Social Justice, Social Norms and the Governance of Social Media

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I.   Introduction and Background: Re-Introducing Four Forms
of Governance

Digital media generate a technological environment which allows for, and at times even creates, a thriving social discourse. The dynamics unfolding throughout these networks – sometimes referred to as "social media" – enhance important autonomy-related rights such as freedom of speech, expression and association. Yet the rich information flows enabled by these applications also generate abuses and social wrongs to both those participating in the discourse and external parties. They do so by enhancing speech-related torts, privacy breaches, IP infringements and other problems.

In response to the challenges posed by these realms, various forms of governance have arisen: rules that detail conduct which is permitted and forbidden throughout these digital settings, as well as an apparatus to enforce them.[1] The role of formulating and applying governance was usually

1. For a recent discussion of the concept of governance in this, and the broader, context, see Markus Oermann et al., *Approaching Social Media Governance* (HIIG Discussion Paper No. 2014-05 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2498552.

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vested in the state, but the term no longer pertains exclusively to the acts of government.[2]   Instead, the online environment creates other interesting options.   It introduces governance measures applied through the internal actions of the private and commercial platforms which operate the relevant digital platforms.

The digital media platforms' ability to engage in governance is manifested on several levels. Most prominently, the platforms control the technological architecture, which they create and amend at will.   In this technological setting the platforms can take active steps that directly impact their users within the social media: they can limit the possible interactions users might engage in, or the information they can review or distribute.   They can also apply their control of the architectural design to impose sanctions, which might vary from warnings, through content deletion and even to account termination. In other words, the platforms can engage in *governance by code*.[3]

These somewhat aggressive governance steps are further enabled by the Terms of Use, accepted (at least formally) by the social media users when they begin their virtual activity across the platform.   Such terms are often considered to be part of a formal contractual agreement between the user and the platform operator.[4]   In other words, the actions carried out through code are backed by the contractual language governing the relation of platform users with controllers.   Furthermore,

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2. *See* IAN BROWN & CHRISTOPHER MARSDEN, REGULATING CODE: GOOD GOVERNANCE AND BETTER REGULATION IN THE INFORMATION AGE 12, 126 (William J. Drake & Ernest J. Wilson III eds., 2013) (noting that the origins of the term "governance" lie in discussions of "self-regulation").

3. This phrase is clearly borrowed. *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).   A similar idea was raised by Joel Reidenberg. *See* Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998). For a recent discussion of this element, see Oermann et al., *supra* note 1, at 10.
See also discussion of this concept by Margaret Radin, who refers to it as "machine rule."   MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 47 (2013).

4. These agreements are in fact standard form contracts which present a specific set of concerns in general and in the online environment in particular. *See generally* Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303 (2008).

the contractual framework immunizes platforms from future claims regarding the legitimacy of their actions.   When platforms act on the basis of these legal documents they are thereby *governing by contract*.

At first glance these two methods of governance (through code and through contract) dominate the social media realm.[5] Seemingly, decisions regarding governance are exclusively vested in a single, private and powerful intermediary. This private actor governs disputes and limits harms unilaterally and at its own discretion through the contracts drafted by its lawyers and the code written by its engineers. So *prima facie* at least, the situation portrayed here is problematic, and might even promote unfairness and injustice. The notion that a small group of managers (who presumably control the engineers and lawyers) unilaterally set the rules regulating the social discourse is daunting. It seems to furnish an alarming example of the "outsourcing" of important social choices. This is especially true when these rules impact users' core rights – such as their ability to engage in free speech or invoke privacy. While the individuals vested with the power to make such governance-based decisions might be talented and even qualified to do so, they will be mostly driven by financial incentives and will strive to boost their firms' bottom line, thus blazing the trail to normatively unacceptable outcomes.

This dynamic, one might argue, is in sharp contrast to *governance by law*: the prospect of governing conduct in these virtual spaces on the basis of laws and regulations. The foundations of such governance are quite different.[6] They are set out by governments and legislators. These public actors are perceived as the representatives of the broader public and

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5. To a great extent, regulations via contract and via code are grouped together in this article. However, fundamental differences between the two exist. For instance, in some cases governance via code regulates behavior *ex ante*, as opposed to enforcing contracts, which regulates behavior *ex post*. In addition, regulation via code can in some cases enable "perfect enforcement," which is unavailable through other models of governance. These distinctions are beyond the scope of our current discussion. *See* JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 109 (2008).

6. RADIN, *supra* note 3, at 36 (explaining the difference between governance by law and by contract, while noting that the latter erase the safeguards of the polity).

promote their interests and preferences. Indeed, laws govern some of the situations arising in social media (through privacy and IP laws), although the governance choices set forth in this manner are at times circumvented or ignored.[7]

That said, governance by contract or code might not be as bad as it sounds. One can convincingly argue that these forms of governance are in fact a reflection of the platform users' normative preferences. These are signaled to the platform operators by means of the various feedback mechanisms (formal and informal) that the technological environment provides. If such signaling is indeed unfolding, social media are largely, and at least by proxy, still governed by the *users' social norms*. Yet rather than reflecting the public's values as set forth in an election process, it reflects norms as signaled by the public in the open market.[8]

The question whether forms of governance by "code" and "contract" are aligned with the users' social norms is therefore crucial. The answer might provide important insights into the need for further regulation of the social media realm. If "code," "contract" and "social norms" are all indeed aligned, social media might not require substantial governance by law, absent specific normative justifications. And regardless of this issue, regulating social media by government has several evident disadvantages. Governments are ill-equipped to deal with legal challenges arising at the cutting edge of the technological environment in which social media develop. In addition, like any other highly complex regulatory process that relies on external feedback, the regulatory process might be tainted by political interests and lobbying.[9] Accordingly, many benefits might follow if the public's preferences could be met without direct government intervention.

Against this, a variety of convincing arguments could be made that *only* governance by government can achieve fairness

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7. Anne-Marie Zell, *Data Protection in the Federal Republic of Germany and the European Union: An Unequal Playing Field*, 15 GERMAN L. J. 461 (2014) (discussing how Facebook.com escaped regulation by law in Germany).

8. Here one might argue that these two sets of preferences need not be identical. *See* CASS SUNSTEIN, THE REPUBLIC.COM 2.0 128 (2009).

9. *See* Dennis D. Hirsch, *The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?*, 34 SEATTLE U. L. REV. 439, 440 (2011) (for a brief discussion of the central arguments in this context).

and justice at this juncture, given inherent market and other failures.[10]   The analytical discussion as to whether the governance of social media via "contract" or "code" (as opposed to "law") should be considered harmful, reasonable, or perhaps even beneficial, is extremely complex. There are seemingly convincing arguments to be made on both sides – those calling for more governmental intervention and those calling for less. In an attempt to introduce yet another important insight into this crucial debate, recent empirical studies have begun exploring the relations among the foregoing forms of governance.   This article reports an initial discussion of findings produced by a team of legal scholars and sociologists from Germany and Israel (in which the author had the privilege of participating) which approached this empirical challenge.[11]   The empirical study is to some extent a much needed extension of the theoretical work originally done by Lawrence Lessig.   In his seminal 1999 book *Code*, Lessig identified "code," "law," "markets" and "social norms" as the key forces which shape and regulate the online environment.[12] This joint empirical study strives to develop tools to measure and thus compare the four somewhat abstract concepts, while focusing on their role in governance and the context of social media.

The empirical study aimed to achieve its objective by developing and applying a complex and multidisciplinary methodology which strives to measure and compare the four forms of governance.[13]   Among other things it formulated and applied tailored online surveys to establish the nature of *social norms* in the social and technological setting and context discussed here.   This article will focus on a portion of this survey's findings, and provide an initial discussion of its results.   Given the numerous factors this study entails, the preliminary test case under discussion here examines a specific

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10. *Id.*

11. GUSTAVO MESCH & JAN SCHMIDT, PRIVACY-RELATED ATTITUDES AND PRACTICES ON FACEBOOK (Oct. 2013) (Joint Report Germany-Israel) (on file with author). For a discussion of other elements of this study, see generally, Oermann et al., *supra* note 1.

12. LESSIG, *supra* note 3, at 88.

13. For an additional discussion as to how this methodology integrates these factors, see Oermann et al., *supra* note 1, at 8.

issue: a subset of privacy governance on the Facebook website.[14]   Resting on the study's findings, this article will extrapolate to the broader issues of fair and just governance, and strive to shed some light on this emerging debate.

The remainder of this article proceeds as follows: Part II briefly addresses the theoretical arguments regarding the pros and cons of various governance strategies, focusing on the advantages, disadvantages and pitfalls of reliance on private parties. In Part III, the article describes, in general terms, the above-mentioned empirical study, explaining its methodology, the specific challenges to its design and implementation, and how these were met. The discussion specifically centers on a survey taken to establish the nature of social norms. Part IV presents a specific test case: whether pseudonymity should be permitted in social media or should "real names" be mandatory. Part V briefly discusses insights that the "real names" test case might provide for the broader questions regarding justice and fairness in social media governance. The article concludes with yet another context, the "right to be forgotten," which might provide additional insights into the important research questions this project and others begin to address. It further notes additional extensions of the methodological design this article introduces.

An important caveat is due. While the article strives to argue a normative point as to the fair, just and proper way to govern social media, it draws on empirical findings regarding users' actual social norms. Clearly, however, there are numerous examples of situations demonstrating descriptive social norms to which can hardly be considered a normative baseline to aspire. In fact social norms embraced by the majority might reflect prejudice, errors and the inability to adapt to social changes. In some instances, especially those pertaining to information privacy,[15] the "crowd" might not be wise at all.[16] For these reasons, the policy implications and

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14. For a discussion of a different subset of this study, one that focuses on the posting and dissemination of photos on Facebook, see Oermann et al., *supra* note 1.

15. Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1883-88 (2013).

16. For a popular discussion of such instances in the general context see

recommendations to be derived from the discussion that follows are noted carefully, and must be subjected to additional considerations and scrutiny.   Nevertheless, establishing whether governance methods, as applied in these innovative settings, are *objectively* fair and just, is extremely difficult if not impossible. Thus, reliance on imperfect proxies such as the nature of "social norms" will surely prove constructive. Therefore, examining the differences between these four subsets of governance ("code," "contract," "law," and "social norms") can provide us with insights into the "justice" of the governance administered by the platform provider and address the nuances of this intriguing reality.

II.   Governance by Government / Governance by Firms: Benefits and Detriments

A. *General Intuitions*

Social media provide a fertile ground for promoting important social objectives.   They might also generate substantial harms in the form of speech-related torts. Other forms of media, such as broadcast TV and radio, have traditionally been subjected to a comprehensive regulatory framework.[17] Yet the aggressive "command and control" form of regulation which was often applied to these latter contexts is in an overall decline.[18] Other methods are gaining favor,[19] such as co-regulation (which involves a joint effort by both government and industry),[20] applying codes of conduct[21] and

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MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 72 (2005) (addressing among other things the election of Warren Harding as U.S. President – according to some, the worst president ever elected).

17. *See* JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 239 (2005) ("the FCC's spectrum management regime remains an exemplar of 'command and control' regulation.").

18. *Id.* (discussing the move "beyond command-and-control").

19. *See* BROWN & MARSDEN, *supra* note 2, at 2-3.

20. *See* Hirsch, *supra* note 9, at 465.

21. MONROE E. PRICE & STEFAAN G. VERHULST, SELF-REGULATION AND THE INTERNET (2005).

self-regulation.[22]   The argument for these latter forms of regulation is especially strong in technological realms, where expertise is mostly found outside of government.[23]

In respect of social media, the regulatory frameworks discussed here will practically always pertain to *private* entities currently operating these media realms. Applying aggressive governmental regulation to such private entities is not a step to be taken lightly. Furthermore, and as opposed to regulatory issues involving the media in the past, the operational environment is not one considered "public" by nature (such as TV and radio making use of the electromagnetic spectrum)[24] or among those that benefited from massive governmental subsidies and other privileges in the past (such as telecom or cable operators).[25] So it should come as no surprise that government largely shied away from extensively regulating of social media. Instead, governance of these realms was conducted by the private parties themselves.

Yet one can easily formulate arguments for greater governmental intervention, among other ways through governance, in social media. Such arguments could be set on both an intuitive and an analytical level. Intuitively, the notion that decisions regarding the public's privacy- and speech-related rights (and others) be left to private, for-profit entities is, on the face of it, unacceptable.[26] It is for the government, one would immediately and categorically declare, to decide the extent of these rights given their foundational importance.

On a deeper, analytical, level, one might claim (1) that government alone can furnish the governance and rule-making

22. Hirsch, *supra* note 9, at 440; ZITTRAIN, *supra* note 5, at 152.

23. *See* Hirsch, *supra* note 9, at 440.

24. *See* STUART M. BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 30 (2d ed. 2006) (noting that the spectrum is closely regulated by government because it presumably "owns" it, but ultimately explaining that this intrusive level of regulation is justified for other reasons).

25. Arguably, this logic should apply to the internet as well, as it resulted from various projects funded by the U.S. Defense Department or other academic sources. However, this argument, which is something of a stretch factually, might pertain to the internet's current infrastructure but hardly to the software tools used in popular social media today.

26. *See* LAURA DENARDIS, THE GLOBAL WAR FOR INTERNET GOVERNANCE 170 (2014).

process with proper checks and balances; and (2) that government alone acts as the legitimate representative of the people, therefore only the governance structure erected by the state may be applied.[27] Let us examine and closely scrutinize these two general arguments.

B. *The (Perceived) Benefits of a Private "Decider"*

The two noted presumptions regarding the superiority and advantages of government-led governance of social media can be challenged. First, let us turn to the notion of checks and balances that government, as opposed to the firm, is able to provide. In some settings which relate to digital media this presumption need not prove true. It is the firm, rather than the government, that benefits from greater insulation against unwanted pressures, and can reach proper decisions – decisions which can prove efficient, fair and just. For instance, in a recent thoughtful and provocative essay titled "The Deciders," Jeffery Rosen seriously considers the idea that the firm, rather than the government, is best suited for handling decisions on the governance of discourse in social media.[28] In doing so, Rosen introduces "The Decider": Google's deputy general counsel (at the time), Nicole Wong.

During her tenure at Google, Wong (who later moved from Google to Twitter, and is currently working for the White House)[29] was vested with the authority to decide "what goes up or comes down" on Google's various sites – including the popular video sharing site, YouTube. Rosen reviews Ms. Wong's actions favorably, commenting that she was "essentially codifying" the protection of free speech as opposed to both oppressive and even Western governments that at times suppressed it. In other words, Rosen explains that some firms,

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27. *See* BROWN & MARSDEN, *supra* note 2 (quoting former French President Nicolas Sarkozy). See a similar point made by RADIN, *supra* note 3, at 36.

28. Jeffrey Rosen, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 FORDHAM L. REV. 1525 (2012).

29*. See Office of Science and Technology: Leadership & Staff*, THE WHITE HOUSE,
http://www.whitehouse.gov/administration/eop/ostp/about/leadershipstaff
(last visited Sept. 26, 2014).

especially those that are considerably wealthy, are not bound to succumb to internal and external pressures, while governments often are. This might be especially true of multinational firms, which enjoy substantial power when facing pressures from local politicians. Governments, on the other hand, might at times strive to limit their citizen's speech so to achieve various objectives.   So in such cases, the firm rather than the government might be the body whose conduct is closer to its users' normative preferences.

Rosen concludes his analysis on a more somber note. He recognizes that firm-based decision-making on crucial issues related to free speech and other important human rights is unstable; in the long run, it is uncertain whether the firms and the platform they constructed can withstand commercial pressures.[30]   Rosen therefore concludes: "*a user-generated system for enforcing community standards will never protect speech as scrupulously as unelected judges enforcing strict rules.*" In other words, firm-based governance has its limits and the state must, ultimately, step in.

Rosen's final assertion can be critiqued. While judges might "scrupulously" enforce rules, they may lack the training and understanding as to how that is done in the context of cutting-edge technologies.[31] Moreover, by the time an issue reaches the courts it might be of limited relevance given the slow response time of the judiciary. Finally, judges too are subject to local pressures and of course local law. Hence Rosen's initial endorsement of the firm's governance authority might still be with merit, and the first argument promoting state governance is not without problems. Therefore, it is advisable to continue seeking the problematic aspects of governance by firms in this specific context.

C. *Governance by Code and Contract: "Top-Down" or "Bottom-Up"?*

As noted above, one might argue that regulation via code

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30. Rosen, *supra* note 28, at 1527.

31. For a similar discussion see Tal Z. Zarsky & Norberto Nuno Gomes de Andrade, *Regulating Electronic Identity Intermediaries: The "Soft eID" Conundrum*, 74 OHIO ST. L.J. 1335, 1397 (2013).

or contract is unacceptable as it merely reflects the position of the firm, rather than that of the public. Yet the firm-based governance dynamics unfolding in the social media need not fail to represent the thoughts and preferences of the people. The process whereby the platform formulates its strategy for both "code"- and "contract"-based governance need not be strictly "top-down" but could involve a "bottom-up" flow of information.[32] The latter process might take several forms. It might be *explicit*, in which case users will debate the form of proper rules and agree on a framework eventually implemented by the firm. Hence the governance then adopted will be an extension of the public's preferences. This dynamic is indeed part of Wikipedia's governance structure.[33] Still, Wikipedia is admittedly the exception rather than the rule for entities operating in the social media space. Such direct user influence is in fact rare.

Alternatively, users might impact the firm's governance practices *indirectly* and *implicitly*. This dynamic could unfold through the users' complaints and interaction with the firm, while using Web 2.0 tools. For instance, on occasion social media firms such as Google and Facebook have offered novel services which their users found unacceptable. After vocal complaints and debates these firms changed their policy and technology to meet users' demands.[34]

Yet this claim regarding a persistent and sustainable "bottom-up" dynamic in social media must be taken with more than a grain of salt: the existence of "bottom-up" feedback loop

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32. *See* RADIN, *supra* note 3, at 34 (explaining that public ordering is a top bottom process and private ordering – bottom-up).

33. *See Wikipedia: Policies and Guidelines*, WIKIPEDIA (last modified Sept. 13, 2014 4:43 AM), en.wikipedia.org/wiki/Wikipedia:Policies_and_guidelines#Life_cycle.
See discussion of this example of self-regulation and governance in ZITTRAIN, *supra* note 5, at 143-46.

34. For a discussion of ten such instances which pertained to Google and Facebook, see Ira Rubinstein & Nathan Good, *Privacy by Design: A Counterfactual Analysis of Google and Facebook Privacy Incidents*, 28 BERKELEY TECH. L.J. 1333, 1377-1406 (2013). See similar discussion in Robert Brendan Taylor, Consumer-*Driven Changes to Online Form Contracts*, 67 N.Y.U ANN. SURV. AM. L. 371 (2011-2012) (generally examining what triggered the firm's "capitulation" to social pressures which led to changes in their contracts and practices).

is supported by no empirical evidence. Rubinstein's and Good's analysis of privacy fiascos involving Google and Facebook illustrates a variety of responses by firms in such cases. Sometimes firms have made minor changes to benefit their users; sometimes they have quietly weathered the storm of criticism but have done nothing in practice. And of course, in specific cases firms have made substantial changes in their policy and practices.[35]   Yet these latter cases are merely anecdotal and cannot prove the existence of a systematic pattern of governance. An additional study found similar results.[36] Therefore, at present it is difficult to assert that the governance structure offered by firms is one to which their users substantially contribute. However, the firm's governance might also be a reflection of users' preferences (and not only their own) given various economic forces impacting the firms' actions – a notion the article now moves to discuss, applying thereto previous legal discussions which addressed remarkably similar premises.

D. *Social Media and Economic Forces, or Nanny Corporations and Virtual Company Towns*

It is possible that firms are in fact adequately responding to the bottom-up pressures of their users as part of a broader response to market signals, and are doing so appropriately, without direct government intervention. This different set of arguments regarding the pros and cons of government - and firm-based governance models is rooted in the "Law and Economics" literature, especially its analysis of "nanny corporations."   Todd Henderson set forth a comprehensive argument as to the advantages of governing by the decisions of corporate entities, as opposed to those of government.[37]   It should be noted that this law and economics-based discussion mostly addresses the fears that firm's will adopt "paternalistic"

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35. Rubenstein & Good, *supra* note 34, at 1405-06.

36. See Taylor, *supra* note 34, at 392 (finding that when examining such events involving social pressures and privacy breaches, the firms' actions "did not frequently result in capitulation.").

37. *See* M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517 (2009).

norms, so to speak, which are stricter than those the public finds necessary.[38] However, with some alternations, it could be applied to the context at hand, which addresses a broad array of instances in which public opinions and rules set by firms diverge.

Social media websites are a relatively new dynamic, yet this discussion of firm governance was already discussed in the past. A common context of governance discussions in the literature is the "company towns" of former times: residential areas built and operated by firms for their employees.[39] The resident/employee living in such a town was required to abide by the local rules, which at times included monitoring and restrictions of various behaviors.[40] In other words, in company towns individuals were subject to governance by the firm in almost all areas of their lives – including those pertaining to basic human rights and values. The company town, in its classic format, rarely exists in the U.S. today. Still, one can easily argue that social media are a modern variation of this older concept.

On its face, the firms' should be motivated to respond to their users (or employees) preferences. However, governance by nanny corporations might lead to problematic outcomes – a lesson we might want to carry over to the present. Henderson recognizes two reasons for errors (and thus, inefficiencies) which might follow from the governing initiatives of the firm: miscalculating the potentially negative consequences of restricting individual liberties, and trying to use their power to impose selfish and socially costly preferences.[41] In other words, the market forces impacting the firms' conduct will not properly account for democratic and other non-monetary interests.[42] Margaret Radin has recently referred to similar dynamics as "democratic degradation" which follows when firms displace state regulation.[43]

Accordingly, for an argument regarding the efficiency and

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38. *Id.* at 1523.
39. *Id.* at 1535.
40. *Id.* at 1536-37.
41. *Id.* at 1532.
42. *Id.* at 1583.
43. RADIN, *supra* note 3, at 33.

success of governance by firms to prevail and overcome these shortcomings, it must be premised on several assumptions and claims (which Henderson sets forth) which point to the advantages firms have over governments. Let us examine three of such assumption and arguments, and their relevance to the social media context. First, firms are more agile by nature. They can frequently tailor their relevant policies, and the impact of such changes will materialize faster.[44] They can also engage in greater experimentation on their way to achieving an optimal outcome.[45] Governmental rules and restrictions, on the other hand, are sticky. It is also quite difficult to change a rule once it is put in place.[46] This point is especially pertinent to the present context. Firms can easily alter governance by changing both the contract and the code which are both relatively flexible, while the government's response will be much slower.

Yet Henderson's next two assumptions are quite far-fetched when applied to our specific context – social media. Second, Henderson further argues firms are subject to greater oversight than politicians, therefore are the preferred nannies;[47] and third, that individuals can, with greater ease, opt out of the relevant firm's governance. Opting out of the state's jurisdiction is far more costly. Thus firms – not governments – will compete for people's patronage and attention, and provide governance rules which are normatively acceptable to them.

Establishing whether governments or firms are subject to the greater external oversight in the social media context is extremely complex. The intuitions noted by Henderson could be countered. The fact that the social media firms are both multi-national and powerful renders effective oversight difficult. In addition, governments have taken steps to enhance their transparency – especially with regard to lobbying activities.[48] Therefore, this oversight-based

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44. *See* Henderson, *supra* note 37, at 1561.

45. *Id.* at 1575.

46. *Id.* at 1561, 1572-73.

47. *Id.* at 1534.

48. *See, e.g.*, MICAH SIFRY, WIKILEAKS AND THE AGE OF TRANSPARENCY 73 (2011).

assumption is at best speculative in this context. It cannot provide clear insights into the governance debate at hand. Perhaps the empirical tests presented below will shed light on this issue.

The third assumption and claim is even shakier than the second in the social media context. While opting out of a jurisdiction is indeed very hard, the current market structure renders opting out of the relevant contractual framework, hence out of the social media, almost equally difficult.[49] When users engage in social media, their costs to switch to another such realm are high. Several lock-in effects also come into play.[50] Furthermore, given the high barriers to entry, in many instances sufficient alternative platforms might not exist in social media markets. Again, empirical evidence might prove helpful in resolving this difficult matter of which realm is easier to exit. However, when opting out is of limited feasibility, firms will have limited incentives to meet the public's preferences, and the state will be forced to intervene. In sum, the social media might prove a poor "corporate nanny" because the governance applied will presumably be strictly "top-down" rather than "bottom-up," given the failure of the implicit signaling process noted above.

Yet even if (and as noted, in this context it is a very big "if") and when Henderson's three assumptions are met, the governance laid down by a "nanny corporation," in a corporate town or anywhere else, might fail to generate an efficient and fair framework due to additional signaling failures. As noted, this might occur with regard to issues pertaining to democratic values. Such outcomes might result from "collective action" problems – namely the overall damage from the firm's conduct will be enormous, yet quite limited for each particular user who is unable or unwilling to signal her full discontent.[51]

In addition, as Cass Sunstein argues, individuals conduct

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49. *See* RADIN, *supra* note 3, at 40.

50. *See* Ruben Rodrigues, *Privacy on Social Networks: Norms, Markets, and Natural Monopoly*, *in* THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION 237, 246–49 (Saul Levmore & Martha C. Nussbaum eds., 2010); Randal C. Picker*, Competition and Privacy in Web 2.0 and the Cloud*, 103 NW. U. L. REV. COLLOQUY 1, 6–8 (2008).

51. Henderson, *supra* note 37, at 1583.

themselves quite differently when assuming their role as consumers as opposed to their role as citizens.[52]   Thus, governance by government cannot be supplanted by that of firms.   In their capacity as citizens, individuals hold higher aspirations regarding the society they would like to live in.   As consumers, they might be merely interested in making the best deal.   While these two forms of behavior might, at times, seem contradictory they may not be, given people's different mindsets when making decisions in these two capacities (consumers vs. citizens).   When deciding on the governance of social media, which indeed might impact important rights and values, people's preferences at the ballot, rather than at the market (by selecting from various social media for their usage), should be heard and at times followed.   Therefore, governance should not be left to the firms but must be carried out by the government directly – as a proxy of the citizen's *relevant* preferences for the issues to be governed.   The "bottom-up" process in establishing a firm's governance might therefore be in play, but is still insufficient by nature to reflect all the relevant and required preferences.

Sunstein's theory could be sharply critiqued, undermining the argument for opting for governance by the state rather than deferring to market forces.   One can question if indeed individuals act differently in these two realms (consumers v. citizens).   Perhaps the individuals' behavior is nuanced –as they choose to purposely indicate unachievable aspirations in the political realm.   Therefore, the only signals to be considered are those indicated when people reflect on realistic options and "put their money where their mouth is."   Or one might argue that the market is where people's true preferences are reflected.   This is as opposed to the political realm, where limited choices and other systematic distortions encumber one's ability to express them properly and effectively.   Here again, the discussion could benefit from empirical testing.

Another potential concern with and caveat to the "bottom-up" governance-by-firms process pertains to the multi-national presence of the firms discussed here.   As noted, the firms' global nature potentially strengthens their ability to reject

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52. SUNSTEIN, *supra* note 8, at 128.

local pressures, and thus rendering governance by code or contact an optimal governance option.[53] However, one might argue that a firm's global presence leads it to also reject the local specific preferences presented by both government and users at their specific location. Rather, in order to promote efficiency, such a firm will opt for *standardized* global governance rules, which might merely cater to the majority of their users, to those in the firm's country of origin, or to a common denominator of all user norms set by the firm. In any event, the governance applied will have limited linkage to the specific users' preferences or signaling in any given state. Thus, one might argue, at least with global firms, actual governance practices have little to do with the local *laws* and *social norms,* and are almost exclusively governed by the firms' strategy (which might be quite different) as dictated by both *code* and *law*. Stronger laws with a global reach must be put in place to assure that the users' preferences are properly considered.

However, the global presence of a social media platform need not mean that it will categorically set aside local laws and norms. Indeed, firms can and do offer different interfaces[54] and contractual language[55] to different users, based on their geographical location. Given the flexibility of the digital realm, engaging in governance-by-geographical segmentation is doable and is indeed unfolding.[56] Thus, the firm's disregard for local laws and norms cannot necessarily be explained by its global presence and calls for additional discussion. Still, future studies should perhaps probe whether the governance dynamics for global and local platforms present substantial differences and therefore must be examined separately.

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53. *See supra* Part II.D.

54**.** *See, e.g.*, *Search Removal Request under Data Protection Law in Europe*,   GOOGLE, https://support.google.com/legal/contact/lr_eudpa?product=websearch&hl=en (last visited Oct. 1, 2014) (Google's new form for merely EU users, allowing them to invoke their "right to be forgotten."). *See* discussion *infra* note 86 and related text.

55. *See, e.g.*, *infra* note 91 and relevant text.

56. *See generally* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (2008).

E. *Governance of Firms and Spheres of Justice*

As a final step in the analysis of governance methods, let us set aside efficiency considerations as well as the "law and economics" perspective, and question the fairness and justice of allowing firms to govern all elements of our lives – especially those that relate to crucial rights and values. This argument is strengthened in instances where the firm's governance is "top-down" and does not reflect the public's choices. Again, similar questions have been raised in the past in the context of the "company town." In his important book *Spheres of Justice*, Michael Walzer addresses this matter directly. Discussing the company town of Pullman, Illinois,[57] he finds it unacceptable that a firm could leverage its control over property into control of people's lives, in a feudalism-like dynamic. Allowing a small group of individuals – the company's executives and owners – to control the lives of others is unjust. This argument fits well within Walzer's broader thesis that power should not be allowed to migrate and transform from one sphere (in this case ownership of property) to another (control over other individuals' lives).[58]

Even though Walzer penned this argument over thirty years ago and in a different context, it could be smoothly transposed into the social media discussion. Here the firm's control over a proprietary website, the related technologies and relevant IP rights cannot be tantamount to its assuming the right to dictate the public's preferences regarding important rights such as information privacy and free speech. In the "company town" context, Walzer explains that the firms should not be allowed to extend their influence beyond the manufacturing plant and into the employee's home. In our context the firms' influence can extend far beyond thousands of employees to millions of users impacted by the firm's governance strategy. Such control should therefore be considered unjust.

Yet the "company town" analogy has its limits. In the case

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57. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 295 (1983).

58. *Id. passim*.

of Pullman, Illinois, a firm was able substantially to impact its employees' physical lives by controlling all aspects round the clock – with the noted exception of the employee's important right and ability to opt out and move away. The social media are powerful, but nonetheless still virtual. Governing social media might not necessarily mean that the firms control their users' lives in a way deemed unjust. Indeed, courts have refused to find online realms analogous to "company towns" in the past for this precise reason, in the context of defining a "public forum."[59] Perhaps the migration of broader scopes of our lives (and our personal information) to the virtual world would lead courts to rethink this analogy, and indeed consider social media as possibly equivalent to company towns. Should this occur, the "spheres of justice" argument might be relevant – and allow for framing the governance problems discussed here in consideration of the powerful concept of injustice.

In conclusion, on the one hand, the noted theoretical review of possible justifications for relying on governance set by a firm (via contract or code) has yielded several interesting arguments. On the other hand, strong arguments have been made for setting the firm's governance initiatives aside and resting exclusively on governance dictated by the state. Given the novelty of the situation at hand, the analysis has mostly adduced arguments voiced in somewhat different contexts. Neither set of theories could be seamlessly applied to the virtual realm of social media; each requires some tinkering, which might weaken their analytical force. In addition, the basic arguments themselves are at times speculative. It will therefore be helpful and important to add an empirical element to this inquiry.

Before proceeding, note that legal scholarship has broadly addressed the relation of social norms arising in society to law on the books.[60] These studies – most notably the work of Robert Ellickson – scrutinize the efficiency as well as the enforcement of these norms as part of an examination of the

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59. *See* Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKLEY TECH. L. J. 1115, 1135-42 (2005) (discussing, among other things, the *Cyber Promotions* cases).

60. See discussion in Amitai Aviram, *Path Dependence in the Development of Private Ordering,* 2014 MICH. ST. L. REV. 29 (2014).

dynamic of "private ordering."[61]   The analysis above did not directly address this important strand of work. The reason for such apparent neglect is that our current discussion is somewhat removed from this broader theme.   With social media, the norms are mostly dictated and enforced (with apparent success) by one firm. In addition, the relevant social context differs from other "private ordering" settings in that it is not formulated from a great variety of contracts among parties, but in a one-to-many contractual framework.   For these reasons, many of the insights this weighty literature might provide are of limited relevance to this article's focused discussion, and their examination is left for another day.

III. Fair Governance – An Empirical Perspective

A. *General*

Beyond the normative analysis discussed, this article notes four models of governance unfolding in social media: (1) by code, (2) by contract, (3) by law, (4) by social norms.[62] Each fulfills a role in the overall governance of this novel and important realm, yet how influential each is, is unclear. As explained above, reliance on every one of these models generates both advantages and drawbacks. Studying the relations among them is therefore interesting and important. It is interesting to try and establish the similarities and differences among these very different forms of governance, because such findings can provide insights into who in fact has the most substantial effect and thus, *de facto*, governs the social media (as well as other online realms).   Examining changes in these governance models might show the "evolution"[63] of overall governance trends in the online realm. It might also provide explanations as to which external events

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61. *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

62. For a similar discussion and mapping, see Oermann et. al., *supra* note 1, at 8.

63. For a discussion of this issue, see Fred Stutzman, Ralph Gross & Alessandro Acquisti, *Silent Listeners: The Evolution of Privacy and Disclosure on Facebook*, 4 J. PRIVACY AND CONFIDENTIALITY 7 (2013), *available at* http://repository.cmu.edu/cgi/viewcontent.cgi?article=1098&context=jpc.

cause such changes. Yet beyond academic interest, understanding the nature of the interactions among these governance systems will provide important guidance for regulators, giving them a better grasp of the best way to minimize problematic practices and maximize those that government deems preferable. Policymakers will know which policy levers are destined to have the greatest effect, and thus utilize them to promote their various interests. As explained above, the current study strives to introduce empirical findings into this theoretical discussion.

B. *Overcoming Challenges*

Empirically comparing the foregoing four governance methods presented several challenges, of which three central ones quickly surfaced. First, the factors to be considered were numerous. Secondly, comparing governance models was extremely difficult. Thirdly, comparing these very different realms called for ensuring that the same issues could be addressed by measurable parameters on each of the four governance dimensions and that the parameters overlapped.

The joint German-Israeli research group addressed these challenges in several ways. To manage the vast scope of this research project, the initial study chose to focus on a modest objective: gathering information on privacy-related issues pertaining to a leading social media website, namely Facebook.com. The choice of Facebook for the study is easily justified, as this specific medium provides invaluable insights into all four dimensions with relative ease. Facebook generates a vibrant legal and policy discussion,[64] so establishing the treatment of relevant *laws* and the governance they imply is relatively simple. Facebook has both an extensive *contractual* and *technological* (i.e. "code") framework, which facilitates their study. And perhaps most importantly, its broad and global popularity makes for easy generation of surveys to establish the *social norms* governing its use. Privacy also seemed to be an intuitive choice for such a policy-related study, given the

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64. *See, e.g.*, James Grimmelmann, *Saving Facebook*, 94 Iowa L. Rev. 1137 (2009).

growing interest and concern it is currently generating worldwide.[65]

Secondly, to further the comparison of very different parameters on distinct dimensions (as well as the ability to address other important issues such as the global effects of multinational platforms), the study added an extra layer: a comparative examination of these governance models in two legal and social systems, *Germany* and *Israel*. Both countries share some relevant traits; their legal systems have some level of privacy protection, the language used is non-English and Facebook has a substantial presence, reflected by considerable usage levels.[66] Differences and similarities between these two countries should provide additional insight into the relations among the various governance forms. Furthermore, to overcome the problem of comparing and measuring governance through code with other factors, in its first stage the study chose to rely on instances in which this governance parameter was constant in the two jurisdictions.

Thirdly, to ensure that the study relied on a set of measurable and comparable factors for each of the four governance forms (and in each of the two jurisdictions – Germany and Israel), the study required a somewhat recursive process. It called for extensive pretests for all eight governance realms (four forms of governance X two jurisdictions). With each pretest the study sought to identify measurable governance points. For instance, a pretest probed the context of "contracts" while examining which issues were addressed in the firm's terms of use. It later strove to match these issues with relevant laws, technical measures and indications of social norms (in the most elaborate part of the study, as detailed

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65. See case studies discussed in Rubinstein & Good, *supra* note 34.

66. According to some reports, Israel has four million Facebook users as of May 2013; 2.4 million Israelis use the social network every day. This leads to a remarkable almost 50% level of Facebook usage in Israel (given a population of around 8 million). Germany had 22 million Facebook users in February 2014, and ranked second among European countries. Given Germany's population of almost 81 million, Facebook's usage rate per capita is roughly 27%. For Israel, see Omer Kabir & Meir Orbach, *Facebook Reveals: How Many Israelis Social Network Users?*, CALCALIST [Hebrew] (May 21, 2013). For Germany, see *European Union*, INTERNETWORLDSTATS (Aug. 30, 2014 http://www.internetworldstats.com/europa.htm#de; see also sources noted in Oermann et. al., *supra* note 1, at 5.

below). After completing a basic round of pretests, the researchers were able finally to focus their efforts on the issues which overlapped in all eight governance realms tested, and in that way effectively to compare them.

C. *Measuring Social Norms: The Comparative Survey*

Perhaps the most challenging segment of this study of social media governance was the measurement of social norms. It was resolved by an online survey conducted by sociologists in Germany and Israel.[67] To ensure that the issues examined matched factors measured in other governance dimensions, the survey was conducted last, although the prospect of the upcoming survey guided the selection of issues examined in the other three governance realms from the outset. For instance, budgetary and other constraints, as well as the specific expertise of the team members, limited the survey to Germany and Israel. This in turn led to focusing the legal and contractual analysis on frameworks pertaining to these two countries as well. This explains why the study does not review the very interesting U.S. governance landscape.

The survey's text, which was applied (after painstaking translation to both German and Hebrew) in both Israel and Germany, was closely reviewed by all team members prior to distribution. The survey, a questionnaire with 100 items, was digitally distributed to 309 Facebook users aged 18-35 years in Germany and Israel in October and November 2013. Overall, the Israeli and German participants had similar demographic characteristics, with slight differences.[68] The survey, which

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67. MESCH & SCHMIDT, *supra* note 11.

68. The average age of the respondents was 27.12 years (SD=4.48) in Israel and 26.91 (SD=4.46) in Germany. The age difference was not statistically significant. As to gender composition, the samples of both countries were similar, 65% of the German sample were women compared to 53% of the Israeli sample. Regarding marital status, in Germany 88% of the participants were single, while in Israel 57% reported not being married. In terms of education, the samples were similar, as 52% of the Israeli sample had a college or graduate education compared with 57 % in Germany. Most of the respondents indicated that they access Facebook from home (93% in Germany and 87.5% in Israel). As for daily use, there is a statistically significant difference as Israeli users indicate they use Facebook on average 94 minutes a day and Germans only 52 minutes. Future study will examine

took on average 47 minutes to complete, asked users about their perception of descriptive and injunctive norms[69] and the extent of disclosure of personal information they engaged in on Facebook.com.

The survey provided a rich array of findings on privacy attitudes of Facebook users in Germany and Israel.[70] It is an important addition to a growing literature of recently published surveys, all of which addressed these issues.[71] But the survey's most salient (yet not necessarily apparent) innovative feature is its overlap with measurable and noticeable governance elements in the other dimensions. Accordingly, this survey will no doubt promote the study of governance in social media.[72]

As a first step of such a study, this article examines its perhaps most obvious findings – the points on which the study demonstrates significant differences among the governance realms. Thus, the discussion below focuses on one specific issue which yielded significantly different results from the Israeli and the German respondents: *anonymity and the mandatory use of "real names."* The analysis below briefly examines the study's overall interesting findings on this issue, the differences among the various governance dimensions that came to light, and their possible implications.

IV. Analyzing a Governance Choice: Anonymity vs. Real Names

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whether this difference had a substantial impact on the results.

69. For a discussion of the difference between these two sets of norms, see Oermann et al., *supra* note 1, at 17.

70. MESCH & SCHMIDT, *supra* note 11. For an additional discussion of the survey, see Oermann et al., *supra* note 1, at 23, 32.

71. *See*, *e.g.*, EUROPEAN COMM'N, EUROBAROMETER 359: ATTITUDES ON DATA PROTECTION AND ELECTRONIC IDENTITY IN THE EUROPEAN UNION (2011), *available at* http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf; *see also* Noellie Brockdorff & Sandra Appleby-Arnold, *What Consumers Think, Consent – Work Packages 7 & 8* (Mar. 2013), *available at* http://consent.law.muni.cz/storage/1365167549_sb_consentonlineprivacyconfe rencemarch2013-consentprojectresultswhatconsumersthink.pdf (a set of surveys focusing on consumer sentiment regarding privacy in user-generated content services).

72. For another paper resulting from this study, see Oermann et al., *supra* note 1.

A. *General*

The Internet has famously promoted anonymous speech and conduct. "On the Internet," the famous cartoon averred, "nobody knows you're a dog."[73] Of course, this perception of apparent anonymity is greatly distorted. Governments can, and in many instances do, track the online discourse, "connecting the dots" between the anonymous and actual speakers. Commercial firms, especially those enabling the online discussion, can do so as well, to some extent.[74] However, the online realm to some extent, still allows users to cloak their identity in anonymity, at least to other users. Many websites allow surfers to propagate ideas under a pseudonym, or "handle."[75] The anonymity norm in online realms generates various benefits, mostly in the form of extensive and uninhibited speech. However, anonymity has been known to generate detriments as well – especially hurtful speech aimed at society's weaker groups.[76]

Still, the anonymity of the online discourse is not set in stone (or perhaps, code). In recent years, especially in some realms involving social media, anonymity (even vis-a-vis other online users) has been supplanted by "Real Name" policies. The most recognizable example is the one applied by Facebook. Individuals are required to use their "real" offline names when registering for and interacting within this realm.[77] The practice has generated significant discontent (dubbed by some the "Nym Wars"),[78] but Facebook has not changed its policies. It is not likely to do so in the near future, in view of the presumed benefits that this identification strategy generates

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73. Peter Steiner, *On the Internet, Nobody Knows You're a Dog*, NEW YORKER, July 5, 1993, at 61.

74. *See, e.g.*, *There Is No Anonymity on the Internet*, TEACHING PRIVACY (2014),

http://teachingprivacy.icsi.berkeley.edu/theres-no-anonymity/.

75. Zarsky & Andrade, *supra* note 31, at 1352.

76. *Id.* at 1362 (discussing such benefits and detriments), Ronen Perry & Tal Zarsky, *Liability for Online Anonymous Speech: Comparative and Economic Analyses*, 5 J. EUR. TORT L. 205, 206 (forthcoming, 2014), *available at* http://ssrn.com/abstract=2448706.

77. Zarsky & Andrade, *supra* note 31, at 1352.

78. *Id.* at 1353.

for Facebook's bottom line.[79]

As noted, some critics have been quite vocal about the adoption of "real name" policies in online social media, but it is far from clear which form of identity management is normatively superior at this juncture, or will prove to be just and fair. Both technological options – anonymity or compulsory identification – could be normatively justified.[80] Hence the governance of this specific trait of online social media conduct seems fertile ground for empirical testing and study, including an examination of subjective social norms. Therefore, the eight dimensions noted above – law, contract, code and social norms in the two legal and social jurisdictions of Germany and Israel are addressed here accordingly. This context also invites application of the theoretical background noted above. For instance, given that "real name" policies could be also considered (over-) protective of users (and not only merely a measure to promote corporate objectives), the rationales discussed pertaining to the acceptance or rejection of governance by a "nanny corporation" should apply, and the theoretical discussion of this concept could be examined in light of empirical findings.

B. *Governing "Real Names" – Law, Contract and Code*

Law: The anonymous/pseudonymous vs. real names governance context presents an interesting legal setting. It brings to light differences between the two legal jurisdictions the study chose to examine – Israel and Germany. This distinction will prove helpful in the quest for normative and operative conclusions, below. Israeli law treats the right of anonymity with great respect. In one important Israeli Supreme Court case regarding defamation, the need to protect the right to anonymity, at least implicitly, led to the surprising finding that the court had no authority to expose the identity of

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79. *Id.* at 1356.

80. For some limited justification for the use of "real names" see ZITTRAIN, *supra* note 5, at 228. For a debate on the suitability of possible mandatory attribution as opposed to possible pseudonymity in the national security context, see David D. Clark & Susan Landau, *Untangling Attribution,* 2 HARV. NAT'L SEC. J. 531 (2011).

online anonymous defendants.[81] A subsequent case regarding IP right recognized the rights of anonymous defendants in this context as well, albeit less rigorously.[82] Israeli courts, however, have not objected to the use of "real name" policies as applied by private actors. Nor are these issues addressed directly by Israeli laws. So it is fair to assume that Israeli law takes the position of *weakly endorsing* online anonymity.

The legal protection afforded anonymous speech is far greater in Germany. German law provides strong rights protecting the individual's control over his or her identity. [83] More specifically, according to the German Telemedia Law, consumers of online services are *entitled*, among other things, to pseudonymous use of such services.[84] The legality of Facebook's "Real Names" policy, which blocks the effective use of pseudonyms, was recently examined by the German courts. While the case was eventually dismissed upon appeal on jurisdictional grounds (given that Facebook operates in Germany as a company with headquarters in Ireland), the lower court initially found that Facebook's "Real Name" policies were at odds with the noted provisions of German law.[85] Also, the proactive right to online pseudonymity in Germany has been reflected in a national ICT project, namely the New German ID card enables the use of a pseudonym.[86] Thus it is fair to conclude that German (as opposed to Israeli) law takes the position of *strongly endorsing* online anonymity.

Code: throughout the Facebook social media platform, the governance of "Real Names" through code takes a very different turn from the interests reflected by law. Here, the use of real names is deeply imbedded in the technological interface.   There is no significant difference between the

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81. CA 4447/07 Rami Mor v Barak ITC – Int'l Telecomms Corp. 63(3) PD 664 [2010] (Isr.); *see* Perry & Zarsky, *supra* note 76, at 218.

82. CA 9183/09 The Football Ass'n Premier League Ltd. v. John Doe [2012] (Isr.); *see* Perry & Zarsky, *supra* note 76, at 219.

83. Zell, *supra* note 7.

84. *Id.* at 480.

85. *Id.* at 481.

86. *See* Marian Margraf, *The New German ID Card*, *in* ISSE 2010 SECURING ELECTRONIC BUSINESS PROCESSES 367, 368 (Norbert Pohlmann et al. eds., 2011) ("the ID card must enable pseudonymous authentication"); Zarsky & Andrade, *supra* note 31, at 1353.

interface in Germany and in Israel on this point. Interacting with Facebook, one is required to provide a "real name" during registration. Naturally, the name of the specific user is prominently displayed at various points within the social media. Yet the most prominent way in which the notion of exclusive usage of "real names" is governed is through sanctions. Facebook can and at times does deactivate a user's account when suspecting that the "Real Name" policy is not being followed.[87] In addition, Facebook applies code-related governance through peer-reporting mechanisms. The website allows (and even encourages) users to notify the operator if another user is applying a fake name – a notification measure which could launch the code-related sanctions.[88]

Contract: As with code, the embedded contracts governing the Facebook realm enable and enforce the usage of "real names." Facebook's Israel-based website indicates in its terms (which are in Hebrew, yet reflect the standard terms used elsewhere) regarding "Security" that when registering a user may not provide false information, and use only one account.[89] Other provisions allow for the subsequent enforcement (via code, as indicated above) of the rigid "real names" policy.[90] Facebook's German-based website carries similar provisions. Importantly, however, it has several provisions written specifically for Germany.[91] These were most likely put in place in view of a court case invalidating standard terms in online service agreements – especially those pertaining to the

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87. See for instance explanation on *Why Was My Account Disabled,* FACEBOOK (2014), http://www.facebook.com/help/245058342280723/. For a discussion of particular instances in which this sanction was applied, see Zarsky & Andrade, *supra* note 31, at 1336 (particularly discussing the facts involving Salman Rushdie). For a discussion of a partial limitation on exercising this right in Germany in view of a recent case, see *infra* note 92 and related text.

88. For Facebook's explanations as to how to use these buttons, see *Report a Violation*, FACEBOOK (2014), http://www.facebook.com/help/263149623790594/.

89. *Statement of Rights and Responsibilities*, FACEBOOK § 4 (Nov. 15, 2013), https://www.facebook.com/legal/terms/.

90. *Id*. § 15.

91. *Terms for Users Residing in Germany*, FACEBOOK (Apr. 20, 2012), http://www.google.com/translate?hl=en&ie=UTF8&sl=de&tl=en&u=http%3A%2F%2Fwww.facebook.com%2Fterms%2Fprovisions%2Fgerman%2Findex.php (translating http://www.facebook.com/terms/provisions/german/index).

operating website's ability to unilaterally terminate an account without prior notice.[92]   However, these do not alter the requirement of users to abide by the "real name" policy. The amended provisions relevant to the issue at hand merely somewhat dampen the harshness with which Facebook can move to terminate the user's account. They do, however, reflect an example as to how contractual frameworks respond to external events.[93]

To sum up the analysis thus far, in both jurisdictions the analysis points to a divergence between the forms of governance which originate from the firm (code and contract) and the spirit of governance flowing from the state. It is however clear that the divergence is greater in Germany than in Israel (even after accouting for the recent changes in contractual terms), given the difference between these two legal systems. It will therefore be interesting to reveal the direction taken by the governance rules derived from the survey of the user's social norms and what this might teach us.

C. *"Real Names": "Survey Says. . ."*

Four survey questions pertained to users' attitudes and preferences regarding the use of pseudonyms and/or "real names" on Facebook.   Findings from all questions show a statistically significant difference between German and Israeli respondents. Table I below lists the questions and the average responses given (as well as their standard deviation). The first question was directly to the point, inquiring whether the use of pseudonyms is acceptable on Facebook. Responses were scaled

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92. For a discussion of this case, which pertained to the terms applied by Google, see Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, WAKE FOREST L. REV. 53-54 (forthcoming 2015); *see also* Press Release, Federation of German Consumer Organisations Wins Lawsuit Against Google (Nov. 19, 2013), *available at* http://www.vzbv.de/cps/rde/xbcr/vzbv/google-vzbv-press-release-2013-11-19.pdf; Karin Retzer, *German Court Finds 25 Provisions in Google's Online Terms of Use and Privacy Policy to Be Unenforceable*, SOCIALLY AWARE BLOG (Dec. 19, 2013).

93. For a review of other instances where such changes unfolded, see Florencia Marotta-Wurgler & Robert Brendan Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 248, 268 (2013).

from 0 ("never OK") to 5 ("absolutely OK"). The second question approached the same issue somewhat indirectly, asking how many of the respondents' Facebook contacts considered their (the respondents) use of a pseudonym a positive activity, in this realm. Responses were again from 0 ("none") to 5 ("all"). For both questions, the average level of agreement with the use of pseudonyms was higher in Germany than in Israel. These results indicate a more permissive norm in Germany supporting the use of Facebook without adhering to its "real name" policy.

The next two questions took a different approach to this issue (thus limiting the chance that any finding would prove anecdotal). They focused on users' concerns about falling for a fake profile. Arguably, groups of users with a preference for pseudonyms in social media would not consider this a serious problem, and vice versa. This in fact proved to be the case. Respondents provided answers regarding such fears resulting from actions premised on fake profiles of both organizations and individuals on a scale from 0 ("not concerned") to 5 ("most concerned").   Again, there are statistically significant differences between the countries, with Israelis indicating, on average, a higher level of concern than Germans. This result might be linked to the attitudes and preferences reflected in the previous questions. Israelis are less likely to use pseudonyms on Facebook and therefore more concerned about being defrauded by a fake person or organization.

From these survey results, it is possible to formulate a tentative understanding of the form of governance social norms would dictate for Facebook – one that would allow for the use of pseudonyms online. The comparative perspective also shows that German users have stronger attitudes and preferences for the use of pseudonyms than their Israeli counterparts.

Table I: Summary of Relevant Survey Responses

Item	Response mean in Germany (S.D.)	Response mean in Israel (S.D.)

Thinking about yourself, is it ok to use Facebook with a pseudonym?	4.10 (1.18)	2.72 (1.35)**
When thinking about your Facebook contacts, how many of them will think positively of your using Facebook with a pseudonym?	4.07 (2.98)	2.98** (1.39)
How concerned are you about falling for a fake profile of an organization on Facebook?	2.13 (.93)	2.43 ** (.95)
How concerned are you about falling for a fake profile of a person on Facebook?	2.10 (.93)	2.32** (.99)

**p<.001 (statistical significance of difference in results).

Table II below sums up the analysis of the eight governance dimensions examined above, while distinguishing between Germany (DE) and Israel (IL). It indicates an interesting story.   While the firm set an overall anti-pseudonym governance structure, the law in the two jurisdictions differed. Before any examination of the nature of social norms in these two countries, at least two hypotheses could have been posited to predict the trajectory of the (hypothetical form of) governance via social norms.[94]   One would be an alignment of social norms with the norms chosen by the firm (and implemented by code and contract) – as opposed to those reflected in the selections made by the government. The other would be an alignment of social norms with those reflected by the law (and thus, government) and opposed to those selected by the firm. The actual results from

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94. For an additional discussion of instances where law and social norms converge or diverge, see Oermann et al., *supra* note 1, at 36-37.

the survey clearly demonstrate that the latter option predominated; both Israeli and German respondents provided answers which correlated with the norms reflected by the local laws.

The comparative aspects of this study add an additional set of findings indicating an association between governance by law and social norms. It can be argued that this correlation is the result of cultural differences in the conception of privacy in the two countries. Thus, cultural differences in the conception of privacy and personal disclosure possibly shape both the law and the social norms of behavior on Facebook. Of course, one might also argue that law shapes social norms, and vice versa. Establishing these causal connections calls for additional study, perhaps by examining changes in one of these factors (such as a new law, or case) and their impacts. Yet lack of certainty regarding these open questions need not undermine the possible conclusions this study brings about, which are presented in the next chapter.

Table II: The Governance of "Real Names" on Facebook

	Code	**Contract**	**Law**	**Social Norms**
DE	Implemented	Mandated	Strongly object	Strongly object
IL	Implemented	Mandated-*	Weakly Object	Weakly object

* Some limited pro-user contractual language, in view of legal changes.

V. Discussion of Results, Normative Conclusions and Important Limitations

The case study presents interesting findings which could be integrated in various ways. The article will now review these findings and discuss two analytical issues. First, it examines these findings in light of the above theoretical discussion, pointing out which theories are strengthened and

which are possibly refuted. Secondly, with regard to the theoretical discussions in Part II.5 it strives to briefly articulate the implications of the study's findings in terms of efficiency, fairness and justice.

An important caveat should be emphasized once more. While the study can point to correlations and discrepancy among the examined factors, it cannot identify the trigger for such differences or the cause of these effects. Thus, the conclusions below are presented cautiously, and can only speculate about various causation theories explaining the study's findings.

One salient way to articulate these findings is to point out that governance through social norms goes hand in hand with that set out by government, and not that set out by the firm – a result that emerged in both jurisdictions. At first glance such a finding might seem trivial, even obvious. Should we not expect laws and social norms to be aligned? This could be explained either by the fact that citizens set the social norms and vote for their government, which implements them. Or from a different perspective, social norms are shaped by the existing law. In addition, should we indeed be surprised that large firms ignore both the law and their users' preferences whenever possible, and set out to apply governance rules tailored to solely promote their own objectives?

As explained above, there was indeed reason to believe that the realm of social media would provide results contrary to such intuitions. Governance flowing from laws might prove inappropriate by social standards, hence removed from social norms, given the slow and rigid process of their acceptance, lack of proper oversight and other detriments.[95] On the other hand, it is the firms that arguably have both incentives and the ability to quickly meet their users' social preferences, and alter their governance models accordingly.

Yet the results indicate that contrary to these arguments, governance through law and through social norms are closely linked. Perhaps more important still, the social media do not introduce a reality in which firms comply with their users' social norms.   Therefore, these findings cannot validate

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95. *See supra* notes 44-47 and accompanying text.

theories noted above regarding firms' motivations to meet user preferences. Rather, the empirical findings indicate that the process of governance by code and contract is strictly top-down rather than bottom-up. The similar findings in both jurisdictions strengthen this conclusion.

Returning to the theoretical discussion, the reason why bottom-up processes ultimately did not unfold in this context can be explained in several ways. First, it might be a result of the firm's global policy, which adopts a uniform framework and chooses to ignore specific local governance initiatives. The study's findings cannot negate this theory. Note, however, that the firm ignores local governance in two different geographical realms – Israel and Germany, the latter being a substantial state and also one for which Facebook chose to modify its contract so as to cater to it in other contexts. Therefore, this explanation might have limited force.

The difference between firm governance and the governance by law and social norms might result from the dearth of competition or high switching costs[96] – both of which are relevant to Facebook and probably other social media platforms. When the firm's users are unable to signal their normative preferences, the firm moves to set governance rules in ways which comply with their self-interest to maximize their profit (rather than their users). However, the reason for the perceived divergence of social norms from the firm's governance might be very different. As Cass Sunstein explains,[97] the governance laid down by firms might indeed result from a bottom-up process and in response to the users' preferences. But the preferences given in the survey, which possibly reflect the users' thinking as citizens, are perhaps different from their signaling and actions as consumers (or perhaps as members of a new social category: internet users). In that case the findings would indicate a very different form of regulatory failure. Additional study is required to establish which of these two general theories, or perhaps yet another explanation, underlies the results.

The uncertainty regarding the reasons for the study's

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96. *See supra* note 50 and accompanying text.
97. *See* SUNSTEIN, *supra* note 8 and accompanying text.

findings hampers the ability at this time to draw clear normative conclusions regarding the proper governance setting for social media. Nevertheless, the most likely conclusion of this article's analysis is that the firm's managers dictate the nature of governance, without properly considering the full extent of their users' preferences. This generates intuitive discontent, which may be articulated on several analytical levels. One is that of efficiency. Arguably, a firm engaging in governance which counters its users' preferences is inefficient. Yet structuring an efficiency-related argument at this juncture calls for an abundance of assumptions which go beyond the confines of this article, especially considering the firm's global nature. True, it might be quite efficient for a global firm to ignore the preferences of many of its users, given the costs of catering to their specific needs.

An additional argument could be premised upon autonomy,[98] respect and violation of possible rights. Here one might argue that the firm's disregard for users' rights and preferences is normatively problematic. This issue too requires extensive analysis and the formulation of various definitions in this specific context of the various complex terms noted above, and must be set aside for now as well. Accordingly, the article will briefly examine the implications of the governance dynamic described here in terms of fairness and justice, while adhering to this law journal symposium's overall theme.[99]

As explained above (in reference to Walzer's work),[100] a reality in which those controlling the firm – hence the social network platform – can unilaterally impact their users' lives and rights is arguably unjust.[101] This is true regardless of the

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98. For a definition of autonomy which might prove helpful for this discussion, see GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 20 (Sydney Shoemaker ed., 1988).

99. Symposium, *Social Media and Social Justice*, Pace Law School (Mar. 28, 2014).

100. *See* Henderson, *supra* note 37, at 1583.

101. When discussing injustice, an additional argument is often adduced concerning injustice which might rise between different social segments. Given that firms govern while adhering to their own interests, subjects are left to face a grim reality. But some subjects are better off than others. Social groups that obtain knowledge, wealth and power can ensure that their preferences are met by exercising their influence and sophistication, while weaker groups must comply with the initial rules under which they are

firm's global nature and other efficiency-related considerations. The argument is strengthened by the fact that the aspects controlled by the few are important and relate to crucial rights such as privacy and identity.[102] Furthermore, those in control were not chosen nor elected by the public. Rather, and as explained above, this small group leverages its control from one set of contexts to another; it uses its control over the online platform – a right related to property and contract – to enforce a set of normative decisions in many walks of life.

The injustice could be resolved by limiting the firm's realm of influence and control, and assuring that governance in social media reflects users' preferences as well. The study indicates that the current governance process does not yield this result. On the other hand, the study further shows that local laws have the potential of properly reflecting social norms. Therefore, this injustice might be mitigated if governance by law featured more prominently in the overall mix of governance influences in the context of social media platforms. This could be achieved by broader laws and stricter implementation of rules that reject the firm's attempts to circumvent the relevant country's jurisdiction.[103]

VI. Conclusions, Complications and Future Extensions

The comparative study presented above provides substantial foundations for future research on social media governance. A possible way forward on the basis of data

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subjected. While this argument is often set forth in such situations, it is difficult to apply it in the present context; it is indeed hard to see how influence and sophistication will make a substantial difference in addressing Facebook's harsh governance policies, through contract or code. One might even note that those that belong to stronger groups have more to lose given the application of "real name" policies. Given these difficult questions, this argument is currently set aside.

102. For a discussion of the importance of identity and how it is related to the use of "real name" policies, see Zarsky & Andrade, *supra* note 31, at 1360.

103. For instance, the actions of Facebook, as described in note 83 and the relevant text. For a different recent example regarding Google (and Google Spain), and how such an argument was rejected, *see* Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2014 E.C.R. ¶ 58-60.

already collected pertains to the "right to be forgotten" – individuals' ability to mandate the deletion of information pertaining to them from third-party datasets, even when such data are accurate and complete. The governance-based study examined this issue as well. It mapped out the forms of governance unfolding with regard to code, contract and law. It also included a relevant question in the survey. This question too bore an interesting result, indicating a significant difference between Israel and Germany. Table III notes the question and the average responses in the two countries.

However, at the time of writing, this specific issue has been subjected to a drastic change, which somewhat sets this aspect of the research back. This specific case-study demonstrates the difficulty in researching such a dynamic issue. In June 2014, the European Court of Justice ruled that in many cases, and according to the EU Data Protection Directive, individuals have the right to demand that a platform remove and delete data at the data subject's discretion, even if they are correct and complete (yet possibly irrelevant at this time).[104] So the rule of law regarding the "right to be forgotten" in both Germany and Israel (which is not subjected to the EU Directive, yet is influenced by it) will possibly change further. Moreover, regulation by *code* has changed as well. As the court found that Google cannot escape EU jurisdiction on this matter, Google was forced to react quickly.[105] It did so by creating an online form which allows EU users to request removal of specific links, and has began to act on these requests.[106] It is most likely that social media platforms – not only search engines – will alter their practices in view of this ruling and Google's actions. This might even impact public opinion and social norms regarding this specific matter.[107] In

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104. *Id.*

105. *Id.*

106. Mark Scott, *Google Ready to Comply With 'Right to Be Forgotten' Rules in Europe*, N.Y. TIMES, June 18, 2014, http://bits.blogs.nytimes.com/2014/06/18/google-ready-to-comply-with-right-to-be-forgotten-rules-ineurope/.

107. For a very recent survey indicating popularity of the "right to be forgotten" among American – a result which was not necessarily predictable, see: DANIEL HUMPHRIES, SOFTWARE ADVICE, U.S. ATTITUDES TOWARD THE 'RIGHT TO BE FORGOTTEN: INDUSTRY VIEW (2014), *available at*

view of this, the study's current findings on the "right to be forgotten" must be revisited. Still, the historical data gathered in this study regarding the "right to be forgotten" issue will make for a better understanding of the reasons for (or causation of) the differences among governance models, should these arise.

Beyond reliance on the study's existing findings, the project noted above sets forth an overall methodology for studying the relations among various forms of governance. The research group's general aspiration is to expand this analysis not only to broader privacy-related questions with regard to digital media, but to issues of copyright policy and abusive content as well. To that end, the theoretical assumptions on the balance of the four governance models must be reexamining and possibly recalibrated. Additional jurisdictions will be examined as well, for a wider exploration of the findings. In addition, I do hope that other scholars from a variety of fields will choose (even partially) to apply this methodology and contribute to a better understanding of the crucial notion of governance in the digital age.

Table III: Social Norms and the Right to Be Forgotten

Item	Response mean in Germany (SD)	Response mean in Israel (SD)
Respondents were asked: How concerned are you that Facebook will keep your personal data even after you delete your account ("0" – not concerned; "5" – very concerned)	3.41 (.87)	2.59** (.98)

**p<.001 (measure of statistical significance).

http://www.softwareadvice.com/security/industryview/right-to-be-forgotten-2014.