RESPONSE

PRIVACY LAW'S CONSENT CONUNDRUM[†]

STACY-ANN ELVY[*]

CONTENTS

[†] An invited response to Daniel J. Solove, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law*, 104 B.U. L. REV. 593 (2024).

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INTRODUCTION

The issue of consent has long been problematic in consumer transactions. Consent serves as the justification for the imposition and validation of corporate terms and policies associated with the sale of goods and services. In an ever-increasingly connected world, terms and conditions, privacy policies, end-user licensing agreements, and service subscription contracts are but a few of the agreements and policies to which consumers must express consent. These policies and agreements are often one-sided and can favor corporate entities at the expense of consumers.

In his article, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law*, Daniel J. Solove masterfully critiques the transformative power of consent in transactions involving consumer data. After documenting the different approaches to consent used in privacy law, Solove contends that privacy law's current approach to consent is inadequate. He posits that privacy law should view consent as fictitious or "murky" and reduce its power in data transactions.[1] As Solove describes it, "murky consent should authorize only a very restricted and weak license to use data."[2] To achieve this goal, Solove proposes that privacy law should incorporate a duty of loyalty, a duty to acquire consent properly, a duty to refrain from frustrating consumers' reasonable expectations, and "a duty to avoid unreasonable risk."[3] Solove makes a significant contribution to the privacy law field by advancing our understanding and knowledge of the failures of consent in the privacy context and offering useful solutions to remedy these deficiencies.

In this response, I focus primarily on Solove's proposed "duty to obtain consent appropriately."[4] I argue that although Solove contends that "[f]ormalities such as contract law or express consent mechanisms will not turn privacy consent's fictions to fact [and] . . . [c]ontract law thus lacks the answers,"[5] standards established by courts in applying contract law principles to assess the validity of consumer consent to online terms and conditions can offer a useful framework for assessing whether a firm has obtained meaningful consent to its privacy practices or has satisfied Solove's proposed "duty to obtain consent appropriately."

While a privacy policy need not constitute an enforceable contract, case law that assesses the meaningfulness of consumer assent to online contracts in a nuanced manner, particularly by recognizing the realities of the online setting that may render consent less meaningful, can still provide important guidance on how to determine the validity and appropriateness of consent in the privacy

[1] Daniel J. Solove, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law*, 104 B.U. L. REV. 593 (2024).

[2] *Id.* at 594.

[3] *Id.* at 598.

[4] *Id.*

[5] *Id.* at 630.

setting.[6] Thus, while contract law may not have all of the answers to privacy law's consent problem and, indeed, as Solove aptly observes, contract law "also struggles with consent,"[7] some courts have attempted to restore the integrity of consent in the online context by meticulously evaluating the presentation of contractual provisions from the consumer's perspective.[8] In *Sgouros v. TransUnion*,[9] for instance, the court stated that it could not

> presume that a person who clicks on a box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.) Indeed, a person using the Internet may not realize that she is agreeing to a contract at all, whereas a reasonable person signing a physical contract will rarely be unaware of that fact.[10]

[6] *See, e.g.*, Jurin v. Google Inc., 768 F. Supp. 2d 1064, 1073 (E.D. Cal. 2011) ("A [company's] broadly stated promise to abide by its own policy does not hold Defendant to a contract."); *In re* Nw. Airlines Priv. Litig., No. Civ. 04-126, 2004 WL 1278459, at *6 (D. Minn. June 6, 2004) ("The usual rule in contract cases is that 'general statements of policy are not contractual.'" (quoting Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 741 (Minn. 2000))); Dyer v. Nw. Airlines Corps., 334 F. Supp. 2d 1196, 1200 (D.N.D. 2004) ("[B]road statements of company policy do not generally give rise to contract claims."); *see also* STACY-ANN ELVY, A COMMERCIAL LAW OF PRIVACY AND SECURITY FOR THE INTERNET OF THINGS 128-30 (2021) ("The contract law status of privacy policies has been the subject of significant debate."); Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REGUL. 45, 45 (2019) ("[There is] little support for the . . . claim that there is a clear trend [by courts] recognizing privacy policies as contracts"). *But see* Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7, 28 (2017) ("In 2004 and 2005, courts were evenly split in their treatment of privacy policies as contracts. After 2005, however, courts have predominantly recognized privacy policies as contracts, evidencing a trend in favor of enforcement.").

[7] Solove, *supra* note 1, at 630.

[8] Nancy S. Kim, *Ideology, Coercion, and the Proposed Restatement of the Law of Consumer Contracts*, 32 LOY. CONSUMER L. REV. 456, 472, 475 (2020) [hereinafter Kim, *Ideology*] ("While earlier cases focused solely or primarily on the text in assessing the reasonableness of notice, more recent cases place more emphasis on the context and the contracting experience. . . . [M]ore courts have started to carefully analyze the presentation of terms from the user's perspective and to consider whether a contract has been formed with respect to specific material terms or terms that may alter the reasonable expectations of the parties."); Nancy S. Kim, *Online Contracting*, 72 BUS. L. 243, 243-53 (2017) [hereinafter Kim, *Online Contracting*] (discussing cases in line with the *Berkson* approach and noting that "courts are more carefully analyzing the presentation of contract terms in the online environment" and are also "willing to engage in a detailed factual analysis that more accurately reflects the user's experience with online contracts"); *see also* ELVY, *supra* note 6, at 139-40 (discussing *Berkson* and other "courts that are hesitant to uphold form contracts absent clear satisfaction of contract formation conditions").

[9] 817 F.3d 1029 (7th Cir. 2016).

[10] *Id.* at 1035; Kim, *Online Contracting*, *supra* note 8, at 253.

Several courts have hesitated enforcing standardized consumer contracts absent clear manifestation of assent and effective and appropriate notice.[11] These cases indicate that, even if a consumer received general notice of a company's contract, such as the terms and conditions, such notice does not automatically constitute blanket assent to nor notice of all contractual provisions.[12] In enforcing the "duty to obtain consent appropriately," Solove argues that privacy law "should require more rigorous ways of obtaining consent when the risks are higher."[13] If consent is used to justify data practices, consent should be meaningfully and validly obtained regardless of the level of risk associated with the transaction or data.

I. THE LIMITS OF CONSENT

Various sources of privacy law have primarily dealt with the issue of consumer consent to corporate data practices by adopting either a notice-and-choice model or an express consent model.[14] The 1973 Fair Information Practice (FIP) principles, which set forth recommendations for data practices, have served as the foundation for several domestic and international privacy law frameworks.[15] The predominant conception of privacy within privacy law frameworks, often embraced at both state and federal levels, is privacy as control. This control narrative is reflected in the notice-and-choice approach and, to some extent, in certain state laws that grant consumers various privacy rights, such as rights of access and deletion.

[11] *See, e.g.*, Cullinane v. Uber Techs., Inc., 893 F.3d 53, 61-62 (1st Cir. 2018) (highlighting notice and consent); Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 402 (E.D.N.Y. 2015) (same); *see also* ELVY, *supra* note 6, at 139-40; Kim, *Online Contracting*, *supra* note 8, at 243; Martha Ertman, *Properly Restating the Law of Consumer Contracting*, JOTWELL (May 15, 2019), https://contracts.jotwell.com/properly-restating-the-law-of-consumer-contracting/ [https://perma.cc/E2Q4-776B].

[12] ELVY, *supra* note 6, at 140; Kim, *Online Contracting*, *supra* note 8, at 243; Nancy Kim, *The Proposed Restatement of the Law of Consumer Contracts and the Struggle Over the Soul of Contract Law*, JURIST (June 2, 2019, 12:09 PM), https://www.jurist.org/commentary/2019/06/nancy-kim-contracts-restatement/ [https://perma.cc/7K5W-EEHP] ("Some courts have started to question whether a manifestation of assent is enough to show consent to all the terms, showing signs of requiring specific assent to important, rights-altering terms . . . . In other words, recent cases seem to be swinging the pendulum back toward reasonable expectations, or at least away from unconsented-to terms.").

[13] Solove, *supra* note 1, at 633.

[14] *Id.* at 599.

[15] U.S. DEP'T OF HEALTH, EDUC. & WELFARE, NO. (OS) 73-94, RECORDS, COMPUTERS AND THE RIGHTS OF CITIZENS 41-42 (1973); Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get)*, 2001 STAN. TECH. L. REV. 1, 15 ("Fair Information Practices played a significant role in framing privacy laws in the United States."); *see also* Woodrow Hartzog & Neil Richards, *Privacy's Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1687, 1690 (2020) ("The EU's omnibus approach to data protection is based on individual rights over data, detailed rules, a default prohibition on data processing, and a zealous adherence to the fair information practices (FIPs).").

Solove aptly critiques privacy law's overreliance on consent and exposes the gaps in both the notice-and-choice approach as well as the express consent model. Regardless of which approach to consent is adopted, companies primarily provide notice of their data practices via their privacy policies because various sources of privacy law often require companies to post privacy policies. Solove argues that under the notice-and-choice regime, individuals can consent to a company's privacy practices simply by continuing to use the company's services or products after receiving notice via a privacy policy (that is, by "failing to opt-out").[16] Solove goes on to posit that under the express consent framework, consumers consent to a firm's data practices as disclosed in a privacy policy, or other such statement, after affirmatively expressing assent to same, such as by clicking an "I agree" option.[17] A somewhat similar divide exists in the terms and conditions context, the validity of which is determined by contract law principles.

In providing their online terms and conditions, firms often use a variety of contracting formats.[18] In a clickwrap format, the consumer demonstrates affirmative assent by clicking the "I agree" button or box once the terms of service or terms and conditions appear.[19] This approach shares similarities with the express consent approach in the privacy context.[20] By contrast, when firms use the browsewrap format, consumers may be deemed to assent to a firm's

[16] Solove, *supra* note 1, at 599-602, 605.

[17] *Id.* at 602-06.

[18] In addition to the clickwrap and browsewrap formats, sign-in wrap and scrollwraps are examples of other types of online contracting formats. Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 865-66 (9th Cir. 2022).

[19] ELVY, *supra* note 6, at 134; LINDA J. RUSCH & STEPHEN L. SEPINUCK, COMMERCIAL LAW: PROBLEMS AND MATERIALS ON SALES AND PAYMENTS 60 (West 2011).

[20] Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1 ("'[C]onsent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her;"); Lindsey Barrett, *Confiding in Con Men: U.S. Privacy Law, the GDPR, and Information Fiduciaries*, 42 SEATTLE U. L. REV. 1057, 1084 (2019) ("[T]he GDPR places a much higher bar for what constitutes consent, acknowledging that [pre]check[ed] . . . clickwrap hardly ever constitutes meaningful decision-making."); J. Kyle Janecek, *It's a Wrap! Enforcing Online Agreements in Light of the CPRA*, NEWMEHER DILLION (Mar. 3, 2021), https://www.newmeyerdillion.com/publications/its-a-wrap-enforcing-online-agreements-in-light-of-the-cpra/ [https://perma.cc/JMV5-9SBD] ("[The California Consumer Privacy Act] differs considerably from the prior California law on browsewrap agreements and effectively requires that agreements are shifted to a clickwrap structure, putting privacy policies in line with the explicit approvals required under the European Union's General Data Protection Regulation ("GDPR") which requires explicit permission for the use of cookies in data collection.").

terms and conditions by continuing to use their service.[21] With this format, companies typically display the terms and conditions via a link that the consumer must click on just to view it. The burden is thereby placed on the consumer to locate, identify, and click the hyperlink to review the terms and conditions. Similarly, as Solove observes with the notice-and-choice approach in the privacy policy context, "the onus is on individuals to review the privacy notice and then decide if they want to proceed. People's inaction (failure to opt out) is interpreted as implied consent."[22] Given the burdens associated with browsewrap formats, the Ninth Circuit noted in a 2022 opinion that "[c]ourts are more reluctant to enforce browsewrap agreements because consumers are frequently left unaware that contractual terms were even offered, much less that continued use of the website will be deemed to manifest acceptance of those terms."[23] A company's terms and conditions may also reference or contain a hyperlink to the company's privacy policy regardless of the contracting format used.

Despite the prevalence of privacy policies describing companies' data collection, use, and monetization practices, privacy policies often do not provide consumers with sufficient notice and understanding of these practices. Solove offers several cogent explanations for this conundrum. First, Solove contends

[21] RUSCH & SEPINUCK, *supra* note 19, at 60 (noting that with browsewrap contracting format, "[t]he other terms are not displayed, but the website may provide a link to them or may simply display a notice that the transaction is governed by a set of terms and that using the website or engaging in some defined conduct will bind the user to the terms"); *see also Berman*, 30 F.4th at 856-57 (9th Cir. 2022) (describing browsewrap formatting as "a website [that] offers terms that are disclosed only through a hyperlink and the user supposedly manifests assent to those terms simply by continuing to use the website" and noting that "[t]he presence of 'an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound' is critical to the enforceability of any browsewrap-type agreement."); Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014) (defining browsewrap formats as "where a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen" and noting that "unlike a clickwrap agreement, a browsewrap agreement does not require the user to manifest assent to the terms and conditions expressly . . . [a] party instead gives his assent simply by using the website." (alterations in original)).

[22] Solove, *supra* note 1, at 600; Thomas B. Norton, *The Non-Contractual Nature of Privacy Policies and a New Critique of the Notice and Choice Privacy Protection Model*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 191-93 (2016) ("Privacy policies, however, often take the browsewrap form . . . . In fact, it has been industry practice to draft privacy policies in this way so that they do *not* constitute enforceable agreements.").

[23] *Berman*, F.4th at 856; Eric Goldman, *Ninth Circuit Enforces a "Browsewrap" (That Was Actually a Clickthrough)–Patrick v. Running Warehouse*, TECH & MARKETING: L. BLOG (Feb. 16, 2024), https://blog.ericgoldman.org/archives/2024/02/ninth-circuit-enforces-a-browsewrap-that-was-actually-a-clickthrough-patrick-v-running-warehouse.htm [https://perma.cc/6577-HNQT] (suggesting that most browsewrap contracts are not enforceable and in "the post-Nguyen world, sometimes courts accept nothing less than a two-click process (a "clickwrap")"). *But see*, Hawkins v. CMG Media Corp., No, 22-CV-04462, 2024 WL 559591, at *4-5 (N.D. Ga. Feb. 12, 2024) (finding browsewrap agreement valid although "the website did not contain an explicit textual notice that continued use of the website demonstrates a user's intent to be bound by an agreement").

that privacy policies are unilaterally imposed on consumers under a take-it-or-leave-it approach.[24] This is also the case with firms' online terms and conditions. Privacy policies, as well as terms and conditions, can also contain provisions that permit entities to unilaterally modify such agreements at any time. Second, Solove posits that manipulative tactics used by firms to obtain consent to their data practices can render consent less meaningful in the privacy context.[25] Third, because consent is a requirement to obtain access to companies' services and products, consent under either an opt-out (notice-and-choice) or opt-in (express consent) regime is less consensual. [26] The latter two explanations are particularly convincing as these explanations expose the power of large technology companies to shape and influence our expectations of privacy and our willingness to consent to their data practices in exchange for services and products.

Solove acknowledges that some sources of privacy law, such as the California Consumer Privacy Act (CCPA), attempt to address concerns about consent by seeking to protect consumers from discrimination when they exercise their statutorily granted rights.[27] However, the exceptions to these protections may render them less effective from a consumer protection perspective. Similarly, the federal Children's Online Privacy Protection Act and its applicable rules restrict requiring children to disclose more data than is reasonably necessary to participate in online services and products.[28]

Other persuasive reasons Solove offers for the lack of meaningful consent in consumer data transactions under both the notice-and-choice and express consent regimes include challenges associated with consumers' lack of information. These difficulties flow from consumers' reluctance to review privacy policies due in part to the large number of documents consumers must review whenever they interact online with companies' website, particularly when purchasing goods or using services. Even when consumers review these documents, they may not understand any associated legalese or the implications of consenting to a company's data practices.[29] These challenges are also present when consumers consent to online terms and conditions.

Solove proposes that we should limit the power of consent in the privacy law arena to reflect its lack of meaningfulness. To achieve what he describes as murky consent, he recommends the adoption of a "duty to consent

[24] *Id.* at 607-10.

[25] *Id.* at 11-12.

[26] *Id.*

[27] *Id.* at 12-13.

[28] *Complying with COPPA: Frequently Asked Questions*, FTC (Jan. 2024), https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions [https://perma.cc/6XWU-52GY] ("Operators covered by the [COPPA] Rule must, [among other things,] [n]ot condition a child's participation in an online activity on the child providing more information than is reasonably necessary to participate in that activity.").

[29] Solove, *supra* note 1, at 614-23 (discussing consumers' reluctance to read and understand privacy policies and cognitive and structural limitations associated with consent).

appropriately." In this regard, he proposes that opt-in consent, along with stronger methods, such as pop-up alerts, should be used in instances of high risk because it is a stronger method of obtaining consent.[30] However, it is unclear what would constitute high-risk as opposed to a low-risk context for purposes of justifying opt-in consent as opposed to opt-out consent. Solove makes clear though that his proposed "duties are a start . . . [that] provide basic guardrails that should provide strong protections in many circumstances."[31] Case law addressing the issue of consumer consent to online contracts may be instructive in dealing with the issue of consent generally in the privacy context and in building on the foundations of Solove's proposed "duty to obtain consent appropriately." This is the duty that I will focus on below.

II. TOWARDS MORE MEANINGFUL CONSENT

In a 2002 decision, the Second Circuit noted that "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."[32] Thus, to determine the validity of an online contract, such as a company's terms and conditions, courts have focused on whether the consumer had notice and an opportunity to review the applicable terms and conditions and whether there has been a demonstration of assent.[33] With respect to the history of this standard, as Nancy Kim observes, shrinkwrap agreements, a non-electronic contracting format in which terms are displayed and included with the packaged product, "paved the way for the [application of the] standard of 'notice-and-manifestation'" in electronic adhesion agreements.[34] In applying the notice and manifestation of assent standard, courts

[30] *Id.* at 633-34.

[31] *Id.* at 636.

[32] Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002).

[33] *See, e.g.*, Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 856 (9th Cir. 2022) (noting that in clickwrap agreements "the consumer has received notice of the terms being offered and, in the words of the Restatement, 'knows or has reason to know that the other party may infer from his conduct that he assents' to those terms" (citation omitted)); Kai Peng v. Uber Techs., Inc., 237 F. Supp. 3d 36, 47 (E.D.N.Y. 2017) ("A party may be bound to a 'click-wrap' agreement . . . by clicking a button declaring assent, so long as the party is given a 'sufficient opportunity to read the . . . agreement, and assents thereto after being provided with an unambiguous method of accepting or declining the offer.'" (second alteration in original) (footnote omitted) (citation omitted)); Walsh v. Microsoft Corp., No. C14-424, 2014 WL 4168479, at *3 (W.D. Wash. Aug. 20, 2014) ("Online agreements are enforceable under Oregon law if a consumer has an opportunity to review the terms of the agreement and manifested assent to its terms."); *see also* ELVY, *supra* note 6, at 135.

[34] Kim, *Ideology*, *supra* note 8, at 467-70, 460 n.7 (discussing shrinkwrap case law and history of notice-and-manifestation-of-assent standard's application to online consumer contracts of adhesion and contending that "the decision to apply this notice-and-manifestation standard to adhesive form contracts has its origins in politics and ideology, not [contract] doctrine").

have evaluated whether the individual received reasonable notice, which can be actual or constructive, of the terms and conditions.[35]

Not surprisingly, some courts have insufficiently addressed the complexities and concerns plaguing online contracting environments. Some courts have presumed that consumers understand that by registering on a website, signing up for an online service, ordering a product, or logging on to a website, they are entering into a contract regardless of whether they accessed any hyperlinked terms or actually reviewed the terms and conditions.[36]

In contrast, other courts have attempted to expressly acknowledge and address the realities of consumer online contracts by conducting a more nuanced application of the reasonable notice standard.[37] In *Berkson v. Gogo, LLC*, which, in part, decided whether the consumer plaintiffs had agreed to the defendant's terms of use that contained a mandatory arbitration clause, the court noted that "[c]ourts have 'decided,' based largely on speculation, what constitutes inquiry notice of a website's 'terms of use.'" [38] In *Berkson*, the court reasoned that, until consumer studies and empirical evidence demonstrate that the average individual understands which contractual terms they are assenting to when interacting with an online website, "preemptive rules in favor of vendors who do not forcefully draw purchasers' attention to terms disadvantageous to them should be rejected."[39] The court concluded that firms should bear the burden of proving the specifics of the agreed-upon contractual terms.[40] The court went on to note that, to prove assent to contract terms, "proof of special know-how based on the background of the potential buyer or adequate warning of adverse terms by the design of the agreement page or pages should be required before adverse terms . . . are enforced."[41]

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[35] *See, e.g.*, Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014); Nicosia v. Amazon.com, Inc., 384 F. Supp. 3d 254, 266 (E.D.N.Y. 2019); Kim, *Online Contracting*, *supra* note 8, at 243.

[36] *See, e.g.*, Meyer v. Uber Techs., Inc., 868 F.3d 66, 75, 79-80 (2d Cir. 2017) ("A reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not."); *Nicosia*, 384 F. Supp. 3d at 278 ("But is there any question that reasonably prudent internet users know that there are terms and conditions attached when they log onto Facebook, order merchandise on Amazon, or hail a ride on Uber? They know this, not because a loud, brightly-colored notice on the screen tells them so, but because it would be difficult to exist in our technological society without some generalized awareness of the fact.").

[37] *See, e.g.*, Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 402 (E.D.N.Y. 2015) (providing multi-prong inquiry in analyzing electronic contracts that addresses these nuances); *see also* Kim, *Online Contracting*, *supra* note 8, at 247-52 (discussing several cases in which courts have conducted nuanced analyses of the reasonable notice and manifestation of assent standard).

[38] *Berkson*, F. Supp. 3d at 402.

[39] *Id.* at 403.

[40] *Id.*

[41] *Id.*

The *Berkson* court established the following four-part inquiry to evaluate the validity and enforceability of "sign-in-wraps, and electronic contracts of adhesion generally:"[42] (1) even if the consumer clicked the log-in, purchase, or sign-in option, is there significant evidence from the website that indicates that the consumer was aware that by engaging with the company's website the consumer would be binding themselves "to more than an offer of services or goods?"[43] (2) were the details of the contract "readily and obviously available" to the consumer based on the website's content and design?[44] (3) were the specifics of the agreement as well as the contract's importance "obscured or minimized by the physical manifestation of assent expected of a consumer?"[45] and (4) did the company draw the consumer's attention to significant and material provisions of the terms and conditions "that would alter what a reasonable consumer would understand to be her default rights when initiating an online consumer transaction from the consumer's state of residence?"[46]

Several courts have applied a somewhat similar analysis in determining the validity of online contracts.[47] The *Berkson* case, along with others adopting a similar view,[48] demonstrates that some courts are willing to conduct a more in-depth analysis of the online contracting domain that more adequately accounts for consumers' experiences with companies' online terms and conditions. These courts appear to acknowledge the important differences between the traditional in-person paper-contract formation process and the online terms and conditions context in which consumers are likely to require more adequate notice of contractual terms for consent to be valid and meaningful.[49]

In states like California that have adopted relatively nascent consumer privacy laws, regulators are increasingly attempting to provide detailed guidance to firms on how to obtain valid consumer consent, including avoiding dark patterns.[50] The *Berkson* four-part inquiry could be useful in assessing consent

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 402.

[46] *Id.*

[47] Kim, *Online Contracting*, *supra* note 8 at 247-52; *see also* ELVY, *supra* note 6, at 140.

[48] *See e.g.*, Cullinane v. Uber Techs., Inc., 893 F.3d 53, 62 (1st Cir. 2018) (adopting a two-prong test of a similar nature); Adwar Casting Co.. v. Star Gems, Inc., 342 F. Supp. 3d 297, 305 (E.D.N.Y. 2018) (adopting *Berkson* test); Starke v. SquareTrade, Inc., No. 16-CV-7036, 2017 WL 3328236, at *6 (E.D.N.Y. Aug. 3, 2017) (applying *Berkson* four-party inquiry and denying motion to compel arbitration and noting "[t]he *Berkson* test has been favorably cited and applied by federal and state trial courts"); *see also* ELVY, *supra* note 6, at 140; Kim, *Ideology*, *supra* note 8, at 472-480; Kim, *Online Contracting*, *supra* note 8, at 243, 247-48, 252.

[49] *Berkson*, 97 F. Supp. 3d at 382 ("[T]here is a difference between paper and electronic contracting . . . [and] internet consumers . . . require clearer notice than do traditional retail buyers.").

[50] CAL. CODE REGS. tit. 11, § 7004 (2024) (providing detailed guidance on how to obtain consumer consent, including "[s]ymmetry in choice," and avoiding confusing language and

generally in the privacy context and in applying Solove's proposed "duty to acquire consent appropriately." To be clear, my argument is not that privacy policies should be viewed as contracts in the same way that a company's terms and conditions may constitute a valid contract. Instead, I argue that, to the extent that privacy law retains consent as a means of justifying data practices or incorporates Solove's "duty to obtain consent appropriately," the four-part inquiry established by the court in *Berkson* can provide guidance in assessing whether appropriate notice of a company's data practices has been given to a user and whether the company has obtained meaningful consent or fulfilled this proposed duty.

With some adjustments, the *Berkson* inquiry could aid in facilitating a nuanced determination of the specific terms of a privacy policy that "the consumer could reasonably be expected to discern and agree to."[51] Taking from the first prong of the four-part *Berkson* inquiry, privacy law could require an evaluation of whether the consumer was aware that, by engaging with the online platform, the consumer would be subject to the company's privacy policy and applicable data practices.[52] Second, privacy law could ask whether the website's design and content made the provisions of the privacy policy "readily and obviously available to the user."[53] Third, it could inquire whether the firm cloaked important provisions of the privacy policy, such as the company's data disclosure and secondary-use practices, with physical manifestations of assent, if any, that the consumer had to provide to access the services or product. Several sources of privacy law already include restrictions on the use of dark patterns [54] and this third prong continues that line of inquiry by focusing on the physical manifestation of assent. Fourth, it could ask if the company drew consumers' attention to significant provisions of the privacy policy that "would alter what a reasonable consumer would understand to be her default [privacy] rights [or privacy expectations] when initiating an online consumer transaction" with the company.[55]

This fourth prong is also, to some extent, in keeping with Solove's proposed duty to refrain from blocking consumers' reasonable expectations with respect to the collection and use of their personal data.[56] Under this proposed duty, disclosing in a privacy policy specific data uses that consumers do not reasonably expect would be inadequate for purposes of murky consent.[57]

elements, and noting that "[a]ny agreement obtained through the use of dark patterns shall not constitute consumer consent.").

[51] *Starke*, 2017 WL 3328236, at *6.

[52] *Berkson*, 97 F. Supp. 3d at 402.

[53] *Id.*

[54] *See, e.g.*, CAL. CIV. CODE § 1798.140(l) (West 2023) (defining dark pattern); COLO. REV. STAT. § 6-1-1303(5)(c) (2023) (noting that consent obtained via dark patterns is not valid).

[55] *Berkson*, 97 F. Supp. 3d at 402.

[56] Solove, *supra* note 1, at 634.

[57] *Id.*

However, in connection with this duty, Solove observes, that if companies want to stray from "common social norms and practices [regarding peoples' personal data,] they must either find a way to obtain actual consent . . . or find another basis to collect and use personal data other than consent."[58] Thus, to the extent that a company includes provisions in its privacy policy that deviates from consumers' reasonable expectations regarding their data, the fourth prong of the *Berkson* approach can help to better ensure that adequate notice is provided and consumers' consent to such provisions are more meaningful.

Under the *Berkson* approach, even if a consumer is deemed to have received notice of a company's privacy policy, such a decision does not automatically mean that the consumer received notice of specific terms or assented to the same.[59] Thus, a consumer can be deemed to consent to some provisions of a privacy policy and not others. The *Berkson* four-part inquiry also has the potential to address certain manipulation concerns Solove contends renders consumers' consent to privacy policies less meaningful because it incorporates an analysis of whether the firms' website design and content "obscured or minimized" key terms.[60]

Notwithstanding the potential usefulness of the *Berkson* framework in helping to address consent issues in the privacy law context, I agree with Solove that privacy law must move beyond consent in some instances.[61] Consent alone cannot adequately protect consumer interests. There are limits to the consumer protection capabilities of consent. The law may need to expressly shed light on permissible and impermissible data practices.[62] Additionally, Solove's remaining proposed duty of loyalty and the duty to avoid unreasonable risk may aid in helping privacy law to move beyond its consent dilemma. Lastly, there may be instances in which the law should limit consumers' ability to waive their privacy rights and even expressly remove the power of consent by disallowing the use of consent as a justification for harmful practices. For example, the

[58] *Id.* at 634.

[59] Kim, *Online Contracting*, *supra* note 8, at 244 ("Consistent with a more sophisticated understanding of online contracts, several courts seem to be acknowledging the folly of blanket assent to online terms and rejecting the view that notice that contract terms apply to the transaction means notice of (and assent to) *all* of the terms. Concordant with the notion that notice of a contract does not equal notice of *specific* terms, courts seem to be paying more attention to the potential for altering digital terms."); Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 416 (2020) (noting some courts have "acknowledge[ed] the folly of blanket assent" (internal quotations omitted)); Dee Pridgin, *ALI's Restatement of the Law of Consumer Contracts: Perpetuating a Legal Fiction?*, 32 LOY. CONSUMER L. REV. 540, 558 (2020) (discussing *Berkson* and *Nicosia* cases and the ALI's proposed Restatement, noting that "Llewellyn said the blanket assent was only an assent to 'any not unreasonable or indecent terms . . . which do not alter or eviscerate the reasonable meaning of the dickered terms'" (alteration in original) (citation omitted)).

[60] *Berkson*, 97 F. Supp. 3d at 402.

[61] ELVY, *supra* note 6, at 269-301.

[62] *Id.* at 269-80.

CCPA restricts companies' ability to force individuals to consent to waiving statutorily granted rights by expressly providing that any such contractual provisions are invalid.[63]

CONCLUSION

Solove's article, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law*, offers a convincing description and explanation of the failures of consent in the privacy context. Solove's powerful proposals lay the groundwork for reformulating the power of consent in the privacy law arena. His recommendation that privacy law incorporate a duty to obtain consent in an appropriate manner in combination with a duty of loyalty, "a duty to avoid unreasonable risk,"[64] and a duty to refrain from frustrating consumers' reasonable expectations has the potential to more adequately guard against privacy abuses. My response exposes a modest but important difference in viewpoints regarding the potential role of contract law principles in addressing consent problems in the privacy-law setting. With my proposal, I shed light on how an existing consent framework established by courts in applying contract law to assess the validity of companies' terms and conditions can aid in both remedying privacy law's consent conundrum and mapping out the contours of Solove's proposed "duty to obtain consent appropriately." Solove's timely and well-written article should capture the attention of privacy scholars, courts, regulators, and legislators interested in learning more about the shortcomings of consent and what privacy law can do about it.

[63] CAL. CIV. CODE §§ 1798.120, 1798.125, 1798.135, 1798.192 (West 2023).

[64] Solove, *supra* note 1, at 598.