

# Inconceivable: Impossible Consent and Your Internet Service Provider

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## INTRODUCTION

When you pick up the paper (or, more likely, pick out a blog post), it tells you that the COVID-19 pandemic changed every aspect of how we relate to one another. This misses the point. The pandemic has not changed everything—but it has aggravated and stressed resource gaps in the United States. One example is the desperate need for improved Internet access and increased infrastructure. For years, activists and politicians have urged us to recognize internet access as a public utility.<sup>1</sup> These calls are particularly poignant as our activities are forced online. We go to work, school, the bank, the tax preparer, and the courtroom—all from a networked device.

This Note questions the precarious position of our right to privacy in the present world where one cannot realistically opt-out of Internet service without losing access to fundamental services necessary for day-to-day life. Section I gives background information on the function of Internet service providers (ISPs) and the “digital divide” faced by a considerable portion of Americans. Section II critiques the consent component of an ISP’s privacy policy and argues that such policies are, on their face, non-consentable. Section III proposes a new division of the Federal Trade Commission (FTC) which evaluates these policies before they are enacted. Finally, Section IV details how this proposal connects with the ethical obligations of the legal field. These updates are critical not just to consumer rights, but to the ethical obligations (legal and otherwise) of the drafters, evaluators, and enforcers of the contracts themselves. To be perfectly clear: this is intended to be a band-aid solution—wider and more systemic change will be needed.

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1. This Note takes the position that the Internet is a public utility as true. This is discussed later in Section I. Background. For further discussion, *see generally* Susan Crawford, *Why Broadband Should Be a Utility*, BROADBAND COMMUNITIES MAG., Mar./Apr. 2019, at 50. *See also* S. DEREK TURNER, DIGITAL DENIED: THE IMPACT OF SYSTEMIC RACIAL DISCRIMINATION ON HOME-INTERNET ADOPTION, FREEPRESS (2016), [https://www.freepress.net/sites/default/files/legacy-policy/digital\\_denied\\_free\\_press\\_report\\_december\\_2016.pdf](https://www.freepress.net/sites/default/files/legacy-policy/digital_denied_free_press_report_december_2016.pdf) [<https://perma.cc/BEV3-FV7S>]; Elizabeth Warren, *My Plan to Invest in Rural America*, MEDIUM.COM (Aug. 7, 2019), <https://medium.com/@teamwarren/my-plan-to-invest-in-rural-america-94e3a80d88aa> [<https://perma.cc/9XF5-PVRF>]; Bernie Sanders, *High-Speed Internet for All*, BERNIESANDERS.COM, <https://berniesanders.com/issues/high-speed-internet-all/> [<https://perma.cc/693M-AR52>] (last accessed March 6, 2022).

## I. BACKGROUND

The Internet as we know it was (and is) made possible through government funding, as “everyone in the tech world knows.”<sup>2</sup> A team out of the Advanced Research Projects Agency (now known as DARPA) developed ARPANet in the 1960s, which is now known as the earliest predecessor of the modern Internet.<sup>3</sup> Similarly, the TCP/IP protocol, “the Internet’s defining language” that allows two computers to send messages to each other, was developed by two government-employed and funded researchers, Vint Cerf and Robert Kahn.<sup>4</sup> Commercial players did not arrive on the scene until the late 1980s and early 1990s.<sup>5</sup> Today, taxpayer funds are used to support and expand broadband infrastructure.<sup>6</sup>

ISPs control access to the Internet. There are a few players in the field, including Xfinity (a Comcast subsidiary), Comcast itself, AT&T, HughesNet, Spectrum, and Viasat. Yet for a swath of Americans, the choice of an ISP is illusory; that is to say, there is only one game in town.<sup>7</sup> ISPs function as monopolies<sup>8</sup> and often there is only one choice available to the consumer.<sup>9</sup> In 2020, Comcast and Charter maintained “an absolute monopoly over at least 47 million” Americans and another 33 million Americans had access to only slow and unreliable DSL as the supposed competitive option.<sup>10</sup> This gap is more likely to hurt poor communities, rural

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2. Farhad Manjoo, *Obama Was Right: The Government Invented the Internet*, SLATE (Jul. 24, 2012), <https://slate.com/technology/2012/07/who-invented-the-internet-the-outrageous-conservative-claim-that-every-tech-innovation-came-from-private-enterprise.html> [<https://perma.cc/87FW-MFMV>]. For a general history of the Internet through the late 1990s, see Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts, & Stephen Wolff, *Brief History of the Internet*, INTERNET SOC’Y, 1997.

3. Farhad Manjoo, *Obama Was Right: The Government Invented the Internet*, SLATE (Jul. 24, 2012), <https://slate.com/technology/2012/07/who-invented-the-internet-the-outrageous-conservative-claim-that-every-tech-innovation-came-from-private-enterprise.html> [<https://perma.cc/87FW-MFMV>]; ARPANet, DARPA, [https://www.darpa.mil/attachments/ARPANET\\_final.pdf](https://www.darpa.mil/attachments/ARPANET_final.pdf) [<https://perma.cc/ZFB8-U56W>] (last accessed March 6, 2022).

4. Manjoo, *supra* note 2.

5. ARPANet, DARPA, [https://www.darpa.mil/attachments/ARPANET\\_final.pdf](https://www.darpa.mil/attachments/ARPANET_final.pdf) [<https://perma.cc/ZFB8-U56W>] (last accessed March 6, 2022).

6. See How States Support Broadband Projects, THE PEW CHARITABLE TRUSTS (Aug. 2019), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/07/how-states-support-broadband-projects> [<https://perma.cc/ZFB8-U56W>].

7. See Emily Stewart, *America’s Monopoly Problem, as Explained by Your Internet Bill*, VOX (Feb. 18, 2020), <https://www.vox.com/the-goods/2020/2/18/21126347/antitrust-monopolies-internet-telecommunications-cheerleading> [<https://perma.cc/VRX5-T5GD>].

8. *Id.* See also Bernie Sanders, *High-Speed Internet for All*, BERNIESANDERS.COM, <https://berniesanders.com/issues/high-speed-internet-all/> [<https://perma.cc/693M-AR52>] (last accessed March 6, 2022).

9. Even in cities with more than one option, the “alternative” is not competitive in reality because of throttling and price gouging. See Susan Crawford, *Bad Internet in the Big City*, WIRED (Feb. 28, 2018), <https://www.wired.com/story/new-york-city-verizon-internet/> [<https://perma.cc/73Y7-WQTV>].

10. H. TROSTLE & CHRISTOPHER MITCHELL, PROFILES OF MONOPOLY: BIG CABLE AND TELECOM, INSTITUTE FOR LOCAL SELF-RELIANCE (2020), [https://ilsr.org/wp-content/uploads/2020/08/2020\\_08\\_Profiles-of-Monopoly.pdf](https://ilsr.org/wp-content/uploads/2020/08/2020_08_Profiles-of-Monopoly.pdf) [<https://perma.cc/AC9X-T9XV>].

communities, and communities of color.<sup>11</sup> Even on the international stage, Americans pay more money for slower internet speeds.<sup>12</sup>

With such a hold on a drastically underregulated market,<sup>13</sup> the ISP serves as a gatekeeper to modern society. To access utility service, a consumer must purchase a plan and agree to the terms set out by the ISP in its boilerplate contract. Baked into these terms is a privacy policy. These policies allow the ISP to track, gather, and utilize the consumer's data for its own use or the use of third parties (both private actors and governments).<sup>14</sup> Negotiation is not welcome, nor even possible.<sup>15</sup> The contract operates on a take-it-or-leave-it basis—the consumer must agree to the full terms or be denied service.

Inequalities of Internet access are brought into sharp relief by the COVID-19 pandemic. News outlets endlessly rehearse stories of people trekking to schools and nearby fast-food parking lots to access Internet connections that operate at speeds which (at best) barely match what is available in most of the developed world.<sup>16</sup> The goals of the journey are simple yet critical: do homework, teach a class, attend a meeting, or check their email.<sup>17</sup>

These incidents rise above little inconveniences. A person needs email and internet to apply for and secure a job—and possibly to keep that job. Telehealth options, particularly for mental health treatment, exploded in popularity over the

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11. See Karl Bode, *How Bad Maps Are Ruining America's Broadband*, THE VERGE (Sept. 24, 2018), <https://www.theverge.com/2018/9/24/17882842/us-internet-broadband-map-isp-fcc-wireless-competition> [<https://perma.cc/8XM8-H6YT>]; Susan Crawford, *Bad Internet in the Big City*, WIRED (Feb. 28, 2018), <https://www.wired.com/story/new-york-city-verizon-internet/> [<https://perma.cc/73Y7-WQTV>]; 2018 BROADBAND DEPLOYMENT REPORT, FED. COMM'N COMM'N (Feb. 2, 2018), <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report> [<https://perma.cc/KLX2-R6HV>].

12. See Allan Holmes & Chris Zubak-Skees, *These Maps Show Why Internet Is Way More Expensive in the US than Europe*, VERGE (Apr. 1, 2015), <https://www.theverge.com/2015/4/1/8321437/maps-show-why-internet-is-more-expensive-us-europe-competition> [<https://perma.cc/UP3L-GDPT>].

13. See Shira Feder, *US is Making Its Biggest Investment in Broadband Internet Ever*, POPULAR SCI. (Nov. 12, 2021), <https://www.popsci.com/technology/infrastructure-bill-broadband-access-us/> [<https://perma.cc/KYX2-888G>].

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

15. See Margaret Jane Radin, *An Analytical Framework for Legal Evaluation of Boilerplate* in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 8 (G. Lestas, P. Saprai, & G. Klass, eds.) (2014).

16. See, e.g., Madeline Will, *Teachers Without Internet Work in Parking Lots, Empty School Buildings During COVID-19*, EDUCATION WEEK (Apr. 29, 2020), <https://www.edweek.org/technology/teachers-without-internet-work-in-parking-lots-empty-school-buildings-during-covid-19/2020/04> [<https://perma.cc/QK76-R384>].

17. *Id.* See also N'dea Yancey-Bragg, *More than \$130K Raised for California Family After Girls Seen Using Taco Bell WiFi for School Work*, USA TODAY (Sept. 1, 2020), <https://www.usatoday.com/story/news/nation/2020/09/01/thousands-raised-girls-who-had-use-taco-bell-wifi-school/5680992002/> [<https://perma.cc/RN3K-QYZ2>]; Bracey Harris, *Homework in a McDonald's Parking Lot: Inside One Mother's Fight to Help Her Kids Get an Education During Coronavirus*, THE HECHINGER REPORT (Jun. 27, 2020), <https://hechingerreport.org/homework-in-a-mcdonalds-parking-lot-inside-one-mothers-fight-to-help-her-kids-get-an-education-during-coronavirus/> [<https://perma.cc/4AT2-YH3V>].

tenure of the COVID lockdown.<sup>18</sup> The IRS has pushed for people to move completely away from paper tax filing since at least 2012.<sup>19</sup> “Just like we today expect clean running water, sewage, and electricity, as essential, so is broadband necessary to partake in society, to interact with government, to learn, to inform and be informed, to be a fully functioning member of society.”<sup>20</sup> Internet is not an optional add-on but a necessity. Modern society is increasingly interdependent, and a person’s livelihood, happiness, and autonomy are limited without access to a reliable Internet connection. Without that connection, a person is walled off from participating in society.<sup>21</sup>

In 2016, The United Nations declared Internet access a human right, condemning its disruption as a violation of those rights.<sup>22</sup> In 2021, Congress publicly acknowledged the Internet as “essential to full participation in modern life”<sup>23</sup> and featured 65 billion dollars in its 2021 infrastructure bill to promote access to Internet technologies and reduce service costs.<sup>24</sup> This moved in the right direction, but a myriad of thornier questions remain.

## II. NOTICE, CONSENT, AND YOUR INTERNET SERVICE PROVIDER

### A. BACKGROUND

Contract formation requires both manifestation of mutual assent to the terms of the contract as well as consideration.<sup>25</sup> For online contracts such as an ISPs privacy policy, mutual assent is analyzed under the dominant notice and consent

18. See *New Nationwide Poll Shows an Increased Popularity for Telehealth Services*, AM. PSYCHIATRIC ASS’N (June 02, 2021), <https://www.psychiatry.org/newsroom/news-releases/New-Nationwide-Poll-Shows-an-Increased-Popularity-for-Telehealth-Services> [<https://perma.cc/GV5F-RY2R>].

19. See *IRS Discourages Tax Return Drop-offs at Taxpayer Assistance Centers*, ACCOUNTINGWEB.COM (Feb. 27, 2012), <https://www.accountingweb.com/aa/auditing/irs-discourages-tax-return-drop-offs-at-taxpayer-assistance-centers> [<https://perma.cc/4T97-TY39>]. Indeed, the IRS this year hoped to include mandatory facial recognition to access past tax documents and other critical papers. Public outcry shot this down (for now). See Alan Rappeport, *I.R.S. Will Allow Taxpayers to Forgo Facial Recognition Amid Blowback*, N.Y. TIMES (Feb. 21, 2022), <https://www.nytimes.com/2022/02/21/us/politics/irs-facial-recognition.html> [<https://perma.cc/7X9D-TYGT>].

20. Allan Holmes & Chris Zubak-Skees, *These Maps Show Why Internet is Way More Expensive in the US than Europe*, THE VERGE (Apr. 1, 2015), <https://www.theverge.com/2015/4/1/8321437/maps-show-why-internet-is-more-expensive-us-europe-competition> [<https://perma.cc/UP3L-GDPT>] (quoting Rudolf van der Berg).

21. See 47 U.S.C. § 1722(1)(A) (2021) (stating that “a broadband connection and digital literacy are increasingly critical to how individuals . . . participate in the society, economy, and civic institutions of the United States; and access health care and essential services, obtain education, and build careers . . .”).

22. See Human Rights Council Res., A/HRC/32/L.20, at 2 (Jun. 27, 2016). The resolution stressed, among other things, “the importance of applying a comprehensive human rights-based approach when providing and expanding access to the internet and for the internet to be open, accessible, and nurtured.” *Id.*

23. 47 U.S.C. § 1701(1) (2021).

24. See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (codified in scattered sections of 47 U.S.C.).

25. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

(sometimes instead referred to as notice and choice)<sup>26</sup> paradigm. The court makes a two-prong determination: first, whether the company has given reasonable and visible notice to the consumer of its terms.<sup>27</sup> Second, whether the consumer responded by manifesting her consent (implied or express).

This Note focuses on the meaning and value of consent when the framework is applied to ISP privacy policies. Consent is the moral game changer that is “legally and ethically transformative,” allowing a person’s actions to change between legality and illegality.<sup>28</sup>

## B. CONSENT

Valid notice requires valid consent. Simply, consent “is at the core of the modern understanding of contract law.”<sup>29</sup> Without this crucial element, there is no contract. Moreover, consent is never free from context; this includes the experiences, physical conditions, environment, and actions of each party to the proposed activity.<sup>30</sup> Consent requires at least three conditions: conscious manifestation, knowledgeability, and voluntariness.<sup>31</sup> Each of these elements should be evaluated in relation to the context of the given consent.<sup>32</sup> But we must first answer whether the proposed terms are even consentable in order to get to the question of whether there was consent, valid or invalid.<sup>33</sup> This Note claims that the structure of the ISP privacy policy renders itself un-consentable, in the sense that one of the three above conditions is necessarily violated by the structure of the contract. Without considerable changes or external support, the question of whether or not a consumer has consented makes no sense, as conditions will be violated which are both necessary for consent and cannot be willed by the consenting party.

### 1. CONSCIOUS MANIFESTATION

First, we come to the consentability condition, which asks if there is a conscious manifestation of this consent. This section will be brief, as most points pertaining to the manifestation of consent are delivered at length in discussions of the preceding sub-conditions. A consumer has no motive to consent to the privacy

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26. See generally Robert H. Sloan & Richard Warner, *Beyond Notice and Choice: Privacy, Norms and Consent*, 14 J. HIGH TECH. L. 370 (2014).

27. See Nancy S. Kim, *Online Contracting*, 72 BUS. LAW. 243, 243 (2016).

28. Nancy S. Kim, *CONSENTABILITY: CONSENT AND ITS LIMITS* at 7 (2019).

29. Brian H. Bix, *Consent and Contracts*, in *THE ROUTLEDGE HANDBOOK OF THE ETHICS OF CONSENT* 222 (Andreas Müller & Peter Schaber eds., 2018).

30. See Kim, *supra* note 28, at 9.

31. See *id.*; see also, Solon Barocas & Helen Nissenbaum, *On Notice: The Trouble with Notice and Consent*, PROCEEDINGS OF THE ENGAGING DATA FORUM: THE FIRST INTERNATIONAL FORUM ON THE APPLICATION AND MGMT. OF PERS. ELEC. INFO. (Oct. 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2567409](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567409) [<https://perma.cc/XP54-WVVU>].

32. See Kim, *supra* note 28, at 9.

33. See *id.* at 49.

policy of an ISP. Even if that consumer wanted to, they lack the understanding of the policy necessary to form conscious consent because the effects on their current and continued right to privacy are vague, hidden, or simply unknowable. ISPs are uninterested in clarifying this for the consumer and instead benefit from their lack of expertise. While the customer may check that little box that we've all become so familiar with, it is just not reasonable to assume actually-manifested consent.

## 2. KNOWLEDGEABILITY

The knowledgeability condition of consent is the crux of the conversation. Knowledgeability serves as the root for the other conditions of conscious manifestation and voluntariness. It follows from the definition of consent that one cannot manifest consent without knowledge of the contract, and that consent cannot be freely and voluntarily given without complete knowledge of the content. It should not be controversial to assert that a consumer must be knowledgeable about the terms of a contract; they must know to what they are agreeing. But, as this Note argues below, knowledgeability is often missing in practice. Consider, as an example, the privacy policy of Xfinity (owned by Comcast).<sup>34</sup>

Xfinity stipulates that it never sells or otherwise distributes identifying information;<sup>35</sup> the same is not true for so-called non-identifying personal information.<sup>36</sup> This “sharing” of your personal information happens when: “it’s needed to provide you with [Xfinity’s] Services”; Xfinity is directed to do so by you (for example, if you want to authorize additional users on your account); Xfinity is required by law; disclosure required to protect Xfinity’s property rights or the safety of its employees or customers; or if it is for the marketing and advertising activities of other companies.<sup>37</sup> When it is the last, you must opt-out or be considered to have consented.<sup>38</sup> Xfinity does not specify who is getting your information for their “activities” beyond general categories of purchasers.<sup>39</sup>

The knowledgeability component of the consumer’s consent cannot be satisfied by Xfinity’s current policy because it is missing essential subparts of

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34. See generally *Privacy Policy*, XFINITY (October 12, 2021), <https://www.xfinity.com/privacy/policy#privacy-who> [<https://perma.cc/R9YA-KZ8T>].

35. Personal information includes indirect identifiers like device numbers, IP addresses, and account numbers, but can also include direct identifiers such as names, social security numbers, addresses, or phone numbers. The personal information acquired is not limited to the account holder but is drawn from anyone using the account. This may also mean information bought or otherwise obtained from third parties. *Id.*

36. It is difficult to find a definition of non-identifying personal information. A sidebar explains that Xfinity “may share de-identified or aggregate information that in no ways identifies you.” *Id.* Third-party receivers, as explained in the same sidebar, must agree to not re-identify the information, raising the question of how it is anonymous at all. See Barocas & Nissenbaum, *supra* note 31 for discussion on whether non-identifying personal information is ever in-fact anonymous as the name suggests.

37. *Id.*

38. *Id.*

39. *Id.*

knowledge (understanding and information). Consider the enormity of the task faced by a consumer. A person's average day may look like this: they wake up, corral the kids, commute to a workplace where they stay for eight to twelve hours before commuting to pick up the kids and grab groceries, drive back home, cook and eat dinner, clean up . . . rinse and repeat. Exhaustion is a fact of life. In 2008, it took a single individual 244 hours in a year to read the online privacy policies for each site they visited at an average reading speed of 10 minutes a policy.<sup>40</sup> In workdays, that amounts to 76 days.<sup>41</sup> Another study done in 2019 found that the average has increased from 10 minutes to read a policy to something more like 15 minutes (and growing).<sup>42</sup> These measurements do not address the reality that, in general, privacy policies are subject to change at the will of the contract-writer.<sup>43</sup> A consumer, if truly tasked with staying abreast of the details of the agreed-upon terms, may have to visit the same policy several times in a year.<sup>44</sup> This surely renders the expectations set by the above statistics significantly more egregious. Even in a situation of assumed perfect competency at the specialized skill of legal reading, when asked to read each privacy policy (let alone each full contract) that a person comes across, one could reasonably respond "with what time?"

Moreover, even if a person had infinite paid time to sit and read policies with a perfect understanding of the concepts within, the essential information often is not available. Returning to Xfinity's policy, there is no concrete information given through the policy on what the personal data collected is or how it is collected. Xfinity does not tell the consumer who exactly is receiving their data or how it is being used by that party.<sup>45</sup> Without this information, it is impossible for a consumer to give informed consent.<sup>46</sup> To that end, the chain of actors receiving and using the consumer data could be innumerable from a consumer standpoint,

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40. See Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, I/S: A J. OF L. AND POL'Y 543, 563 (2008).

41. *Id.*; see also, Alexis C. Madrigal, *Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, ATLANTIC (Mar. 1, 2012), <https://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/> [<https://perma.cc/5CHF-5GFU>].

42. See Kevin Litman-Navarro, *We Read 150 Privacy Policies. They Were an Incomprehensible Disaster*, N.Y. TIMES (Jun. 12, 2019), <https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html> [<https://perma.cc/TVY7-4LAB>]. Some estimates put the average closer to 17 minutes per policy after the GDPR was enacted. See, e.g., Rob Sobers, *How Privacy Policies Have Changed Since GDPR*, VARONIS (Jun. 25, 2018), <https://www.varonis.com/blog/gdpr-privacy-policy> [<https://perma.cc/SPZ4-2T29>]. Looking over entire contracts, privacy policies and all, could take up to an hour or more. See David Lazarus, *Want to Read a Tech Company's User Agreements? Got an Hour to Spare?* L.A. TIMES (Aug. 24, 2021), <https://www.latimes.com/business/story/2021-08-24/column-consumer-contracts> [<https://perma.cc/VR8X-23NQ>].

43. See Barocas & Nissenbaum, *supra* note 31 at 5. In the keeping with the example this Note has been referencing, see XFINITY, *supra*, note 34, which provides that Xfinity may update the policy at any time, and will notify users if there are changes that "increase [Xfinity's] right to use personal information" of the user. *Id.*

44. See Barocas & Nissenbaum, *supra* note 31, at 5.

45. See generally, XFINITY, *supra* note 34. The policy gives broad categories of third parties but no explicit entities.

46. See Barocas & Nissenbaum, *supra* note 31, at 5.

and the uses of their data rendered unpredictable. Not only would a consumer not find enough time to gain knowledge, but the necessary knowledge may be *unavailable*.<sup>47</sup> If this is the case, we cannot possibly find that a consumer knowingly renders consent—they cannot grasp the breadth or consequences of doing so.

Now assume that a consumer has perfect information but imperfect understanding. That is to say, the privacy policy supplies every detail a consumer would need to form knowledgeable consent, but the consumer has a realistically imperfect ability to understand that information. Privacy policies are documents written “by lawyers, for lawyers.”<sup>48</sup> There are no federal accessibility, transparency, nor readability standards for these contracts, industry-wide or legislative, as there are for other kinds of contract.<sup>49</sup> Where readability standards exist in other jurisdictions, this threatens further engorgement of privacy policies and more strain for the ISPs writing them. To understand what kinds of data is gathered and how, a consumer would need years of formal, technical training on the technologies involved, the economics of data surveillance, and the legal underpinnings.<sup>50</sup> As it is, over half of Americans may struggle to work with such dense, jargoned, and lengthy reads.<sup>51</sup> These layers of necessary understanding render privacy policies impenetrable. When a person cannot reasonably read the terms to a contract and consider its mechanics and potential impacts, they are not given the opportunity to give knowledgeable consent. Understanding also implies an ability to compare alternatives and choose the best fit for the individual consumer’s needs. But, as discussed previously, ISPs have near ubiquitous control over geographic

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47. See *id.* at 6.

48. See Litman-Navarro, *supra* note 42.

49. See Barocas & Nissenbaum, *supra* note 31, at 5. See, for example, the Credit CARD Act of 2009, which requires credit card statements to be written in a way that is clear, concise, and conspicuous. Credit Card Accountability Responsibility and Disclosure Act of 2009, 15 U.S.C. 1601.

50. Technologies like cookies, IP addresses, trackers, scripts, etc. are all involved in the online market of surveillance and data collection. *Data Mining*, ConsumerNotice, <https://www.consumernotice.org/data-protection/mining/> (last visited May 4, 2022) [<https://perma.cc/CR2R-JWYK>]. The consumer would also need to understand the economic effects. What is the value of the data? How is it bought and sold, and to whom is it valuable? What does a buyer get from obtaining this personal information?

51. See Amanda Grannis, *You Didn't Even Notice! Elements of Effective Online Privacy Policies*, 42 FORDHAM URB. L.J. 1109, 1147 (2015) (“Subjects of this study reported that privacy statements were too long and verbose to read.”). Former FTC Chairman Jon Leibowitz has remarked that “consumers don’t notice, read, or understand the privacy policies.” *Id.* at n. 337. A general benchmarks of literacy found that the majority of American adults are able to perform intermediate or basic literacy activities. See *National Assessment of Adult Literacy*, NATIONAL CENTER FOR EDUCATION STATISTICS (2003) [https://nces.ed.gov/naal/kf\\_demographics.asp](https://nces.ed.gov/naal/kf_demographics.asp) [<https://perma.cc/2VKR-4HLJ>]. Litman-Navarro’s study compared the difficulty of privacy policies to popular prose texts; the majority of policies required a college or advanced degree-level of reading competency, akin to texts like Immanuel Kant’s *Critique of Pure Reason* or Stephen Hawking’s *A Brief History of Time*. See Litman-Navarro, *supra* note 42.



regions in many parts of the country.<sup>52</sup> Without alternatives, accessible writing, and sufficient information, consumer consent is a red herring.

Finally, the inherent vagueness of the policy obscures a clear path forward for a consumer, contributing to unfair and deceptive foundations for the contractual relationship. An ISP is a body of experts, with expertise generally not available to the consumers with whom it interacts. While the decision of whether to accept proposed terms lies with one actor in a scenario like this, consentability is not unilateral but actually draws from the context and behaviors of both parties.<sup>53</sup> While it is unlikely that an ISP is intentionally hiding the ball, it is not doing the work to explain in clearer and more detailed terms to the consumer unless it is required to, despite having the expertise to do so technologically, economically, and legally.<sup>54</sup>

It is hard to avoid the appearance of opportunism. ISPs know, like any other savvy firm, that when a company's privacy policy is complex, vague, long, and riddled with jargon, consumers will opt to "blindly agree to the terms" to get back to their already overburdened lives.<sup>55</sup> To a consumer faced with no alternatives and an unavoidable need to participate in the global society, this result is a policy which does not look as much like a choice as it does a default. ISPs appear to benefit from conduct that they can reasonably expect to know the consumer is in no position to evaluate.<sup>56</sup> There are not incentives to make the information easily understood or transparent.<sup>57</sup> This is one potential explanation for the prevalence of apparent agreement to contract terms that consumers otherwise assert that they find objectionable.<sup>58</sup> Opportunism is not tolerated elsewhere and should not be able to hide in the folds of dubious consent here.

### 3. VOLUNTARINESS

This leads directly into the third requirement for consentability: voluntariness. Considering issues related to online data collection and the movement of this data requires examining both individual and collective concerns.

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52. See, e.g., Stewart, *supra* note 7; Ally Marotti, Samatha Bomkamp, & Corilyn Shropshire, *Chicago companies fear unknown in net neutrality repeal*, CHI. TRIBUNE (2017), <https://www.chicagotribune.com/business/ct-biz-net-neutrality-repeal-impact-20171215-story.html> [<https://perma.cc/869N-FMUA>].

53. See Kim, *supra* note 28 at 9.

54. See Lazarus, *supra* note 42.

55. *Id.*

56. *Id.* ("Businesses know their terms are unreadable by consumers.").

57. *Id.*

58. See Brooke Auxier, *How Americans See Digital Privacy Issues Amid the COVID-19 Outbreak*, PEW RESEARCH CENTER (May 4, 2020), <https://www.pewresearch.org/fact-tank/2020/05/04/how-americans-see-digital-privacy-issues-amid-the-covid-19-outbreak/> [<https://perma.cc/LE33-36CS>]; Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CENTER (May 20, 2015), <https://www.pewresearch.org/internet/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/> [<https://perma.cc/NP25-YBM4>]; See generally Joseph Turow, Michael Hennessy, & Nora A. Draper *The Tradeoff Fallacy – How Marketers Are Misrepresenting American Consumers and Opening Them up to Exploitation*, ANNENBERG SCHOOL FOR COMMUNICATION (2015).

First consider the individual voluntariness of a single consumer entering into a contract with an ISP which contains a privacy policy. Motive is an essential part of the volition consideration, asking what the consenting party's purpose is as that purpose pertains to the proposed conduct.<sup>59</sup> This condition also requires that the act is not reflexive, forced, or coerced in any way.<sup>60</sup> All of these sub-aspects go to the individual's autonomy, meant to be one of the most highly regarded and highly guarded aspects of personhood in the American legal system.<sup>61</sup> Autonomy, though a complex and contextual concept, typically refers to some claim of self-governance and to the ability to "move, act, or think independently and without assistance."<sup>62</sup> In the case of privacy policies, an inquiry into voluntariness follows much of the same path as the knowledge inquiry. Because of the virtual monopolies that ISPs hold in many regions, large portions of the American population do not have a choice of provider. If an individual is knowledgeable enough to understand the contract, but does not like what they find—too bad. They will be told to take it or leave it. But, as established earlier, internet access is no longer an option; it is a necessity. They cannot walk away because they need this product, which exists in a monopolized market.<sup>63</sup> This leaves that individual with both a lack of alternatives and an irreplaceable need. If there is no other option, this becomes a compulsion—not a motivation. This does not satisfy as a freely made decision nor does it fulfill one's ability to act independently.

If we assume that the single individual does not mind the privacy policy and would voluntarily consent even with knowledge of the consequences, does this move the inquiry toward consentability for that privacy policy? Not necessarily. Consent is a manifestation of autonomy. Privacy concerns often cannot be addressed on an individual basis. At times, the autonomy of one individual may impinge on that of another, and this must be reconciled. For that matter, there are times that the individual autonomy may rub against the collective autonomy.<sup>64</sup> Consent would not serve the purpose of protecting individual autonomy if the consent of one person subjected another to objectionable consequences to which they had not consented. Privacy concerns are ripe for such clashes.

Most online outfits insist that the data collected is anonymized and cannot be traced to the individual. Xfinity is no exception.<sup>65</sup> This use of 'anonymous' defies the traditional usages employed by the average speaker. It does not mean that you cannot be tracked from that piece of information or that you cannot be recognized

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59. See Kim, *supra* note 28, at 71.

60. See Kim, *supra* note 28, at 9.

61. See Kim, *supra* note 28, at 53. See also Richard H. Fallon Jr., *Two Senses of Autonomy*, 46 *Stan. L. Rev.* 875, 876 (1994) ("autonomy holds unique promise to function as the constitutional value of values.").

62. See Kim, *supra* note 28, at 74.

63. See Margaret Jane Radin, *An Analytical Framework for Legal Evaluation of Boilerplate*, *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 8 (G. Lestas, P. Saprai, & G. Klass, eds.) (2014).

64. See Kim, *supra* note 28, at 84 ("collective autonomy is defined as the interest that all members of society have in a particular right."). For a more detailed analysis of the collective autonomy, see *infra* section III.

65. See XFINITY, *supra* note 29.

through it.<sup>66</sup> Rather, it means that traditionally recognized identifiers (your birthday, full name, or Social Security number, for example) are not assigned to the data gathered.<sup>67</sup> There are still unique identifiers associated with the data.<sup>68</sup> Similarly, an ISP and the companies they sell to can use customer data to infer information about other, completely unaffiliated individuals.<sup>69</sup> For that matter, the third parties buying a customer's information from the ISP may very well be unaffiliated with that customer but able to infer information regardless.

Even freely and knowledgeably given, the choice of a small pool of consumers to consent to the privacy policy of an ISP ushers in a huge and unwanted invasion of privacy upon the larger population. This harms the individual autonomy of others by lessening the impact of that other individual's own refusal to consent. Indeed, it may very well eliminate their ability to even wield consent and guard their privacy. Once the ISP or whatever third party has enough pieces of individual data, individualized consent is more-or-less a moot request done for show and liability protection. This diminishment of consent to privacy forfeiture impinges on the society's collective autonomy. Each person has a stake in the maintenance of their privacy. When this is depleted, the ability of society as a group to discourage bad acts is depleted as well. Finally, the use of the mass data collected from the minority may institutionalize forms of latent discrimination.<sup>70</sup> For unavoidable privacy policies, the risks to individual and collective autonomy are too high to see even voluntary consent as acceptable.

### III. A SMALL REGULATORY PROPOSAL

One conclusion emerges from the above analysis: we cannot continue to apply the same legal analyses where the contracts are not between two individuals. The current scheme of notice-and-consent does not work. Indeed, under this framework, anonymity and consent are virtually irrelevant to a boilerplate contract.<sup>71</sup> A majority of contracts made now are such boiler-plate contracts and there seems to be little reason to believe this will change any time soon.<sup>72</sup> As demonstrated above, these cannot be considered consentable. But the fact remains that a

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66. See Solon Barocas & Helen Nissenbaum, *Big Data's End Run Around Procedural Privacy Protections*, COMPUTING ETHICS 31, 32–33 (2014).

67. *Id.*

68. *Id.*

69. See *id.* at 32 (illustrating the infamous example of the Target pregnancy index); see also SHAUN B. SPENCER, PREDICTIVE ANALYTICS, CONSUMER PRIVACY, AND ECOMMERCE REGULATION, RESEARCH HANDBOOK ON ELECTRONIC COMMERCIAL LAW 492, 494–96 (John A. Rothchild, ed., 2016).

70. See *id.* at 500–01.

71. See Barocas & Nissenbaum, *supra* note 65, at 32.

72. See Margaret Jane Radin, *An Analytical Framework for Legal Evaluation of Boilerplate* in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 8 (G. Lestas, P. Saprai, & G. Klass, eds.) (2014).

person's ISP holds the key to their participation in the world.<sup>73</sup> Due to its ubiquity, the ISP has even been termed "quasi-governmental."<sup>74</sup>

This Section proposes regulation that requires ISPs to submit their privacy policies to an independent board of the FTC for evaluation according to developed standards. With its policy, the ISP should submit statements explaining why it believes each group of gathered data is necessary to its operation and its proposals for maintaining the integrity of consumer privacy. Should the policy be deemed to broach privacy rights too far or be out of step with the standards, it may be sent back for additional tweaks by the ISPs legal team until it satisfies the evaluating body. This independent body should be staffed by experts from relevant fields, primarily legal, economic, and technical. Included in the legal experts should be practitioners as well as scholars to provide a broad understanding of the law as it is and as it could or should be envisioned.

Regulation is the clearest way to balance autonomies and the responsibilities of the ISP. The individual approach to privacy is not capable of safeguarding the rights of the people singularly or collectively. There is an obvious clash of autonomies, and it is the role of the government to resolve these incompatibilities.<sup>75</sup> Regulating these privacy policies can prevent consumers from making decisions that harm their future autonomy interests in ways they cannot predict and will likely regret, strengthens the conditions of consent by establishing a baseline acceptability for such policies, prevents some actors from restricting or otherwise harming the autonomy of others, and discourages opportunism.<sup>76</sup>

The individual, as discussed under knowledgeability, cannot be expected to understand the reach of the data gathering practices and the uses of that data, either due to practical limitations or pure impossibility. The impingement on the consumer's privacy rights has an indefinite duration; it applies so long as the consumer contracts with an ISP. Because they cannot forego the Internet, this is a lifetime commitment. With this timeline and the harm to autonomy outlined in the voluntariness subsection above, the consumer's own autonomy will predictably suffer. Enacting regulation prevents this predictable diminishing.

Moreover, a regulatory scheme of this kind gives a baseline of protection that consumers can rely on when evaluating policies. This eases the unreasonably high responsibility that is placed on individuals and appropriately refocuses it on the ISP, which holds the expertise and the power.<sup>77</sup> This reliability also strengthens consumer consent. With the knowledge that an independent body of experts

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73. See Priscilla M. Regan, *A Design for Public Trustee and Privacy Protection Regulation*, 44 SETON HALL LEGIS. J. 487, 488 (2020).

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

75. See Kim, *supra* note 28, at 58 ("[T]he state must determine what to do when the interests of its citizens conflict, and it must set up rules and systems which minimize the occasion for such conflicts.")

76. *Id.* at 69.

77. Radin, *supra* note 15, at 8.

has reviewed and approved the policy at hand, the consumer may have more confidence in giving their consent. This works as a facilitator of consumer consent and enhances the strength of that consent. And because the consumer can work confidently from that baseline, the very validity of the consumer consent can be more readily relied upon by the ISP, relieving some pressure to determine the internal state of the consenter.

We have also discussed ways that the independent forfeiture of information may inadvertently affect other consumers and the collective at large. When one person's right *to do* something impinges on another's right *to be free from* something, these interests must be balanced. Independent review of privacy policies may mitigate the concerns of one person's autonomy intruding on the collective's by insisting detailed, publicly accountable review. Trading jargon for understandability will necessarily add length while diminishing the amount of detailed technical information that is included in the policy. If the onus of review is shifted away from the consumer to the independent board, this sacrifice becomes less necessary. It can be required that the gory details of data collection and sale (the who's, what's, when's, where's, and how's) be included, mitigating the "transparency paradox" that simplicity has introduced.<sup>78</sup>

One might protest that the autonomy of the ISP should not be decreased because of mere potential impact to the consumer's autonomy. Even if we accept that the ISP should have an autonomy consideration equal to that of an individual human, its autonomy does not weigh enough to counteract the interests of each individual consumer and the collective. Each person holds autonomous interests: bodily integrity, freedom of movement, civil and political rights, property rights, and so on. The ISP may observe each movement through data-informed surveillance, influence civil and political engagement by platform ownership, and rob an individual of their property—the very data gathered with or without consent by parties known or unknown. Similarly, there are collective interests: equality, justice, due process, public safety, democracy, and political process. Regulation can address issues of embedded discrimination cemented by Big Data, preserve the individual's ability to challenge data uses, and guard public safety against uninvited breaches of their constitutional right to privacy. It is against both collective autonomy and individual autonomy to allow the ISP to restructure the right to privacy.<sup>79</sup>

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78. See Barocas & Nissenbaum, *supra* note 66, at 32 ("... simplicity and fidelity cannot both be achieved because details necessary to convey properly the impact of the information practices in question would confound even sophisticated users . . ."). Because of the inherent unknowability of some uses of Big Data, noted above in section II.E Voluntariness, it can only mitigate this "paradox", not eliminate it. It would not be bad practice to include short section synopses for consumer review where a consumer would want it.

79. See Radin, *supra* note 15, at 26-27. ("Firms with broad reach over large swaths of the public are deploying boilerplate that restructures recipients' legal rights. They are in effect replacing the law of the state with the 'law' of the firm for substantial portions of the populace.").

## IV. REGULATION AND THE ETHICAL LAWYER

The issue of consentability considered here is an ethical one that has attempted to assess the consentability of current privacy policies and suggest ameliorative next steps from that assessment.<sup>80</sup> Because of their position, lawyers hold a particular duty to the problem, which is higher than that of the non-lawyer and non-expert. Lawyers owe fidelity to the rights of people and there is a “special responsibility for the quality of justice.”<sup>81</sup> In 2014, the Human Rights Council of the United Nations noted “the importance of building confidence and trust in the Internet, not least with regard to freedom of expression, privacy, and other human rights.”<sup>82</sup> In one breath, the right to privacy was cemented as a human right. Recognized as such, the lawyer owes that special responsibility to upholding and guarding this right. Moreover, lawyers have the duty to understand the “deficiencies” of the system in which they operate and should “seek improvement of the law [and] access to” that system.<sup>83</sup>

Each angle of the consentability inquiry and the proposed regulatory body presents an opportunity for lawyers to advocate consistent with these principles. Lawyers draft the privacy policies, argue for or against contractual consent in the courtroom, and oversee regulation. These phases are often in dialogue with each other. At the front end, the drafting lawyer can push to actively center the privacy concerns of the individual and reduce the inaction that renders current policies largely opportunistic. This can be achieved by drafting clear definitions that are easily read at an intermediate level and avoiding ambiguous terms. The draft should also explain in detail rather than generalizations, as discussed in the knowledgeability section above.<sup>84</sup> While the Xfinity policy used as an example throughout the Note lacks some of these features, its use of expandable menus helps ameliorate the trade-offs between length and readability.<sup>85</sup> Drafting with more user-friendly visual design principles in mind may be another avenue to maximize benefits to the user. Importantly, until other guidelines are adopted either by the board proposed here or other legislative action, it is the drafting lawyer that sets the direction of the ISP-consumer interaction.

At the courtroom level, the lawyer can push the set policies by advocating for consumer-focused interpretations of the law. As explained in Section II, consentability requires knowledgeability, voluntariness, and manifestation.<sup>86</sup> These

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80. See Larry Alexander & Michael Moore, *Deontological Ethics*, Standard Encyclopedia of Philosophy (Edward N. Zalta, ed.) (Nov. 21, 2007), <https://plato.stanford.edu/archives/win2021/entries/ethics-deontological/> [<https://perma.cc/QP68-7ALJ>] (“[D]eontology falls within the domain of moral theories that guide and assess our choices of what we ought to do . . .”).

81. MODEL RULES OF PROFESSIONAL CONDUCT pmb1. ¶ 1 (2018). [hereinafter MODEL RULES].

82. G.A. Res. 26/13, at 2 (Jul. 14, 2014).

83. MODEL RULES pmb1. ¶ 6.

84. See Section II.B.2, *supra* page 6.

85. *Id.*

86. See Section II.B.2, *supra* page 5.

factors should be central to arguments seeking to void privacy policies and can be unraveled through the same features as discussed in Section II (i.e., vague third-party descriptors instead of specifically named companies, dense text which relies on an above-average reading level, and so on). By pressing for a more consumer-minded consent framework in the courtroom, the trial lawyer promotes the quality of justice for disempowered, leveling the playing field in impactful ways.

The lawyers who serve on the proposed independent board play a crucial role in upholding the rights of the people and challenging systemic deficiencies while keeping up to date on the benefits and risks associated with the relevant technologies.<sup>87</sup> Functioning properly, the board will define and moderate the standards to which ISP privacy policies are crafted. As argued in Section II, ISP privacy policies are not currently consentable because of internet's centrality and the policies' errors in knowledgeability. By creating a baseline, board lawyers help bring these policies out of the consent no-man's-land. Policies which conform to these standards will be more reliable both for policy creators, lawyers, and consumers.

Big Data presents complex problems. With a product as fundamental as Internet service, these problems become only murkier as social and systemic issues are pulled into the mix. We can no longer expect any one person to know everything they need to know. By upholding the principles of our ethical system, lawyers can contribute to equality and equity just by helping to bridge the knowledge gap.

## CONCLUSION

As discussion wraps, I should say that this suggested regulatory act is not intended as a permanent solution. Rather, it is intended to be a bandage holding together the pieces of a deficient system while more robust and consumer-friendly systems are developed in tandem. If we are to truly have a free, open, and unabusive internet, we should advocate for municipal broadband and robust standardizations. Let's return the infrastructure, which was developed by the public dollar, to the public. The effects of these privacy intrusions on autonomy are collective, not individual, and they must be dealt with collectively. The proposal here helps create a more rapid response to a problem far past its due date while developing consumer protections that may be reliable from all sides. I hope this to be a step toward a human-centric model of privacy, which prioritizes the needs and autonomy of the people.

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87. MODEL RULES R. 1.1 cmt. 8 (detailing that the duty of competency includes "keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . .").