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AGENTIZING PRIVACY PREFERENCES WITHOUT PRIVATIZING DATA PROTECTION POLICY†

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I. INTRODUCTION

Kar & Yu's "The Contractual Death and Rebirth of Privacy" is a remarkable contribution to research on data protection. Their work situates law and policy in time, revealing via rich narratives how much more personal data quotidian commercial transactions now reveal, even as they seem more private because they are conducted inside the home. They rightly insist that most "privacy policies" and terms of service are little more than "pseudo-contract," which courts should not recognize as binding.[1] They propose convincing ways of distinguishing between what ought to be deemed false and real contractual terms.[2] And they situate their own reform proposals within a thoughtful *tour d'horizon* of engaged privacy law scholarship, appreciating this work on its own

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† Response to: Robin Bradley Kar & Xiaowei Yu, *The Contractual Death and Rebirth of Privacy*, 38 HARV. J.L. & TECH. 1103 (2025).

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We wish to thank the *Harvard Journal of Law & Technology* for offering us the chance to comment on Kar & Yu's deeply insightful and important paper. We also thank Alberto De Franceschi for excellent comments on a draft and Lucas You for research assistance on this Article.

1. *See* Robin Bradley Kar & Xiaowei Yu, *The Contractual Death and Rebirth of Privacy*, 38 HARV J.L. & TECH. 1103, 1104–06 (2025).

2. *See id.* at 1140–41 (outlining framework where non-cooperative terms are unenforceable pseudo-contract).

terms while simultaneously arguing that their own approach to contract is necessary to further advances in the field.

Let's assume that governments heed Kar & Yu's article and adopt their more stringent interpretative framework for the contractual validity of online boilerplate terms. How will consumers actually use their newfound power? To the extent consumers are left on their own to navigate their choices, they may well drift toward recreating the same asymmetries of power that now characterize the existing privacy landscape. Reading privacy terms is not a particularly riveting activity, and modern consumers likely have even less stomach for it in the digital age. Contemporary social media and short-form video amp up attentional expectations to the point that reading text (or even listening to bare spoken words) seems as alluring as watching paint dry.[3] As one character puts it in a PowerPoint embedded in a Jennifer Egan novel, "a word wall is a long haul."[4] This habitual shortening of attention spans makes generative AI ("GAI") attractive as a load-bearing crutch for intellectual labor. AI is becoming an all-purpose, cognitive Swiss Army knife to fend off unwanted intrusions of written text into a mental world increasingly defined by images and speech.[5] As a result, there is a real possibility that, as individuals are given new agency with respect to online pseudo-contracts, they increasingly offload their newfound decision-making ability onto GAI agents.

Such reliance on GAI need not inevitably recreate the anti-consumer dynamics of the status quo. These new agents could instead aid text-averse consumers in navigating a potential deluge of "real contract" bargain offers in the wake of the laudable doctrinal evolution that Kar & Yu propose. We predict that low-cost, automated consumer agents may become an important tool for consumers who aim not to negotiate terms, but rather to automatically turn down terms that amount to objectionable impositions on their privacy. Code-driven agents have an important role to play here. Even as early as 2006, scholars were expounding upon "a process called Semantic Parameterization previously used to derive rights and obligations from privacy goals," in order to "aid requirements engineers, standards organizations, compliance officers, and stakeholders in assuring systems conform to policy and satisfy requirements" of law.[6] The rise

3. *See* Louise David, Eliana Vassena & Erik Bijleveld, *The Unpleasantness of Thinking: A Meta-Analytic Review of the Association Between Mental Effort and Negative Affect*, 150 PSYCH. BULL. 1070, 1081 (2024) (finding a positive association between mental effort and negative affect and suggesting that mental effort is inherently aversive).

4. JENNIFER EGAN, A VISIT FROM THE GOON SQUAD 196 (2010).

5. *See* discussion *infra* Part II.

6. Travis D. Breaux, Matthew W. Vail & Annie I. Antón, *Towards Regulatory Compliance: Extracting Rights and Obligations to Align Requirements with Regulations*, 14TH IEEE INT'L REQUIREMENTS ENG'G CONF. (2006).

of both GAI and AI agents provides further promise here.[7] GAI allows consumers to give a natural language explanation of what they want to avoid in terms of data extraction.[8] Automated Consumer Agents (hereinafter "ACAs") may be able to identify such terms and automatically decline such proposed alterations to the stripped-down baseline of the real contract identified by Kar & Yu. Allowing consumers to engage in personalized automated flagging of undesirable terms would amount to the "agentizing" of privacy preferences, as consumers delegate choices to various AI agents.

This scenario could restore some sense of agency to what are now alienating transactions. However, the development of AI agents to aid consumers could catalyze a chain of moves and countermoves wherein corporations attempt to adapt to the new contractual landscape by inventing new methods to retain their boilerplate advantage. Thus, even if such an advance occurs, privacy regulators should continue to closely monitor the rise of ACAs for two distinct vulnerabilities. First, data-intensive firms may unite to develop and publicize ACAs that aim to gradually restore one-sided, extractive data relationships. We call this advance the "NetChoice" approach to ACAs, after the trade association that has attacked varied regulations in court on behalf of technology firms.[9] Coordinated interventions could easily swamp ACAs provided by authentically pro-consumer businesses or civil society organizations, particularly if ACAs are accessed via app stores run by firms with incentives to disseminate lenient ACAs and to downrank strictly privacy-protective ones. If the major companies responsible for

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7. *See* Yingxuan Yang, Mulei Ma, Yuxuan Huang, Huacan Chai, Chenyu Gong, Haoran Geng et al., Agentic Web: Weaving the Next Web with AI Agents 15–20, 35–41 (July 28, 2025) (unpublished manuscript) (on file with arXiv), https://arxiv.org/abs/2507.21206 [https://perma.cc/4K5M-RQ6R] (discussing potential for autonomous agents to execute web-based tasks based on user preferences). For example, the CLAUDETTE project partially automated the detection of potentially objectionable contract clauses in consumer scenarios using a training set of fifty consumer contracts. *See* Marco Lippi, Przemyslaw Palka, Giuseppe Contissa, Francesca Lagioia, Hans-Wolfgang Micklitz, Giovanni Sartor et al., *CLAUDETTE: An Automated Detector of Potentially Unfair Clauses in Online Terms of Service*, 27 A.I. & L. 117, 118–19 (2019) (utilizing sentence classification to detect potentially unfair clauses in contracts and comparing precision and recall across AI network configurations). The project achieved an eighty percent detection rate for potentially unfair clauses. *Id.* at 136.

8. There is a growing literature on using LLMs for compliance tasks, focused on compliance with law. *See, e.g.*, Aniket Kesari, Travis Breaux, Tom Norton, Sarah Santos & Anmol Singhal, *From Legal Text to Tech Specs: Generative AI's Interpretation of Consent in Privacy Law*, 2025 PROC. INT'L CONF. ON A.I. & L. (forthcoming 2025) (on file with arXiv), https://arxiv.org/pdf/2507.04185 [https://perma.cc/Q9PZ-TBJ5]. In principle, little stands in the way of translating legal compliance successes into preference compliance successes, with automated agents predicting the next word(s) of their principals in response to a proposed alteration to terms of service.

9. *See, e.g.*, NetChoice v. Bonta, 770 F. Supp. 3d 1164, 1179 (N.D. Cal. 2025). Notably, NetChoice members include three of the "Magnificent 7" tech firms: Google, Amazon, and Meta. *See About Us*, NETCHOICE, https://netchoice.org/about/#association-members [https://perma.cc/8CMB-H4QE].

privacy erosion monopolize the tools used to flag undesirable contract terms, the result would be a privatization of data protection policy, as public values are occluded by commercial interests.

A second problem is that individual preferences may drift toward actions that are somewhat advantageous individually but fail to account for the fair distribution of economic surplus arising out of the data economy. For example, a banking app user may freely allow the app to track all her activity on other apps, in exchange for a small one-time discount or incentive. But once enough persons have made this choice, banks may have achieved remarkable visibility into their customers' lives, with profit potentials far greater than the small concession received by the customer. This distributional problem raises deep issues regarding digital political economy and the proper scope of data protection regulation. Perhaps certain forms of control over one's contributions to the broader data economy should be inalienable, and consumers who opt in should receive a share of their worth to advertising superstructures.[10]

This essay proceeds in three brief parts. First, Part II addresses the challenges to traditional contracts that may arise if preferences not to read or think become more pronounced, pervasive, and entrenched in the wake of GAI. Next, Part III explains how ACAs may attempt to solve this problem. Finally, Part IV develops and addresses the "NetChoice" and distributional challenges to ACAs.

II. CONTRACT AFTER THE DECLINE OF READING

Kar & Yu emphasize that the legitimacy of a contract derives from a meeting of the minds of the contracting parties.[11] A basic and intuitive premise of modern contract law is the voluntary entry into a quid pro quo where each party exchanges something of value for something else.[12] Lengthy contracts with unexpected terms undermine these principles and thereby weaken contractual legitimacy. Consumers do

10. *See* Frank Pasquale, *Inalienable Due Process in an Age of AI: Limiting the Contractual Creep toward Automated Adjudication*, *in* CONSTITUTIONAL CHALLENGES IN THE ALGORITHMIC SOCIETY (Hans-W. Micklitz, Oreste Pollicino, Amnon Reichman, Andrea Simoncini, Giovanni Sartor & Giovanni De Gregorio eds., 2021) (describing protecting certain consumer rights and interests as inalienable).

11. *See* Kar & Yu, *supra* note 1, at 1137–40.

12. RESTATEMENT (SECOND) OF CONTS. § 71 (A.L.I. 1981) ("(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.").

not read[13] or understand[14] these policies, and agreement is often a condition to accessing web-based services. In addition to faulty formation, privacy policies also do not resemble typical contracts. The *New York Times* has an extensive privacy policy, but the bulk of its text has no contractual purpose and obfuscates the terms waiving privacy rights.[15] The average consumer encountering the Burger King website to purchase a Whopper has no understanding of the lengthy legal jargon hyperlinked to their agreement to use cookies while accessing the website.[16] The presentation of online boilerplate language is often accompanied by "dark patterns" — design practices with a deliberate goal of tricking or coercing the user into agreeing when they otherwise may not.[17] Examples of these tactics include bundling consent to extensive terms, hiding opt-out options, and implementing invasive or permissive default privacy settings.[18] Dark patterns present both formation and appearance abnormalities when compared to contractual norms.

Privacy scholars have consistently pointed out the risks inherent in the general acceptance of online boilerplate's enforceability.[19] When every company is collecting extensive data — along with buying and selling it to each other and third parties — the result is a surveillance network enabled by thousands of these unread pseudo-contracts.[20] Given boilerplate terms' abnormalities in comparison to traditional contract doctrine,[21] commentators have consistently objected to the

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13. *See* Shankar Vedantam, *Do You Read Terms of Service Contracts? Not Many Do, Research Shows*, NPR (Aug. 23, 2016, at 05:06 ET), http://www.npr.org/2016/08/23/491024846/do-you-read-terms-of-servicecontracts-not-many-do-research-shows [https://perma.cc/5HZM-JRAM].

14. *See* Hailey Reissman, *Americans Don't Understand What Companies Can Do with Their Personal Data — and That's a Problem*, UNIV. OF PA., ANNENBERG SCH. FOR COMMC'N (Feb. 7, 2023), https://www.asc.upenn.edu/news-events/news/americans-dont-understand-what-companies-can-do-their-personal-data-and-thats-problem [https://perma.cc/9FQU-WW3U].

15. Kar & Yu, *supra* note 1, at 1143–44.

16. *See id.* at 1152–55.

17. *See* Jennifer King & Adriana Stephan, *Regulating Privacy Dark Patterns in Practice — Drawing Inspiration from California Privacy Rights Act*, 5 GEO. L. TECH. REV. 250, 253–55 (2021).

18. *See id.* at 255–56.

19. *See, e.g.*, James Gibson, *Boilerplate's False Dichotomy*, 106 GEO. L.J. 249, 252–65 (2018) (discussing the issues with boilerplate and its treatment by courts).

20. *See* Kar & Yu, *supra* note 1, at 1162; *see also* FED. TRADE COMM'N, A LOOK BEHIND THE SCREENS: EXAMINING THE DATA PRACTICES OF SOCIAL MEDIA AND VIDEO STREAMING SERVICES 36–38 (2024), https://www.ftc.gov/reports/look-behind-screens-examining-data-practices-social-media-video-streaming-services [https://perma.cc/87J6-T8UX] (finding that many companies collect, share, and sell large amounts of data despite their privacy policies providing only illusory notice of these practices).

21. Natalino Irti, an Italian jurist, described the proliferation of digital boilerplate as exchanges without agreement, sparking a long-time debate among Italian civil law scholars.

general acceptance of their enforceability in court.[22] Kar & Yu frame this acceptance as a "paradigm slip" in contract law that must be corrected.[23] Rather than propose that all boilerplate terms be *per se* unenforceable, they propose applying a framework of "shared meaning analysis" to boilerplate terms.[24] Under their framework, courts would determine whether "disputed text was communicated in a sufficiently cooperative manner to produce a common meaning."[25]

The practical effect of such an approach would be the unenforceability of many clickwrap terms. As a result, companies would need to isolate the contractual portions of their current boilerplate text and present them in a "sufficiently cooperative" way.[26] Given the relative triviality of a transaction to access a website, users could realistically agree to a small set of terms, but with nowhere near the specificity or reach of the usual terms of service.[27] If Kar & Yu's approach were adopted by courts and legislatures, the statutory and common law of privacy would have far more reach, unruffled by the elephantine terms of service that now stomp across America's data protection landscape.

Next, we explore the potential downstream effects if Kar & Yu's admirable prescriptions were adopted by courts (in their interpretation of boilerplate terms) or by legislatures. We anticipate that the weakened enforceability of boilerplate privacy contracts will result in strategic moves and countermoves by parties seeking to protect data privacy and parties seeking to advance data extraction. The following chart in Table 1 limns a potential chain of scenarios — beginning with the status quo — that the rest of this essay will address:

Natalino Irti, *Scambi Senza Accordo*, *in* NORMA E LUOGHI: PROBLEMI DI GEO-DIRITTO 148 (2001). Alberto De Franceschi summarized Irti's views:

> Irti's thesis is that the market is moving increasingly towards (not the contract understood as an agreement between parties, but) the coincidence of unilateral acts. The forms and templates so widespread in the modern commercial world, instead of promoting contracts, determine their decline because they eliminate their essential dialogical component. Therefore, as can be seen, Irti considers dialogue between the parties to be necessary for a contract: the consequence is that exchanges without agreement (forms and templates, exchanges *iactu pecuniae*) invoke another name, but not that of contract. Irti thus refers to the teachings of Perozzi, Bonfante, and Betti, who separated the *contractus* from the *consensus*, and thinks of a type of 'non-consensual' contract.

Email from Alberto De Franceschi, Professor of Priv. L., Univ. of Ferrara, to Frank Pasquale, Professor of L., Cornell L. Sch. (Aug. 9, 2025) (on file with author).

22. *See, e.g.*, MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 143–53 (2012).

23. Kar & Yu, *supra* note 1, at 1136.

24. *Id.* at 1156.

25. *Id.* at 1140.

26. *Id.* at 1146.

27. *See id.* at 1153–54.

Table 1: Scenario Analysis of Potential Reform-Defeating Moves and Responses to Them

Data Subject-Supporting Strategy	**Data Collector-Supporting Strategy**
Scenario 1: Consumer relies on personal knowledge of privacy rights and corporate duties when engaging in data transactions.	Scenario 2: Company withholds product or service unless consumer signs unread, lengthy terms of service.
Scenario 3: Judicial or legislative adoption of Kar & Yu's approach protects consumers from pseudo-contractual terms.	Scenario 4: Companies begin to present formerly obscured terms in clear, plain, and brief language for consumer consent.
Scenario 5: Consumers could (1) read the proposed terms and decide, or (2) delegate that task to ACAs programmed to act on their stated privacy preferences.	Scenario 6: Companies develop ACAs favorable to their own interests and widely disseminate them.
Scenario 7: Consumers recognize ACA biases and reject inadequate ones, and governments regulate deceptive ACAs.	Scenario 8: Companies leverage substantial privacy concessions from small sums of money.
Scenario 9: Governments require that privacy-for-cash deals include (1) up-front payment of sixty-six percent of the data's expected value or (2) royalties equal to sixty-six percent of the value attributed to the data.[28]	Scenario 10: Companies commission valuation experts to minimize the portion of revenues and/or profits attributed to data.

Scenarios 1–4 are contemplated by Kar & Yu within their article. Scenarios 5–10 envision further developments representing a tension between consumer autonomy interests and corporate data interests.

28. ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 246 (2018) (discussing the proper valuation of data labor and suggesting adherence to the assumption that fair pay would conform with a two-thirds share of income distribution).

While such scenarios may seem speculative, they are critical to understanding the potential second- and third-order effects of doctrinal evolution and statutory reform.[29] The critical insight is that data collection, analysis, and use are dynamic fields, where any advance in consumer interests is likely to be blunted and perhaps overwhelmed by the countermoves of the powerful actors hurt by the change.

Having described how Scenarios 1–4 could develop, we next examine why Scenario 5(2) — which demonstrates how consumers themselves may undermine efforts at reform — is far more likely than 5(1). Privacy scholars have long documented that consumers do not read current, prolix privacy policies.[30] Scholars and journalists have also demonstrated that it would be practically impossible for a consumer to do so.[31] What we want to explore is the possibility that, even if small sets of terms now included in very long privacy policies were proposed (in, say, a few paragraphs), consumers would still not want to review them.

In a post-GAI world, it is enormously tempting for persons to outsource their reading and thinking to conversational agents. Even sophisticated scholars who are employed, in part, to read papers are beginning to delegate some of their peer review tasks to computers (even when forbidden to do so).[32] Rather than reading a book and writing a report on it, students are tempted by general purpose chatbots like ChatGPT, Perplexity, and Claude to simply ask for a rundown of

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29. *See generally* Frank Pasquale, *Power and Knowledge in Policy Evaluation: From Managing Budgets to Analyzing Scenarios*, 86 LAW & CONTEMP. PROBS. 39 (2023) (providing an account of the importance of scenario analysis to policy evaluation).

30. *See, e.g.*, Daniel J. Solove, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law*, 104 B.U. L. REV. 593, 605–07, 614–15 (2024) (citing various studies reaching this conclusion); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014) (suggesting that only 0.2 percent of software-purchasers access end-user license agreements for at least one second).

31. *See, e.g.*, Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 J.L. & POL'Y FOR INFO. SOC'Y 543, 563 (2008) (finding that it would take on average forty minutes per day to read privacy policies); Alex Hern, *I Read All the Small Print on the Internet and It Made Me Want to Die*, GUARDIAN (June 15, 2015, at 06:56 ET), https://www.theguardian.com/technology/2015/jun/15/i-read-all-the-small-print-on-the-internet [https://perma.cc/XQ5D-HM4U] (reporting the author spent eight hours skim reading thirty-three documents in one week). At least one policymaker has also adopted this point. *See* Statement of Chair Lina M. Khan Regarding the Report to Congress on Privacy and Security, FTC FILE NO. P065401, at 3 & n. 16 (2021) (citing the impossibility of consumers reading every privacy policy they come across as an example of the "serious shortcomings" of the notice-and-consent framework).

32. *See, e.g.*, Miryam Naddaf, *AI is Transforming Peer Review — and Many Scientists Are Worried*, NATURE (Mar. 27, 2025), https://www.nature.com/articles/d41586-025-00894-7 [https://perma.cc/68VD-YYKM] (reporting increased use of AI in journal editing despite policies against it).

the word count needed.[33] The problem is not simply one of AI producing what are often hallucinatory or inaccurate texts, but also of individuals relying upon it in order to review the documents which their own writings or decisions should be based on.[34] These developments in the attention economy and the growing availability of GAI tools make it more likely that a majority of consumers will still be resistant to parsing shorter privacy terms. Consumers quickly and heuristically decide whether to read privacy policies.[35] If the results of this analysis are leading to reliance on GAI to read documents related to school and employment, it is unlikely that the dry, confusing, non-negotiable language of privacy terms will fare any better.

In an ideal world, AI complements human cognition.[36] As experts in the science of learning are beginning to document, advanced technology can provide "scaffolds" of skill-building, which enable further development of expertise.[37] However, the same technology can also lead to skill-degradation, dependence, alienation, and absence of

33. *See, e.g.*, Johanna Alonso, *How Much Do Students Really Read?*, INSIDE HIGHER ED (Sep. 25, 2024), https://www.insidehighered.com/news/students/academics/2024/09/25/students-turn-ai-do-their-assigned-readings-them [https://perma.cc/Q23L-RL5G] (reporting that college students are relying on AI to do their assigned readings); The Learning Network, *What Students Are Saying About Using A.I. for Schoolwork*, N.Y. TIMES (May 8, 2025), https://www.nytimes.com/2025/05/08/learning/what-students-are-saying-about-using-ai-for-schoolwork.html [https://perma.cc/4FX8-B325] (compiling high schoolers' observations about peer AI usage).

34. *See generally* NAOMI S. BARON, READER BOT: WHAT HAPPENS WHEN AI READS AND WHY IT MATTERS (forthcoming Jan. 2026) (discussing AI's potential to undermine cognitive skills developed through active reading, thus diminishing our ability to understand and interact with the world around us).

35. *See* Heather Daiza, *Wrap Contracts: How They can Work Better for Businesses and Consumers*, 54 CAL. W. L. REV. 201, 212 (2018). *See generally* Gerd Gigerenzer, *Fast and Frugal Heuristics: The Tools of Bounded Rationality*, *in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 62, 62 (Derek J. Koehler & Nigel Harvey eds., 2007) (explaining the reliance on heuristics to make efficient decisions with imperfect information and time limitations).

36. *See generally* NICHOLAS CARR, THE GLASS CAGE: HOW OUR COMPUTERS ARE CHANGING US (2014) (examining the hidden costs of technology and suggesting its potential to enrich the human experience).

37. *See* Yueqiao Jin, Kaixun Yang, Roberto Martinez-Maldonado, Dragan Gašević & Lixiang Yan, Do Students Write Better Post-AI Support? Effects of Generative AI Literacy and Chatbot Interaction Strategies on Multimodal Academic Writing 13 (July 6, 2025) (unpublished manuscript) (on file with arXiv), https://arxiv.org/pdf/2507.04398 [https://perma.cc/A3UT-KC4L] ("in the context of GenAI-assisted multimodal writing, [students] with higher GenAI literacy appear better prepared . . . to produce high-quality, independent academic writing without continual external support."); *see also* Gwo-Jen Hwang, Haoran Xie, Benjamin W. Wah & Dragan Gašević, *Vision, Challenges, Roles and Research Issues of Artificial Intelligence in Education*, 1 COMPUTS. & EDUC. 1, 3–4 (2020) (outlining potential research issues on how AI could be used to tutor and support students).

mind.[38] Reading has declined remarkably over the past three decades.[39] Neil Postman commented on videos replacing texts; now, short-form videos are further supplanting films and television programs.[40] Ted Gioa's account of a rising "dopamine culture" postulates *distraction* as the ultimate endpoint here, a form of thoughtlessness promising less need for engagement than even the least demanding books or movies.[41] A reversion from a literate to a primarily oral culture may be imminent.[42]

We make no moral judgment on these trends here. Alfred North Whitehead once famously declared that "[c]ivilization advances by extending the number of important operations which we can perform without thinking about them."[43] However, a decline in attention and literacy undermines hope of directly informed and empowered consumers in the digital space reading proposed new privacy terms on their own. Of course, in at least one critical context, home purchases and sales, consumers do regularly hire outside help — such as realtors and attorneys — to negotiate a contract on their behalf. But employing experts to represent your interests in a negotiation involves an investment (or a potential waste of resources) orders of magnitude more

38. *See* CARR, *supra* note 36, at 76 (explaining that in solving a logic puzzle, "[p]eople who relied on [software aids] displayed less strategic thinking, made more superfluous moves, and ended up with a weaker conceptual understanding of the assignment"); *see also* Mark Coeckelbergh, *The Tragedy of the Master: Automation, Vulnerability, and Distance*, 17 ETHICS & INFO. TECH. 219, 221 (2015) ("[T]he master [of the automation] becomes a dependent and *vulnerable* master whose vulnerability is transformed in specific ways by the tools used.").

39. *See* NAT'L ENDOWMENT FOR THE ARTS, READING AT RISK: A SURVEY OF LITERARY READING IN AMERICA ix (2004) ("The percentage of adult Americans reading literature has dropped dramatically [between 1982 and 2002]."); *see also* Sunil Iyengar, *Federal Data on Reading for Pleasure: All Signs Show a Slump*, NAT'L ENDOWMENT FOR ARTS (Oct. 3, 2024), https://www.arts.gov/stories/blog/2024/federal-data-reading-pleasure-all-signs-show-slump [https://perma.cc/5FU3-3636] ("[I]n 2022, just 37.6 percent reported reading a novel or short story, compared with 41.8 percent in 2017 and 45.2 percent in 2012."); All Things Considered, *Americans Are Reading Fewer Books for Less Time. People Want to Know Why*, NPR, at 00:33 (Feb. 20, 2025, at 17:50 ET), https://www.npr.org/2025/02/20/nx-s1-5298185/americans-are-reading-fewer-books-for-less-time-people-want-to-know-why [https://perma.cc/FV9N-MZV6] (referring to a Bureau of Labor Statistics survey suggesting that the amount of time Americans spend reading declined steadily over the past twenty years).

40. *See* NEIL POSTMAN, AMUSING OURSELVES TO DEATH: DISCOURSE IN THE AGE OF SHOW BUSINESS 113 (20th Anniversary ed. 2005) ("It has not yet been demonstrated whether a culture can survive if it takes the measure of the world in twenty-two minutes.").

41. *See* Ted Gioia, *The State of the Culture, 2024*, THE HONEST BROKER (Feb. 18, 2024), https://www.honest-broker.com/p/the-state-of-the-culture-2024 [https://perma.cc/47KC-3WQ7] ("The fastest growing sector of the culture economy is *distraction*. Or call it scrolling or swiping or wasting time or whatever you want. But it's not art or entertainment, just ceaseless activity.").

42. *See generally* WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD (1982) (describing the distinction between orality and literacy).

43. ALFRED NORTH WHITEHEAD, AN INTRODUCTION TO MATHEMATICS 61 (1st ed. 1911).

consequential than any single term of a data collection contract.[44] So it is very unlikely that consumers will utilize lawyers, or even less costly experts, to negotiate privacy contracts on their behalf. This leads us to possibility 5(2) above (the rise of ACAs), which is covered in Part III.

III. ENVISIONING AUTOMATED CONSUMER AGENTS AFTER THE END OF PRIVACY PSEUDO-CONTRACTS

Rory Van Loo has extensively explored the role of consumer agents in protecting and promoting consumer interests.[45] Van Loo describes consumer agents as "parties working actively on the consumer's behalf as an intermediary with respect to some other business."[46] There are some important corporate and personal agents already acting on behalf of others. For example, a union may negotiate for its members to secure certain privacy protections at work.[47] The members pay dues for exactly this type of purpose. However, it is much more difficult to imagine most consumers paying a consumer union or other organization to negotiate more advantageous privacy terms. Moreover, almost none of the entities trying to foist terms onto their users are likely to negotiate, even if a would-be customer offered very attractive terms, because platforms draft their terms based on requirements set by regulators and courts rather than the individual preferences of the consumer.[48]

Once trained properly (perhaps by consumers unions), GAI agents could operate like an organization reviewing clickwrap agreements. Consumers have already deployed automated tools to better navigate an increasingly complex and treacherous digital landscape. Van Loo helpfully summarizes some of these tools in his recent article on the topic.[49] Insurance exchanges established pursuant to the Affordable Care Act have featured marketplaces that quickly summarize and organize complex financial information (such as the potential out-of-pocket costs arising under different plans).[50] In the realm of social

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44. However, it may not be as consequential as the sum total effects of all data collection contracts one enters into during one's lifetime.

45. *See generally* Rory Van Loo, Consumer Agents (Mar. 31, 2025) (working paper) (on file with Scholarly Commons at Boston University School of Law), https://scholarship.law.bu.edu/faculty_scholarship/4048/ [https://perma.cc/TAD2-HXEA] (examining the potential advantages of facilitating consumer agents through consumer protection law to address common gaps in current regulatory frameworks).

46. *Id.* at 6.

47. *See* Lukas Hondrich & Anne Mullen, *Implementing Employee Interest Along the Machine Learning Pipeline*, *in* A.I., LAB. & SOC'Y 95, 99 (Aide Ponce del Castillo ed., 2024).

48. *See* Thomas Haley, *Illusory Privacy*, 98 IND. L.J. 75, 117 (discussing how privacy contracts situate consumers as "absentee counterparties," and contractual terms are written by entities for an audience of regulators).

49. Van Loo, *supra* note 45, at 24–27.

50. *Id.* at 40–41.

networking services, Power Ventures "offered an app that would allow users to manage all of their social media accounts in one place," and Gobo offered similar functionality.[51] A software developer interested in reducing Facebook doomscrolling developed an "Unfollow Everything" tool to allow social media users to stop receiving any posts in their feed, so that they could reconstruct it by only choosing to follow a subset of the persons they were connected with.[52] Loyalty program company AwardWallet collated frequent flier miles onto one screen, in part to help consumers strategize miles accumulation.[53] These tools mirror the uptick in delegating to GAI some of the intellectual labor costs of consolidating and analyzing information.

To be sure, both technical and legal obstacles have undermined widespread adoption of such tools.[54] But they are proofs of concept for a more general ideal: that software can assist individuals to better navigate the increasing number of transactions that are taking place online. A user might summarize their views on privacy in a conversation with the chatbot or enter their preferences via pre-programmed options once prompted. Just as the "Five Wishes" form, which provides a short list of a patient's advance directive preferences, has guided persons toward more informed pre-decision-making about end-of-life care,[55] a short interview may inform agentic AI about the broad preferences of its principal. The ACA could then extrapolate from the interview to judge whether its user would accept or reject the proposals made by data-seeking firms.

The combination of AI's data processing capacity and potential for personalization could counteract consumers' reluctance to read privacy policies.[56] Legal reform could accelerate this development. As Van Loo has observed, consumer agents in general need more legal support to become widely adopted and effective.[57] For example, legal requirements that firms allow their customers to delegate access to their accounts to third parties may well be necessary, given many firms'

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51. *Id.* at 26–27.

52. *Id.* at 26; Louis Barclay, *Facebook Banned Me for Life Because I Help People Use It Less*, SLATE (Oct. 7, 2021, at 09:38 ET), https://slate.com/technology/2021/10/facebook-unfollow-everything-cease-desist.html [https://perma.cc/R5KG-NC4X].

53. Van Loo, *supra* note 45, at 26.

54. Currently, a lack of legal protection allows large companies to accuse ACAs of violating the law by their operation, including consumer protection law. *Id.* at 25–26. Additionally, platforms can implement technological barriers that prevent third-party programs from accessing necessary information entirely. *Id.* at 28–29.

55. *See* Ray J. Koenig III & Mackenzie Hyde, *Be Careful What You Wish For: Analyzing the "Five Wishes" Advance Directive*, 97 ILL. B.J. 242, 243 (2009) (acknowledging that Five Wishes has been helpful in promoting dialogue about end-of-life care but cautioning against its use as a total substitute for statutory directives).

56. *See* Christoph Busch, *Consumer Law for AI Agents*, 26 GERMAN L.J. (forthcoming 2025) (manuscript at 11), http://dx.doi.org/10.2139/ssrn.5187056 [https://perma.cc/56J9-ZE4N].

57. Van Loo, *supra* note 45, at 31–35.

hostility toward such access.[58] Without such statutory protections, the resource asymmetries between Big Tech companies and smaller developers of ACAs will give any cease-and-desist letter a powerful chilling effect.[59]

More specific to data protection scenarios, statutes may need to protect consumers who choose not to agree to new data sharing proposed as true contracts. One source of inspiration here could be California privacy law. Under the California Consumer Privacy Act (CCPA), a covered business "shall not discriminate against a consumer because the consumer exercised any of the consumer's rights under this title."[60] Similarly, legislation designed to support effective realization of Kar & Yu's vision of a real meeting of the minds for contract terms could require that firms not cut off access to their services if a consumer fails to agree to requested contractual terms after the business relationship has begun. This is a logical extension of CCPA anti-retaliation provisions, which prohibit a covered firm from denying goods or services in response to a customer's assertion of their rights under the law.[61]

There are additional legal issues presented if ACAs are built to both analyze privacy policies and agree to them on behalf of consumers. The Uniform Electronic Transactions Act ("UETA") and the federal E-SIGN Act provide the current statutory background for electronic transactions. Both the UETA and the E-SIGN Act contemplate automated agents in transactions. The UETA allows for automated transactions[62] performed by an electronic agent.[63] Similarly, the E-SIGN Act allows electronic agents to form binding contracts as long as

58. *See id.* at 25–27 (listing examples of companies utilizing cease-and-desist letters and trademark, contract, and CFAA suits against online consumer agents).

59. *See id.* at 27 ("The prevailing wisdom is that upon receipt of such a letter it is worth pausing all services immediately . . . . [T]o resist such an order 'you'd need to risk your finances, mental health and years of your life to litigate against the Big Tech company . . . . [I]t's completely irrelevant that you're right and they're wrong.'") (footnotes omitted).

60. CAL. BUS. & PROF. CODE § 1798.125(a)(1).

61. *See* CAL. CIV. CODE § 1798.125; Alysa Z. Hutnik, Aaron J. Burstein & Alexander I. Schneider, *The CCPA Non-Discrimination Right, Explained*, KELLEY DRYE (Apr. 29, 2020), https://www.kelleydrye.com/viewpoints/blogs/ad-law-access/the-ccpa-non-discrimination-right-explained [https://perma.cc/K58X-7EVP]. Analogous anti-retaliation protections would be necessary for the same reasons as similar protections for tenants and whistleblowers: an inherent imbalance of power that would otherwise discourage the exercise of statutory rights.

62. UNIF. ELEC. TRANSACTIONS ACT § 2(2) (NAT'L CONF. COMM'RS. ON UNIF. STATE L. 1999) ("'Automated transaction' means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual.").

63. *Id.* § 2(6); *id.* § 14(1) ("A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.").

their actions are attributable to the person being bound.[64] This provides a basis for ACAs to enter into contracts, but does not address potential indemnity for the developers behind electronic agents. When an ACA makes a mistake related to a privacy policy, the above provisions may prevent those mistakes from voiding the agreement. In that case, the consumer may seek indemnity or attempt to hold the developer liable for their loss of privacy. The governing law on rights against AI developers is slowly developing,[65] and this uncertainty could lead to hesitancy in developing and using ACAs.

IV. PREVENTING BIASED AGENTS AND ASYMMETRIC BARGAINS

The question arises, of course, as to who will provide these agents. In the best-case scenario, trusted entities like Consumer Reports ("CR") will be at the forefront.[66] CR leverages both foundation support and a broad-based subscription model to provide unbiased perspectives on the performance of various products and service providers. Privacy advocacy groups may also find an important niche here. These non-profits may be able to convince extant funders to support ACAs to better inform consumers.

However, it would be naïve to assume that such positive influences on the information ecology would be dominant. Consider, for example, the role of search engines. While they started with clearly delineated organic and paid results, the distinction between these forms of content has declined, leaving many dissatisfied with the objectivity and value of the results they obtain.[67] Many more consumers are completely unaware of the ways in which commercial interests have influenced

64. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001(h) (2000) (rejecting ability to rescind contract "solely because its formation, creation, or delivery involved the action of one or more electronic agents so long as the action . . . is legally attributable to the person to be bound.").

65. *See generally* Goli Mahdavi & Amy de La Lama, *US State-by-State AI Legislation Snapshot*, BCLP, https://www.bclplaw.com/en-US/events-insights-news/us-state-by-state-artificial-intelligence-legislation-snapshot.html [https://perma.cc/9JRF-DQV3] (tracking state-by-state legislation about AI, showing only three states with no AI legislation enacted or proposed).

66. Civil society groups have done much to advance consumers' ability to understand and make use of their privacy rights. FRANK PASQUALE, DATA ACCESS AND AI EXPLAINABILITY 54–57 (2025).

67. *See* Molly Loe, *Google Search Sucks, Thanks SEO*, TECH HQ (Jan. 19, 2024), https://techhq.com/news/google-search-optimization-ruins-the-browser/ [https://perma.cc/G7FC-FF9H]; Edwin Wong & Andrew Melnizek, *The Future of the Internet is Likely Smaller Communities, With a Focus on Curated Experiences*, THE VERGE (Feb. 25, 2025, at 10:00 ET), https://www.theverge.com/press-room/617654/internet-community-future-research [https://perma.cc/KHR8-GU3E].

their view of the web.[68] Over time, search engine companies have capitalized on exploiting consumer behavior flaws to push paid results to psychologically advantageous positions on a page.[69] The same patterns of commercial influence are now infiltrating GAI in the form of generative engine optimization, capitalizing on (while slowly eroding) its reputation for unbiased responses.[70] Google and other popular sites selling their prime digital real estate to the highest bidders demonstrate the value of controlling the flow of information. These manipulative superstructures require large swaths of information, the gathering of which is protected in part by click- and browse-wrap privacy policies in the status quo. If privacy policies begin bearing less fruit in terms of data, they may attempt to gather this information by reworking privacy ACAs to serve as data mining tools, as predicted in Scenario 6 above.

Just as search engine optimization has heavily influenced the results that are presented in response to many lucrative queries, there are many methods of promoting apps in both the Google and Apple app stores.[71] To the extent that ACAs operate via such apps, it would be possible for an association of data-seeking firms to promote a substantial number of them as privacy management tools. Large digital firms have already proven nimble at influencing judicial and political outcomes by banding together in trade associations like NetChoice.[72] The same collective action could easily result in slick marketing and

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68. *See* John Finn, *Most People Don't Understand Search Engines, And That's A Big Problem*, SCREENRANT (Jan. 24, 2020, at 18:31 ET), https://screenrant.com/google-search-seo-problems/ [https://perma.cc/9GT9-322M] ("[A] recent survey found only 37% of people had a clear understanding of how Google Search works. In addition, 54% said they placed more trust in the website ranked first in the results than the others.").

69. *See* Raluca Mihaela Ursu, *The Power of Rankings: Quantifying the Effect of Rankings on Online Consumer Search and Purchase Decisions*, 37 MKTG. SCI. 530 (2018) (finding product position in search results affects consumer search behavior); Ashish Agarwal, Kartik Hosanagar & Michael D. Smith, *Location, Location, Location: An Analysis of Profitability of Position in Online Advertising Markets*, 48 J. MKTG. RSCH. 1057, 1058 (2011) (finding that conversion rate increases with higher position).

70. *See* John Hermann, *SEO Is Dead. Say Hello to GEO*, N.Y. MAG. (Aug. 4, 2025), https://nymag.com/intelligencer/article/seo-is-dead-say-hello-to-geo.html [https://perma.cc/R2XG-B7AG] ("[D]ozens of startups have popped up and collectively raised hundreds of billions of dollars around chatbot analytics, optimization, and marketing. Profound, an analytics platform that promises to help clients get 'mentioned' by [chatbots] . . . has raised tens of millions of dollars from major VC firms and counts among its clients major international brands."); Dan Milmo, *AI Tools May Soon Manipulate People's Online Decision-Making, Say Researchers*, THE GUARDIAN (Dec. 29, 2024, at 19:01 ET), https://www.theguardian.com/technology/2024/dec/30/ai-tools-may-soon-manipulate-peoples-online-decision-making-say-researchers [https://perma.cc/FKQ7-NFG9].

71. *See* Lee Wilson, *A Complete Guide to App Store Optimization (ASO)*, SEARCH ENGINE J. (Sep. 30, 2024), https://www.searchenginejournal.com/app-store-optimization-how-to-guide/241967/ [https://perma.cc/7E5G-9YKB].

72. *See, e.g.*, Cecilia Kang, *The Tech Lobbying Group Helping to Broaden the First Amendment's Reach*, N.Y. TIMES (Oct. 7, 2024), https://www.nytimes.com/2024/10/07/technology/netchoice-free-speech-meta-google.html [https://perma.cc/V3HW-8JJM].

promotion of ACAs designed to put the interests of their creators ahead of their ostensible principals. The ACAs themselves could be designed to collect data under the guise of that being necessary to explain privacy terms encountered on the web.[73] Alternatively, the explanations of terms generated by firm-made ACAs could be programmed to downplay the risks of unfavorable terms to the consumer.[74] In combination with existing strategies to promote products via algorithm manipulation, these disloyal ACAs could easily eclipse their pro-consumer counterparts in usage.

There is no easy answer to this problem, but potential responses are represented by Scenario 7 above. Governments could implement licensing requirements for ACAs with approval subject to sufficient proof of anti-bias protections and algorithmic transparency, to prevent the circulation of apps that are not genuinely advancing consumer interests.[75] The European Law Institute has already suggested instituting requirements to disclose conflicts of interest before a consumer agrees to use an ACA.[76] Alternatively, ACAs may be deemed fiduciaries, obliged to advance the interests of the persons utilizing them.[77] Governments may also create or subsidize ACAs in order to advance the public interest. For example, the U.S. Digital Service (USDS) developed DirectFile software to make tax filing more convenient, and a revived USDS could apply its significant technological expertise to aiding consumer protection agencies.[78] The

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73. *Cf.* Meredith Whittaker, *AI Agents Are Coming for Your Privacy, Warns Meredith Whittaker*, THE ECONOMIST (Sep. 9, 2025), https://www.economist.com/by-invitation/2025/09/09/ai-agents-are-coming-for-your-privacy-warns-meredith-whittaker [https://perma.cc/MQS3-L78W] (discussing AI agents' abilities to covertly extract third-party data and contravene competitor firms' guarantees of privacy).

74. *Cf.* Busch, *supra* note 56, at 13 (discussing how AI agents could be utilized to "nudge" consumers towards certain decisions, operating "as a highly paternalistic instrument for restricting freedom of choice").

75. *See generally* Frank Pasquale and Gianclaudio Malgieri, *Licensing High-Risk Artificial Intelligence: Toward Ex Ante Justification for a Disruptive Technology,* 52 COMPUT. L. & SEC. REV. 105899 (2024) (providing a more general account of the importance of licensing high-risk AI).

76. *See* GUIDING PRINCIPLES & MODEL RULES ON DIGIT. ASSISTANTS FOR CONSUMER CONTS. art. 12 (E.L.I. 2025). However, this approach may also suffer from consumers' reluctance to read and limited ability to understand legal disclosures or their implications.

77. *See* Sebastian Benthall & David Shekman, *Designing Fiduciary Artificial Intelligence*, EAAMO '23: PROC. OF 3RD ACM CONF. ON EQUITY & ACCESS ALGORITHMS, MECHANISMS, & OPTIMIZATION art. 10, at 3–5 (2023), https://doi.org/10.1145/3617694.3623230 [https://perma.cc/4UF8-CA4R] (discussing how AI agents could be fiduciaries).

78. *See 10 Years of the U.S. Digital Service: Transforming Government for the Digital Age*, U.S. DIGIT. SERV. (Aug. 13, 2024), https://www.usds.gov/news-and-blog/10-years-of-usds [https://perma.cc/CU8V-L28D]. Jennifer Pahlka helped found the USDS and recently described many ways in which government could aid citizens in the digital realm in a widely acclaimed book. *See generally* JENNIFER PAHLKA, RECODING AMERICA: WHY GOVERNMENT IS FAILING IN THE DIGITAL AGE AND HOW WE CAN DO BETTER (2023) (discussing various cross-agency digital implementation projects from her time leading the USDS and the

bottom line is a sobering one: while civil society may offer important tools to consumers to address privacy rights management, governmental intervention is likely necessary to promote the widespread use of truly useful ACAs.

Scenario 8 above observes another difficult problem arising out of the rise of a "real contract" scenario in consumer data transactions, which centers on classic tensions in the valuation of information. Privacy scholars have observed a "paradox" where consumers express deep concern about their privacy rights but fail to act accordingly.[79] Many consumers are willing to trade their information for relatively small financial benefits, minor conveniences, or slightly improved customer support.[80] Such decisions make sense individually, but collectively they may well sacrifice enormous value unwittingly. Information pertaining to a particular transaction may seem to be of almost no value to the person it pertains to, but once aggregated with that of millions of other persons, it may be part of a database with extraordinary value. This value asymmetry presents important options for firms to bargain for data in ways that occlude its ultimate value, effectively dispossessing data subjects of some claim to the social surplus arising out of their activity. They will ask, for example, whether the consumer would like to give up certain data in exchange for small increases in speed of response, or one-time reductions in cost. A firm could claw back each aspect of a one-sided pseudo-contract for very small discounts of a subscription fee. The result would be spending nominal amounts to convince consumers to once again hand over extensive data, and then selling access to this data trove for millions of dollars a month.

To be sure, there is value creation arising out of such surveillance. The firm effectively observing or gathering the data seems to be doing a great deal of work. However, the data subjects are subject to a version of what social theorist Mark Andrejevic calls "the work of being watched," including the burden of having potentially compromising

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importance of digital expertise in achieving policy goals). Pahlka specifically describes USDS's role in increasing public understanding of Small Business Administration requirements, demonstrating a precedent for advancing more educative and accessible interfaces. *Id.* at 58.

79. *See* Susanne Barth & Menno D.T. de Jong, *The Privacy Paradox — Investigating Discrepancies Between Expressed Privacy Concerns and Actual Online Behavior — A Systematic Literature Review*, 34 TELEMATICS & INFORMATICS 1038, 1039 (2017).

80. *See Survey Shows Consumers Very Willing to Trade Personal Data for Financial Benefits*, PR NEWSWIRE (Aug. 5, 2020, at 08:00 ET), https://www.prnewswire.com/news-releases/survey-shows-consumers-very-willing-to-trade-personal-data-for-financial-benefits-301106196.html [https://perma.cc/6DC9-AXNY] ("Thirty-nine percent like the idea of monetary compensation from a company for sharing their personal data, although 20% say they most value product discounts . . . . Gen Z says they value greater convenience in using services (20%) and more responsive customer service and support (18%) . . . . ").

activities recorded.[81] Risks arise from databases, and surveillance can cause many vulnerabilities.

Whatever the balance of costs and benefits to consumers, the firms that make such large multiples of revenue from paying pittances to data subjects may be characterized as unjustly enriched by the transaction.[82] Therefore, those regulating data transactions should consider imposing certain minimum compensation levels for data collection. As suggested in Scenario 9 above, authorities could require that privacy-for-cash trade-offs include provisions for (1) payments of at least sixty-six percent of the expected value of the data obtained or (2) royalties amounting to sixty-six percent of the value fairly attributed to the data obtained. We propose this percentage as a starting point for inquiry, recognizing full well that the attribution of value is contestable. Nevertheless, this payment structure would still allow data-intensive firms to profit from the value created by their activities, while ensuring that some fair share of that value will return to the data subjects put at risk by their operations.

V. CONCLUSION

Kar & Yu's "The Contractual Death and Rebirth of Privacy" is an important contribution to both expert discourse on and public understanding of data protection policy. Our commentary has engaged with their contribution by developing scenarios that could either advance or impede the ultimate normative vision of their article. We believe this type of scenario analysis is important because, as commendable as certain doctrinal development or statutory reform may be, there will be an army of attorneys paid to work tirelessly to restore the *status quo ante*, if there are sufficient commercial stakes in that past equilibrium. Our discussion of agentization and its discontents aims to forestall such a restoration, or at least to mitigate its worst effects.

To thrive in a digital economy, consumers cannot rely solely on their own ability to understand the implications of data use and transfer, and to control it accordingly. They need some form of mediation. It is quite possible that strong governmental regulation of data collection, analysis, and use is the "first-best" solution here, but current trends in U.S. politics make this exceedingly unlikely at the federal level. We propose ACAs as a second-best response to the complex questions of

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81. Mark Andrejevic, *The Work of Being Watched: Interactive Media and the Exploitation of Self-Disclosure*, 19(2) CRIT. STUD. IN MEDIA COMM. 230, 230 (2002).

82. *In re* Facebook Inc. Internet Tracking Litig., 956 F.3d 589, 600 (9th Cir. 2020) (holding that California law supports claims for unjust enrichment stemming from profits gained by consumer data regardless of whether the consumer planned to sell the data or whether the data's value was reduced). However, to the extent that such transactions are valid contracts with proper disclosure and consent, unjust enrichment claims may be inaccessible. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2 (A.L.I. 2011).

privacy and fairness arising out of the data economy. Ideally, they would amount to a form of automated advocacy in a technical environment, meant to reliably translate privacy preferences into actionable decision-making. If they were cynically manipulated by affected firms, they could exacerbate the very problems we propose they ameliorate. We nevertheless remain cautiously optimistic that they are worth trying, since the status quo is so one-sided and unlikely to improve on its own.