WHAT'S IN A NAME? – FACEBOOK'S REAL NAME POLICY AND USER PRIVACY

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I. INTRODUCTION

Social media is an integral part of daily life and is woven into the texture of our society. In social media's early days, we were more celebrative of the agency newly acquired through social media. Individually, we found new channels to express our opinions and to connect with others. Collectively, we witnessed how social media mobilized citizens in the Arab Spring and the Occupy Movement.[1] Nevertheless, in recent years, concerns are growing about the risks of social media use. Social media filter bubbles—personalized content algorithmically curated based on one's previous behavior on a given website—are replacing traditional mass media and weakening the imagined socio-political community.[2] Two prominent whistleblowers, Edward Snowden and Christopher Wylie, alerted us on how social

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[1] *See, e.g.*, Nahed Eltantawy et al., *The Arab Spring | Social Media in the Egyptian Revolution: Reconsidering Resource Mobilization Theory*, 5 INT'L J. COMM. 1207 (2011); CHRISTIAN FUCHS, OCCUPYMEDIA!: THE OCCUPY MOVEMENT AND SOCIAL MEDIA IN CRISIS CAPITALISM (2014); ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST (2017).

[2] *See, e.g.*, CASS SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017).

media users' privacy is under threat.[3] Snowden revealed mass government surveillance and the potential cooptation of service providers. Wylie warned of Facebook's earlier mistake in allowing developers to access excessive amounts of users' data without their consent.[4] Furthermore, Wylie unveiled Facebook's continued failure and incapability to police developers' use of data, which the developers previously acquired from Facebook.[5]

Both whistleblowers demonstrate the danger of a surveillance society that social media facilitates; where individuals voluntarily surrender their data to service providers every day.[6] It may be fair to call the users naïve if they had not realized that they—as the collective of the data points about them—are the products, not the customers, of such services.[7] Among the major social media services, Facebook stands out, not only due to its market share, but also because of its insistence on a strong real name policy.[8] Subscribers cannot use a pseudonym, but must sign up with their real name as their username on the platform.[9] Due to this policy, Facebook users have more reason to worry about government and corporate surveillance they potentially

[3] *See The NSA Files*, THE GUARDIAN, https://www.theguardian.com/us-news/the-nsa-files [https://perma.cc/YBE4-AB6W]; *The Cambridge Analytica Files*, THE GUARDIAN, https://www.theguardian.com/news/series/cambridge-analytica-files [https://perma.cc/LZ4C-R8X6].
[4] *See id.*
[5] *See id.*
[6] *See, e.g.*, DANIEL TROTTIER, SOCIAL MEDIA AS SURVEILLANCE: RETHINKING VISIBILITY IN A CONVERGING WORLD (2016).
[7] *See, e.g.*, Will Oremus, *Are You Really the Product: The History of a Dangerous Idea*, Slate, SLATE, (Apr 27, 2018), https://slate.com/technology/2018/04/are-you-really-facebooks-product-the-history-of-a-dangerous-idea.html [https://perma.cc/YA8B-BNGZ].
[8] *See* Priit Kallas, *Top 10 Social Networking Sites by Market Share Statistics [June 2018]*, DREAM GROW, (July 2, 2018), https://www.dreamgrow.com/top-10-social-networking-sites-market-share-of-visits/ [https://perma.cc/SEJ8-4LZB] (suggesting that as of June 2018, Facebook is the top social media website and has 2.2 billion monthly active users globally).
[9] *See Terms of Services*, FACEBOOK, https://www.facebook.com/terms.php [https://perma.cc/J8YZ-B4JF] (explaining that Facebook requires subscribers to "use the same name" they use in everyday life, create only one account (i.e. cannot have another account with pseudonym), and Facebook may change a subscriber's username for his/her account "if someone else claims the username and it appears unrelated to the name you use in everyday life.").

encounter by using the platform.[10] The real name policy raises safety concerns for some users.[11] Facebook's subscribers have protested against its real name policy.[12] Yet, Facebook remains firm on demanding real names.[13] This paper addresses why Facebook should reconsider this position and allow pseudonymous usernames.[14]

Existing literature repeatedly points to several problems caused by social media's real name policies – e.g. users are unable to clearly separate contacts they know and interact with in different social contexts and, hence, experience context collapse, finding it awkward when communicating on the platform;[15] individuals should be able to explore different personas;[16] real name policies may cause chilling effect and hinder free speech;[17] real name policies may be abused and expose marginalized communities to harassment or danger,[18] etc. Individuals may challenge government imposed real name registration systems in court, and South Korea courts declared them unconstitutional.[19] Nevertheless, when private companies impose real

[10] *See* Ekaterina Netchitailova, *Facebook as a Surveillance Tool: From the Perspective of the User*, 10 TRIPLEC 683 (2012); Hilary McLauchlin, *We (Chat) the People: Technology and Social Control in China*, HARV. POL. REV. (Dec. 31, 2017), http://harvardpolitics.com/world/wechat-the-people-technology-and-social-control-in-china[https://perma.cc/TQ67-DP35].

[11] *See* danah boyd, *"Real Names" Policies Are an Abuse of Power*, SOC. MEDIA COLLECTIVE (Aug. 4, 2011), https://socialmediacollective.org/2011/08/04/real-names-policies-are-an-abuse-of-power [https://perma.cc/4YUN-PE7L].

[12] *See infra* note 71–74.

[13] *See generally* Eva Galperin & Wafa Ben Hassinee, *Changes to Facebook's "Real Names" Policy Still Don't Fix the Problem*, ELECTRIC FRONTIER FOUND., (Dec. 18, 2015), https://www.eff.org/deeplinks/2015/12/changes-facebooks-real-names-policy-still-dont-fix-problem [http://perma.cc?9E8L-ASJ8] (explaining how in 2015, Facebook revised the enforcement process of this policy in response to a series of criticism. Nevertheless, the demand for subscribers' use of their real names remains the same. Moreover, the revised policy is criticized for putting vulnerable users at a higher risk, as it asks them to provide more detailed personal information to the platform operator in order to use pseudonyms).

[14] To clarify, this paper is mainly concerned about the type of real name policy that requires users' real name on frontstage. Many service providers require users to sign up with a cell phone number or an institution email which is linked to their real-world identity and keep such information in backstage.

[15] *See infra* note 39–40 and accompanying text.

[16] *See infra* note 42–43 and accompanying text.

[17] *See infra* note 67–70 and accompanying text.

[18] *See infra* note 54, 68, 71–74 and accompanying text.

[19] *See* David Caragliano, *Real Names and Responsible Speech: The Case of South Korea, China and Facebook*, YALE J. INT'L AFFAIRS, (May 21, 2013), http://yale

name policies, users are assumed to willingly accept the companies' policies when choosing to use their platform; though, these criticisms hardly amount to any legally actionable grounds.[20]

Privacy and data protection can derive one possible challenge. Our names reflect a variety of cultures and identities.[21] This paper expands on this point and emphasizes that a person's name contains a lot of potentially sensitive information. By requiring users to use real names on social media, many users may be immediately giving out a slew of information, such as gender, ethnicity, religion, social status, generation/age etc. Moreover, social media operators collect not only individual behavioral data, but they also observe the interaction between individuals. Hence, Facebook's real name policy allows the company to map our patterns of interaction with users of different gender, ethnicity, religion, social status, generation/age, from which they may deduce more knowledge about us. With rising awareness of privacy in the surveillance society, it is more important to carefully consider the impact of Facebook's strong real name policy, especially since the platform is arguably the largest social media service. The refashioned concerns about privacy also lead to new legal mechanisms, such as the European Union's General Data Protection Regulations (GDPR), which offers non-EU countries a new regulatory model.[22] In the past, Germany challenged Facebook's real name policy.[23] This paper discusses how the new data protection regime may handle a similar challenge differently and the new opportunities for users to challenge Facebook's real name policy.

II. REAL NAMES ON SOCIAL MEDIA – RATIONALES AND CRITICISMS

There have been debates about requiring real names or permitting pseudonymity or anonymity on social media. This section will lay out

journal.org/article_post/real-names-and-responsible-speech-the-cases-of-south-korea-china-and-facebook/ [https://perma.cc/Q4JL-NKF4].

[20] *See infra* note 106 (explaining that the only threat to bring a class action lawsuit against Facebook's real name policy in the United States was not to challenge the policy per se, but its enforcement).

[21] *See infra note* 99–101 and accompanying text.

[22] *See* EUR. PARL. DOC. (COM 679) 1 (2016).

[23] *See infra* Section IV. *See* Cesar Itiberê, *New law regulates use of personal data*, BRAZILGOVNEWS, (Aug 16, 2018) http://www.brazilgovnews.gov.br/news/2018/08/new-law-regulates-use-of-personal-data [https://perma.cc/VH3A-A4P4] (Brazil passed GDPR-inspired legislation in August 2018).

these debates by: tracing controversies in different social media services, including Friendster, Facebook and Google+; analyzing their rationale for demanding real names; exploring the concerns their policies have raised; and, highlighting the criticisms they have received.

A. Meet Friendster! – A Predecessor of Real Name Social Media and User Revolt.

Facebook's real name policy began at its inception in 2004, but it is not the first social media provider to require real name use. Friendster, the once popular online dating site, experienced user fallout when enforcing its real name policy. Unsatisfied with the "random and anonymous" hook-ups on pre-existing online-dating sites, Jonathan Abrams founded Friendster in 2002 for people to meet friends of their friends. Friendster subscribers could see four degrees of connections and the platform functioned like an early-day social media platform.[24] Some subscribers did not conform to the service's design and used it for non-dating purposes.[25] Some still found the site's architecture too limiting and attempted to meet people beyond the fourth degree. They repurposed the system by connecting to popular fake accounts, which allowed them to break their own social circles and meet new groups of people.[26]

Abrams and his colleagues wanted to keep Friendster the way they designed, a virtual beach party where one meets more people through friends, and started to clamp down on fake accounts.[27] During this fallout, Friendster users pointed out what social media scholars later theorized: all accounts are performing and fakesters are no less authentic than those accounts with real names.[28] The operators' action was characterized as "Fakester genocide," and users called for "Fakester revolution," asking fellow users to defend their "right to

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[24] *See* Lessley Anderson, *Attack of the Smartasses*, SFWEEKLY, (Aug. 13, 2003), https://archives.sfweekly.com/sanfrancisco/attack-of-the-smartasses/Content?oid=2149018 [https://perma.cc/YZ2T-4KZP].

[25] *See* MICHAEL FISHER ET AL, THE POWER OF CUSTOMER MISBEHAVIOR: DRIVE GROWTH AND INNOVATION BY LEARNING FROM YOUR CUSTOMER, 118-20 (2014).

[26] *See* danah boyd, *None of This is Real: Identity and Participation in Friendster*, in STRUCTURE OF PARTICIPATION IN DIGITAL CULTURE 149-50 (Joe Karagnais ed., 2007).

[27] Anderson, *supra* note 24.

[28] *Id.*

exist in the form . . . [they] . . . choose or assume."[29] But, these collective actions did not persuade the site operators to change policy and, as a commentator noted, Friendster was Abrams' beach party, so "he gets to decide who is accepted and who isn't."[30] Friendster's strong position drove away many users, and the late-comer, Myspace, overtook its position in the early competition between social media services.[31]

Friendster's experience of adopting and enforcing a real name policy was far from pleasant or successful, but it did not deter every platform operator from repeating its path. Facebook and Google+ are notable examples, although their rationales and trajectories are not the same.[32] Recently, OkCupid, also an online-dating website, stirred a round of controversy when it attempted to abolish usernames and asked subscribers to "go by who you are, and not be hidden beneath another layer of mystique."[33] Changing policy from permitting a pseudonym to requiring a real name, such as what OkCupid did, is especially problematic as a user may have exhibited or performed on the platform in a way different from how they would have acted if the platform required real names from the beginning.[34] If users did not have the option to erase that information from the platform's record, including their interaction with other users, they would have to choose between connecting their real name with their activities under their pseudonym, start anew on the website, or abandon the service. OkCupid's policy change was so unpopular that the company backtracked from the decision and clarified they are not demanding real/legal names.[35]

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[29] boyd, *supra note* 26.
[30] Katherine Mieszkowski, *Faking out Friendster*, SALON (Aug. 14, 2003), https://www.salon.com/2003/08/14/fakesters/ [https://perma.cc/H8LG-FUNX].
[31] *See generally* boyd, *supra* note 26.
[32] *See infra* note 55, *infra* note 78.
[33] Kelly Cooper, *An Open Letter on Why We're Removing Usernames, Addressed to the Worst Ones We've Ever Seen*, OKCUPID BLOG, (Dec. 21, 2017), https://theblog.okcupid.com/an-open-letter-on-why-were-removing-usernames-addressed-to-the-worst-ones-we-ve-ever-seen-dd017c75d49a [https://perma.cc/N64D8DUN].
[34] *See* Matthew Sheffield, *OkCupid's Big Blunder: Dating Site Won't Make You Use Your Real Name After All*, SALON (Jan 1, 2018), https://www.salon.com/2018/01/01/okcupids-big-blunder-dating-site-wont-make-you-use-your-real-name-after-all/ [https://perma.cc/YZ9T-3XQJ].
[35] *See* Christina Bonnington, *OkCupid Says People Have to Use Their Real Names – and then Changes Its Mind*, THE DAILY DOT (Jan 3, 2018), https://www.dailydot.

B. Everyone Should Have Only One Identity – Do Real Names Make Authentic Social Media?

Mark Zuckerberg claims that everyone should have only one identity – "[h]aving two identities for yourself is an example of lack of integrity."[36] Similar to Friendster's rationale of meeting friend's friends, Facebook believes the real name policy makes the platform experience more authentic – like talking to real friends in real life.[37] Nevertheless, as communication scholar Amber Davisson points out, Facebook bases its idea of authenticity on the assumption that we reveal our full names to others in real life, however, full names are actually only used for introductions on specific occasions.[38]

Many scholars raised concerns about real name policies by referring to Erving Goffman's performed self or to Helen Nissenbaum's notion of contextual integrity.[39] In general, individuals play different roles according to specific contexts. An individual's real life may be carefully compartmented in the physical world, allowing one to perform consistently in a given context. The real name policy on social media collapses these contexts by flattening the many folds of one's social world into one webpage display, making it difficult for an individual to separate audiences and hence causing constant tension and awkwardness.[40] Facebook does allow users to decide who can see their content, which is one way to address this issue; however, this would not solve the problem for those who use pseudonyms to interact with others in certain contexts. Bernie Hogan has pointed out that

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com/debug/okcupid-real-name-policy-backtrack/ [https://perma.cc/4U96-6J62].

[36] Michael Zimmer, *Facebook's Zuckerberg: "Having Two Identities for Yourself is an Example of a lack of Integrity"*, MICHAELZIMMER.ORG (May 14, 2010), https://www.michaelzimmer.org/2010/05/14/facebooks-zuckerberg-having-two-identities-for-yourself-is-an-example-of-a-lack-of-integrity/ [https://perma.cc/R75W-3URA].

[37] *See* Amber Davisson, *The Politics of Authenticity in Facebook's Real Name Policy*, in 2 SOCIAL MEDIA AND POLITICS: A NEW WAY TO PARTICIPATE IN THE POLITICAL PROCESS (Glen W. Richardson Jr. ed., 2016).

[38] *See id.*

[39] *See generally* Erving GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1956); danah boyd, *It's Complicated: The Social Life of Networked Teens* chapter 1 (2014); *see generally* Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 101, 118–133 (2014).

[40] *See, e.g.*, danah boyd, *Facebook's Privacy Trainwreck: Exposure, Invasion and Social Convergence*, 14(1) CONVERGENCE: THE INT'L J. RESEARCH INTO NEW MEDIA TECHS. 13, 18 (2008).

while some users may take pain to manage the audience of each posts––when concerned about context collapse caused by real name policies—others may simply become more reserved on social media than in real life.[41] Hence, the authentic identity of real names does not guarantee users authentic experiences and interactions.

A relevant argument to context collapse is that individuals should be allowed to explore different personalities, and the Internet is the prime location for such exploration. The real name policy forecloses that opportunity.[42] Nevertheless, since the real name policy is not widely adopted by social media providers, Facebook can respond to this argument by simply saying that those who are interested in persona exploration are free to utilize other services.[43]

Another argument is that real names will help prevent impersonation on social media. Nevertheless, Facebook's stringent real name policy can be problematic to those who are already known in the offline world by their pennames or stage names prior to joining Facebook. For example, Facebook once deactivated acclaimed writer Salman Rushdie's account and later, upon reviewing his passport photo page, unilaterally changed his user name to Ahmed Rushdie, as his official passport name is Ahmed Salman Rushdie.[44] This policy's enforcement not only violates Rushdie's will, but can also confuse the public and those who intend to connect with the author or other public

[41] *See* Bernie Hogan, *The Presentation of Self in the Age of Social Media: Distinguishing Performances and Exhibitions Online*, 30(6) BULL. OF SCI., TECH. & SOC'Y 377 (2010).

[42] *See generally* Michael S. Bernstein et al., *4chan and /b/: An Analysis of Anonymity and Ephemerality in a Large Online Community*, THE FIFTH INTERNATIONAL AAAI CONFERENCE ON WEBLOGS AND SOCIAL MEDIA, BARCELONA, SPAIN, July 17-21, 2011.

[43] Mothers who wish to vent and release stress from parenting without worrying about the usual image of motherhood can go to *YouBeMom*, a forum that allows mothers to anonymously discuss parenting, instead of using Facebook that requires them to use their real name. *See generally* Sarita Yardi Schoenebeck, *The Secret Life of Online Moms: Anonymity and Disinhibition on YouBeMom.com,* https://yardi.people.si.umich.edu/pubs/SchoenebeckYouBeMom13.pdf [https://perma.cc/JPU6-MR5C]; PROCEEDINGS OF THE SEVENTH INT'L AAAI CONFERENCE ON WEBLOGS AND SOCIAL MEDIA, July 8–11 2013, at 555.

[44] *See* Emil Protalinski, *Facebook Name Battle: Ahmed Salman Rushdie Claims Victory*, ZDNET (Nov. 15, 2011), https://www.zdnet.com/article/facebook-name-battle-ahmed-salman-rushdie-claims-victory/ [https://perma.cc/KLX4-6YKG].

figures with an established penname.[45] While Facebook eventually reversed its decision and allowed Rushdie to reclaim his old username after he publicized the incident on Twitter;[46] others with a lower profile or with usernames that deviate more from their real names may have a harder time fighting with Facebook.

Facebook is not alone in holding a real name policy. In 2011, Google released its social networking service, Google+, which adopted a real name policy following Facebook's rationale and enforced it heavy-handedly.[47] The controversy led to "nymwars" and debates over privacy and online identity.[48] Some note that Google+ is the victim of its real name policy, as those who continued to use the service in uninteresting ways affected its popularity.[49] In 2012, Google relaxed the policy to allow users to start a new account with already established pseudonyms, but the company required these users to register and have their legal name on record.[50] Around the same time, Facebook's "verified account" also took a similar approach to allow well-known people to use their stage names, but still asks them to

[45] Facebook did relax their real name policy for people with established public persona in 2012 with "verified accounts" – allowing users with 20,000 subscribers or more to use their stage name or penname after providing the company their official identification. Yet, they have to first register with their real name, attract enough subscribers to meet the high standard with their real name before they can be verified. In other words, even though there are some celebrities that we rarely associate with their real names, Facebook forces them to disclose their real identity before they can be their usual stage selves. Even after verification, they are still not allowed to erase such information but will have to include their real names in the usernames or in the "about" section of the profile. *See* Somini Sengupta, *Lady Gaga Now, Even on Facebook*, N.Y. TIMES (Feb. 16, 2012), https://www.nytimes.com/2012/02/17/technology/new-facebook-policy-on-made-up-names-lets-gaga-be-gaga.html [https://perma.cc/2MMQ-UAFU].

[46] *See* Protalinski, *supra* note 44.

[47] *See* Ben Parr, *Google Responds to Google+ Account Suspension Controversy*, MASHABLE (July 25, 2011), https://mashable.com/2011/07/25/google-plus-common-names/#3XJ_sq9A35qh [https://perma.cc/XL6T-VXUT].

[48] *See* COLE STRYCKER, HACKING THE FUTURE: PRIVACY, IDENTITY AND ANONYMITY ON THE WEB (2012).

[49] *See* Jamie Beckland, *Google+: Why the Real Name Policy Is Creating a Very Boring Social Network [Opinion]*, MASHABLE (Sept. 19, 2011), https://mashable.com/2011/09/19/google-plus-real-name-boring/#PYRZNKxSjSq5 [https://perma.cc/7MDG-XXUQ].

[50] *See* Violet Blue, *Pseudonyms on Google Plus? Wrong.,* ZDNET (Jan. 23, 2012), https://www.zdnet.com/article/pseudonyms-on-google-plus-wrong/ [https://perma.cc/TG2E-CMDX].

include their real names in the username or in the profile.[51] In 2014, Google+ suddenly reversed and abolished the real name policy, apologizing for causing "unnecessarily difficult experiences" for some users.[52] This long-awaited policy change did not save Google+ though, as the service had several other issues and failed to unseat Facebook in the social media market.[53] Nevertheless, the company changed the policy just in time, right before Facebook's real name policy led to another wave of criticism when it deleted or suspended profiles of drag queens and Native American users in 2014, eventually escalating to the #MyNameIs campaign, which will be discussed later.[54]

C. Real Names Make It Easy to Connect

When talking about the real name policy, Zuckerberg often emphasizes its importance for making Facebook easy to use, allowing people to look up friends and reconnect with them.[55] Indeed, many

[51] *See* Caragliano, *supra* note 19.

[52] Violet Blue, *Google Reverses 'Real Names' Policy, Apologizes*, ZDNET (July 15, 2014), https://www.zdnet.com/article/google-reverses-real-names-policy-apologizes/ [https://perma.cc/M3UF-NY72]. In 2013, claiming to fight spams, Google angered users by requiring YouTube comments to be posted via Google+ and thus signed in with real names; Stuart Dredge, *YouTube Fights Back Against Spam Comments but Sticks with Google+*, THE GUARDIAN (Nov. 26, 2013), https://www.theguardian.com/technology/2013/nov/26/youtube-spam-comments-google-plus [https://perma.cc/B9MH-EUS2]. This practice also ended in 2014 when Google abandoned the real name requirement.

[53] Seth Fiegerman, *Inside the Failure of Google+: A Very Expensive Attempt to Unseat Google+*, MASHABLE (Aug. 2, 2015), https://mashable.com/2015/08/02/google-plus-history/#62RVCWPP2sqQ [https://perma.cc/79AX-EPR3]. In October 2018, when Google announced that it will shut down Google+ after a security lapse, it also admitted that the service has low usage. THE VERGE, *Google Is Shutting Down Google+ for Consumers following Security Lapse* (Oct. 8, 2018), https://www.theverge.com/2018/10/8/17951890/google-plus-shut-down-security-api-change-gmail-android [https://perma.cc/YDR3-ZBM6].

[54] *See* John Colucci, *What You Need to Know about Facebook's Battle with Drag Queens*, ENGADGET (Sept. 30, 2014), https://www.engadget.com/2014/09/30/facebook-drag-queens-explainer/ [https://perma.cc/4V9C-47FY]; John Vibes, *Native Americans Get Facebook Pages Removed on Columbus Day for "Fake Names"*, TRUE ACTIVIST (Oct. 20, 2014), http://www.trueactivist.com/native-americans-get-facebook-pages-removed-on-columbus-day-for-fake-names/ [https://perma.cc/VSG5-NC2Y].

[55] *See, e.g.*, Mark Zuckerberg, Townhall Q&A, FACEBOOK (July 1, 2015), https://www.facebook.com/zuck/posts/10102213601037571?comment_id=101022

people, this author included, have found or have been found by childhood friends on social media. And, this feature may contribute to Facebook's popularity to a certain extent. Nevertheless, this argument does not necessitate a strong policy that obligates everyone to use their real name. As danah boyd pointed out, some have chosen to use their real name on Facebook, not because the website imposes a real name policy, but because they saw it as an established social norm.[56]

This might also be the reason why LinkedIn, having its own real name policy, stirs much fewer controversies than Facebook.[57] People who are using LinkedIn, a business networking service, to present their professional selves for the purpose of networking and self-advertising are more willing to give out their real names. Facebook began as a service offered to only a few campuses.[58] Early Facebook adopters were likely to bump into each other physically and learn about each other's real names anyway; if not having a physical "facebook" that contains such information at hand already.[59] After the service became open to the wider public, the character of the website also changed.[60] Context collapse is a bigger problem when the social

13698751751&reply_comment_id=10102213934943421&total_comments=45&comment_tracking=%7B%22tn%22%3A%22R9%22%7D [https://perma.cc/4E4R-E8PM].

[56] *See* danah boyd, *Designing for Social Norms (or How Not to Create Angry Mobs)*, ZEPHORIA (Aug. 5, 2011), http://www.zephoria.org/thoughts/archives/2011/08/05/design-social-norms.html [https://perma.cc/T9VB-47FL].

[57] *See Names Allowed on Profiles*, LINKEDIN, https://www.linkedin.com/help/linkedin/answer/28422/names-allowed-on-profiles?lang=en [https://perma.cc/XUH2-4K6F].

[58] *See Company Timeline*, FACEBOOK (Feb. 28, 2008), https://web.archive.org/web/20080228004941/http://www.facebook.com/press/info.php?timeline [https://perma.cc/VU5T-JS7K].

[59] Alan J. Tabak, *Hundreds Register for New Facebook Website,* THE HARV. CRIMSON (Feb. 9, 2004), https://www.thecrimson.com/article/2004/2/9/hundreds-register-for-new-facebook-website/ [https://perma.cc/XA7F-RW9D]. In fact, Facebook began as an attempt to build a third-party Harvard-University-wide student directory to outdo the official student directory, Facebook, that is divided by undergrad student residential houses. Such directory already contains students' real names and profile pictures. Also, back then Facebook required users to sign up with the institutional email, which in general already contains surname or even the full name.

[60] *See, e.g.*, Joe O'Shea, *Unlike This! Why Parents Make Facebook So Uncool*, INDEPENDENT.IE (Dec. 4, 2013), https://www.independent.ie/lifestyle/unlike-this-

media service is not confined to people we meet in one type of setting. After Facebook began to serve the general public, some people found no problem following the example of early adopters by registering with their real names, but others may have good reasons to feel reluctant.

D. Real Names Foreclose Bad Behavior

There is a common sentiment against online pseudonymity and anonymity, associating them with trolling and abusive behavior.[61] Anonymity is quite different from pseudonymity. On Internet discussion forums, pseudonymous comments are not necessarily hostile. In fact, a great majority of pseudonymous comments are either positive or neutral.[62] To combat cyber defamation and bullying, South Korea once required online commenters to register with their real name and national identity number.[63] However, the registration system does not effectively address the problem it was supposed to solve.[64] On the other hand, associating pseudonymity and anonymity with trolling underestimates the value of pseudonyms on the Internet. Comment hosting service Disqus reports that pseudonymous commenters post more often than those logged in from Facebook and generate more positive responses.[65] Scholars reckon that a persistent

why-parents-make-facebook-so-uncool-29802959.html [https://perma.cc/XJ2T-G552]. The change of website character and its impact on user's online identity may not have been so drastic or caused as much confusion as in the case of OkCupid's policy change. There was also no user revolt similar to the one in the OkCupid case. After all, it is harder for users to argue that Facebook should not expand its services. Also, since the expansion was gradual, users might have adapted their behavior with the demographic change. Nevertheless, there had been reports about people leaving the platform because their parents have joined.

[61] *See, e.g.*, Mathew Ingram, *Believe It or Not, Online Trolling Could Get Worse*, FORTUNE (Mar. 30, 2017), http://fortune.com/2017/03/30/online-abuse-trolls/ [https://perma.cc/BF8G-EPZG]; Pam Ramsden, *How Does the Internet Turns People into Trolls*, NEWSWEEK (Feb 28, 2017), https://www.newsweek.com/internet-trolls-psychology-behavior-anonymity-invisibility-cloak-562150 [https://perma.cc/JRB3-438L].

[62] *See* STRYCKER, *supra* note 48, at 168.

[63] Note that pseudonymous handles are still permitted, but they need to be associated with the commenter's real identity through registration. *See* Caragliano, *supra* note 19.

[64] *See* Caragliano, *supra* note 19.

[65] *See* Courtney Rubin, *Real Names: A Study Says Commenters with Pseudonyms Leave the Most High-Quality Comments*, INC., (Jan 13, 2012), https://www.inc.

pseudonym enables people to build their online reputation and is a way to provide both accountability and privacy.[66] Scholars also point out that instead of insisting on real names, building social norms and technological solutions may be more effective to combat bad behavior online.[67]

Real name policies may deter malicious anonymous speech, but they also deter legitimate speech, if used as a tool for government censorship. Moreover, Facebook received criticism for making reporting too easy and for the real name policy itself silencing speech or being used to bully other users.[68] Not using one's real name violates the terms of use and leads to account suspension.[69] Even without behaving in any way that violates the community standards, once reported under the real name policy, a user can be shunned from the site by Facebook until he or she provides sufficient proof to the administrator.[70] Real name policies not only affect one's ability to speak up freely, but also provide security and safety as well. Victims of domestic violence or stalking may expose themselves to the perpetrators if they cannot use pseudonym on Facebook.[71]

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com/courtney-rubin/should-you-force-people-to-comment-with-real-names.html [https://perma.cc/D8WX-XT2U].

[66] *See* Amy Bruckman, *Studying the Amateur Artist: A Perspective on Disguising Data Collected in Human Subject Research on the Internet*, NYU WEB (2002), https://www.nyu.edu/projects/nissenbaum/ethics_bru_full.html [https://perma.cc/26GP-DJSK]; *See, e.g.*, Judith Donath, *We Need Online Alter Ego Now More than Ever*, WIRED (Apr. 25, 2014), https://www.wired.com/2014/04/why-we-need-online-alter-egos-now-more-than-ever/ [https://perma.cc/83ZX-HGGX].

[67] *See* danah boyd, *supra* note 56; Emily van der Nagel & Jordan Frith, *Anonymity, Pseudonymity, and the Agency of Online Identity: Examining the Social Practices of r/Gonewild*, FIRST MONDAY (Mar. 2, 2015), http://www.firstmonday.org/article/view/5615/4346 [https://perma.cc/94BN-63S6].

[68] *See, e.g.*, Davisso*n, supra* note 37, at 103; Andre Shakti, *Facebook Owes "Real Name" Crusader Dottie Lux a Whole Lotta Dough*, I AM POLY (Jun. 21, 2017), https://www.iampoly.net/blog/2017/6/21/facebook-owes-real-names-crusader-dottie-lux-a-whole-lotta-dough [https://perma.cc/ZCD5-CGHN].

[69] *See* FACEBOOK HELP CENTER, https://www.facebook.com/help/18574758 1553788 [https://perma.cc/ZBN3-9R4W].

[70] *See id.*

[71] *See, e.g.*, Samantha Allen, *How Facebook Exposes Domestic Violence Survivors*, DAILY BEAST (May 20, 2015, 5:25 AM), https://www.thedailybeast.com/how-facebook-exposes-domestic-violence-survivors [https://perma.cc/764B-RF7G]; Russell Brandom, *Facebook is Changing the Way It Enforces Its Real Name Policy*, THE VERGE (Dec. 15, 2015, 1:00 PM), https://www.theverge.com

The impact Facebook's real name policy can have on marginalized communities or vulnerable individuals is especially concerning. Native Americans have been falsely reported for violating the policy simply because the mainstream population is unfamiliar with their naming systems.[72] Transgender individuals, drag queens, and victims of stalking and domestic violence fault Facebook's real name policy for exposing them to danger.[73] The outspoken members of the group are likely to be targeted and silenced due to account deactivation from these false reports.[74] The #MyNameIs campaign, led by these various groups, was unable to convince Facebook to change the real name policy, but it did pressure the company to apologize and to adjust its report mechanism, hoping to deter false reports by making the procedure more onerous.[75] The new procedure also includes an inquiry for the reported accounts to provide some relevant contexts for the administrator, although this new measure may actually require vulnerable individuals to provide more details and may expose them to danger.[76] The #MyNameIs campaign raised public awareness and acknowledgment of how Facebook's real name policy affects marginalized communities or vulnerable individuals. Nevertheless, the narrow focus of this campaign also makes the real name policy

/2015/12/15/10215936/facebook-real-name-policy-changes-appeal-process [https://perma.cc/FL96-8MBL].

[72] *See* SPUTNIK INT'L, *Native Americans Set to Sue Facebook Over "Real Name" Policy* (Feb. 20, 2015), https://sputniknews.com/science/201502201018507661/ [https://perma.cc/DD5Q-QVZ8].

[73] *See, e.g.*, Chris Lane, *Facebook's New "Real Name" Policy is Unfair and Dangerous,* HOU. PRESS (Sept. 23, 2014, 6:00 AM), http://www.houstonpress.com/arts/facebooks-new-real-name-policy-is-unfair-and-dangerous-6376305 [https://perma.cc/AH3Y-7L7Q]; Allen, *supra* note 71.

[74] *See, e.g.*, Rebel Siren, *Tag: Facebook Allows Harassment but Insists You Use Your Real Name While Getting Harassed by Fakes*, WORDPRESS (Oct. 8, 2014), https://rebelsiren.wordpress.com/tag/facebook-allows-harassment-but-insists-you-use-your-real-name-while-getting-harassed-by-fakes/ [https://perma.cc/AU3K-D44Z].

[75] *See #MyNameIs*, MY NAME IS CAMPAIGN, http://www.mynameiscampaign.org/ [https://perma.cc/K2Y4-HX5Y]; Chris Cox, FACEBOOK (Oct. 1, 2014), https://www.facebook.com/chris.cox/posts/10101301777354543 [https://perma.cc/Q4AU-8AT6] (apologizing to the affected communities but claiming the real name policy to be the right policy. Yet, also announcing measures to improve its reporting and enforcement mechanism); Brandom, *supra* note 71.

[76] *See* SARA WACHTER-BOETTCHER, TECHNICALLY WRONG: SEXIST APPS, BIASED ALGORITHMS, AND OTHER THREATS OF TOXIC TECH 199-200 (2017).

appear to be the problem of only the marginalized few, rather than a common problem for all Facebook users.

E. Not Social media; Identity Services

When Google+ was first released, it was only available to people who had invitations to sign up as beta testers. Although it was also offered to a selected group of people, the beta testers were unlike early Facebook adopters, who had certain physical bounds on campus. This is perhaps why Google+ had more pushback for its real name policy, even though both Facebook and Google+ embraced such policy from inception.[77] Not long after the Google+ release, Google's then-executive chairman Eric Schmidt once admitted that Google+ was "primarily an identity service," not social media, and they need people to use their real names to "build future products that leverage that information."[78] This comment sheds light to a less-spoken reason for real name policies. Google was already collecting users' behavior, such as browsing history and clicks. Associating such behavioral information with their real identity will allow better microtargeting and, thus, making their data more valuable.[79] Scholars suggest that Facebook's association of authenticity and real names is an administrative concept. Seeing itself as an online registry and identity service, Facebook asks people to use the identities that are sanctioned by established authorities.[80] To this author's knowledge, Facebook has

[77] *See* STRYKER, *supra* note 48 (suggesting that demographic difference was the reason why Google+ received more negative feedback for its real name policy than Facebook. The "Silicon Valley geeks" are more accustomed to the culture of pseudonym and alternate identities than their "ivy league pals"). This demographic difference also entails a social norm that is different from the early adopter of Facebook, who saw it as an online version of the physical Facebook that lists other potential adopters' photos and real names already. In this walled garden, there is less resistance to use real names on the social media platform as an extension of campus life.

[78] Emily Banks, *Eric Schmidt: If You Don't Want to Use Your Real Name, Don't Use Google+*, MASHABLE (Aug. 28, 2011), https://mashable.com/2011/08/28/google-plus-identity-service/#C_FXc9q1Jqqq [https://perma.cc/JX62-AVZ8].

[79] *See* David Auerbach, *You Are What You Click: On Microtargeting: Why Privacy and Anonymity Are Being Violated Online by an Unstoppable Process of Data Profiling*, THE NATION (Feb. 13, 2013), https://www.thenation.com/article/you-are-what-you-click-microtargeting/ [https://perma.cc/268W-2N4P].

[80] *See* Oliver L. Haimson & Anna Lauren Hoffmann, *Constructing and Enforcing "Authentic" Identity Online: Facebook, Real Names, and Non-Normative Identities*, FIRST MONDAY (June 6, 2016), http://firstmonday.org/ojs/index.

never acknowledged that identity service is a reason for their insistence on the real name policy. Nevertheless, real names add value to Facebook's user data profile and makes Facebook a unique platform for offering this feature.[81] For example, Facebook Connect, an authentication application program interface (API) that allows users to log onto other platforms with their Facebook account, can appeal to services that associate real names with better online behavior.[82]

II. ON FACEBOOK, DO YOU HAVE CONTROL OF YOUR INFORMATION?

When Congress confronted whether Facebook's business model, and the data collection practice it involves, may threaten users' privacy, Facebook's standard response was that their users' have control of what they share and with whom they share. [83] Nevertheless, these responses are not really answering the question. At best, Facebook's responses address only that users can control what other users could see, but not what Facebook can know about them.[84] This response is given so often that it appears Facebook is intentionally misinterpreting or diverting the question to something else.[85] For media studies scholar Christian Fuchs, Facebook reducing user privacy to the visibility of information to other users is just "cover[ing]

php/fm/article/view/6791/5521#p4 [https://perma.cc/K6LF-Q267].

[81] Pete Cashmore, *Why Google+ Will Never Back Down on Real Names*, CNN (Aug. 29, 2011), http://edition.cnn.com/2011/TECH/social.media/08/29/google plus.real.names.cashmore/ [https://perma.cc/WUW4-JBFV].

[82] *E.g.*, Mathew Ingram, *Handing Comments Over to Facebook Is a Double-edged Sword*, GIGAOM (Aug. 18, 2011, 3:09 PM), https://gigaom.com/2011/08/18/ handing-comments-over-to-facebook-is-a-double-edged-sword/ [https://perma. cc/AHM7-N9L5].

[83] *See Transcript of Mark Zuckerberg's Senate Hearing*, THE WASH. POST (Apr. 10, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10 /transcript-of-mark-zuckerbergs-senate-hearing/?noredirect=on&utm_term=.d617 6314b861 [https://perma.cc/93KQ-WUZC]; *see also Transcript of Zuckerberg's Appearance Before House Committee*, THE WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/11/transcript-of-zuckerbergs-appearance-before-house-committee/?utm_term=.663c12b45b8b [https://perma.cc/HH4V-2GZH].

[84] *See id.*

[85] *See, e.g.*, *Transcript of Mark Zuckerberg's Senate Hearing*, *supra* note 82 (noting Zuckerberg's response to Senator Grassley, Nelson, Blunt, Durbin, and Lee).

up the economic surveillance and commodification of user data" which is fundamental to its profit scheme.[86]

Indeed, users can decide how public a post is, change the privacy setting later or take the post down, and customize friend's lists for better audience control. Facebook gives users tools to manage how they want to appear online and to avoid context collapse. Some have criticized the customized friend's list function for being too difficult to use.[87] This results in users tending not utilizing the function and, thus, their activities fall into the default public setting, which Facebook prefers over a private setting.[88] Nevertheless, even if users are diligent to exercise such control, this author's concern is that they would be surrendering more data to Facebook: who are their closest friends; which of their friends are often grouped together or never grouped together at all; what kind of information they are willing to share with which friends; the kind of locations a user would go with different groups of friends; etc. It is ironic, but the 'users' choice' Facebook prides itself on seems to be a choice between users' control of how widely they would share the information and how much they would like Facebook to know about them.[89]

Zuckerberg also claims that users can choose not to have Facebook collect their information: "[t]he information that we collect, you can choose to have us not collect."[90] However, it is doubtful that users have full control of what Facebook collects, as they lack full knowledge of what Facebook actually collects.[91] Facebook does give

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[86] Christian Fuchs, *The Political Economy of Privacy on Facebook*, 13(2) SAGE J. TELEVISION & NEWS MEDIA 139, 139–59 (2012).

[87] *See, e.g.*, Vindu Goel, *Some Privacy, Please? Facebook, Under Pressure, Gets the Message*, N.Y. TIMES (May 23, 2014), https://www.nytimes.com/2014/05/23/technology/facebook-offers-privacy-checkup-to-all-1-28-billion-users.html?_r=0 [https://perma.cc/F6FS-K9LS].

[88] *See id.*

[89] *See* JOHN CHENEY-LIPPOLD, WE ARE DATA: ALGORITHMS AND THE MAKING OF OUR DIGITAL SELVES 245 (2017) (noting Facebook's privacy setting, which claims to give users control, is not really privacy but mere "adequate site architecture.").

[90] *Transcript of Zuckerberg's Appearance Before House Committee,* THE WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/11/transcript-of-zuckerbergs-appearance-before-house-committee/ [https://perma.cc/JD39-YBW3].

[91] *See* Colin Lecher, *Facebook Releases 500 Pages of Damage Control in Response to Senators' Questions,* THE VERGE (June 11, 2018, 7:59 PM), https://www.theverge.com/2018/6/11/17451360/facebook-senate-questions-zuckerberg-answers [https://perma.cc/8AXE-UJJV] (referencing the fact that

users some tools to turn off information from third parties, so they do not see advertisement based on their behavior.[92] This may give privacy-conscious users certain comfort as they are not seeing behavioral advertisement. Nevertheless, that does not alleviate privacy concerns, as Facebook still collects certain users' behavioral data. Zuckerberg admitted to Congress that data collection is the center of their business model.[93] Instead of offering users the option to pay for an advertisement-free environment, they believe advertisement is the right model because it keeps their services free and permits more people to subscribe to their service.[94]

In fact, even if Facebook argues that their business relies on advertising, and that they would prefer the ability to show relevant ads, Facebook does not need to know users' real name to microtarget. Associating users' profiles with their real-world identity may add value if Facebook aggregates their own data with real name containing datasets that they purchased from data brokers. However, phone numbers or email addresses may be more useful for such purposes, as they are more unique and can avoid the confusion caused by common names.[95] Zuckerberg claims that interacting with data brokers is

Facebook tracks users "operations and behaviors."); *Data Privacy*, FACEBOOK, https://www.facebook.com/privacy/explanation [https://perma.cc/X9P8-ENGV] (last modified Apr. 19, 2018) (noting the difference between the data policy and explanation and that each pages roughly describes the type of user information Facebook tracks); *Data Privacy*, FACEBOOK, https://www.facebook.com/about/privacy/previous [https://perma.cc/CR8V-7MEY] (last modified Sept. 29, 2016) (showing that Facebook allows users to turn off certain data collection, and doing so acknowledges the collection of data in the settings. But neither operation nor behavior tracking is an option that users may turn off).

[92] *See Transcript of Mark Zuckerberg's Senate Hearing*, THE WASH. POST (Apr. 10, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/ [https://perma.cc/S9X8-M29T] (noting Mark Zuckerberg's response to Senator Nelson that Facebook users may turn off relevant advertising).

[93] *See, e.g.*, *Transcript of Zuckerberg's Appearance Before House Committee,* THE WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/11/transcript-of-zuckerbergs-appearance-before-house-committee/ [https://perma.cc/JD39-YBW3] (noting Mark Zuckerberg's answers to Congresswoman Doris Matsui); Haimson & Hoffman, *supra* note 80.

[94] *See id.*

[95] *See* Kalev Leetaru, *The Data Brokers So Powerful Even Facebook Bought Their Data – But They Got Me Wildly Wrong*, FORBES (Apr. 5, 2018, 04:08 PM), https://

common practice in the industry and that Facebook stopped doing so in March 2018.[96] If Facebook conducts microtargeting only based on its own data, including its other company-owned services, it has fewer reasons to continue imposing its real name policy.

Facebook's real name policy has effectively silenced activists and marginalized communities and vulnerable individuals. Without behaving badly or violating any community policies, users who supposedly violate the real name policy must prove their identity or their account can be suspended or deactivated. Malicious false reports and subsequent account suspension or deactivation can significantly impact an individual's ability to express their opinion. Malicious false reports can be strategically used to suppress collective actions by silencing political leaders or activists at critical moments or societal transformations. Removing the policy, instead of adjusting it as Facebook did in 2015, is more effective to stop such abuse. Even without a real name policy, Facebook may still induce users to provide their real names if they see it as an established social norm on the platform. Facebook can further induce users to provide real names by improving their privacy practices, including properly scrutinizing government requests for user data and denying overbroad requests. Some may argue that, in light of the Russian meddling, Facebook should insist on getting rid of fake accounts. Yet, technologically speaking, Facebook should be able to differentiate between the fake accounts with suspicious patterns of activities and the individual pseudonymous accounts, as Facebook have done in the past.[97] If Facebook no longer has a real name policy, then Facebook can conceptually separate legitimate pseudonymous users from the "fake

www.forbes.com/sites/kalevleetaru/2018/04/05/the-data-brokers-so-powerful-even-facebook-bought-their-data-but-they-got-me-wildly-wrong/#6fb101b83107 [https://perma.cc/VG6B-6QDU].

[96] *See Transcript of Zuckerberg's Appearance Before House Committee*, THE WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/11/transcript-of-zuckerbergs-appearance-before-house-committee/?noredirect=on&utm_term=.c04210db8af5 [https://perma.cc/JD39-YBW3].

[97] *See* Nicholas Fandos & Kevin Roose, *Facebook Identifies an Active Political Influence Campaign Using Fake Accounts*, N.Y. TIMES (Jul. 31, 2018), https://www.nytimes.com/2018/07/31/us/politics/facebook-political-campaign-midterms.html [https://perma.cc/T6QR-3XHQ]; *see also* Olivia Solon, *Facebook Removes 652 Fake Accounts and Pages Meant to Influence World Politics*, THE GUARDIAN (Aug. 22, 2018), https://www.theguardian.com/technology/2018/aug/21/facebook-pages-accounts-removed-russia-iran [https://perma.cc/54Q3-CMN6].

accounts," in the Russian meddling scenario, and stop them from being categorically blamed for being potential trolls.

Facebook understated the amount of information that a real name contains. Generally, it is easy to guess a person's gender from his or her name. John Doe and Jane Doe describe whether an anonymous party in a lawsuit identifies as male or female. Facebook's data policy acknowledges that some categories of information, such as religious belief, receive special protection under certain jurisdictions and users choose whether to give out such information.[98] Nevertheless, Facebook may deduce such sensitive information from a user's real name without the user providing the information on their profile page. A person's name often reflects his or her religion.[99] Names may also reveal the political beliefs of the parent and show clues on the upbringing of the children if parents name their children after their national hero or socio/political leaders. For some people, their race or ethnicity can be easily guessed from their names. It is also possible to derive one's birthplace or country of origin from a name, or at least narrow down the possibilities. People may guess from this author's surname that she is ethnically Chinese, and seeing this author's first name, people are likely to believe that she is not a second-generation immigrant born in a Western country. Those who are more familiar with Chinese languages would know that this author's last name is pronounced differently in different dialects. Depending on the dominant dialect of the region, it can be spelled differently in the official documents. Singaporeans with the same last name are likely to be 'Tan' instead of 'Chen,' while Cantonese with the same last name are likely to be 'Chan.' Some names or naming systems may be reserved for people of certain social status, even though such rules are not self-evident to people from other cultures.[100] Popular names in a given country differ from generation to generation, thus names may also suggest to which age group one belongs.[101] In short, real names

[98] *See* FACEBOOK DATA POLICY, https://www.facebook.com/full_data_use_policy [https://perma.cc/STM5-XTFT].
[99] *See, e.g.*, K. M. Sharma, *What's in a Name? Law, Religion, and Islamic Names*, 26 DENV. J. INT'L L. & POL'Y, 151, 192 (1998).
[100] *See, e.g.*, Amy Franz, *A Peak Inside Hindu Name Origins: Caste-Based Surnames*, ETHNIC TECHNOLOGIES, (Sept. 12, 2017), http://www.ethnictechnologies.com/peak-inside-hindu-name-origins-caste-based-surnames/ [https://perma.cc/D5A4-BY6F].
[101] *See Tells Us about Your Age, Where Your Live, Your Political Leanings and Your Job*, THE WASHINGTON POST, (May 26, 2015),

contain significant amounts of information. Even though some information is not easily decipherable by people who are unfamiliar with a particular context or culture, developers can create technical tools to analyze such information in aggregate data.[102]

Information contained in real names may also be misleading. Someone with a feminine sounding name may actually identify as male. A person's name may be German or French, but it is actually Canadian. A Muslim woman may keep her family name after marrying a Christian and converting. Yet, the point is not whether Facebook's assumptions are right or wrong. They are not always correct when they profile us based on the other behavioral data they collect. The point is that Facebook can collect the information contained in names with its real name policy and can already profile their users based on their knowledge, misconstrued or not. In a datafied world, Facebook can make decisions about users based on how they are categorized, e.g. feed users the information/advertisement Facebook believes to be relevant to them.[103] Even though in some jurisdictions users have the right to rectify incorrect information about them, they need to know that Facebook is collecting certain information about them.[104] When Facebook can covertly collect information by requiring real names, users will have more difficulties exercising such rights.

Despite Facebook's claims that users control what they are willing to share, under its real name policy, users do not have control of sharing the information contained in their names, which can be fundamental to their personal identity. Facebook was criticized for allowing race-discrimination housing ads.[105] Even without collecting individual's behavioral data, using their names and the names of the

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https://www.washingtonpost.com/news/wonk/wp/2015/05/26/what-your-name-says-about-your-age-state-job-and-political-leanings/?utm_term=.efc15796679a [https://perma.cc/UF67-UZ4Y].

[102] *See, e.g.*, Alan Milove et al., *Understanding the Demographic of Twitter Users* (2011), https://www.aaai.org/ocs/index.php/ICWSM/ICWSM11/paper/viewFile/2816/3234 [https://perma.cc/GA39-64WV].

[103] *See generally* Chenney-Lippold *supra* note 89.

[104] *See* EU 2016/679, art. 16.

[105] *See* Julia Angwin et al, *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, PROPUBLICA, (Nov. 21, 2017), https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin [https://perma.cc/SK2W-FJHS].

people they frequently interact with already allows certain kinds of racial profiling.

III. THE GENERAL DATA PROTECTION REGULATION AS A NEW REGULATORY MODEL?

Facebook's real name policy led to criticism and protests, but rarely legal challenges. As Facebook is a private party platform and users agree to their terms of use when signing up, opponents have limited legal tools. In early 2015, Native Americans attempted to bring a class action against Facebook. The complaint was not disputing Facebook's real name policy per se, but that the enforcement of the policy makes it especially difficult for Native American users.[106] Given the limited scope of U.S. data protection laws, it is difficult to effectively challenge Facebook's real name policy in the United States.[107] In the past, two German regulators have ordered Facebook not to enforce the policy in Germany, but Facebook challenged both orders and prevailed in the court. In 2018, in a lawsuit brought by a German consumer-protection organization against Facebook's real name policy, the Berlin district court ruled that the policy violates Germany's data collection law. Facebook appealed, and it is still unclear how the higher court will decide.[108] The Berlin court decision occurred a few months before the implementation of the EU General Data Protection Regulation (GDPR). This section briefly reviews the few times Facebook was challenged in Germany and discusses whether the GDPR, the new regulatory model of user privacy on the Internet, may allow users and regulators to challenge Facebook's real name policy more effectively.

In 2012, the data regulator in Schleswig-Holstein (SHULD) ordered Facebook to stop implementing the real name policy, as it violates the German Telemedia Act (2007), which asks telemedia

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[106] *See* Melissa Anthony, *Does the Native American Threatening to Sue Facebook Have a Good Case*, CLASSACTION.ORG (Mar. 9, 2015), https://www.classaction.org/blog/does-the-native-american-threatening-to-sue-facebook-have-a-good-case [https://perma.cc/Q9E2-DSKF].

[107] *See, e.g.*, FEDERICA GIOVANELLA, COPYRIGHT AND INFORMATION PRIVACY CONFLICTING RIGHTS IN BALANCE 301 (2017).

[108] *See* Natasha Lomas, *German Court Finds Fault with Facebook's Default Privacy Setting*, TECHCRUNCH, (Feb. 13, 2018), https://techcrunch.com/2018/02/13/german-court-finds-fault-with-facebooks-default-privacy-settings/ [https://perma.cc/RR3P-88JU].

service providers to allow anonymous or pseudonymous use of their services.[109] It ordered that providers can also profile usage based on pseudonym for advertisement purposes if the subscriber is notified with the right of refusal and does not object.[110] However, the provider cannot connect users' real identity with their online pseudonyms.[111] SHULD emphasized that Facebook's monopoly status in social media compels people to sign up for their services.[112] Hence, SHULD considers its order reasonable because Facebook's competing interest in choosing business models does not outweigh users' interests in protecting their privacy.[113]

Facebook challenged the order in the state administrative court and prevailed.[114] The court agreed with Facebook's claim that the processing of data took place in Ireland by Facebook Ireland, Ltd.[115] Since the data controller (Facebook Ireland) is based in a EU member state, it does not matter that the company has a German subsidiary to process and store German data.[116] The court decided that Irish law is exclusively applicable and that Facebook's policy is complying with the Irish law.[117] The court did not discuss the substantial arguments raised by the SHULD, even though it agreed that Facebook's mandatory real name policy violates the German Telemedia Act.[118]

In 2015, the data regulator in Hamburg also issued an order regarding Facebook's real name policy. Like SHULD, the Hamburg regulator found the real name policy violated the German Telemedia Act, which gives users' the right to use a pseudonym. The regulator also found Facebook's requirement to provide official identification was in violation of German identification and passport law.[119] In the

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[109] *See* Telemediengesetz [TMG] [Telemedia Act], Feb. 26, 2007, BGBl. I at 179, §13 (Ger.).
[110] *See id.* at 179, §15(3).
[111] *See id*. at §§ 13, 15.
[112] *See* Sandra Schmitz, *Facebook's Real Name Policy: Bye-Bye Max Mustermann?*, 4 JIPITEC 190, 195 (2013).
[113] *See id*.
[114] *See id*. at 196.
[115] *See id*.
[116] *See id*.
[117] *See id.* at 195–196.
[118] *See id.* at 196.
[119] *See* Alex Hern, *Germany Fights Facebook over Real Name Policy*, THE GUARDIAN, (Jul. 29, 2015), https://www.theguardian.com/technology/2015/jul/29/germany-fights-facebook-over-real-names-policy [https://perma.cc/3RQL-UJZR].

case in question, Facebook unilaterally changed the user's pseudonym, which the regulator deemed violated users' right to informational self-determination: a basic right the German Federal Constitutional Court developed and still recognizes.[120] The Hamburg regulator rejected Facebook's position that only Irish law applies because Facebook has economic activities in Germany and a branch in Hamburg.[121] Facebook fought the order. The Hamburg administrative court decided in favor of Facebook, finding that Irish data protection law applied, and that the Irish data protection authority already determined Facebook's real name policy was Irish-law-compliant.[122] In 2016, the Hamburg Higher Administrative Court ruled in favor of Facebook, finding it unclear whether the EU Data Protection Directive allows the Hamburg data regulator to take national actions against Facebook, whose European headquarters is in Ireland.[123]

While the courts decided on jurisdiction and choice-of-law grounds, neither court elaborated on the substantive legal arguments provided by the data regulators. The GDPR changes the jurisdiction arrangement in the previous EU Data Protection Directive. Even if Facebook claims that its headquarter is in Ireland, German regulators may still establish their jurisdiction based on the collection of German data subjects. Though Irish regulators may still be the lead supervisory authority, under the GDPR, German regulators may establish a right to participate in joint operations by asserting that Facebook, the data controller, has an establishment in Germany and a significant number of German data subjects are likely to be substantially affected by processing operations.[124] Although the Telemedia Act was revised in 2017, users' right to remain anonymous or pseudonymous remains

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[120] *See, e.g.*, Antoinette Rouvroy & Yves Poullet, *The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy*, *in* REINVENTING DATA PROTECTION? 45, 49 (Serge Gutwirth et al. eds.) (2009).

[121] *See* Schmitz, *supra* note 112.

[122] *See* Carlo Piltz, *Germany: Facebook Wins 2nd Round in Fight over Legitimacy of Its Real Name Policy*, GERMAN IT LAW, (June 30, 2016), http://germanitlaw.com/germany-facebook-wins-2nd-round-in-fight-over-legitimacy-of-its-real-name-policy/ [https://perma.cc/7M9E-GWBK].

[123] *See id.*

[124] *See* Reg. EU 2016/679, art. 62, recital 116, 122, 126, 127, 2016 O.J. (L 119) 1.

unchanged under the new Act.[125] If German regulators ordered Facebook to stop implementing its real name policy now, once the jurisdiction of German laws is established, Facebook may find it more difficult to fight the decision. Hence, German residents and German regulators may stand a better chance under GDPR to demand Facebook to comply with German laws and to stop implementing its real name policy.

Other EU residents and regulators may also have a plausible argument to challenge the real name policy. As previously discussed, Facebook's business model and advertising scheme does not necessarily need users' real names and the collection of such data may violate the GDPR's principle of data minimization; which requires Facebook to process only what is necessary in relation to their operation.[126] This position is likely to lead to a long argument on what is 'necessary.' Facebook may still assert that a real name is central to their operation. Yet, as also previously discussed, users' real names often contain a lot of sensitive information which the GDPR considers special categories of personal data, including: racial or ethnic origin, political opinions, and religious or philosophical beliefs. The processing of such data requires explicit consent from the data subjects.[127] Such consent must be freely given, and, under GDPR Recital 43, consent is invalid if a clear imbalance between the data subject and the controller exists.[128] EU data subjects or data regulators

[125] *See* Telemedia Act, http://www.wipo.int/wipolex/en/details.jsp?id=17674 (last visited Sep. 14, 2018) [https://perma.cc/4JY5-SWDJ].

[126] *See* General Data Protection Regulation, O.J. L. 119, Art. 5(1)(c) (2016) ("[data minimization] adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed").

[127] *See id*. at art. 9 ("'Processing of special categories of personal data': Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health of data concerning a natural person's sex life or sexual orientation shall be prohibited Paragraph 1 shall not apply if the data subject has given explicit consent to the processing of those personal data for one or more specified purposes.")

[128] *See id*. at recital 43 ("'freely given consent': In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is clear imbalance between the data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation.").

could first consider making a case that Facebook's monopoly compels users to sign up. Second, as the Berlin court in the lawsuit brought by the consumer protection organization in 2018 opined, the mandatory real name policy is a covert way of collecting "real names" as personal data.[129] Courts may consider the policy a covert way of collecting users' special categories of data that are already contained in their names.

As discussed earlier, even without a real name policy, users signing up for Facebook may still be willing to provide their real names because they consider it a social norm on the platform and want to exploit the platform's merits, such as easy searchability and personality/brand management. Without a mandatory policy, provided that Facebook explains the data collection in a transparent and easily accessible way that complies with the GDPR, Facebook may be able to establish that those who choose their real names as user accounts have given Facebook explicit consent.[130]

IV. CONCLUSION

The track record of Facebook's privacy practice is problematic. In response to the recent Cambridge Analytical scandal, Zuckerberg repeatedly emphasizes that users have control of their data, including how much of their data Facebook collects for targeted advertising. This paper argues that users do not have such control if Facebook continues to insist on its real name policy because our names contain a lot of information about us. The EU's GDPR opens a new regulatory model and provides EU residents with a higher level of protection regarding the collection and processing of their data. The new jurisdiction arrangement in the GDPR also shakes up internet intermediaries' previous strategies in relation to the choice of laws. Since the GDPR's enforcement on May 25, 2018, a new spree of lawsuits against mega internet intermediaries has already begun.[131]

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[129] *See* Lomas, *supra* note 108108.

[130] *See* Facebook Data Policy, *supra* note 98 (noting that Facebook already takes this approach in its data policy, seeing those who provide information about their religious belief as giving their consent. It is questionable though, if that is enough notice as it is buried in the long explanation on a separate data policy page rather something users will be alerted when filling out their profile).

[131] *See* Natasha Lomas, *Facebook, Google Face First GDPR Complaints over "Forced Consent"* TECHCRUNCH, (May 25, 2018),

Facebook made several adjustments to be GDPR compliant, but changing its real name policy is not among the measures taken.[132] It would not be a surprise if Facebook's long controversial real name policy soon faces new challenges in the EU, and Facebook may find the policy less defendable under the new regime.

https://techcrunch.com/2018/05/25/facebook-google-face-first-gdpr-complaints-over-forced-consent/ [https://perma.cc/FZ5E-77UX].

[132] *See What Is the General Data Protection Regulation (GDPR)*, FACEBOOK, https://www.facebook.com/business/gdpr [https://perma.cc/7C3G-GCVH].