

## REAL-NAME REGISTRATION RULES AND THE FADING DIGITAL ANONYMITY IN CHINA

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*Abstract.* China has implemented comprehensive online real-name registration rules, which require Internet users to disclose their identities. Chinese national law has required most online service providers to implement real-name registration since 2012. This article uses the real-name registration rules to illustrate the supremacy and limitations of the Network Authoritarian Model (NAM), an approach leveraging corporate resources for political surveillance and occasionally adopted by the Chinese party-state. By addressing the evolution of real-name registration rules in China, this article illustrates the party-state's gradual efforts in both eliminating cyberspace anonymity and etching Chinese characteristics on the architecture of the Internet. Although the Chinese government has faced serious challenges in enforcing the real-name registration policy and current enforcement is far from satisfactory, China is not alone in promoting such a policy. Major Internet companies, including Google, Facebook, and LinkedIn, have expressed similar interests in requiring users to register their real names. Moreover, policymakers in developed and developing countries are exploring similarly themed regulations and China, therefore, may well be in the vanguard of the global movement for online real-name registration. Nonetheless, requiring real-name registration in China has not only created huge costs for Internet companies, but also given rise to fierce controversy associated with free speech, privacy, and law enforcement. In this article, we identify several important legal and policy implications of the Chinese real-name registration policy. We also illustrate the foremost predicament currently faced by the Chinese party-state in enforcing the policy. This analysis argues that China may create a "spillover effect" in jurisdictions outside China as well as in the global Internet architecture.

### I. INTRODUCTION

Online real-name registration policies require the disclosure of the speaker's identity with the aid of various methods, ranging from government regulation of Internet service providers (ISPs) to technologies embedded in communication infrastructure. Promulgated under the Chinese

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government's philosophy of fostering a "responsible" Internet, the real-name registration rules have become one of the regulatory risks of doing business in China. For example, in its annual report filed with the U.S. Securities and Exchange Commission, Sina, a NASDAQ-listed company and one of China's largest Internet companies, warned its investors that Chinese authorities might shut it down because its Twitter-like microblogging sites were in noncompliance with the Chinese government's real-name registration rules.<sup>1</sup> In order to maintain public order, China has enacted local and national laws requiring Internet users, especially bloggers and microbloggers,<sup>2</sup> to register their real name and personal information with various ISPs that directly provide users with Internet access or services.<sup>3</sup> These regulations reflect the Chinese government's position that individuals should be responsible for their online communications. Nonetheless, this regulation has simultaneously led to fierce controversy and policy debate.<sup>4</sup>

As the Internet facilitates economic development, Chinese policy makers aim to channel its energy and creativity in ways that fit the Chinese governance model. But what the Chinese party-state government is concerned about is the free flow of information which, enabled by digital technologies, may upset social stability. Therefore, the government has carved out a unique approach to coping with this instance of the "dictator's dilemma."<sup>5</sup> In order to control online information, the government has imposed strict duties on Internet companies or ISPs under the twin principles of "harmonious society" and "social responsibility."<sup>6</sup> Most Internet

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<sup>1</sup> Loretta Chao, *Microblogs Survive Real-Name Rules—So Far*, WALL ST. J.: CHINA REALTIME (Apr. 30, 2012), [http://blogs.wsj.com/chinarealtime/2012/04/30/microblogs-survive-real-name-rules-so-far/?mod=google\\_news\\_blog](http://blogs.wsj.com/chinarealtime/2012/04/30/microblogs-survive-real-name-rules-so-far/?mod=google_news_blog).

<sup>2</sup> See, e.g., Li Shigong, *Is Real-Name Registration Necessary for Micro-Blogs?*, BEIJING REV. (Feb. 2, 2012), [http://www.bjreview.com.cn/forum/txt/2012-01/30/content\\_422194.htm](http://www.bjreview.com.cn/forum/txt/2012-01/30/content_422194.htm).

<sup>3</sup> See *infra* Part III. A.; see also Kristen Farrell, *The Big Mamas Are Watching: China's Censorship of the Internet and the Strain on Freedom of Expression*, 15 MICH. ST. J. INT'L L. 577, 584–88 (2007) (analyzing China's requirement that Internet users register their personal information).

<sup>4</sup> See, e.g., Fan Dong, *Controlling the Internet in China: The Real Story*, 18 CONVERGENCE: INT'L J. RES. INTO MEDIA TECH. 403, 409 (2012) (indicating that the real-name registration system "has been vehemently opposed by scholars, netizens and industry people" in China); Hai Tang, *Blogging in China: Freedom of Expression vs Political Censorship in Sexual and Satirical Blogs*, 2 NETWORKING KNOWLEDGE: J. MECCSA POSTGRADUATE NETWORK 1, 4 (2009) (pointing out that the real-name registration policy "seems to be unacceptable and unpleasant to Chinese bloggers").

<sup>5</sup> See, e.g., Johan Lagerkvist, *Principal-Agent Dilemma in China's Social Media Sector? The Party-State and Industry Real-Name Registration Waltz*, 6 INT'L J. COMM. 2628, 2629 (2012) [hereinafter Lagerkvist, *Principal-Agent Dilemma*].

<sup>6</sup> See, e.g., Johan Lagerkvist, *New Media Entrepreneurs in China: Allies of the Party-State or Civil Society?*, 65 J. INT'L AFF. 169, 173 (2011) [hereinafter Lagerkvist, *New Media Entrepreneurs in China*]. See also Ann Bartow, *Privacy Laws and Privacy Levers: Online Surveillance Versus Economic Development in the People's Republic of China*, 74 OHIO ST. L.J. 853, 853 (2013) (addressing the Chinese government's effort to reconcile the two competing interests of maintaining effective government

companies have tamely abided by the government's mandates and have cooperated with the government in enforcing Internet regulations. In this way, the companies hope to continue extracting profit from the largest digital economy in the world. Put differently, by taking advantage of the business sector's profit-driven motives, the authoritarian government can easily leverage commercial power and corporate resources for online political censorship and surveillance. This so-called "Network Authoritarian Model" (NAM) has strong Chinese characteristics.<sup>7</sup> In the past decade, the Chinese government has successfully implemented the NAM via various measures, such as Internet filtering and strict Internet regulations.<sup>8</sup> China's implementation of the real-name registration rules can also be understood as an example of the network-authoritarian regulatory model.

However, China's implementation of the NAM is not without its challenges. Because the strategy relies on compliance by private ISPs, it may be vulnerable when those private ISPs lack incentive or the ability to cooperate. As China's real-name registration rules have created insurmountable compliance costs, most Internet companies have hesitated to fully implement the real-name registration rules and the accompanying verification system.<sup>9</sup> Such noncompliance has led to more uncertainties associated with the effective enforcement of the real-name registration policy. Despite the success of the network authoritarian approach in controlling the flow of online information in the last decade, the uncertainties have created challenges for the continuance of this approach.<sup>10</sup>

The implementation of the Chinese real-name registration policy presents an ideal opportunity to analyze the interaction between the various—sometimes competing—agendas associated with privacy, online free speech, and government control of the Internet.<sup>11</sup> China is definitely not

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surveillance and developing the nation's knowledge economy); *Id.* at 869 (arguing that prevention of social unrest is one of the Chinese government's main goals in controlling online communications); *Id.* at 894 ("Much of the active governmental surveillance in China is directed at promulgating the CPC conception of social harmony.").

<sup>7</sup> See e.g., SIVA VAIDHYANATHAN, *THE GOOGLIZATION OF EVERYTHING (AND WHY WE SHOULD WORRY)* 32 (2011); Jyh-An Lee, Ching-Yi-Liu, & Weiping Li, *Searching for Internet Freedom in China: A Case Study on Google's China Experience*, 31 *CARDOZO ARTS & ENT. L.J.* 405, 426–27 (2013) [hereinafter Jyh-An Lee et al.].

<sup>8</sup> See, e.g., Jyh-An Lee et al., *supra* note 7, at 419–23, 426–28.

<sup>9</sup> See *infra* notes 172–179 and accompanying text.

<sup>10</sup> Jyh-An Lee et al., *supra* note 7, at 426–28.

<sup>11</sup> Cf. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 148–49 (2007) (indicating the difficulties in balancing free speech, privacy, and reputation in the digital world); Jyh-An Lee, *Regulating Blogging and Microblogging in China*, 91 *OR. L. REV.* 609, 616–19

alone in opposing blanket digital anonymity. Policymakers in developed and developing countries alike have explored or implemented real-name registration rules for online activities.<sup>12</sup> Major Internet companies, including Facebook and Google, have also advocated for real-name registration. Interestingly, most scholarly work on online anonymity and relevant policy issues thus far has not discussed real-name policies in depth. The aim of this article is to bridge the gap between scholarly work on online anonymity and real-name policies. By addressing the evolution of real-name registration rules in China, this article illustrates the party-state's gradual efforts to eliminate cyberspace anonymity and etch Chinese characteristics on the architecture of the Internet. This article also investigates relevant policy concerns, such as privacy and free speech, within the Chinese context and the effects of China's real-name registration rules on the global Internet. Part II illustrates the anonymity afforded by the Internet, the social value of anonymity on the Internet, and the challenges online anonymity faces. Part III details the evolution of the Chinese real-name registration policies and rules and their underlying rationales. Part IV assesses the costs and feasibility of the real-name registration policy in terms of privacy, free speech, user behavior, and its enforcement by the government. In conclusion, although the Chinese policy on real-name registration has raised serious concerns associated with privacy and free speech and created intricate enforcement problems, the international movement for real-name registration and China's role therein will profoundly affect the future of the Internet.

## II. PROBLEMS POSED BY ANONYMITY AND THE INTERNET

The biggest impact of the real-name registration rules is that individuals may no longer post writings and participate in discussions without fear of reprisal in the physical world. While absolute anonymity may not exist in digital environments, a limited degree of anonymity may still be healthy for civil society. By thoroughly eliminating online anonymity, real-name registration rules can fundamentally change the very nature of the Internet and, in particular, can do away with the Internet's valuable contribution to civil society.

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(2012) (discussing the Chinese approach to regulating online speech and privacy in the blogosphere) [hereinafter Jyh-An Lee, *Regulating Blogging and Microblogging in China*].

<sup>12</sup> See *infra* notes 63–64, 223 and accompanying text.

Anonymity has been a longstanding, if incomplete, attribute of cyberspace.<sup>13</sup> The Internet has long been viewed as a privacy-friendly space where mandatory user identification is the rare exception, not the rule.<sup>14</sup> However, such anonymity is by no means absolute. In today's virtual world, most people register information with third parties such as ISPs and domain-name registries.<sup>15</sup> Online intermediaries occasionally hold identifiable information. Most Internet users are actually only "traceably" anonymous. Many Internet users share their identities with certain trusted parties while remaining effectively anonymous to those outside that trusted circle. Put differently, "[t]raceable anonymity is for the most part what currently exists on the Internet"<sup>16</sup> although "[m]any people don't realize that their anonymous blogging or comments can be traced back to them."<sup>17</sup> It is therefore fair to say that very few individuals are actually untraceable in cyberspace and neither anonymity nor pseudonyms guarantee true untraceability.<sup>18</sup>

Under this architecture,

[T]he key is for the law to allow the unmasking of anonymous people when they engage in harmful speech about others. But people shouldn't be unmasked too readily. The law thus must draw a careful line between when it is appropriate to unmask any anonymous speaker and when it isn't.<sup>19</sup>

For this reason, "John Doe" lawsuits in the United States have become a compromise between online anonymity and accountability.<sup>20</sup> Similarly, China's policy of real-name registration has to strike a balance when it is necessary to unmask an anonymous speaker.

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<sup>13</sup> See, e.g., Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 503 (2013).

<sup>14</sup> See, e.g., PAUL BERNAL, INTERNET PRIVACY RIGHTS: RIGHTS TO PROTECT AUTONOMY 237–38 (2014).

<sup>15</sup> SOLOVE, *supra* note 11, at 147 ("[When] a user communicates over the Internet, her IP address is logged. For any session of Internet use, the ISP typically has information that links a particular customer with her IP address.").

<sup>16</sup> *Id.* at 146.

<sup>17</sup> *Id.* at 147.

<sup>18</sup> See, e.g., Woodrow Hartzog & Frederick Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 4 (2013). See also BERNAL, *supra* note 14, at 238 (claiming that untraceability is hard to achieve and justify).

<sup>19</sup> SOLOVE, *supra* note 11, at 147.

<sup>20</sup> See, e.g., Chesa Boudin, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 YALE L.J. 2140 (2011).

In the United States, the First Amendment's freedom of speech guarantee has long been extended to protect anonymous speech. However, the scope of that constitutional protection has been the subject of much debate.<sup>21</sup> Consequently, as long as anonymity is expressive in its nature, regulating online anonymity will have to overcome the problems of constitutionality.<sup>22</sup> Because the nature of the Internet makes it difficult to trace online speakers, some legal scholars argue that anonymity is an essential protection for dissidents<sup>23</sup> and indispensable for democratic processes as it allows minorities, whistleblowers, and other marginalized members of society to step forward and speak about matters of justice without fear of repercussions.<sup>24</sup> In addition, substantial research shows that it is easier for people to freely express their views online rather than offline because they believe identification is more difficult in the virtual world.<sup>25</sup> As noted by Danielle Keats Citron, "anonymity can be essential for some people to speak the truth about themselves and the world as they see it . . . . Examples abound of the importance of anonymity for commentary on politics, culture, and social matters."<sup>26</sup>

Anonymity is particularly significant for democratic decision-making processes insofar as it permits politically active individuals to express a given viewpoint while avoiding any association with the viewpoint. In other words, anonymity can be seen as a shield against the tyranny of the majority.<sup>27</sup> Anonymity strengthens the expression of viewpoints while concealing the identity of the person expressing his or her viewpoints. Though U.S. courts have held that anonymous expression is protected under

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<sup>21</sup> *See id.*

<sup>22</sup> *See, e.g.,* Susanna Moore, *The Challenge of Internet Anonymity: Protecting John Doe on the Internet*, 26 J. MARSHALL J. COMPUTER & INFO. L. 469 (2009); Jason M. Shepard & Genelle Belmas, *Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech*, 15 YALE J.L. & TECH. 92 (2012).

<sup>23</sup> *See, e.g.,* A. Michael Froomkin, *Regulation of Computing and Information Technology: Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395, 429 (1996).

<sup>24</sup> *See, e.g.,* Lyriisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1574 (2007).

<sup>25</sup> *See, e.g.,* Shirley S. Ho & Douglas M. McLeod, *Social-Psychological Influences on Opinion Expression in Face-to-Face and Computer-Mediated Communication*, 35 COMMUNICATION RESEARCH 190–207 (2008).

<sup>26</sup> DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 60–61 (2014).

<sup>27</sup> *See, e.g.,* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

free-speech principles,<sup>28</sup> the issue is now focused on the proper standard for a qualified right to online anonymity.<sup>29</sup>

As Professor Martin Redish notes,

[T]hough they are not identical, the right against compelled speech possesses the same constitutional DNA as the right of anonymity. Much as it has protected the right against compelled speech, the Supreme Court has generally protected a speaker's right to keep his identity private . . . . [I]n certain ways the First Amendment argument for anonymity is even stronger than the rationale for a right not to speak.<sup>30</sup>

To a government, anonymity poses obstacles to law enforcement.<sup>31</sup> In addition, it has long been argued that online anonymity can promote irresponsible online comments and harmful behavior.<sup>32</sup> For example, by defining anonymity as being unable to “trace the source of an electronic message,”<sup>33</sup> Ann Wells Branscomb, a pioneer in the discourse on the relationship between security and privacy, advocates a balance between a set of rules governing online communications and responsible behaviors in cyberspace.<sup>34</sup> She proposes that private parties may try to regulate anonymity in electronic forums they control.<sup>35</sup> More recently, Ari Ezra Waldman points out that not only is the image of a free and anonymous online world wrong, but our online selves are also “traceable and increasing[ly] identifiable as the extensions of our physical selves.”<sup>36</sup> Therefore, he proposes that we should reorient the way we think about our online activities and rights, emphasizing privacy and free speech instead of anonymity.<sup>37</sup>

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<sup>28</sup> See, e.g., *id.* at 342–43.

<sup>29</sup> Lyriisa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1376–78 (2009).

<sup>30</sup> MARTIN H. REDISH, *THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY* 160–61 (2013).

<sup>31</sup> See, e.g., Choi, *supra* note 13, at 536–37.

<sup>32</sup> See, e.g., *id.* at 539.

<sup>33</sup> Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1641 (1995).

<sup>34</sup> *Id.* at 1641–45.

<sup>35</sup> See Branscomb, *supra* note 33.

<sup>36</sup> Ari Ezra Waldman, *Durkeim's Internet: Social and Political Theory in Online Society*, 7 N.Y.U. J.L. & LIBERTY 345, 348 (2013).

<sup>37</sup> *Id.* at 386.

Anonymous speech can benefit both speakers and audiences. Recognizing potential benefits, Professor Redish persuasively notes that the “rejection of a right of anonymity arguably undermines *both* speaker-centric *and* listener-centric models of free expression.”<sup>38</sup> When “viewed in this manner, the constitutional interest in protecting anonymity appears to be even more powerful than the constitutional interest underlying the well-established right not to speak at all.”<sup>39</sup> In addition, anonymity is an empowering tool with which speakers can level arguments against majority opinions,<sup>40</sup> making it possible for speakers to associate with a marginalized segment of the population and thereby helping them self-realize without worrying about tarnishing their personal image or reputation.<sup>41</sup> Furthermore, anonymous speakers can escape stereotyping based on ethnicity, race, gender, or other personal characteristics. In this way, speakers ensure that the audience will judge their arguments solely or largely upon its anonymously delivered substance. In other words, anonymity “allows people to be more experimental and eccentric without risking damage to their reputation.”<sup>42</sup>

Moreover, since mandating the disclosure of identifying information or registration of real names can directly or indirectly hamper expressions of unpopular views, the purpose of protecting anonymous speech is to empower individual speakers to counter illegitimate government practices.<sup>43</sup> As A. Michael Froomkin points out, “the debate about anonymity . . . is in effect a debate about the degree of political and economic freedom that will be fostered, or tolerated, in a modern society.”<sup>44</sup> Prohibiting the use of tools or technologies that enable anonymity will exacerbate the fundamental imbalance of power between individuals and their government.

For a number of reasons, anonymity can also benefit audiences. Anonymity confers on audiences the ability to engage in relatively

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<sup>38</sup> REDISH, *supra* note 30, at 161 (emphasis in original).

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL’Y 405, 413 (2003).

<sup>41</sup> See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460–464 (1958).

<sup>42</sup> SOLOVE, *supra* note 11, at 140 (citing Gary T. Marx, *Identity and Anonymity: Some Conceptual Distinctions and Issues for Research*, in DOCUMENTING INDIVIDUAL IDENTITY 311, 316 (Jane Caplan & John Torpey eds., 2001)).

<sup>43</sup> See Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (“[A]pplication of First Amendment law is best understood and most readily explained as a kind of motive-hunting.”); see also Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767 (2001).

<sup>44</sup> Froomkin, *supra* note 23, at 401–02.



uninhibited information seeking, which can promote greater variety in the marketplace of ideas by creating a swell in demand for otherwise seldom or marginally sought-out material.<sup>45</sup> More importantly, anonymity can promote the distribution of valuable speech and the ease with which audiences can access such speech.<sup>46</sup> Audiences also benefit from anonymity insofar as it grants them more room to seek answers to potentially shameful or embarrassing questions.<sup>47</sup> Finally, as with anonymous speakers, anonymous audiences can escape or minimize the chilling effects that stereotypes and stigmas have on an individual's effort to seek out information.<sup>48</sup> In short, anonymity for audiences, as well as for speakers, can benefit the whole of society.<sup>49</sup>

Despite all the benefits of anonymity, words can still cause harm<sup>50</sup> and, therefore, legal regulation of harmful speech is sometimes appropriate.<sup>51</sup> It is unreasonable to assert that unfettered anonymous speech is harmless. Anonymous speakers are separated from any immediate consequences of their speech, making them feel safe from retaliation despite having spread defamatory or harassing speech.<sup>52</sup> In addition, from an information acquisition standpoint, anonymous speech may be less valuable than identifiable speech due to both the unverifiability of sources of anonymous speech<sup>53</sup> and the audience's difficulty in determining whether any self-interest or bias lies behind a particular instance of anonymous speech.<sup>54</sup> Put differently, as the U.S. Supreme Court recognized, there is an inherent tension between transparency and anonymity.<sup>55</sup> Some prominent free speech scholars have argued that most information providers in traditional

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<sup>45</sup> Choi, *supra* note 13, at 524–25.

<sup>46</sup> *See id.* at 552.

<sup>47</sup> Froomkin, *supra* note 23, at 408.

<sup>48</sup> *See* Choi, *supra* note 13, at 524–25.

<sup>49</sup> Froomkin, *supra* note 23, at 408–09.

<sup>50</sup> *See generally* RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND (2004).

<sup>51</sup> *See, e.g.*, JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION 66–67 (2005).

<sup>52</sup> *See, e.g.*, Margot Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 815, 827–28 (2013).

<sup>53</sup> Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 862–63 (2000).

<sup>54</sup> *Id.*

<sup>55</sup> *See, e.g.*, Boudin, *supra* note 20, at 2172–73.

information marketplaces have had to abstain from anonymous speech and thus shoulder the responsibilities associated with transparency.<sup>56</sup>

While anonymity has tremendous intrinsic value, its harm lies in its ability to cloak bad behavior. As Daniel Solove points out, “anonymity allows people to escape accountability for their words, but this comes at a cost—the loss of authorship credit under one’s real name.”<sup>57</sup> Anonymity also makes harassment and stalking easier than ever.<sup>58</sup> However, the history of free speech protection shows us that attempts to regulate against harmful anonymity are often overbroad and eventually devolve into censorship of perfectly legitimate expressions. The constitutional protection of free speech requires “breathing space” for protected speech to flourish. Even assuming speech sometimes gives rise to harmful consequences, blanket identity-registration requirements will result in a chilling effect by deterring anonymous speech and are consequently incompatible with the very idea of free speech.<sup>59</sup> Therefore, asking whether the government can impose a blanket ban on anonymity is a meaningful question that has become increasingly significant as the proliferation of online dissenters and offline revolutionaries has led governments around the world, particularly booming Internet economies such as China, to adopt online real-name policies.<sup>60</sup>

### III. REAL-NAME REGISTRATION POLICY IN CHINA

Online real-name registration policies function to facilitate traceability or prohibit anonymity<sup>61</sup> and have gained wide popularity in governments from all corners of the globe.<sup>62</sup> For example, South Korea enacted real-name laws in 2007, requiring all online users to verify their identities by submitting their Resident Registration Numbers (RRNs) to ISPs.<sup>63</sup> In

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<sup>56</sup> See, e.g., C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 972 (2007).

<sup>57</sup> SOLOVE, *supra* note 11, at 139.

<sup>58</sup> See, e.g., Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 324 (2008).

<sup>59</sup> See, e.g., *Thomas v. Collins*, 323 U.S. 516, 539 (1945); *Watchtower Bible v. Village of Stratton*, 536 U.S. 150, 165–66 (2002).

<sup>60</sup> See, e.g., Eric S. Fish, *Is Internet Censorship Compatible with Democracy?: Legal Restrictions of Online Speech in South Korea*, 10 ASIA-PAC. J. ON HUM. RTS. & L. 43, 47–50 (2009); John M. Leitner, *To Post or Not to Post: Korean Criminal Sanctions for Online Expression*, 25 TEMPLE INT’L & COMP. L.J. 43, 53–55, 64–68 (2011) [hereinafter Leitner, *To Post or Not to Post*].

<sup>61</sup> See *infra* notes 85–86 and accompanying text.

<sup>62</sup> See *infra* note 223 and accompanying text.

<sup>63</sup> See Timothy B. Lee, *South Korea’s “Real Names” Debacle and the Virtues of Online Anonymity*, ARS TECHNICA (Aug. 15, 2011), <http://arstechnica.com/tech-policy/2011/08/what-south-korea-can-teach-us-about-online-anonymity/>.

Germany in 2011, Interior Minister Hans-Peter Friedrich advocated real-name policies in the wake of the Norwegian mass shooting.<sup>64</sup> Given online anonymity's implications for law enforcement and social order, it was unsurprising when China decided in 2012 to expand its regulation of the Internet, requiring microblog and other Internet services users to perform real-name registration.<sup>65</sup> This part provides a historic overview of China's local and national real-name registration rules, followed by the policy rationales and criticisms of those rules.

### A. *Evolution of the Chinese Real-Name Registration Policy*

The Chinese government expressed its interest in establishing a real-name registration Internet policy as early as 2003, when it ordered cyber cafes to collect customers' identification information.<sup>66</sup> The purported policy goal of this real-name identification requirement was to fight crime and to protect minors.<sup>67</sup> Thereafter, the government conducted real-name registration trial runs in a number of major Chinese cities, though not all of them were successful.<sup>68</sup> For instance, in 2006, the Beijing administration failed to implement a real-name registration scheme for bloggers because of strong protest from users, news media, and high-tech industries.<sup>69</sup> Similar frustration associated with local-government efforts to enact real-name registration rules surfaced in Xia Men.<sup>70</sup> In early 2009, the local legislature in Hangzhou passed a real-name registration regulation, mandating that users provide their true identities when posting information online or when playing online games.<sup>71</sup> Nevertheless, the city government eventually

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<sup>64</sup> *See id.*

<sup>65</sup> *See infra* notes 87–89.

<sup>66</sup> *See* Jonathan Ansfield, *China Web Sites Seeking Users' Names*, N.Y. TIMES (Sept. 5, 2009), [http://www.nytimes.com/2009/09/06/world/asia/06chinanet.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/09/06/world/asia/06chinanet.html?pagewanted=all&_r=0); *see also* Fan Dong, *supra* note 4, at 409 (noting that the real-name system “has been gradually forced onto webmasters and internet café visitors.”).

<sup>67</sup> Henry L. Hu, *Real Name Systems in Chinese Cyberspace: Authentication, Privacy and State Capacity*, 4 PEKING U. J. LEGAL STUD. 207, 215, 235 (2013) [hereinafter Hu, *Real Name Systems*].

<sup>68</sup> *See e.g.*, Fan Dong, *supra* note 4, at 409; King-wa Fu, Chung-hong Chan & M. Chau, *Assessing Censorship on Microblogs in China: Discriminatory Keywords Analysis and the Real-Name Registration Policy*, IEEE INTERNET COMPUTING, May–Jun. 2013, at 43 [hereinafter King-wa Fu et al.]; Leitner, *To Post or Not to Post*, *supra* note 60, at 68–69. *See also* Trina K. Kissel, *License to Blog: Internet Regulation in the People's Republic of China*, 17 IND. INT'L & COMP. L. REV. 229, 252–53 (2007) (explaining how local and provincial officials in China have also used their authority to require individuals using BBSs, chat rooms, and IM services to use their real names when posting messages or chatting online).

<sup>69</sup> *See, e.g.*, JOHAN LAGERKVIST, AFTER THE INTERNET, BEFORE DEMOCRACY: COMPETING NORMS IN CHINESE MEDIA AND SOCIETY 56 (2010) [hereinafter LAGERKVIST, AFTER THE INTERNET]; Lagerkvist, *Principal-Agent Dilemma*, *supra* note 5, at 2637; Ansfield, *supra* note 66.

<sup>70</sup> Hu, *Real Name Systems*, *supra* note 67, at 224.

<sup>71</sup> *See* Ansfield, *supra* note 66.

decided against enforcing the regulation due to widespread objections.<sup>72</sup> Since then, the Chinese government has become more cautious in seeking the private sector's support for real-name registration.<sup>73</sup>

In August 2009, in order to comply with “secret” government orders, several news portals, including Sina, NetEase, and Sohu, began to require that new users provide their real names and identification numbers.<sup>74</sup> In February 2012, in order to comply with a measure issued by the Beijing Municipal Government,<sup>75</sup> China's four primary microblog companies—Sina, Sohu, NetEase, and Tencent—set a March 16, 2012 deadline for users to identify themselves by their real names.<sup>76</sup> Currently, all microblog, or *weibo*, users must register using their true identities, including their real names, government-issued ID numbers (*i.e.*, the national identification number),<sup>77</sup> and mobile phone numbers.<sup>78</sup> Although microbloggers are able to use nicknames or pseudonyms on their homepage, they cannot hide their real names from either the microblog companies or the government.<sup>79</sup> Unregistered users, while still able to browse microblog posts, are not allowed to post content.<sup>80</sup> While Chinese bloggers no longer enjoy the same level of anonymity that existed prior to the regulatory changes, the government justified these changes as a means of tamping down on antagonistic speech.<sup>81</sup>

The Chinese government has made the reduction of anonymity in cyberspace a major policy goal, proposing and enacting a number of stricter

<sup>72</sup> *Id.*

<sup>73</sup> LAGERKVIST, *AFTER THE INTERNET*, *supra* note 69, at 56. See also Kay Hearn, *The Management of China's Blogosphere* *Boke (Blog)*, 23 *CONTINUUM: J. MEDIA & CULTURAL STUD.* 887, 891 (2009) (describing the fierce opposition to the compulsory real-name registration rules in China).

<sup>74</sup> See, e.g., Ansfield, *supra* note 66.

<sup>75</sup> See, e.g., Covington & Burling LLP, *China Enacts New Data Privacy Legislation*, E-ALERT: GLOBAL PRIVACY & DATA SECURITY (Jan. 11, 2013), at 2, [http://www.cov.com/files/Publication/83ff413a-af68-4675-850e-a0f54533d149/Presentation/PublicationAttachment/240e4b51-6450-4403-8cfcb0cea77c8370/China\\_Enacts\\_New\\_Data\\_Privacy\\_Legislation.pdf](http://www.cov.com/files/Publication/83ff413a-af68-4675-850e-a0f54533d149/Presentation/PublicationAttachment/240e4b51-6450-4403-8cfcb0cea77c8370/China_Enacts_New_Data_Privacy_Legislation.pdf).

<sup>76</sup> See, e.g., BERNADETTE H. SCHELL, *INTERNET CENSORSHIP: A REFERENCE HANDBOOK* 116 (2014).

<sup>77</sup> See, e.g., David Caragliano, *Why China's "Real Name" Internet Policy Doesn't Work*, *THE ATLANTIC* (Mar. 26, 2013), <http://www.theatlantic.com/china/archive/2013/03/why-chinas-real-name-internet-policy-doesnt-work/274373/>; Reuters, *China Considers Requiring Real Names, Government ID Cards, to Sign Up for Internet Access*, *N.Y. DAILY NEWS* (Dec. 26, 2012, 9:08 AM), <http://www.nydailynews.com/news/world/china-require-real-internet-access-article-1.1227414>; *The Power of Microblogs: Zombie Followers and Fake Re-tweets*, *THE ECONOMIST* (Mar. 17, 2012), <http://www.economist.com/node/21550333> [hereinafter *The Power of Microblogs*].

<sup>78</sup> See, e.g., King-wa Fu et al., *supra* note 68, at 43.

<sup>79</sup> See *id.*; *The Power of Microblogs*, *supra* note 77.

<sup>80</sup> King-wa Fu et al., *supra* note 68, at 43.

<sup>81</sup> See, e.g., Kevin Gregg, “Text ‘Revolution’ to Vote”: *Social Media's Effect on Popular Consent and Legitimacy of New Regimes*, 31 *B.U. INT'L L.J.* 315, 332 (2013).

registration requirements. For example, in 2005, all universities and colleges in China began to require users of Bulletin Board Systems (BBSs)<sup>82</sup> to provide their real names.<sup>83</sup> In 2007, the central government issued an administrative notice ordering all online-game service providers to integrate mandatory real-name registration in their products.<sup>84</sup> According to China's Internet Society Chairwoman Hu Qiheng, the government's goal is to "achieve a state of 'no anonymity' in cyberspace."<sup>85</sup> Mr. Chen Wang, the highest-ranking government official responsible for online information in China, expressed a similar opinion that China needed to create a real-name system that reduced or eliminated anonymity in cyberspace.<sup>86</sup>

As a consequence, in December 2012, lawmakers in the Standing Committee of the National People's Congress passed a new law entitled Decision of the Standing Committee of the National People's Congress on Strengthening Online Information Protection (Online Information Decision), mandating that "network service providers should require their users to supply true identification information when signing [an] agreement to provide them with website access, fixed line telephone, mobile phone access, or allow them to post information via the network."<sup>87</sup> The Online Information Decision has two important legal implications. First, it elevates China's real-name policy to the level of national law.<sup>88</sup> Second, it covers a wide range of online services because most Internet enterprises provide services for gaining "website access" and for "post[ing] information via the

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<sup>82</sup> BBSs are the most popular online forum in China. They can be operated by individuals, private organizations, or government agencies. See, e.g., Xiao Qiang, *The Internet: A Force to Transform Chinese Society?*, in CHINA'S TRANSFORMATIONS: THE STORIES BEYOND THE HEADLINES 129, 136 (Lionel M. Jensen & Timothy B. Weston eds., 2007).

<sup>83</sup> Hu, *Real Name Systems*, *supra* note 67, at 217–18.

<sup>84</sup> *Id.* at 226.

<sup>85</sup> KENNETH GEERS, STRATEGIC CYBERSECURITY 66 (2011).

<sup>86</sup> U.S.-CHINA ECON. AND SECURITY REV. COMM'N, 111TH CONG., 2010 REP. at 226, 228 (2nd Sess. 2010), [http://origin.www.uscc.gov/sites/default/files/annual\\_reports/2010-Report-to-Congress.pdf](http://origin.www.uscc.gov/sites/default/files/annual_reports/2010-Report-to-Congress.pdf) (last visited Oct. 25, 2015).

<sup>87</sup> Quanguo Renda Changweihui Guanyu Jiaqiang Wangluo Xinxi Baohu De Jueding (全国人民代表大会常务委员会关于加强网络信息保护的決定) [Decision of the Standing Committee of the National People's Congress on Strengthening Online Information Protection] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2012, effective Dec. 28, 2012), art. 6, (China), [http://www.gov.cn/jrzq/2012-12/28/content\\_2301231.htm](http://www.gov.cn/jrzq/2012-12/28/content_2301231.htm) [hereinafter Online Information Decision].

<sup>88</sup> See, e.g., Stephen Lawson, *China Orders Internet Users to Disclose Their Real Names*, PCWORLD (Dec. 29, 2012), <http://www.pcworld.com/article/2023521/china-orders-internet-users-to-disclose-their-real-names.html>; Joe McDonald, *China Real-Name Registration Is Now Law in Country*, HUFF POST (Dec. 28, 2013), [http://www.huffingtonpost.com/2012/12/28/china-real-name-registration\\_n\\_2373808.html](http://www.huffingtonpost.com/2012/12/28/china-real-name-registration_n_2373808.html). It should be noted that the Standing Committee of the National People's Congress is probably the most important national legislative body in China. It has the power to interpret the Constitution and enact and amend the laws. See, e.g., BING LING, CONTRACT LAW IN CHINA 26–27 (2002); GUIGUO WANG, *The Legal System of China*, in CHINESE LAW 1, 6–8 (Guiguo Wang & John Mo eds., 1999).

network.”<sup>89</sup> Therefore, the real-name registration requirement has become a legal obligation not only for providers of blogging services, but also for most other online service providers in China.<sup>90</sup> The government has recently expanded this requirement to users of instant messaging applications, including WeChat, the most popular instant-messaging tool in China.<sup>91</sup> Moreover, in 2015, after several years of consideration,<sup>92</sup> the Ministry of Industry and Information Technology finally implemented real-name registration requirements.<sup>93</sup> Mobile phone SIM card buyers now must have their ID card examined by electronic ID readers.<sup>94</sup> Those who fail to register may run the risk of having their phone numbers suspended.<sup>95</sup>

On July 6, 2015, the National People’s Congress in China released a draft of the “Cybersecurity Law” which includes more detailed rules associated with online real-name registration.<sup>96</sup> Article 20(1) of the draft is identical to the network service providers’ obligation of collecting users’ identification information in the aforementioned Online Information

<sup>89</sup> Online Information Decision, *supra* note 87, at art. 6.

<sup>90</sup> See, e.g., Covington & Burling LLP, *supra* note 75, at 2 (pointing out that the real-name registration requirement is applied to “at the least, both content providers such as websites as well as network access providers such as China Unicom or China Mobile”); Lawson, *supra* note 88 (stating that the real-name registration requirement “go[es] beyond social networking sites to include all users of the Internet”). See also Laura Scaife, *The Interrelationship of Platform Providers and Users in the Regulation of Twitter and Offensive Speech—Is There A Right to be Offensive and Offended at Content?*, 18 COMM. L. 128, 132 (2013) (noting that the rule is applied to all Internet platforms).

<sup>91</sup> Cao Yin, *IM Rules Are Tightened to Stem Rumors, Pornography*, CHINA DAILY (Aug. 8, 2014), [http://usa.chinadaily.com.cn/epaper/2014-08/08/content\\_18274337.htm](http://usa.chinadaily.com.cn/epaper/2014-08/08/content_18274337.htm) [hereinafter Cao Yin, *IM Rules*] (reporting the assertion by Chinese law scholar Li Yuxiao that real-name registration rules can effectively reduce online rumors); *China Tightens Control on Instant Messaging Services*, BBC NEWS (Aug. 7, 2014), <http://www.bbc.com/news/world-asia-china-28694890>.

<sup>92</sup> See U.S.-CHINA ECON. AND SECURITY REV. COMM’N, *supra* note 86; Reuters, *supra* note 77; see also Ansfield, *supra* note 66 (“[F]urther regulations of the same nature also appeared to be in the pipeline.”).

<sup>93</sup> See, e.g., Vivienne Zeng, *China Enforces Real-Name Registration for Phone Users*, HONG KONG FREE PRESS (Sept. 2, 2015), <https://www.hongkongfp.com/2015/09/02/china-enforces-real-name-registration-for-phone-users/>.

<sup>94</sup> *Id.*; Staff Reporter, *Real-Name SIM Registration to Be Enforced in China Sept 1*, WANT CHINA TIMES (Aug. 28, 2015), <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20150828000033&cid=1103> [hereinafter *Real-Name SIM Registration to Be Enforced in China Sept 1*].

<sup>95</sup> See, e.g., Zeng, *supra* note 93; *Real-Name SIM Registration to Be Enforced in China Sept 1*, *supra* note 94.

<sup>96</sup> See, e.g., Bethany Allen-Ebrahimian, *The “Chilling Effect” of China’s New Cybersecurity Regime*, FOREIGN POL’Y: TEA LEAF NATION (July 10, 2015), <http://foreignpolicy.com/2015/07/10/china-new-cybersecurity-law-internet-security/>; Nectar Gan, *Why China’s Draft Cybersecurity Law Has Chilling Implications for the Internet and Multinationals: Proposed Legislation Steps up Data Protections as Well as Government Controls Online*, S. CHINA MORNING POST (July 9, 2015), <http://www.scmp.com/news/china/policies-politics/article/1834506/chinas-publishes-draft-cybersecurity-law-implications>.

Decision.<sup>97</sup> Article 53 of the draft imposes legal liability for service providers' violations of the real-name registration obligation, including fines ranging from RMB 50,000 to 500,000 and the suspension of business licenses.<sup>98</sup> Given past legislative behavior, it is very likely that the draft will be passed into law with very few changes.<sup>99</sup>

### B. Policy Basis for China's Real-Name Registration Rules

Why does the Chinese government so actively promote its real-name registration policy? The official explanation is that real-name registration rules can ensure a healthier and safer Internet and protect public interests and social order from illegal content, such as libel, fraud, pornography, rumors, and vulgarity.<sup>100</sup> The government's strict control of the Internet environment is based on the belief that online criticism and other harmful language online may have destructive influences on society.<sup>101</sup> For example, baseless and hysterical rumors spreading on the Internet may be a serious problem for a government that extensively plans and controls citizens' activities.<sup>102</sup> As such, by requiring real-name registration, the government not only effectively regulates malicious and anonymous accusations,<sup>103</sup> but also maintains harmony in society—at least in theory. Official proclamations endorsing the real-name registration system are not novel in China. As the Chinese Internet Society Industry Self-Discipline Committee secretary-general Yang Junzuo recently stated, by reducing such personally

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<sup>97</sup> Wangluo Anquan Fa (Cao An) Quanwen (网络安全法(草案)全文) [PRC Draft of Cybersecurity Law] Art. 20(1) (China), [http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2015-07/06/content\\_1940614.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2015-07/06/content_1940614.htm).

<sup>98</sup> *Id.* at Art. 53.

<sup>99</sup> *See, e.g.*, Allen-Ebrahimian, *supra* note 96.

<sup>100</sup> *See, e.g.*, Ansfield, *supra* note 66; Caragliano, *supra* note 77; Reuters, *supra* note 77; *see also* Lawson, *supra* note 88 (“[T]he rules . . . are intended to . . . ‘safeguard public interest.’”); McDonald, *supra* note 88 (quoting the clarification made by Le Fei, deputy director of the Chinese legislature’s Legal Work Committee, that the real-name registration regulation “is needed for the healthy development of the Internet”).

<sup>101</sup> *See, e.g.*, Lagerkvist, *New Media Entrepreneurs in China*, *supra* note 6, at 174.

<sup>102</sup> *See, e.g.*, *The Power of Microblogs*, *supra* note 77. *See also* Omar Saleem, *China’s Internet Policies Within the Global Community*, 17 J. TECH. L. & POL’Y 299, 316 (2012) (stating that the goal of China’s real-name registration rules serve to “[prevent] vicious rumors about citizens and [to protect] the public rights and interests”); Cao Yin, *IM Rules*, *supra* note 91 (reporting the claim by Chinese law scholar Li Yuxia that the real-name registration rules can effectively reduce online rumors).

<sup>103</sup> *See, e.g.*, Ansfield, *supra* note 66; Caragliano, *supra* note 77. Similarly, when South Korea implemented the real-name policy in 2008, the goal was to curb online hate speech and cyberbullying. *See, e.g.*, Eric Pfanner, *Naming Names on the Internet*, N.Y. TIMES (Sept. 5, 2011), <http://www.nytimes.com/2011/09/05/technology/naming-names-on-the-internet.html>

devastating attacks as fraud and libel, the real-name registration system can eventually help to build a “harmonious Internet ecology.”<sup>104</sup>

The preamble of the Online Information Decision states that the legislation is intended to “ensure Internet information security, safeguard the lawful rights and interests of citizens, legal entities or other organizations, and safeguard national security and public interests.”<sup>105</sup> The function of the real-name registration is to assist in the elimination of online malicious speech, pornography, and “unfounded rumors.”<sup>106</sup> It should be noted that the Chinese government is not the only government to ascribe its real-name registration policy to public interests and order in the digital world. The South Korean government, which built the first national real-name registration system,<sup>107</sup> similarly emphasized the desirability of a more responsible and respectful culture for online expression.<sup>108</sup> Therefore, it is not surprising that the Chinese government has occasionally mimicked the South Korean approach to justifying the official real-name registration rules.<sup>109</sup> Recently, some Chinese government officials again declared that the real-name registration requirement is an important policy tool for battling rising Internet crime.<sup>110</sup> Other pro-government commentators even claim that the requirement is one of several “efforts to combat terrorism,” pornography, and violence.<sup>111</sup>

Critics claim that the real-name registration rules are a tool that the Chinese government uses to prevent Internet users from criticizing government officials or publicizing government corruption.<sup>112</sup> Without online anonymity, a significant number of Chinese Internet users would likely hesitate to criticize the government for fear of government

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<sup>104</sup> Hai Tang, *supra* note 4, at 3.

<sup>105</sup> Quanguo Renda, *supra* note 87, Preamble.

<sup>106</sup> Scaife, *supra* note 90, at 132.

<sup>107</sup> John Leitner, *Identifying the Problem: Korea's Initial Experience with Mandatory Real Name Verification on Internet Portals*, 9 J. KOREAN L. 83, 90 (2009) [hereinafter, Leitner, *Identifying the Problem*].

<sup>108</sup> See Terence J. Lau, *Towards Zero Net Presence*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 237, 272 (2011); Leitner, *To Post or Not to Post*, *supra* note 60, at 63–64.

<sup>109</sup> Ansfield, *supra* note 66.

<sup>110</sup> See, e.g., Cao Yin, *Beijing Police Target Rising Internet Crime Across 900,000 Sites*, CHINA DAILY (Oct. 9, 2014), [http://usa.chinadaily.com.cn/epaper/2014-10/09/content\\_18712082.htm](http://usa.chinadaily.com.cn/epaper/2014-10/09/content_18712082.htm) [hereinafter Cao Yin, *Beijing Police Target Rising Internet Crime*].

<sup>111</sup> See *China Tightens Control on Instant Messaging Services*, *supra* note 91; see also Cao Yin, *IM Rules*, *supra* note 91 (stating that the Chinese government uses real-name registration as a tool to solve problems relating to “terrorism, pornography, and violence”).

<sup>112</sup> Reuters, *supra* note 77; Lawson, *supra* note 88; McDonald, *supra* note 88. See also Hai Tang, *supra* note 4, at 3–4 (noting bloggers' belief that “there is some ulterior motive” behind the government's real-name registration policy).



retribution.<sup>113</sup> Therefore, the real-name registration policy may have chilling effects on speech, especially speech critical of public officials and other sensitive topics.

#### IV. EVALUATING THE CHINESE REAL-NAME REGISTRATION POLICY

China's real-name registration policy may be critiqued from a variety of different policy angles. Some critiques label the policy an infringement on citizens' fundamental rights.<sup>114</sup> Others hold that the policy can neither achieve its original goals nor benefit from effective enforcement. Researchers have conducted studies exploring Chinese citizens' perception of the government's attempts to develop a real-name registration policy but the results of these studies vary significantly.<sup>115</sup> According to a Shanghai-based survey conducted by Chinese scholar Zhao Yawen, a majority of respondents were supportive or very supportive of the real-name registration rules.<sup>116</sup> A survey conducted by the semi-governmental organization China Internet Network Information Center found similar results.<sup>117</sup> By contrast, surveys conducted on sites like Sina indicate that a majority of users opposed the real-name registration policy.<sup>118</sup> This part of the article will analyze policy issues, ranging from privacy, free speech, and impact on users' behavior to effective enforcement of China's real-name registration policy.

##### A. Privacy

Anonymity is a form of privacy protection that may facilitate privacy violations. In other words, anonymity can preserve privacy by allowing people to speak freely without having to submit to public identification. Anonymity can also undermine privacy by allowing people to more easily invade the privacy of others. More specifically, digital invasion of personal privacy stemming from disclosure of non-public or potentially sensitive personal information has been pervasive given that anonymous authors enjoy the freedom to express themselves without fear of any negative personal consequences. As the tensions between anonymity and

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<sup>113</sup> Reuters, *supra* note 77.

<sup>114</sup> See, e.g., Hai Tang, *supra* note 4, at 4 (presenting criticism on the real-name registration policy made by Fang Xingdong, the President of Bokee.com).

<sup>115</sup> See *infra* notes 116–118 and accompanying text.

<sup>116</sup> Lagerkvist, *After the Internet*, *supra* note 69, at 56–57.

<sup>117</sup> James Leibold, *Blogging Alone: China, the Internet, and the Democratic Illusion?*, 70 J. ASIAN STUD. 1023, 1033 (2011).

<sup>118</sup> See Ansfield, *supra* note 66.

accountability and between privacy and free speech demonstrate, the choice is not as simple as one between freedom and constraint. Rather, it is “a choice that involves freedom on both sides.”<sup>119</sup>

For law enforcement, anonymity is a tool with which criminals evade the public’s detection of their illegal activities. This aspect of anonymity is an obstacle to law enforcement and compels governments around the world to consider whether they should regulate anonymity-promoting technology or even whether they should try to stamp out anonymity altogether.<sup>120</sup> It is not difficult to imagine that the more untraceable the various forms of online speech become, the stronger the state’s interest in policing this speech becomes.

Efforts to banish anonymity from the digital world promotes surveillance<sup>121</sup> and chills protected speech, raising the question of whether governments’ blanket ban on online and offline anonymity will become a reality. This question deserves considerable attention. Although the real-name registration policy described above is designed to enhance accuracy in online information, it may cause unintended—or intended—social costs. Among other costs, a decline in privacy is a central concern surrounding efforts to implement China’s real-name registration scheme.<sup>122</sup> The implementation of real-name registration rules results in online platforms’ need to acquire users’ real names and other personal data, in turn raising the risk of privacy infringement.<sup>123</sup>

Moreover, the private sector in China has long contended that without reliable technology for privacy protection, sound implementation of a rigorous real-name registration policy is impossible.<sup>124</sup> South Korea’s experience may best exemplify how real-name registration rules can harm privacy. South Korean Internet users were required to enter identifying

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<sup>119</sup> SOLOVE, *supra* note 11, at 141–42.

<sup>120</sup> See, e.g., Kaminski, *supra* note 52, at 877–80.

<sup>121</sup> See, e.g., Laura K. Donohue, *Technological Leap, Statutory Gap, and Constitutional Abyss: Remote Biometric Identification Comes of Age*, 97 MINN. L. REV. 407, 425 (2012).

<sup>122</sup> See, e.g., Hu, *Real Name Systems*, *supra* note 67, at 217–18, 229 (stating that Chinese online game players and bloggers have complained about potential privacy violations caused by real-name registration rules); John Schinasi, *Practicing Privacy Online: Examining Data Protection Regulations Through Google’s Global Expansion*, 52 COLUM. J. TRANSNAT’L L. 569, 605 (2014) (indicating that China’s real-name registration rule “could potentially erode online privacy”).

<sup>123</sup> See, e.g., Chengyu Xiong & Yuxiang Lv, *Social Network Service and Social Development in China*, 13 STUD. COMM. SCI. 133, 137 (2013).

<sup>124</sup> See, e.g., Hearn, *supra* note 73, at 891.

information into the relevant websites for access.<sup>125</sup> However, due to a severe security breach in which hackers stole the identification numbers of thirty-five million Internet users, South Korea abandoned its real-name registration policy in 2011.<sup>126</sup> In the Constitutional Court of Korea, justices heard complaints that South Korea's Real Name Verification System had unnecessarily exposed South Korean Internet users to Internet fraud.<sup>127</sup> The Court eventually ruled that the real-name registration rule was unconstitutional in part because it posed an unnecessary risk to users' personal data.<sup>128</sup>

Although privacy protection in South Korea may differ from that in China, China has experienced a rapid increase in identity theft.<sup>129</sup> Therefore, its real-name registration policy may trigger privacy concerns as serious as those witnessed in South Korea. Moreover, many defenders of the frequent argument that online anonymity is a form of privacy protection<sup>130</sup> argue that China's real-name registration rule might "erode online privacy"<sup>131</sup> or even "necessarily intrude on people's privacy."<sup>132</sup> As China has enacted a series of privacy laws<sup>133</sup> and strengthened its privacy protection in recent years,<sup>134</sup> privacy risks caused by real-name registration rules will no doubt become a difficult legal issue in the near future.

### B. Free Speech

Commentators have claimed that real-name registration regulations harm free speech.<sup>135</sup> It is easy to understand that in a repressive or authoritarian society, anonymity enables dissidents to express anti-

<sup>125</sup> Pfanner, *supra* note 103.

<sup>126</sup> See Caragliano, *supra* note 77; Xeni Jardin, *South Korea to Abandon "Real Name" Internet Policy*, BOING BOING (Aug. 12, 2012), <http://boingboing.net/2011/08/12/south-korea-to-abandon-real-name-internet-policy.html>; Pfanner, *supra* note 101; Scaife, *supra* note 88, at 132.

<sup>127</sup> See Leitner, *To Post or Not to Post*, *supra* note 60, at 63.

<sup>128</sup> Scaife, *supra* note 90, at 133.

<sup>129</sup> See, e.g., Schinasi, *supra* note 122, at 604; *Thousands Busted in Identity Theft Cases*, CHINA DAILY (May 30, 2013), [http://www.chinadaily.com.cn/china/2013-05/30/content\\_16547114.htm](http://www.chinadaily.com.cn/china/2013-05/30/content_16547114.htm).

<sup>130</sup> See LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE, Version 2.0 197–98 (2006).

<sup>131</sup> See Schinasi, *supra* note 122, at 605.

<sup>132</sup> See Hai Tang, *supra* note 4, at 4 (citing tech-blogger Hong Bo's statement).

<sup>133</sup> See, e.g., Bartow, *supra* note 6, at 854–56, 862–65; Hong Xue, *Privacy and Personal Data Protection in China: An Update for the Year End 2009*, 26 COMPUTER L. & SECURITY REV. 284, 284–85 (2010).

<sup>134</sup> See, e.g., Kathrin Hille & Tianqi Zhao, *Roof Caves in on China's Data Miners: Humphrey Arrest*, FIN. TIMES (Aug. 30, 2014), at 3.

<sup>135</sup> See, e.g., Ansfield, *supra* note 66; *Real-Name SIM Registration to Be Enforced in China Sept 1*, *supra* note 94.

establishment views without fear of retaliation.<sup>136</sup> It is equally important to allow anonymity in a democracy as anonymity—again, by diminishing the threat of retaliation—can persuade whistleblowers to come forward.<sup>137</sup>

According to Professor Redish, the U.S. Supreme Court has suggested that:

[A] prohibition on anonymity almost inevitably chills unpopular or controversial expression . . . . [A] choice against allowing anonymity—unlike the choice not to permit silence under certain circumstances—may well reduce the sum total of information and opinion contributed to public debate . . . . In cases where a speaker seeks anonymity, the speaker is necessarily seeking to communicate, albeit anonymously.<sup>138</sup>

The U.S. Supreme Court has recognized a tradition of anonymous pamphleteering<sup>139</sup> and it has “construed the First Amendment right of anonymity to apply beyond the directly expressive context.”<sup>140</sup>

A chill on speech is a central concern raised by opponents of real-name registration policies.<sup>141</sup> If a government effectively enforces such a policy, targeted monitoring may prevent users from expressing ideas beneficial to society.<sup>142</sup> This stifles not only online creativity, but also

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<sup>136</sup> ERIC SCHMIDT & JARED COHEN, *THE NEW DIGITAL AGE: RESHAPING THE FUTURE OF PEOPLE, NATIONS AND BUSINESS* 123 (2013) (“[O]verall, the anonymity of the Internet and the networked power of communication technologies will provide activists and would-be participants with a new layer of protective insulation that encourage them to continue on.”).

<sup>137</sup> See, e.g., Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1764–73 (2007) (describing the inadequacies of SOX whistleblowing); James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 929 (2011) (suggesting that “the significance of anonymity as a political practice, if indeed it has any, lies in its capacity to affect the behavior of those who participate in democratic politics.”); James Gobert & Maurice Punch, *Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998*, 63 MODERN L. REV. 25 (2000) (analyzing Britain’s Public Interest Disclosure Act 1998).

<sup>138</sup> REDISH, *supra* note 30, at 161.

<sup>139</sup> See *Talley v. California*, 362 U.S. 60, 64 (1960) (the Supreme Court invalidated a Los Angeles ordinance prohibiting distribution of leaflets); see also *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360 (1995) (overturning an Ohio law banning the distribution of anonymous election pamphlets and holding that an “author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment” and that “anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.”).

<sup>140</sup> REDISH, *supra* note 30, at 162.

<sup>141</sup> See, e.g., King-wa Fu et al., *supra* note 68, at 43; Leitner, *Identifying the Problem*, *supra* note 107, at 105.

<sup>142</sup> See, e.g., Caragliano, *supra* note 77; Hu, *Real Name Systems*, *supra* note 67, at 235–36.

political speech.<sup>143</sup> Researchers have observed that some recent prospective microbloggers have given up completing the website registration process.<sup>144</sup> Preliminary empirical research suggests that, in China, the number of politically sensitive microblog posts significantly declined after the government's enforcement of real-name registration.<sup>145</sup> Moreover, the Chinese government has used its censorship mechanisms in tandem with real-name registration to block speech by notable dissidents, such as Ai Weiwei.<sup>146</sup> Nonetheless, the long-term effect of the real-name registration policy remains unclear.

Acknowledging these types of considerations, the Constitutional Court of Korea ruled that the country's real-name registration rule was unconstitutional primarily because its benefits were not sufficient to justify its significant restrictions on citizens' right to free speech.<sup>147</sup> Such reasoning may provide valuable insights into the Chinese context.

As free speech is protected by the Chinese Constitution<sup>148</sup> and is essential to online activities, Chinese citizens have begun to recognize its value.<sup>149</sup> Although the Chinese government has been criticized for suppressing free speech, the Chinese courts have begun to consider various policy factors in relation to free speech cases.<sup>150</sup> Therefore, the free speech implications of China's real-name registration rules merit considerable attention.

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<sup>143</sup> See, e.g., Adrian Wan, *Video Websites Told Directors Must Use Real Names to Post Online Video*, SOUTH CHINA MORNING POST, Jan. 22, 2014, <http://www.scmp.com/news/china/article/1410695/video-websites-told-directors-must-use-real-names-post-online-video> (suggesting that the real-name registration rule in China may decrease the production of micro-movies); Lagerkvist, *New Media Entrepreneurs in China*, *supra* note 6, at 177 (describing the ICT industry's concern that China's censorship and Internet laws "impede creativity and innovation"); Leitner, *Identifying the Problem*, *supra* note 107, at 85 (the real name verification system "threatens to chill legitimate political and social activities in the online space, thus frustrating legitimate and socially generative uses of the internet (sic) . . .").

<sup>144</sup> Chao, *supra* note 1.

<sup>145</sup> King-wa Fu et al., *supra* note 68, at 46–48.

<sup>146</sup> See Alice Ming Wai Jim, *Love the Future: Ai Weiwei and Art for Human Rights*, in HUMAN RIGHTS AND THE ARTS: PERSPECTIVES ON GLOBAL ASIA 23, 32 (Susan J. Henders & Lily Cho eds., 2014).

<sup>147</sup> Scaife, *supra* note 90, at 133.

<sup>148</sup> XIANFA art. 35, (1982) (China) ("Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.").

<sup>149</sup> See, e.g., Jyh-An Lee, *Regulating Blogging and Microblogging in China*, *supra* note 11, at 616.

<sup>150</sup> See, e.g., Hal Blanchard, *Constitutional Revisionism in the PRC: "Seeking Truth from Facts,"* 17 FLA. J. INT'L L. 365, 396 (2005); Mara D. Byrne, *When in Rome: Aiding and Abetting in Wang Xiaoning v. Yahoo*, 34 BROOK. J. INT'L L. 151, 154–55 (2008); Mindy Kristin Longanecker, *No Room for Dissent: China's Laws Against Disturbing Social Order Undermine Its Commitments to Free Speech and Hamper the Rule of Law*, 18 PAC. RIM L. & POL'Y J. 373, 376–79 (2009); Bo Zhao, *Posthumous Reputation and Posthumous Privacy in China: The Dead, the Law, and the Social Transition*, 39 BROOK. J. INT'L L. 269, 271–72 (2014).

Balancing the above considerations, the effective elimination of online anonymity in China sacrifices constitutional free speech protections for exaggerated concerns.<sup>151</sup> Consequently, real-name registration rules can delay the public's emerging awareness of free speech in China. If a government firmly values the right to anonymity, any move to adopt these policies should proceed with the utmost caution.

*C. Impact on Users' Behavior*

If real-name registration rules restrict both political speech and creativity, can these rules restrain libel, rumor, and other hostile speech? The justification of real-name registration rules is relevant to whether authorities can effectively enforce the law to protect citizens from defamation, cyberbullying, and the like. In countries without similar nationwide policies (e.g., the United States), governments appear to be capable of detecting anonymous troublemakers in cyberspace.<sup>152</sup> This is why Internet law scholars have long argued that “[all] of the good that comes from monitoring could be achieved while protecting privacy.”<sup>153</sup> Clearly, real-name registration policies are not the only approach for holding Internet users accountable for their online actions. What it takes to achieve some type of monitoring, without resort to real-name registration, could be merely certain built-in mechanisms capable of ensuring traceability. Accordingly, the primary justification for real-name registration loses much of its persuasiveness because less intrusive means of tracing online users exist.<sup>154</sup>

According to empirical studies conducted in South Korea, real-name registration rules did not change user behavior. Online defamation was as common prior to the enforcement of those rules as it was after their abolishment and the rules did little to improve the online reputations of victims.<sup>155</sup> The Constitutional Court of Korea confirmed the fact that the government's real-name registration requirement also failed to decrease illegal online content.<sup>156</sup> The South Korean example and others like it may have important implications for China. If real-name registration rules neither significantly change user behavior associated with hostile speech nor

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<sup>151</sup> See generally Hartzog & Stutzman, *supra* note 18.

<sup>152</sup> See, e.g., Leitner, *To Post or Not to Post*, *supra* note 60, at 68; Pfanner, *supra* note 103.

<sup>153</sup> LESSIG, *supra* note 130, at 197.

<sup>154</sup> See *supra* notes 13–18 and accompanying text.

<sup>155</sup> Leitner, *To Post or Not to Post*, *supra* note 60, at 63; Leitner, *Identifying the Problem*, *supra* note 107, at 97–98, 101.

<sup>156</sup> Scaife, *supra* note 88, at 133.

meaningfully strengthen protections for private reputations, their justifications would obviously be inadequate. The same argument can be applied in China as well. Recent microblogging activities in China suggest that online activism has not decreased significantly since the Chinese government established its real-name registration rules in 2012.<sup>157</sup> Therefore, it is doubtful whether the rules can achieve the original policy goals by substantially shaping Internet users' behavior.

#### D. Enforcement

Enforcement is an important issue for the Chinese real-name registration policy because government monitoring of individual Internet users promises to be extremely costly and difficult.<sup>158</sup> In this section, we will analyze the difficulties and challenges faced by the Chinese government in enforcing an effective real-name registration scheme.

##### 1. Level of Enforcement

There are numerous reports that neither the Chinese government nor ISPs have strictly enforced real-name registration requirements. The Chinese media has reported that Chinese microblog users who have not verified their identities can still post messages online.<sup>159</sup> Indeed, Internet companies, including Sina, have admitted that they still let users post information on their websites without real-name registration.<sup>160</sup> This revelation implies that neither the government nor ISPs have strictly enforced the real-name registration policy. On the one hand, ineffective enforcement is likely inevitable because successful implementation of any identity verification mechanism on such a large scale, involving so many users, will necessarily take a long time.<sup>161</sup> However, another explanation is possible: to avoid a steep decrease in microblog traffic, the Chinese

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<sup>157</sup> Caragliano, *supra* note 90. See also Bartow, *supra* note 6, at 868 (stating that blogging and other social media activities are not dampened by real-name registration rules). But see Nir Kshetri, *Cybercrime and Cyber-Security Issues Associated with China: Some Economic and Institutional Considerations*, 13 ELECTRONIC COM. RES. 41, 58 (2013) (referring to Sina's belief that real-name registration "would negatively affect user activity and threaten its popular microblogging service").

<sup>158</sup> LAGERKVIST, *AFTER THE INTERNET*, *supra* note 69, at 56; Caragliano, *supra* note 77.

<sup>159</sup> Chao, *supra* note 1; see also Bartow, *supra* note 6, at 892 (noting that the real-name registration policy in China "has not been widely enforced").

<sup>160</sup> Kshetri, *supra* note 157, at 58.

<sup>161</sup> Chao, *supra* note 1.

government may be hesitant to immediately enforce its own real-name registration rules.<sup>162</sup>

The Chinese government must take into account the consequences of strictly enforcing its own policy. A government shutdown of non-compliant blogging platforms could trigger large-scale protests from Chinese Internet users and garner widespread, unwanted attention from the international community. Recently, the Chinese government has ultimately decided to abandon strict Internet regulations due to extensive public discontent.<sup>163</sup> For example, in 2009 the Chinese government attempted to stipulate that all computers made and sold in China be preinstalled with the content filtering software Green Dam Youth Escort.<sup>164</sup> This project was abandoned because of strong opposition from the local Internet community, the U.S. Chamber of Commerce, and the European-American Business Council.<sup>165</sup> Furthermore, some local governments' initiatives in implementing real-name registration rules also failed as a result of public objections.<sup>166</sup> Therefore, if a platform is shut down over noncompliance and triggers mass complaints from China's online community, the effective enforcement of the policy may ironically run counter to China's original policy goal: to build an ideal online environment characterized by public order and trust.

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<sup>162</sup> *Id.*; see also Ansfield, *supra* note 66 (citing the comment from Hu Yong, a new media specialist at Peking University, that if the real-name registration rules are fully enforced, "the development of the industry will be impeded").

<sup>163</sup> See, e.g., *supra* notes 70–73 and accompanying text (describing how the central and local Chinese governments failed to enforce real-name registration rules); Jyh-An Lee & Ching-Yi Liu, *Forbidden City Enclosed by the Great Firewall: The Law and Power of Internet Filtering in China*, 13 MINN. J.L. SCI. & TECH. 125, 127, 141 (2012) (stating that the Chinese government cancelled the Green Dam Escort initiative, which mandated filtering software preinstalled on every computer in China).

<sup>164</sup> See, e.g., WILLIAM HAGESTAD II, 21ST CENTURY CHINESE CYBERWARFARE 266 (2012); Rebecca MacKinnon, *Original Government Document Ordering "Green Dam" Software Installation*, RCONVERSATION (June 8, 2009, 8:29 AM), <http://rconversation.blogs.com/rconversation/2009/06/original-government-document-ordering-green-dam-software-installation.html>; Alexa Olesen, *China: Unpopular Filtering Software Optional: Internet-Filtering Software Will Still Come With All PCs Sold on the Mainland*, NBC NEWS, (June 16, 2009, 6:25 PM), [http://www.nbcnews.com/id/31385738/ns/technology\\_and\\_science-tech\\_and\\_gadgets/t/china-unpopular-filtering-software-optional/#.Vg84GnWhdZQ](http://www.nbcnews.com/id/31385738/ns/technology_and_science-tech_and_gadgets/t/china-unpopular-filtering-software-optional/#.Vg84GnWhdZQ); Zhang Jing & Xiyun Yang, *China Requires Censorship Software on New PCs*, N.Y. TIMES (June 8, 2009), [http://www.nytimes.com/2009/06/09/world/asia/09china.html?\\_r=0](http://www.nytimes.com/2009/06/09/world/asia/09china.html?_r=0).

<sup>165</sup> See, e.g., U.S.-China Econ. & Security Rev. Comm'n, 111th Cong., 2009 Rep. 282–83 (1st Sess. 2009), [http://origin.www.uscc.gov/sites/default/files/annual\\_reports/2009-Report-to-Congress.pdf](http://origin.www.uscc.gov/sites/default/files/annual_reports/2009-Report-to-Congress.pdf).

<sup>166</sup> See *supra* notes 76–77 and accompanying text.



## 2. *Internet Companies' Cooperation with China's Real-Name Registration Policy*

Online service providers are important intermediaries in the efforts by the Chinese government to enforce its own Internet regulations.<sup>167</sup> In order to extract profit from the world's largest and fastest-growing Internet economy,<sup>168</sup> most Internet companies in China have considerable incentive to cooperate with the government in enforcing its regulations.<sup>169</sup> This scenario reflects how the party-state controls the online world via the NAM. As numerous Internet companies are highly profitable in China,<sup>170</sup> the NAM seems quite suitable for regulating the Internet in China. However, this regulatory approach has not been working as planned since providers began to hesitate to comply.<sup>171</sup> The section below will discuss the main obstacles to Internet companies' cooperation with the government in implementing the real-name registration rules, which include the high costs of cooperation, services provided by foreign websites, and the lack of an effective verification mechanism.

### *i. High Cost of Cooperation*

From the service provider's perspective, the costs of implementing the real-name registration policy are enormous. These costs stem not only from the heavy burden of "identification verification," but also from the huge information security costs associated with protecting personal information from theft.<sup>172</sup> It is unsurprising that Sina has resisted the real-name registration rules from the very beginning.<sup>173</sup> The company reported in its 2012 regulatory filing that it had yet to implement the scheme because of "existing user behavior, the nature of the microblogging product, and the lack of clarity on specific implementation procedures."<sup>174</sup> Other microblog

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<sup>167</sup> See, e.g., Jyh-An Lee & Ching-Yi Liu, *supra* note 162, at 149–50.

<sup>168</sup> See, e.g., ANUPAM CHANDER, *THE ELECTRONIC SILK ROAD: HOW THE WEB BINDS THE WORLD TOGETHER IN COMMERCE* 194 (2013).

<sup>169</sup> Jyh-An Lee et al., *supra* note 7, at 427–28. See also CHANDER, *supra* note 168, at 50–52 (describing how Yahoo complied with the Chinese government's request for information), 197 (illustrating how foreign Internet companies might "yield to political and economic pressure from the government").

<sup>170</sup> See, e.g., CHANDER, *supra* note 168, at 195.

<sup>171</sup> See *infra* notes 173–177 and accompanying text.

<sup>172</sup> See Caragliano, *supra* note 77; see also *supra* notes 115–17, 126–29 and accompanying text (describing the privacy concerns raised by real-name registration rules).

<sup>173</sup> See Caragliano, *supra* note 77.

<sup>174</sup> Covington & Burling LLP, *supra* note 75, at 2; see also Kshetri, *supra* note 157, at 58 (noting that "well after the March 16, 2012 deadline, Sina Weibo continued to allow users, who had not registered their real names to post and use its services."); Lagerkvist, *Principal-Agent Dilemma*, *supra* note 5, at 2640

operators are facing similar difficulties.<sup>175</sup> Likewise, primary mobile operators, including China Telecom, China Unicom, and China Mobile, have all expressed difficulty in implementing the registration policy because of their large user bases.<sup>176</sup> Commentators indicate that the real-name registration policy has been unsuccessful mainly because ISPs have been reluctant to invest in the implementation of the registration.<sup>177</sup>

China's past failure with enforcing real-name registration of cyber café customers helps to explain why the high costs borne by private companies would eventually hinder cooperation with the government.<sup>178</sup> Private companies that require real-name registration may be disincentivized to cooperate with the policy if they find that the requirement costs them significant numbers of customers.<sup>179</sup> Without the assistance of ISPs or other Internet companies, successful implementation of the real-name registration policy may be impossible. Concerning the insurmountable costs faced by Internet companies, avoiding misaligned incentives has become one of the Chinese government's main challenges in executing its current registration rules.

*ii. Circumventing Foreign Websites*

It is always challenging for national governments to regulate content or online activities hosted by foreign websites because the digital environment is borderless.<sup>180</sup> The limited regulatory reach of nation states creates impediments for the implementation of real-name registration rules as well. South Korea is one of the few countries that adopted a real-name registration policy before China, but it abandoned its efforts partly over the difficulty of enforcement.<sup>181</sup> To make matters worse for the South Korean

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(reporting that Sina's system is "full of loopholes offering abundant possibilities to disregard or compromise using false identities").

<sup>175</sup> McDonald, *supra* note 88 ("Microblog operators, two of which say they have more than 300 million users each, were ordered last year to confirm the identities of users but acknowledge they have yet to complete that task.").

<sup>176</sup> Zeng, *supra* note 93.

<sup>177</sup> See, e.g., Hu, *Real Name Systems*, *supra* note 67, at 230 ("It is too costly for [blog-service providers] to carry out [the real-name registration] plan.").

<sup>178</sup> *Id.* at 213.

<sup>179</sup> *Id.* at 213, 230. See also Lagerkvist, *Principal-Agent Dilemma*, *supra* note 5, at 2638 (reporting the warning made by Sina's CEO that real-name registration may have a negative effect on the company's profitability).

<sup>180</sup> See, e.g., Cherie Dawson, *Creating Borders on the Internet: Free Speech, the United States, and International Jurisdiction*, 44 VA. J. INT'L L. 637, 638 (2004); Bernhard Maier, *How Has the Law Attempted to Tackle the Borderless Nature of the Internet?*, 18 INT'L J.L. & INFO. TECH. 142, 144, 147-48 (2010).

<sup>181</sup> Pfanner, *supra* note 103.

venture, some international companies, such as YouTube, have decided to refrain from full compliance with the policy and, in fact, redirected local users to their international websites to circumvent the national registration rules.<sup>182</sup>

Conversely, although some commentators argue that the Chinese real-name registration policy may lead Internet users to foreign providers,<sup>183</sup> the circumvention issue is not a major problem for China because the country has successfully built the world's most sophisticated Internet filtering system, the so-called Great Firewall, to block foreign websites.<sup>184</sup> In the long run, Internet companies serving Chinese users cannot dodge the Great Firewall and redirect users to foreign websites.<sup>185</sup> In other words, the Internet filtering techniques constitute a shield with which the Chinese government can ensure the effective enforcement of the real-name registration policy. A quick observation of the Chinese market for social media will lend further credence to the viewpoint that the South Korean circumvention problem is highly unlikely to occur in China. As the Chinese government blocks or filters most popular social media websites (including Facebook, YouTube, and Twitter),<sup>186</sup> Chinese Internet users generally rely on the services of domestic Internet companies.<sup>187</sup> Most of these domestic companies operate only in the Chinese market and are accustomed to collaborating with the authoritarian government in order to turn a profit.<sup>188</sup> Domestic Internet companies, such as Tencent, have declared that they will support the real-

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<sup>182</sup> See, e.g., Leitner, *Identifying the Problem*, *supra* note 107, at 99; Pfanner, *supra* note 103; Matthew J. Wilson, *E-Elections: Law in Asia & Online Political Activities*, 12 WYO. L. REV. 237, 240 (2012).

<sup>183</sup> See, e.g., Hu, *Real Name Systems*, *supra* note 67, at 229–30; Hai Tang, *supra* note 4, at 4 (citing Fang Xingdong's statement).

<sup>184</sup> See, e.g., LAURA DENARDIS, *THE GLOBAL WAR FOR INTERNET GOVERNANCE* 212–13 (2014); Bartow, *supra* note 6, at 891; Jyh-An Lee & Ching-Yi Liu, *supra* note 163, at 129–35; Jonathan Watts, *Behind the Great Firewall*, THE GUARDIAN (Feb. 9, 2008), <http://www.theguardian.com/technology/2008/feb/09/internet.china>.

<sup>185</sup> See, e.g., Jyh-An Lee & Ching-Yi Liu, *supra* note 163, at 145.

<sup>186</sup> See, e.g., CHANDER, *supra* note 168, at 129, 195–96; Ansfield, *supra* note 66; Bartow, *supra* note 6, at 891; Tania Branigan, *China Blocks Twitter, Flickr and Hotmail Ahead of Tiananmen Anniversary*, THE GUARDIAN (June 2, 2009), <http://www.theguardian.com/technology/2009/jun/02/twitter-china>; Chris Buckley, *Analysis: China Seeks to Tether the Microblog Tiger*, REUTERS (Sept. 16, 2011), <http://www.reuters.com/article/2011/09/16/us-china-internet-idUSTRE78F04D20110916>; Lagerkvist, *New Media Entrepreneurs in China*, *supra* note 6, at 172; Scaife, *supra* note 90, at 132.

<sup>187</sup> See, e.g., Bartow, *supra* note 6, at 891–92. See also Caragliano, *supra* note 77 (“The state’s decision to deny market access to foreign social media brought about the proliferation of a multitude of domestic Chinese platforms . . . .”); Watts, *supra* note 185 (stating that in every sector of the Internet industry in China, domestic players are on top).

<sup>188</sup> See Jyh-An Lee et al., *supra* note 7, at 427.

name registration policy and have urged their users to respect the law.<sup>189</sup> As political correctness is the key to operating a successful Internet business in China, domestic Internet companies can ill afford to offend the party-state by redirecting users to websites abroad. Although redirecting users to foreign websites may not be a serious problem for implementing the policy in China, other factors, such as the high costs of cooperation and the absence of an effective verification mechanism, may still prevent Internet companies from implementing such a policy.

### 3. *Effective Verification*

From a practical perspective, implementing this policy takes considerable resources. Policymakers and government authorities need to design a mechanism for verification of real-name registrations.<sup>190</sup> Otherwise, the rules will, in digital environments, prove to be hollow pronouncements backed by idle threats. South Korea's experience exemplifies how a verification mechanism works: the government required that private portals direct their users to a public website, where they would certify their identity by entering their national identification numbers into the website.<sup>191</sup> By contrast, the Chinese government has neither established a concrete implementation plan nor designated an organization to play the role of enforcer.<sup>192</sup> Furthermore, China does not have reliable technology capable of effectively executing online identity verification. In fact, a few years ago, China attempted to develop a system allowing local police to register and authenticate the real names of Internet café customers.<sup>193</sup> However, this system proved to be ineffective because the overall surveillance program failed to gain the necessary cooperation of cyber cafés.<sup>194</sup> Though the Chinese government is noted for its stringent, technologically adept regulation of online activities,<sup>195</sup> it has not yet developed technology capable of carrying out the real-name registration policy.

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<sup>189</sup> See Cao Yin, *Beijing Police Target Rising Internet Crime*, *supra* note 110; Cao Yin, *China Tightens Control on Instant Messaging Services*, *supra* note 91.

<sup>190</sup> See, e.g., Hu, *Real Name Systems*, *supra* note 67, at 233 (“[T]he core process of [Real Name System] is authentication, that is, to make sure whether the virtual character online is correspondent to the very identical person.”).

<sup>191</sup> See Leitner, *Identifying the Problem*, *supra* note 107, at 84–85.

<sup>192</sup> See Schinasi, *supra* note 122, at 605.

<sup>193</sup> Hu, *Real Name Systems*, *supra* note 67, at 212–13.

<sup>194</sup> *Id.* at 213. See, e.g., Hearn, *supra* note 73, at 891.

<sup>195</sup> See, e.g., Jyh-An Lee & Ching-Yi Liu, *supra* note 164, at 129–40; Jyh-An Lee et al., *supra* note 7, at 419–24.

In the case of China, online marketplaces have responded to the rules in a way unintended by the Chinese government. Savvy Internet users are perhaps easily circumventing current registration mechanisms in China and elsewhere.<sup>196</sup> Enterprising underground businesses have been selling fake verification information to purchasers who wish to remain anonymous while logging into microblog accounts.<sup>197</sup> If a microblogger is willing to shell out extra money to an illegal underground business, the blogger can inconspicuously register with a microblog website. In China, some Internet users have used so-called “ID Card Generator” software to generate ID card numbers for Internet users who do not want to disclose their identities.<sup>198</sup> In light of this reality, enforcement of the registration policy is far from satisfactory. If the market for fake identity increases to a critical mass and the government truly commits itself to successfully enforcing the real-name registration policy, authorities must either devote more and better resources to enforcement of the policy or enact a new policy altogether. Otherwise, it is very likely that the current, ineffectually enforced policy will remain only a nominal threat to most Chinese Internet users.

## V. THE FUTURE OF DIGITAL ANONYMITY AND THE INTERNET

With recent advancements in digital technologies and the law, legal scholars have recognized that the right to anonymity should not be absolute.<sup>199</sup> The network itself is traceable, user identity cannot be hidden perfectly,<sup>200</sup> and real-name registration policies are not the only strategy for controlling online activities. The Constitutional Court of Korea has rightly pointed out that less restrictive policies for controlling online activity are available.<sup>201</sup> Therefore, the argument that real-name registration policies are uniquely suited to the task of policing the Internet is quite doubtful. One scholar argued that a user’s “identity [can] be requested where needed and appropriate . . . .”<sup>202</sup> Under this approach, the main issue would be whether requiring an Internet user’s identity information is necessary and appropriate. Given the aforementioned concerns, real-name registration may not be an

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<sup>196</sup> See e.g., Hearn, *supra* note 73, at 892; Hu, *Real Name Systems*, *supra* note 67, at 227; Leitner, *Identifying the Problem*, *supra* note 107, at 101.

<sup>197</sup> *The Power of Microblogs*, *supra* note 77.

<sup>198</sup> Hu, *Real Name Systems*, *supra* note 67, at 214, 227.

<sup>199</sup> See Susan W. Brenner, *The Privacy Privilege: Law Enforcement, Technology, and the Constitution*, 7 J. TECH. L. & POL’Y 123, 163 (2002); Choi, *supra* note 13, at 537–38, 541; Ekstrand, *supra* note 40, at 407.

<sup>200</sup> See *supra* notes 15–17 and accompanying text.

<sup>201</sup> Scaife, *supra* note 90, at 133.

<sup>202</sup> BERNAL, *supra* note 14, at 237.

ideal approach in the digital sphere; even scholars advocating for a reduction in online anonymity find that such extensive real-name registration rules are an unacceptable approach to Internet regulation.<sup>203</sup>

Professor Lawrence Lessig, arguably one of the most important commentators on Internet law, once proposed that “we should certainly architect cyberspace to ensure anonymity.”<sup>204</sup> Nonetheless, China’s real-name registration policy is pushing the Internet in a direction opposed by Lessig: the elimination of online anonymity.<sup>205</sup> This endeavor may profoundly reshape the architecture and norms of the Internet in China and around the world.<sup>206</sup> After all, China has become a major worldwide cyber power<sup>207</sup> and there is no justifiable reason to conclude that the country’s real-name registration policy is incapable of influencing the global Internet.

Although China has failed to implement its registration rules in the short term, these rules may have important policy implications for global Internet governance. The Chinese government’s NAM has leveraged private commercial power and corporate resources to regulate the Internet<sup>208</sup> and, in doing so, regulated the Internet in a more effective and economical way.<sup>209</sup> It is possible that the Chinese government may collaborate with key players in the Internet industry to further advance the real-name registration policy. Some Internet companies may realize that adhering to the policy will eventually work toward their own corporate benefit.

Though laws in some countries, such as Germany, protect anonymous or pseudonymous use of Internet services,<sup>210</sup> a number of major social media companies, such as Google, Facebook, and LinkedIn, have expressed interest in urging users to register with real names.<sup>211</sup> Google has announced

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<sup>203</sup> See Brenner, *supra* note 199, at 147–48; Choi, *supra* note 13, at 537–38.

<sup>204</sup> LESSIG, *supra* note 130, at 197.

<sup>205</sup> See *supra* notes 90–91 and accompanying text.

<sup>206</sup> Hu, *Real Name Systems*, *supra* note 67, at 234.

<sup>207</sup> See, e.g., Jyh-An Lee, *The Red Storm in Uncharted Waters: China and International Cyber Security*, 82 UMKC L. REV. 951, 963–65 (2014).

<sup>208</sup> See, e.g., Jyh-An Lee et al., *supra* note 7, at 426–28. See also Lagerkvist, *New Media Entrepreneurs in China*, *supra* note 6, at 172 (describing the increasing public-private cooperation in regulating online content in China).

<sup>209</sup> See, e.g., Jyh-An Lee et al., *supra* note 7, at 426–27.

<sup>210</sup> See, e.g., Juhi Tariq, *The NSA’s Prism Program and the New EU Privacy Regulation: Why U.S. Companies with a Presence in the EU Could Be in Trouble*, 3 AM. U. BUS. L. REV. 371, 380 (2014); Anne-Marie Zell, *Data Protection in the Federal Republic of Germany and the European Union: An Unequal Playing Field*, 15 GERMAN L.J. 461, 480–82 (2014) (introducing German courts’ decisions regarding whether Facebook’s real-name policy violates German Telemedia law).

<sup>211</sup> See, e.g., REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM 150–51 (2012); Marvin Ammori, *The “New” New York Times: Free Speech*

that it retains the right to disable accounts whose users are not using their real names<sup>212</sup> whereas Facebook has already deactivated some accounts registered under pseudonyms or fake names.<sup>213</sup> While Google recently lifted its real-name requirement for Google+ users,<sup>214</sup> Facebook's explanation for its real-name policy is that this policy can prevent users from "act[ing] abusively towards other members of [the] community . . . ."<sup>215</sup> Those major Internet companies' recent preference for real-name registration<sup>216</sup> only strengthens the argument that real-name registration has the potential to become the norm in the global Internet environment.

Google and Facebook have also been developing effective real-name verification technologies,<sup>217</sup> which the Chinese government lacks. Google and Facebook are, of course, key Internet platforms. Thus, both their enthusiastic development of real-name registration architecture<sup>218</sup> and their extraordinary influence on Internet governance<sup>219</sup> will perhaps shape the global Internet environment in ways that favor China's implementation of an effective real-name registration policy. The more incentives there are for

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*Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2271 (2014); Choi, *supra* note 13, at 534; Steve Coughlan & Robert J. Currie, *Social Media: The Law Simply Stated*, 11 CAN. J.L. & TECH. 229, 231 (2013); King-wa Fu et al., *supra* note 68, at 48; Kaminski, *supra* note 52, at 824; Pfanner, *supra* note 103. See also Waldman, *supra* note 36, at 400–401 (explaining "the exploding popularity of real-name social networking sites"). But see Danah Boyd, *The Politics of "Real Names": Power, Context, and Control in Networked Publics*, 55 COMM. ACM 29, 29 (2012) (stating that users use pseudonyms in MySpace); Mathew Ingram, *Why Twitter Doesn't Care What Your Real Name Is*, GIGAOM (Sept. 16, 2011), <https://gigaom.com/2011/09/16/why-twitter-doesnt-care-what-your-real-name-is/> (explaining why Twitter does not require real-name registration).

<sup>212</sup> See, e.g., BERNAL, *supra* note 14, at 242–43.

<sup>213</sup> See, e.g., Kevin Park, *Facebook Used Takedown and It was Super Effective! Finding a Framework for Protecting User Rights of Expression on Social Networking Sites*, 68 N.Y.U. ANN. SURV. AM. L. 891, 911 (2013); Neil M. Richards, *The Perils of Social Reading*, 101 GEO. L.J. 689, 699–700 (2013). But see Boyd, *supra* note 211, at 29 (stating that Facebook does not strictly enforce real-name policy in late-teen communities).

<sup>214</sup> Nonetheless, it should be noted that Google+ has drawn back from its real-name registration policy probably because of the attempt to gain more market share. See, e.g., James Johnson, *Google's Real Name Registration Policy Halted By Criticism*, INQUISITR (Mar. 5, 2013), <http://www.inquisitr.com/557566/google-real-name-registration-policy-halted-by-criticism/>; Greg Kumparak, *3 Years Later, Google+ Drops Its Dumb Real Name Rule And Apologizes*, TECHCRUNCH (July 15, 2014), <http://techcrunch.com/2014/07/15/3-years-later-google-drops-its-dumb-real-name-rule-and-apologizes/>.

<sup>215</sup> Jacob Davidson, *Facebook's Zuckerberg Defends Controversial 'Real Name' Policy*, TIME (July 1, 2015), <http://time.com/money/3942997/facebook-real-name-policy/>.

<sup>216</sup> See *supra* note 211 and accompanying text; see also BERNAL, *supra* note 14, at 244 (suggesting that Facebook has the potential to make real-name registration "an internet-wide norm").

<sup>217</sup> See, e.g., Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 UCLA L. REV. 606, 669 (2014).

<sup>218</sup> See, e.g., Boyd, *supra* note 211, at 30.

<sup>219</sup> See, e.g., DENARDIS, *supra* note 184, at 23.

Internet companies to adopt real-name registration, the more likely China will be able to put such a policy into action.

If such endeavors are justified under public policy rationales, such as building a more civil Internet<sup>220</sup> or combating terrorism,<sup>221</sup> then China may be set to shape a very different Internet architecture. Moreover, the Chinese approach to eliminating digital anonymity by implementing effective real-name registration rules may have a strong “spill over” effect on global Internet governance and regulations.<sup>222</sup> China is not alone in promoting such policies. Other countries, including Iran, Kazakhstan, Syria, and Saudi Arabia, have enacted laws eliminating user anonymity in the online world.<sup>223</sup> Some individuals and enterprises also believe that the Internet would be more civil if Internet users were identifiable online by their real names.<sup>224</sup> For example, Hans-Peter Friedrich, Interior Minister of Germany, is of the opinion that the identities of bloggers should be transparent so that the bloggers can be held accountable for their posts.<sup>225</sup> Politicians in the United Kingdom and Ireland have made similar proposals.<sup>226</sup> From a comparative perspective, a real-name registration requirement may also be designed as a safe harbor for ISPs to avoid potential liability, rather than a strict legal obligation with Chinese characteristics.<sup>227</sup>

It is true that limiting anonymity might be an effective strategy to combat abusive online behavior. But should Internet gatekeepers be legally obliged to require real names? Although some commentators argue that the benefits of anonymity are often outweighed by its costs to civility,<sup>228</sup> one can just as reasonably argue that:

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<sup>220</sup> See Pfanner, *supra* note 101.

<sup>221</sup> China has claimed that one aim of the real-name registration policy is to “to combat terrorism.” See *supra* note 111 and accompanying text.

<sup>222</sup> Cf. Jyh-An Lee et al., *supra* note 7, at 431–32 (arguing that the Chinese approach to Internet governance may have a “spillover” effect on the global Internet).

<sup>223</sup> See, e.g., SCHELL, *supra* note 76, at 116; Sanja Kelly & Sarah Cook, *Evolving Tactics of Internet Control and the Push for Greater Freedom*, FREEDOM ON THE NET 2012, at 11 (2012), <http://www.freedomhouse.org/sites/default/files/resources/FOTN%202012%20Overview%20Essay.pdf>.

<sup>224</sup> See, e.g., Pfanner, *supra* note 103.

<sup>225</sup> *Id.*

<sup>226</sup> BERNAL, *supra* note 14, at 245.

<sup>227</sup> See, e.g., Eric Goldman, *UK's New Defamation Law May Accelerate The Death Of Anonymous User-Generated Content Internationally*, FORBES (May 9, 2013), <http://www.forbes.com/sites/ericgoldman/2013/05/09/uks-new-defamation-law-may-accelerate-the-death-of-anonymous-user-generated-content-internationally/>.

<sup>228</sup> See, e.g., Christopher Wolf, Letter to the Editor, *Sunday Dialogue: Anonymity and Incivility on the Internet*, N. Y. TIMES, Nov. 27, 2011, at SR2.



[W]ithout anonymity, domestic violence and sexual assault victims might not join online survivors' groups for fear that their abusers might discover them. LGBT teenagers might not seek advice from online support groups about coping with bullying if they had to worry about their peers learning of their sexual orientation . . . . With inflexible real-name policies, society may lose a lot and gain too little.<sup>229</sup>

The ongoing development of various real-name registration policies suggests that a strong “spill over” effect on our online lives is unavoidable. One should not overlook the conventional constitutional wisdom that anonymous speech, including the use of pseudonyms, is a powerful tool of political debate.<sup>230</sup> As such, this constitutional tradition merits an extension to encompass the Internet, the most powerful communication tool for the marketplace of information and ideas to date invented by human beings. Although commentators appear to agree that online anonymity is not absolute, we argue here that real-name registration policies should never serve as the main approach to controlling the Internet. Even American scholars promoting the application of civil-rights law to online harassment cases have argued that “real name policies are not guaranteed to deter bad actors. Determined harassers may be able to figure out a way to disguise their identity. Private platforms should retain online anonymity as the default rule.”<sup>231</sup>

## VI. CONCLUSION

Online anonymity poses new challenges for regulators and raises new complex legal dilemmas that elude quick and easy solutions under existing law. China's real-name registration policy represents a significant response to this challenge and also exemplifies—with strong Chinese characteristics—the NAM. This policy has raised serious concerns associated with privacy and free speech. Moreover, the Chinese government has encountered intractable enforcement problems arising from a pronounced misalignment of incentives for ISPs and a lack of reliable technology for real-name verification. Nonetheless, it is still too early to

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<sup>229</sup> CITRON, *supra* note 26, at 28.

<sup>230</sup> See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358–59, 363–67 (1995) (Thomas, J., concurring); George F. du Pont, *The Criminalization of True Anonymity in Cyberspace*, 7 MICH. TELECOMM. TECH. L. REV. 191 (2001); Miguel E. Larios, *ePublius: Anonymous Speech Rights Online*, 37 RUTGERS L. REC. 36 (2010).

<sup>231</sup> CITRON, *supra* note 26, at 28.

assert that the policy is doomed to fail. In fact, support for this type of policy has progressively expanded to other countries and the global Internet industry. Regardless of how the laws, norms, and Internet architecture of anonymity evolve and interact with each other in the global digital sphere, the international movement for real-name registration and the role of China therein will profoundly affect the future of the Internet.

The findings and insights in this article strongly suggest that societies should establish a more balanced regulatory architecture including various real-name registration policies enforced both by governments and by Internet companies. Legal solutions to the problems of online incivility and illegality should take shape sooner rather than later and should protect online victims without threatening free-speech rights and privacy rights enjoyed by Internet users. Ideally, the new legal solutions would not expand the existing categories of unprotected speech by turning protected speech into unprotected speech. At the same time, the question as to how Internet intermediaries, such as ISPs, will play their role in the changing digital landscape needs to be answered very carefully so as not to encroach upon the fundamental privacy rights of Internet users. Any redesign of regulatory architecture that functions solely to meet the requirements of real-name registration policies can significantly reshape online norms in ways that strengthen authoritarian governance of the Internet. Therefore, while the public and private sectors work together implementing real-name registration policies, we must be wary of a more authoritarian governance of the Internet becoming the default of our online lives. This governance can easily lack transparency and accountability and condemn certain kinds of positive online behaviors. Our approach should work to balance these considerations.