

# FACEBOOKISTAN\*

ANUPAM CHANDER\*\*

*Who rules Facebookistan? Who makes the rules that govern the way a tenth of humanity connects on the Internet? The United States, France, China, or Mark Zuckerberg? Facebook represents a type of multinational corporation new to the world stage—one that raises issues different than those raised by earlier generations of multinational corporations. A review of international controversies involving Facebook reveals that Facebook has changed some of its policies as a result of pressures from governments around the world, while resisting other pressures. At the same time, Facebook has itself helped spur changes in the law, most evidently in helping undermine repressive governments. Ultimately, this Article finds that regulatory power is, de facto, dispersed across a wide array of international actors.*

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\*\* Director, California International Law Center, Professor of Law, and Martin Luther King, Jr. Hall Research Scholar, University of California, Davis. J.D. Yale; A.B. Harvard. I thank Sarah Anker and Johann Morri for excellent research assistance (the latter in French) and Andrew Chin and my North Carolina Law Review editors (including and especially James Lawrence) for insightful suggestions.

## INTRODUCTION

Who rules Facebookistan? The United States? France? Egypt? Mark Zuckerberg? Social networks by necessity span borders, following the transnational webs of human relationships. Who makes the rules that govern the actions of the tenth of humanity connected via Facebook?

Facebook has become so powerful and omnipresent that some have begun to employ the language of nationhood to describe it. It boasts a community of some four-fifths of a billion people.<sup>1</sup> It circulates a currency that can be purchased in some forty-nine national currencies, from the Argentinian Peso to the Vietnamese Dong.<sup>2</sup> It dispatches a team of “diplomats” to reach governments around the world.<sup>3</sup> Its head of global communications previously served as Press Secretary for President Bill Clinton.<sup>4</sup> The *New York Times* records a “Zuckerberg Law,” where each year people “share twice as much information as they share . . . the year before.”<sup>5</sup> Facebook can boast of an “economy” consisting of the various third-party developers who engage in commerce using the Facebook platform.<sup>6</sup> Facebook even holds a kind of a taxing power through its

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1. Facebook, Inc., Registration Statement (Form S-1), at 11 (Feb. 1, 2012) (prospectus, subject to completion), available at <http://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm> (reporting 845 million monthly active users as of December 31, 2011).

2. Miguel Helft, *New Money, Online Only: Facebook Looks for Real Dollars by Promoting Virtual Credits*, N.Y. TIMES, Sept. 22, 2010, at B1 (discussing new Facebook “Credits” currency that can be purchased with any of multiple currencies, “including . . . United States dollars, the euro, the British pound, the Venezuelan bolivar and the Danish krone”).

3. Mike Swift, *Wanted: Team To Guide Facebook Abroad—Social Network Seeks Global Directors To Navigate Policy, Culture*, SAN JOSE MERCURY NEWS, May 23, 2011, at 1A; Cyrus Farivar, *Mr. Ambassador, Meet President Zuckerberg*, SLATE (May 27, 2011, 12:31 PM), <http://www.slate.com/id/2295700/>. There is further suggestion of a foreign policy in Facebook’s scheme to grow its user base outside the United States, which *The Wall Street Journal* has characterized as Facebook’s “Marshall Plan.” Tom Loftus, *Facebook’s Marshall Plan*, WALL ST. J. (July 14, 2011, 8:33 AM), <http://blogs.wsj.com/digits/2011/07/14/facebook-marshall-plan/>.

4. Jessica Guynn, *Facebook Hires Former White House Press Secretary Joe Lockhart*, L.A. TIMES (June 14, 2011, 3:10 PM), <http://latimesblogs.latimes.com/technology/2011/06/facebook-hires-former-white-house-press-secretary-joe-lockhart.html>.

5. Saul Hansell, *Zuckerberg’s Law of Information Sharing*, N.Y. TIMES (Nov. 6, 2008, 7:03 PM), <http://bits.blogs.nytimes.com/2008/11/06/zuckerbergs-law-of-information-sharing/>; Somini Sengupta, *Zuckerberg’s Unspoken Law: Sharing and More Sharing*, N.Y. TIMES (Sept. 23, 2011, 2:54 PM), <http://bits.blogs.nytimes.com/2011/09/23/zuckerbergs-unspoken-law-sharing-and-more-sharing/>. Zuckerberg’s Law seems to be modeled self-consciously on Moore’s Law, which predicts the doubling of transistors on integrated circuits every two years. *Moore’s Law Inspires Intel Innovation*, INTEL, <http://www.intel.com/content/www/us/en/silicon-innovations/moores-law-technology.html> (last visited May 2, 2012).

6. Nathan Olivarez-Giles, *Facebook ‘App Economy’ Has Created More Than 182,000 Jobs, Study Says*, L.A. TIMES (Sept. 19, 2011, 9:05 PM), <http://latimesblogs.latimes.com/technology/2011/09/facebook-app-economy-has-created-more-than-182000-jobs-study-says.html>.

sharing of the revenues garnered via commerce on its site.<sup>7</sup> Rebecca MacKinnon suggests that “Facebookistan . . . [is] run by a sovereign, who believes himself to be benevolent.”<sup>8</sup>

For the growing number of people trusting their lifetime of intimate communications with friends and family to this service,<sup>9</sup> the question of who controls Facebook is quite substantial. Facebook increasingly records our lives, mediates our interactions, and serves as a platform for businesses, media, organizations, and even governments to engage the world.

Facebook’s global nature results in a dazzling array of possible regulators—from Afghanistan to Zimbabwe. More than eighty percent of Facebook users lie outside the United States, Facebook’s home country.<sup>10</sup> Will the array of possible regulators ultimately prove powerless, ineffective against this global service run (for most of its users) from afar?

The inquiry into Facebook’s relationship with sovereign states allows us to interrogate some foundational issues of cyberlaw. By reviewing the interaction between one of the world’s most important web enterprises and a number of nation-states, we can test the validity of early claims about the web. Is East Coast Code more powerful than West Coast Code, or vice versa?<sup>11</sup> Are national efforts to regulate futile against a company that operates offshore?<sup>12</sup> Will governmental efforts to regulate cyberspace be contested as illegitimate?<sup>13</sup> Does cyberspace create separate fiefdoms,

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.com/technology/2011/09/university-of-maryland-study-says-facebook-apps-have-created-more-than-182-thousand-jobs.html.

7. See Deborah Liu, *Expanding Our Commitment to Facebook Credits*, FACEBOOK DEVELOPER BLOG (Feb. 25, 2010, 2:30 PM), <https://developers.facebook.com/blog/post/364/> (“Facebook will collect 30 percent of currency spent by users.”).

8. *Life in Facebookistan*, ON THE MEDIA (Feb. 3, 2012), <http://www.onthemediamedia.org/2012/feb/03/life-facebookistan/>.

9. Facebook’s new Timeline feature seeks to tell “the story of your life.” Emma Barnett, *Facebook Wants Your Life Story*, DAILY TELEGRAPH (U.K.) (Sept. 24, 2011), <http://www.telegraph.co.uk/technology/facebook/8783750/Facebook-wants-your-life-story.html>. For an account of how Facebook’s influence extends even after death, see generally Jason Mazzone, *Facebook’s Afterlife*, 90 N.C. L. REV. 1643 (2012) (describing Facebook’s policies governing the accounts of deceased individuals and proposing reforms).

10. Facebook, Inc., *supra* note 1, at 44 (reporting 161 million monthly active users in the United States as of December 31, 2011 and 845 million such users worldwide as of that date).

11. East Coast Code is “the ‘code’ that Congress enacts (as in the tax code or ‘the U.S. Code’) . . . that say *in words* how to behave.” LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* 53 (1999). West Coast Code is “code that code writers ‘enact’—the instructions imbedded in the software and hardware that make cyberspace work.” *Id.*

12. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1372 (1996) (arguing that “efforts to control the flow of electronic information across physical borders . . . are likely to prove futile”).

13. See *id.* at 1374 (maintaining that such “protective schemes will likely fail as well”).

largely immune to sovereign-bound legal process?<sup>14</sup> Does voting with one's feet prove an effective disciplinary mechanism for wayward web masters?<sup>15</sup>

At the same time, this inquiry furthers understanding of the globalization of contemporary corporations. Facebook represents a type of multinational corporation new to the world stage—one that raises issues different than those raised by earlier generations of multinational corporations. Earlier eras of corporate globalization saw companies turning to the world as a market for goods. Witness General Motors's cars and General Electric's turbines. These companies quickly globalized production of goods as well, establishing manufacturing subsidiaries or outsourcing manufacturing around the world.<sup>16</sup> Hollywood studios, too, represent an important breed of multinational corporation, distributing their products around the world and occasionally outsourcing production as well. The multinational enterprises that make up Web 2.0<sup>17</sup> offer something different—not goods to be manufactured and distributed, but rather a platform on which others can create and share.

This intertwines Facebook with issues of culture, religion, and politics around the world. Facebook founder and CEO Mark Zuckerberg acknowledges the firm's peculiar role. "We exist at the intersection of technology and social issues," he observes.<sup>18</sup>

Facebook is not the only Web 2.0 enterprise existing at the intersection of technology and social issues. Google, Yahoo, and Microsoft are among the companies with the breadth, capital, and power to challenge governments as alternative authorities. Focusing on Facebook alone allows us to probe the position of such enterprises in the international order.

My discussion proceeds as follows. I first argue, in Part I, that Facebook differs from the multinational corporations of the past in ways that raise the question of sovereignty more sharply. In Part II, I review efforts by nation-states to change Facebook's behavior, concluding that states have some, if erratic, influence over Facebook, and that Facebook, in

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14. Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L.J. 1207, 1234 (2002) (characterizing cyberspace as consisting of fiefdoms, where "political authority" is "an incident of private property").

15. Johnson & Post, *supra* note 12, at 1398 n.101.

16. See generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1993) (providing examples of how various companies, including General Motors and General Electric, adapted to changes in the economy).

17. Web 2.0 is a broad concept that encompasses using the Internet as a social networking tool, an interface to find information, and a platform for developing applications. See Richard MacManus, *What is Web 2.0*, ZDNET (Sept. 7, 2005, 2:58 AM), <http://www.zdnet.com/blog/web2explorer/what-is-web-20/5>.

18. Sengupta, *supra* note 5.

turn, has occasional impact on governments. In Part III, I show that jurisdictional uncertainties compromise state efforts to regulate Facebook and cyberspace more generally. I consider various alternative approaches to regulating Facebook, concluding that in the near future, Facebook will be subject to a variety of pressures from states, shareholders, and subscribers.

#### I. FACEBOOK, C'EST MOI

The newsmagazine *Slate* reports that “Facebook is sending diplomats to foreign countries.”<sup>19</sup> Facebook now employs an “envoy to India” and an “emissary to Italy.”<sup>20</sup> *Slate* advises, “Now foreign countries should send diplomats to Facebook.”<sup>21</sup> One scholar writes, “When David Cameron became Britain’s prime minister, he made an appointment to talk to another head of state—Mark Zuckerberg.”<sup>22</sup>

Yet while Facebook plans to engage governments across the world, Facebook’s own view of the world avoids political borders, preferring to describe the world graphically through human connections. Figure 1 shows a map that appears in Facebook’s Registration Statement with the Securities and Exchange Commission (“SEC”).

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19. Farivar, *supra* note 3.

20. *Id.*

21. *Id.*

22. LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY 1 (2012).

Figure 1: *The World, as Viewed Through Facebook*<sup>23</sup>



Figure 1 shows that political boundaries are in a sense reinscribed even by human relationships mapped through Facebook. China is conspicuously absent because it censors Facebook.<sup>24</sup> Brazil, Japan, and Russia are not well represented because other social networks dominate there.<sup>25</sup>

A. *Why States Seek To Regulate Facebook*

Facebook is hardly the only corporation with substantial power over people's lives. Since their original formulation as entities chartered by the king or queen, corporations have long enjoyed enormous powers over people's lives. Corporations built bridges (and charged tolls), ran rail lines across cities and states, and managed universities.<sup>26</sup> Granted an official monopoly on trade with India, the East India Company grew into history's most powerful corporation, becoming the de facto government for millions

23. Facebook, Inc., *supra* note 1, at unnumbered page just prior to page i.

24. *See infra* notes 128–30 and accompanying text.

25. Google's Orkut is dominant in Brazil, Mixi is the largest online social network in Japan, and V Kontakte has the largest share of Russian users. *See* Vincenzo Cosenza, *World Map of Social Networks: June 2011*, VINCOS BLOG, <http://www.vincos.it/wp-content/uploads/2011/06/WMSN0611-1024.png> (last visited May 2, 2012).

26. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 43 (2003).

of people.<sup>27</sup> The great chronicler of the twentieth century corporation, Alfred Chandler, has called multinationals “leviathans,” borrowing Thomas Hobbes’ characterization of the omnipotent state.<sup>28</sup>

The elision between state and corporation is to some extent understandable. Each provides a good or service that individual persons would lack the capital to supply by themselves, with the state largely supplying public goods and the corporation largely supplying private goods.<sup>29</sup> Each must deal with the possible abuse of minority stakeholders by those in power.<sup>30</sup> Perhaps more to the point, only corporations can hope to rival states in terms of power, though we are witnessing the emergence of another counterweight, social networks empowered by Facebook and its peers.

Still, Facebook is different from the multinational corporations that have come before. A number of features distinguish it. First, its database of information about individuals is nearly unparalleled in human history. Second, it enjoys an enormous user base of individuals who can interact directly with each other. These direct relationships with a significant percentage of humanity and the power they give to Facebook have led many to employ the language associated with sovereigns to this company.

Facebook itself believes that it is part of a major change in human organization. In his letter to shareholders on the eve of Facebook’s initial public offering, Mark Zuckerberg observes of the printing press and television, “They changed the way society was organized.”<sup>31</sup> Zuckerberg embraces Facebook’s “social mission,” to reorganize “the world’s

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27. See Ron Harris, *Another Look at the Equator Principles: A Historical and Economic Perspective*, THEORETICAL INQUIRIES L.F., May 2008, at 59, 60, available at <http://www.degruyter.com/view/j/til.2008.9.issue-3/1565-3404.1001/1565-3404.1001.xml?format=INT> (click on “Full Text PDF”) (“For 250 years the East India Company was at the same time both a for-profit multinational corporation and a governmental body with sovereign powers and an army.”).

28. Alfred D. Chandler, Jr. & Bruce Mazlish, *Introduction*, in LEVIATHANS: MULTINATIONAL CORPORATIONS AND THE NEW GLOBAL HISTORY 1, 1–2 (Alfred D. Chandler, Jr. & Bruce Mazlish eds., 2005).

29. I say “largely” because states often outsource the production of public goods to private entities and because they often supply private goods as well; corporations at times provide public goods such as parks and schools. See, e.g., Fred Grimm, *Marlins Shop, Taxpayers Get the Bill*, MIAMI HERALD (Dec. 11, 2011), <http://www.miamiherald.com/2011/12/10/2540665/marlins-shop-taxpayers-get-bill.html> (“Miami-Dade residents . . . are liable for bonds that provided 80 percent of the \$684 million needed to build the Marlins their gleaming new money factory[, a baseball stadium in Miami].”).

30. See generally Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119 (2003) (comparing and contrasting the treatment of minority shareholders under corporate law with racial minorities in constitutional law).

31. Letter from Mark Zuckerberg, Founder and CEO, Facebook, Inc., to Shareholders, in Facebook, Inc., *supra* note 1, at 67.

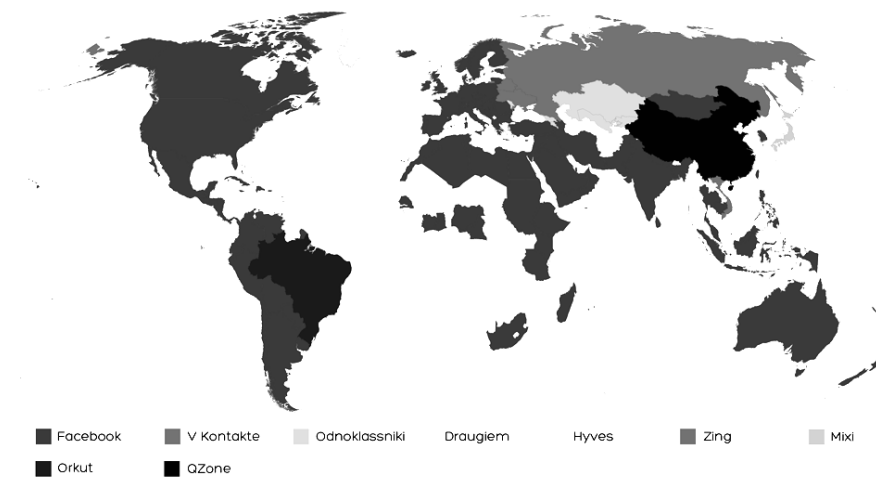
information infrastructure” into “a network built from the bottom up or peer-to-peer, rather than the monolithic, top-down structure that has existed to date.”<sup>32</sup>

In the case of Facebook, the size of its user community—some 845 million people<sup>33</sup> and growing—is itself an indicium of nationhood. Many have observed that if Facebook were a state, a membership of that magnitude would easily make it the third largest country in the world.<sup>34</sup> This membership is widely distributed around the world. Figure 2 illustrates the extent of Facebook’s global dominance.

Figure 2: Most Popular Social Network by Country<sup>35</sup>

## WORLD MAP OF SOCIAL NETWORKS

June 2011



credits: Vincenzo Cosenza [www.vincos.it](http://www.vincos.it)

license: CC-BY-NC

source: Google Trends for Websites / Alexa

Yet it is not the size of Facebook as a corporation alone that makes some use the language of nationhood to describe it. What makes Facebook different from so many other corporations, and more like a government, is how it is involved with so many aspects of our lives, including our business

32. *Id.*

33. Facebook, Inc., *supra* note 1, at 44.

34. See, e.g., Dan Fletcher, *Friends Without Borders*, TIME, May 31, 2010, at 32, 32 (“If the website were granted terra firma, it would be the world’s third largest country by population . . .”).

35. Cosenza, *supra* note 25.



relationships, our friendships, and our families. Australian writer Julian Lee cautions,

If Facebook [were] a government agency, its power would be as undisputed as it would be frightening. For a single organisation to know as much as it does about the habits, interests and behaviour of 10 million Australians is unsettling. If a government department had so much up-to-the-minute information about who we know, where we have been and what we are doing at its fingertips then one can only imagine the outcry.<sup>36</sup>

In some ways, Facebook is more involved with intimate aspects of our lives than governments of liberal states. In the United States, the constitutional right to privacy established in *Griswold v. Connecticut*<sup>37</sup> and reaffirmed in *Lawrence v. Texas*<sup>38</sup> removed the state government's right to interfere with certain relations in the bedroom.<sup>39</sup> Liberal states generally maintain realms of private behavior, in which they may neither interfere nor monitor. Facebook limits itself somewhat—by banning some sexual material—but generally encompasses the breadth of our lives, even more explicitly so now through its new “Timeline” view of one's life.

Facebook has embraced the concept of the social graph, and seeks to implement it across the world.<sup>40</sup> The social graph refers to “the global mapping of everybody and how they're related.”<sup>41</sup> Websites linked through this social graph can share information with each other, enhancing user experience by utilizing information supplied by an individual's personal social network. At the same time, this means that an extraordinary amount of data and information linked to particular individuals passes through Facebook.

Nation-states will often seek to regulate Facebook because of four principal concerns. First and most obviously, Facebook's practices

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36. Julian Lee, *Facebook's Power Should Worry Us All*, SYDNEY MORNING HERALD (Austl.) (Oct. 10, 2011), <http://www.smh.com.au/opinion/society-and-culture/facebooks-power-should-worry-us-all-20111009-11fu0.html>.

37. 381 U.S. 479 (1965).

38. 539 U.S. 558 (2003).

39. *Id.* at 578 (“The petitioners are entitled to respect for their private lives.”); *id.* at 562 (“In our tradition the State is not omnipresent in the home.”); *Griswold*, 381 U.S. at 485–86 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

40. Brad Fitzpatrick, *Thoughts on the Social Graph*, BRADFITZ.COM (Aug. 17, 2007), <http://bradfitz.com/social-graph-problem/>. Fitzpatrick now works at Google, which at one time offered its own social graph application processing interface for the social web. James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1143 (2009) (discussing the social graph and citing Fitzpatrick, *supra*).

41. Fitzpatrick, *supra* note 40.

implicate *privacy*—the sharing and processing of information about individuals. As James Grimmelman writes, “By the time you’re done [filling out your Facebook profile], Facebook has a reasonably comprehensive snapshot both of who you are and of whom you know.”<sup>42</sup> Since Facebook users often post information about others (a natural human activity for everyone but the most solipsistic), Facebook holds information that people have not disclosed about themselves.

Second, Facebook might permit or censor *speech* in ways that raise regulatory concerns. Speech that involves religious, political, trade union, or sexual matters might be subject to diverse regulation across the world. Rules for defamation and hate speech are implicated as well.

Third, states may wish to regulate the kinds of associations permitted by Facebook. This is because Facebook grants individuals and enterprises the ability to form associations without official sanction or intermediation.

Fourth, states may wish to regulate the economic impacts of Facebook. Facebook is increasingly becoming a global bazaar. Rather than relying upon advertising alone (which itself has an economic impact), Facebook gains revenue from taxing the transactions occurring through its platform. Facebook keeps a thirty percent cut of all transactions occurring through its platform.<sup>43</sup> In 2011, Facebook earned forty-four percent of its revenue from advertisers and platform developers outside the United States.<sup>44</sup>

Each of these areas of law—privacy, speech, association, and economic regulation—vary dramatically across nation-states.

Some will suggest that nation-states should not seek to regulate Facebook because engagement with Facebook is entirely voluntary, in that one does not need to sign up at all if one does not like its terms. Indeed, there are many who have rejected Facebook and other social networks.<sup>45</sup> Increasingly, however, one needs to open a Facebook account in order to receive information about an institution, a company, or a store; to participate in a conference; or to receive information about activities nearby. Even if one forgoes all these opportunities, other people can still post information about non-users on Facebook.

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42. Grimmelman, *supra* note 40, at 1149.

43. *See supra* note 7 and accompanying text.

44. Facebook, Inc., *supra* note 1, at 50.

45. Jenna Wortham, *The Facebook Resisters*, N.Y. TIMES, Dec. 14, 2011, at B1 (noting that while Facebook seeks to build closer ties among people, “some who steer clear of the site say it can have the opposite effect of making them feel more, not less, alienated”).

*B. Facebook as Nation?*

Does Facebook possess the characteristics of a nation-state in international law? Article 1 of the Montevideo Convention on Rights and Duties of States provides as follows: “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”<sup>46</sup>

Does Facebook satisfy these criteria? Facebook does not necessarily have a permanent population. We might begin by reminding ourselves that Facebook does not network nearly a billion people directly to each other, but only to a small fraction of people personally approved by each person. If people want to share information with the world, they can publish it to the World Wide Web. The virtue of Facebook is that one can share information only with “friends.” In fact, a recent survey found that the average Facebook user has 245 friends.<sup>47</sup> I have 236. If Facebook is my second country, my community is quite small indeed.

Facebook obviously lacks the second key attribute of the Montevideo-criteria nation-state: a defined territory. Facebook’s physical manifestation in people’s lives is through LED screens, not soil.

Facebook may, however, satisfy the last two criteria: a government and the capacity to enter into relations with other states, at least nominally. Facebook has leaders who make rules. Facebook interprets these rules and enforces them. Enforcement consists in removing and/or banning individuals or groups for violating Facebook’s terms (as determined by Facebook), deleting certain information, or sharing certain information with government authorities. To take one example, Facebook enforces a policy against nudity.<sup>48</sup> When individuals sought to post photos of

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46. Montevideo Convention on the Rights and Duties of States art. I, Dec. 26, 1933, 49 Stat. 3097, 3100, 165 L.N.T.S. 119, 125. These criteria are now commonly accepted as the starting point for discussions of statehood. See John Cerone, *The UN and the Status of Palestine—Disentangling the Legal Issues*, AM. SOC’Y INT’L L. INSIGHTS (Sept. 13, 2011), <http://www.asil.org/pdfs/insights/insight110913.pdf> (“The Montevideo criteria, set forth in the 1933 Montevideo Convention, are now widely accepted as the definitive criteria for the establishment of statehood.”).

47. KEITH N. HAMPTON ET AL., PEW INTERNET & AM. LIFE PROJECT, WHY MOST FACEBOOK USERS GET MORE THAN THEY GIVE 5 (Feb. 3, 2012), available at [http://www.pewinternet.org/~media/Files/Reports/2012/PIP\\_Facebook%20users\\_2.3.12.pdf](http://www.pewinternet.org/~media/Files/Reports/2012/PIP_Facebook%20users_2.3.12.pdf) (“In this sample of Facebook users, the average person has 245 friends.”).

48. *Statement of Rights and Responsibilities*, art. 3(7), FACEBOOK, <https://www.facebook.com/legal/terms> (last updated Apr. 26, 2011) (“You will not post content that: is hateful, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence.”). What appear to be Facebook’s guidelines to its content moderators have been leaked and posted online. See Adrian Chen, *Inside Facebook’s Outsourced Anti-Porn and Gore Brigade*, GAWKER.COM (Feb. 16, 2012, 3:45 PM), <http://gawker.com>

breastfeeding mothers, Facebook initially deleted them. Its spokesperson explained, “I recognize breastfeeding is a natural thing to do, but many users want to foster diverse respect so we have come up with a set of community standards.”<sup>49</sup> Following public outcry, Facebook soon reconsidered,<sup>50</sup> showing that, like governments, Facebook is at times susceptible to public protest. For example, it reinstated a photo of two men kissing after removing it as a violation of the terms of use incited public outcry.<sup>51</sup>

Facebook has even introduced a “governance” mechanism whereby users can comment on changes to Facebook’s terms of use.<sup>52</sup> Facebook promises that “[i]f more than 7,000 users comment on the proposed change, we will also give you the opportunity to participate in a vote in which you will be provided alternatives.”<sup>53</sup> Facebook’s management reserves the right to overrule the votes, however, unless “more than 30% of all active registered users as of the date of the notice vote”<sup>54</sup>—a high hurdle considering that its current user base is 845 million people across the world. Yet the opportunity to participate in Facebook’s governance is meaningful and could become even more so over time.

Still, the deficiency regarding the first two criteria—a permanent population and a defined territory—would make nonsense out of an international law claim to statehood, at least under current law. Perhaps someday the physical territory criterion might seem anachronistic, our loyalties and governments created through ethereal links as our lives become more deeply connected by digital networks. As I have written elsewhere, “In place of a geographical sense of identity, we may create new transnational communities of people who share, not geography, but interests or loyalties.”<sup>55</sup> A new kind of nation, promulgating its own rules,

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/5885714/inside-facebooks-outsourced-anti+porn-and-gore-brigade-where-camel-toes-are-more-offensive-than-crushed-heads.

49. Kim Pemberton, *Breastfeeding Mom Takes on Facebook Nudity Policy*, VANCOUVER SUN (Can.) (Jan. 11, 2012), <http://www.vancouversun.com/health/Breastfeeding+takes+Facebook+nudity+policy/5975935/story.html>.

50. Bill McGinty, *Facebook Apologizes for Removing Breastfeeding Photo*, WCNC.COM (Dec. 30, 2011, 6:42 PM), <http://www.wncn.com/news/local/Facebook-does-about-face-on-breast-feeding-photo-136442808.html>.

51. Amy Lee, *Facebook Apologizes for Censoring Gay Kiss Photo*, HUFFINGTON POST (June 19, 6:12 AM), [http://www.huffingtonpost.com/2011/04/19/facebook-gay-kiss\\_n\\_850941.html](http://www.huffingtonpost.com/2011/04/19/facebook-gay-kiss_n_850941.html).

52. *Facebook Site Governance*, FACEBOOK, <https://www.facebook.com/fbsitegovernance> (last visited Apr. 8, 2012).

53. *Statement of Rights and Responsibilities*, *supra* note 48, art. 13(3).

54. *Id.*

55. Anupam Chander, *Whose Republic?*, 69 U. CHI. L. REV. 1479, 1495 (2002) (internal citations and quotation marks omitted).

might well represent a natural evolution from the kind of cyber-self-regulation proposed by cyber-enthusiasts some fifteen years ago.<sup>56</sup> Yet that seems a distant possibility given the current political, social, and economic climate.

Might we think of Facebook as a nation-state perhaps not in a legal sense, but in a more deeply personal sense? For nineteenth century French historian Ernest Renan, the nation was “a spiritual principle, the outcome of the profound complications of history.”<sup>57</sup> Facebook users would not seem to have ties to Facebook that are strongly affective or spiritual, but the communities that Facebook users create can be strongly affective or spiritual. But these communities would mark a set of diverse private associations, not the kind of national sentiment called for in the formation of a single nation.

## II. FACEOFF: FACEBOOK VS. NATION

As Facebook goes global, have states melted against Facebook’s juggernaut, or is Hobbes’s Leviathan still potent? Writing of a faceoff between German Minister of Consumer Protection Ilse Aigner and Facebook’s then-25-year-old founder Mark Zuckerberg, *The Economist* offered this acute observation: “[I]t is hard to say who is the David,” and who the Goliath.<sup>58</sup> This Part surveys efforts to use municipal law to influence Facebook.

### A. *United States*

In its home jurisdiction, Facebook has been the target of a number of federal and state regulatory efforts, as well as the defendant in a number of lawsuits. It seems sensible that the United States would be the jurisdiction with the most extensive efforts to regulate Facebook thus far. As the home of Facebook’s principals, its key assets, its headquarters, and the site of its incorporation, the United States can be Facebook’s most effective regulator, if it so chooses.

The most significant effort to modify Facebook’s policies by the U.S. government occurred in December 2011, when the Federal Trade

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56. See, e.g., Johnson & Post, *supra* note 12, at 1388 (“Experience suggests that the community of online users and service providers is up to the task of developing a self-governance system.” (footnote omitted)).

57. Ernest Renan, *What Is a Nation?*, in NATION AND NARRATION 8, 18 (Homi K. Bhabha ed., 1990). Compare Renan’s definition to Joseph Stalin’s: “A nation is a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up manifested in a common culture.” Joseph Stalin, *The Nation*, in NATIONALISM 18, 20 (John Hutchinson & Anthony D. Smith eds., 1994).

58. *David and Goliath*, *ECONOMIST*, Apr. 10, 2010, at 56, 56.

Commission (“FTC”) sought to resolve a complaint against Facebook for its privacy practices.<sup>59</sup> The FTC alleged that Facebook had failed to live up to its privacy promises and had engaged in “unfair or deceptive acts or practices . . . in violation of Section 5(a) of the Federal Trade Commission Act.”<sup>60</sup> The FTC alleged, for example, that Facebook shared users’ information in violation of its own privacy policies by doing such things as giving third-party applications access to information about a user’s friends, even if those friends had not authorized such access.<sup>61</sup> It also charged that Facebook would publish the list of one’s friends, even when one selected a privacy setting to keep that information private.<sup>62</sup> The FTC’s complaint was not published until December 2011, when the FTC announced a proposed settlement with Facebook. Under the proposed settlement, Facebook agreed to not misrepresent the privacy or security of personal information about individual consumers and to obtain the user’s “affirmative express consent” before materially modifying its privacy settings.<sup>63</sup> Furthermore, any violations of the terms would result in fines of up to \$16,000 per violation, per day.<sup>64</sup> Some commentators characterized the FTC’s proposed settlement terms as a “wrist slap.”<sup>65</sup> But the settlement

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59. See generally Complaint, Facebook, Inc., No. 0923184 (F.T.C. Nov. 29, 2011), 2011 WL 7096348 (alleging that Facebook’s privacy practices violated the Federal Trade Commission Act).

60. *Id.* ¶ 63; see also Edith Ramirez, Comm’r, Fed. Trade Comm’n, Keynote Address at the Federal Communications Bar Association/Practicing Law Institute 29th Annual Institute on Telecommunications Policy and Regulation 5 (Dec. 8, 2011), available at <http://www.ftc.gov/speeches/ramirez/111208fcbapl.pdf> (“Overnight, Facebook took information that was private and made it public by default. This surprised and outraged many consumers. We charged that Facebook sprang these changes on its users without warning or permission, and in violation of the company’s privacy promises. And that, we alleged, was both a deceptive and unfair commercial practice that violated the FTC Act.”).

61. See Complaint, *supra* note 59, ¶ 9 (“[I]f a user’s ‘Friend’ authorizes a Platform Application, that application can access certain of the user’s profile information, even if the user has not authorized that Application. For example, if a user authorizes a Platform Application that provides reminders about Friends’ birthdays, that application could access, among other things, the birthdays of the user’s Friends, even if these Friends never authorized the application.”).

62. *Id.* ¶ 24.

63. Agreement Containing Consent Order at pt. 2, Facebook, Inc., No. 0923184 (F.T.C. Nov. 29, 2011), 2011 WL 6092532.

64. Ramirez, *supra* note 60, at 4 (“Facebook will have to abide by the order for the next 20 years or risk fines of up to \$16,000 per violation, per day.”).

65. See, e.g., Therese Poletti, *Facebook Gets Wrist Slapped by the FTC*, MARKETWATCH (Nov. 29, 2011, 3:16 PM), <http://www.marketwatch.com/story/facebook-gets-wrist-slapped-by-the-ftc-2011-11-29>. But see Ramirez, *supra* note 60, at 5 (“The order does not impose a fine because Congress has not given the FTC the power to seek civil penalties for violations of Section 5 of the FTC Act, the law that we alleged that Facebook violated. But now, under the proposed order, Facebook can be subject to fines for order violations.” (footnote omitted)).

order included a crucial provision: an independent audit of Facebook's privacy and security practices conducted biennially for twenty years.<sup>66</sup>

A smaller regulatory initiative, undertaken by a single state, shows both the possible multitude of regulators even within a single country and the extent of Facebook's reach into our relationships. This statute targeted Facebook users as the focus of regulation, rather than Facebook itself. In 2011, Missouri passed the Amy Hestir Student Protection Act, a statute that included a section that quickly became known as the "Facebook Law."<sup>67</sup> The law barred teachers from using "a nonwork-related website that allows exclusive access with a current or former student."<sup>68</sup> In effect, this law outlawed teachers from using Facebook or other social media to communicate with students. This provision was motivated by reports of teachers using online services to engage in misconduct with students such as explicit online messages. It responded to concerns that social media allowed teachers to reach students outside the classroom and without parental supervision. A lawsuit followed a storm of criticism. The Missouri State Teachers Association sought to enjoin the contested portions of the statute as a violation of teachers' First Amendment rights. The Missouri court granted a preliminary injunction based on the statute's "chilling effect on speech."<sup>69</sup> In October 2011, the Missouri legislature repealed the contested section of the law, replacing it with a requirement that each school board develop a social media policy "to prevent improper communications between staff members and students."<sup>70</sup>

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66. Agreement Containing Consent Order, *supra* note 63, pt. 5.

67. Amy Hestir Student Protection Act, § A, 2011 Mo. Legis. Serv. 938, 946 (West), repealed by Act of Oct. 21, 2011, 2011 Mo. Legis. Serv. 1st Ex. Sess. S.B.1 (West), available at <http://www.senate.mo.gov/11info/pdf-bill/S1/tat/SB1.pdf>; see also Katherine Bindley & Timothy Stenovec, *Missouri 'Facebook Law' Limits Student-Teacher Interactions Online, Draws Criticism and Praise*, HUFFINGTON POST (Aug. 3, 2011, 8:58 AM), [http://www.huffingtonpost.com/2011/08/03/missouri-facebook-law\\_n\\_916716.html](http://www.huffingtonpost.com/2011/08/03/missouri-facebook-law_n_916716.html) (describing reactions to Missouri's "Facebook Law").

68. § A, 2011 Mo. Legis. Serv. at 946.

69. Amended Order Entering Preliminary Injunction at 2, *Mo. State Teachers Ass'n v. Missouri*, No. 11AC-CC00553, 2011 WL 4425537 (Mo. Cir. Ct. Aug. 26, 2011). Circuit Judge Jon E. Beetem explained that

social networking . . . is often the primary, if not sole manner, of communications between the Plaintiffs and their students. Examination of the statute indicates that that [sic] it would prohibit all teachers from using any non-work-related social networking sites which allow exclusive access with current and former students. It clearly prohibits communication between family members and their teacher parents using these types of sites. The Court finds that the statute would have a chilling effect on speech.

*Id.*

70. MO. ANN. STAT. § 169.069(2) (West 2011); see also Jason Hancock, *Nixon Signs Revised 'Facebook Law,' MOSIRA*, STL TODAY (Oct. 21, 2011, 2:40 PM), <http://www>

*B. Germany*

Within Europe, Facebook has met its sharpest critics in Germany, a country with a deep commitment to privacy.<sup>71</sup> Facebook's social graph architecture allows any site to share information between the site and the Facebook platform,<sup>72</sup> permitting readers of the German newsmagazine *Spiegel Online* to see what stories their Facebook "friends" like for example. Websites such as *Spiegel Online* often use a "Like" button to connect their visitors to Facebook, permitting users to promote a particular item with a single click.<sup>73</sup> Many users might assume that no information would be passed to Facebook unless they pressed the "Like" button, but they would be wrong. An executive at a privacy software company offers a startling comparison: "What people don't realize is that every one of these buttons is like one of those dark video cameras. If you see them, they see you."<sup>74</sup>

Facebook admits that the company can see "information such as the IP address" of users who visit a site with a "Like" button.<sup>75</sup> But it says that it simply collects aggregate data: "According to Facebook, it simply counts the number of Internet Protocol (IP) addresses that visit sites with Like

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.stltoday.com/news/local/govt-and-politics/political-fix/article\_0972f5b4-fc1e-11e0-bd3b-0019bb30f31a.html (providing an account of the events leading up to repeal of the law). For further discussion of the First Amendment concerns raised by regulating teachers' use of social networking, see generally Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597 (2012).

71. See generally James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) (discussing the different conceptions of privacy in the United States and Germany).

72. In 2010, Facebook opened up its powerful platform, allowing any site in the world to connect to Facebook. Emily Bell, *Why Facebook's Open Graph Idea Must Be Taken Seriously*, GUARDIAN (U.K.) (Apr. 26, 2010, 2:00 PM), <http://www.guardian.co.uk/media/pda/2010/apr/26/facebook-f8-emily-bell>.

73. *Spiegel Online's* English site calls the Facebook button "Recommend," instead of "Like." See *'Like' Button Battle: Facebook Agrees to Voluntary Privacy Code*, SPIEGEL ONLINE (Ger.) (Sept. 8, 2011), <http://www.spiegel.de/international/germany/0,1518,785190,00.html>. By moving from a self-hosted comment system to one employing Facebook, newspapers rid themselves of most anonymous or pseudonymous comments because most people use their real names on Facebook (as its policy requires). Commentators accordingly become more careful about what they say because they can be more easily held accountable for it. At the same time, the policy makes it easier to identify political dissidents as well.

74. Riva Richmond, *As 'Like' Buttons Spread, So Do Facebook's Tentacles*, N.Y. TIMES (Sept. 27, 2011, 3:51 PM), <http://bits.blogs.nytimes.com/2011/09/27/as-like-buttons-spread-so-do-facebooks-tentacles/>.

75. Melissa Eddy, *German Privacy Watchdog Dislikes Facebook's 'Like,'* USA TODAY (Aug. 19, 2011), <http://www.usatoday.com/tech/news/story/2011/08/German-privacy-watchdog-dislikes-Facebooks-Like/50061684/1>.



buttons . . . .”<sup>76</sup> The Facebook privacy policy, however, suggests that Facebook receives an array of data when a user visits a website that connects to the Facebook Platform through such links as the “Like” button:

We receive data whenever you visit a game, application, or website that uses Facebook Platform or visit a site with a Facebook feature (such as a social plugin). This may include the date and time you visit the site; the web address, or URL, you’re on; technical information about the IP address, browser and the operating system you use; and, if you are logged in to Facebook, your User ID.<sup>77</sup>

In August 2011, the data protection minister for the northern German State of Schleswig-Holstein, Thilo Weichert, declared that the “Like” button and other Facebook actions violated both German and European law. The state data protection authority led by Weichert, the Independent Center for Data Protection for Schleswig-Holstein (the “ULD”), explained: “Whoever visits facebook.com or uses a plug-in must expect that he or she will be tracked by the company for two years. Facebook builds a broad profile for members and even a personalized profile. Such profiling infringes German and European data protection law.”<sup>78</sup> The ULD thus directed websites based in the state to desist from connecting their site to Facebook through the “Like” button subject to a penalty of up to €50,000. The ULD also directed government agencies to shutter their own Facebook pages.<sup>79</sup> The Schleswig-Holstein Tourism Agency was one of the entities that complied with the ruling, pulling its Facebook page. While noting that the Tourism Agency takes issues of privacy very seriously, a spokeswoman for the agency also “bemoaned the loss of the tools provided by the social media platform, saying they had been useful for business.”<sup>80</sup>

In response to these complaints, Facebook announced in September 2011 that it would abide by a voluntary code of conduct in Germany to protect user data, which, according to reports, was “the first time the site

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76. *Id.* (reporting a Facebook spokesperson’s statement that “[w]e delete this technical data within 90 days”); Stuart Tiffen, *Facebook’s ‘Like’ a Hot Button Issue in Germany*, DEUTSCHE WELLE (Ger.) (Sept. 9, 2011), <http://www.dw.de/dw/article/0,,15375988,00.html>.

77. *Data Use Policy*, FACEBOOK, [https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy) (last updated Sept. 23, 2011).

78. Press Release, Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein [the Independent Center for Data Protection for Schleswig-Holstein (“ULD”)], ULD to Website Owners: “Deactivate Facebook Web Analytics” (Aug. 19, 2011), *available at* <https://www.datenschutzzentrum.de/presse/20110819-facebook-en.htm>.

79. *Id.*

80. Tiffen, *supra* note 76.

has agreed to such measures.”<sup>81</sup> The details of this code have not been published to date.

Facebook has not smoothed its relations with all German authorities, however. In November 2011, the data protection authority of the German State of Hamburg said that it planned to initiate legal action against Facebook for a new feature that automatically recognizes faces in photos posted to the site.<sup>82</sup> The Hamburg authority complained that Facebook had introduced this feature without seeking user consent. Indeed, in the United States, at least, the feature is activated by default, though an individual can disable it if he or she chooses.<sup>83</sup>

### C. *Austria and Ireland*

While German authorities have provided Facebook the most fierce European resistance, Austria and Ireland have also questioned the social network’s privacy practices. In July 2011, twenty-four-year-old Austrian law student Max Schrems, exercising his right under European data protection law,<sup>84</sup> asked Facebook for the information it had collected about him. He received a CD with more than 1,200 pages of information.<sup>85</sup> On these pages he found

everyone he had ever friended and de-friended, every event he had ever been invited to (and how he responded), a history of every “poke” he had ever received, a record of who else signed onto Facebook on the same computers as him, email addresses that he

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81. *German Minister Advises Colleagues To Shun Facebook*, AGENCE FRANCE-PRESSE (Fr.) (Sept. 11, 2011), [http://www.google.com/hostednews/afp/article/ALeqM5hyxHKd75Jl0hI\\_RfeclhEvMPZ8w?docId=CNG.ee29706d29744c955731a90381f66cc5.831](http://www.google.com/hostednews/afp/article/ALeqM5hyxHKd75Jl0hI_RfeclhEvMPZ8w?docId=CNG.ee29706d29744c955731a90381f66cc5.831).

82. Cyrus Farivar, *Hamburg Considers Suing Facebook Over Facial Recognition Feature*, DEUTSCHE WELLE (Ger.) (Nov. 10, 2011), <http://www.dw-world.de/dw/article/0,,15523030,00.html>.

83. See Matt Elliott, *How To Disable Facial Recognition in Facebook*, CNET (June 8, 2011, 11:38 AM), [http://howto.cnet.com/8301-11310\\_39-20070045-285/how-to-disable-facial-recognition-in-facebook/](http://howto.cnet.com/8301-11310_39-20070045-285/how-to-disable-facial-recognition-in-facebook/).

84. The Data Protection Directive requires each E.U. member state to provide citizens a “right of access” to the information stored and processed about them. See Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 12, 1995 O.J. (L 281) 31, 42 (EC). Article 12 of this directive states that “[m]ember States shall guarantee every data subject the right to obtain from the controller: (a) without constraint at reasonable intervals and without excessive delay or expense: . . . communication to him in an intelligible form of the data undergoing processing and of any available information as to their source.” *Id.*

85. Kashmir Hill, *Max Schrems: The Austrian Thorn in Facebook’s Side*, FORBES (Feb. 7, 2012, 10:03 AM), <http://www.forbes.com/sites/kashmirhill/2012/02/07/the-austrian-thorn-in-facebooks-side/>.

hadn't provided for himself (but that must have been culled from his friends' contact lists) and all of his past messages and chats, including some with the notation "deleted."<sup>86</sup>

Another user with the initials "L.B." asked Facebook for the information it held about her, and received a CD containing merely 880 pages, including a list of all persons who had ever "poked" her, "a list of the machines that L.B. has used Facebook from, how often she has signed in from the machine, as well as a list of all the other Facebookers who have logged in on that machine."<sup>87</sup> With these dossiers in hand, a group of activists calling themselves Europe versus Facebook filed a complaint with Facebook's European regulator, the Irish Data Protection Commissioner.<sup>88</sup> The group complained that Facebook was violating Irish and European privacy law by, for example, saving data that was thought to have been deleted.

In December 2011, the Office of the Irish Data Protection Commissioner announced both its findings on the basis of an audit and its resolution of the claims. The report did not focus on whether Facebook had broken European or Irish data protection law, but whether Facebook had adopted what the Commissioner believed to be best practices for the social network in its European operations. Indeed, despite suggesting various changes to Facebook's policies, the report indicated that its recommendations "do not carry an implication that [Facebook Ireland's] current practices are not in compliance with Irish data protection law."<sup>89</sup> Facebook agreed to modify its policies in a number of ways,<sup>90</sup> including

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86. *Id.*

87. Kashmir Hill, *Facebook Keeps a History of Everyone Who Has Ever Poked You, Along with a Lot of Other Data*, FORBES (Sept. 27, 2011, 4:36 PM), <http://www.forbes.com/sites/kashmirhill/2011/09/27/facebook-keeps-a-history-of-everyone-who-has-ever-poked-you-along-with-a-lot-of-other-data/>.

88. See Hill, *supra* note 85. I return to the question of why Ireland is Facebook's European regulator below. See *infra* notes 154–55 and accompanying text.

89. OFFICE OF DATA PROT. COMM'R OF IR., FACEBOOK IRELAND LTD.: REPORT OF AUDIT 4 (Dec. 21, 2011), available at <http://dataprotection.ie/documents/facebook%20report/final%20report/report.pdf>.

90. The Commissioner summarized the changes to Facebook's policies as follows:

The Report records significant recommendations and commitments from Facebook Ireland in relation to:

- a mechanism for users to convey an informed choice for how their information is used and shared on the site including in relation to Third Party Apps
- a broad update to the Data Use Policy/Privacy Policy to take account of recommendations as to where the information provided to users could be further improved

anonymizing or deleting information gained through third-party websites connected to the Facebook platform, increasing the privacy controls available to users, and deleting information about advertisements clicked on by users after two years.<sup>91</sup>

Even though the Irish Data Protection Commissioner visited Facebook's Silicon Valley offices,<sup>92</sup> Facebook, Inc. itself was not the subject of the audit. Rather Facebook Ireland, Ltd. was the subject of the audit and the entity taking on obligations for changes.<sup>93</sup> But despite the focus on the Irish entity, the Irish enforcement action has implications beyond Ireland and even beyond Europe. While the audit was focused on Facebook's Irish data processing facility, the Irish Data Protection Commissioner did visit Facebook's Palo Alto headquarters and meet with Mark Zuckerberg. Furthermore, because Facebook places responsibility for data about persons outside the United States and Canada with Facebook

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- transparency and control for users via the provision of all personal data held to them on request and as part of their everyday interaction with the site
  - the deletion of information held on users and non-users via what are known as social plugins and more generally the deletion of data held from user interactions with the site much sooner than presently
  - increased transparency and controls for the use of personal data for advertising purposes
  - an additional form of notification for users in relation to facial recognition/"tag suggest" that is considered will ensure Facebook Ireland is meeting best practice in this area from an Irish law perspective
  - an enhanced ability for users to control tagging and posting on other user profiles
  - an enhanced ability for users to control whether their addition to Groups by friends
  - the Compliance management/Governance function in Dublin which will be further improved and enhanced to ensure that the introduction of new products or new uses of user data take full account of Irish data protection law.

Press Release, Office of Data Prot. Comm'r of Ir., Report of Data Protection Audit of Facebook Ireland Published (Dec. 21, 2011), *available at* <http://dataprotection.ie/viewdoc.asp?DocID=1175&m=f>.

91. OFFICE OF DATA PROT. COMM'R OF IR., *supra* note 89, at 86 (regarding cookies/third-party information); *id.* at 7 (allowing users greater rights to delete data about certain actions on Facebook); *id.* at 61–62 (limiting retention of ad-click data to two years).

92. *Id.* at 21 ("In September 2010 in recognition of the necessity to raise awareness in relation to the requirements of EU Data Protection law, the Commissioner visited Facebook Inc HQ in Palo Alto, California and met with the company CEO and other senior executives with roles and responsibilities which could be influential in this area.")

93. *Id.* at 21–23.

Ireland, Ltd., the home regulator of Facebook Ireland becomes, de facto, the regulator of Facebook across the world (outside the United States and Canada). Of course, this does not mean that other nations cannot regulate simultaneously. The Irish Data Protection Commissioner does not claim exclusive regulatory authority over Facebook even within Europe.<sup>94</sup> From the perspective of those concerned about protecting privacy, there are some advantages to this arrangement for those outside Europe. European data protection laws are stricter than United States laws<sup>95</sup> and, thus, offer a stricter home regulator than the American alternative.

*D. France*

France appears to be among the European countries who have battled Facebook—and won. In *Hervé G. v. Facebook France*, the Paris Court of First Instance considered a claim brought by a French Bishop against Facebook.<sup>96</sup> Bishop Hervé Giraud of Soissons claimed that a Facebook page titled “Courir nu dans une église en poursuivant l’évêque” (running naked in a church after the bishop) incited hate and violence against Catholics and, thus, violated the French hate speech codes.<sup>97</sup> He also claimed that his photograph was used without his permission.<sup>98</sup> The French court ruled in the bishop’s favor on both grounds.<sup>99</sup> Even though the photograph at issue was not at all scandalous, but rather simply a portrait of the bishop,<sup>100</sup> the French court ordered Facebook to remove the page, and to pay €2,000 in damages, with a penalty of €500 for every day the page remained up.<sup>101</sup> In addition, Facebook was ordered to identify the person who posted the page.<sup>102</sup>

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94. *Id.* at 21 (“The position of the Data Protection Commissioner should not however be interpreted as asserting sole jurisdiction over the activities of Facebook in the EU.”).

95. See Anupam Chander, *How Law Made Silicon Valley* 32–33 (Mar. 1, 2012) (unpublished manuscript) (on file with the North Carolina Law Review).

96. See Rick Mitchell, *French Court Fines Facebook for Page with Photo of Bishop, ‘Insulting’ Caption*, 15 *Electronic Com. & L. Rep. (BNA)* 662 (Apr. 28, 2010), available at 2010 WL 1667686.

97. *Id.*

98. *Id.*

99. *Id.*

100. See Joséphine Bataille, *Condamné pour Outrage à un Évêque, Facebook Gagne en Appel*, LA VIE (Fr.) (Nov. 1, 2011), [http://www.lavie.fr/actualite/france/condamne-pour-outrage-a-un-veque-facebook-gagne-en-appel-11-01-2011-13046\\_4.php](http://www.lavie.fr/actualite/france/condamne-pour-outrage-a-un-veque-facebook-gagne-en-appel-11-01-2011-13046_4.php) (providing an image of the Facebook page).

101. Mitchell, *supra* note 96.

102. *Id.* (reporting that the court “ordered the company to identify the author of the page and of what it termed hate-inciting comments posted on the page that alleged, among other things, pedophilia”).

Facebook failed to appear before the trial court.<sup>103</sup> Indeed, Facebook's French entity seems to have insisted that the complaint should be lodged with the Facebook parent entity, rather than Facebook France. The bishop's attorney told the BNA news service that (in the news service's words) "Facebook France indicated to him that it had no connection to the litigious page and that the bishop would have to pursue Facebook.com in the United States."<sup>104</sup>

*E. Canada*

One of the most thorough official examinations of Facebook's privacy practices to date was conducted by Canadian authorities. Faced with a complaint about Facebook's privacy policies, in 2009 the Canadian Privacy Commissioner undertook an investigation into those practices.<sup>105</sup> Assistant Commissioner Elizabeth Denham made a number of findings about the allegations, concluding that some were well founded while others were not.<sup>106</sup> With respect to the former group, Assistant Commissioner Denham made a number of recommendations in a preliminary report. Facebook implemented a number of changes in response to these recommendations.<sup>107</sup> It appears that Facebook applied these changes to its American offerings as well. In a sense then, Assistant Commissioner Denham became a privacy commissioner for Americans as well, as her recommendations were implemented in a manner that affects Facebook's operations for Americans.<sup>108</sup>

Facebook did not agree to all the recommendations, however. Facebook was asked "to implement technological measures to limit application developers' access to user information that is not required to run a specific application."<sup>109</sup> It refused to do so, instead proposing to give

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103. *Id.*

104. *Id.*

105. See ELIZABETH DENHAM, OFFICE OF THE PRIVACY COMM'R OF CAN., REPORT OF FINDINGS INTO THE COMPLAINT FILED BY THE CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC (CIPPIC) AGAINST FACEBOOK INC. UNDER THE PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT *passim* (2009), available at [http://publications.gc.ca/collections/collection\\_2010/privcom/IP54-31-2009-eng.pdf](http://publications.gc.ca/collections/collection_2010/privcom/IP54-31-2009-eng.pdf).

106. *Id.* at 3.

107. *Id.*

108. Cf. Tim Wu, *The International Data Privacy Regime*, in SECURING PRIVACY IN THE INTERNET AGE 91, 92 (Anupam Chander et al. eds., 2008) (explaining how privacy advocates use foreign law to police American technology companies).

109. DENHAM, *supra* note 105, at 53–54.

users specific consent for each category of information shared with third-party applications.<sup>110</sup>

In addition to the privacy audit, Facebook has had to deal with litigation in Canada. In *St-Arnaud v. Facebook, Inc.*,<sup>111</sup> the Montreal Superior Court considered a privacy-based challenge against Facebook. The petitioner, Patrice St-Arnaud, sought to have the court certify a class action brought by Quebec residents who claimed they were harmed by Facebook's privacy practices.<sup>112</sup> Facebook argued that Quebec users of its service had agreed to resolve disputes exclusively in its home jurisdiction in Santa Clara County, California.<sup>113</sup> The submission to jurisdiction clause in the terms of use read as follows:

You will resolve any claim, cause of Action or dispute ("claim") you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County.<sup>114</sup>

St-Arnaud argued that the clause was part of an abusive adhesion contract and should, therefore, be unenforceable.<sup>115</sup>

Relying on the Supreme Court of Canada's decision in *Dell Computer Corp. v. Union des consommateurs*,<sup>116</sup> in which the Canadian Supreme Court ruled that hyperlinked terms of use gave users sufficient notice and were therefore enforceable, the Montreal Superior Court held that St-Arnaud was bound by Facebook's terms.<sup>117</sup>

St-Arnaud offered an alternative, and seemingly promising, argument under the Civil Code of Quebec, which declared that waivers of the jurisdiction of local courts were not valid in consumer contracts.<sup>118</sup> The Montreal Superior Court ruled, however, that "Facebook does not have a consumer relationship with its Users," because "[a]ccess to the Facebook

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110. Press Release, Office of the Privacy Comm'r of Can., Facebook Agrees to Address Privacy Commissioner's Concerns (Aug. 27, 2009), available at [http://www.priv.gc.ca/media/nr-c/2009/nr-c\\_090827\\_e.cfm](http://www.priv.gc.ca/media/nr-c/2009/nr-c_090827_e.cfm).

111. [2011] QCCS 1506 (Can. Que.), available at <http://www.canlii.org/en/qc/qccs/doc/2011/2011qccs1506/2011qccs1506.pdf>.

112. *Id.* para. 1.

113. *Id.* para. 13. There was also a choice of law clause choosing the laws of the State of California, but that was not at issue in the case.

114. *Id.*

115. *Id.* para. 25.

116. [2007] 2 S.C.R. 801 (Can.).

117. *Id.* para. 45–49. See *infra* notes 183–85 and accompanying text for a discussion of Facebook's forum selection and choice of law clause.

118. Civil Code of Québec, S.Q. 1991, c. 64 art. 3149 (Can.) ("A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.").

website is completely free.”<sup>119</sup> A consumer contract is “premised on payment and consideration,” and must be “onerous.”<sup>120</sup> Thus St-Arnaud could not take advantage of the mandatory Quebec law to maintain an action in Montreal, despite Facebook’s terms of use.

Even while Quebec consumer protection law might not be applicable to Facebook, Facebook itself might have had an impact on Canadian law. The pressure of Facebook and other social media services based outside Canada seems to have resulted in the Canadian government rescinding its ban on election night release of early election results.<sup>121</sup> In place since 1938, the law was designed to prevent what was seen as improper influence on voting in the western provinces by the results of voting in eastern provinces.<sup>122</sup> The Canadian Supreme Court had upheld the restriction in 2007 as a speech constraint that was within parliamentary power.<sup>123</sup> Unwilling to expend the resources to try to enforce the gag rule, in January 2012, the Canadian government announced its reversal of the 1930s law via a twenty-first century medium, Twitter.<sup>124</sup>

#### F. *China, Syria, Tunisia, and Egypt*

While many governments in liberal states have found Facebook an irritant, a few governments see it as a mortal threat. In July 2010, a newspaper associated with the Chinese Communist Party carried the following front page headline: “Facebook could be a spy tool.”<sup>125</sup> A report by the Chinese Academy of Social Sciences concluded, “Facebook and certain other social networking sites may be exploited by Western intelligence services and used for subversive purposes . . . . Its special political function can be a threat.”<sup>126</sup> The report went on to say that “[i]n the name of freedom, some organisations or people are encouraging revolt.”<sup>127</sup>

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119. *St-Arnaud*, [2011] QCCS 1506, para. 51–52.

120. *Id.* para. 54.

121. *Twitter and Facebook Force End to Canada’s Election Night Internet Gag*, NAT’L POST (Can.) (Jan. 13, 2012), <http://news.nationalpost.com/2012/01/13/law-banning-communication-of-election-results-while-polls-open-repealed-by-harper-government/>.

122. *Id.*

123. *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, 564 (Can.).

124. *Twitter and Facebook Force End to Canada’s Election Night Internet Gag*, *supra* note 121.

125. Reshma Patil, *Chinese Think-Tank Finds Facebook a Political Threat*, HINDUSTAN TIMES (India) (July 10, 2010), <http://www.hindustantimes.com/News-Feed/World/Chinese-think-tank-finds-Facebook-a-political-threat/Article1-570084.aspx>.

126. *Id.*

127. *Id.*



In July 2009, China blocked Facebook across the country after unrest in the northwest province of Xinjiang.<sup>128</sup> The site remains blocked as of this writing.<sup>129</sup> According to a report by Sohu.com, Mark Zuckerberg has held several meetings with Baidu CEO Robin Li to discuss a possible deal to develop a Chinese offering for Facebook.<sup>130</sup> Thus far at least, it does not appear that these discussions have borne fruit.

In 2009, Syria blocked access to Facebook after Facebook permitted residents of the Golan Heights to claim Israel as their country of abode.<sup>131</sup> Facebook had responded to earlier protests of its policy of requiring residents of that area to specify Syria as their country of residence.<sup>132</sup> Critics suggested that “the Syrian government was simply looking for a pretext to block Facebook because it fears the influence of the social networking site.”<sup>133</sup> Syria restored access, only to deny all Internet access in early June 2011 in response to widespread protests.<sup>134</sup> Again, Syria restored the Internet, though protests and violent repression continue as of this writing.<sup>135</sup>

In Tunisia, weeks before the Ben Ali dictatorship fell, it was reported that the government was trying to “steal[] an entire country’s worth of passwords.”<sup>136</sup> Dissidents “found their Facebook pages taken over without their knowledge.”<sup>137</sup> Back in California, Facebook treated the hacking as “a

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128. *Id.*

129. See *Test Results for Facebook.com*, GREATFIREWALLOFCHINA.ORG, <http://www.greatfirewallchina.org/index.php?siteurl=facebook.com> (last visited Apr. 8, 2012); see also John Boudreau, *Culture Clash at Heart of Facebook’s China Problem*, SAN JOSE MERCURY NEWS (Dec. 13, 2011, 2:05 PM), [http://www.mercurynews.com/china/ci\\_18450897](http://www.mercurynews.com/china/ci_18450897) (describing some of the challenges confronting Facebook as it seeks to enter China).

130. Mark Lee, *Facebook Reaches Deal for China Site with Baidu, Sohu Reports*, BLOOMBERG (Apr. 11, 2011), <http://www.bloomberg.com/news/2011-04-11/facebook-reaches-deal-for-china-site-with-baidu-sohu-com-says.html>.

131. *Syria Blocks Facebook After Golan Israel Recognition*, GLOBES (Isr.) (Sept. 15, 2009), <http://www.globes.co.il/serveen/globes/docview.asp?did=1000498621>.

132. *Id.*

133. *Id.* Maps are, of course, highly political. See, e.g., Kwame Opah, *Google Legitimizes Libya’s New Government on Google Maps*, GIZMODO (Aug. 22, 2011), <http://gizmodo.com/5833297/google-legitimizes-libyas-new-government-on-google-maps>.

134. Elizabeth Flock, *Syria Internet Services Shut Down as Protesters Fill Streets*, WASH. POST (June 3, 2011, 9:58 AM), [http://www.washingtonpost.com/blogs/blogpost/post/syria-internet-services-shut-down-as-protesters-fill-streets/2011/06/03/AGtLwxHH\\_blog.html](http://www.washingtonpost.com/blogs/blogpost/post/syria-internet-services-shut-down-as-protesters-fill-streets/2011/06/03/AGtLwxHH_blog.html).

135. See Louis Charbonneau & Michelle Nichols, *U.N. Says Syrian Violence Continues Despite Pledges To End It*, REUTERS (Apr. 23, 2012, 2:56 PM), <http://www.reuters.com/article/2012/04/23/us-syria-un-idUSBRE83M0YM20120423>; *Transparency Report*, GOOGLE, <http://www.google.com/transparencyreport/traffic/> (last visited May 3, 2012).

136. Alexis Madrigal, *The Inside Story of How Facebook Responded to Tunisian Hacks*, ATLANTIC (Jan. 24, 2011), <http://www.theatlantic.com/technology/archive/2011/01/the-inside-story-of-how-facebook-responded-to-tunisian-hacks/70044/>.

137. Georgia Prodhon, *Egypt Shows How Easily Internet Can Be Silenced*, REUTERS (Jan. 28, 2011), <http://af.reuters.com/article/egyptNews/idAFLDE70R09P20110128>.

black and white security issue and less of a political issue.”<sup>138</sup> Access to Facebook was insecure because Facebook had not offered more secure communications options. As a *Wired* “Threat Level” blogger explained,

The dangers of that design decision became very clear earlier this month when the Tunisian government, via the country’s largest ISP, inserted rogue JavaScript into the html of Facebook.com’s homepage as users loaded it, in order to steal passwords of activists. It used those passwords to delete accounts and pages critical of the regime.<sup>139</sup>

In response, Facebook allowed users to use https, “a more secure method of accessing Facebook,” throughout its site.<sup>140</sup> Facebook also devised a clever method to foil government infiltrators of dissident accounts. It required anyone logging in to an account to prove his or her identity by identifying that person’s friends.<sup>141</sup>

Access to Facebook proved crucial because Tunisians wanted to share videos of the government’s repression, and other video sites were blocked by the Tunisian government.<sup>142</sup> Videos posted to Facebook helped disseminate information widely among the Tunisian population:

The videos—shot shakily with cameraphones—created a link between what was happening on the streets in the poor areas of the country and the broader Tunisian population. . . . Those videos, and the actions they recorded, became the raw material for a much greater online apparatus that could amplify each injury, death, and protest.<sup>143</sup>

For example, a small-town fruit-and-vegetable peddler named Mohamed Bouazizi who tragically immolated himself to protest conditions in Tunisia is known the world-over. Video of his mother’s protest following

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138. Madrigal, *supra* note 136.

139. Ryan Singel, *Facebook Enables HTTPS So You Can Share Without Being Hijacked*, WIRE (Jan. 26 2011, 6:17 PM), [http://www.wired.com/threatlevel/2011/01/facebook-https/?utm\\_source=Contextly&utm\\_medium=RelatedLinks&utm\\_campaign=Previous](http://www.wired.com/threatlevel/2011/01/facebook-https/?utm_source=Contextly&utm_medium=RelatedLinks&utm_campaign=Previous).

140. *Facebook Helps Foment Revolution in Egypt and Tunisia*, PUB. RADIO INT’L (Jan. 27, 2011), <http://www.pri.org/stories/business/social-entrepreneurs/facebook-helps-foment-revolution-in-egypt-and-tunisia2586.html>.

141. Madrigal, *supra* note 136. Interestingly, this demonstrates a privacy-enhancing use for photo tagging, a feature usually criticized as undermining privacy.

142. Yasmine Ryan, *How Tunisia’s Revolution Began*, AL JAZEERA (Jan. 26, 2011), <http://www.aljazeera.com/indepth/features/2011/01/2011126121815985483.html> (“Facebook, unlike most video sharing sites, was not included in Tunisia’s online censorship.”).

143. Madrigal, *supra* note 136.

Bouazizi's death was broadcast on television by Al Jazeera, which "had picked up the footage via Facebook."<sup>144</sup>

Facebook, of course, seeks to keep its services as widely available as possible. Dan Rose, who is responsible for Facebook's worldwide business development, states, "We try very hard to keep Facebook available wherever people want to access it." He continues, "We have outreach and relationships with governments all around the world. We can only do what we can do."<sup>145</sup>

Of course, perhaps the most important use of Facebook thus far was by the Egyptian revolutionaries. Wael Ghonim, the Google Middle East executive who helped spark the revolution using Facebook, thanked Mark Zuckerberg after Hosni Mubarak fell:

I want to meet Mark Zuckerberg one day and thank him. . . . I'm talking on behalf of Egypt. . . . This revolution started online. This revolution started on Facebook. This revolution started . . . in June 2010 when hundreds of thousands of Egyptians started collaborating content. We would post a video on Facebook that would be shared by 60,000 people on their walls within a few hours. I've always said that if you want to liberate a society just give them the Internet.<sup>146</sup>

Here, it seems clear that Facebook had an impact and that local authorities lacked the power over it that they would have liked. In Egypt, the Mubarak government demonstrated its fear of Facebook and other social media by switching off the Internet for the entire country.<sup>147</sup>

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The above review of points of tension between the law and Facebook in countries across the world reveals neither that the local government always prevails nor that Facebook always prevails. We see Facebook bending its course—for example, agreeing to independent privacy and security audits. We also see governments changing theirs—take for example Canada, rescinding a 1938 election law, or, more dramatically, Egypt's Hosni Mubarak yielding power in the face of mass demonstrations nurtured by social media.

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144. Ryan, *supra* note 142.

145. Prodhon, *supra* note 137.

146. Catharine Smith, *Egypt's Facebook Revolution: Wael Ghonim Thanks the Social Network*, HUFFINGTON POST (Feb. 11, 2011), [http://www.huffingtonpost.com/2011/02/11/egypt-facebook-revolution-wael-ghonim\\_n\\_822078.html](http://www.huffingtonpost.com/2011/02/11/egypt-facebook-revolution-wael-ghonim_n_822078.html).

147. See Anupam Chander, *Jasmine Revolutions*, 97 CORNELL L. REV. (forthcoming 2012) (manuscript at 18) (on file with the North Carolina Law Review).

## III. THE JURISDICTIONAL DANCE

Richard Ford compares jurisdiction to dance. Like dance, Ford tells us, jurisdiction exists through its performance.<sup>148</sup> But he also means an almost literal dance across the border, like that of the Von Trapp family crossing the border into Switzerland.<sup>149</sup> With Facebook, we see both the company and governments stumbling over borders, uncertain which way to step or who should lead. The jurisdictional dance here is hardly graceful, but is rather characterized by what we might call jurisdiction confusion.<sup>150</sup>

A. *Jurisdiction Confusion*

Return to the disliking “Like” controversy. When the data protection authority in the German State of Schleswig-Holstein ruled that the Facebook web analytics were illegal under German law, it sharply limited its ruling. It imposed its prohibition on the “Like” button only to “website owners in Schleswig-Holstein,” by which it seems to mean websites owned by persons located in that German state.<sup>151</sup> It did not command Facebook itself to no longer collect information from “Open Graph” affiliates in the absence of affirmative actions by the user to share information with Facebook. That is, even though the data protection authority ruled that Facebook’s practices violated German and European law, it did not tell Facebook to stop.

Why did the German state authority pull its punch? A clue might be found in its public statement explaining its ruling. There the authority noted that “Facebook . . . does not have an establishment in Germany.”<sup>152</sup> Under the European Data Protection Directive, the physical location of the establishment is relevant to the assignment of both the law and the regulatory authority. Under Article 4 of the Directive, the national law applicable to a data processor is the law of the state of the establishment of the data controller.<sup>153</sup> The Directive makes the establishment accountable to its local data protection authority.

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148. See Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 855–56 (1999).

149. *Id.* at 856.

150. Cf. Christopher Kuner, *Data Protection Law and International Jurisdiction on the Internet (Part 2)*, 18 INT’L J.L. & INFO. TECH. 227, 235 (2010) (characterizing “problems caused by online jurisdictional uncertainties in the context of data protection [as] serious”).

151. Press Release, *supra* note 78.

152. *Id.*

153. Council Directive 95/46, art. 4., 1995 O.J. (L 281) 31, 39 (EC). Article 4 of the Data Protection Directive provides as follows:

National law applicable

For its part, Facebook seems to insist that Irish law applies to its entire European operation. A German newspaper explained that “Facebook had previously said it needed to obey only Irish law as it maintained a European headquarters in Dublin.”<sup>154</sup> This explains why the Austrian group brought its complaint against Facebook to Ireland.<sup>155</sup>

Uncertainty and confusion are the order of the day. When Ilse Aigner, the German Consumer Protection Minister, announced that she would advocate “strict bloc-wide rules on facial recognition, geodata and the profiling of individual Internet users,” a German newspaper noted that it “remain[s] unclear how the new rules . . . will be applied to international companies based outside of the EU.”<sup>156</sup>

In the context of web services, European law itself invites the possibility of jurisdiction confusion. On the one hand, the Brussels regulation on jurisdiction allows one to sue for torts “where the harmful event occurred.”<sup>157</sup> On the other hand, the European Union’s Directive on Electronic Commerce declares that “information society services should in principle be subject to the law of the Member State in which the service provider is established.”<sup>158</sup> The preamble to the Directive reads as follows: “[I]n order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established.”<sup>159</sup> The two commands are, of course, not necessarily incompatible. A web user might have the right to sue a website in his or her local court, yet be required to sue under foreign

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1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State . . . .

*Id.*

154. Sean Sinico, *German Minister Talks to Facebook, Google on US Tech Tour*, DEUTSCHE WELLE (Ger.) (Sept. 21, 2011), <http://www.dw.de/dw/article/0,,15404365,00.html>.

155. *See supra* note 88 and accompanying text.

156. Sinico, *supra* note 154.

157. Council Regulation 44/2001, art. 5(3), 2000 O.J. (L 012) 1, 4 (EC) (“A person domiciled in a Member State may, in another Member State, be sued: . . . 3. in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur.”). Ralf Michaels observes that “the main objective of the Regulation is ‘to allocate jurisdiction to the most appropriate Member State, regardless of sovereignty interests of the Member States.’” Ralf Michaels, *Two Paradigms of Jurisdiction*, MICH. J. INT’L L. 1003, 1042 (2006).

158. Council Directive 2000/31, sec. 22, 2000 O.J. (L 178) 1, 4 (EC).

159. *Id.*

law, specifically, the law of the company's domicile. But choice of forum and choice of law are usually tightly linked in practice.

In the consolidated cases of *eDate Advertising GmbH v. X* and *Martinez v. MGN Ltd.*,<sup>160</sup> the European Court of Justice faced this quandary directly. The two cases involved efforts by individuals to sue websites based in other European countries. Understandably, in each case, the individuals filed suit in their home jurisdiction. In the first case, a German individual sought to stop an Austrian dating website from disclosing the fact that he had been convicted of murder (the individual was now free on parole).<sup>161</sup> In the second case, French actor Olivier Martinez sought to stop a London website from alleging that he was dating Australian singer Kylie Minogue.<sup>162</sup>

The court sought to thread the needle—allowing the companies to be governed by law no stricter than that in its state of establishment, yet permitting European citizens to bring suit in local courts for the harms arising to them locally.<sup>163</sup> The court, in effect, separated the choice of law and jurisdiction inquiries—allowing suit where the consumer lives, yet limiting protections to those offered in the service provider's home jurisdiction.

Facebook for its part often seeks to resist local efforts to assert jurisdiction. In the French bishop's case, Facebook's French entity seemed to have insisted that the complaint should be lodged with the Facebook parent entity, rather than Facebook France.<sup>164</sup> As the bishop's attorney told the BNA news service (in the news service's words), "Facebook France indicated . . . that it had no connection to the litigious page and that the bishop would have to pursue Facebook.com in the United States."<sup>165</sup>

Again and again, the privacy regulators are mindful of their own limitations. Complaining that Facebook's "Like" button on non-Facebook sites allows tracking of users, the data protection authority in the German State of Schleswig-Holstein noted that it was a "small privacy agency."<sup>166</sup> The fact that the Irish authorities serve as Facebook's principal regulator for all of Europe may redound to Facebook's advantage. Given Facebook's importance to both Irish employment and to government revenues, authorities will want to be careful not to risk their golden goose. A recent

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160. Joined Cases C-509/09 & C-161/10 (Oct. 25, 2011), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0509:EN:HTML>.

161. *Id.* ¶¶ 15–18.

162. *Id.* ¶ 25.

163. *Id.* ¶ 69.

164. *See supra* notes 103–04 and accompanying text.

165. Mitchell, *supra* note 96.

166. Press Release, *supra* note 78.

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study commissioned by Facebook suggests that Facebook has contributed some €400 million in value to the Irish economy.<sup>167</sup> Irish authorities have taken to touting Facebook's decision to locate its European headquarters in their country. Figure 3 shows an advertisement run by the Irish government in Hartsfield-Jackson Atlanta International Airport, seeking to use Facebook's presence to attract additional foreign direct investment.<sup>168</sup>

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167. DELOITTE, MEASURING FACEBOOK'S ECONOMIC IMPACT IN EUROPE 6 (Jan. 2012), available at <http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/Industries/TMT/uk-tmt-media-facebook-europe-economic-impact.pdf>.

168. James Quinn, *Barry O'Leary Says Dublin's 'Emerald Valley' Is Key to Growth*, TELEGRAPH (U.K.) (Dec. 20, 2011, 11:16 PM), <http://www.telegraph.co.uk/finance/newsbysector/constructionandproperty/8968642/Barry-OLeary-says-Dublins-Emerald-Valley-is-key-to-growth.html>.

Figure 3: Facebook Advertisement<sup>169</sup>

Often the consequences for failure to observe local law are far from severe, even in Germany. When Johannes Caspar of the Hamburg data protection authority initiated legal proceedings under Germany's strict privacy laws, he noted that "*Facebook could be fined tens of thousands of euros* for saving private information of individuals who don't use the site and haven't granted it access to their details."<sup>170</sup> It was obvious even to one newspaper reporting the story that the potential fine was a "a drop in the bucket" for Facebook.<sup>171</sup>

Recall that in the French bishop case, even though Facebook failed to even appear in the French trial court to defend itself, the judgment entered against it only included a fine of €2,000 plus €500 for each day of noncompliance after the judgment—likely less than the costs of hiring a lawyer to appear for the day. While the Irish Data Protection Authority was considering the Europe versus Facebook complaint, reports suggested that Facebook might be subject to a fine of €100,000, a relatively small amount

169. The author saw this advertisement in December 2011, in Hartsfield-Jackson Atlanta International Airport. See *IDA Ireland: Facebook*, ADS OF THE WORLD, [http://adsoftheworld.com/media/print/ida\\_ireland\\_facebook](http://adsoftheworld.com/media/print/ida_ireland_facebook) (last visited May 4, 2012) (providing a reproduction of the advertisement). The text of advertisement reads: "facebook found a space for people who think in a certain way. It's called Ireland." The tagline at the bottom reads: "Ireland, Innovation comes naturally." *Id.*

170. Sam Bovard, *Germans Take on Facebook over Data Privacy*, WASH. TIMES, July 8, 2010, at A10 (emphasis added).

171. *Max's Privacy War Brings Facebook to Heel*, SYDNEY MORNING HERALD (Austl.) (Oct. 27, 2011, 10:05 AM), <http://www.smh.com.au/technology/technology-news/maxs-privacy-war-brings-facebook-to-heel-20111027-1mksg.html#ixzz1e29o4c2c>.



for a multi-billion dollar company. In fact, Facebook's settlement with the Irish authority included no monetary penalties.<sup>172</sup>

The threatened consequences for noncompliance might be so mild as to be charming. Miffed at Facebook's privacy policies, the German Federal Minister of Consumer Protection, Ilse Aigner, concluded her letter to Mark Zuckerberg urging Facebook to change policies she believed violated German law: "Should Facebook not be willing to alter its business policy and eliminate the glaring shortcomings, I will feel obliged to terminate my membership."<sup>173</sup>

### B. *Jurisdictional Rights and Wrongs*

While lawyers in the United States divide jurisdiction into subject matter jurisdiction and personal jurisdiction, international lawyers divide it in a different way, distinguishing legislative jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction. The latter division corresponds to the separation of powers familiar to students of American political structure, though international law does not require each of the three jurisdictional powers to be exercised by different agencies. Because of the division of the world into territorial sovereigns, exercises of jurisdiction are regulated by international law. Permissible bases for jurisdiction include territoriality, effects, nationality, universality, the protective principle, and passive personality. Asserting jurisdiction based on effects in a state's territory is a corollary of the territoriality principle itself. As Christopher Kuner notes, "The effects doctrine has been vehemently criticized, but seems to have become widespread, at least with regard to assertions of jurisdiction over conduct on the Internet."<sup>174</sup>

If each state asserts jurisdiction over the same website, it is inevitable that the rules for users across the world will vary. I have labeled this legal "glocalization," with a site localized to conform to different rules in different jurisdictions.<sup>175</sup> Even Facebook does this to a minor extent, offering Germans a special set of rules.<sup>176</sup>

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172. OFFICE OF DATA PROT. COMM'R OF IR., *supra* note 89, at 4.

173. Letter from Ilse Aigner, Ger. Fed. Minister of Consumer Prot., to Mark Zuckerberg, Founder and CEO, Facebook, Inc. (Apr. 5, 2010), available at <http://www.spiegel.de/international/germany/0,1518,687285,00.html>; see also *David and Goliath*, *supra* note 58, at 56 ("Shape up, Mrs Aigner warned, or she would quit the social-networking site.").

174. Christopher Kuner, *Data Protection Law and International Jurisdiction on the Internet (Part I)*, 18 INT'L J.L. & INFO. TECH. 176, 190 (2010).

175. Anupam Chander, *Trade 2.0*, 34 YALE J. INT'L L. 281, 285 (2009) (defining "glocalization" as "requiring a global service to conform to local rules when both the rules and their application to a particular transaction are consistent with international legal norms").

176. See *Statement of Rights and Responsibilities*, *supra* note 48, art. 16(3) ("Certain specific terms that apply only for German users are available here.")

States asserting jurisdiction based on effects must consider rules of proportionality. Such assertions should be tempered, with forbearance a wise course unless the interests are sufficiently strong to justify intervention.<sup>177</sup> The risk is that excessive interventions will jeopardize the worldwide nature of the web, hampering communications across borders.

*C. Who Should Rule Facebookistan?*

Let us move from the description of the current state of the law to the normative question of who should rule Facebookistan? Consider a number of possibilities:

- (1) Country of origin—letting the home country of the corporation be its exclusive regulator;
- (2) Countries of reception—letting the home countries of its users regulate;
- (3) United Nations or other treaty-based entity—granting exclusive regulatory authority to an international-treaty based entity;
- (4) Self-regulation—giving Facebook’s management free reign; or
- (5) Regulation by its users.

Each of these approaches has its virtues. The country of origin principle is efficient and clear, reducing costs for compliance. The countries of reception principle is fair to users, who will often lack the knowledge and resources to bring claims against an enormous enterprise in a distant jurisdiction. A United Nations or international treaty-based approach would involve all the governments of the world in creating a single regulatory regime. Self-regulation would be ideal for corporations, allowing them to maximize profits, subject only to a loss of consumers from potential disagreements over policies. Regulation by users would give them maximum control over the site.

Each would also carry flaws. The country of origin principle might lead corporations to race to the bottom, locating in the country with the least rules from which to operate. The countries of reception principle would subject the corporation to multiple and sometimes conflicting regulations. A treaty-based regime is difficult to imagine because it would require agreement upon a single set of rules for intellectual property, privacy, security, defamation, pornography, and hate speech. Self-

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177. Chander, *supra* note 175, at 318.

regulation might lead to exploitation of consumers, especially if consumers are not fully aware of what happens in an opaque system. Regulation by users might yield policies that fail to generate sufficient income to the corporation to provide a powerful service.

For now, the most likely disciplinary mechanisms for Facebook are governments and the website's many users.<sup>178</sup> Albert O. Hirschman famously characterized two options for the disaffected member of a community—exit or voice.<sup>179</sup> Rebecca MacKinnon offers the example of Lokman Tsui, who in May 2010, quit Facebook to protest its privacy practices.<sup>180</sup> Yet, a year later, Tsui returned. Facebook had become such a valuable tool for staying in contact with people with whom he had “weak ties” that leaving it was far more detrimental for Tsui than Facebook.<sup>181</sup> Voting with one's feet might yet prove an important disciplinary mechanism if there is a viable and popular alternative to Facebook, such as Google+ or a foreign alternative such as Mixi or Tuenty. As noted above, voice has shown occasional success in changing Facebook's policies.<sup>182</sup>

Facebook's terms of service would have its users resolve disputes with Facebook on Facebook's home turf in California.<sup>183</sup> This is true even of Facebook users outside the United States.<sup>184</sup> It should be noted that California law offers far more consumer protections than the laws of some other states. Both a California state appeals court and the Ninth Circuit Court of Appeals have refused to enforce forum selection clauses that aimed to send California consumers to Virginia state courts.<sup>185</sup> But even if California law offers a robust set of consumer protections, many users around the world may lack the resources to bring claims in California.

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178. For a discussion of why Facebook users might be able to influence Facebook, see Grimmelman, *supra* note 40, at 1204–06 (suggesting that “user-driven education” might help influence Facebook).

179. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES passim* (1970).

180. REBECCA MACKINNON, *CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM* 149 (2012).

181. *Id.* at 159 (“In a way, nobody else was punished by his exile but himself.”).

182. *See supra* notes 48–51 and accompanying text.

183. *Statement of Rights and Responsibilities*, *supra* note 48, art. 15(1) (“You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.”).

184. *See supra* 113–17 and accompanying text (applying Facebook's forum clause to Canadian users).

185. *See Doe 1 v. AOL LLC*, 552 F.3d 1077, 1084 (9th Cir. 2009); *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 707–15 (Ct. App. 2001).

Furthermore, California law may provide greater protection for speech than the laws of other jurisdictions that may protect privacy or reputations in greater measure. Finally, any contractual choice of law or forum would of course not be applicable to torts.

As it seeks to become a publicly registered corporation in the United States, Facebook will face yet another kind of public scrutiny—that of its public shareholders. A corporation that offers securities to the public must disclose information that is material to the investment decisions of those who might buy its securities.<sup>186</sup> The disclosures become useful not only to those who might invest, but also to the general public, which may have interest in the firm for other reasons. Facebook will have to inform its investors what actions might put it in legal jeopardy in a financially material way.

#### CONCLUSION

Return to the notion of Zuckerberg's law. "When we started Facebook, we built it around a few simple ideas," said Mr. Zuckerberg. "When people have control over what they share, they want to share more. When people share more, the world becomes more open and connected."<sup>187</sup> But Zuckerberg's law for a digital world will at times run afoul of the laws of countries of earth and blood. Both Facebook and governments must negotiate a reasonable path through this difficult jurisdictional terrain.

The fact that Facebook transcends national borders rather than being Balkanized into different networks (or "Stans") for each country in which it operates is a key aspect of its usefulness. After all, human beings do not confine their relationships within national borders. At the same time, Facebook gains income from serving as many people as possible, including those outside the United States.

The laws of various states—from the United States to Canada and Europe—have influenced Facebook's operations. In turn, Facebook has influenced the law, putting pressure on authoritarian governments worldwide. At the same time, United States law permits a large measure of freedom for Facebook to set the terms of Facebookistan. European and Asian states, by contrast, impose greater obligations on their social network spaces. Thus, the answer to the question of who rules Facebookistan—nation-states or Facebook—is, in the end, all of the above.

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186. 15 U.S.C. § 78(l) (Supp. I 2011).

187. Bovard, *supra* note 170.