetzDG has improved Germany’s international reputation through law or not, a question for another article.

Other democracies that copied NetzDG have found it complicated. After considerable debate and investigation, a social media law strongly resembling NetzDG passed in France’s parliament in May 2020.⁶⁰ Yet the French Constitutional Court struck down

⁵⁴Ibid., p. 8.

⁵⁵Human Rights Watch, “Germany: Flawed Social Media Law.”

⁵⁶Maria Vasilyeva and Tom Balmforth, “Russia’s Parliament Backs New Fines for Insulting the State Online,” *Reuters*, 13 March 2019, accessed 22 May 2020, <https://www.reuters.com/article/us-russia-politics-fakenews/russias-parliament-backs-new-fines-for-insulting-the-state-online-idUSKBN1QU1UN>.

⁵⁷Fiss and Mchangama, “Germany’s Online Crackdowns Inspire the World’s Dictators.”

⁵⁸Ibid.

⁵⁹Discussions at Santa Monica meeting of Transatlantic High-Level Working Group on Content Moderation Online and Freedom of Expression (May 2019). The discussions occurred under Chatham House rules.

⁶⁰Simon Chandler, “French Social Media Law is Another Coronavirus Blow to Freedom of Speech,” *Forbes*, 14 May 2020, accessed 25 May 2020, <https://www.forbes.com/sites/simonchandler/2020/05/14/french-social-media-law-is-another-coronavirus-blow-to-freedom-of-speech/#19efbd29703c>.

significant portions of that law in June. What worked for German democracy did not work for the democracy next door. This highlights again how German understandings of law and its place in society played a crucial role in the development and acceptance of NetzDG.

Some have suggested that laws rooted in international human rights principles will fare better, while the Taiwanese government offers an example of how democracies can create different approaches to this problem. During the COVID-19 crisis, Taiwan adopted a ‘humor over rumor’ strategy. Rather than pushing platforms to delete problematic content, the Taiwanese digital minister Audrey Tang spearheaded initiatives to counter such speech swiftly, as well as to preempt it through consistent and reliable government messaging.⁶¹ Although the Taiwanese government was approaching speech in a very different context, the example suggests that beyond law, there are other methods to approaching harmful speech, which might not be so easily copied by authoritarian regimes. Thus, this article finally considers briefly the difficulties in measuring the efficacy of NetzDG and how the focus on speech and speech law may have hindered greater attention from being paid to the underlying structural issues. These include economic inequality, anti-immigrant sentiment, disparities between East and West Germany, and the role of gender.

Measuring efficacy

It is unclear how NetzDG has furthered the specific stated goal of addressing hate. We do not even really know if it has reduced the volume of hate speech online without independent investigations of social media companies’ numbers. For example, has the volume of complaints increased or decreased because there is more or less hate speech, because users have grown tired of complaining, or because there is a greater volume of material online?

In part, the effects even on speech are so difficult to measure because companies themselves have provided little access for researchers. The companies cite privacy concerns (including those related to GDPR), while researchers have faced significant hurdles in cooperating with company initiatives, such as Facebook’s Social Science One. Although Social Science One began in 2018, by late December 2019 the co-chairs and European advisory committee of Social Science One expressed deep frustration that Facebook had ‘still not provided academics with anything approaching adequate data access.’⁶² More data (such as URLs) was only provided after funders threatened to withdraw. The problems of investigating online speech remain rooted in the inability to investigate them thoroughly on a wide range of platforms. Multiple leading scholars have outlined what they would still need in order to understand these problems through a robust evidence base in 2020, showing that basic questions about cause and effect remain far harder to answer than many might assume.⁶³ Scholars

⁶¹ Anne Quito, “Taiwan is Using Humor as a Tool against Coronavirus Hoaxes,” *Quartz*, 5 June 2020, accessed 16 January 2021, https://qz.com/1863931/?utm_term=mucp.

⁶² “Public Statement from the Co-Chairs and European Advisory Committee of Social Science One,” 11 December 2019, accessed 16 January 2021, <https://socialscience.one/blog/public-statement-european-advisory-committee-social-science-one>

⁶³ Irene V. Pasquetto et al., “Tackling Misinformation: What Researchers Could Do with Social Media Data,” *Harvard Kennedy School Misinformation Review* (2020), <https://doi.org/10.37016/mr-2020-49>.

such as Nicholas John have also shown how companies' own numbers are often highly flawed and do not stand up to simple scrutiny.⁶⁴ Finally, there remain significant gaps in our knowledge about how the Internet may cause radicalization.⁶⁵ Such issues make it very difficult to draw any definitive judgments about NetzDG beyond the numbers provided in transparency reports.

While NetzDG was designed to address the online speech elements of extremism, German political scientists had also long pointed to the problems of political and media discourse around right-wing extremism.⁶⁶ Media coverage itself may have helped the AfD and far-right extremists to prominence, even more than social media. Since the rise of the AfD, more traditional media outlets have focused intensely on scandals like outrageous statements by AfD members. Despite the simultaneous rise of the Green Party, it received far less coverage than outrageous statements by the AfD. In a vicious cycle, media narratives reporting on the Far Right may have cemented the idea that such sentiment was widespread in Germany, thus making it more permissible to vote for and engage with such ideas. Focusing on social media companies has directed the spotlight away from difficult questions about the role of tabloids like *BILD* in spurring anti-immigrant sentiment, for example.

NetzDG also focused on large companies rather than the ecosystemic dynamics of extremism and offline issues within the intelligence community, police, and military. In October 2016, a 'Reichsbürger' shot at police in Bavaria, and one person was killed. The *Reichsbürger* do not have a consistent ideology but generally reject the legitimacy of current democratic Germany and believe that Germany should still have the borders of 1937. Though they seem scattered and comparatively few in number, some of these men have worked for the police in Bavaria, Berlin, and several other German states.⁶⁷ Possibly influenced by *Reichsbürger* ideology, in February 2020, a right-wing extremist shot and killed ten people in two shisha bars in Hanau. In a classic pattern, the extremist had written a manifesto, which circulated online and received wide media coverage. NetzDG does not address how newspapers, radio, and TV or smaller platforms might amplify illegal speech.

Even within the realm of preventing 'fake news' (an initial stated goal of NetzDG), the German government seems to have leaned on speech law rather than other mechanisms such as financial electoral reform. To combat foreign interference in elections, Canada updated its electoral laws to include restrictions on third-party spending and to create a neutral group of civil servants who would warn the general public if foreign interference passed a certain threshold.⁶⁸ Germany, by contrast, still has considerable loopholes that potentially enable foreign funding of political advertising. Indeed, the AfD has been involved in multiple electoral finance scandals. Rather than focus on speech law, campaign finance and electoral reforms offer other paths to ensure that extreme views do not get

⁶⁴Nicholas A. John, "Social Media Bullshit: What We Don't Know about facebook.com/peace and Why We Should Care," *Social Media + Society* (2019), doi/10.1177/2056305119829863.

⁶⁵For a literature review reaching that conclusion, see Özen Odag, Anne Leiser, and Klaus Boehnke, "Reviewing the Role of the Internet in Radicalization Processes," *Journal for Deradicalization*, vol. 21 (2019): pp. 261–300.

⁶⁶See, for example, Britta Schellenberg, *Die Rechtsextremismus-Debatte: Charakteristika, Konflikte und ihre Folgen*, 2nd ed. (Wiesbaden: VS Springer für Sozialwissenschaften, 2014).

⁶⁷Anna Clauß, Birger Menke, Conny Neumann, and Jean-Pierre Ziegler, "Staatsleugner als Staatsdiener," *Spiegel.de*, 21 October 2016, accessed 25 May 2020, <https://www.spiegel.de/panorama/justiz/reichsbuerger-wo-staatsleugner-als-polizisten-arbeiten-a-1117747.html>.

⁶⁸Michael Pal, "Evaluating Bill C-76: The Elections Modernization Act," *Journal of Parliamentary and Political Law* (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3572737.

disproportionate representation before elections.⁶⁹ But the history of German law helps to explain why NetzDG seemed more intuitive (or more feasible) to German politicians.

Conclusion

Despite taking extraordinary responsibility for the Holocaust and German crimes during World War II, despite SPD and CDU politicians committed to fighting extremism, and despite widespread public revulsion of Nazism, Germany has never fully removed far-right beliefs. These problems date back further than 2015. East German anti-immigrant sentiment flared up in the early 1990s with the now infamous attacks in Hoyerswerda and Rostock.⁷⁰ A more direct lineage for current anti-refugee sentiment are events like the ‘pogrom-like’ attacks by neo-Nazis on Indian immigrants in the small town of Mügeln in Saxony.⁷¹ Anti-immigrant violence and racist language have a long and complex history within unified Germany.

Since 2015, however, politicians have undertaken renewed efforts to address these problems, with differing levels of success that are sometimes hard to measure. This article has examined one prominent element of those efforts: a focus on speech law. I explore how the framework of using speech law to fight hate drew on a longer German history of using law to create international prestige as well as to address political concerns. But that focus constrained the imagination, frequently excluding bolder solutions related to inequality or even electoral reform. The offline world continues to offer horrifying examples of hate, even just against politicians in Germany. In June 2019, a right-wing extremist murdered pro-refugee CDU mayor Walter Lübcke outside his home in Isthna near Kassel. As with other previous violent incidents, the assassination spotlighted once more the problems of prosecuting hate crimes and combatting right-wing extremism that NetzDG could never solve.

In many ways, NetzDG set the international terms of engagement with online hate. It focused politicians around the world, whether in democracies or authoritarian regimes, on using law to fight hate. Countries like New Zealand have moved to update their online content regulation, including in amendments to a bill proposed in May 2020 to censor material that demonstrably causing harm. One telling sentence notes that stakeholders sent ‘a recurring message that while this work [of online content regulation] is useful, more needs to be done to proactively address the drivers of violent extremist behavior and provide protection for groups who are targeted by it.’⁷² Germany has exported the idea that we best fight hate with law. But Germany’s history suggests that we ignore other approaches at our peril.

⁶⁹On the possibilities of campaign finance reform for democracy, such as limiting private donations to political campaigns, see Julia Cagé, *The Price of Democracy: How Money Shapes Politics and What to Do about It*, trans. Patrick Camiller (Cambridge, MA: Harvard University Press, 2020).

⁷⁰Michael Lausberg, *Die extreme Rechte in Ostdeutschland, 1990–1998* (Magdeburg: Tectum Verlag, 2012).

⁷¹Britta Schellenberg, *Mügeln. Die Entwicklung rassistischer Hegemonien und die Ausbreitung der Neonazis* (Dresden: Heinrich-Böll-Stiftung Sachsen, 2014), https://www.boell.de/sites/default/files/muegeln_download.pdf.

⁷²“Appendix C: Regulatory Impact Assessment – Countering Violent Extremism Online – Changes to Censorship Legislation to Better Protect New Zealanders from Online Harm,” 2020, accessed 28 May 2020, [https://www.dia.govt.nz/diawebsite.nsf/Files/Proactive-releases/\\$file/regulatory-impact-assessment-countering-violent-extremism-online.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Proactive-releases/$file/regulatory-impact-assessment-countering-violent-extremism-online.pdf), p. 12.

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Disclosure statement

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