
THE NEW SOCIAL CONTRACT: FACEBOOK’S COMMUNITY AND OUR RIGHTS

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ABSTRACT

Digital platforms have an ever-growing ability to control and regulate their users. The platforms’ terms of service, content moderation policies, and algorithms form new regulatory ecosystems. These new ecosystems, this Article argues, do more than simply establish sets of affordances and constraints; rather, they challenge and transform basic legal concepts. To demonstrate this argument, this Article analyzes Facebook’s design, technology, and rhetoric. The analysis shows that Facebook’s infrastructure creates and promotes a novel regime of rights. Rights, under this regime, protect the freedom to feel instead of the freedom to choose. They do not generate any duties—not on the fellow users, and certainly not on the platform itself, which is not accountable to, or limited by, the users’ rights. This regime of rights, unlike traditional ones, does not function through discourse and interpretation, but through code. Thus, as this Article reveals, digital platforms go beyond adding a digital layer to our personal, professional, and political relations: they also add a normative and legal layer, and shape new social contracts. Alarming, for the most part, users seem unaware of this normative aspect.

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I. INTRODUCTION

In the summer of 2017, Clay Higgins, a Republican congressional representative for Louisiana, wrote a post on his Facebook page calling for the slaughter of radicalized Muslims. “Hunt them, identify them, and kill them,” he urged.¹ The congressman’s call went untouched by Facebook. At around the same time, the Boston poet and Black Lives Matter activist, Didi Delgado, wrote on her Facebook page, “All white people are racist. Start from this reference point, or you’ve already failed.”² The company quickly removed Delgado’s post and disabled her account for seven days.³

There are some explanations for Facebook’s apparently inconsistent responses to the two expressions.⁴ However, regardless of whether these

¹ Peter Holley, *‘Kill Them. Kill Them All’: GOP Congressman Calls for War Against Radical Islamists*, THE WASHINGTON POST (June 5, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/06/05/kill-them-kill-them-all-gop-congressman-calls-for-holy-war-against-radical-islam/?utm_term=.2098f5226f9b [<https://perma.cc/25KG-LAGQ>].

² The DiDi Delgado, FACEBOOK (May 4, 2017), <https://www.facebook.com/THEDiDiDelgado/posts/my-personal-page-just-got-banned-for-the-following-post-its-official-racist-is-a/278984872549205/> [<https://perma.cc/HV52-A65Y>].

³ Julia Angwin & Hannes Grassegger, *Facebook’s Secret Censorship Rules Protect White Men From Hate Speech But Not Black Children*, PROPUBLICA (June 28, 2017), <https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms> [<https://perma.cc/3LLR-RKTA>].

⁴ There are some explanations for the arguably inconsistent application of Facebook’s moderation processes and related sanctions. According to some analyses, Higgins’ expression went untouched by Facebook because it targeted a specific sub-group of Muslims—those who are “radicalized”—while Delgado’s post was deleted for attacking whites in general. Several leaked training documents for Facebook moderators instruct trainees to protect personal characteristics such as sex, race, religious affiliation, nationality, and sexual orientation, but not such attributes as political ideology, occupation, age, and social class. Additionally, Facebook operates an escalation policy targeting repeat offenders,

responses are justified or not, it is hard to ignore the social media giant's growing power to control and regulate its more than two billion users worldwide.⁵ The platform's content-monitoring mechanisms, terms of service, technological design, and algorithms create a regulative ecosystem. In this ecosystem, this Article argues, users experience, practice, and exercise their rights in a way that is fundamentally different from how rights have been imagined and practiced in the modern tradition.

Delgado and Higgins, like all the platform's users, are subject to a novel regime, which guides, controls, regulates, and aggregates their statements and information, as well as their social, professional, and political relations. Although this regime's policies and norms are dynamic, responsive, and sometimes personalized and decentralized, they nonetheless create an internal, quasi-legal order. Referring to these political and legal capacities, some have even begun to employ the language of nationhood to describe Facebook's regime,⁶ while others propose using existing terms like the "company town" for conceptualizing this emerging power.⁷ This Article examines how this regime, however we conceive it, perceives and frames the notion of "rights," which has long served as the organizing principle of the modern Western order.

In the modern age, rights have served as the conceptual building blocks of the Western social contract. They have been used to protect citizens from political regimes, to organize citizens' relations with each other, and to conceptualize individuality. Through an in-depth examination of Facebook's design, technology, and rhetoric, this Article reveals that, under Facebook's "jurisdiction," the concept of rights continues to play a certain role, but its meaning and the social and political arrangements it produces have changed.

The power of Facebook to shape the notion of rights and the social contract lies in its ability to materialize abstract and sometimes pre-existing ideas, transforming them into a digital infrastructure.⁸ Facebook's infrastructure

according to which action is taken when there is a record of previous incidents. Each subsequent violation of Facebook's community guidelines receives a heavier punishment. For the leaked training documents, *see generally* Nick Hopkins, *Facebook Moderators: A Quick Guide to Their Job and its Challenges*, THE GUARDIAN (May 21, 2017), <https://www.theguardian.com/news/2017/may/21/facebook-moderators-quick-guide-job-challenges> [https://perma.cc/2H9J-M87E].

⁵ Facebook Newsroom, *Stats*, FACEBOOK, <https://newsroom.fb.com/company-info> [https://perma.cc/4RWR-ARQ8].

⁶ Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807 (2012).

⁷ *See* Tal Zarsky, *Social Justice, Social Norms and the Governance of Social Media*, 35 PACE L. REV. 154 (2014). Others suggest trying new conceptions for this purpose, such as the "new governors." *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

⁸ Peter-Paul Verbeek, *Materializing Morality: Design Ethics and Technological Mediation*, 31 SCI. TECH. & HUMAN VALUES, 361–380 (2006) (Verbeek argues that, when

facilitates unique answers to questions such as: What are rights? What is community? And what do we owe each other? The answers to these questions are not written, yet they are visible, tangible, and based on practices in which users engage consciously and unconsciously by navigating through the design and architecture of the platform. Vision and infrastructures are the greatest naturalizers. What we see and practice in familiar surroundings *look right*, epistemically as well as normatively, and may condition—as well as constrain—our sense of justice.⁹ When users sit in their very personal and familiar living spaces, poring over their very personal feeds, they are unconsciously adopting and practicing a new notion of rights, which is different from the modern conceptualization.

Facebook does not have police, courts, or other state-like institutions, and it does not have physical territory, either. Still, it has tremendous power over its users. More than two billion monthly active users worldwide—among them, 68% of all U.S. adults¹⁰—experience a substantial proportion of reality through the mediation of Facebook's platform. Facebook mediates and controls users' interactions and serves as a platform for businesses, media, organizations, and even governments to engage the world.¹¹ For many, it is the main channel for news consumption, and, for some, it is even the method of choice for managing social and professional relationships. Additionally, the corporation's real product is the users' data. The company arguably controls users' personal and shared data as no government or any other entity has in the past.¹²

I suggest framing Facebook's power not only as economic, but also as

technologies co-shape human actions, they give material answers to the question of what constitutes ethical behavior).

⁹ Sheila Jasanoff, *Future Imperfect: Science, Technology, and the Imaginations of Modernity*, in DREAMSCAPES OF MODERNITY: SOCIOTECHNICAL IMAGINARIES AND THE FABRICATION OF POWER, 3-33 (Sheila Jasanoff & Sang-Hyun Kim eds., 2015) (Jasanoff elaborates on the ability of visions to shape the social imaginary and sense of justice).

¹⁰ Shannon Greenwood, Andrew Perrin & Maeve Duggan, *Demographics of Social Media Users in 2016*, PEW RESEARCH CENTER (2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016> [https://perma.cc/88RP-KTQ7].

¹¹ Nancy S Kim & D. A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723 (2015).

¹² As information becomes crucial to every aspect of professional, social, and private life, those who control the information flows greatly affect others' ability to participate in modern life. See, e.g., Frank A. Pasquale, *Privacy, Autonomy, and Internet Platforms*, in PRIVACY IN THE MODERN AGE, THE SEARCH FOR SOLUTIONS (Marc Rotenberg, Julia Horwitz & Jeramie Scott, eds. 2015); Chander, *supra* note 6; Anja Bechmann, *Internet Profiling: The Economy of Data Intraoperability on Facebook and Google*, 29 MEDIEKULTUR: J. OF MEDIA AND COMM. RES. 19 (2013); Christian Fuchs, *Digital Labor*. THE ROUTLEDGE COMPANION TO LABOR AND MEDIA 51 (2015); Shoshana Zuboff, *Big Other: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. OF INFO. TECH. 75-89 (2015).

regulatory and normative. Lawrence Lessig defined the regulation of cyberspace as a complex interaction among four different regulatory forces: law, markets, social norms, and the “private” architecture or code.¹³ Almost 20 years later, it seems that Facebook, which serves as the Internet gatekeeper for billions of users, not only serves as the author of the code, but also has influence on the other three regulatory forces—the laws, the markets, and the social norms. Facebook’s ability to influence different countries’ laws comes from the dependency of governments and elected officials on the corporation, both for advertising and for security and surveillance purposes.¹⁴ Facebook’s ability to influence markets derives from the company’s global monopolistic-like powers,¹⁵ powers that greatly reduce the ability of the market to be a regulatory force that shapes the norms in the platform. Furthermore, with regards to Facebook’s major role in mediating many users’ social relations, the platform is shaping in many cases the social norms themselves (a phenomenon I will demonstrate later in this Article). These tremendous regulatory and normative powers call for the exploration of the platform’s underlying normative principles. To this end, I explore in this Article the platform’s latest version of the concept of rights.

The attempt to identify legal premises and concepts outside state law has been a growing trend in legal literature in recent years. Global law literature has pointed toward a rise in informal modes of international and transnational law-making.¹⁶ At the same time, law and technology literature and Science and Technology Studies have identified new types of rule formulation in the digital sphere: regulation via internet-form contracts,¹⁷ technological

¹³ LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (2009).

¹⁴ Additionally, a major defining feature is that Facebook operates in transnational cyberspace, a space where no government is totally sovereign.

¹⁵ Pasquale, *supra* note 12.

¹⁶ This literature tends to abandon the effort to differentiate sharply between legal and non-legal norms and instead adopts a functional definition of international public authority or of the public capacity to make decisions for others. *See* *INFORMAL INTERNATIONAL LAWMAKING* (Joost Pauwelyn, Wessel Ramses A. Wessel, and Jan Wouters eds., 2012); *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW* (Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann, Matthias Goldman eds., 2010).

¹⁷ *See* MARGARET JANE F RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).

design,¹⁸ algorithms,¹⁹ social networks,²⁰ and big data.²¹

Following these insights, I maintain that Facebook regulates its users not just through traditional legal documents, such as its terms of service, but also through an ensemble of features including its user-interface design, the algorithms building its feeds, and its own rhetoric. Following this trajectory, I combine an analysis of the interface design and technology of Facebook together with an examination of the company's rhetoric in a bid to grasp the notion of rights that the platform promotes. In this context, I analyze publicly available texts, designs, and technological features that the company has produced since 2012 when it went public. Among these materials are the platform's rules and policies,²² the "personal settings" options on the

¹⁸ Science and Technology Studies (STS) and the Law and Technology literature have emphasized the inherently political nature of the Internet's infrastructure and design. See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006); Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, 145 *DAEDALUS* 18–20 (2016); Helen Nissenbaum, *How Computer Systems Embody Values*, 34 *COMPUTER* 119–20 (2001); Helen Nissenbaum, *From Preemption to Circumvention: If Technology Regulates, Why Do We Need Regulation (and Vice Versa)?* 26 *BERKELEY TECH. L. J.* 1367–86 (2011); Manuel M. Castells, *The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance*, 616 *THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI.* 78–93 (2008); JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF* (2012); Julie E. Cohen, *The Biopolitical Public Domain: The Legal Construction of the Surveillance Economy*, 31 *PHIL. & TECH.* 213–33 (2018); Laura DeNardis, *Hidden Levers of Internet Control: An Infrastructure-Based Theory of Internet Governance*, 15 *INFO., COMM. & SOC'Y* 720–38 (2012); LAURA DENARDIS, *THE GLOBAL WAR FOR INTERNET GOVERNANCE* (2014); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 *L. AND CONTEMP. PROBS.* 147–71 (2003); Tarleton Gillespie, *The Politics of 'Platforms'*, 12 *NEW MEDIA & SOC'Y* 347–64 (2010); James Bohman, *Expanding Dialogue: The Internet, the Public Sphere and Prospects for Transnational Democracy*, 52 *THE SOC. REV.* 131–55 (2004); CASS R. SUNSTEIN, *REPUBLIC.COM 2.0.* (2009); REBECCA MACKINNON, *CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM* (2012); Geoffrey Bowker, C. Baker, K., Millerand, F. & Ribes, D., *Toward Information Infrastructure Studies: Ways of Knowing in a Networked Environment*, in *INTERNATIONAL HANDBOOK OF INTERNET RESEARCH* 97–117 (J. Hunsiger, L. Klastrup, & M. Allen eds., 2010).

¹⁹ Tarleton Gillespie, *The Relevance of Algorithms*, in *MEDIA TECHNOLOGIES: ESSAYS ON COMMUNICATION, MATERIALITY, AND SOCIETY* (Tarleton Gillespie, Pablo Boczkowski, and Kirsten Foot eds., 2014); Karen Yeung, *Algorithmic Regulation: A Critical Interrogation*, *REGULATION & GOVERNANCE* (2017).

²⁰ José van Dijck, & Thomas Poell, *Understanding Social Media Logic*, 1 *MEDIA AND COMM.* 2–14 (2013); NICHOLAS A. JOHN, *THE AGE OF SHARING* (2016); Jacquelyn Burkell, Alexandre Fortier, Lorraine Wong & Jennifer Lynn Simpson, *Facebook: Public Space, or Private Space?*, 17 *INFO., COMM. & SOC'Y* 974–85 (2014); Laura DeNardis & A. M. Hackl, *Internet Governance by Social Media Platforms*, 39 *TELECOMM. POL'Y* 761–70 (2015).

²¹ See Karen Yeung, 'Hypernudge': *Big Data as a Mode of Regulation by Design*, 20 *INFO., COMM. & SOC'Y* 118–36 (2017).

²² Statement of Rights and Responsibilities, FACEBOOK, [hereinafter *Statement of*

platform,²³ the company's statements to investors,²⁴ and Facebook's founder and CEO Mark Zuckerberg's posts, open letters to the public, and public speeches.²⁵

I compare the references to and meanings of "right" I found in Facebook's regulatory ensemble with the corresponding notion of "right" in the modern Western tradition. I suggest distinguishing between three distinct roles of rights, which have shaped the Western social contract: their role in organizing the political realm, their role in organizing the social realm, and their role in organizing the individual realm. This inquiry seeks to delineate the premises regarding the nature of rights and the social contract that Facebook's infrastructure promotes²⁶ in these three realms—the political, the social, and the individual.²⁷

Rights and Responsibilities] <https://www.facebook.com/terms.php> [<https://perma.cc/GEK8-6PZB>]; Facebook Principles, FACEBOOK, <https://www.facebook.com/principles.php> [<http://perma.cc/LY6G-SDLA>]; Community Standards, FACEBOOK, <https://www.facebook.com/communitystandards> [<https://perma.cc/5TBK-SACG>]; Design principles, FACEBOOK, <https://www.facebook.com/notes/facebook-design/facebook-design-principles/118951047792/> [<https://perma.cc/NG34-6W7X>]; Data policy, FACEBOOK, <https://www.facebook.com/about/privacy> [<https://perma.cc/3GPN-MTTR>]; Facebook and Privacy, FACEBOOK <https://www.facebook.com/fbprivacy/> [<https://perma.cc/V4EY-L72M>].

²³ Privacy Basics, FACEBOOK, <https://www.facebook.com/about/basics> [<https://perma.cc/MCA9-L2SS>].

²⁴ Annual Reports, FACEBOOK, <https://investor.fb.com/financials/default.aspx> [<https://perma.cc/EDW9-QS9U>].

²⁵ For Mark Zuckerberg's official page, see Mark Zuckerberg, FACEBOOK, <https://www.facebook.com/zuck> [<http://perma.cc/E5YD-DM58>].

²⁶ Several previous works have explored, from various theoretical perspectives, the hidden human rights assumptions underlying different systems. For example, Joseph Weiler searches for the hidden human rights values and virtues of European legislations. See Joseph Weiler, *The Values, Virtues and Vices Of Europe* (paper presented at the conference "Rethinking Responsibility" at Bar Ilan University May 2017). Lotem Perry-Hazan and Michael Birnhack explore how closed-circuit TV systems in schools shape the schools' hidden human rights curricula. Lotem Perry-Hazan & Michael Birnhack, *The Hidden Human Rights Curriculum of Surveillance Cameras in Schools: Due Process, Privacy and Trust*, 48 CAMBRIDGE J. OF EDUC. 47-64 (2018). Michael Birnhack, Eran Toch and Irit Hadar expose the canonical technological texts' hidden assumptions about the rights to privacy (Michael Birnhack, Eran Toch & Irit Hadar, *Privacy Mindset, Technological Mindset*, 55 JURIMETRICS 55-114 (2014)).

²⁷ I do not intend to expose, through this analysis, the platform's "real" or the "true" legal rights and duties as courts or scholars interpret, or should interpret, them. Nor do I aspire to expose Facebook's employees', managers', or lawyers' "real" perceptions, as some new qualitative studies do. For example, Marvin Ammori searches for the social networks' lawyers' perceptions on and role in shaping freedom of expressions, (see Marvin Ammori, *The New York Times: Free Speech Lawvering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259 (2013)). Similarly, Rikke Frank Jørgensen explores the human rights perceptions of Facebook's employees. According to this investigation, employees and lawyers view

Using this methodology, I find that though it is very tempting, and in some senses accurate, to see Facebook as a horizontal social space beyond the realm of political power, Facebook has simultaneously created a new internal, political-like hierarchal order. On Facebook, users cannot communicate with the faceless power that regulates them, they have no recourse for appeal against its decisions regarding their rights, and they cannot participate in either the design or the enforcement of the platform's rules. To be a Facebook user, a member of this "community," or even a member of a concrete Facebook group, means you can enjoy the services but not participate in—or even really know—the background rules of the platform. Therefore, by using the platform, two billion users experience power as a controlling force from above that shapes their surroundings and opportunities, but which is not accessible for dialogue and certainly is not accountable to, or limited by, their rights.

At the societal level, I have discovered that Facebook's technological mediation among users enables users to have social relations that are not guided by the imperative to respect the rights of others. The platform's technology filters images, actions, and expressions, concealing them from those whose feelings or rights may be harmed. This mediation or censoring among users is highly appealing for its expedience, enabling users to make almost limitless connections around the world without having to negotiate the trickier aspects of interaction and communication. And herein lies the concern. It allows individuals to not take into account others' rights by suppressing the need to respect the other side and to balance between "our" rights and "theirs." In this way, individuals grow accustomed to living in a world where there is no need to respect and tolerate others.

Rights, in the modern tradition, also play an important role in shaping the *individual realm*—that is, individuals' agency and autonomy. Since the second half of the twentieth century, many liberals have regarded the freedom to choose as the ultimate expression of liberties and rights.²⁸ In the Facebook universe, algorithmic systems which make up the personal feed of each user have the power to influence users' consciousness and perceptions of the world. This new capability could undermine users' free will and their ability to make certain important conscious choices. As a result, it is other abilities, such as the ability to feel, that have become the ultimate manifestation of

themselves and their companies as defenders of rights in general and of human rights in particular. See Rikke Frank Jørgensen, *Framing Human Rights: Exploring Storytelling Within Internet Companies*, 21 INFO., COMM. & SOC'Y 1-16 (2017). Kate Klonick describes the internal policy of big-data-based corporations, including Facebook, regarding freedom of speech, based on interviews. See Klonick, *supra* note 7.

²⁸ ERIC FONER, *THE STORY OF AMERICAN FREEDOM* (1998); LIZ COHEN, *THE CONSUMERS REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 126 (2003); MILTON & ROSE D. FRIEDMAN, *FREE TO CHOOSE* (1980).

freedom on the platform.

In sum, through a close examination of many features of Facebook's infrastructure, this present paper demonstrates that, besides the digital layer that Facebook introduces to our personal, professional, and political relations, it also adds a normative layer that dictates a new social contract. The company is not alone in establishing this layer. In constructing rights in this way, Facebook is probably not acting against the will of its users or in defiance of existing laws.²⁹ I view Facebook's notion of rights not as some deliberate conspiracy on the part of the corporation, but as a joint, dynamic, and interactive co-production of the corporation, its users, and the legal and cultural systems of many countries and communities.³⁰

The contemporary legal literature that addresses the data-driven corporations' influence on individuals' rights usually asks the important questions of whether and how these entities promote or violate existing legal

²⁹ It is important to note here the obvious. The existing legal framework does not impose political human rights obligations on corporations. According to the contemporary UN framework on business and human rights, corporations are obliged to respect rights, but not to protect and fulfill them. For this framework, see John G. Ruggie (Special Rep. of the Sec'y-Gen.), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011). Therefore, the company is not obliged to protect and fulfill its users' rights, nor to involve the users in its internal rule-formulation. The normative correctness of this model in today's world is beyond the scope of this article. However, in practice, the relations between the company and its users do share some similarities with relations between a state and its citizens, and the company does have some political-like powers over its users. Nevertheless, in these relations, unlike in the state's case, rights do not play any role in mitigating the seemingly political powers.

³⁰ For the co-production of political constructs in the online social networks, see Yeung, *supra* note 21; for the social imaginary and the internet, see Joseph Turow, Lee McGuigan & Elena R. Maris, *Making Data Mining a Natural Part of Life: Physical Retailing, Customer Surveillance and the 21st Century Social Imaginary*, 18 EUR. J. OF CULTURAL STUD. 464-78 (2015).

or moral rights,³¹ especially the rights to privacy³² and freedom of expression.³³ Although I share some of these concerns, my focus is different.

³¹ These corporations influence the entire spectrum of the existing human rights. Their activities enhance important autonomy-related rights, such as freedom of speech, expression, and association. Social networking platforms have significantly lowered the threshold for individuals to publish content that can reach large audiences and have enabled engagement in varied ad hoc political actions. Yet, their practices challenge fundamental rights and freedoms among both users of the platforms and external parties. Their surveillance and information-related practices threaten the right to privacy; their terms of use and monitoring practices threaten freedom of expression; and their social-engineering capabilities threaten political rights and could influence social rights as well. Furthermore, online communication has an impact on specific offenses such as cyber-bullying, cyber-racism, cyber-sexual harassment, and cyber-homophobia. Big data and algorithm-based decision-making can lead to new modes of discrimination. See HUMAN RIGHTS AND THE INTERNET (Steven Hick, Edward Halpin & Eric Hoskins, eds., 2016); DeNardis & Hackl, *supra* note 20; Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335 (2013) (elaborating on the social networks' influence on political rights outside the digital world); Keats Danielle Citron & Frank A. Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1 (2014) (elaborating on the potential influences of data-driven corporations on credit ranking, and thus on social rights outside the platform); and Tal Zarsky, *The Trouble with Algorithmic Decisions: An Analytic Road Map to Examine Efficiency and Fairness in Automated and Opaque Decision Making*, 41 SCI., TECH., & HUMAN VALUES 118-32 (2016) (elaborating on how big-data techniques impact discrimination).

³² See, e.g., Marjorie Heins, *The Brave New World of Social Media Censorship*, 127 HARV. L. REV. F. 325 (2013); Daniel J. Solove, *Privacy Self Management and the Consent Dilemma*, 126 HARV. L. REV. 1880-93 (2013); JONATHAN L. ZITTRAIN, *THE FUTURE OF THE INTERNET (AND HOW TO STOP IT)* (2008); Michael D. Birnhack & Niva Elkin-Koren, *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, 8 VA. J.L. & TECH. 6 (2003); Ronald Deibert, John Palfrey, Rafal Rohozinski & Jonathan L. Zittrain, *Access Contested, chapter 1: Toward the Fourth Phase of Cyberspace Controls*, in ACCESS CONTESTED: SECURITY, IDENTITY, AND RESISTANCE IN ASIAN CYBERSPACE (2011).

³³ See generally Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014); Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053 (2015); Anupam Chander & Uyên P. Lê, *Free Speech*, 100 IOWA L. REV. 501 (2015); Elizabeth M. Jaffe, *Imposing a Duty in an Online World: Holding the Web Host Liable for Cyberbullying*, 35 HASTINGS COMM. & ENT. L.J. 277 (2013). SAUL LEVMORE & MARTHA C. NUSSBAUM, *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* (2010); Jillian York, *Policing Content in the Quasi-Public Sphere*, OPEN NET INITIATIVE (2010); Niva Elkin-Koren & Eldar Haber, *Governance by Proxy: Cyber Challenges to Civil Liberties*, 105 BROOK. L. REV. 82 (2016); Frank La Rue, *Report of the Special Rapporteur to the General Assembly on the Right to Freedom of Opinion and Expression Exercised Through the Internet*, U.N. DOC. A/66/290 (Aug. 10, 2011), <http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf> [<https://perma.cc/Y9XH-UBUW>]; David Kaye, *Report of the Special Rapporteur to the Human Rights Council on Freedom of expression, states and the private sector in the digital age*, U.N. DOC. A/HRC/32/38 (May 11, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/095/12/PDF/G1609512.pdf?OpenElement> [<https://perma.cc/WK56-T7ZR>].

While Facebook, like other data-driven corporations, in some cases violates rights and in others promotes them, I argue that the company does something else that the literature tends to ignore: it reinvents and reframes the *idea* of rights and, subsequently, our political and social arrangements and relations.

This Article proceeds as follows. Part I elaborates on the seemingly political dimension of Facebook's platform. It describes the hidden vertical and hierarchical relations between the company and its users, the lack of user participation in determining the platform's rules, and the users' rights (which are, in fact, closer in nature to privileges) relative to the company.

Part II elaborates on the horizontal, social dimensions of rights on the platform. This chapter reveals that rights in the Facebook sphere are not necessarily correlative to any duties or obligations. It argues that, potentially, even the minimal and basic mutual obligation to respect others' rights is eroded through Facebook's algorithms.

Part III deals with the *individual* aspect of rights. It demonstrates that Facebook's designs and technologies have conflicting implications for the notions of freedom of choice. On the one hand, the company promotes and gives new legal form to the overlap between rights and choice, but, on the other hand, some of the company's practices undermine the very possibility of making conscious choices. These contradictory tendencies sabotage the late modern understanding of rights as a choice.

Part IV describes the enforcement of rights on the platform. It contends that Facebook's procedures for reporting and receiving remedies for violations of rights do not enable argumentation. Facebook's reporting procedures are highly structured, based on restrictive multiple-choice questions that offer no place for free expression or for deliberation with the other party or with the nameless "judge." Therefore, on this platform, conversations about rights are reduced from discourse, dialogue, and interpretation to a structured code.

The conclusion of this paper discusses the implications of these findings. This Article intends not to judge these transformations normatively, but to point out the impact of this novel articulation of rights on our shared political, social, and legal imaginary.

II. THE POLITICAL DIMENSION

Facebook calls itself a social network and, more recently, has begun to call itself a community.³⁴ Both of these images are etched in our common imagination as horizontal social structures that are located outside the domain

³⁴ Mark Zuckerberg, "Building Global Community", FACEBOOK (February 16, 2017) [hereinafter Zuckerberg, *Global Community*] <https://www.facebook.com/notes/mark-zuckerberg/building-global-community/10154544292806634/> [https://perma.cc/3HAQ-WR8Q].

of political power. However, a closer look into the order of the platform reveals huge power disparities between the company and its users and a monopoly of the company over the ability to legislate, judge, and execute the platform's internal norms. In this section, I examine the hidden vertical relations between the company and its users and ask how rights are being used in organizing these relations.

Despite referring to itself as a social network or a community, connectivity has not been created through collective action on the part of its members, nor through spontaneous initiatives of equal individuals, but through each user's vertical personal contract with the power-holder.³⁵ Therefore, the network is actually a bundle of vertical contracts between each user and the company. The horizontal relations among the users are made possible legally and technically only through the mediation of the corporation,³⁶ which enables, shapes, and sometimes censors their mutual connections. This mediation has a profound implication on the way users experience themselves, their relations with each other, and their relation to a superior power like Facebook.

Charles Taylor argues that, after the transition to modernity, we began to imagine ourselves as equal individuals who could create political ties with each other and establish collective political bodies through social contracts, without the mediation of a king or god. This was a transition from a certain "verticality" of hierarchical societies (in which one was a member of the order through one's private relation to a king) to a modern horizontal society.³⁷ I contend that Facebook's internal order can be understood as a new transformation and manifestation of the pre-modern hierarchical, mediated order. In Facebook, one is a member of the order through one's relation to the company. The company mediates between people, thus setting

³⁵ For the characteristics of the contract between users and the internet giants, see RADIN, *supra* note 17.

³⁶ Bearing all the necessary and significant distinctions in mind, we can view Facebook's powers to mediate between individuals and to construct their social and political rules of behavior as quite similar to the abilities of religion. Religions and religious leaders set social and sometimes political norms for their believers, and actually mediate between individuals. Charles Taylor draws the line between secular and religious associations by finding out "what constitutes the association?" Where this is something that transcends the realm of the common actions of the members in the association (like an act of god, a king, or natural law), the association is non-secular. Where the constituting factor is nothing other than common action of the members—we have secularity (CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 105 (2004) [hereinafter TAYLOR, *MODERN SOCIAL IMAGINARIES*]; Charles Taylor, *On Social Imaginary*, *CONTEMPORARY SOCIOLOGICAL THEORY* (2001) [hereinafter Taylor, *On Social Imaginary*]). In this sense, one can argue that the Facebook "community" is a non-secular community. The pre-structured platform and the company's mediation are the preconditions for the existence of the community.

³⁷ TAYLOR, *MODERN SOCIAL IMAGINARIES*, *supra* note 36, at 105.

barriers to the individuals' and communities' collective ability to self-govern and guarantee other members' rights.

The following inquiry is based on a comparison between (a) the role of rights in organizing relations with political powers in the modern imaginary and (b) the role of rights in organizing the relations between Facebook and its users. The premise of this analysis is that rights in the modern Western mindset give power and voice to the people and hence limit the actions of the political regime, containing its behavior in favor of its citizens.³⁸ In the modern tradition, rights guide, regulate, and limit the political power through two main channels. First, in the modern imaginary, citizens are not only the beneficiaries of the rights but are also the authors of their rights through democratic mechanisms.³⁹ The legislation of the rights and their correlative duties is not understood in this tradition as an external coercion emanating from above, but as an expression of the collective preferences, perceptions, and will of the citizens and their joint action. The second channel via which rights mitigate political power in the Western tradition is through their role as the central restriction on political power. States are obliged to respect, protect, and fulfill their citizens' rights. In this chapter, I examine how these principles are reinvented on the Facebook platform.

A. *The Hidden Vertical Structure of the Platform*

As I argued earlier, it is very tempting, and in a certain sense accurate, to see Facebook as a horizontal social space that enables equal persons to connect and create communities. This image, which the corporation encourages by various means, conceals the vertical power relations between the corporation and its users. Facebook controls its users' various connections with each other, their media and content consumption, their personal data, and their opportunities to establish communities on the platform. However, the corporation's direct agency is hidden most of the time and is certainly not accountable to the users' claims inside the platform.

³⁸ According to a parallel interpretation, human rights are a set of basic human needs and capabilities, which states are obliged to protect and provide. These functions—to protect and provide rights—are the only justification for the power of the state.

³⁹ See Sergio Dellavalle, *Squaring the Circle: How the Right to Refuge Can Be Reconciled with the Right to Political Identity*, MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW & INTERNATIONAL LAW (MPIL) RESEARCH PAPER NO. 2016-24. (2016); Jürgen Habermas, *Human Rights and Popular Sovereignty: The Liberal and Republican Versions*, 7 *RATIO JURIS* 1-13 (1994). Taylor describes the role of the law and in particular the role of each country's bill of rights as follows: "This law defines a community, of those whose freedom it realizes/defends together. It defines a collective agency, a people, whose acting together by the law preserves their freedom." (Taylor, *On Social Imaginary*, *supra* note 36). Therefore, the preservation of freedom is granted by the collective action and, at the same time, constitutes the collective agency.

Through this system that relies on a controlling power inaccessible to the public, users experience power as a faceless force that shapes their environment and opportunities—a force that is inaccessible for dialogue, unaccountable, and unrestrained by their rights.

Facebook frames and shapes its interface with its users with minimal reference to the vertical power relations, emphasizing the horizontal relationship between users. One can identify the company's efforts to frame the platform as horizontal and to veil its own controlling agency in various contexts. The use of the term "friends" to describe each user's connections, or the use of the term "community" to describe the platform, pushes our imagination into a horizontal social space. In the liberal legacy, the social sphere is seemingly unmediated and lacks significant power disparities and political intervention. As the company's very design and its "design principles" reveal, the look and feel of the platform are deliberately natural and minimalistic, masking the company's heavy intervention. "Our visual style is clean and understated to create a blank canvas on which our users live," say the principles, while "a minimal, well-lit space encourages participation." They continue, "the promise of this product is that the people you care about are all in one place. This is why our voice and visual style stay in the background, behind people's voices, people's faces, and people's expressions."⁴⁰

In the company's terms of use and policies there is a tendency to frame the users' rights, such as the rights to privacy, just as a matter between each user and his or her "friends," and not as user rights vis-à-vis the company. In the "privacy setting tools," one can define privacy preferences only in relation to other users, not the company.⁴¹ In "Facebook Principles," the reference to privacy is similar, specifying the right of users to control their privacy, but only with respect to other users.⁴²

Parallel to the company's attempts to draw attention to the relationship between users and away from the relations and agency of the corporation itself is its notable absence from meaningful dialogue on the platform. If one wants to direct questions or complaints at the company, doing so via the platform's interface is impossible. The company's Help Center contains many possible answers to questions regarding the use of Facebook, but there is no option other than to search through the existing answers. There is no

⁴⁰ Design principles, *supra* note 22.

⁴¹ These mechanisms decide which friends and users will be exposed to a user's activity and information on the platform.

⁴² "People should have the freedom to decide with whom they will share their information, and to set privacy controls to protect those choices. Those controls, however, are not capable of limiting how those who have received information may use it, particularly outside the Facebook Service." Facebook Principles, *supra* note 22.

channel for submitting a unique question or complaint.⁴³ If a user does not find a suitable answer to their problem, Facebook suggests that they turn to other users in the “Help Community.”⁴⁴ The corporation itself, which controls every component of the platform, chooses not to offer a two-way interaction with its users. As I will discuss later, this lack of accessibility and accountability becomes much more problematic in cases in which users’ accounts are deleted by the company without prior notice or appeal.

The company’s reluctance to acknowledge its vertical power relationship with users is not necessarily a cynical, veiled attempt to avoid any legal or other kind of responsibility. Instead, one can understand this reluctance as a product of the company’s cultural heritage, tracing back to its roots in “hacker culture” that shuns any hierarchy, bureaucracy, and politics.⁴⁵ In some sense, the platform infrastructure does succeed in breaking away from hierarchies and bureaucracies. It facilitates direct and equal contact with elected officials and public figures. It allows, through direct dialogue and public shaming practices, immediate results to be achieved in struggles that in bureaucratic political systems could take years to resolve or may never be resolved at all. At the same time, my claim is that, in its efforts to create a brave new world in which direct and horizontal connections replace politics, bureaucracy, and hierarchy, Facebook has actually created a new hierarchal order. In the internal workings of the platform, individuals grow accustomed to living in a hierarchal structure, where they lack any capabilities to negotiate with the higher power that governs their virtual lives.

B. The Sub-Groups’ Vertical Structure

In the previous part, I elaborated on the hidden vertical relations between Facebook and its users. Now I will argue that the company actually replicates this vertical structure and shapes the relations between the admins of Facebook’s groups and group members, based on similar organizing principles. With one billion daily users,⁴⁶ Facebook’s groups have become a

⁴³ Help Center, FACEBOOK, <https://www.facebook.com/help/> [<https://perma.cc/E8G5-KSH3>].

⁴⁴ Community Help Center, FACEBOOK, <https://www.facebook.com/help/community> [<https://perma.cc/4LMQ-3TFQ>].

⁴⁵ As *Logic* magazine argues, the seeds of this corporate culture are located in the Communalist culture of the 1960s: “This is the tradition that drives claims by companies like Google and Facebook that they are making the world a better place by connecting people. It’s a kind of connectionist politics. Like the New Communalists, they are imagining a world that’s completely leveled, in which hierarchy has been dissolved. They’re imagining a world that’s fundamentally without politics.” “*Don’t Be Evil*” Fred Turner on *Utopias, Frontiers, and Programmers*, LOGIC (2017) <https://logicmag.io/03-dont-be-evil/> [<https://perma.cc/24ZN-9B3W>].

⁴⁶ Zuckerberg, *Global Community*, *supra* note 34.

leading medium for various kinds of communal initiatives, from regional and neighborhood gatherings, to parent support groups, to political forums. These groups can add significant value to their members' lives and enable them to participate in meaningful communal activities. Yet, as this part argues, Facebook groups are also an infrastructure in which the group members experience, on a daily basis, hierarchal and vertical modes of communal membership and control.

In 2017, Facebook declared its new emphasis on communities. In his letter to the public entitled "Building Global Community," Zuckerberg elaborated on the company's new emphasis, arguing that for "the past decade, Facebook has focused on connecting friends and families. With that foundation, our next focus will be developing the social infrastructure for community."⁴⁷ In Facebook's first "Community Summit," held in June 2017, the corporation unveiled its updated mission: "Give people the power to build community and bring the world closer together."⁴⁸ The company's re-framing, from social network to community, can lead to several interpretations based on different theoretical perspectives. First and foremost, with more than two billion users, the company's growth capability is no longer confined to increasing the number of users of the platform, but rather to increasing their engagement. Community involvement (as the company seems to think) may increase the users' engagement in the platform. Second, this transition echoes some general contemporary anti-globalization tendencies and the yearning to restore local communities. In this matter, Facebook's moves at the same time influence (and are influenced by) general social and political processes. The company operates in accordance with general trends, but also designs and frames these trends in a certain and contingent way.

Subsequent to the new emphasis, the company launched a new set of tools designed to assist admins in running Facebook groups.⁴⁹ These tools include providing the groups' managers with data about the community members' behavior and use of the group (the time of day they are most active, for example), and providing the ability to remove members and their content quickly. Admins can temporarily turn off a member's ability to comment and post and, with a single click, remove members from multiple groups they manage. These tools join the existing tools that allow admins to approve or reject every post in the group in advance. Lastly, among the additions is a tool for processing information about new members, enabling managers to "sort and filter membership requests on common categories like gender and

⁴⁷ *Id.*

⁴⁸ Kang-Xing Jin, *Our First Communities Summit and New Tools For Group Admins*, FACEBOOK NEWSROOM (May 22, 2017) <https://newsroom.fb.com/news/2017/06/our-first-communities-summit-and-new-tools-for-group-admins/> [<https://perma.cc/2H5N-PJKK>].

⁴⁹ *Id.*

location, and then accept or decline all at once.”⁵⁰ These filters could, for example, bar someone who is biologically female but identifies as a man and wants to join a men’s group, or someone who lives in one city but wants to join another city’s community group because they frequently stay there. As of now, there is no appeals process for users who believe they have been wrongfully rejected from a group on such a basis. Simultaneously, Facebook announced another new policy allowing business and organizational pages, not just personal accounts, to create and participate in groups.⁵¹ Up until then, businesses had not been able to post and be the admins of groups; only a personal profile could do so.

The development of these new tools to increase admins’ direct control over group members is an important phase in Facebook’s new emphasis on communities. In his letter to the public, Zuckerberg maintained that the key to a community’s success is its leader’s power to lead: “Great communities have great leaders.” He said at the community summit that “If we want the world to be filled with communities . . . we need to give more leaders the power to build communities.”⁵² It appears, then, that in Zuckerberg’s mindset, a community by definition has (and needs) a leader, and it is created in the image of the leader. The power to build a community, according to this mindset, is not a power that people hold in common, but a power that belongs to that leader. Moreover, these leaders of Facebook groups do not own or exercise this power by themselves, but have been granted this power from a higher order—from Facebook itself. In this universe, the power to build community comprises mainly surveillance abilities and the freedom to include and exclude members and censor content at will. These groups’ rules are designed mainly by the company and, to a lesser extent, by the group leaders. The members of the group enjoy the communication, the support, and the common interest with the rest of the members, but they are not required to deal with the behind-the-scenes rules according to which the group operates—indeed, they are excluded from doing so.⁵³

The announcement of the shift in emphasis was accompanied by very solemn statements, by Zuckerberg and others, on the importance of

⁵⁰ *Id.*

⁵¹ Mark Zuckerberg (July 19, 2017), FACEBOOK <https://www.facebook.com/photo.php?fbid=10103899863723631&set=a.529237706231.2034669.4&type=3&theater> [https://perma.cc/M4W9-BJM3].

⁵² Mark Zuckerberg, *Bringing the World Closer Together*, FACEBOOK (June 22, 2017) [hereinafter Zuckerberg, *Bringing the World*] <https://www.facebook.com/notes/mark-zuckerberg/bringing-the-world-closer-together/10154944663901634/> [https://perma.cc/WZ8F-7N72].

⁵³ For the Facebook groups’ benefits to users, see, e.g., Nick Pearce & Sarah Learmonth, *Challenges and Opportunities in Using Facebook to Build a Community for Students at a UK University*, in WIDENING PARTICIPATION, HIGHER EDUCATION AND NON-TRADITIONAL STUDENTS. PALGRAVE MACMILLAN UK, 105-17 (2016).

communities to the political, social, and personal orders.⁵⁴ Two hundred years prior Alexis de Tocqueville, in his seminal book *Democracy in America*,⁵⁵ had argued for the central importance of local communities to both individuals and the entire fabric of American society. According to Tocqueville, the local community is fundamental because it is a school of democracy, teaching its members self and shared governance. Zuckerberg shares with Tocqueville the notion that local communities matter and that they serve as a school for broader communities.⁵⁶ However, for Zuckerberg, democracy and self-governance are not necessarily the important building blocks of these communities.

Facebook's sub-groups miss what Tocqueville found to be the profound contribution of voluntary associations: a platform for making decisions together. As we have seen, the key to successful communities, according to Zuckerberg, is not self-rule but rule-under-leadership.⁵⁷ Leaders, in the Facebook realm, can be businesses, as well as individuals, and they can manage and control the group through the company infrastructure, without involving the group members. Groups in this daily experience are not communal, collective, horizontal, and democratic organizations, but hierarchical, vertical, and authoritarian projects. That is not to say that the group members do not gain meaningful opportunities from their membership, including a sense of belonging, solidarity, and a common purpose. But, at the same time, and often without their conscious awareness, their every action is under subordination to others who shape the underlying rules of their own associations.

Significant vertical power gaps are not a new phenomenon. Actually, the social contract and the scheme of right it promotes were invented, among other purposes, to regulate and mitigate the vertical power gaps between governments and their citizens. In the following sections, I examine the role of rights in organizing the vertical relations on Facebook.

C. From Rights as a Collective Political Project to Rights as a Private Matter

The political aspect of rights in the modern tradition has several expressions. One of the most prominent is the communal public establishment and formulation of rights. Although the modern imaginary perceives human rights as natural and universal, they have different

⁵⁴ Zuckerberg, *Global Community*, *supra* note 34.

⁵⁵ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Vol. 10. 2003).

⁵⁶ In his speech at the first Facebook "Community Summit," Zuckerberg said, "Change starts local, when enough of us feel a sense of purpose and support in our own lives that we can start caring about broader issues too." Zuckerberg, *Bringing the World*, *supra* note **Error! Bookmark not defined.**

⁵⁷ Pearce & Learmonth, *supra* note 53.

manifestations in each country, in accordance with its citizens' self-rule procedures. At the imaginary level, we all participate together in the continual formalization of rights within our political communities, through democratic procedures and public deliberations.⁵⁸ Rights are, therefore, a product of communal and collective procedures and actions. In contrast, on Facebook, rights cease to be a collective political project. When one opens a Facebook account, one arguably automatically agrees to Facebook's rules and policies, including the rights on the platform. One cannot, in any meaningful sense, participate in the platform's rule formation.⁵⁹

One could argue that the lack of user participation in the design of the internal rules of the platform is not a unique phenomenon. When we enter a shopping mall, we do not participate in setting the mall's norms.⁶⁰ However, malls do not control our social, political, and professional relations. They do not have (yet) the ability to guide, monitor, store, aggregate, or regulate private conversations and our social network of connections while we are on or off their premises. Facebook has all these capabilities. More than that, shopping malls are much more heavily regulated by states; therefore, individuals participate, at least on the imaginary level, indirectly in the formulation of rights there via their political participation in the state. States regulate Facebook much less, if at all, and therefore the public's indirect participation in the formulation of rights on the platform is also absent. Furthermore, in the case of the shopping mall, the legal debates have usually asked whether the mall is allowed to *prevent* political activity on its

⁵⁸ Habermas, *supra* note 39.

⁵⁹ Laura Stein examines users' participation in shaping rules of behavior on different websites—YouTube, Wikipedia, and Facebook. Stein proposes a typology of participation from the maximal power of “dominant control over site content and governance” to the non-power of “deceptive or inadequate information” and “nonparticipation.” According to her findings, Facebook provides the minimal power of “informing” in three policy areas: “permitted content and its use,” “content ownership/copyrights,” and “modifying software”; furthermore, it provides only slightly better minimal power of “choice” for the “user information/data area.” See Laura Stein, *Policy and Participation on Social Media: The Cases of YouTube, Facebook, and Wikipedia*, 6 COMMUNICATION, CULTURE & CRITIQUE 353-71 (2013). Julie Cohen elaborates on the social and technological conditions that enable corporations to set the rules by themselves. See Julie E Cohen, *The Surveillance-Innovation Complex: The Irony of the Participatory Turn*, in THE PARTICIPATORY CONDITION IN THE DIGITAL AGE (Darin Barney, Gabriella Coleman, Christine Ross, Jonathan Sterne & Tamar Tembeck, eds. 2016) (*surveillance-innovation*). For normative suggestions as to how to involve users in setting the platforms' rules and policies, see Philip M. Napoli, *Social Media and the Public Interest: Governance of News Platforms in the Realm of Individual and Algorithmic Gatekeepers*, 39 TELECOMMUNICATIONS POLICY, 751-60 (2015). For Facebook's terms of service, see *Statement of Rights and Responsibilities*, *supra* note 22.

⁶⁰ For a comparison between other kinds of corporations and Facebook, see Chander, *supra* note 6. For a review of the literature on shopping malls' activities and legal categorization and their comparison to the data-driven corporations, see Zarsky, *supra* note 7.

property⁶¹ while, in the case of Facebook, the corporation's product *facilitates* political activity. Thus, the question of who sets and shapes rights on the platform is actually a question of who structures an important part of our current social and political infrastructure. The fact that Facebook formulates and establishes the rights on the platform without its users' input has much more alarming and far-reaching ramifications than the equivalent scenario in the mall analogy.

However, it is fair enough to observe that most Facebook users probably do not want to participate in designing the set of rights and duties that are relevant to this space. Actually, most of them probably have not even read Facebook's visible policies and terms of use.⁶² Besides that, nothing in today's legal or moral frameworks has obliged Facebook to involve users in setting its rules. I certainly agree with these statements, and they actually reinforce my claim here. I do not claim that Facebook acts against the will of its users by not involving them in the formulation of the rules. Rather, I argue that Facebook creates a universe where individuals are encouraged to enjoy membership in groups or communities without having to participate in the design of the groups' rules. In this universe, an unseen force controls the background rules of the group and knows everything that is going on in it. On the one hand, this is a great solution for the busy, overwhelmed user who simply wants a straightforward, well-packaged means of connecting with others. But, on the other hand, this product's features and practices are acclimating users to a very particular form of decision-making, in which an inaccessible force dictates rights and duties to individuals without their participation.

In the current state of affairs, Facebook creates alone its "Community Standards," which define in general terms what content is permitted and what is prohibited on the platform.⁶³ Lately, in response to criticism regarding its censorship, Facebook has stated that it is interested in facilitating greater involvement on the part of its users in setting the standards. In his 2017 Open Letter, Zuckerberg presented a new initiative to involve users in determining the Community Standards for acceptable content. "Facebook is not just technology or media," he writes, "but a community of people. That means we need Community Standards that reflect our collective values for what should and should not be allowed."⁶⁴ This proposed system is based on a

⁶¹ For discussions regarding political rights in private shopping malls, *see, e.g.*, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Hudgens v. NLRB*, 424 U.S. 507, 517 (1976); *LLC v. NLRB*, 172 P.3d 742, 749 (Cal. 2007); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

⁶² *See Solove, supra* note 32.

⁶³ Klonick, *supra* note 7.

⁶⁴ Zuckerberg, *Global Community, supra* note 34.

multiple-choice questionnaire regarding preferences on various kinds of offensive and inappropriate content. According to this system, the rules regarding which content is permissible will be based upon each user's preferences. "The idea is to give everyone in the community options for how they would like to set the content policy for *themselves*," writes Zuckerberg. "Where is your line on nudity? On violence? On graphic content? On profanity? What you decide will be your personal settings."⁶⁵

This new initiative is an important step toward greater user participation. But a closer examination of the proposed mechanism for user participation reveals that it allows each user to choose his or her own standards alone, thereby undermining the whole premise that Community Standards are set jointly in negotiations and joint public discourse. In other words, the newly proposed involvement transforms political participation and rights formulation from collective and communal projects into personal ones, thereby reducing public deliberation from open and innovative conversations to limited, pre-structured ones.

According to this system, questions such as the permissible limits to depictions of violence or what constitutes pornography (questions that have been located at the heart of the political sphere as well as our modern imaginary and that were byproducts of collective decision-making procedures and deliberations) become, in Zuckerberg's vision, private matters. According to this vision, each user selects the political state of affairs for him- or herself from among the options the corporation provides and articulates. This system eliminates the common political aspect from the creation of rights.

On the platform, the right to privacy is structured today in a similar fashion. Each user can set his or her "privacy preferences" in a structured questionnaire. Also, here the users' choices do not affect the characteristics of the right to privacy of the entire community, but only their own. These systems make it possible to genuinely take into account every user's choices directly, not through representatives. At the same time, in this system, democracy and rights are not a joint decision-making process (for while using this tool, every user is isolated), but a personal response to a structured questionnaire that the corporation provides. This image of rights, as a product of private pre-structured preferences, has the potential to spread far beyond the users' personal feeds because, according to Zuckerberg's express hope, Facebook's decision-making system may become the basis for global collective decision-making in other areas as well.⁶⁶

Alongside this unique articulation of political participation in the platform, one could argue that users have another channel for participating in the formulation of the options offered to them. This is a passive mode of

⁶⁵ *Id.*

⁶⁶ *Id.*

participation, which is neither conscious nor intended. One prominent feature of algorithms and big-data-based regulation is their constant reliance on many users' behaviors to shape the interface and the options available to each user. These systems are very responsive to user preferences, and hence Facebook consistently learns its users' behaviors and reacts accordingly. For example, it studies the frequency at which and circumstances under which an individual uses a particular feature, such as the ability to hide posts; then, according to the results, it makes this feature more accessible to other users with similar characteristics. Through these practices, one can argue, users participate indirectly and unknowingly in shaping the options for other users. One user does not *deliberately* affect others, but simply fulfills his or her momentary will. However, the platform constantly collects, aggregates, and analyzes all the users' behaviors and employs them in the dynamic design of the product itself. Throughout these mechanisms, one's behavior can influence other users through different proxies.

Henry Jenkins distinguishes between participation and interactivity. He assigns the former to the realm of social practice and the latter to that of technological affordance.⁶⁷ Participation is more open-ended and less controlled by the entities in power. Interactivity, according to Jenkins, refers to the ways that digital technologies have been designed to be more responsive to user feedback. One of the prominent distinctions between participation and interactivity is that “[i]nteractivity takes place according to coded protocols,” while “participation carries the implied promise of intervening in the code” itself.⁶⁸ Therefore, even if users affect the rights of others on the Facebook platform, they do so passively, and usually unintentionally. It is the corporation's “black box”⁶⁹ that determines whether and how their behavior will affect the rights of others.

To sum up, because of the way in which the corporation structures political participation on the platform, users can actively influence the formation of only their own rights in regard to a few very limited issues, and then only in a manner that is predefined by the corporation. Thus, on a daily basis, users experience political participation in a way that is fundamentally different from the modern organizing principle, whose underpinnings include collective political participation. On the platform, regardless of whether users are busy attempting to attract “likes” for their jokes and selfies or are engaging in enriching, far-from-trivial interactions, these billions of users are

⁶⁷ HENRY JENKINS, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE*, 133 (2006).

⁶⁸ Mark Andrejevic, *The Pacification of Interactivity*, in *THE PARTICIPATORY CONDITION IN THE DIGITAL AGE 187-206*, at 188 (Darin Barney, Gabriella Coleman, Christine Ross, Jonathan Sterne, Tamar Tembeck Eds. 2016).

⁶⁹ See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015).

unconsciously growing accustomed to the idea that rights are not fruits of public deliberations and collective actions, but an outcome of the engineered decisions of a corporation.

D. From Inalienable Rights to Alienable Privilege

There are, as I mentioned before, at least two ways in which rights restrict political power in the modern tradition. The first is through the participation of citizens in writing their own dynamic bill of rights and the second is through obliging the political power to respect, protect, and fulfill rights. In Part I.C, I discussed the lack of user participation in setting Facebook's rules and rights. Here, I argue that users' rights do not function as a source of duties that create obligations for the corporation.

The platform's business model and its legislative expression as written in its Terms of Service (TOS) suspend, in fact, some of the users' civil rights, such as the right to privacy. At the same time, the company uses the terms "rights" and "freedoms" to describe products and services it provides, such as "the freedom to share" (describing the opportunity to publish posts).⁷⁰ Therefore, users' rights suffer from double commodification on the platform. First, the users' human rights, such as privacy, become the company's commodity, and the company does not treat them as protected rights. Second, the company frames its products as rights. Using the rhetoric of rights to describe corporate services, even with no deliberate ill intent, transforms rights in the public imaginary into privileges that the company grants and can revoke, according to its own will and interest. In the paragraphs that follow, I will first discuss the suspension of human rights as we used to know them, then elaborate on the practice of reframing rights and transforming them into privileges.

Facebook and other data-driven business models rely on direct or indirect trade in the users' rights to their data. While opening a Facebook account, the users allegedly agree to waive the right to their data in return for various services.⁷¹ According to its yearly financial reports, Facebook generates most of its revenue from selling targeted advertisements and other commercial and sponsored content based on users' private data.⁷² The users' data and

⁷⁰ *Statement of Rights and Responsibilities*, supra note 22.

⁷¹ *Id.* As the TOS declares: "To provide these services, we must collect and use your personal data. We detail our practices in the Data Policy, which you must agree to in order to use our Products." *Id.*

⁷² Facebook, Inc., *Annual Report (Form 10-K)*, FACEBOOK, 7 (Feb. 1, 2018), https://s21.q4cdn.com/399680738/files/doc_financials/annual_reports/FB_AR_2017_FINAL.pdf [<https://perma.cc/GF9J-YBCS>]. "We generate substantially all of our revenue from selling advertising placements to marketers. Our ads let marketers reach people based on a variety of factors including age, gender, location, interests, and behaviors. Marketers purchase ads that can appear in multiple places including on Facebook, Instagram, and third-party

information are therefore among the central products of the corporation. Shoshana Zuboff portrays this practice as an accumulation of rights.⁷³ Rebecca MacKinnon contends that these platforms take a “Hobbesian approach to governance,” with users consenting to give up fundamental rights in exchange for services.⁷⁴

This give-and-take is not really a voluntary exchange—users have no choice but to give up their rights if they want to use the platform. In today’s world, leaving or not using platforms is not a real option for many people.⁷⁵ Contributing to the online economy via online expressions has become a premise for participation in the networked public sphere.⁷⁶ Some Facebook users are part of communities and relationships that are accessible only through the platform. Many users rely on Facebook services in their personal, professional, and public lives.⁷⁷ Furthermore, Facebook users cannot re-create their network on a different social network website without convincing other Facebook users to leave as well. In this system, the users have no real choice other than to give up their rights. The users’ rights become company property and its source of profit. In this space, rights cease to be inalienable,⁷⁸ becoming a commodity.

In addition to forcing users to waive their rights to their data and information, in accordance with the company’s business model, Facebook’s TOS—like other internet contracts unilaterally formulated by the company and ostensibly accepted by users—deprive the users of other rights.⁷⁹ Among them are the right to choose the place of litigation, the right to participate in a class action suit, and some copyright rights.⁸⁰ Facebook and other data-

applications and websites.” *Id.*

⁷³ Zuboff, *supra* note 12, at 83.

⁷⁴ See MACKINNON, *supra* note 18, at 164. For this line of thought, see generally Kim & Telman, *supra* note 11.

⁷⁵ BRUCE SCHNEIER, DATA AND GOLIATH: THE HIDDEN BATTLES TO COLLECT YOUR DATA AND CONTROL YOUR WORLD 60-61 (2015).

⁷⁶ *Id.*

⁷⁷ *Id.* As Bruce Schneier writes, “[i]t’s not reasonable to tell people that if they don’t like data collection, they shouldn’t e-mail, shop online, use Facebook, or have a cell phone. . . . Opting out just isn’t a viable choice for most of us, most of the time; it violates what have become very real norms of contemporary life.” *Id.*

⁷⁸ Since the end of the seventeenth century, rights have also been understood as inalienable, i.e., not ours to give away. As Lock put it: “A man, as has been proved, cannot subject himself to the arbitrary power of another” JOHN LOCKE, TWO TREATISES OF GOVERNMENT 163 (1999). For a comprehensive analysis of the inalienable dimension of rights, see generally Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107 (2011).

⁷⁹ *Statement of Rights and Responsibilities*, *supra* note 22.

⁸⁰ *Id.*; Facebook, *Facebook Commercial Terms*, FACEBOOK, https://www.facebook.com/legal/commercial_terms [<https://perma.cc/GX8P-E8BK>] (last

driven corporations use this kind of wrap contract to reorder or withhold rights otherwise available to consumers.⁸¹ As Margaret Jane Radin explained, “businesses use form contracts to overrule legislation specifically designed to protect parties’ rights to form contracts.”⁸² Zuboff describes Facebook’s TOS that suspend the users’ rights as a “form of unilateral declaration that most closely resembles the social relations of a pre-modern absolutist authority.”⁸³ One should note that the denial of these rights is invalid in some countries,⁸⁴ but the TOS’s public declaration of the possibility of depriving users of their basic rights certainly affects whether rights are imagined as inalienable or not.

While some civil rights are allegedly suspended on the platform through these practices, once users enter Facebook’s jurisdiction, the platform grants them a set of alternative capabilities or powers, sometimes calling them “rights.”. These powers include the ability to communicate, to share, to see, to hear, and to act socially and politically on the platform. For example, according to Facebook’s mission from 2013, as well as its stated principles, the company grants its users the “power to share.”⁸⁵ Its principles divide this power into two parts: “the freedom to share” and “the right to connect.”⁸⁶ In 2017, the company declared that it grants its users “voice,”⁸⁷ eyes, and ears.⁸⁸ Later that same year, the company’s statement was updated, this time referring to a mission “to give people the *power to build community*.”⁸⁹ Following this rhetoric, these basic social and political skills—the ability and right to build communities—are something that Facebook now believes it bestows on its users.⁹⁰

visited Jan. 5, 2019).

⁸¹ *Statement of Rights and Responsibilities*, *supra* note 22.

⁸² See RADIN, *supra* note 17, at 97-99.

⁸³ Zuboff, *supra* note 12, at 83.

⁸⁴ See RADIN, *supra* note 17, at 97-105.

⁸⁵ Facebook, Inc., *Annual Report (Form 10-K)*, FACEBOOK 5, (Feb. 1, 2013), https://s21.q4cdn.com/399680738/files/doc_financials/annual_reports/FB_AR_33501_FINANCIAL.pdf [<https://perma.cc/734N-U7BN>].

⁸⁶ Facebook, *Facebook Principles*, FACEBOOK, *supra* note 22.

⁸⁷ Zuckerberg, *supra* note 34. In his letter to the public from 2017, Zuckerberg wrote that Facebook does not only give people the power to share but also gives people voice. *Id.*

⁸⁸ At the 2017 F8 developers’ conference, the company presented its augmented-reality plan: using the phone camera to lay a digital blanket over everything people see, hear, and touch. According to this vision, Facebook not only gives us voice but also gives us eyes and ears. See Facebook for Developers, *F8 2017 Keynote*, FACEBOOK <https://developers.facebook.com/videos/f8-2017/f8-2017-keynote/> [<https://perma.cc/DK3R-BFHZ>] (last visited Jan. 5, 2019).

⁸⁹ Zuckerberg, *supra* note 52.

⁹⁰ *Id.* Therefore, according to this mission, Facebook also provides humans with

On the one hand, as Facebook declares, all the individual users of the platform get the same “rights” and share a similar status and the company argues: “We can offer someone in Africa the same product as the president of the United States, and we don’t have to take any extra money for it.”⁹¹ On the other hand, Facebook’s business model relies on payment for content exposure to users.⁹² Therefore, “someone in Africa” does not necessarily get the same product as the president of the United States because it is possible that the latter will pay for promotional content.⁹³ As a result, the two persons do not get the same “right” to share and to connect.

However, this alternative set of “rights” that the company grants to its users does not have any role in limiting or even guiding the company’s policies and practices.⁹⁴ These options for self-expression are not rights, but privileges in the sense that they are special entitlements that can be revoked by Facebook in arbitrary ways at its own discretion.⁹⁵ Under Facebook’s “jurisdiction,” individuals may find themselves locked out of their accounts without prior notice or an opportunity to save their data or notify their contacts.⁹⁶ For example, in 2016, Facebook started to delete posts and even accounts that mentioned the following Hebrew words: “koksinef” (which means she-male), “kushi” (which is equivalent to “nigger”), and “vehodon” (“vid”).⁹⁷ The content that led to the deletions and bans included content from seven years earlier and content that did not contain any abusive context.⁹⁸ Furthermore, some users could continue to use the “forbidden words,” while

the ability to be Aristotle’s “political animals.” ARISTOTLE, ARISTOTLE’S POLITICS 4 (Carnes Lord trans., 2 ed. 2013). As Aristotle put it, “[f]rom these things it is evident, then, that the city belongs among the things that exist by nature, and that man is by nature a political animal. He who is without a city through nature rather than chance is either a mean sort or superior man; he is ‘without clan, without law, without hearth’” *Id.*

⁹¹ Jørgensen, *supra* note 27, at 345.

⁹² See FACEBOOK, *supra* note 72, at 7.

⁹³ *Id.*

⁹⁴ One should note here again that this observation does not stem from a presumption that the company *should* guarantee equal rights. Regardless of whether the company is to ensure equal rights, the way users experience rights on the platform affects the nature of rights within the social imaginary.

⁹⁵ See generally SUZANNE B. MCNICOL, LAW OF PRIVILEGE (1992); Alina Tugend, *Barred from Facebook, and Wondering Why*, N.Y. TIMES (Sept. 19, 2014), <https://www.nytimes.com/2014/09/20/your-money/kicked-off-facebook-and-wondering-why.html> [https://perma.cc/M7NF-TYS7].

⁹⁶ Tugend, *supra* note 95.

⁹⁷ Nimrod Zuk, *Forbidden Words: Facebook’s Discriminatory Censorship Policy*, KLKALIST (Nov. 24, 2016), <https://www.calcalist.co.il/internet/articles/0,7340,L-3702519,00.html> [https://perma.cc/W8LB-HSWG].

⁹⁸ *Id.*

others were banned unilaterally from the platform.⁹⁹

The company is not required to provide an explanation as to why the account was suspended in the first place.¹⁰⁰ Usually the banned users are given notice that their posts violate Facebook policy or “Community Standards,” but, in fact, the company has a separate, much more detailed (and much more regularly updated) set of internal rules used by human moderators to make their decisions regarding users’ posts and accounts.¹⁰¹ Terminated users typically have no recourse to an actual customer service representative, and efforts to resolve the problem may take weeks or longer, even for those users who are eventually reinstated.¹⁰² Consequently, in one single action—the deletion of a post or account—Facebook acts on behalf of the three branches of power, with no separation between them.¹⁰³

We have seen through practices and rhetoric that Facebook users experience unique relations with a higher power. Their rights on the platform are not formulated with their own participation and do not limit the political-like power that governs them. Furthermore, their rights are not inalienable. The company grants them and revokes them, according to its own will, with limited options for communication, and none for dialogue or outright resistance.¹⁰⁴ The daily experience of these practices has the potential to affect how we visualize and construct the role of rights in relation to political powers, even outside the platform.

The de-politicization of rights, along with their detachment from a particular political community and from citizens’ active involvement, preceded the company’s design and framing of rights. Over the three last decades of the twentieth century, rights began to lose their association with a concrete political community and started to reflect some supranational uniform standards.¹⁰⁵ Facebook’s ideology, design, and technology promote the separation between rights and political collectives. However, in this space, rights are *not* supranational uniform standards, but rather a new construct—a personalized, structured filter and a set of inalienable powers. Therefore, the conceptual change in the image of rights precedes its

⁹⁹ *Id.*

¹⁰⁰ Kim & Telman, *supra* note 11, at 760-61.

¹⁰¹ Klonick, *supra* note 7, at 1633-35.

¹⁰² Kim & Telman, *supra* note 11, at 760-61.

¹⁰³ See, e.g., Wendy Hui Kyong Chun, *Crisis, Crisis, Crisis, or Sovereignty and Networks*, 28 THEORY, CULTURE & SOC’Y 91, 92 (2011).

¹⁰⁴ Kim & Telman, *supra* note 11, at 760-61.

¹⁰⁵ For the processes, beginning in the second half of the twentieth century, in which rights ceased to be a domestic constitutional construct regulating the relations between citizens and the state, and became instead a universal construct, see generally SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

establishment and development by Facebook, but the company has developed a unique version of these changes, which it has transformed into institutions, practices, and rituals.¹⁰⁶

III. THE SOCIAL DIMENSION

In the modern imaginary, the social contract shapes not only relations with the political regime, but also the horizontal relations between citizens.¹⁰⁷ According to social contract theories, rights have shaped these two realms via different sets of correlative duties. Rights generate duties on states—the duties to respect, protect, and fulfill their citizens' rights, and, simultaneously, the same rights generate duties on individuals to respect their fellow citizens' rights.¹⁰⁸ The imperative to respect others' rights is a central organizing principle of the Western modern imaginary—its moral and legal formula for living together.¹⁰⁹ The mutual obligation to respect each other's rights has had two main modern expressions: first, inherent to rights is the basic implication that there are obligations to respect them; second, all members in a political community have a shared responsibility to guarantee the other members' rights.¹¹⁰ Facebook challenges both these expressions. First, Facebook enables users to practice their rights without imposing the correlative duty to respect these same rights among other individuals. Second, it does not allow users to know which rights are accessible to others and thus does not enable a mutual guarantee of each other's rights.

A. *The Erasure of the Obligation to Respect Rights*

The modern tradition established an unbreakable bond between rights and their correlating moral and legal duties.¹¹¹ In the modern legal imaginary, rights and duties are inseparable.¹¹² In this tradition, rights necessarily have

¹⁰⁶ For the important role of rituals in the processes of embedding new technologies which are interwoven in political ideas and social organization, see generally Bryan Pfaffenberger, *Technological Dramas*, 17 *SCI., TECH. & HUM. VALUES* 282 (1992).

¹⁰⁷ See TAYLOR, *MODERN SOCIAL IMAGINARIES*, *supra* note 36, at 106.

¹⁰⁸ *Id.* In this maxim, corporations have been imagined as equivalent to individuals, and they have the same minimal obligations—to respect others' rights. *Id.*

¹⁰⁹ Taylor suggests that the neutral pre-political rights transformed during modernity into the idea that individuals establish together a political community that is based on mutual obligations to respect rights. TAYLOR, *MODERN SOCIAL IMAGINARIES*, *supra* note 36, at 96, 123.

¹¹⁰ The entire community is perceived as a guarantor of rights. Through the static institutions—courts, police, welfare institutions—rights are preserved. *Id.* at 99-100.

¹¹¹ *Id.* at 94.

¹¹² See, e.g., Joel Feinberg, *Duties, Rights and Claims*, 3 *AM. PHIL. Q.* 137, 141 (1966).

correlative duties, for without duties there is no meaning to rights.¹¹³ The connection between rights and duties is situated at the center of legal practice and the jurisprudential scholarship.¹¹⁴ The minimal negative duty to respect the rights of others is not just a legal duty, but a moral and social one.¹¹⁵ It is the basic organizing principle and imperative in the modern world.¹¹⁶ Even extreme libertarians would not deny this fundamental negative duty to respect others' rights.¹¹⁷ However, this imperative becomes obsolete in the Facebook universe.

Indeed, despite the centrality of the mutual imperative to respect rights, various writers from different disciplines and scholarly traditions observed a weakening in the notion of mutual obligations and responsibilities in the American lexicon over the last two decades of the twentieth century.¹¹⁸ Mary

¹¹³ *Id.*

¹¹⁴ All rights, according to Emmanuel Kant, have correlative duties, in the sense that a right is the justification for a perfect duty. *See, e.g.*, Feinberg, *supra* note 112. As early as the beginning of the twentieth century, Wesley Hohfeld drew up a typology that serves as the basis for understanding the interrelationship between rights and duties. According to Hohfeld, rights are necessarily correlated to duties, in the sense that rights and duties are two sides of the same coin. *See* WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 38 (Walter Wheeler Cook ed., 1923). Decades later, Joseph Raz sketched a different connection between rights and duties. For him, rights are a justification for imposing duties, not just a mirror image of them. A right, according to Raz, is created when an individual's interest is sufficient reason for imposing duties on others to realize the interest. *See* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 166 (1986); J. Raz, *On the Nature of Rights*, 93 *MIND* 194, 197 (1984); J. Raz, *Legal Rights*, 4 *OXFORD J. OF LEGAL STUD.* 1, 5 (1984). Hart's answer to the question of the connection between rights and duties is that rights give those who have them control over other people's duties (and freedom). To have a right is to have the ability to determine what others may and may not do and so to exercise authority over a certain domain of affairs. *See generally* H. L. A. HART, *THE CONCEPT OF LAW* (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012).

¹¹⁵ For the distinction between negative and positive duties, *see, e.g.*, JOEL FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 144 (1980); RICHARD B. BRANDT, *ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS* 439 (1959); ROBERT E. GOODIN, *PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES* (1985).

¹¹⁶ HENRY SIDGWICK, *THE METHODS OF ETHICS* 273 (3d ed. 1884).

¹¹⁷ As Henry Sidgwick put it toward the end of the nineteenth century, "[f]reedom from interference is really the whole of what human beings, originally and apart from contracts, can be strictly said to *owe* to each other: at any rate, that the protection of this Freedom (including the enforcement of Free Contract) is the sole proper aim of Law." *Id.*

¹¹⁸ For a sociological description of the decline in the use of the concepts of duty and responsibility, *see* ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (3d ed. 2007). For a description of the difficulty of conceptualizing duties in the human rights discourse, *see* HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (2d ed. 1996). For communitarian observation on this issue, *see generally*, CHARLES TAYLOR, *SOURCES OF THE SELF: THE*

Ann Glendon argued that Americans have and perform mutual duties and responsibilities toward each other, but the evolving legal dialect of rights hides and overlooks those existing real-world duties.¹¹⁹ Glendon pointed to a schism toward the end of the twentieth century between *practice* (which was based on a recognition of mutual obligations) and the public *vocabulary* (from which mutual obligations disappeared).¹²⁰ Facebook's infrastructure assimilates into practice a rhetoric of rights that does not generate any horizontal mutual obligations. This infrastructure supports the institutionalization and materialization of practices that lack any mutual obligations and responsibilities. Like Kant's description of how an abstract category becomes "schematized" when it is applied to reality in space and time,¹²¹ the abstract category of "rights without duties" is schematized in the dense sphere of common practice on Facebook.¹²² The platform's technology and design enable us to practice rights without the need to impose correlative duties on others, essentially disconnecting rights from duties and undermining the relational aspect of rights. Within this infrastructure, one can believe one's rights are being respected, even while others are *not* actually respecting those rights. The realization of rights on the platform does not depend on others' active fulfillment of their duties at all, but on the mediation of technology.

Facebook's initiative to involve users in determining its Community Standards demonstrates this tendency. Zuckerberg presented this system in his 2017 open letter in response to criticism of Facebook's censorship,¹²³ including criticism about closing accounts and taking down content, such as videos related to "Black Lives Matter" or war photos from Vietnam, while, at the same time, allowing hateful content and accounts.¹²⁴ Zuckerberg's solution to this complex policy-oriented and multicultural clash is a

MAKING OF THE MODERN IDENTITY (1989); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). For feminist observations, *see generally*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1872 (1987).

¹¹⁹ *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 48 (1991).

¹²⁰ *See generally id.*

¹²¹ TAYLOR, MODERN SOCIAL IMAGINARIES, *supra* note 36, at 111; *see generally* IMMANUEL KANT, IMMANUEL KANT'S CRITIQUE OF PURE REASON (2013).

¹²² I borrowed the use of Kant's terms in this context from Taylor, who elaborates on the mutual connections between theory and practice, while they both shape the social imaginary. *See* TAYLOR, MODERN SOCIAL IMAGINARIES, *supra* note 36, at 111.

¹²³ Zuckerberg, *supra* note 34.

¹²⁴ Sam Levin, *Facebook Temporarily Blocks Black Lives Matter Activist After He Posts Racist Email*, GUARDIAN (Sept. 12, 2016, 5:26 PM), <https://www.theguardian.com/technology/2016/sep/12/facebook-blocks-shaun-king-black-lives-matter> [https://perma.cc/M35W-BRRZ].

sociotechnical one. He suggests that “each person should see as little objectionable content as possible, and each person should be able to share what they want”¹²⁵ This rationale goes hand-in-hand with the company’s business goal of encouraging as much activity as possible, but also presents a contingent approach regarding the nature of rights. As he detailed, “content should simply not be shown to anyone whose personal controls suggest they would not want to see it”¹²⁶

What Zuckerberg actually proposed is that everyone have almost unlimited freedom of expression with no constraints,¹²⁷ but, at the same time, all users have the almost unlimited “right” not to be exposed to content they could find offensive. The coexistence of those two conflicting freedoms is made possible by technology that enables users to curate and filter their Facebook environment, so as not to be directly exposed to unwanted content, choices, or actions of others.¹²⁸ This coexistence suppresses the need for individuals to respect the “other side” and to balance between their own rights and others. It enables users to post whatever they want, with no need to take into account the sensitivities and rights of other users. At the same time, it enables other users to avoid the duty to tolerate and respect opinions and expressions that contradict their own views.

It is true that, even in the offline world, people can try to avoid ideas and practices that they find wrong or offensive by choosing their social environments. However, they cannot *always* escape exposure to these practices and ideas. We pass demonstrations on our way to work, hear the opinions of colleagues, and come across pictures in the newspaper. When exposed to them, we have the duty to respect and tolerate them. Facebook’s mediation between users, through its AI systems, could make this duty obsolete. In this virtual universe, rights still triumph, but their victory does not demand anything from anyone, except the development of AI to monitor all the content.

Although this system is not yet fully active, other features of Facebook are based on the same rationale. For instance, the “Hide” function is one of the existing features demonstrating this rationale.¹²⁹ This function enables a user to stop exposure to posts or comments of specific “friends” without the onerous, but respectful, need to notify these friends that their content has been censored from the user’s feed.¹³⁰ The hidden social significance of this option is the creation of an infrastructure for relationships in which one does not

¹²⁵ Zuckerberg, *supra* note 34.

¹²⁶ *Id.*

¹²⁷ Zuckerberg says that even in the proposed system, which is based on user preferences, the corporation will prohibit certain expressions in extreme cases. *See id.*

¹²⁸ *Id.*

¹²⁹ FACEBOOK, *Community Standards*, *supra* note 22.

¹³⁰ *Id.*

need to be accountable to others. This infrastructure enables individuals to make decisions and to use their rights with no constraints and no need to consider the implications for others and their rights. This design feature creates an acoustic separation between individuals, enabling us to turn off our friends' voices without their knowledge.

According to Wesley Hohfeld's matrix, this practice is legally legitimate—your friend has the liberty to speak, but you don't have any duty to listen.¹³¹ However, at the moral and the imaginary level, this design changes a very basic premise about what the meaning of living together is. In the offline world, you have no duty to hear your friends—you can cover your ears while they chat with you, or mute the speaker while they talk to you on the phone. However, sooner or later, they will notice, and your behavior will have consequences. We depend on each other - our actions influence others, and when we make choices, we take others and their rights into consideration. It is not just a matter of politeness or rules of comportment in society; it is also a matter of the meaning of others' rights and the duty of respecting others. In contrast, the "Hide" button enables us to experience the practice of muting others as legitimate, and as not containing any normative meanings.¹³² It creates the infrastructure for a world in which one's rights do not generate a duty of respect for others.

One other Facebook feature that provided an infrastructure for relations in which there was no need to respect the rights of others and to treat them with tolerance was the rainbow "Pride" reaction.¹³³ In 2017, to celebrate Pride

¹³¹ HOHFELD, *supra* note 114, at 36.

¹³² This feature has even more fundamental implications when it is used on public officials' formal pages. The "hide" button enables page administrators to conceal any response from the public, while leaving it visible to the commentator who posted it and his friends. For example, According to Haaretz, critical responses disappear regularly from Israeli prime minister Benjamin Netanyahu's page shortly after being posted. See Yarden Michaeli, *Comments Critical of Netanyahu Regularly Disappear From His Facebook Page*, HAARETZ (May 3, 2017), <http://www.haaretz.com/israel-news/.premium-1.786608> [<https://perma.cc/QT92-WRKR?type=image>]. The commentators, along with their friends, can still see these comments while the rest of the world cannot. Public officials, unlike fellow citizens, do have concrete constitutional duties to hear citizens, without discrimination and without favoring opinions that support them. With regard to the ability to block citizens' accounts on public officials' formal pages, a federal court found that even a short-term ban of a constituent from a public official's Facebook page violates the First Amendment. See *Davison v. Loudoun County Board of Supervisors*, 1:16CV932 (JCC/IDD), 2016 WL 4801617, at *7 (E.D. Va. Sept. 14, 2016). The "hide" button can undermine these duties and the ability to locate and identify violations of these duties. Thus, this feature actually splits Hohfeld's matrix—it creates a wall between one's rights and another's correlative duties. It enables one to have freedom of expression and to write comments on public officials' pages, while freeing the public officials of duties to listen and fulfill this right.

¹³³ See J. Nathan Matias, Aimee Rickman & Megan Steiner, *Who Gets to Use Facebook's Rainbow 'Pride' Reaction?* ATLANTIC (June 26, 2017),

Month, Facebook debuted a feature allowing users to react to a post with a rainbow flag instead of the usual “Like” icon—but not everyone could use it or even see when others used it.¹³⁴ Those in “major markets with Pride celebrations”¹³⁵ had access to the feature automatically, while other users needed to “Like” Facebook’s LGBTQ page to access this feature. For other users, the feature was not accessible at all.¹³⁶ This policy is understandable due to the diverse multicultural and multinational demands that Facebook navigates. However, this policy also has some deep effects on our shared understanding of rights. Pride parades are about celebrating access to equal rights in public, even if doing so hurts feelings or opposes the religious beliefs of others. These others are obliged to respect, tolerate, and allow the pride parade to proceed through public spaces. On Facebook, clicking on the rainbow “Pride” button enabled some users to celebrate equal rights; but, at the same time, others who, Facebook assumed, might be bothered by the rainbow flag were not exposed to this celebration of equal rights.¹³⁷ Here too, the design and technology automatically prevented individuals from being exposed to content that the platform assumed they might not like, and thus precluded the duty to respect.

This articulation of rights, which does not demand anything from anyone, enables us to practice almost limitless freedom of expression and makes us feel secure and safe in a manner that was not possible before Facebook existed. Yet, it could erode the very basic organizing precept for living together in the modern age—namely, mutual respect.

B. The Erasure of the Mutual Guarantee of Others’ Rights

The modern imperative to respect each other’s rights is also reflected in the perception of a political community as one in which every member has a mutual obligation to protect and fulfill his or her fellow citizens’ rights. In the modern imaginary, the entire community is perceived as a guarantor of rights.¹³⁸ Rights are preserved through collective institutions—courts, police,

<https://www.theatlantic.com/technology/archive/2017/06/facebook-pride-reaction/531633/>
[<https://perma.cc/879C-336A>].

¹³⁴ *Id.*

¹³⁵ Alex Schultz, *Facebook Celebrates Pride Month*, FACEBOOK (June 5, 2017) <https://newsroom.fb.com/news/2017/06/facebook-celebrates-pride-month/>
[<https://perma.cc/48NG-JWWM>].

¹³⁶ Facebook did not release a list of who could access the Pride rainbow, but according to the press and comments left on Facebook’s LGBTQ page, the feature was unavailable in Singapore, Egypt, Malaysia, UAE, Tunisia, Serbia, and Russia—all countries with explicitly anti-LGBTQ policies, and also in some American cities. *See* Matias, Rickman & Steiner, *supra* note 133.

¹³⁷ *Id.*

¹³⁸ TAYLOR, MODERN SOCIAL IMAGINARIES, *supra* note 36, at 93.

and welfare institutions.¹³⁹ The tax contributions of citizens enables the existence of these institutions and the protection of the members' rights.¹⁴⁰ In the case of Facebook, the preservation of rights becomes a private, non-collective matter, thereby liberating individuals from mutual responsibility. The company enforces and tailors the meaning of rights to a particular user in a particular way, having to do with the user's menu-driven, structured choices, and, increasingly, with their intentional and unintentional behavior, together with some proxies that predict preferences.

Therefore, in Facebook's "community," nobody really knows what their fellow user's feed looks like, how their fellow user's structured questionnaire is designed, or what their fellow user's set of options are.¹⁴¹ This is also true regarding one's knowledge of the other members' opportunities in a given Facebook group.¹⁴² The members have no access to the company "black box" that configures every member's experience and unique set of options. Consider again the rainbow "Pride" button. Some users had the opportunity to use it and to express pride, while others did not; some had the opportunity to see whether others used the button, and some did not. Nobody really knew the logic behind the decision as to who would be offered the button and who would not. The set of tools, or powers, that the company offered differed from place to place and from user to user. It was impossible to know what tools others had access to. Without this basic knowledge, surely no one could fight for others' rights. In such systems, fellow users do not have any role in the protection of other community members' rights.

Facebook's infrastructure also enables users to report abusive content, even if this content does not directly harm them. This opportunity challenges the Western practice and theory, which usually enable one to claim and act against the violation of a right—but only in relation to *one's own* right. Therefore, the platform increases the opportunities to report and demand responses to violations of others' rights.

Technological and corporate mediation between users enables them to be largely unaffected by others, and with the concealment of mutual dependence, comes a concealment of mutual obligations. The platform's technology filters actions and expressions, obscuring them from the view of those whose feelings may be hurt or whose rights may be infringed upon. In

¹³⁹ See Tomer Shadmy, *Superheroes' Regulation: Human Rights Responsibilities as a Source of Transnational Authority*, 43 N.C.J. INT'L L. 130, 173-74 (2018).

¹⁴⁰ For the relations between taxes and rights, see generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999).

¹⁴¹ See Brian Christian, *The A/B Test: Inside the Technology That's Changing the Rules of Business*, WIRED (Apr. 25, 2012 8:47 PM), <https://www.wired.com/2012/04/ff-abtesting/> [<https://perma.cc/8A36-BQJ9>].

¹⁴² See, e.g., PASQUALE, *supra* note 69, at 40.

this way, individuals have grown accustomed to living in a world where there is no need to respect and tolerate others.

Many observers have lately elaborated on the effects of “echo chambers” or “filter bubbles” on public deliberation processes and on the development of individual consciousness.¹⁴³ These echo chambers or filter bubbles actually lead us to forgo the duty to respect and tolerate the other, the duty that has, until now, organized modern social life. Hence, in the moral evolution that Facebook supports, the duty of respect becomes an unnecessary appendage that is condemned to disappear.

IV. THE INDIVIDUAL DIMENSION

The modern social contract and the language of rights it is based on have an important role in shaping individual agency and autonomy. Human rights represent basic interests or needs that every individual has, but they also represent the imaginary’s core human characteristics. They define what does and should differentiate humans from other creatures. In this sense, rights have a role in creating the individual—their present and possible futures.¹⁴⁴ On this basis, human will and its late-modern expression in the ability to choose acquire a prominent role in defining both normative rights and the ontological self. I will demonstrate in this section how Facebook’s infrastructure, on the one hand, relies on this notion of rights, but, on the other hand, undermines the scope of an individual’s conscious choice. I argue that while the modern concept of rights presupposes a certain type of individual (one who could and should choose), Facebook’s infrastructure threatens the possibility of such an individual and hence could render the notion of rights meaningless, thus inviting us to rethink the essence of the individual and of rights in digital times.

Since the second half of the twentieth century, many liberals have seen the ability to choose as the ultimate expression of freedoms and rights.¹⁴⁵

¹⁴³ One could additionally argue that this articulation could restrict our ability to develop our individual personality through negotiation and encounters with other conflicting ideas. It also restricts the ability of the public discourse to arrive at a rational solution and to make a decision through deliberation over conflicting ideas. For this line of critique, which usually frames these problems as “echo chambers” or “filter bubbles,” see generally Eytan Bakshy, Solomon Messing & Lada A. Adamic, *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 SCI. 1130 (2015); Seth Flaxman, Sharad Goel & Justin M. Rao, *Filter Bubbles, Echo Chambers, and Online News Consumption*, 80. PUB. OPINION Q. 298 (2016); Elanor Colleoni, Alessandro Rozza, & Adam Arvidsson, *Echo Chamber or Public Sphere? Predicting Political Orientation and Measuring Political Homophily in Twitter Using Big Data*, 64 J. COMM. 317 (2014).

¹⁴⁴ See Solove, *supra* note 32, at 1880-82.

¹⁴⁵ See FONER, *supra* note 28, xviii; COHEN, *supra* note 28, at 126; FRIEDMAN *supra* note 28, at 6-7. In the neoliberal legal mindset (which follows the libertarian logic), the overlap between rights and choice is reflected in the constant efforts to regulate as few fields as

According to this mindset, the meaning of the right to autonomy is best described as the ability of the individual to choose and write his or her own “life story.” This idea presupposes: (1) that individuals *can* design and choose their particular way of life; (2) that they *should* do so; and (3) that it is desirable to enable, protect, and fulfill this ability.¹⁴⁶ Accordingly, in legal theory, the function of a right is understood as giving its owner control and choice.¹⁴⁷ Will or choice theorists maintain that a right makes the right-holder “a small-scale sovereign.”¹⁴⁸ They assert that the function of a right is to give its holder control over another’s duty.¹⁴⁹

The current American legal approach to the right to privacy (and other digital rights) relies on this logic of self-management and choice.¹⁵⁰ The law provides individuals with a set of rights to enable them to make decisions about how to manage their data.¹⁵¹ The goal of this bundle of rights, according to Solove is “to provide people with control over their personal data, and through this control, they can decide for themselves how to weigh the costs and benefits of the collection, use, or disclosure of their information.”¹⁵²

Facebook embraces this version of the overlap between choice and rights.¹⁵³ The company promotes the idea that users’ choice and control over their own data—and not public restriction of the way data is collected, processed, and distributed—should be the manifestation of the right to privacy.¹⁵⁴ In a post that described the company’s initiative to reframe the public discourse about the right to privacy, the company argued that “the question we should be asking is not how to restrict data or protect people

possible and to allow maximum choice for legal persons, even if not everyone has the same means to choose and even if the choice will endanger the chooser or the public good. See KENT GREENFIELD, *THE MYTH OF CHOICE: PERSONAL RESPONSIBILITY IN A WORLD OF LIMITS* 145-61 (2011).

¹⁴⁶ GREENFIELD, *supra* note 145.

¹⁴⁷ See H. L. A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 183 (2011).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 434 (2016).

¹⁵¹ These rights consist primarily of rights to notice, access, and consent regarding the collection, use, and disclosure of personal data. For this approach and its weaknesses, Solove, *supra* note 32, at 1800-82.

¹⁵² *Id.* at 1880.

¹⁵³ FACEBOOK & CTRL-SHIFT, *A NEW PARADIGM FOR PERSONAL DATA: FIVE SHIFTS TO DRIVE TRUST AND GROWTH* 2 (June 2016) <http://www.ctrl-shift.co.uk/news/2016/06/21/facebook-a-new-paradigm-for-personal-data/> [<https://perma.cc/3F4A-XYT>].

¹⁵⁴ *Id.* at 9-10.

from it – it’s how to give them control over it.”¹⁵⁵ This agenda is reflected in the various privacy tools for users’ choice and control. In these tools, users can select (from a range of structured questionnaires) the desired level of exposure to other users and to their content and information.¹⁵⁶ However, these questionnaires do not enable users to restrict the company’s use of their personal data and information.¹⁵⁷ The system for personal control over content, which I presented earlier and is still under development, could be understood as a similar mechanism for the management of the freedom of expression. In these systems, making a selection from a corporate structured questionnaire is perceived as an expression of rights.

The structured privacy and content questionnaires are actually an interesting (if not confusing) innovative legal construct in themselves. We used to consider two dimensions of rights: the public dimension that shapes the meaning of a right in the political and legal spheres, and the private dimension in which individuals make their choices and realize their rights.¹⁵⁸ In Facebook’s rights questionnaires, the two dimensions collapse into each other: the rights questionnaires both shape the meaning of rights and are also part of their realization. For example, the content questionnaires formulate the limits of the right, thus functioning as the public dimension of rights, and simultaneously express each user’s preferences, functioning as the private dimension. Both of these dimensions are not upheld in their old modern spheres. The questionnaires are not public. Rights are constituted between each user and the company without the participation (or even the knowledge) of the rest of the users, but, at the same time, this process is not private—the company always accompanies, monitors, and directs the users’ choices.¹⁵⁹

¹⁵⁵ *Facebook and Privacy*, FACEBOOK (June 21, 2016). <https://www.facebook.com/fbprivacy/posts/1338431306185331:0> [<https://perma.cc/2X9E-7JAJ>].

¹⁵⁶ FACEBOOK & CTRL-SHIFT, *supra* note 153, at 10.

¹⁵⁷ For Facebook’s privacy agenda, tools, and their limitations, see Ira S. Rubinstein & Nathaniel Good, *Privacy By Design: A Counterfactual Analysis of Google and Facebook Privacy Incidents*, 28 BERKELEY TECH. L.J. 1333, 1392-1406 (2013); Jeffrey Rosen, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 FORDHAM L. REV. 1525, 1534-38 (2012); Yang Wang et al., *A Field Trial of Privacy Nudges for Facebook* 2368-71 THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS (Apr. 26 - May 1, 2014); Emilee Rader, *Awareness of Behavioral Tracking and Information Privacy Concern in Facebook and Google* 56-61 SYMP. ON USABLE PRIVACY AND SECURITY (SOUPS) (July 9 - 11, 2014). See generally Fred Stutzman, Ralph Gross & Alessandro Acquisti, *Silent Listeners: The Evolution of Privacy and Disclosure on Facebook*, 4 J. OF PRIVACY AND CONFIDENTIALITY 7 (2012); James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137 (2009).

¹⁵⁸ Alan F. Westin, *Social and Political Dimensions of Privacy*, 59 J. SOC. ISSUES 431, 432 (2003).

¹⁵⁹ Kim & Telman *supra* note 11, at 731, 735-36.

Therefore, in these questionnaires, the overlap between rights and choice has undergone a transformation. On the platform, users are called to choose the *law itself* from a set of options—to determine what their own version of the law will be. By this process of personalization, privatization, and corporatization of the law, Facebook becomes a rights’ gatekeeper. The users get to choose their rights, but from a curated pre-selection, which does not include the right to opt out of that pre-selected range.

This new phase of overlap between choice and rights is accompanied by parallel tendencies that undermine the ability of individuals to make *conscious* choice. At the same time that the platform embraces the self-management version of rights, it nudges users by relying on designs and techniques that direct or guide the individual’s decision-making processes in ways identified by the underlying algorithm as “optimal.”¹⁶⁰ These herding forces are created through several mechanisms. First, the contents of the suggested options, such as in the Facebook privacy settings, are pre-determined, including only references to other users’ exposure to personal data and not the company’s or apps’ exposure to the same data.¹⁶¹ Second, these forces are exerted by means of different configurations of “opt-outs” and “opt-ins” and by offering “suggestions” and default options intended to prompt the user to make the decisions preferred by the choice architecture.¹⁶² For example, until recently for many users, the default option in the “App Settings” manual (in the category “Apps Others Use”) was the one that permits the apps that your friends use—and you don’t—to use your personal data, including your activities, posts, and religious and political views. Facebook has removed this feature, after waves of criticism regarding the extensive use of users’ data.¹⁶³

In any event, even if we set aside for a moment the possibilities for manipulation by design, empirical evidence and social science literature demonstrate that, from the outset, people’s ability to make informed and rational decisions in a big-data environment is questionable.¹⁶⁴ Users do not generally read privacy or other corporate policies, they do not understand

¹⁶⁰ See *id.*; Solove, *supra* note 32, at 1889-90; Rubinstein & Good, *supra* note 157, at 1399; Rosen, *supra* note 157, at 1535-36; Stutzman, Gross & Acquisti, *supra* note 157, at 9; Wang et al., *supra* note 157, at 2367-69; Grimmelmann, *supra* note 157, at 1149, 1160; Rader, *supra* note 157, at 51, 60; Anne S.Y. Cheung, *Defaming By Suggestion: Searching for Search Engine Liability in the Autocomplete Era*, in *COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION* 467, 467 (András Koltay ed., 2015).

¹⁶¹ See, e.g., Jørgensen, *supra* note 27, at 350.

¹⁶² See Jørgensen, *supra* note 27, at 349. One of Facebook’s employees was quoted as saying, “[i]f you have settings that are very granular for ‘power users’, normal users would be overwhelmed.” *Id.*

¹⁶³ Thomas Tamblin, *Facebook Rolls Out New Privacy Controls On Smartphone And Desktop*, HUFFPOST UK (March 29 2018) [<https://perma.cc/Z3KD-23KN>].

¹⁶⁴ Solove, *supra* note 32, at 1880.

them, and they often lack enough background knowledge to make an informed choice.¹⁶⁵ Furthermore, people have a limited ability to make a rational assessment of the costs and benefits of consenting to various forms of collection, use, and disclosure of big data.¹⁶⁶ These characteristics, often collectively referred to as the “consent dilemma,” are well known to Facebook and the other internet giants.¹⁶⁷ Thus, while the company promotes the overlap between choice and rights, it is acknowledging and fostering an environment that undermines the value of choice as an expression of autonomy.

Moreover, in a different context, such platforms no longer rely solely on users’ intentional decisions (in the form of “clicks”) as an expression of their choices, but instead rely on other measures of users’ unintentional behavior—such as periods of reading and response, computer mouse movement patterns, and so on. These indicators are used to predict, fulfill, and create users’ desires and choices,¹⁶⁸ bypassing consciousness and instead operating in the mode of alerts and reflexes.¹⁶⁹ For example, Facebook’s News Feed has evolved from a fairly crude algorithm into a complex machine-learning system that provides a much more individualized user experience, in which the algorithm adapts to users’ behavior.¹⁷⁰

These machine-learning systems not only predict the choices of the users based on their behavior but also *create* their choices in some senses.¹⁷¹ The algorithmic analysis of data patterns dynamically configures the targeted individual’s choice environment in highly personalized ways, affecting the individual’s behavior and perceptions by subtly molding the networked user’s understanding of the world that surrounds them.¹⁷² One example of this tendency is the “Lookalike” tool Facebook suggests for advertisers to

¹⁶⁵ *Id.* at 1888.

¹⁶⁶ See Solove, *supra* note 32, at 1880-81. Empirical and social science research demonstrates that there are severe cognitive and structural problems that undermine the possibility of consent and a real conscious choice in the digital environment. *Id.*

¹⁶⁷ *Id.* at 1895.

¹⁶⁸ Cohen, *supra* note 59, at 7.

¹⁶⁹ Antoinette Rouvroy, *The End(s) of Critique: Data-Behaviourism versus Due Process*, in PRIVACY, DUE PROCESS AND THE COMPUTATIONAL TURN: THE PHILOSOPHY OF LAW MEETS THE PHILOSOPHY OF TECHNOLOGY 143, 153 (Mireille Hildebrandt & Katja de Vries eds., 2013).

¹⁷⁰ Victor Luckerson, *Here’s How Facebook’s News Feed Actually Works*, TIME MAGAZINE (July 9, 2015), <http://time.com/collection-post/3950525/facebook-news-feed-algorithm/> [<https://perma.cc/WS48-ZDQ2>]. Because the average Facebook user has access to about 1,500 posts per day, but looks at only 300, most see only a sliver of the potential posts in their network each day; hence, algorithmic ranking critically determines how these posts are filtered and highlighted in users’ minds. *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

find new audiences to target.¹⁷³ This tool dissects existing groups of people and identifies their common qualities (such as demographic information, interests, behavior).¹⁷⁴ Then, it finds people who are similar to (or “look like”) them and targets them.¹⁷⁵ For example, if, for one reason or another, a user is deemed compatible with the profile of people who buy one brand of shoes, Facebook will expose him or her to these shoe-related advertisements and content.¹⁷⁶ This raises the chances that the user will also become interested in buying the shoes, even if he originally had no particular interest in that type of product.¹⁷⁷ Hence, the user’s “choice” is created by the environment that the platform produces. The platform’s algorithms imagine the users, and they respond accordingly within the algorithms’ affordances.¹⁷⁸ Via continuous feedback loops based on online users’ interactions, algorithms configure individuals online by “tailoring their conditions of possibility.”¹⁷⁹

Another tendency that undermines the possibility of intentional choice on the platform is the automation of interaction within the platform—that is, automation of sharing through passive monitoring systems.¹⁸⁰ Different apps, such as location and navigation apps, directly convey information on a user’s whereabouts to the company and their friends without the user’s direct and conscious action.¹⁸¹ Some future technologies could lead to a new scale of automation that further undermines the possibility of conscious choice, such as technology aims to decode neural activity devoted to speech in the user’s brain and enable him to “type from the brain” without a keyboard.¹⁸² Through these systems, deciding what thoughts, decisions, and sensations will be

¹⁷³ For “Lookalike Audiences,” see Facebook Business, Advertiser Help, *About Lookalike Audiences*, <https://www.facebook.com/business/help/164749007013531> [<https://perma.cc/J7Q4-5NKK>] (last visited Jan. 5, 2019).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Danny Butt, *FCJ-198 New International Information Order (NIO) Revisited: Global Algorithmic Governance and Neocolonialism*, 27 *FIBRE CULTURE J.* 1, 8 (2016).

¹⁷⁹ John Cheney-Lippold, *A New Algorithmic Identity: Soft Biopolitics and the Modulation of Control*, 28 *THEORY, CULTURE & SOC’Y* 164, 168 (2011); Yeung, *supra* note 21, at 19.

¹⁸⁰ See, e.g., Cohen, *supra* note 59, at 209.

¹⁸¹ *Id.* at 208-09.

¹⁸² As Regina Dugan, Facebook’s Vice President of Engineering and Building, wrote in her Facebook post: “Over the next 2 years, we will be building systems that demonstrate the capability to type at 100 wpm by decoding neural activity devoted to speech.” Regina Dugan, FACEBOOK (Apr. 18, 2017, 10:12 PM), https://www.facebook.com/ReginaEDugan/posts/343078239427954?__tn__=R [<https://perma.cc/VWL6-YLKK>].

publicly visible will be an operation performed automatically by the company's technology.

Such practices could undermine the perception that conscious choice is the basis of agency and of the rights of the individual.¹⁸³ In this new reality, the "agent" is the outcome and not the instigator of a particular "assemblage" of behaviors, impulses, and expressions.¹⁸⁴

In questioning the possibility of an individual to choose, the ability to feel becomes an alternative possible basis for the concept of a right. The possibility of such a conceptualization is in the emphasis given to emotions and feelings in the platform design. In the system (still under development) for personal control over content, the right to freedom of expression is as important as the "right" not to be exposed to content one may find offensive.¹⁸⁵ While in constitutional theories the right to freedom of expression is one that transcends any feelings or beliefs, in this system, feelings and emotions are sacred, are framed as rights, and bear the same import as classic human rights. Another example of the growing importance of emotions on the platform is the "Reactions" feature created to facilitate response to content. The alternative reactions to choose from, following Facebook's rhetoric, are "Like," "Love," "Haha," "Wow," "Sad," and "Angry."¹⁸⁶ Facebook describes the purpose of this feature as to offer "a

¹⁸³ The change in the way the company relates to human agency is also evident in close reading of its financial statements. In its yearly reports, one can see a decline in the volume of references to the word "user/s," from 457 references in the first report of 2012, to just 241 in 2016. A corresponding decline was recorded in the number of times the word "people" was mentioned: 40 in 2012, compared to 24 in 2016. At the same time, there is a vast increase in references to the words "data" and "time." Rhetoric changes with the transformation of the corporation's relationship to human agency. The number of human users (human agents) have become less and less important, while the data that derives from their isolated units of behavior and the time spent on the platform become increasingly important. It seems that with more than 2 billion users worldwide, Facebook has almost reached its user limit, and, therefore, the opportunities for future growth and profits are no longer inherent in the growth of the number of human users but rather in the ability to extract more and more data from any interaction with a user and make him spend more time on the platform. For these purposes, it is much more efficient to stop seeing in one user one agent and to start dividing each one into separate segments. For the yearly reports, see FACEBOOK, *supra* note 72.

¹⁸⁴ See generally Cohen, *supra* note 59.

¹⁸⁵ See Zuckerberg, *supra* note 34. This conceptualization is expressed in what Zuckerberg calls the "guiding principles" of the Community Standards, according to which "each person should see as little objectionable content as possible, and each person should be able to share what they want while being told they cannot share something as little as possible." *Id.* This approach, of course, is also suitable for the business model of the company, which would prefer that every user be as active as possible on the platform.

¹⁸⁶ Facebook Brand Resource Center, *Reactions*, <https://en.facebookbrand.com/assets/reactions> [<https://perma.cc/G8AB-KP4X>] (last visited

quick and easy way to express how you feel.”¹⁸⁷ According to this mindset and regulation by design, individuals should react to content from a repertoire of six basic emotions, not with thoughts, logic, or opinions.

Thus, there is a new reliance on the freedom to feel, rather than the freedom to choose, as the ultimate expression of individuality and therefore of rights. This should come as no surprise, given that AI systems can perform tasks more quickly than humans—even those based on more complex rationales and informed choices.¹⁸⁸ In such an environment, human uniqueness is expressed in the ability to share feelings, and, therefore, this ability becomes almost sacrosanct and trumps any other rights. One could say this ability and the right arising from it, the right to feel, is far less threatening to Facebook’s business model than other modern rights—such as the right to privacy.

We have seen, then, that Facebook promotes the liberal overlap between choice and rights, as it frames user rights as mechanisms for self-choice and control, and not as a source of legislative constraints. Facebook, like other internet giants, uses the concept of user choice to justify and legitimate its business model.¹⁸⁹ At the same time, the company’s big-data and algorithmic-regulation techniques undermine the ability of users to make some conscious choices. Consequently, for now, the notion of rights is diluted into an almost meaningless concept, like a shell company or a Trojan horse, carrying the seeds of its own destruction.

In light of these developments, it seems that Facebook and other internet giants’ adoption of the choice version of rights, together with their practices that undermine the ability to choose meaningfully, expose the difficulty of employing the modern conceptualizations of individuality, autonomy, and rights to guide and regulate contemporary affairs. It exposes the contingency of the late-modern overlap between rights and choice and demonstrates a potential split between the idea of choice and the idea of autonomy in the digital environment.¹⁹⁰ All these tendencies raise the question of what the meaning of individual autonomy and rights in the present era could and should be.

V. THE ENFORCEMENT OF RIGHTS

In the modern Western world, rights are enforced mostly through ex-post

Jan. 5, 2019).

¹⁸⁷ *Id.*

¹⁸⁸ U.S. Gov. Accountability Office, GAO-18-142SP, *Artificial Intelligence: Emerging Opportunities, Challenges, and Implications* 16, 18 (2018).

¹⁸⁹ Zuboff, *supra* note 12, at 81.

¹⁹⁰ Solove, *supra* note 32, at 1894. “Ironically,” writes Solove, “paternalistic regulation might limit people’s freedom to choose in the name of enhancing their autonomy.” *Id.*

litigation, be it private or public. Litigation is based on discourse in the form of argumentation, interpretation, and persuasion. The practice of rights is a practice of constant dialogue.¹⁹¹ Even if rights are considered trumps, there is plenty of room for argumentation—legal experts discuss whether a state of affairs or an action constitutes a rights violation, what the limits of rights are, whether there are competing rights or public interests, and so on.¹⁹²

In contrast, the interactions dealing with rights within Facebook do not enable open discourse, interpretation, or argumentation. Facebook implements its rules and standards through pre-structured procedures, many of them automated, with no dedicated place for dialogue and no option to appeal. As we saw earlier, in these processes, the company occupies all three branches of government—it sets the rules, serves as judge, and enforces the decisions. These three powers are exercised simultaneously and without separation. If a user is deemed to have violated the TOS or the Community Standards, the company can block him or her without prior notice, without transparency, and with no option to appeal.¹⁹³

Facebook's rights enforcement—or, according to its particular lexicon, “content moderation”—has several modes.¹⁹⁴ There are channels of automatic *ex-ante* moderation processes that rely on algorithmic screening of content prior to publication.¹⁹⁵ An example of such moderation is geo-blocking, in which, usually following a government request, specific content is rendered unavailable in some geographical areas.¹⁹⁶ An alternative mode of enforcement on the platform is *ex-post* moderation. There are some proactive modes of *ex-post* moderation in which the platform proactively seeks out and removes published content, again using various algorithms.¹⁹⁷ However, the company's central mode of moderation is *ex-post reactive* moderation, in which moderators assess content only after users bring the content to their attention through reporting or (according to the internal

¹⁹¹ As Habermas wrote, “[t]he internal connection between popular sovereignty and human rights lies in the normative content of the very *mode of exercising political autonomy*, a mode that is not secured simply through the grammatical form of general laws but only through the communicative form of discursive processes of opinion—and will-formation.” JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 103 (William Rehg trans., 1996). See also Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?* 29 *POL. THEORY* 766, 776 (William Rehg trans., 2001).

¹⁹² Klonick, *supra* note 7, at 1602.

¹⁹³ *Id.* at 1647.

¹⁹⁴ For a comprehensive overview of Facebook's modes of moderation, see generally Klonick, *supra* note 7. For different categories of online moderation, see James Grimmelman, *The Virtues of Moderation*, 17 *YALE J.L. & TECH.* 42, 63-70 (2015).

¹⁹⁵ Klonick, *supra* note 7, at 1636.

¹⁹⁶ *Id.* at 1637.

¹⁹⁷ *Id.* at 1638.

terminology) “Flagging.”¹⁹⁸ This is a mechanism provided by the platform “to allow users to express concerns about potentially offensive content.”¹⁹⁹ The extensive reliance on user reports helps the company to legitimize censoring or banning content and assists in reviewing huge volumes of content.²⁰⁰

The process for reporting posts or profiles that violate rights or feelings is, once again, a structured procedure, with multiple-choice questions and with no dedicated space for free expression or for argumentation with the other party or the nameless “judge.”²⁰¹ During this process, users have no choice but to select one of the pre-structured options, even if no option fits their case.²⁰² At the end of a series of closed questions, the system offers the user the following optional remedies: “Submit to Facebook for review,” “Block,” or “Hide.”²⁰³ If a user chooses “Submit,” they are not told what the procedure for handling the report is, are not exposed to the process and its results, and certainly do not participate in this process.²⁰⁴

Facebook has its own comparatively small in-house moderating team, but most of the moderators work for subcontractors in the Philippines, Ireland, India, or Eastern Europe.²⁰⁵ Several dynamic manuals guide these content moderators’ decision-making.²⁰⁶ These manuals are different from the company’s open-to-the-public TOS or Community Standards.²⁰⁷ They are more detailed and change much more frequently.²⁰⁸ These manuals make evident that even human decision-making on this issue is guided by code-based logic.²⁰⁹ Every employee is required to make hundreds of decisions a day, and their judgments are structured by engineered formulas.²¹⁰

¹⁹⁸ *Id.* at 1638.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1638.

²⁰¹ *See id.* at 1639. When you want to report on rights violations, you can click on a button to “Report/Mark as Spam.” Then you are asked to describe your report in terms such as: “Hate Speech,” “Violence or Harmful Behavior,” or “I Don’t Like This Post.” *See id.*

²⁰² *Id.* at 1638.

²⁰³ *Facebook Community Standards*, FACEBOOK *Introduction*, <https://www.facebook.com/communitystandards/> [<https://perma.cc/WYY7-4343>] (last visited Jan. 3, 2019).

²⁰⁴ Klonick, *supra* note 7, at 1639.

²⁰⁵ *Id.* at 1640.

²⁰⁶ *Id.* at 1639.

²⁰⁷ *Id.* at 1641.

²⁰⁸ *Id.* at 1639.

²⁰⁹ *See id.* at 1634.

²¹⁰ *See* Hopkins, *supra* note 4. Till Krause & Hannes Grassegger, *Facebook’s Secret Rule of Deletion*, SÜDDEUTSCHE ZEITUNG (December 15, 2016) <http://international.sueddeutsche.de/post/154543271930/facebooks-secret-rule-of-deletion> [<https://perma.cc/2F9U-2FRP>].

If a moderator has decided to ban a Facebook user's content, it is taken down immediately, and he or she is automatically prevented from accessing their Facebook account for a time.²¹¹ Sanctions for repeat offenders are gradually escalated.²¹² After two posts are removed within a certain amount of time, for example, an account may be suspended.²¹³ Further violations of Community Standards can result in a total ban or the deletion of an account.²¹⁴ These rules are not provided to the public and can be applied differently to different users at different times.²¹⁵ In any case, Facebook does not allow for appeals with regard to removed posts or suspended profiles or pages; it only allows for an appeal of the complete removal of a profile or page.²¹⁶

This enforcement system has some advantages over states' enforcement mechanisms. It is simple and accessible. To file a complaint against rights violations on the platform, one does not need knowledge or expertise, mediation of legal practitioners, financial resources, or time. However, through these procedures, the users are constrained by code—they cannot effectively negotiate with the platform using words. Its architecture does not allow for the interpretation and argumentation that are characteristic of legal practice,²¹⁷ not to mention the improvisation and the spontaneity that are central features of political action.²¹⁸

Steadily evolving is a vast body of literature on how algorithmic decision-making processes are detrimental to individual dignity and autonomy.²¹⁹ My point here is slightly different. I am more concerned with how these procedures challenge the idea or imaginary that rights are the locus of individual and public deliberation and argumentation.

In a letter to investors included in Facebook's IPO filing, Zuckerberg outlined his philosophy for running the platform.²²⁰ He writes that Facebook

²¹¹ Klonick, *supra* note 7, at 1647. ("When the user next attempts to sign in, she will be given the message: 'We removed the post below because it doesn't follow the Facebook Community Standards.' When she clicks 'Continue,' the user is told: 'Please Review the Community Standards . . .' The user then clicks 'Okay' and is allowed to log back in.") *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 1639-42.

²¹⁶ *Id.* at 1648.

²¹⁷ DUNCAN KENNEDY, *A Left/Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation*, in LEGAL REASONING: COLLECTED ESSAYS 153, 156, 170 (2008).

²¹⁸ See generally HANNAH ARENDT, *THE HUMAN CONDITION* (1958).

²¹⁹ See generally Zarsky, *supra* note 31; Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1031-34 (2014).

²²⁰ S-1 Filing 67-70, FACEBOOK (2012),

adopted the hacker mantra: “Code wins arguments.”²²¹ He explained that this mantra means that, “[i]nstead of debating for days whether a new idea is possible or what the best way to build something is, hackers would rather just prototype something and see what works.”²²² Beyond the clear rejection of discussion and discourse as a basis for management, this mantra describes the essence of the platform’s enforcement mechanisms—where the binary “code” defeats and undermines all discourse and justification.

In this section, I described how users are regulated and constrained on a daily basis by a system whose decision-making processes are not transparent and not open to any dialogue, argumentation, or interpretation. The execution of decisions in this system is immediate and automatic. Through these practices, rights transform from a product of discourse and the practice of interpretation to a result of the practice of structured coding.

VI. CONCLUSION

This Article has demonstrated how Facebook users experience a new conceptualization of the social contract while interacting with the platform. The implications of this conceptualization could extend far beyond each user’s personal newsfeed.²²³

After Frank Pasquale published his influential book *The Black Box Society*,²²⁴ which, among other things, called for transparency of corporate codes, some scholars argued that, because the public has difficulty understanding codes (and because of the information flood that makes it difficult to track codes anyway), it is much simpler and more effective to monitor the outputs of the codes and ensure they do not discriminate against or directly harm anyone.²²⁵ This is quite an attractive and pragmatic

<https://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm>
[<https://perma.cc/2PVM-LRZR>].

²²¹ *Id.* at 69.

²²² *Id.*

²²³ Joshua A.T. Fairfield, *Mixed Reality: How the Laws of Virtual Worlds Govern Everyday Life*, 27 *BERKELEY TECH. L.J.* 55, 55 (2012).

²²⁴ PASQUALE, *supra* note 69, at 15-16.

²²⁵ See Anupam Chander, *The Racist Algorithm?*, 115 *MICH. L. REV.* 1023, 1024-25 (2017). Other scholars share this criticism on the possibility of code transparency but suggest other solutions. Perel and Elkin-Koren, for example, argue that, given the transparency shortcomings of algorithmic enforcement, black-box tinkering becomes an important tool for generating social activism as a check on algorithmic governance. See Maayan Perel & Niva Elkin-Koren, *Black Box Tinkering: Beyond Disclosure in Algorithmic Enforcement*, 69 *FLA. L. REV.* 181, 181-82 (2017). Tal Zarsky distinguishes between three categories of unfairness that stem from algorithmic decision-making processes: “(a) unfair transfers of wealth; (b) unfair differential treatment of similar individuals; and (c) unfair harms to individual autonomy.” Zarsky, *supra* note 31, at 123.

argument, but my findings here pull in another direction. According to these findings, even if, in the end, the output of Facebook's codes does not discriminate and does not harm anyone's concrete rights, it has some broader, deeper, and more abstract implications—it could change our shared legal and political notions. Black boxes, such as Facebook's secret algorithms, appear to have an aura. They bear implications on our shared political, social, and legal imaginary—the imaginary that guides and designs our present and future realities.²²⁶

The aim of this paper is not to glorify the modern conception of rights and argue to restore it. In fact, some of the significant legal and moral problems we face today stem from the incompatibility of the modern, state-centric conception of rights to our current transnational, privatized, hyper-connected reality. In recent years, the statist Western notion of rights that has guided, shaped, and justified modern institutions and practices is losing its descriptive, normative, and even aspirational power.²²⁷ Globalization, the Neoliberal movement and its premises, the rising power of multinational corporations, and other epistemic and ontological changes have created cracks in this existing model of rights.²²⁸ The need to reinvent human rights or invent parallel concepts that will guide current normative organizing principles is more than pressing in our era. Precisely against the backdrop of this interregnum, the alternative notion of rights that Facebook's infrastructure promotes has major implications for all citizens, not just Facebook users, as it is planting the seeds for an alternative conceptualization of rights and legal order. In this new version of rights, there are aspects that can develop normatively and offer new and fresh legal thinking. At the same time, in this version of rights, there are also worrisome elements that can reduce human freedom.

However, one thing is clear. Our normative organizing principles are too important and too sacred to abdicate in favor of the people of Silicon Valley, even if they are the smartest and most benevolent people in the world. We

²²⁶ Consider, for example, the practice of “safe spaces” on American, Canadian, and British campuses. These practices establish private spaces, private echo chambers, in which the use of some words is forbidden, while the outside world continues to run differently. See Frank Furedi, *Campuses Are Breaking Apart Into ‘Safe Spaces’*, L.A. TIMES (Jan. 5, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-furedi-safe-space-20170105-story.html> [<https://perma.cc/TK7M-GBVJ>]. Those walls enclosing the spaces are very similar to the walls that Facebook's technologies enable and promote. The so-called “right to feel”—the right not to be offended—becomes almost limitless here, as it is in Facebook's practices and designs. Any discussion, as well as a balance between freedom of speech and the right not to be offended, is also out of bounds. *Id.*

²²⁷ ONORA O'NEILL, *JUSTICE ACROSS BOUNDARIES: WHOSE OBLIGATIONS?* 6 (2016).

²²⁸ I describe elsewhere the current transformation in the way the duties that correlate to rights are understood; for this inquiry, see Shadmy, *supra* note 139, at 130-31.

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should not leave bold and innovative thinking exclusively to Menlo Park's engineers, but use such thinking to reinvent more liberating and just ways of living together in today's digital world.