

STUDENT NOTE

Militant Moralism: The Hegemonic Consequences of German Content Moderation

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Abstract

Germany's content moderation law—*NetzDG*— is often the target of criticism in English-language scholarship as antithetical to Western notions of free speech and the First Amendment. The purpose of this Article is to encourage those engaged in the analysis of transatlantic content moderation schemes to consider how Germany's self-ideation influences policy decisions. By considering what international relations scholars term *ontological security*, Germany's aggressive forays into the content moderation space are better understood as an externalization of Germany's ideation of itself, which rests upon an absolutist domestic moral and constitutional hierarchy based on the primacy of human dignity. Ultimately, this Article implores American scholars and lawmakers to consider the impact of this subconscious ideation when engaging with Germany and the European Union in an increasingly multi-polar cyberspace.

Keywords: Militant moralism; NetzDG; First Amendment; Ontological Security; Kant; Hegel; Constitutional Law; Freedom of Speech

In May 2016, the European Commission unveiled a new Code of Conduct for combating illegal online hate speech.¹ Conceived of after the social media-organized terror attacks on the French satirical magazine *Charlie Hebdo* in Paris² and the coordinated bombing at the Brussels airport,³ the Code of Conduct brought together some of the largest names in the technology industry—namely Facebook and X, previously known as Twitter—and committed them to European goals for combatting online radicalization and hate speech.⁴ However, implementation of these voluntary protocols has been inconsistent.⁵ Indeed, by 2021, Google's YouTube, Meta's Facebook, and Twitter removed less than half of all materials flagged as problematic.⁶

¹European Commission Press Release IP/16/1937, European Commission and IT Companies Announce Code of Conduct on Illegal Online Hate Speech (May 31, 2016).

²Giles de Kerchove, *Preparing to Counter ISIS 2.0: European CT Efforts Since Charlie Hebdo*, WASH. INST. FOR NEAR E. POL'Y (June 20, 2017), <https://www.washingtoninstitute.org/policy-analysis/preparing-counter-isis-20-european-ct-efforts-charlie-hebdo>.

³European Commission Press Release, *supra* note 1.

⁴*Id.*

⁵Mark Scott, *Social Media Companies Remove Less Hate Speech in 2021*, POLITICO (Oct. 7, 2021), <https://www.politico.eu/article/facebook-google-hate-speech-social-media-european-commission-transparency/>.

⁶*Id.*

Not content with the efforts of technology giants to stem the tide of hate speech and fake news on their platforms,⁷ Germany's then-Justice Minister Heiko Maas introduced the *Netzwerkdurchsetzungsgesetz* (NetzDG) in the spring of 2017.⁸ Colloquially known as the "Facebook Act," NetzDG expanded the scope of mandatory content moderation take-downs and reporting while significantly increasing penalties for non-compliance.⁹ The adoption of NetzDG has spurred substantial scholarship on both sides of the Atlantic, ranging from tacit praise to outright excoriation.¹⁰ Yet, most American-based scholarship discussing NetzDG has approached the issue from a distinctly Anglo-centric perspective and has emphasized the conflicts between NetzDG and First Amendment jurisprudence.¹¹ Other scholarship has used NetzDG as an exemplar of or foil for proposed domestic reforms.¹²

The purpose of this Article is to encourage those engaged in the analysis of transatlantic content moderation schemes to consider how Germany's self-ideation influences policy decisions.¹³ By considering what international relations scholars term *ontological security*, Germany's aggressive forays into the content moderation space are better understood as an externalization of Germany's ideation of itself, which rests upon an absolutist domestic moral and constitutional hierarchy based on the primacy of human dignity. Ultimately, this Article implores American scholars and lawmakers to consider the impact of this subconscious ideation when engaging with Germany and the European Union in an increasingly multi-polar cyberspace.

This Article will proceed in four parts. Section A briefly discusses the theory of ontological security and its impact on constructivist foreign relations theory. Section B then unpacks the moral philosophy of the German Idealist school that greatly influenced the development of German constitutional law and legal culture in the post-World War II era. Section C explores how the structure of the German constitutional system calcifies the moral philosophy of Kant and Hegel into an obligation for affirmative state action in furtherance of those morals. This social structure is subsequently imbedded within Germany's ideation of itself and applies subconscious pressure to Germany's domestic policy decisions. Section C continues by describing generally the supra-national consequences of Germany's affirmative moral obligation, a framework of law and values that I have termed *militant moralism*.¹⁴ Section D considers NetzDG as a case study of militant moralism, ultimately suggesting the realignment of content moderation scholarship

⁷See Katrin Bennhold, *Germany Acts to Tame Facebook, Learning from Its Own History of Hate*, INDEPENDENT (June 15, 2018) https://www.independent.co.uk/news/long_reads/facebook-germany-online-hate-censorship-social-media-a8374351.html (discussing the rise of hate speech in Germany leading up to the passage of NetzDG).

⁸Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], Sept. 1, 2017, BGBl. I at 3352 (Ger.).

⁹*Germany: Network Enforcement Act Amended to Better Fight Online Hate Speech*, LIBR. OF CONG. (July 6, 2021), <https://www.loc.gov/item/global-legal-monitor/2021-07-06/germany-network-enforcement-act-amended-to-better-fight-online-hate-speech/>.

¹⁰See, e.g., Patrick Zurth, *The German NetzDG as Role Model or Cautionary Tale? Implications for the Debate on Social Media Liability*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1084 (2021).

¹¹Hannah Bloch-Wehba, *Global Platform Governance: Private Power in the Shadow of the State*, 72 SMU L. REV. 27, 58 (2019) ("[M]any of these critics simply object on normative grounds to the European approach, which appears to prioritize individual privacy rights equally highly or perhaps even above press freedoms and the free flow of information. This balance simply would not pass muster under U.S. constitutional law, which privileges First Amendment freedoms above privacy rights.")

¹²See, e.g., Imara McMillan, *Enforcement Through the Network: The Network Enforcement Act and Article 10 of the European Convention on Human Rights*, 20 CHI. J. INT'L L. 252 (2019); Laura E. Moon, *A New Role for Social Network Providers: NetzDG and the Communications Decency Act*, 28 TRANSNAT'L L. & CONTEMP. PROBS. 623 (2019); Brittany Finnegan, *The Cost of Free Speech: Combating Fake News or Upholding the First Amendment?*, 75 U. MIA. L. REV. 572 (2021).

¹³For an overview of ontological security and its effects on state action, see Jennifer Mitzen & Kyle Larson, *Ontological Security and Foreign Policy*, OXFORD RSCH. ENCYCLOPEDIAS, POL. (2016), <https://doi.org/10.1093/acrefore/9780190228637.013.458>.

¹⁴This is based on the German notion of *militant democracy* and should not be confused with two unrelated ideas: *Militant morality* or *militant ethics*.

toward a more ontologically aware constructivist perspective to improve policy outcomes in an increasingly multi-polar cyberspace.

A. Ontological Security in Constructivist Foreign Policy Theory

As an initial matter, it is worth considering what one means when they say “ontological security” within the context of foreign relations. Traditional notions of security have focused primarily on physical security of the self and, when abstracted to the level of the state, the continued existence of the state and the government.¹⁵ Confronted with the rise of communism and fascism in the early twentieth century, foreign policy scholars expanded the notion of security to also include ideological security as a state-level consideration. However, it was not until the 1980s that scholars such as Alexander Wendt and Nicholas Onuf began exploring what is today called “constructivism.” At its most basic, constructivism seeks to understand a state’s actions in relation to that state’s ideational conception of the self and places a particular importance on those ideational factors which are commonly held within a society.¹⁶ By extension, ontological security is the sense of stability achieved by the outward manifestation of that self-ideation to create a constructive conception of the whole person—or, in this instance, the whole state.¹⁷ As such, ontological security becomes a useful conceptual tool to help scholars “identify the cognitive and normative maps that actors use to decide when to act, how, and why.”¹⁸

For state actors, the formation of a stable self-identify functions to construct an “autobiographical identity narrative” which rationalizes the state’s behavior within the international system by providing an underlying meaning or purpose to those acts.¹⁹ These narratives act to reinforce the practices and routines of the nation state and to self-justify and affirm their very creation.²⁰ But because these fundamentally domestic narratives do not exist in a vacuum, the externalization of these narratives through the policies they undergird can create conflict between states and by extension increase ontological insecurity, triggering a negative feedback loop that perpetuates international conflict.²¹ Thus, when states enact policies, it is important to recognize not only the domestic and international context of said action, but also to consider how that action reflects these internalized pressures. Likewise, if scholars can better understand how a given state self-ideates, then scholars and politicians alike can better react and respond to those acts in a way that speaks to both the physical and ontological security of the state.²²

B. German Idealism and the Development of a Deontological View of Ethics

In order to examine the constitutional structure of the German Federal Republic and explore how its moral hierarchy has profound consequences in the geopolitics of cyberspace, it is important to begin by establishing a philosophical foundation by reviewing two core elements of German

¹⁵See Alexander Wendt, *Anarchy is What the State Makes of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391, 391–93 (1992).

¹⁶*Id.* at 394.

¹⁷See Jennifer Mitzen, *Ontological Security in World Politics: State Identity and the Security Dilemma*, 12 EUR. J. INT’L REL. 341, 342 (2006).

¹⁸See Viktoria Akchurina & Vincent Della Sala, *Love and Fear in the Neighborhood: Emotions and Ontological Security in Foreign Policy Analysis 4* (Am. Pol. Sci. Ass’n, Working Paper Version 1, 2019), <https://preprints.apsanet.org/engage/apsa/article-details/5d6ab79f74958f00198216d9>.

¹⁹Jelena Subotić, *Narrative, Ontological Security, and Foreign Policy Change*, 12 FOREIGN POL’Y ANALYSIS 610, 614 (2016).

²⁰Akchurina & Della Sala, *supra* note 18, at 6.

²¹See generally Amir Lupovici, *Ontological Dissonance, Clashing Identities, and Israel’s Unilateral Steps Toward Palestinians*, 38 REV. INT’L STUD. 809 (2012).

²²For more on this topic, see Subotić, *supra* note 19, at 616–17 (discussing how political actors strategically utilize these narrative templates to advance and justify domestic policy objectives).

idealism which fundamentally influence the German constitutional order.²³ First, German Idealism—as expressed by the works of Immanuel Kant—embraces an absolutist view of universal norms rooted in a shared human dignity, distinguishing it from the dialectic American tradition that emphasizes personal liberty. Second, the moral absolutism espoused by German Idealism imposes a categorical imperative that compels both individuals and the State to act in furtherance of those established moral absolutes.

I. German Idealism Embraces an Absolutist View of Human Dignity

The concept of human dignity has deep historical and religious roots.²⁴ But the works of Immanuel Kant are among the most prominent and influential philosophical treatments of the question of fundamental human rights.²⁵ Developed in response to the two dominant schools of moral philosophy prominent in the late eighteenth century, Kant fundamentally sought to bridge the divide between rationalism and empiricism.²⁶ The Kantian contribution to moral philosophy was to recognize that the empiricist school revealed the instrumental principles sought by the rationalist school.²⁷ Thus, the basic aim of Kant's moral philosophy was to elucidate the fundamental principles that applied to humanity across all times and cultures.²⁸ The mutual respect commanded by such shared humanity creates the supreme limiting condition to personal freedom.²⁹ So limited, the individual is compelled to act “as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only.”³⁰ By extension, Kant finds that human dignity, as an objective end unto itself, must therefore constitute the supreme limiting condition on all subjective ends—establishing a universal and absolute law of humanity.³¹

Recognizing universal human dignity as the lynchpin of a moral political order,³² subsequent thinkers like Georg Wilhelm Friedrich Hegel emphasized that a system of rights could not be fully recognized individually.³³ Rather, a moral political order required mutual *self-consciousness*—the absolute recognition of the inherent human dignity of a community.³⁴ Beyond the theoretical formality of universality described by Kant, rights must be codified through a cultural mechanism

²³Although it would be an overstatement to say that the Basic Law is a Kantian document, the influence of Kant's work—particularly the primacy of human dignity—is clear and profound. For more, see EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS OF GERMANY AND THE UNITED STATES* 7 (2002).

²⁴See, e.g., *DIGNITY: A HISTORY* (Remy Debes ed., 2017); Andrew Fagan, *Human Rights*, INTERNET ENCYCLOPEDIA OF PHIL. (2021), <https://iep.utm.edu/hum-rts/#H2> (tracing the origins of human rights to Aristotle's *Nicomachean Ethics*).

²⁵Guy Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT'L L.J. 277, 285 (2008) (“The concept of human dignity has deep roots in many religions, as well as in moral and political philosophy. Human dignity played a historical part in the development of religious and philosophical approaches to human rights. Immanuel Kant is probably the most prominent and influential among philosophers who dealt with human dignity.”).

²⁶WILL DUDLEY, *UNDERSTANDING GERMAN IDEALISM* 3–6 (2007).

²⁷Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (2021), <https://plato.stanford.edu/archives/spr2021/entries/kant-moral/>.

²⁸IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS* 27 (Thomas Kingsmill Abbott trans., Start Publ'g 2012) (1785) (“Here it would be easy to show how, with this compass in hand, men are well able to distinguish, in every case that occurs, what is good, what bad, conformably to duty or inconsistent with it . . . we do not need science and philosophy to know what we should do to be honest and good, yea, even wise and virtuous.”).

²⁹*Id.* at 62.

³⁰*Id.* at 59.

³¹*Id.* at 62.

³²Carmi, *supra* note 25, at 280.

³³G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* 110 (A.V. Miller trans., Oxford Univ. Press 1977) (1807) (“Self-consciousness achieves its satisfaction only in another self-consciousness.”).

³⁴Lewis P. Hinchman, *The Origins of Human Rights: A Hegelian Perspective*, 37 WEST. POL. Q. 7, 18–19 (1984); HEGEL, *supra* note 33, at 112 (“They recognize themselves as mutually recognizing one another.”).

that infuses the *Geist* of society.³⁵ Mutual self-consciousness serves this role, infusing the essence, purpose, and product of the state.³⁶ Through this mechanism, the state becomes the embodiment of fundamental rights and human freedom.³⁷ Community, therefore, becomes a necessary pre-condition for the development of a just society—and places special emphasis on such socio-political manifestations in constructing such a society.³⁸

In contrast to the liberal philosophy of theorists like John Locke or Thomas Hobbes, human dignity in a Kantian or Hegelian sense cannot be secured absent the development of supra-individual institutions whose communitarian impulses crystalize the dignity of the individual into a normative structure to protect human rights.³⁹ Abstract rights of freedom and property remain abstract unless formalized in a societal structure.⁴⁰ At the most basic level, the role of the state is to formalize the universal principles and thus protect the rights of the individual against the potential of abuse by his or her fellow man.⁴¹ This philosophical posture alters the role of the state from the Lockean understanding by expanding the opportunity for positive rights—enforced by the state—to achieve maximal human happiness and flourishing.⁴²

This fundamental desire to maximize human happiness leads naturally to a comparison of the German Idealist school with the utilitarian philosophy espoused by John Stuart Mill and Jeremy Bentham. Similar to Kant and Hegel, Mill's philosophy embraces a form of communitarian awareness.⁴³ However, this communitarianism is not rooted in the universal values espoused by Kant, but rather by the shared benefit of the community's collective interest.⁴⁴ In stark contrast to the duty-based position of Kant, utilitarianism represents a consequentialist approach to ethics.⁴⁵ Rather than recognizing the universality and primacy of human dignity as an end unto itself, Mill's morality turns on the usefulness or worth of an action as determined by its utility.⁴⁶ Ultimately, the distinguishing feature of Kantianism is that the actions of an individual are morally determined by the relationship between the action and the corresponding right, rather than the individual and the corresponding outcome.⁴⁷

II. German Idealism Imposes Positive Obligations onto the State and its Citizens to Act in Furtherance of Universal Norms

Beyond recognizing the existence and primacy of individual human dignity that is preserved through communitarian recognition, German Idealism—informed by both Kant and Hegel—moves beyond the liberal conception of fundamental rights by imposing positive obligations on both the individual and the community to act to preserve and further those rights.⁴⁸ Each joint in

³⁵David T. ButleRitchie, *Organic Constitutionalism: Rousseau, Hegel, and the Constitution of Society*, 6 J.L. Soc'y 36 (2005).

³⁶G.W.F. HEGEL, *PHILOSOPHY OF RIGHTS* § 257 (S.W. Dyde trans., George Bell & Sons 1896) (1821).

³⁷*Id.* at § 260.

³⁸Hinchman, *supra* note 34, at 20.

³⁹*Id.* at 22.

⁴⁰HEGEL, *supra* note 36, § 36.

⁴¹See Ernst-Wolfgang Böckenförde, *The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory*, 10 CAN. J.L. & JURIS. 5, 12 n.9 (1997).

⁴²David Abraham, *The German Duality of State and Society*, 4 CASE W. RES. J. INT'L L. 345, 345–46 (1996).

⁴³JOHN STUART MILL, *UTILITARIANISM* 80–81 (Dover Publ'ns 2007) (1863) (describing the shared community of interest between the individual and their membership in human society).

⁴⁴*Id.* at 81–82.

⁴⁵Christopher Bennett, *Utilitarianism*, in *WHAT IS THIS THING CALLED ETHICS?* 55, 59 (2010).

⁴⁶See MILL, *supra* note 43, at 82 (“To give any meaning to Kant's principle, the sense put upon it must be, that we ought to shape our conduct by a rule which all rational beings might adopt with *benefit to their collective interest*.”).

⁴⁷IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 62 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

⁴⁸See *id.* at 51 (“[T]he Categorical Imperative is a Law either of Command or Prohibition, according as doing or not doing of an action is represented as a Duty.”).

the communitarian superstructure of moral values is linked to a corresponding political right.⁴⁹ This bond “imposes an obligation on the state to ensure that it becomes an integral part of the general legal order.”⁵⁰ This deontological approach to moral philosophy is encapsulated by Kant’s Categorical Imperative—an objective, unconditional principle that the individual is obligated to follow.⁵¹

Conceptually, the rules that govern a society are distinct from the underlying moral principles, with the underlying principle commanding an overarching obligation for both the individual and the community.⁵² Because the underlying principle is objective—and thereby obligatory—the formulation of this principle creates a command that necessitates action.⁵³ As applied to human dignity, this Categorical Imperative obligates individuals to reject any violation of human dignity and imposes a duty upon the state to protect human dignity even when the violation stems from private action.⁵⁴ Because the fundamental principles are the ultimate expression of rational thought, conflict between the rule and the principle cannot be rationally balanced; the obligation to the principle is reflexive.⁵⁵ Consequently, the development of a moral society requires the establishment of a hierarchy of principles built upon the primacy of human dignity and the positive duty to reinforce this hierarchy.⁵⁶

C. The Basic Law and the Externalization of Moral Obligation

The Basic Law, adopted in May 1949 as a temporary constitution for Allied-occupied West Germany, is an expressive document that encapsulates the political and social trends of its era.⁵⁷ The abuses of National Socialism and its strain of legal positivism led to a brief re-emphasis of natural law theory and deontological moral theory in democratic West Germany.⁵⁸ Neo-Kantianism was embraced by Gustav Radbruch,⁵⁹ whose scholarship was deeply influential in the formation of the Basic Law.⁶⁰ An examination of the character and structure of the Basic Law reveals a document that embodies the deontological principles discussed in Part II. In this sense, the Kantian Categorical Imperative is transformed into a political force of national ideation as discussed in Part I, with hegemonic consequences—both domestic and foreign.

⁴⁹*Id.* at 56 (“The conformity of an Action to the Law of Duty constitutes its legality; the conformity of the Maxim of the Action with the Law constitutes its morality.”).

⁵⁰Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 859 (1991).

⁵¹See KANT, *supra* note 47, at 50 (“An Imperative is a practical Rule by which an Action, otherwise contingent in itself, becomes necessary.”); see also KANT, *supra* note 28, at 40 (“The categorical imperative would be that which represents an action as necessary of itself without reference to another end, i.e., as objectively necessary.”).

⁵²Mattias Klatt, *Contemporary Legal Philosophy in Germany*, ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 519, 529 (2007).

⁵³KANT, *supra* note 28, at 39.

⁵⁴Carmi, *supra* note 25, at 285.

⁵⁵Klatt, *supra* note 52, at 531.

⁵⁶Andrew Arato, *A Reconstruction of Hegel’s Theory of Civil Society*, in HEGEL AND LEGAL THEORY 302, 307 (Drucilla Cornell, Michel Rosenfeld, & David Gray Carlson eds., 1991).

⁵⁷See Carmi, *supra* note 25, at 283 (drawing comparisons between the Basic Law and the Universal Declaration of Human Rights’ “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family” as a foundational right).

⁵⁸Klatt, *supra* note 52, at 520.

⁵⁹Radbruch, a neo-Kantian legal philosopher and statesman, was one of the foremost legal scholars in Germany in the Weimar period. His seminal work, *Gesetzliches Unrecht und übergesetzliches Recht* posited the so-called “Radbruch Formula,” which calls upon a judge to apply the positive law of statutes up until the point that the injustice of the positive law reaches such a degree that it must yield to justice. For more, see Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, 26 OXFORD J. LEGAL STUDS. 1, 7 (Bonnie Paulson & Stanley Paulson trans., 2006).

⁶⁰Klatt, *supra* note 52, at 520.

I. The Basic Law Embraces the Deontological Principles of German Idealism

The Basic Law—as a document of political philosophy—embodies the theories of the German Idealists like Kant and Hegel.⁶¹ This influence can be seen in the text’s first lines.⁶² The fundamental principles espoused in the document “define a way of life to which the German people, as a nation, are committed.”⁶³ From a Hegelian perspective, this actualization of the German post-War *Geist* breathes moral life into the constitutional document.⁶⁴ To borrow a phrase from Austrian jurist Hans Kelsen,⁶⁵ the Basic Law represents the *Grundnorms* “that govern and legitimate the entire legal order.”⁶⁶ Far from being a mere set of abstract principles, the Basic Law serves as a moral compass, directing the German state as it emerged from the horrors of World War II. This necessary connection between law and morality is often attributed to Radbruch, whose influential theory “serves as a sort of naturalist pressure release valve” against gross injustice.⁶⁷ In this substantive and directive posture, the Basic Law embodies the spirit of the Hegelian dialectic,⁶⁸ synthesizing the lessons learned during the late nineteenth and early twentieth centuries and enabling Germany to emerge from that period as a liberal, democratic state.⁶⁹

The structure of the Basic Law lays out an inviolable hierarchy of principles that permeate German society and subject the generally positivist state to supra-positive notions of justice.⁷⁰ This order primarily affects public law.⁷¹ But the communitarian nature of the Basic Law means that the hierarchy of principles is indirectly superimposed onto private law as well.⁷² More than merely embodying a shared culture, the Basic Law integrates the fundamental values of the German people into a common consciousness—the very supra-individual structure called for by the Idealists.⁷³ This activation of moral principles within the constitutional structure is

⁶¹See Carmi, *supra* note 25, at 290 (“James Whitman observes that German constitutional scholars had developed, in the 1950s, a powerful body of Kantian thought on the nature of human dignity.”).

⁶²Grundgesetz [GG] [Basic Law] art. I, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (“Human dignity shall be inviolable”); see also Carmi, *supra* note 25, at 325 (“The German Constitutional Court has purposely structured its constitutional jurisprudence with the supreme *Grundwert*, human dignity, at its core.”).

⁶³Kommers, *supra* note 50, at 861.

⁶⁴See ALLEN W. WOOD, *HEGEL’S ETHICAL THOUGHT* 221 (1990); see also HEGEL, *supra* note 36, § 257.

⁶⁵One of the foremost legal philosophers of the early twentieth century, Kelsen’s neo-Kantian legal positivism as set for in *Reine Rechtslehre* (Pure Theory of Law) argues that the continued existence of the positive legal order requires an ethical guarantor. The *Grundnorm* (basic norm) is the legal basis for the entire hierarchy of laws to follow. See HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 1967) (1960).

⁶⁶Kommers, *supra* note 50, at 848.

⁶⁷Klatt, *supra* note 52, at 534.

⁶⁸Dialectics describes a method of philosophical argument involving a contradiction between two opposing sides, typically people. Hegel’s innovation was to abstract the opposing sides depending on the subject matter. For more, see Julie E. Maybee, *Hegel’s Dialectics*, STAN. ENCYCLOPEDIA OF PHIL. (2021), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=hegel-dialectics>.

⁶⁹In an extended metaphor describing his dialectic, Hegel writes:

The plant . . . does not lose itself in mere indefinite change. From the germ much is produced when at first nothing was to be seen. But the whole of what is brought forth, if not developed, is hidden, and ideally contained within itself. But this coming without itself has an end in view. Its completion fully reached, and its previously determined end, is the fruit.

G.W.F. HEGEL, *LECTURES ON THE HISTORY OF PHILOSOPHY* 22 (E.S. Haldane trans., Kegan, Paul, Trench, Truebner, & Co. 1892) (1837). Similarly, the constant challenges of the Weimar Republic and the moral desolation of the Third Reich help to shape the maturation of German constitutional law.

⁷⁰Kommers, *supra* note 50, at 846.

⁷¹*Id.* at 848.

⁷²Ronald 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, 1562 (2004) (noting the expansive interpretation of the Basic Law’s hierarchy to encompass private law as well as public law).

⁷³See Kommers, *supra* note 50, at 861; see also BVerfGE, 1 BvR 400/51, Jan. 15, 1958, at 15–16 (“The concept of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person’s dependence on the commitment to the community, without infringement upon a person’s individual value.”).

well-documented within the study of ontological security.⁷⁴ Indeed, these narratives “establish the foundation not only for what once was, but for what ought to be.”⁷⁵ As such, this re-anchoring of national identity upon Idealist moral principles encourages the German state to engage in affirmative acts in furtherance of these principles.

All political rights, in this context, are simultaneously preserved and limited by the architectonic moral principles that inform the Basic Law.⁷⁶ This interwoven network of rights and privileges gives the Basic Law its depth and force. As described by the late legal scholar and Federal Constitutional Court Judge Ernst-Wolfgang Böckenförde, the purpose of this linkage between political rights and moral principles “is aimed at realizing and fulfilling the value expressed in and through such rights.”⁷⁷ To achieve these lofty ends, the state and the citizens are subsequently obligated under this structure to not merely defend these principles, but to advance them whenever possible.⁷⁸ In doing so, the Basic Law advances “an objective ordering of values” upon not only German society, but upon their global interactions.⁷⁹

II. The Deontological Element Distinguishes German Constitutional Law from the American Constitutional Tradition

The effects of this deontological philosophic tradition on German domestic affairs are well-documented—particularly with respect to two interrelated phenomena: Freedom of expression and militant democracy.⁸⁰ In both instances, the objective order of values prescribed by the Basic Law dictate the occasional suppression of what American scholars often see as fundamental liberty interests.⁸¹ This tension between Germany and some of its fellow democracies reflects a conscious and deliberate choice on the part of German society to weigh the various social costs and benefits on a different scale.⁸²

Germany’s stance toward the freedom of expression is in stark contrast with the American tradition. Article 5 of the Basic Law enshrines a broad conception of free speech: “Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures . . . there shall be no censorship.”⁸³ This first clause parallels similar American protections: “Congress shall make no law . . . abridging the freedom of speech, or of the Press . . .”⁸⁴ While the freedom of expression in the United States is not absolute,⁸⁵ the protection is robust and scrutiny

⁷⁴See Subotic, *supra* note 19, at 612 (“Narratives can also be mobilizational, created to establish and promote specific collective values, and encourage a sense of groupness and solidarity.”).

⁷⁵See *id.* (citing James V. Wertsch, *Narratives as Cultural Tools in Sociocultural Analysis: Official History in Soviet and Post-Soviet Russia*, 28 *ETHOS* 511, 518 (2000)).

⁷⁶See Kommers, *supra* note 50, at 857; see also KANT, *supra* note 28, at 39 (“All imperatives are expressed by the word ought [or shall], and thereby indicate the relation of an objective law of reason to a will, which from its subjective constitution is not necessarily determined by it [an obligation].”).

⁷⁷E.W. BÖCKENFÖRDE, *STATE, SOCIETY, AND LIBERTY* 190–91 (1991).

⁷⁸Kommers, *supra* note 50, at 857–62.

⁷⁹Krotoszynski, *supra* note 72, at 1555.

⁸⁰See, e.g., Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 *S. CAL. L. REV.* 657, 674 (1980); see also Krotoszynski, *supra* note 72, at 1590–93.

⁸¹See Krotoszynski, *supra* note 72, at 1598 (“German constitutional law intentionally subordinates the freedom of expression in order to promote values associated with dignity, community, and support for democratic self-government.”).

⁸²Krotoszynski, *supra* note 72, at 1552–54.

⁸³Grundgesetz [GG] [Basic Law] art. 5., translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0031.

⁸⁴U.S. CONST. amend. I.

⁸⁵See *Virginia v. Black*, 538 U.S. 343, 358 (2003) (explaining that states may constitutionally regulate certain categories of speech); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (describing the reasoning for excluding certain categories of speech from First Amendment protections).

of laws abridging this fundamental right is strict.⁸⁶ Generally, beyond “[t]hose few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement,”⁸⁷ a restriction of speech must be narrowly drawn and serve a substantial interest to avoid running afoul of First Amendment protections.⁸⁸ The Supreme Court has consistently reaffirmed the “bedrock principle underlying the First Amendment”⁸⁹ that the government may not restrict speech simply because such speech is offensive or disagreeable.⁹⁰

By contrast, the second clause of Article 5 immediately places freedom of expression in Germany within the broader communitarian framework: “These rights shall find their limit in the provisions of general laws, in the provisions for the protection of young persons, and in the right to personal honor.”⁹¹ Under the Basic Law, the purpose of the state as a political entity is to “facilitate peaceful debates as well as solutions and ultimately decisions in accordance with procedural standards of argumentation and public discourse.”⁹² This value of speech is thus balanced against any competing interests and can be overcome through a showing that the expressive speech’s harm to a higher fundamental principle outweighs the speech’s benefit.⁹³ However, such an analysis is not utilitarian in nature. Rather, the state action supports and maintains the freedom of humanity by hindering actions that themselves hinder the freedom of others.⁹⁴ Accordingly, for types of speech that harm others—like slander, libel, or antisemitism—the corresponding strength of the constitutional protection for that speech is inverted and an obligation arises to restrict that speech through direct state coercion to a degree necessary to maintain a maximal amount of human freedom.⁹⁵ Importantly, this balancing is not objective; the Federal Constitutional Court is generally more protective of speech that advances governmental interests.⁹⁶

The obligations imposed by the Basic Law diverge from the American tradition most sharply over political expression. The legal superstructure of the German political system is often described as a *militant democracy*, one which obligates the State to actively oppose persons and groups who seek to use the rights and institutions enshrined in the Basic Law to subvert or destroy the democratic order.⁹⁷ This constitutional mandate, born from understandable political concerns facing West Germany during de-Nazification and the Cold War, persists as a sort of moral originalism, embracing the value determinations of the founding fathers of modern Germany and obligating state action in furtherance of said values.⁹⁸ Although the modern socio-political milieu of Germany is different than that of 1949, the militant nature of German democracy remains strong.

⁸⁶See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 453 (1969) (holding that an Ohio law criminalizing advocacy for criminal syndicalism violated the protections of the First Amendment).

⁸⁷*Matal v. Tam*, 137 U.S. 1744, 1765 (2017).

⁸⁸*Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564–65 (1980).

⁸⁹*Texas v. Johnson*, 491 U.S. 397, 414 (1989).

⁹⁰See, e.g., *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988); *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 509–14 (1969).

⁹¹Grundgesetz [GG] [Basic Law] art. 5(2), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0031.

⁹²Böckenförde, *supra* note 41, at 7.

⁹³See, e.g., Krotoszynski, *supra* note 72, at 1582 (“When the dignity interest involves a specific individual, however, the Federal Constitutional Court usually finds that reputation (even of a dead person) trumps the Article 5 interest in freedom of expression.”).

⁹⁴Frederick Rauscher, *Kant’s Social and Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (2021), <https://plato.stanford.edu/archives/sum2021/entries/kant-social-political/>.

⁹⁵KANT, *supra* note 47, at 62.

⁹⁶Kommers, *supra* note 50, at 861.

⁹⁷*Id.* at 854.

⁹⁸*Id.* at 855.

III. The Categorical Imperative Imbedded Within the Basic Law has Spill-over Effects on German Foreign Policy Where Such Acts Serve to Increase Ontological Security

As discussed in Section C.II above, the deontological nature of German constitutionalism has direct consequences on domestic politics that distinguish this feature from American constitutional traditions. This structural imperative burdening the state and its citizens, however, does not subside at Germany's borders. Perhaps unintentionally, the Categorical Imperative imbedded within the Basic Law has supplanted nationalism with a self-assuring form of moral supremacy: *Militant moralism*.

The similarity of this term to the well-known—and previously discussed—militant democracy is intentional. However, the analogy is more abstract. By militant moralism, this Article does not suggest that the text of the Basic Law—taken literally—creates an explicit directive to the German state to advance the cause of human dignity beyond the traditional boundaries of the Westphalian nation-state. Nor, for its militant defense of domestic democratic norms, has Germany engaged in any sort of exportation of liberal democratic values akin to the United States' invasion of Iraq in 2003.⁹⁹ Yet, the same structural imperative that empowers the German commitment to the liberal democratic order suffuses German foreign policy with deeply moralistic undertones rooted in the primacy—and universality—of human dignity.¹⁰⁰

Militant moralism is, in a sense, an internal animating force behind the oft-studied *Brussels Effect*, whereby domestic laws and regulations are externalized through market mechanisms to establish globalized standards.¹⁰¹ In looking to the internal motivations behind the European Union's (EU) hegemonic regulatory scheme, Anu Bradford adopts a skeptical position advanced by then-Czech President Václav Klaus that the EU's global agenda is rooted in competitive concerns for domestic industries.¹⁰² Specifically, Bradford points to the domestic interests of a small number of influential EU member states—Germany and France—as the preliminary source of this regulatory putsch.¹⁰³ By entrenching these domestic influences into EU legislation, the Brussels Effect then amplifies and globalizes these policy preferences.¹⁰⁴ Importantly, Bradford suggests that the hegemonic consequences of the Brussels Effect are both incidental and ancillary to this primary motivation.¹⁰⁵

The deontological nature of the Basic Law suggests that, beyond these domestic economic concerns, at least some of the policy advanced by Germany in the EU and beyond is influenced by militant moralism. In advancing this position, Germany legitimizes its regulatory preferences by claiming that policies are normatively desirable based on the universality of the commanding underlying values.¹⁰⁶ This position is one that re-enforces Germany's self-identity and increases its ontological security in the foreign policy sphere by giving this narrative extraterritorial effect.¹⁰⁷

⁹⁹See, e.g., Shibley Telhami, *Exporting Democracy to the Middle East*, BROOKINGS INST. (Mar. 1, 2007), <https://www.brookings.edu/articles/exporting-democracy-to-the-middle-east/>.

¹⁰⁰See Jochen Bittner, *The World Used to Fear German Militarism. Then It Disappeared.*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/opinion/the-world-used-to-fear-german-militarism-then-it-disappeared.html> (“Moralism has become the new nationalism.”).

¹⁰¹Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 3 (2012) (“Unilateral regulatory globalization occurs when a single state is able to externalize its laws and regulations outside its borders through market mechanisms, resulting in the globalization of standards.”).

¹⁰²*Id.* at 39 (quoting VÁCLAV KLAUS, *RENAISSANCE: THE REBIRTH OF LIBERTY IN THE HEART OF EUROPE* 16 (1997)).

¹⁰³Bradford, *supra* note 101, at 40.

¹⁰⁴*Id.*

¹⁰⁵See *id.* at 6 (“The EU's external regulatory agenda has thus emerged largely as an inadvertent by-product of that internal goal rather than as a result of some conscious effort to engage in regulatory imperialism.”); see also *id.* at 42 (“While the primary objective of European regulatory activity has been to create a guard the single market, this activity has had the ancillary effect of establishing the EU as a global regulatory hegemon.”).

¹⁰⁶Bradford, *supra* note 101, at 37 (citing TEFU art. 3(5)).

¹⁰⁷See Subotić, *supra* note 19, at 615 (“A constructed narrative reaches a tipping point threshold when a critical mass of social actors accepts and buys into it as a social fact. This state narrative then becomes an uncontested ‘rhetorical commonplace.’ It becomes hegemonic.”).

This sort of moral posture gives structure to the German regulatory scheme, which is then amplified across the EU. Rather than establishing a *de jure* globalized norm of human dignity through international agreement, the spill-over effects of militant moralism encourage the same sort of *de facto* convergence of global regulatory policy advanced by Bradford.¹⁰⁸

Overwhelmingly, the influence of militant moralism on German foreign policy is directed at the promotion of societal structures that are considered by liberal democracies to have positive social capital. The Federal Foreign Office emphasizes Germany's commitment to democracy, the rule of law, and human rights as central pillars of their foreign policy.¹⁰⁹ A far cry from the nationalism and militarism that has defined much of its history, the modern German state takes an overwhelmingly antimilitarist approach to national security concerns—preferring diplomatic solutions to open conflict.¹¹⁰ Unsurprisingly, there is little to no pushback from American scholars against these exercises of soft hegemony—perhaps because such values are shared between Germany and much of the English-speaking world. The impact of militant moralism on German foreign policy and the need for a new, holistic, and ontologically aware approach to dealing with these policy determinations is best illustrated when state power is directed at the demotion of societal structures that hinder human freedoms. As discussed below, the concentration of state action against undesirable speech—like hate speech and misinformation—is antithetical to the traditional liberty-centric values of the American political tradition which values the primacy of the freedom of expression.¹¹¹ Consequently, when moralistic policies are amplified and exported through the Brussels Effect or related phenomena, the clash between European and American law takes on distinctively geopolitical tones which require a conscious consideration of the ontological narrative driving those policies to effectively counteract.

D. Content Moderation & NetzDG: Militant Moralism on the March

The final section of this Article explores how NetzDG and Germany's expansive content moderation scheme embodies the militant moralism derived from the Basic Law in an effort to promote both the physical and ontological security of the German state. More than a mere incidental benefit of Germany's domestic policy objective, this Article argues that the foreign policy consequences of militant moralism are the ultimate objectives to help reposition Germany as a major player in an increasingly multipolar cyberspace. Given this shift toward multipolarity, this Article concludes by recommending that American scholars move away from First Amendment-based critiques of Germany's policies and instead adopt an explicitly constructivist mode of analysis which better accounts for the moral and philosophical aspects of these acts.

I. NetzDG Defends the Deontological Values of Germany's Militant Moralism

Faced with the proliferation of hate speech and radicalization on social media platforms, NetzDG was passed in October 2017.¹¹² Rather than establishing a public administrative body to regulate

¹⁰⁸See Bradford, *supra* note 101, at 8 (“Instead, we typically see only a *de facto* regulatory convergence whereby much of global business is conducted under unilateral EU rules even when other states continue to maintain their own rules.”) (internal quotations omitted).

¹⁰⁹GERMANY'S FOREIGN AND EUROPEAN POLICY PRINCIPLES, FEDERAL FOREIGN OFFICE (Oct. 9, 2019), <https://www.auswaertiges-amt.de/en/aussenpolitik>.

¹¹⁰See *id.*; see also Daniel Flesch & Hannes Ebert, *The Contested Use of Force in Germany's New Foreign Policy*, E-INT'L RELATIONS (Sept. 9, 2016), <https://www.e-ir.info/2016/09/09/the-contested-use-of-force-in-germanys-new-foreign-policy/>.

¹¹¹See Danielle K. Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1038 (2018); see also Jacob Mchangama & Joelle Fiss, *Germany's Online Crackdowns Inspire the World's Dictators*, FOREIGN POL'Y (Nov. 6, 2019), <https://foreignpolicy.com/2019/11/06/germany-online-crackdowns-inspired-the-worlds-dictators-russia-venezuela-india/>.

¹¹²Ben Knight, *Germany Implements New Internet Hate Speech Crackdown*, DEUTSCHE WELLE (Jan. 1, 2018), <https://www.dw.com/en/germany-implements-new-internet-hate-speech-crackdown/a-41991590>.

online speech, NetzDG is designed to co-opt the private administrative body within companies like Facebook and imposes a substantial burden on these private actors to remove unlawful content.¹¹³ Under such a “regulated self-regulation” scheme, the brunt of costs is shifted to the social media companies, thereby reducing the financial obligation on the state.¹¹⁴ The law, which applies to social media companies with more than two million domestic users, imposes harsh penalties for failing to remove unlawful content from their platforms.¹¹⁵ NetzDG distinguishes between two types of content: (i) Manifestly illegal content and (ii) illegal content.¹¹⁶ For manifestly illegal content, NetzDG requires providers to identify and remove the content within twenty-four hours of being reported.¹¹⁷ For other unlawful content, the providers must remove the content within seven days.¹¹⁸ In a departure from existing EU regulation, NetzDG modifies the actual knowledge requirement that immunizes social network providers from secondary liability into constructive knowledge with a twenty-four hour clock.¹¹⁹

Despite opposition from civil liberties groups and the European Commission,¹²⁰ NetzDG went into effect in January 2018.¹²¹ This forced most major social media companies—including U.S.-based Facebook, YouTube, and Twitter—to alter their content moderation strategies.¹²² In 2019, the Federal Office of Justice (Bfj) levied a €2 million fine against Facebook for underreporting complaints.¹²³ However, the threat posed by hate speech and radicalization only became more pronounced. Following the murder of Christian Democratic Union politician Walter Lübcke by a right-wing extremist who disagreed with Lübcke’s pro-refugee policies, the Bundestag introduced legislation to scale up the reporting requirements for providers and increase the enforcement power of the Bfj.¹²⁴ This attack, coupled with racially-motivated violence directed at immigrant communities in Halle an der Saale and Hanau, underscored the real world consequences associated with online hate speech.¹²⁵ In an effort to increase compliance, NetzDG was updated to increase the ease of reporting alleged content violations,¹²⁶ lower the threshold reporting requirements for social media providers,¹²⁷ as well as increasing the power of the Bfj in overseeing enforcement of the Act.¹²⁸

Looking to the purpose and effects of NetzDG, the links between the law and the underlying moral values encased within the Basic Law become apparent. In identifying what qualifies as “unlawful content,” the Act cites various sections of the Criminal Code identifying speech which falls beyond the protections of freedom of expression.¹²⁹ Such balancing of the freedom of expression against the communitarian interests of the state is expressly endorsed by Article 5

¹¹³Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2030 (2018).

¹¹⁴Alex Rochefort, *Regulating Social Media Platforms: A Comparative Policy Analysis*, 25 COMM. L. & POL’Y 225, 247 (2020).

¹¹⁵See NetzDG § 3(2)–(3); see also Rochefort, *supra* note 114, at 245.

¹¹⁶NetzDG § 3.

¹¹⁷NetzDG § 3(2).

¹¹⁸NetzDG § 3(3).

¹¹⁹Compare Council Directive 2000/31 of June 8, 2000, The Electronic Commerce Directive, art. 14., 2000 O.J. (L 178) with NetzDG § 3(2).

¹²⁰Oliver Noyan, *Germany’s Online Hate Speech Law Slammed by Opposition, Commission*, EURACTIV (May 10, 2021), <https://perma.cc/5BVV-84TA>.

¹²¹Knight, *supra* note 112.

¹²²Balkin, *supra* note 113, at 2030.

¹²³*Germany Fines Facebook for Underreporting Hate Speech Complaints*, DEUTSCHE WELLE (July 2, 2019), <https://www.dw.com/en/germany-fines-facebook-for-underreporting-hate-speech-complaints/a-49447820>.

¹²⁴Janosch Delcker, *Germany’s Balancing Act: Fighting Online Hate While Protecting Free Speech*, POLITICO (Oct. 1, 2020), <https://www.politico.eu/article/germany-hate-speech-internet-netzdg-controversial-legislation/>.

¹²⁵*Targeted Steps to Combat Hate Crimes*, OFFICE OF THE CHANCELLOR (2021), <https://www.bundesregierung.de/breg-en/news/bekaempfung-hasskriminalitaet-1738462>.

¹²⁶NetzDG § 3(2).

¹²⁷NetzDG § 2.

¹²⁸NetzDG § 4(a).

¹²⁹See NetzDG § 1(3) (listing the relevant sections of the Criminal Code).

of the Basic Law.¹³⁰ In defending the law's intent and scope, scholars have argued that the perpetuation of hate speech threatens "the peaceful coexistence of a free, open, and democratic society."¹³¹ The rise of right-wing, anti-migrant speech in recent years has begun to challenge the very notions of communitarianism and universal human dignity that undergird the Basic Law. In this sense, NetzDG embodies an approach to protecting and promoting human dignity and preserving the democratic order. This determination is influenced by the dignity-oriented Basic Law and the concept of *Informationelle Selbstbestimmung*.¹³² In combination, the rights of human dignity and informational self-determination create a moral super-structure that encourages the state to pursue the policy aims of NetzDG.

II. NetzDG Advances German Ontological Interests in a Multipolar Cyberspace at the Expense of American-Style Free Speech on the Internet

For its multifarious domestic effects, NetzDG has also sent ripples through the global content moderation space. In terms of scope and impact, NetzDG has become a poster child of content-based regulation.¹³³ Despite Europe's historically strong intermediary protections,¹³⁴ the implementation of NetzDG has resulted in the proliferation of intermediary regulatory schemes targeting illegal hate speech.¹³⁵ This is the latest development in what Jack Balkin has described as *new-school regulation*, whereby nation-states "threaten, coerce, or co-opt elements of the Internet infrastructure in order to get the infrastructure to surveil, police, and control speakers."¹³⁶ These attempts to coax, cajole, or coerce compliance are guided by a philosophical framework that champions the globalization of fundamental human rights like human dignity and self-determination.¹³⁷

The consequences of Germany's deviation from European Commission guidance are most immediately felt within the wider European community. Since 2018, both France and Austria have adopted similar domestic regulations against hate speech.¹³⁸ In 2019, then candidate for European Commission President Ursula von der Leyden called for a new "Digital Services Act" (DSA) and a modernization of the e-Commerce Directive.¹³⁹ Since her election to the presidency, von der Leyden and other German officials have played a central role in drafting the DSA, which aims to require companies like Facebook and Google to increase the censorship of "vitriol, misinformation, and illicit content on their sites."¹⁴⁰ The final text of the DSA, adopted in April 2022, embraced the spirit of NetzDG nearly word-for-word, implementing a centralized set of

¹³⁰Grundgesetz [GG] [Basic Law] art. 5(2).

¹³¹Zurth, *supra* note 10, at 1102.

¹³²Michael J. Rustad & Sanna Kulevska, *Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J. LAW & TECH. 349, 359 (2015) (describing an individual's right to informational self-determination and the right to control how they are portrayed to the public).

¹³³Balkin, *supra* note 113, at 2015.

¹³⁴See Council Directive 2000/31, *supra* note 119.

¹³⁵Bloch-Wehba, *supra* note 11, at 43.

¹³⁶Balkin, *supra* note 113, at 2015–16; see also Bloch-Wehba, *supra* note 11, at 62 (describing the "collateral censorship" of state coercion of private companies to censor speech that the government could not itself lawfully sanction).

¹³⁷See, e.g., Rochefort, *supra* note 114, at 256 (linking content moderation to fundamental concepts of privacy that undergird the right to informational self-determination).

¹³⁸See, e.g., *France's Watered-Down Anti-Hate Speech Law Enters into Force*, UNIVERSAL RTS. GRP. (July 16, 2020), <https://www.universal-rights.org/blog/frances-watered-down-anti-hate-speech-law-enters-into-force/>; *First Analysis of the Austrian Anti-Hate Speech Law (NetDG/KoPIG)*, EUROPEAN DIGIT. RTS. (Sept. 10, 2020), <https://edri.org/our-work/first-analysis-of-the-austrian-anti-hate-speech-law-netdg-koplg/>.

¹³⁹Ursula van der Leyden, *A Union That Strives for More: My Agenda for Europe*, in POLITICAL GUIDELINES FOR THE NEXT EUROPEAN COMMISSION 2019–2024 13 (2019), https://commission.europa.eu/system/files/2020-04/political-guidelines-next-commission_en_0.pdf.

¹⁴⁰Adam Satariano, *An Experiment to Stop Online Abuse Falls Short in Germany*, N.Y. TIMES (Sept. 26, 2021), <https://www.nytimes.com/2021/09/23/technology/online-hate-speech-germany.html>.

content-moderation compliance schemes against all internet intermediaries beginning in February 2024.¹⁴¹ Beyond the EU, at least thirteen countries have adopted or proposed legislation modeled after NetzDG.¹⁴² Taken in concert, these domestic and supranational trends within and across national regimes have positioned Europe as an influential hub for content moderation regulation—with Germany leading the way.¹⁴³

The proliferation of NetzDG-style laws across the globe underscores the hegemonic draw of such regulation and increase the significance of Germany as a central player in the geopolitics of cyberspace. Although a presumption against extraterritoriality is an established norm of international law, the Brussels Effect amplifies and propagates NetzDG across the globe, effectively creating a unilaterally-established global norm.¹⁴⁴ The hegemonic consequences of NetzDG are best illuminated when contrasted against the United States' best domestic equivalent, Section 230 of the Communications Decency Act.¹⁴⁵ In the United States, social network providers are immunized against any information shared on their platform.¹⁴⁶ Section 230 further protects companies from civil suit arising from any voluntary actions—taken in good faith—to restrict access to objectionable content regardless of whether such content is constitutionality protected.¹⁴⁷ Since its passage in 1996, Section 230 has represented the dominant approach to content moderation globally, reflecting a more general trend toward the least-restrictive regulatory scheme in cyberspace.¹⁴⁸ However, as Kenneth Waltz notes, unipolarity is “the least durable of international configurations.”¹⁴⁹ Ultimately, the unipolar moment¹⁵⁰ in cyberspace devolved into a largely bipolar framework between the liberal West dedicated to freedom of expression—as represented by the United States and the EU—against the authoritarian East—as represented by China—diametrically opposed to freedom of expression.

It is from this bipolar framework that NetzDG emerges as a radical departure from the historic approaches of the United States and the EU to content moderation. However, NetzDG does not go so far as to realign German interests in cyberspace with Chinese content moderation strategies. Rather, it positions German content moderation policy as an attractive alternative to either the American or Chinese approach. The emergence of this multipolar cyberspace is not incidental.¹⁵¹ The structure and function of NetzDG effectively creates a global regulation, the validity of which is reinforced via the Brussels Effect.¹⁵² Daphne Keller has suggested that the emergence of this multipolar system has the potential to “create an unprecedented imbalance in the Internet ecosystem” toward the global dominance of European—and by extension German—content

¹⁴¹ Andreas Steffens & Dirk Distelrath, Digital Services Act (DSA) and Digital Markets Act (DMA), KPMG (last accessed 2/22/2024), <https://kpmg.com/de/en/home/insights/2023/03/digital-services-act-dsa-and-digital-markets-act-dma.html>.

¹⁴² Jacob Mchangama & Joelle Fiss, *The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship*, JUSTICIA 6–16 (Nov. 2019), https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2019/11/Analyse_The-Digital-Berlin-Wall-How-Germany-Accidentally-Created-a-Prototype-for-Global-Online-Censorship.pdf.

¹⁴³ See Monika Zalnieriute, *An International Constitutional Movement for Privacy in the Times of Mass-Surveillance*, 23 INT. J. LAW INFO. TECH. 99, 118 (2015).

¹⁴⁴ See, e.g., Dawn Carla Nunziato, *The Fourth Year of Forgetting: The Troubling Expansion of the Right to be Forgotten*, 39 U. PA. J. INT'L L. 1011, 1040–45 (2018).

¹⁴⁵ 47 U.S.C. § 230 (2018).

¹⁴⁶ 47 U.S.C. § 230(c)(1) (2018).

¹⁴⁷ 47 U.S.C. § 230(c)(2)(A) (2018).

¹⁴⁸ See Citron, *supra* note 111, at 1039–40.

¹⁴⁹ Kenneth Waltz, *Structural Realism After the Cold War*, 25 INT'L SEC. 5, 27 (2000).

¹⁵⁰ International relations scholars broadly consider the decade following the collapse of the Soviet Union—during which American hegemony was at its zenith—as a “unipolar moment” in geopolitics. See Charles Krauthammer, *The Unipolar Moment*, FOREIGN AFFS. (Jan. 1, 1990), <https://www.foreignaffairs.com/articles/1990-01-01/unipolar-moment>.

¹⁵¹ Tyson Barker, *Europe Can't Win the Tech War It Just Started*, FOREIGN POL'Y (Jan. 16, 2020), <https://foreignpolicy.com/2020/01/16/europe-technology-sovereignty-von-der-leyn/> (noting that Germany's political and foreign policy elite are casting cyberspace in explicitly geopolitical terms).

¹⁵² See Kate Klonik, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1651 (2018).

moderation policies.¹⁵³ The passage of the Digital Services Act—itself an extension of the fundamental policy determinations of NetzDG—will further enable an unprecedented influence of German cyber-hegemony over the global Internet.¹⁵⁴

The threat posed by this emergent multipolar space is not academic. Even within the limited time that NetzDG and similar anti-hate speech laws have been in effect, “calls to remove hate speech have quickly ballooned to cover expression that does not violate existing European law.”¹⁵⁵ Increasingly, these demands for cooperation reflect mounting pressures on platforms to alter their content moderation strategies in favor of global deletion.¹⁵⁶ This censorship creep, as described by Danielle Keats Citron, presents a real threat to the core American concept of freedom of expression.¹⁵⁷ Worryingly, authoritarian governments like Russia and Türkiye have adopted Germany’s content moderation policies as precedent for imposing their own highly restrictive moderation regimes aimed at stifling dissent.¹⁵⁸ A secondary consideration of NetzDG-style regulations is the impact of soft censorship on the democratic process.¹⁵⁹ As Derek Bambauer notes, shifting the regulatory burden onto private actors to enforce the government’s preferred speech limitations effectively insulates the decision making from any form of public accountability, increasing the potential for abuse.¹⁶⁰ In concert, the unopposed expansion of German content moderation in a multipolar cyberspace threatens the very fabric of the liberal democratic order and undermines American interests in a free and open Internet.

III. To Better Respond to NetzDG, American Scholars Must Account for Ontological Security When Challenging German Cyber-Policy

In response to the increasing cachet of Germany’s content moderation policies, most American scholarship discussing NetzDG has adopted a constitutional framework centered on the primacy of the First Amendment.¹⁶¹ However, as Hannah Bloch-Wehba notes, imposing First Amendment standards on global platform governance assumes a unilateral approach to speech and privacy across the global Internet.¹⁶² The emerging reality in cyberspace—contrary to this assumption—is one marked by multipolarity and great power politics.¹⁶³ To appropriately react to this evolution, content moderation scholarship in the United States would benefit by adopting a framework informed by international relations theory which is cognizant of the inherent desire for ontological security.

During the early days of the Internet, thought leaders sought to segregate and liberate cyberspace from the political considerations of real space in favor of the promise of

¹⁵³Daphne Keller, *The Final Draft of Europe’s “Right to be Forgotten” Law*, STAN. L. SCH. CTR. FOR INTERNET & SOC’Y (Dec. 17, 2015), <http://cyberlaw.stanford.edu/blog/2015/12/final-draft-europes-right-be-forgotten-law>.

¹⁵⁴Nunziato, *supra* note 144, at 1048–49.

¹⁵⁵Citron, *supra* note 111, at 1039.

¹⁵⁶Bloch-Wehba, *supra* note 11, at 29.

¹⁵⁷Citron, *supra* note 111, 1039–40.

¹⁵⁸Mchangama & Fiss, *supra* note 142, at 7–8.

¹⁵⁹Bloch-Wehba, *supra* note 11, at 63.

¹⁶⁰See, e.g., Derek E. Bambauer, *Orwell’s Armchair*, 79 U. CHI. L. REV. 863, 905 (2012) (arguing that soft censorship suffers significant legitimacy concerns in democratic societies); see also Jon D. Michaels, *All the President’s Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 923–24 (2008) (describing how soft regulation via public-private partnerships facilitates the avoidance of public oversight).

¹⁶¹See, e.g., Jennifer Daskal, *Speech Across Borders*, 105 VA. L. REV. 1605, (2019); Diana Lee, *Germany’s NetzDG and the Threat to Online Free Speech*, YALE L. SCH. MEDIA, FREEDOM & INFO. ACCESS CLINIC (Oct. 10, 2017), <https://law.yale.edu/mfia/case-disclosed/germanys-netzdg-and-threat-online-free-speech>; Selina MacLaren, *Is There a First Amendment Right to Tweet?*, JSTOR DAILY (Mar. 31, 2021), <https://daily.jstor.org/is-there-a-first-amendment-right-to-tweet/>.

¹⁶²Bloch-Wehba, *supra* note 11, at 66.

¹⁶³Barker, *supra* note 151 (recognizing the increasing acceptance of a Westphalian understanding of cyberspace).

self-regulation.¹⁶⁴ However, the intervening decades have belayed such efforts and underscored the influence of geopolitics on cyberspace.¹⁶⁵ Scholars like Jack Goldsmith, Timothy Wu, and Orin Kerr have all rejected cyber-exceptionalism to one extent or another.¹⁶⁶ Yet, American scholarship has not sufficiently adapted. Even scholars like Jennifer Daskal, who recognize the consequences of European content moderation schemes as a “new form of international rule-making,” do not take the subsequent step in adopting an equally international framework.¹⁶⁷

The underlying motivation for Germany’s data protection policies is not merely the preservation of personal autonomy but is best understood as a strategic deployment of national and supra-national law to challenge American and Chinese hegemony in cyberspace. Far from a mere policy consideration, cyber policy is increasingly central to the practice of government.¹⁶⁸ By focusing on American-based technology companies, Germany and the EU have torn down the distinctions between cyber space and real space and erected burdensome challenges that limit the strength of these companies in the European market.¹⁶⁹ Given the rise of multi-national corporations that blur the boundaries between states, the reactionary movement of German and EU law targeting these corporations and moving toward a more balkanized Internet should be conceived as a geopolitical act reasserting the dominance of the German moral tradition embodied by the constitutional provisions of the Basic Law. However, because Germany and the EU have couched these expansionistic policies in moralistic terms as protectors of fundamental rights, these unilateralist actions—that would be seen as highly aggressive if undertaken by a geopolitical rival—are instead perceived as little more than an expression of policy preference.¹⁷⁰ Further, because American scholars have not taken the time to recognize how these actions reinforce German notions of self-identity rooted within the Basic Law, challenges and criticisms leveled against the German government have thus far been ineffective. Without understanding and accounting for these moral superstructures that reinforce militant moralism, it seems unlikely that American cyber-policy can prevail. As cyberspace continues to evolve as a multipolar system of competing regulatory and governance options,¹⁷¹ recognizing and adopting a constructivist frame of analysis when discussing content moderation is critical to preserving and advancing American policy objectives.

Without such changes, American technology companies will continue to be repurposed to magnify Germany’s favored policy solutions on a global scale without effective American resistance.¹⁷² As the United States debates the proper role of social media companies in democratic society and considers overhauling content moderation laws, American scholarship must consider the strategic rebalancing of cyberspace against not only the proposals of illiberal

¹⁶⁴See John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence>; see also Bloch-Wehba, *supra* note 11, at 39 (“In suggesting that the Internet would be a new place or territory, beyond the jurisdiction of any territorially-based sovereign, cyber-exceptionalists predicted that the Internet could escape these disagreements by permitting online communities to create rules and norms to govern themselves.”).

¹⁶⁵See, e.g., Paul Mozur, *China Presses Its Internet Censorship Efforts Across the Globe*, N.Y. TIMES (Mar. 2, 2018), <https://www.nytimes.com/2018/03/02/technology/china-technology-censorship-borders-expansion.html>.

¹⁶⁶See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1200–01 (1998); Timothy Wu, *When Law & the Internet First Met*, 3 GREEN BAG 2d 171, 172 (2000); see also Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 361–62 (2003).

¹⁶⁷See, e.g., Jennifer Daskal, *Borders and Bits*, 71 VAND. L. REV. 179, 233 (2018) (associating the perpetuation of European content moderation policies to the mechanism underpinning the Brussels Effect).

¹⁶⁸Jonathan Lancelot, *Cyber-Realpolitik: U.S. Foreign Policy and a Fragmented International System*, SMALL WARS J. (Aug. 6, 2019), <https://smallwarsjournal.com/jrnl/art/cyber-realpolitik-us-foreign-policy-and-fragmented-international-system>.

¹⁶⁹Citron, *supra* note 111, at 1045.

¹⁷⁰Zalnieriute, *supra* note 143, at 17.

¹⁷¹See CAROL M. GLEN, *CONTROLLING CYBERSPACE: THE POLITICS OF INTERNET GOVERNANCE AND REGULATION* 5 (2018).

¹⁷²Bloch-Wehba, *supra* note 11, at 29.

regimes like China and Russia, but also against our erstwhile European allies, lest our current blindness to the geopolitical implications of Germany's militant moralism leave us helplessly outflanked in the race for digital supremacy.

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