In the online context, users constantly assent to contractual agreements as a condition of using website services, mobile applications, and other products. These privacy policies and terms of service are notoriously opaque, filled with confusing legal terms, and often run into the thousands of words. Yet, much of today’s technological ecosystem is built on this framework, in which consumers frequently consent to contracts without actually reading them and certainly without understanding them.

The prevalence of the “notice and consent” principle is what makes this set of affairs so pervasive – and so frustrating. In order to fairly enter into a relationship with an online service provider or vendor, consumers are given notice of a service provider’s practices (usually via the privacy policy or terms of service), and then consent to that notice (usually by clicking or selecting “I agree”). Policies may be filled with vague terms that a consumer may not understand, and the consent action may be as active as clicking an “I agree” button, or may be as passive as continuing to use the service after being confronted with contractual language. But as commentators have noted, most users never actually read these policies, effectively consenting to contracts that they have not actually comprehended.1 Professor Margaret Jane Radin has observed that this set of social norms points to the difficulty of assuming “voluntariness” in contract formation.2 As a result, some argue that notice and consent may have reduced vitality or importance in the technological age, and may in fact hamper innovation by firms seeking to analyze data sets without specifying in advance the uses or analytical framework (referred to as big data).3

We disagree that notice and consent, as a principle, is sufficiently untenable in the current technology sphere as to be disregarded or undermined. However, it is clear that the traditional theory of “notice and consent” is under stress and needs to be updated or reconceptualized in order to more effectively mediate the

1 Susan E. Gindin, Nobody Reads Your Privacy Policy or Online Contract: Lessons Learned and Questions Raised by the FTC's Action against Sears, 8 N.W. J. TECH. & INTELL. PROP. 1 (2009).
2 Margaret Jane Radin, What Boilerplate Said: A Response to Omri Ben-Shahar (and a Diagnosis), available at http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1208&context=law_econ_current.
3 See, e.g., President's Council of Advisors on Science and Technology, Big Data and Privacy: A Technological Perspective (May 2014), available at http://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_big_data_and_privacy_-_may_2014.pdf.
relationship between consumers and companies. In this position paper, we first analyze why notice and consent is important and worth preserving, and discuss some promising new methods of updating notice and consent, highlighting the strengths and drawbacks of each.

I. The Importance of Notice and Choice

Notice and choice as a principle has been central to contractual understanding, but as discussed above, it has posed challenges to the online context. The Fair Information Practice Principles (FIPPs), in multiple instantiations, have used notice and choice as core principles in promoting responsible data governance regimes.\(^4\) We believe that the FIPPs are a vital organizing framework with continued relevance, even given recent advances in technology and computing power. Notice and choice, therefore, is worth preserving as part of a FIPPs-based model for information governance.

The FTC has also repeatedly used notice and choice – in the context of privacy policies and terms of service – as an element in seeking enforcement actions against companies that violate the FTC Act’s ban on deceptive or unfair acts or practices. Companies that fail to accurately communicate their practices through notice and receive consent for those practices from consumers have been the subject of FTC investigations and enforcement actions.\(^5\) The notice and consent framework helps ensure corporate accountability via the FTC’s regulatory authority and enforcement agenda.

II. Reframing Notice and Choice

As discussed, the notice and choice principle presents a particular challenge for online services. On mobile devices, it is nearly impossible to read a privacy policy or terms of service document, given constrained physical size and display area. For wearable devices and consumer electronics that do not have display screens, there are challenges to actually delivering notice on the device; if companies change their practices, it may difficult to effectively communicate those changes to consumers in a timely manner.

One promising alternative has been “short form” privacy policies. These abbreviated alerts and messages provide individuals with information regarding a company’s practices that are most relevant to use of a service. These notices may include statements regarding whether a mobile application collects location information; with what entities a social network shares user data; and to what digital libraries or assets a service provider seeks access to when a user uses the service. By concisely describing these provisions in advance of a user’s choice to install or sign up for a service, users are more easily able to comprehend relevant practices and to more meaningfully to a service’s terms. Coupled with the longer privacy policy and terms of service documents, short form notices can describe practices that consumers are actually concerned about, and refer to the longer documents for more obscure provisions.

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Iconography has also been suggested as a way to concisely communicate service provisions to a consumer, allowing them to evaluate icons prior to installing or signing up for a service. In the mobile context, iconography is particularly desirable given the limited visual “real estate” on a mobile device. If properly designed and rigorously tested, icons can communicate information more effectively than text. While designing icons effectively is a challenge, there have been some initiatives (including Lookout’s open source mobile privacy policy)\(^6\) that have tested icon sets with users and attempted to develop workable iconography that allow for more effective notice and choice transactions. Some uses of iconography have been demonstrated to be ineffective, however,\(^7\) pointing to the need for careful design and testing before relying upon an icon system.

### III. Just-in-Time Notice and Choice & Notice-and-Choice Lite

There is definitely middle ground between notice and choice for every new use of personal data, however minor, and abandoning notice and choice altogether. For example, the kind of just-in-time notice and choice mechanisms used in Apple’s iOS platform (and elsewhere) provide very timely, succinct notice about an app’s desire to access certain data or gain permissions to do things that the user may find invasive (e.g., push notifications).

Moreover, the upcoming workshop will be a perfect place to talk through other kinds of alternatives. One such alternative may be “Notice-and-Choice Lite,” in which more minor secondary uses of personal data – or secondary uses of what may be particularly non-sensitive personal data – don’t require full-blown notice and consent. The idea being that only when particularly surprising, concerning, and privacy-implicative secondary uses of personal data are made does full notice and consent get triggered. There will need to be careful calibration of this line in the sand, so to speak, so that the balance between minor and major secondary uses (or personal data) is sufficient to not overwhelm users but also make sure that they knowingly participate and understand important changes in the use of their personal data or a business’ practices.

Of course, as simple as it sounds, notice-and-choice lite will need support from other elements of FIPPs to be truly successful: most notably, transparency and accountability. Some users will want to be aware of more minor secondary uses that they may have had explicit choice over in the past. A log or description of uses made where notice and choice were not sought out could help here; for example, “We have begun to examine generic search query terms (queries that match dictionary words, so are less likely to identify an individual), with no connection to user information for the purpose of spotting influenza outbreaks,” could be how one line in such a log might appear. For feedback and accountability, there should be a mechanism where if a user (or a quorum of users) agree that some new secondary use of personal data was not, in their mind, as minor as a service provider may have thought, that data can be removed from that program\(^8\)

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\(^8\) Note that technologies like IBM’s Sensemaking can remove data from production analytical systems and recalculate inferences and other quantities on-the-fly such that removing data rows (observations about single individuals, for example) from a source data set does not mean necessarily starting from scratch. See Jeff Jonas, *IBM InfoSphere Sensemaking* (2012), available at https://www-304.ibm.com/industries/publicsector/fileserve?contentid=235174.
or that use from that point on could be recognized as a major different in business practice that should require actual notice and choice mechanisms.

**IV. Conclusion: The Need to Preserve Notice and Choice for Consumers**

A crucial reason for preserving notice and choice as a core principle for data governance is the importance of empowering the consumer to make affirmative decisions regarding how they use online services and devices. The consumer should have some control over the services and devices they patronize and purchase; to suggest otherwise is declare individual autonomy irrelevant or undervalued. Properly constructed notice and choice models can help to empower individuals to use services and devices responsibly and to have the ability to make affirmative choices, rather than blindly assent to terms without fully understanding them.

Further research and investment are clearly needed on these issues in order to better communicate notice and consent provisions to users. Alternative models are urgently needed, but they must be carefully crafted and comprehensively field-tested in order to ensure that relevant and specific information is communicated to consumers, and that consumers have the opportunity to comprehend and assent to a company’s terms.