

Reputation Protection on Online Rating Sites

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INTRODUCTION

The Internet has enabled individuals to publish information about themselves and to publicly comment on others in a readily accessible manner. The ease of viewing others' communication is one of the key features of Internet-enabled communication. This enhanced transparency has created a new business model and has led to the flourishing of sites for the rating, evaluation, and even blacklisting of individuals.¹ For

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1. In this article, rating sites refer to online platforms that score and rank individuals or businesses. Evaluation sites provide an opportunity for users to post comments on individuals and businesses, in addition to ranking and scoring them.

example, teachers, lawyers, and doctors are now openly rated by their students,² clients,³ and patients,⁴ respectively. Yet, such evaluations are not confined to job performance. For instance, OpenTable is a site that allows restaurant owners to identify customers who are likely to turn up late for their bookings;⁵ Rottenneighbors.com allows residents to locate unfriendly neighbors; and DontDateHimGirls.com affords women a platform to out terrible boyfriends.⁶ In the words of Lori Strahlevitz, we now live in a “reputation nation,”⁷ in which various aspects of our conduct are evaluated by often anonymous individuals, ushering in the danger of shame sanctions. Unfair evaluations or personal information taken out of context can lead to misjudgments and misunderstandings, potentially causing serious harm.⁸ Moreover, such information can exert a negative impact on communities as a whole when they rely on biased and unfair models, and incorrect information to make decisions or judge others.

Although reputation rating sites are far from being a system of formal adjudication, their power can hardly be ignored, especially when evaluations are related to work performance. Users often post false information to these sites, many of which do not have effective or accessible means to allow individuals to correct such information.⁹ Victims may find themselves helpless against anonymous individuals expressing their opinions online.¹⁰ Alternatively, they may struggle to correct false

Sacha Pfeiffer, *Ratings Sites Flourish behind a Veil of Anonymity*, BOSTON GLOBE (Sept. 20, 2006), http://www.boston.com/business/technology/articles/2006/09/20/ratings_sites_flourish_behind_a_veil_of_anonymity [<https://perma.cc/2828-QUHN>].

2. RATE MY PROFESSORS - REVIEW TEACHERS AND PROFESSORS, SCHOOL REVIEWS, COLLEGE CAMPUS RATINGS, <http://www.ratemyprofessors.com> [<https://perma.cc/XS76-6VEF>]; Cour d'appel [CA] [regional court of appeal] Paris, 14e ch., Jun. 25, 2008, 08/04727; Bundesgerichtshof [BGH] [Federal Court of Justice] Jun. 23, 2009, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2888, 2009 (Ger.).

3. *Law Society v. Kordowski* [2011] EWHC (QB) 3185 (appeal taken from Eng.); *Davis v. Avvo*, No. C11-1571RSM, 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012).

4. *Braverman v. Yelp, Inc.*, 128 A.D.3d 568 (N.Y. 2015).

5. Katie Hafner, *Restaurant Reservations Go Online*, N.Y. TIMES (Jun. 18, 2007).

6. *Hollis v. Cunningham*, 1:2007CV23112 (S.D. Fla. filed Nov. 29, 2007).

7. Lori J. Strahlevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. L. REV. 1667 (2008).

8. Daniel J. Solove, *Speech, Privacy and Reputation on the Internet*, in *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* 15 (Saul Levmore & Martha C. Nussbaum eds., 2010).

9. See Discussion in Part II.

10. Sophie Kay, *Combating Anonymous Online Defamation Conflicts*, INFORMM'S BLOG (Nov. 5, 2016), <https://inforrm.wordpress.com/2016/11/05/combating-anonymous-online-defamation-conflicts-sophie-kay> [<https://perma.cc/82PD-ZZ69>]. RonNell Andersen Jones & Lyrissa Barnett Lidsky, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 VA. J. SOC. POL'Y & L. 155 (2016).

information published on online platforms if the information is considered of legitimate public interest and is already in the public domain. Furthermore, litigation is lengthy, costly, and plagued with uncertainty. In the absence of satisfactory legal solutions and remedies, some have resorted to alternative methods of “reputation management.”¹¹ For example, doctors have reportedly asked patients to sign waiver forms declining to participate in online rating forums before providing consultations,¹² and a number of companies now exist to help those who have been rated unfavorably to rebuild and “amplify their reputation.”¹³

Formal and informal norms are gradually emerging to moderate the battle between evaluation and reputation protection, but they remain in a fledgling state and are not without problems. As explained later in this Article, reputation is an inherently social and relational concept that “serves an important signaling function” about an individual’s place within society.¹⁴ At the same time, the legal rules on reputation protection also reflect the rules of civility within the community: how we manage reputation information to make it reliable and how we should treat one another in different social settings. We argue that a legal framework for protecting online platform reputation should be responsive to the changing set of practices ushered in by the Internet and capable of resolving conflicts in a fair and satisfactory way. Drawing on U.S. and German jurisprudence on online evaluation platforms, this Article advocates for a new regime requiring such platforms to formulate an appropriate information policy providing transparency rules, including disclosing how aggregate evaluations are made and providing for a right to respond, to achieve a new body of communication “netiquette” for

11. Eric Goldman, *The Regulation of Reputational Information*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 293 (Adam Marcus & Berin Szoka eds., 2010).

12. Jeffrey Segal & Michael J. Sacopolos, *Avoid Being Defamed on the Web: Have you Googled Your Name Lately?*, *MEDICAL JUSTICE* (Jan. 1, 2009, 1:42 PM), https://medicaljustice.com/wp-content/uploads/2012/10/ANTI_DEF_-_MJ_Report.pdf [<https://perma.cc/655X-QR58>].

13. Examples of companies that offer services claiming to rescue individuals’ online reputations include Reputation Defenders and eMerit. REPUTATION DEFENDER, <https://www.reputationdefender.com/reputation> [<https://perma.cc/CKS4-A6AB>]; EMERIT - ONLINE REPUTATION MANAGEMENT FOR DOCTORS, <https://emerit.biz> [<https://perma.cc/3HA7-543N>]. The main task of reputation management companies is to push bad news and reviews down on the search results list (i.e., out of the first page), and to clean up negative online content. The techniques used range from writing positive reviews and having websites to promote those reviews to having fake reviews, biased Wikipedia articles or posting false comments and links on blogs or social networking sites. Julie Bort, *Inside the Sleazy World of Reputation Management, Where People Pay to Control What You See on the Internet*, *BUSINESS INSIDER* (Dec. 25 2013), <http://www.businessinsider.com/reputation-management-2013-12> [<https://perma.cc/CZ8B-TT6U>].

14. David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 *HARV. C.R.-C.L. L. REV.* 261, 262 (2010).

social evaluation in the online era. We chose these two jurisdictions because of the popularity of online rating sites in both, as well as the existence of a number of relevant judicial decisions on the subject. This article focuses mainly on the protection of individual reputation rather than that of a business or company though judgments related to the latter have been covered to illustrate the development of relevant legal doctrines. The terms “evaluation sites” and “rating sites” are used interchangeably throughout this Article, as are “online sites” and “online platforms.”¹⁵

Part I of this Article explores the concept of reputation as interpreted in U.S. common law jurisprudence and the German continental law tradition. Under U.S. common law, reputation is largely protected through defamation law, the fundamental concern of which is protecting an individual’s representation to the world and the world’s social construction of his or her identity. German continental law, in contrast, recognizes the protection of a person’s reputation through personality and dignity rights.¹⁶ Beyond protecting against unwarranted reputational harm and unjustified social condemnation, German law also protects an individual’s private sphere.¹⁷ An overview of the two legal systems affords a better understanding of how reputation is protected within embedded systems of social and legal norms. Part II then examines the uphill legal battle that plaintiffs in the U.S. and Germany must wage in the courts against allegedly untrue or misleading comments on online rating platforms. Drawing on the lessons gleaned from the two jurisdictions, Part III argues that we need a new governance regime that balances reputation protection and freedom of expression, including guidelines and procedures that are both Internet-adequate and fitting for the social sphere that is touched, recognizing users’ right to respond and online platform’s need to be responsive to users’ requests to moderate incorrect information. A new governance regime could improve

15. The distinction between evaluation and rating sites is explained in Pfeiffer, *supra* note 1. A website is generally understood to be a web page hosted on a web server by the site’s owner, a hosting provider, or an Internet service provider. PC Magazine Encyclopedia Definition of “Website,” PC MAGAZINE, <https://www.pcmag.com/encyclopedia/term/54397/website> [<https://perma.cc/MT96-4MLY>]. An online marketplace refers to a virtual space in which one party, such as a buyer, can get in touch with another, such as a seller. PC Magazine Encyclopedia Definition of “Online Platform,” PC MAGAZINE, <https://www.pcmag.com/encyclopedia/term/68953/online-platform> [<https://perma.cc/WAK4-3BQM>]. As we will see from the discussion in Part II, U.S. courts use “online sites” to refer to evaluation sites, whereas German courts generally prefer “platforms.”

16. GRUNDGESETZ [GG] [BASIC LAW], arts. 1(1), 2(1), *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 [<https://perma.cc/HJH5-7HE2>] (Ger.).

17. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963 (1997).

the coordination of legal and social norms, and ultimately yield decisions about what kind of online evaluation platforms are reliable and thus deserving of social recognition and legal protection.

I. REPUTATION: WHAT'S IN A NAME?

A well-known verse in the Bible avers, “a good name is more desirable than great riches; to be esteemed is better than silver or gold.”¹⁸ Indeed, there is much truth in the saying that a “good reputation [is] painstakingly earned, easily lost and not readily rebuilt.”¹⁹ The protection of reputation from unjustified attack has thus long been a concern of both the common law and continental law traditions. In this Part, we discuss the fundamental legal rationale for protecting reputation—be it under defamation law or with reference to personality rights—and redraw its socio-legal boundary with freedom of expression in the arena of online rating platforms. In the process, we demonstrate the interconnection of social norms and legal rules and the need for a coherent response.

A. U.S. Common Law Tradition

Common law has a long tradition of protecting reputation through defamation law.²⁰ English and U.S. defamation law had much in common until 1964, when the U.S. Supreme Court handed down its judgment in *New York Times Co. v. Sullivan*,²¹ which sets a different legal standard for public — as opposed to private — figures bringing defamation actions.²² In the area of defamation, while English common law has been criticized as plaintiff friendly; in the U.S., defamation law is generally more defendant friendly. U.S. defamation law varies from state to state, but the core elements of liability for defamation are:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the pub-

18. *Proverbs* 22:1.

19. David A. Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747, 777 (1984).

20. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION* 118 (2007).

21. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

22. Under the *Sullivan* test, plaintiffs who are public officials or public figures have to prove the defendant published the defamatory statement with actual malice, i.e. the defendant published the statement knowing it to be false, or with reckless disregard as to its falsity. Under English defamation law, no such distinction is made. ANDREW T. KENYON, *DEFAMATION: COMPARATIVE LAW AND PRACTICE* 240–41 (2006).

lisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.²³

Consistent with the English common law tradition, U.S. defamation law protects an individual from the publication of false rumors that “exposes [the] person to hatred, ridicule, contempt or obloquy, or cause[s] him to be shunned and avoided.”²⁴ A defamatory statement is one that would generally tend to lower the plaintiff’s standing in the estimation of right-thinking members of society.²⁵ In this understanding, a person’s reputation is largely dependent on his or her estimation in the minds of third parties. The exact definition of reputation, however, remains obscure despite a long line of defamation cases.²⁶

Thus, it is necessary for us to go back in time to examine the goals of reputation protection. In his seminal piece on the socio-historical and legal study of defamation law, Robert Post identifies reputation as property, honor, and dignity.²⁷ According to Post, reputation as property refers to “reputation in the marketplace.”²⁸ An individual can earn recognition and build up his or her reputation through “the exertion of talent” or “mechanical skill and ingenuity,”²⁹ namely, through skill, labor, and effort. An apt illustration is professional reputation.³⁰ The law of defamation is designed to ensure that a person’s reputation is “not wrongfully deprived of its proper market value.”³¹

At the same time, Post also considers reputation to be a form of honor owing to the venerable tradition of conferring social rank or position upon individuals since the times of feudalism and the aristocracy during the Middle Ages.³² Unlike reputation as property, reputation as

23. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

24. *Youssouf v. Metro-Goldwyn-Mayer Pictures Ltd.*, 99 A.L.R. at 874.

25. *Sim v. Stretch*, 1936 2 All ER 1237 at 1240 (H.L.); RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977).

26. Eric Barendt, *What is the Point of Libel Law?*, 52 CURR. LEG. PROBL. 110–125 (1999).

27. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. LAW REV. 691, 693 (1986). For analysis of his piece, see Barendt, *supra* note 26. DAVID ROLPH, REPUTATION, CELEBRITY AND DEFAMATION LAW 87–168 (2008).

28. Post, *supra* note 27, at 693.

29. *Id.* at 694 (quoting Thomas Starkie, TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM AND FALSE RUMOURS xx (New York 1826)).

30. Post also cites the example of building up a reputation through “a course of virtuous and honorable action[s].” *Id.* at 694–95 (quoting J. Hawes, LECTURES ADDRESSED TO THE YOUNG MEN OF HARTFORD AND NEW HAVEN 95–96 (Hartford 1828)).

31. Post, *supra* note 27, at 695.

32. *Id.* at 701–02.

honor cannot be earned through effort or labor. Instead, it is a reflection of the status that society ascribes to one's social position or specifically defined social role. A loss of honor is thus a loss of status and personal identity,³³ the restoration of which can only be "vindicated."³⁴ For Post, this fact explains the underlying rationale for criminal libel and seditious libel in English law.³⁵

Lastly, Post points out that reputation is also linked to the concept of dignity, by which he is referring to the "essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."³⁶ We noted earlier Post's emphasis on the social and public nature of reputation, being bestowed by others and concerning the esteem in which one is held by the community. Here, however, Post highlights the "person's private personality" as his or her "essential dignity."³⁷ Aware of the apparent paradox, Post reconciles it by drawing on the work of Ervin Goffman, specifically the famous sociologist's work on the symbolic interaction tradition.³⁸ In Goffman's view, social interactions with others constantly mold our identity and sense of who we are.³⁹ Each of us is both a subject and an object at the same time.⁴⁰ Applying this conceptualization, Post suggests that our own sense of intrinsic worth is "perpetually dependent upon the ceremonial observation by those around us."⁴¹

The law of defamation functions as norms of "deference and demeanor,"⁴² as well as "rules of civility" that members of society owe to one another to protect the internal aspect of individual personality and individuals' intrinsic self-worth.⁴³ From this perspective, reputation has both private and public dimensions. It protects the private sphere, the internal aspect of an individual's interest in his or her own dignity

33. *Id.* at 691, 703.

34. *Id.* at 703. By "vindication," Post means that the loss of honor can only be "restored" by punishing the defendant, rather than by merely compensating the victim in financial terms.

35. *Id.* at 702-03.

36. *Id.* at 707. Post is quoting Justice Stewart's dictum in *Rosenblatt v Baer*, 383 U.S. 75, 92 (1966).

37. *Id.* at 708.

38. *Id.* at 709-12; ERVING GOFFMAN, *INTERACTION RITUAL* 84-85 (1967).

39. Post, *supra* note 27, at 709.

40. Thomas Gibbons, *Personality Rights: The Limits of Personal Accountability*, 3 *YEARB. OF MEDIA AND ENTERTAIN. LAW* 53, 58 (1998) (discussing Post's article and its relation to Goffman's work).

41. Post, *supra* note 27, at 711.

42. Post, *supra* note 27, at 709.

43. *Id.* at 710.

as a person, while simultaneously concerning the public sphere, particularly society's interest in maintaining its own rules of decency and self-expression.

The three foregoing characteristics of reputation are not mutually exclusive, and each illuminates different aspects of defamation law. Their unifying feature is the "dependence of an individual's reputation on the recognition of others."⁴⁴ Reputation is thus an inherently relational⁴⁵ and distinctly social concept.

Post's examination of the values underlying reputation is an important reminder that defamation analysis requires more than a simple balancing of First Amendment free speech interest and the interest in reputation as two-dimensional concept.⁴⁶ When reputation is a "mélange of several different concepts, and each concept demands its own constitutional analysis,"⁴⁷ a more nuanced and rigorous intellectual exercise is needed. We will observe in our discussion at Part II that the concept of "reputation as property" in the marketplace is often missing in American judicial analysis even when a person's professional standing is at stake. Although Post's writing focuses largely on common law tradition, his framework sheds light on the below discussion in Part B and the understanding of the concept of dignity in German law.

B. German Civil Law Tradition

The link between an individual and the community is prominent in German law, which provides multiple ways to protect a person's reputation. Defamation is primarily a misdemeanor governed

44. DAVID ROLPH, REPUTATION, CELEBRITY AND DEFAMATION LAW 3 (2008) (discussing Post's work).

45. *Id.* at 37.

46. Post, *supra* note 27, at 741. Although defamation law has a long history, "reputation" has not been legally defined. Post points out that it has been assumed that everyone knows of the value of reputation and that the State has a legitimate interest in protecting one's reputation from injury, but the "single undifferentiated" concept of a "good name" has not been adequately analyzed. For instance, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 759 (1985), the plaintiff was a corporation that had been wrongly listed as a company that had filed a voluntary petition for bankruptcy. It sued the defendant, a credit reporting agency, for defamation. The U.S. Supreme Court upheld the lower court decision in ruling that presumed and punitive damages could be awarded in the absence of a proof of actual malice. Post remarks that Justice Powell has attempted to balance First Amendment interests in protecting free speech and the state's interest in protecting reputation. However, Justice Powell's analysis of reputation is premised on the need to safeguard the essential dignity and worth of every human being. Post argues that if the distinction between reputation as property and reputation as dignity is drawn, confusion would be avoided and harm suffered by the plaintiff would be rightly attributed to its corporate goodwill, rather than an individual's dignity.

47. Post, *supra* note 27, at 740.

under sections 186-89 of the Penal Code (Strafgesetzbuch, StGB).⁴⁸ In private conflicts, German courts have recognized a right of personality (*allgemeines Persoenlichkeitsrecht*) in interpreting the scope of protection provided under section 823(1) of the Civil Code (Bürgerliches Gesetzbuch, BGB),⁴⁹ and article 2(1) of the German Constitution or Basic Law (Grundgesetz). However, as explained below, the interpretation of rights protected under article 2(1) must be read in conjunction with article 1(1) of the Basic Law, which protects the right to “human dignity.”⁵⁰ This “right of personality” corresponds with the tort of defamation under English or U.S. common law and guarantees the right to free development of one’s personality.

Interestingly, the Civil Code contains no reference to the term “personality.” Section 823(1)⁵¹ protects specific interests against intentional and negligent invasion, stating: “A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or *another right* of another person is liable to make compensation to the other party for the damage arising from this.”⁵² The absence of the term “personality right” is largely due to historical developments. Unlike most other continental law jurisdictions, Germany never adopted the term “personality,” which is rooted in the Roman

48. STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 186-89, *translation at* https://www.gesetze-im-internet.de/englisch_stgb [<https://perma.cc/6NA6-RRCG>]. *See also* BASIL S. MARKESINIS & HANNES UNBERATH, *THE GERMAN LAW OF TORTS: A COMPARATIVE TREATISE* 27 (2002).

49. RAYMOND YOUNGS, *ENGLISH, FRENCH & GERMAN COMPARATIVE LAW* 436 (3d ed. 2014); Dietrich Murswiek, *Freie Entfaltung der Persönlichkeit, Recht auf Leben, körperliche Unversehrtheit, Freiheit der Person*, in *GRUNDGESETZ: KOMMENTAR*, art. 2, n. 67 (Michael Sachs ed., 2016). *See* BGH May 3, 1963, 39 *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN* [BGHZ] 124 (127); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 1998, 97 *ENTSCHEIDUNGEN DES BUNDESVRFASSUNGSGERICHT* [BVERFGE] 391 (403); BGH May 11, 2013, 198 *BGHZ* 346 (349).

50. Thomas Hoeren & Anselm Rodenhausen, *Constitutional Rights and New Technologies in Germany*, in *CONSTITUTIONAL RIGHTS AND NEW TECHNOLOGIES: A COMPARATIVE STUDY* 137, 138 (Ronald Leenes et al. eds., 2008); Rudolf Streinz, *The Role of the German Federal Constitutional Court Law and Politics*, 31 *RITSUMEIKAN L. REV.* 95, 104 (2014). *See* BVerfG Jan. 31, 1973, 34 *BVERFGE* 238 (245); BVerfG Jun. 5, 1973, 35 *BVERFGE*, 202 (220). Article 1(1) of the German Constitution stipulates that “[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” Article 2(1) stipulates that “[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.” *GRUNDGESETZ* [GG] [BASIC LAW].

51. This clause in the Civil Code is the basis for claims that in a common law system would be regarded as tort claims.

52. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 823, para. 1, *translation at* https://www.gesetze-im-internet.de/englisch_bgb [<https://perma.cc/X858-LMG6>] (emphasis added).

legal concept of *delict injuria*.⁵³ Although well-recognized in Roman law to protect a person's dignity from injuries to reputation and feelings, personality rights were deliberately left out when the Civil Code was drafted in 1900.⁵⁴ General opinion at the time held that it was repugnant to compensate for harms to such an important intangible interest in financial terms.⁵⁵ But sentiments changed dramatically after the Second World War, in light of the defeated Nazi regime's ruthless trampling of any respect for human life, liberty or dignity.⁵⁶ Not only does the German Constitution of 1949 expressly protect the dignity of man as inviolable under article 1(1), but it also stipulates under article 2 that "everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law,"⁵⁷ and the German courts have since adopted an expansive approach to the interpretation of section 823 of the Civil Code.

In 1954, for example, the German Federal Court of Justice (Bundesgerichtshof, BGH) declared in *Schacht* that the defendant, the publisher of the newspaper *Welt am Sonntag*, had violated "a general right of personality" under articles 1(1) and 2(1) of the Basic Law.⁵⁸ The case concerned a letter written to the newspaper by Schacht's lawyer, the plaintiff, demanding that certain statements about his client be corrected.⁵⁹ Schacht had previously served as Germany's Economics Minister under Hitler and worked as a banker in Hamburg after the Second World War.⁶⁰ The newspaper *Welt am Sonntag* first published an article about Schacht's new occupation and his activities before 1945. In response to false characterizations of Schacht, his lawyer wrote a letter to the newspaper *Welt am Sonntag* demanding that the statements be corrected. *Welt am Sonntag* did not comply. It instead published the letter itself with other materials which misleadingly portrayed Schacht's lawyer as taking a personal stance in the matter.⁶¹ The German Federal Court of Justice ruled in favor of the plaintiff and decided that the defendant had infringed the plaintiff's right of personality, as protected under the Basic Law, by publishing the materials in such a misleading

53. P. R. Handford, *Moral Damage in Germany*, 27 INT'L & COMP. L. Q. 849, 851 (1978).

54. *Id.* at 851.

55. *Id.* at 855; MARKESINIS & UNBERATH, *supra* note 48, at 74.

56. Gibbons, *supra* note 40, at 56.

57. GRUNDGESETZ [GG] [BASIC LAW].

58. BGH May 25, 1954, 13 BGHZ 334. For discussion of the case, see Handford, *supra* note 53, at 858. For a case summary and English translation of the case, see MARKESINIS & UNBERATH, *supra* note 48, at 412-15.

59. MARKESINIS & UNBERATH, *supra* note 48, at 413.

60. Handford, *supra* note 53, at 858.

61. MARKESINIS & UNBERATH, *supra* note 48, at 412-13.

manner, and ordered a correction.⁶² Since *Schacht*, the right of personality has been firmly recognized in Germany as an enforceable right rather than as merely an abstract ideal in the Constitution.

Another significant case was the 1957 *Persönlichkeitsrecht* decision⁶³ in which the German Federal Court of Justice held that the general right of personality should be recognized as one of the “other rights” under section 823(1) of the Civil Code, thereby confirming the direct connection between the Civil Code and the Basic Law in the right’s protection.⁶⁴ Soon after, in *Herrenreiter*, the German Federal Court of Justice awarded compensation for violation of the right of personality based on the Civil Code and the Basic Law.⁶⁵ The plaintiff in that case was a successful amateur show-jumper, and the defendant was a pharmaceutical company specializing in the manufacture of a sexual potency enhancement drug.⁶⁶ In one of its promotional posters, the defendant had featured a picture of a show-jumper based on the plaintiff’s photograph without the plaintiff’s permission.⁶⁷ The plaintiff was understandably offended and sued for damages.⁶⁸ The German Federal Court of Justice ruled that the plaintiff’s right of personality had been infringed under section 823(1) of the Civil Code and articles 1 and 2 of the Basic Law.⁶⁹

The Court’s analysis of the meaning of “personality right” provides insight for our discussion. Most importantly, the Court affirmed that the combined effect of the dignity and personality rights enshrined in the Basic Law was to recognize human personalities as “supra-legal basic values” of the law.⁷⁰ The two rights protect the “inner realm of the personality,” providing the basis for the free and responsible self-determination of an individual.⁷¹ Any invasion of that realm must be compensated. A right of personality is characterized as the “inner freedom”⁷² to have interests and make one’s own decisions in the individual sphere.

62. *Id.* at 415.

63. BGH Apr. 2, 1957, 24 BGHZ 72.

64. The case concerns the unlawful release of an insured person’s medical records. See Handford, *supra* note 53, at 859.

65. BGH Feb. 14, 1958, 26 BGHZ 349. For a case summary and English translation of the case, see MARKESINIS & UNBERATH, *supra* note 48, at 415-20.

66. MARKESINIS & UNBERATH, *supra* note 48, at 415.

67. *Id.*

68. *Id.*

69. *Id.* at 416.

70. *Id.* at 418.

71. *Id.*

72. *Id.*

The emphasis on protection of the personal sphere and analysis of its meaning continued in later cases.⁷³ In essence, the personal sphere embraces: (1) the individual sphere preserving personal individuality in one's relationship with the wider world, particularly in one's public sphere of influence; (2) the private sphere, which includes an individual's family and private life; and (3) the intimate or secret sphere, which refers to an individual's inner thoughts and feelings and their external forms.⁷⁴ Thus, the personal sphere carves out the necessary space to determine who one is and how one should relate to the world.⁷⁵ However, these spheres only provide a helpful taxonomy for privacy cases, which always call for a case-by-case decision under German law. Also, the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) stresses that there is no absolute right of an individual to control his or her public image,⁷⁶ acknowledging that this image is a social construction which depends on the status of the individual in society. It is therefore necessary to balance an individual's personal sphere with others' right to free speech.

Readers may already have noticed the differences between U.S. law and German legal approaches to the protection of reputation. U.S. law protects reputation through defamation law, with an aim to protect a person's name against wrongful or untrue social appraisals by others. The German law on personality rights, in contrast, protects an individual's name in order to allow him or her to expressively develop his or her whole being within different societal contexts.⁷⁷ The law of personality sets boundaries on when and to what extent personal life circumstances may be revealed and how a person may be criticized. Although that law bears a close resemblance to the right "to be let alone" in U.S. privacy law,⁷⁸ and to Post's analysis of reputation as dignity protecting a person's sense of intrinsic worth and society's rules of civility,⁷⁹ the scope of the multifaceted personality right goes well beyond the U.S. legal understanding.

The case law established by the Federal Constitutional Court illustrates the additional dimensions of the right of personality, referring to

73. Eberle, *supra* note 17, at 979; Handford, *supra* note 53, at 860.

74. Handford, *supra* note 53, at 860.

75. Eberle, *supra* note 17, at 980.

76. BVerfG Nov. 9, 1999, 101 BVerfGE 361 (380).

77. See Wolfgang Schulz & Max V. Grafenstein, *The Right to Be Forgotten in Data Protection Law: A Search for the Concept of Protection*, 5 INT'L J. PUB. L. & POL'Y 249, 262-63 (2015).

78. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890), discussing the famous phrase in advocating for the recognition of a right to privacy in U.S. common law.

79. Post, *supra* note 27, at 707-10.

the different interests a person can have that are relevant to the protection of his or her reputation.⁸⁰ Because the right of personality in Germany is based on the combined jurisprudence of articles 1(1) and 2(1) of the Basic Law (which cover human dignity and the free development of personality, respectively),⁸¹ it is also important to consider the Federal Constitutional Court's interpretation of human dignity under article 1 of the Basic Law.

Closely related to the right of personality and dignity is personal honor.⁸² Unlike Post's analysis of honor as an aristocratic notion in English society, honor in German law refers to the respect that every person should be accorded based on his or her personhood. The protection of honor is embedded in the protection of human dignity because "honor" protects one from defamation, whereas the protection of human dignity goes beyond. Accordingly, honor is related to protection of the individual sphere.⁸³ This embedded element in the right of personality means that abusive criticism (*Schmähkritik*) cannot be tolerated.⁸⁴ However, owing to the protection of free speech under article 5(1) of the Basic Law, only speech that is demeaning without any factual basis is banned.⁸⁵

The right of personality also protects one's private sphere or privacy.⁸⁶ This includes private and confidential matters such as details about a person's sex life or medical conditions.⁸⁷ In addition, the protection extends beyond an individual's home to a spatial area in public (i.e., areas accessible to the public) where the individual can move and relax, free from continuous public observation and scrutiny.⁸⁸ Hence, the right to publish pictures of someone in a public space depends not only on his or her fame but also on a true public interest to know.⁸⁹

80. Eberle, *supra* note 17, at 1014.

81. 26 BGHZ 349 (354); 13 BGHZ 334 (338); BVerfG Jun. 3, 1980, 54 BVERFGE 148 (153); 35 BVERFGE 202 (220); Judith Janna Märten, *Personality Rights and Freedom of Expression: A Journey Through the Development of German Jurisprudence Under the Influence of the European Court of Human Rights*, 4 J. MEDIA L. 333, 334 (2012).

82. Handford, *supra* note 53, at 860.

83. BVerfG Oct. 20, 1992, 87 BVERFGE 209 (228).

84. Amtsgericht [AG] [District Court] Dannenberg, *Löschen einer Bewertung bei eBay*, 2006 MULTIMEDIA UND RECHT 567, 568.

85. See BVerfG Nov. 10, 1998, 99 BVERFGE 185 (199); Dieter Grimm, *Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts [The Freedom of Speech in Judicature of the German Constitutional Court]*, 48 NEUE JURISTISCHE WOCHENSCHRIFT 1697, 1703 (1995).

86. MARKESINIS & UNBERATH, *supra* note 48, at 450; Märten, *supra* note 81, at 334.

87. Märten, *supra* note 81, at 334-35.

88. MARKESINIS & UNBERATH, *supra* note 48, at 455.

89. See 101 BVERFGE 361 (383); BVerfG Feb. 14, 1973, 34 BVERFGE 269

Finally, the fundamental rights dimension of data protection and the right to informational self-determination also play a role in the consideration of the right of personality, as personal data, such as one's name or address, may serve as indicators of reputation.⁹⁰ The German Constitutional Court first formulated the concept of informational self-determination in the famous Census Case of 1983 (*Volkszählung*).⁹¹ The Court declared certain provisions of the Census Act, which mandated the collection of comprehensive data of citizens, to be intrusive and unconstitutional.⁹² The concern was that comprehensive surveys of the population, coupled with computing technology, would facilitate the state's control of its citizens.⁹³ Informational self-determination is interpreted as "the authority of the individual to decide himself, on the basis of the idea of self-determination, when and within what limits information about his private life should be communicated to others."⁹⁴

The aforementioned rights to honor, private sphere, data protection, and informational self-determination constitute separate aims of protection under the right of personality. German tort law permits claims for all four types of interests (see section 823 of the Civil Code).⁹⁵ There are also additional safeguards such as the right to one's own identity,⁹⁶ special duties for a controller of personal

(283).

90. See 101 BVERFGE 361 (383); Udo Di Fabio, *Staatliche Informationsmaßnahmen als Eingriffe in das allgemeine Persönlichkeitsrecht*, in 81 GRUNDGESETZ-KOMMENTAR, art. 2, nn. 175-78 (Theodor Maunz & Günter Dürig eds., 2017).

91. BverfG Dec. 15, 1983, 65 BVerfGE 1 (42). See Antoinette Rouvroy & Yves Poullet, *The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy*, in REINVENTING DATA PROTECTION? 45, 52 (Serge Gutwirth et al. eds., 2009). See also Eberle, *supra* note 17, at 1000-04.

92. 65 BVERFGE 1 (42); Eberle, *supra* note 17, at 1004; Rouvroy & Poullet, *supra* note 91, at 45.

93. Eberle, *supra* note 17, at 1001.

94. Rouvroy & Poullet, *supra* note 91, at 45 (quoting 65 BVERFGE 1 (42)).

95. 198 BGHZ 346 (348); 97 BVERFGE 391 (403); 39 BGHZ 124 (127); Murswiek, *supra* note 49, art. 2, nn. 103-07.

96. This refers to an individual's interest in determining his or her representation in public. 54 BVERFGE 148 (155). Udo Di Fabio, *Selbstdarstellungsschutz*, in 81 GRUNDGESETZ-KOMMENTAR, art. 2, nn. 166-72 (Theodor Maunz & Günter Dürig eds., 2017). This includes one's right not to be misrepresented to the public or placed in a false light. For instance, false attributions in political debates and fictitious interviews of famous persons were considered violations of the right of personality. GERT BRÜGGEMEIER, MODERNISING CIVIL LIABILITY LAW IN EUROPE, CHINA, BRAZIL AND RUSSIA: TEXTS AND COMMENTARIES 35 (2011).

data,⁹⁷ and provisions of criminal law that protect honor by punishing defamation.⁹⁸ The strong protection of personal data is reflected in the rigorous standards of the Federal Data Protection Act (*Bundesdatenschutzgesetz*)⁹⁹ and the General Data Protection Regulation (*Datenschutzgrundverordnung*) of the European Union.¹⁰⁰ How the General Data Protection Regulation will affect the well balanced system of privacy protection in Germany cannot be foreseen at this time.

The discourse on the right of personality and reputation in German law focuses on the individual and how he or she relates to others in society. An individual is, first and foremost, a social being. As discussed in Part II, the preservation of the personal and private spheres under the right of personality faces severe challenges in the Internet era. An individual's personal information can be easily searched and retrieved, and negative comments about him or her can be readily posted for all to see.

The way in which reputation is framed is highly dependent on cultural and philosophical contexts and the characteristics of the legal system. Because the protection of reputation is intertwined with the social norms of the community, the challenge for the online community is determining what types of information are appropriate for sharing with the public and how information can be shared in a fair manner. The legal challenge is to find the delicate balance between an individual's reputation on the one hand, and others' freedom of expression combined with the public's right to certain personal information on the other.

II. LEGAL BATTLE OVER ONLINE EVALUATION SITES

A. U.S. Law

Society has long attributed reputation to individuals through evaluation, a practice that is playing out prominently on the Internet. Subjects of negative evaluations are understandably offended and frustrated. If they know the identity of the person who has posted a negative review about them on a rating site, they can bring a defamation action against

97. Edith Palmer, *Germany*, in ONLINE PRIVACY LAW 63, 67-70, LAW LIBRARY OF CONG. (2012), <https://www.loc.gov/law/help/online-privacy-law/online-privacy-law.pdf> [<https://perma.cc/KXA7-DEPB>].

98. STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 186-190.

99. Daniel Pauly et al., *Germany - New Law Adopted to Implement the GDPR*, LINKLATERS (June 6, 2017), <https://www.linklaters.com/en/insights/publications/tmt-news/tmt-news---june-2017/germany---new-law-adopted-to-implement-the-gdpr> [<https://perma.cc/K6E5-MDFN>].

100. Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 2016 O.J. (L 119) 1. The regulation came into force on May 24, 2016 and will apply from May 25, 2018. *Id.*

that person, as in *Dietz Development, LLC v. Perez*.¹⁰¹ There, Jane Perez hired Dietz to do renovation work on her townhouse, but she found the work too slow and the quality unsatisfactory.¹⁰² She then wrote negative comments on Yelp! (now known as “Yelp”) and Angie’s List.¹⁰³ Dietz also replied on those sites to defend himself and decided to sue Perez for defamation.¹⁰⁴ Eventually, the case proceeded to trial, where the jury found that both parties had defamed one another and neither would get any damages.¹⁰⁵ The verdict came as a surprise to the parties.¹⁰⁶ However, it is probably more common for plaintiffs not to know who has posted defamatory content; thus, their only recourse is to sue the website operator. As explained below, this has proved to be an uphill kind of legal battle in the U.S.

In *Reit v. Yelp!*¹⁰⁷ a dentist sued Yelp! for defamation after the company removed all ten positive reviews of the plaintiff’s practice following the posting of a single negative comment by an anonymous poster.¹⁰⁸ Yelp! is an interactive online platform that allows the general public to write, post, and read reviews for a variety of businesses and professionals, including restaurants, doctors, and dentists.¹⁰⁹ It also sells and solicits advertisements.¹¹⁰ The dentist alleged that removing

101. *Dietz Dev., LLC v. Perez*, No. CL 2012-16249, 2012 Va. Cir. LEXIS 139 (Dec. 7, 2012), *rev’d*, 2012 Va. LEXIS 227 (Dec. 28, 2012).

102. Transcript of Preliminary Injunction Hearing at 94, *Dietz*, 2012 Va. Cir. LEXIS 139, https://www.citizen.org/system/files/case_documents/dietz-development-hearing-transcript.pdf [<https://perma.cc/AUQ9-LDQT>].

103. Plaintiffs’ Exs. 1, 2, *Dietz*, 2012 Va. Cir. LEXIS 139, https://www.citizen.org/system/files/case_documents/dietzexhibits1-9.pdf [<https://perma.cc/Y6P5-EFNE>].

104. When the case was first heard before the Circuit Court, the judge issued a preliminary injunction ordering Perez to delete certain negative comments and allegations in her reviews. Defendant’s Petition for Review of Preliminary Injunction at 4-5, *Dietz*, 2012 Va. LEXIS 227, https://www.citizen.org/system/files/case_documents/petitionforreview2.pdf [<https://perma.cc/4JU5-Y3P3>]. Perez appealed the order to the Virginia Supreme Court, arguing the injunction had violated her First Amendment rights. *Id.* at 1. The Virginia Supreme Court allowed the appeal and set aside the injunction order. *Dietz Dev., LLC v. Perez*, *supra* note 101, 2012 Va. LEXIS 227 (Dec. 28, 2012).

105. Justin Jouvenal, *Fairfax Jury Declares a Draw in Closely Watched Case over ‘Yelp’ Reviews*, WASHINGTON POST (Feb. 1, 2014), https://www.washingtonpost.com/local/in-closely-watched-yelp-case-jury-finds-dual-victory/2014/01/31/2d174580-8ae5-11e3-a5bd-844629433ba3_story.html?utm_term=.a24b0dcab413&wpmk=MK0000200 [<https://perma.cc/6W6Q-ZZ3R>].

106. *Id.*

107. *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411 (Sup. Ct. 2010).

108. *Id.* at 412.

109. *See id.* at 413-14; *About Us*, YELP!, <https://www.yelp.com/about> [<https://perma.cc/JL7K-XD9Z>].

110. *Reit*, 907 N.Y.S.2d at 412.

positive reviews and highlighting negative ones was part of Yelp's business model, designed to coerce businesses and professionals into paying for advertising on Yelp.com.¹¹¹

Yelp! claimed that it was immune to defamation liability under the federal Communications Decency Act (CDA)¹¹² because it was an Internet computer service and not an information content provider.¹¹³ Section 230(c) of the CDA states that "[n]o 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." In addition, under section 230(e), "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." The same law defines an interactive computer service as "any information service, system or access software provider that provides or enables computer access by multiple users to a computer server,"¹¹⁴ and an information content provider as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other information computer service."¹¹⁵ Section 230 of the CDA is often seen as a protector of online free speech, as it absolves intermediaries of legal liabilities.¹¹⁶

The dentist argued that the selective removal of all of his positive reviews was more than the exercise of a publisher's traditional editorial function, rendering the company an Internet content provider.¹¹⁷ The Court held otherwise. So long as the allegedly defamatory content was supplied by a third party, the defendant's use of negative posts or reviews in its marketing strategy did not change the nature of the posted data.¹¹⁸ Its selection of posts constituted an action "quintessentially related to a publisher's role" and not that of a content provider.¹¹⁹

111. *Id.* at 412-13.

112. Communications Decency Act, 47 U.S.C. § 230 (1998).

113. *Reit*, 907 N.Y.S.2d at 413.

114. 47 U.S.C. § 230(f)(2).

115. *Id.* § 230(f)(3).

116. Section 230(c)(2)(A) of the CDA is known as the "Good Samaritan" clause. It absolves a provider or user of an interactive computer service of liability of any action voluntarily taken in good faith "to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." See Daniel J. Solove, *Speech, Privacy, and Reputation on the Internet*, in *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* 15, 23 (Saul Levmore & Martha C. Nussbaum eds., 2010) (arguing that section 230 of the CDA overprotects free speech); Paul Ehrlich, *Communications Decency Act Section 230*, 17 *BERKELEY TECH. L.J.* 401, 402 (2002).

117. *Reit*, 907 N.Y.S.2d at 413.

118. *Id.* at 413-14.

119. *Id.* at 414.

The plaintiff further alleged that Yelp! engaged in deceptive acts and practices in violation of New York's General Business Law.¹²⁰ For that law to offer a remedy, however, a plaintiff must prove that the deceptive conduct in question would be misleading to a reasonable consumer, and there must be an actual injury.¹²¹ Because the plaintiff referred to the text of Yelp's Business Owner's Guide as the basis for its allegedly deceptive practices, the court concluded that the Guide addressed business owners rather than consumers.¹²²

If removing positive comments does not render Yelp! a content provider, what about the inclusion of a "Best of Yelp!" page? The plaintiff in *Braverman v. Yelp!*¹²³ found himself in the same unenviable position as Dr. Reit. Braverman, a dentist who discovered that positive comments about his practice had been filtered out after the posting of two negative reviews by anonymous posters,¹²⁴ sued for defamation, alleging that Yelp! had removed all positive reviews of his practice, failed to investigate any reviews, and never contacted him for comments on the negative reviews.¹²⁵ In its defense, Yelp! relied on §230, claiming that it could not be held liable as the publisher or speaker of the defamatory statement. In response, Braverman argued that in filtering out reviews, including a list of other dentists in a "Best of Yelp! list," and charging for advertisements, Yelp! was effectively a content provider.¹²⁶ The court disagreed. As in *Reit*, it ruled that filtering out positive reviews written by users was not the same as creating or developing content.¹²⁷ Furthermore, the Best of Yelp! list was in a separate section from the user reviews, and thus Yelp! still enjoyed immunity as long as it was not a content provider for the "portion of the statement" at issue.¹²⁸ Likewise, the argument that the Best of Yelp! list was in fact a list of paid advertisers was also insufficient to deprive Yelp! of §230 immunity.¹²⁹

In recognition of the almost insurmountable odds of suing Internet service providers under defamation law, the plaintiff in *Davis v. Avvo, Inc.* chose an alternative legal path, bringing action against the defendant for false advertising, unauthorized use of a likeness for commercial purposes, and violations of the Florida Deceptive and Unfair Trade

120. *Id.*

121. *Id.* at 415.

122. *Id.*

123. Braverman brought another set of actions on slightly different grounds (defamation and breach of contract) and lost. *Braverman v. Yelp, Inc.*, No. 158299/2013, 2014 WL 712618, at *5 (N.Y. Sup. Ct. 2014), *aff'd*, 10 N.Y.S.3d 203 (N. Y. App. Div. 2015).

124. *Id.* at *2.

125. *Id.*

126. *Id.*

127. *Id.* at *3.

128. *Id.* at *2-3.

129. *Id.*

Practices Act.¹³⁰ The plaintiff, Davis, was a Florida attorney specializing in health law. The defendant was a Seattle-based website operator providing the profiles of many lawyers, doctors, and dentists in the U.S.¹³¹ and listing areas of practice or specialty, disciplinary history, experience, peer endorsements, and client or patient reviews.¹³² The lawyer section of the website is searchable by area of practice and location.¹³³ The information Avvo gathers and posts is publicly available material from state bar associations, state courts, and the websites of lawyers and firms.¹³⁴ Although a listed attorney is unable to change his rating by request, he or she can register on the Avvo website to “claim” his or her profile and update the information on his or her work experience, practice areas, and professional achievements, which may in turn have an impact on his or her rating.¹³⁵

Davis discovered that not only was he incorrectly listed on the site as an employment lawyer, but also that he was the “lowest rated employment lawyer” based on a review by a prospective client who had phoned him asking for a discounted legal rate.¹³⁶ Adding to his humiliation, Davis found that he was unable to correct his practice area or business address on the Avvo website, even after registering.¹³⁷

As the defendant was a Seattle-based corporation, pursuant to a forum selection clause on the Avvo.com website, the case was heard by the Washington State Court. This meant that the defendant was also able to rely on Washington’s anti-SLAPP Act (SLAPP stands for Strategic Lawsuits Against Public Participation) to strike out the plaintiff’s action.¹³⁸ The anti-SLAPP Act is intended to address lawsuits whose primary purpose is to quash the valid exercise of the constitutional right to free speech under the First Amendment and petition for redress of grievances.¹³⁹ According to the Act, a “party may bring a special motion to

130. *Davis v. Avvo, Inc.*, No. C11-1571RSM, 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012). The plaintiff first filed his action for libel. *Id.* at *1. Later, he amended the cause of action to claim invasions of privacy/false light. *Id.* at *2. Finally, he alleged false advertising in violation of Florida Statute section 817.41, the unauthorized use of a likeness for a commercial purpose in violation of Florida Statute 540.08, and violation of the Florida Deceptive and Unfair Trade Practices Act Florida Statute section 501.204. *Id.* at *4.

131. *Id.* at *1.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Public Participation Lawsuits, WASH. REV. CODE ANN. § 4.24.525 (West 2010), *invalidated by* *Ames v. Pierce Cty.*, 374 P.3d 228 (Wash. Ct. App. 2016); *Id.* at *2.

139. *Davis*, 2012 WL 1067640, at *2. See Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741 (2017) (noting that the

strike any claim that is based on an action involving public participation.”¹⁴⁰ Once a defendant has proved the existence of public participation, which is defined as including “any oral statement made . . . in a place open to the public or a public forum in connection with an issue of public concern” and “other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern,”¹⁴¹ the burden of proof shifts to the plaintiff, who must demonstrate that there is a substantial case to answer.¹⁴² If the plaintiff fails to meet that standard, the action is stricken.

In the court’s opinion in *Davis*, it was obvious that Avvo.com was a website that involved public participation because it provided information to the general public that might be helpful in choosing a doctor, dentist, or lawyer.¹⁴³ In addition, it allowed members of the public to participate in a public forum by providing reviews of individual doctors, dentists, or lawyers.¹⁴⁴ The court thus concluded that the site was a “vehicle for discussion of public issues . . . distributed to a large and interested community.”¹⁴⁵ Consequently, the burden of proof shifted to the plaintiff, who had to provide clear and convincing evidence that his claim would prevail under Washington law.

In analyzing the substantive claims of the plaintiff, the court found that because the Washington Consumer Protection Act (WCPA) is substantially similar to the Florida Deceptive and Unfair Trade Practices Act, it would apply the WCPA under choice-of-law principles.¹⁴⁶ To prevail under the WCPA, a plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to the plaintiff’s business or property, and (5) causation.¹⁴⁷ The court did not consider the rating site to be in trade or commerce in its application of the Act, as it does not involve “the sale of assets or services” but “collects data from public sources . . . and provides the underlying data and the ratings to consumers free of

right to petition for redress of grievances is a right guaranteed by the First Amendment, which allows people to initiate complaints to the government).

140. § 4.24.525(4)(a).

141. § 4.24.525(2)(d)-(e).

142. *Davis*, 2012 WL 1067640, at *3.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at *4-5, *8. *Davis* was an attorney from Florida and originally filed in Florida District Court. He later amended his complaint to file the case before the Washington Court. The Washington Court found that the choice-of-law clause was enforceable, and that the WCPA, not the FDUTPA applied to plaintiff’s claims. In other words, *Davis* should have made his claims under Washington law. Nevertheless, the Court ruled that *Davis* had failed to come forward with any evidence to support his claims even under Florida law.

147. *Id.* at *5.

charge.”¹⁴⁸ The publication of information and ratings based on publicly available data was not “trade or commerce”¹⁴⁹ it ruled, meaning that the alleged misrepresentation of the plaintiff’s area of practice or use of his page did not qualify as such.¹⁵⁰ Furthermore, the plaintiff had not alleged, let alone proved, that he had suffered any actual damage or monetary loss,¹⁵¹ and the court therefore struck out his motion.

These precedents show that the U.S. courts are not easily moved by the plight of those faced with misinformation or incorrect information concerning their professional performance posted on rating sites.¹⁵² Issues of reputation and image simply wither in the face of the weighty First Amendment protection of free speech and section 230 of the CDA.¹⁵³

B. German Law

Even though Germany has safe harbor regulation like section 230 of the CDA in its Telemedia Act¹⁵⁴ – based on European Law – German courts have ruled that it does not apply to injunctive reliefs which are

148. *Id.* at *6.

149. *Id.*

150. *Id.*

151. *Id.* at *7.

152. At the time of writing, *Hassell v. Bird* is pending before the California Supreme Court (247 Cal.App.4th 1336; petition for review granted 381 P.3d 231.). The case concerns a law firm that had sued a former client for defamation for posting a false negative review on the Yelp! platform. The California Superior Court entered a default judgment for the plaintiff and ruled that the statement was defamatory, which was affirmed by the Court of Appeals. As that judgment is not disputed, Yelp! was ordered to remove the negative statement. The critical issue before the California Supreme Court is whether an online intermediary should have a right to notice and be given an opportunity to be heard before a trial court orders the removal of online content. Yelp! argues that the case was against § 230 of the CDA and free speech protection under the First Amendment. If Yelp! could successfully challenge the removal order before the California Supreme Court, it would be another victory for internet intermediaries despite the posting of defamatory statement by third party. At the same time, if the California Supreme Court affirms the lower court decision and orders Yelp! to remove the specific statements, it is unlikely to be a full victory for future victims of defamation lawsuits. Application of similar cases in the future is likely to be confined to situations of default judgment against the originator of the defamatory statement or a judicial determination that defamatory statements has been made by such third party on an online intermediary’s platform.

153. Eric Goldman, *The Internet Rallies Against a Terrible Section 230 Ruling—Hassell v. Bird*, TECH. & MARKETING L. BLOG (Aug. 22, 2016), <http://blog.ericgoldman.org/archives/2016/08/hassell-v-bird.htm> [<https://perma.cc/3RRW-EF96>].

154. Telemediengesetz [TMG] [TELEMEDIA ACT], Feb. 26, 2007, BGBl I at 179, last amended by Gesetzes [G], Sep. 28 2017, BGBl I at 3530, art. 1, <https://www.gesetze-im-internet.de/tmg/index.html> [<https://perma.cc/JW2Y-TVPW>]; Boris P. Paal, *Medienwirtschaftsrecht*, in BECK ONLINE KOMMENTAR INFORMATIONEN- UND MEDIENRECHT, TMG § 8, nn. 3-6 (Hubertus Gersdorf & Boris P. Paal eds., 2017).

the prevailing type of claims in cases about reputation.¹⁵⁵ So the claims against platforms can be based on the legal basis explained above, especially section 823(1) of the Civil Code.

The special nature of evaluation platforms and the possible duties of providers became apparent in the *spickmich.de* case decided by the German Federal Court of Justice in 2009, in which it was asked to rule on the legality of a rating platform.¹⁵⁶ The plaintiff was a teacher who brought a legal challenge against the popular rating platform *spickmich.de*. Since its launch in 2007, more than 1.1 million users had registered with the platform, and at the time of the judgment, 448,000 teachers had been rated, with their names and teaching subjects given.¹⁵⁷ Teachers were rated in accordance with various attributes, including whether they were “cool and funny,” “good-humoured,” or “popular.”¹⁵⁸ Student users could also post quotations from their teachers.¹⁵⁹

The plaintiff was a teacher who had received 4.3 out of a total mark of 6, which was equivalent to a bare pass in the German system.¹⁶⁰ She sought a prohibitory injunction in a lower court to stop the publication of her personal information (i.e., her name, the name of her school, her scores on the website, and any comments made in class) under the Civil Code,¹⁶¹ filed for the deletion of her personal data, and argued that the platform had infringed her privacy right under the Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG).¹⁶² In addition, she claimed that the category of “quotations” infringed her right to her own spoken words.¹⁶³ Another of the teacher’s arguments was that teachers and users were not on equal terms on the site because users -- unlike teachers

155. Settled case law since BGH Mar. 11, 2004, 158 BGHZ 236.

156. NJW 2888, 2009. The applicant applied for leave to appeal before the Constitutional Court but the complaint was declared to be inadmissible. BVerfG, 1 BvR 1750/09, Oct. 16, 2010. The facts of the case are based largely on the case discussion in Florian Wagner-Von Papp and Jorg Fedtke, Germany, in EUROPEAN TORT LAW: BASIC TEXTS (ed. Barbara C. Steininger Ken Oliphant 2011). Andreas Ruehmkorf, *Displease Sir: Teacher Rating Legality*, *Society for Computers & Law*, SCL (Nov. 5, 2011, 11:30 AM), <http://www.scl.org/site.aspx?i=ed13764> [<https://perma.cc/RRB5-Q9SE>].

157. Ruehmkorf, *supra* note 156.

158. NJW 2888, 2009.

159. *Id.*

160. *Id.*

161. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE]. §§ 823 and 1004 of the Civil Code govern tortious liability and an application for injunction, respectively.

162. Bundesdatenschutzgesetz [BDSG] [FEDERAL DATA PROTECTION ACT], Jan. 14, 2003, BGBl. I at 2814, http://www.gesetze-im-internet.de/englisch_bdsge/index.html [<https://perma.cc/8JQX-HBRU>].

163. NJW 2888 (2894 recital 5, 46), 2008.

-- could remain anonymous because they did not have to provide usernames, whereas the teachers' full names were disclosed.¹⁶⁴

The *spickmich.de* case was unique in blurring the boundaries of the different objects of protection in the right of personality under the Basic Law. In its decision, the court did not rely primarily on the general right of personality, but rather on the right to informational self-determination, which, on the sub-constitutional level, is protected by the Federal Data Protection Act. In its balancing, however, it used arguments that stem from cases concerning the general right to privacy.

Under section 29(1) of the Federal Data Protection Act, the commercial collection, storage, modification, or use of personal data for the purpose of transfer is permissible without the consent of the person affected if "there is no reason to believe that the data subject has a legitimate interest in excluding such collection, storage or modification."¹⁶⁵ The court interpreted that provision as a test for weighing the conflicting legitimate interests of the plaintiff and defendant.¹⁶⁶ On the plaintiff's side, her claim of privacy rested on section 823(1) of Civil Code in conjunction with articles 2(1) and 1(1) of the Basic Law, which protect personality and dignity rights, respectively.¹⁶⁷ The defendant invoked the right to freedom of expression, protected under article 5(1) of the Basic Law. As discussed earlier, it is well established under German law that the right of personality encompasses various dimensions, namely one's honor, private sphere, data protection and informational self-determination.¹⁶⁸

In the *spickmich.de* case, the right to informational self-determination (the basis of data protection in the German Constitution) came into play. That right protects an individual's choice to decide when and within what limits his or her personal life circumstances are revealed, particularly in the age of data processing.¹⁶⁹ Furthermore, the scope of the right to informational self-determination is dependent on the spheres affected: the intimate, private, or social.¹⁷⁰ Corresponding to the discussion in Part II.B of this Article, the first sphere warrants the highest degree of protection, as it concerns the inviolable core of the

164. *Id.* at (2889 recital 5).

165. 198 BGHZ 346 (349).

166. Michael Schmidt, *Privacy Laws in Germany - Development over Three Decades*, IITR GMBH - INSTITUT FÜR IT-RECHT, <https://www.iitr.us/publications/privacy-laws-in-germany-developments-over-three-decades.html> [<https://perma.cc/W5N9-NGLJ>].

167. GRUNDGESETZ [GG] [BASIC LAW].

168. *See supra* Part I.B.

169. Schmidt, *supra* note 166.

170. Andreas Ruehmkorf, *Ratemylegalrisk.com - The Legality of Online Rating Sites Relating to Individuals in Data Protection Law*, 96 INTELL. PROP. F. 55-67 (2014).

personal sphere (e.g., sexual orientation).¹⁷¹ The second allows intrusions only if they are justifiable and proportionate, and the third merits the least protection because it concerns an individual's social life.¹⁷²

In the Court's opinion, the online platform had touched only upon the plaintiff's social sphere because the rating concerned her professional performance and conduct as a teacher.¹⁷³ It thus held that freedom of expression overrode her right to informational self-determination, because teachers and other professionals must accept criticism or applause of their professional conduct, which is inevitably intertwined with social life.¹⁷⁴ As the rating site related only to the plaintiff's professional/social sphere, and accordingly did not touch upon her core private sphere, the right of personality had to give way to freedom of expression. In addition, the court also highlighted that freedom of expression protects anonymous opinions because the antipode would lead to self-censorship. It further pointed out that if the posts had been abusive or offensive or amounted to an attack on the teacher's dignity, then its decision would have been different.¹⁷⁵ Each case has to be decided on its own facts. It is worthwhile to note the features of spickmich.de that led the court to conclude that the case constituted a reasonable exercise of freedom of expression: the site permitted only one registration per e-mail address; distribution was restricted to current students; login and registration were required; users had to select a particular school and could rate and view ratings on teachers within that school alone; data were retained for no longer than one year; and no comments were allowed; and ratings were not visible on search engines.¹⁷⁶

Subsequent litigation concerning rating sites has largely followed the principles set in the spickmich.de case: namely, a plaintiff is not entitled to know the identity of a poster after a website has removed derogatory comments,¹⁷⁷ and professionals (e.g., doctors) should expect to face "open criticism" in the form of online ratings.¹⁷⁸ With regard to the issue of misleading ratings, which did not arise in the spickmich.de case, the German courts have been more skeptical and unsympathetic toward rating platforms. For instance, when Yelp, a U.S. company, bought the German rating platform Qype in 2012, Qype changed its modes of both operation and rating.¹⁷⁹ Similar to the practice noted in

171. Handford, *supra* note 53, 860, 863.

172. *Id.*

173. NJW 2888 (2892 recital 31), 2009.

174. *Id.* at (2892 recital 32-33).

175. *Id.* at (2892, recital 34); Ruehmke, *supra* note 156.

176. NJW 2888 (2888, 2889 recital 4), 2009.

177. See BGH Jul. 1, 2014, 201 BGHZ 380.

178. See BGH Sept. 23, 2014, 202 BGHZ 242.

179. Ingrid Lunden, *Yelp Pays \$50M to Acquire Its Big European Rival, Qype, to Beef Up Its Recommendations and Listings Business*, TECHCRUNCH (Oct. 24, 2012),

our earlier discussion of the U.S. lawsuits against Yelp, after its purchase, Qype started filtering out positive comments on many businesses while retaining negative comments, which resulted in the massive downgrading of many business entities. In one case, the plaintiff ran a bridal dress shop that had previously received a five-star (out of five) rating but suddenly found itself with a mere two-star rating under the new system, leading to a significant drop in business.¹⁸⁰ Accordingly, the shop brought an action for violation of its right of personality.¹⁸¹ The court ruled in the plaintiff's favor, holding that although companies do not enjoy a right of personality as extensive as that enjoyed by a person, it was by no means clear that deleting the posts constituted an exercise of freedom of expression.¹⁸² Similarly, in another case, the court condemned the medical rating portal jameda when it heard that its top-rated doctors list was "manipulated by purchase."¹⁸³ It ordered that jameda either cease the practice of posting misleading comments about doctors or state clearly that the list was an advertisement.¹⁸⁴ The jurisprudence of the German Federal Court of Justice shows the two main issues with online ratings: the lack of transparency regarding the rating criteria and the conflict between free speech and right to self-determination.

In a recent case, the German Federal Court of Justice made clear that the ownership of content remains the demarcation between acting as a platform and being a content provider.¹⁸⁵ In this case, the provider—a platform for patients to rate hospitals—tried to solve the conflict by single-handedly changing the rating. The court held that by doing so the provider claimed ownership for the content, and therefore could be held liable.

III. SEARCHING FOR ALTERNATIVES

By juxtaposing the U.S. and German legal approaches to the regulation and protection of reputation on online rating platforms, we have learned about the potential and power of reputational sanctions. U.S. judicial decisions, as demonstrated by the cases discussed herein, exhibit

<http://social.techcrunch.com/2012/10/24/yelp-pays-50m-to-acquire-its-big-european-rival-qype/> [<https://perma.cc/V3VV-5PFK>].

180. See Landgericht [LG] [Regional Court] Berlin, Mar. 27, 2014, 2014 MULTIMEDIA UND RECHT 562.

181. *Id.*

182. *Id.*

183. Ekkehard Müller-Jentsch, *Portal muss irreführende Beurteilungen über Ärzte stoppen*, SUEDEUTSCHE.DE (Mar. 19, 2015), <http://www.sueddeutsche.de/muenchen/landgerichts-urteil-irrefuehrende-beurteilungen-1.2401184> [<https://perma.cc/DTY9-NQYQ>].

184. *Id.*

185. BGH Apr. 4, 2017, NJW 2029, 2017.

lopsided favoritism toward online free speech despite some rating sites posting blatantly inaccurate information and only one-sided negative reviews, leaving victims with few remedies other than paying online reputation companies to rebuild their reputations. The U.S. approach thus supports an unsatisfactory situation in which individuals have very little control over their reputations, which are effectively left in the hands of others. A closer look at online platform complaint mechanisms reveals that online platforms are unlikely to deal with factual disputes, let alone allegations of fake negative reviews.¹⁸⁶ For instance, Avvo, Google, and Yelp clearly stipulate on their websites that they would not take sides when it comes to factual disputes.¹⁸⁷ It is unclear as to what grounds they will resort to in order to remove those reviews. Therefore, the user policies can hardly be used as an effective tool for online evaluation sites to deal with defamatory reviews in a meaningful way. Furthermore, online evaluation sites retain much discretion when it comes to interpreting their own user policies. The lack of transparency in moderating problematic reviews and the time required for processing the complaints will also be some of the major deficiencies in their complaint handling mechanisms.

The German courts, in contrast, have adopted a more nuanced approach, in which the evaluation of and opinions on an individual are treated as belonging to the constitutionally protected right of personality. The German Constitutional Court has recognized that personal comments can, in certain situations, intrude into the personal sphere and has also engaged in careful scrutiny of the various zones of that sphere, with the most intimate private sphere prized as inviolable. In the cases considered above, the German courts carefully balanced the personal and social spheres and the right of personality (right to informational self-determination) on the one hand with the right to freedom of expression on the other. What the German courts have thus far failed to do is address the overlap between the private and social spheres. Evaluations of professional performance often touch upon personal characteristics and abilities (e.g., one's sense of humor). In the *spickmich.de* case, the rating portal had previously included a category allowing student users to consider whether a teacher was sexy, but that category was removed during the course of litigation.¹⁸⁸ In post-*spickmich.de* judicial decisions, the German courts have endeavored to devise a fair system of

186. Policies on online review sites prohibit offensive reviews which include illegal content, off-topic reviews, and hate speech, but not fake negative reviews. See, e.g., *Community Guidelines*, AVVO, https://www.avvo.com/support/community_guidelines [<https://perma.cc/ZU94-32DR>]; *Google My Business Help: Flag Inappropriate Business Review*, GOOGLE, <https://support.google.com/business/answer/4596773?hl=en> [<https://perma.cc/T2HR-26TK>]; *Will Yelp Remove a False or Defamatory Review?*, YELP, https://www.yelp-support.com/article/Will-Yelp-remove-a-false-or-defamatory-review?l=en_GB [<https://perma.cc/9FP9-NLB9>].

187. Avvo, *supra* note 187; Google, *supra* note 187; Yelp, *supra* note 187.

188. Ruehmkorf, *supra* note 170, at n.44.

online reputation rating, drawing distinctions between different rating subjects, rating criteria, and access systems. In a recent case, a German district court also acknowledged a violation of the social sphere when information about bankruptcy was revealed against the will of the concerned individual.¹⁸⁹ Thus, the violation need not be one related to the most private sphere to affect an individual's right to self-determination.

Neither the U.S. nor the German legal system gives sufficient consideration to the actual practices and informal norms of online platform users. By focusing on the platforms themselves and their liability, however, the laws in both systems have indirectly influenced how providers design systems of user interactions. Hence, providers have become intermediaries, moderating the relationship between informal social norms and formal law, although it remains unclear what that means for conflict resolution and behavior coordination on rating platforms.

The cases discussed herein suggest that the major causes of frustration for plaintiffs are the lack of transparency concerning evaluation criteria and the unavailability of any means of response (including a right to reply, request a correction, and demand a retraction). Hence, effective disclosure requirements and an opportunity to present the other side of the story are essential to ensuring the fairness and accuracy of online reputation systems. Frank Pasquale advocates the mandatory disclosure of ranking data and methodologies to tackle the problem of "black-box" evaluation systems.¹⁹⁰

Additionally, it is important that online evaluation sites affecting people's professional reputations comply with the additional requirement to delete inaccurate information and bar decontextualized ratings. As previously noted, reputation as property has a special market value that can affect a person's livelihood. It is thus necessary for such sites to provide a correction mechanism or a right to reply. In clear cases of erroneous information (as in the case of *Davis v. Avvo*¹⁹¹), a mechanism should be in place to allow corrections when objective information can be easily established.

A trickier issue is how to decide when, whether, and how to include an alternative story. In Part II, we discussed cases in which evaluation sites had filtered out positive consumer comments while retaining negative ones, an understandably frustrating and seemingly unfair situation for the targeted individuals. Concerned platforms should allow individuals to exercise a right of response to defend themselves. For example, on the online platform *ratemyprofessors.com*, students can rate their

189. AG Rockenhausen, Aug. 9, 2016, 2 C 341/16, <https://dejure.org/ext/c3e33d1b25ac6705c76ea561b757c312> [<https://perma.cc/7254-6X5S>].

190. Frank Pasquale, *Reputation Regulation: Disclosure and the Challenge of Clandestinely Commensurating Computing*, in *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* 107, 120 (Saul Levmore & Martha C Nussbaum eds., 2010).

191. *Davis v. Avvo*, *supra* note 3.

professors and post comments. At the same time, professors can “strike back” and offer their own views of their teaching.¹⁹²

What we are emphasizing is the need to arrive at a standard that is fair to platform providers, users, and evaluation targets. At the state level, U.S. insurance companies have agreed to follow specific guidelines for ranking doctors based on a national model established by the federal government.¹⁹³ At the private level, attempts to set guidelines may involve a complex interaction of social norms, as seen in disputes concerning Wikipedia-related reputation issues.¹⁹⁴ Although Wikipedia is not an evaluation site, the user-generated online encyclopedia provides a standard procedure for complainants seeking to protect their reputation¹⁹⁵ and applies a more stringent standard for biographies of living persons.¹⁹⁶ Information on a living person that is unsourced, poorly sourced, or contentious must be removed immediately.¹⁹⁷ In addition, every article on Wikipedia has a “talk” page that allows users to post comments on or concerns about the article.¹⁹⁸ Furthermore, administrators can require that additional revisions be flagged, or ban a

192. See *The Best of “Professors Strike Back,”* RATEMYPROFESSORS.COM, <http://www.ratemyprofessors.com/blog/profstrikesback?posturl=/the-best-of-professors-strike-back/> [<https://perma.cc/9RVW-CGCZ>].

193. At the national level, a rating list of doctors must pass federal regulations before it can be used. Amy Goldstein, *Federal Health Officials, Insurers Agree on How to Rate Doctors’ Quality*, WASH. POST (Feb. 16, 2016), https://www.washingtonpost.com/national/health-science/federal-health-officials-insurers-agree-on-how-to-rate-doctors-quality/2016/02/16/e87934b0-d4d4-11e5-9823-02b905009f99_story.html?utm_term=.2da3dc00c312

[<https://perma.cc/WWU9-MRCF>]. At the state level, the California Healthcare Performance Information system, which scores 10,000 doctors, was launched in March 2017. Paul Sisson, *How Does Your Doctor Rank? Check Out This New Website*, SAN DIEGO UNION TRIB., (Mar. 28, 2017), <http://www.sandiegouniontribune.com/news/health/sd-me-doctor-ratings-20170327-story.html> [<https://perma.cc/4RPU-WGMW>].

194. See Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J. L. TECH. 163, 164-65 (2006) (discussing whether Wikipedia could be held liable for defamatory statements published on its website).

195. See *Help: Contents*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Help:Contents> [<https://perma.cc/6SYT-DDG9>] (discussing how users can report problems with articles).

196. See *Wikipedia:Biographies of Living Persons*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:Biographies_of_living_persons [<https://perma.cc/GJX8-3LVJ>] (describing the particular care that editors must take when adding information about living persons).

197. *Id.*

198. See *Wikipedia Talk:About*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia_talk:About [<https://perma.cc/Z3LN-JKM8>] (providing talk page for discussing improvements to the “About” page on Wikipedia).

user,¹⁹⁹ although offended users are accorded a right of appeal.²⁰⁰ In sum, Wikipedia's posting policy and dispute-handling mechanism adhere to the principles of transparency and the rights of response and appeal, and address the needs and concerns of both users and subjects. Another possible solution is for online rating platforms to consider giving users additional ways to rate or review other users' comments when deciding whether some reviews should be removed upon request.²⁰¹ This is the lesson that one victim learnt when handling negative reviews on Google. She re-posted the negative reviews and her own response on other social media platforms, gaining sympathy and support from other users. Pressured by this support, Google eventually removed the negative comments.²⁰²

Ultimately, what we need are different sets of etiquette for different rating systems because the public interest at risk in the external social and internal private spheres is markedly different. Guidelines and procedures should be oriented to the online environment and fitting for the social sphere that is concerned, including the specific profession and the relevant social norms. The implementation of such sets would not only benefit the individuals scored or evaluated, but also the users of reputation and evaluation platforms and, ultimately, society as a whole. The U.S. could strengthen and encourage self-regulation by online providers in adopting adequate procedures for the right to reply and to correct false information. In this way, online evaluation platforms could be Good Samaritans while rightly enjoying their immunity under section 230 of CDA.²⁰³ Germany could consider interpreting responsibility for online platforms (intermediary liability) in a way that encourages and provides incentives for them to establish procedures or mechanisms to respond to victims' complaints.

199. See *Wikipedia:Blocking Policy*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:Blocking_policy [<https://perma.cc/F6NA-4H28>] (describing Wikipedia's policy on blocking users).

200. See *Wikipedia:Appealing a Block*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wikipedia:Appealing_a_block [<https://perma.cc/7KYG-M7ZS>] (describing how blocked users can request an unblock).

201. See, e.g., Joy Hawkins, *How to Deal with Fake Negative Reviews on Google*, MOZ, (Feb. 21, 2018), <https://moz.com/blog/fake-negative-reviews-on-google> [<https://perma.cc/V8T7-CX4T>] (describing strategy of posting responses to negative reviews).

202. See *id.* (describing how Hawkins was able to get three negative reviews removed after publicizing them on Twitter).

203. 47 U.S.C. § 230 (1998). Scholars have criticized that the courts have interpreted § 230 of the CDA too broadly to protect "bad Samaritans" and has "exalt[ed] free speech to the detriment of privacy and reputation." See Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 *FORDHAM L. REV.* 401 (2017) (describing how lower courts' interpretation of § 230 has led to blanket immunity from liability for platforms that host illegal content); Solove, *supra* note 20, at 159.

Recalling our earlier discussion of Post, reputation is by nature social, public, and relational.²⁰⁴ Evaluation sites thus need to fulfill the social role of assigning fair value to reputation and sending an accurate signal to the community if they want to be reliable and meaningful to consumers.

IV. CONCLUSION

Reputation is a mysterious²⁰⁵ and powerful thing. It is intensely personal and innately social at the same time. It concerns one's own identity, yet is also intertwined with social appraisal in the minds of others. Regardless of how carefully we groom and shape our reputations, the final judgment rests in the hands of others. Like it or not, in today's networked community, we have become objects vulnerable to having various aspects of our lives ranked, scored, evaluated, and commented upon by anonymous others. U.S. defamation law seems inadequate to protect individuals against the ratings and comments of an unknown crowd. German law on the right to personality has developed a taxonomy of spheres to protect the personal and situate it in relation to the social. U.S. and German laws protect different aspects of reputation. They have generally aimed to restrict the flow of information on individuals and to prevent harm to their social status and private lives, but have achieved different results. The two systems differ in various ways, especially in how reputation is constructed, how the courts have balanced constitutional rights with societal interests in reputation, and how the courts have perceived the role of platform providers in related disputes. However, the reputation sphere is expanding rapidly in the online world,²⁰⁶ bringing new challenges to individuals, users, platform operators and society as a whole. The legal assessments should also take into account that social norms and practices are adaptive. People may not think less of a person just because they have seen an unfriendly rating on the Internet if they are familiar with the practices and manners there. So it is important for the courts to consider those practices and their evolution as well.

Although different legal rights have been identified and fought for, the reputation interest remains the same. What has yet to be addressed is the issue of how to develop a new procedural layout that can accommodate social norms, technological advancement, and the legal right to protect reputation on online platforms.

204. See *supra* Part I.A.

205. See Post, *supra* note 27, at 692 ("Reputation, however, is a mysterious thing.").

206. See David Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 305 (2010) (describing the implications of an increasingly networked world for defamation law).

In this Article, we have identified the personal rights and societal interests involved in reputation, and freedom of expression, and the necessity of establishing a reliable system for assessing reputation, particularly in the professional context. Rather than leaving individuals to seek help from private corporations to rescue and manage their reputations, judges should consider the societal interests behind reputation, and new laws should be enacted that require evaluation platforms to comply with a set of minimum procedural standards of fairness, acknowledging their factual role as “reputation intermediaries.” What is especially needed for online ranking and rating sites is a set of transparency rules that inform users of the assessment criteria, as well as a system offering aggrieved individuals a right to reply. The latter should incorporate rights to respond, openly rebut allegations, correct information, and request the retraction of information. Drawing from the U.S. and German legal experiences surrounding online evaluation sites, we hope other jurisdictions will develop and adopt solutions which touch on governance models and social norms, taking into account the risks and possibilities of Internet-based communication. As evaluation platforms are gaining in popularity and shaping public communication, we need new policies and practices to regulate the online ecology and protect reputation. Only then can we interact and participate meaningfully in constructing our own and others’ reputations.