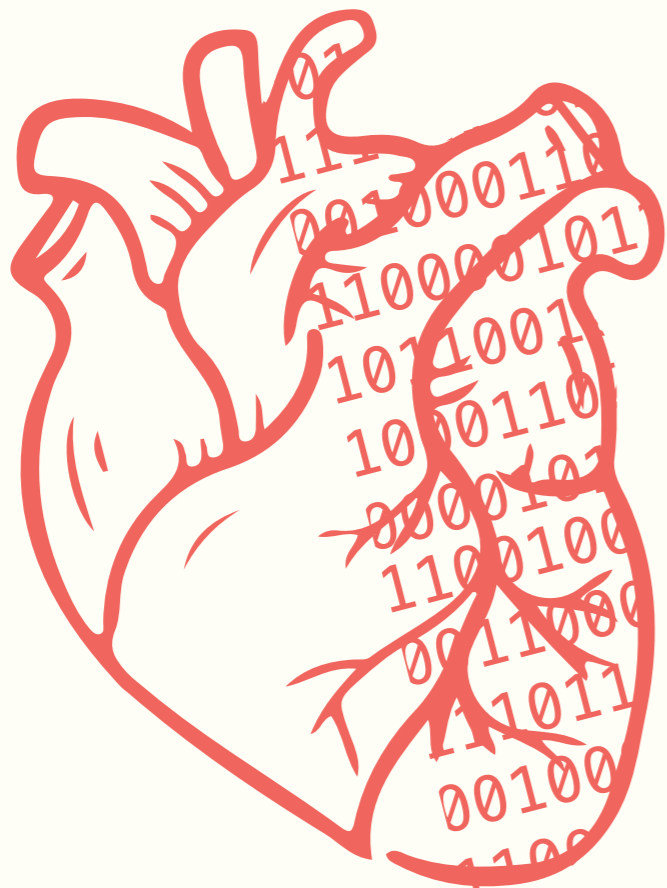


Consent to our Data Bodies lessons from feminist theories to enforce data protection



By Paz Peña and Joana Varon

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lessons from feminist theories to enforce data protection

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Meaningful approaches to consent are in the core of FEMINIST THEORIES and DATA PROTECTION DEBATES.

In both fields, this concept tend to be minimized either by patriarchal approaches to our bodies or neoliberal approaches to our data.

In queer feminist debates, the principle of consent has been closely related to bodily and psychic integrity. That is because, even though it has different meanings, interpretations and cultural implications, informed and active consent, when expressed in situations of power equality, can be seen by some as one of the building blocks to ensure the rights to self determination, autonomy and freedom.

Nevertheless, just as patriarchy tends to push down the standard of consent related to our bodies, minimizing it to solely non-active resistance and turning it into an excuse to legitimate violence; in digital environment, a low standard of unqualified consent is being pushed by tech companies as an excuse to make citizens give away several of their rights. Or, just as bad, some consumers of digital technologies simply ignore such concept and engage on practices of non-consensual dissemination of images, videos or thoughts, using technology to promote gender violence and abuses to our rights to privacy and freedom of expression, among others.

This article departs from the assumption that we can learn from feminist theories and struggles to interpret consent towards building a more meaningful and collective approach to consent when we think about data protection.

Are there situations in our digital interactions where stronger standards or collective views of consent are needed or is this principle simply being used to legitimate abuses? From bodies to screens, we aim to expose practical examples that stress the value and severe limitations of using an individualistic approach to consent as sole requirement for several interactions with our data bodies, as well as craft some possible solutions.

1 the ability to consent for feminisms

For feminisms the concept of consent has been key for women's autonomy and freedoms either socio-political or sexual matters

[Fraisie, 2012, Pérez, 2016].



From writings of the Age of Enlightenment, where the idea of the social contract is consolidated and philosophers - among them Rousseau - describe female consent as an exercise of will (something that was previously exclusively reserved to men), to the consolidation of divorce and the recognition of rape and sexual harassment as a crime, the idea of consent became seen as a core principle.

Nevertheless, the idea of a "capacity to consent" is product of Modernity, a period in which human beings are conceived as autonomous, free and rational individuals, conditions without which there is no possibility for acquiescence.

These assumptions represent a problem for feminism, as the naturalization of this liberal way to conceive consent tend to be posed as some kind of almighty universalizing formula that can resolve everything. As Pérez (2016) asserts, this formula does not take into account historical and sociological structures where consent is exercised:

at a symbolic, social and subjective level, consent is structured from a system of hierarchically organized opposition based on the sexual order and the logics of dominance: it is women's responsibility to establish limits to male attempts to obtain "something" from them.

In other words, for Pérez,

consent has been seen as a feminine verb.

These dimensions of the consent (as an exclusively part of individual freedoms and as a feminine verb) can be seen as naturalized, for example, in legal theories. According to Perez (2016), the theory of consent in criminal matters considers consent as an individual act of free, autonomous and rational human beings. But she sees it as problematic when we reflect upon, for example, sexual consent. For this author, the temporary or total exclusion of certain people from the ability to consent is an important piece of information to suspect that consent is not an inherent capacity to the human condition (for example, you get this ability only with legal age), therefore, we could even question whether if everyone legally capable to consent are actually equally free, autonomous and have the rationale to do so.

Furthermore, another question remains: in this rational, free and individual assumption of consent agents, why the “no” said by women in situations of sexual harassment is, according to Perez (2016), many times ineffective? We could only grasp that the **individualistic liberal framework of consent isolates the act of consent of its symbolic and social dimension and, thus, swipt out the power relationships amongst people**. In this context, Perez considers something fundamental: **it’s not just about consent or not, but fundamentally the possibility of doing so**. In this regard, it seems interesting to recall what Sara Ahmed (2017) says about the intersectional approach towards an impossibility of saying “no”:

“The experience of being subordinate – deemed lower or of a lower rank – could be understood as being deprived of no. To be deprived of no is to be determined by another’s will”.

“Because consent is a function of power. You have to have a modicum of power to give it”, says Brit Marling in an essay on The Atlantic named “Harvey Weinstein and the Economics of Consent” (2017) where she underlines how consent is linked with financial autonomy and economic parity. For her, in the context of Hollywood that can be generally extended to other economic realities, saying “no” for women could imply not only artistic or emotional exile, but also an economic one. Again, here is present the fight against the idea of consent as a free, rational and individual choice. **Consent would be a structural problem that is experienced at an individual level** (Pérez, 2016).

Other important critic to this traditional idea of consent in sexual relationships is the **forced binarism** of

yes / no.

According to Gira Grant (2016), consent is not only given but also is builded from multiple factors as the location, the moment, the emotional state, trust and desire. In fact, for this author, the example of **sexual workers** **could demonstrate how desire and consent are different**, although sometimes confused as the same, for her there are many things that sexual workers do without necessarily want to do it, however they give consent with legitimate reasons.

It is also important **how we express consent**. For feminists as Fraise (2012), there is no consent without the body. In other words, consent has **a relational and communication (verbal and nonverbal) dimension where power relationships matter** (Tinat, 2012, Fraise, 2012). This is very relevant when we discuss "tacit consent" in sexual relationships. In other dimension on how we express consent, Fraise (2012) distinguishes

According to Fraise (2012),

the critical view of consent that is currently claimed by feminist theories is not the consent as a symptom of contemporary individualism; it has a collective approach through the idea of “the ethics of consent”.

In the same sense, Lucia Melgar (2012) asseverates that, in the case of sexual consent, it is not just an individual right, but a collective right of women to say “my body is mine” and from there it claims freedom to all bodies. As Ahmed (2017) states **“for feminism: no is a political labure”. In other words, “if your position is precarious you might not be able to afford no. [...] This is why the less precarious might have a political obligation to say no on behalf of or alongside those who are more precarious”**. Referring Éric Fassin, Fraise (2012) understands that in this feminist view, **consent will not be “liberal” anymore (as a refrain of the free individual), but “radical”, because, as Fassin would call, seeing in a collective act**, it could be function as some sort of consensual exchange of power.

Within the idea of power dynamics and consent, it’s important to talk about the conditions for consent. In this context emerges idea of **“the ethics of consent”, which provides attention to the “conditions” of the practice; the practice adapted to a contextual situation, therefore rejecting universal norms that ignore the diversified conditions of domination** (Fraise, 2012). However, for authors as Fraise, the ethics of consent cannot be a political issue, because it lacks of a collective utopia where we can know what social transformation is at stake and what future it represents. If the political dimension is not present, we would add the evident danger for the “ethics of consent” of being abducted by hegemonic forces.

Much of the above critical perspectives on consent is starting to be present in the discussion of data protection and privacy in the context of digital technologies. Many academics and activists are actually linking influences from feminism and movements as #MeToo or #TimesUp to understand more around the problem of consent in the online world. Before to go further in this regard, it is important to contextualize what is the role of consent in data protection and why, as in feminism, that concept is under heavy scrutiny.

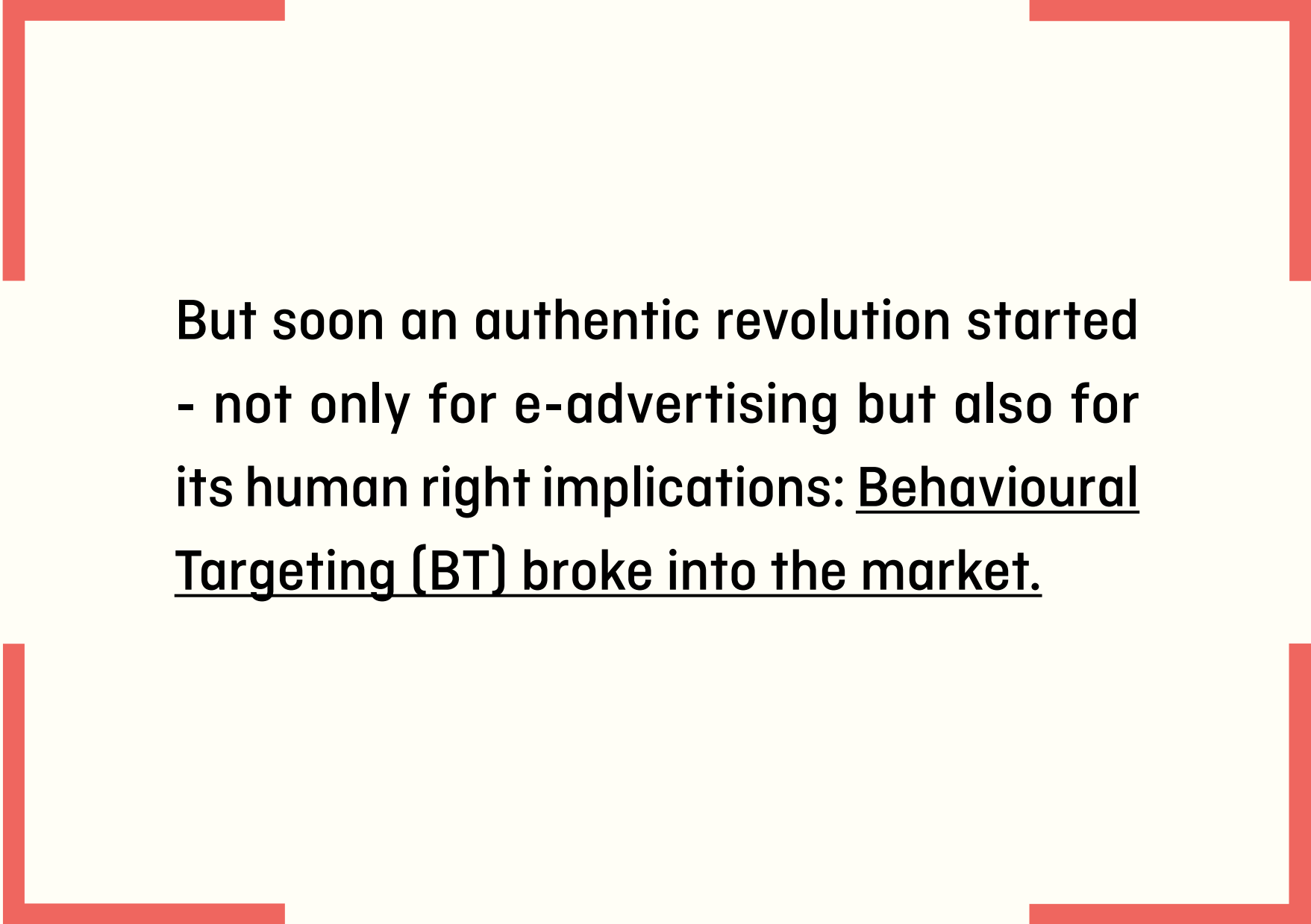
2 agree in a click: it's a consent trap!

a. Data as business model = consent as an unequal power struggle

As Hotaling (2008) acknowledge, in the 90s, companies worldwide began to invest heavily in online advertising, basically due to the growing infrastructure around internet and the evident potential of online advertising to drive up consumer demand for products and services: "Effectively segmenting the online consumer audience into large, discernable blocks, the birth of online advertising permitted corporations to more efficiently target their audience, yielding higher revenues per advertising dollar spent" (p.533).

Soon, as Hotaling (2008) describes, many online advertising companies started to appear and offer more complex services: from "banner" advertisements on websites to the adoption of cookies, first-generation online advertising companies like DoubleClick "sought to match users with appropriate, pertinent advertisements while providing their customers with optimal advertisement visibility" (p.535).





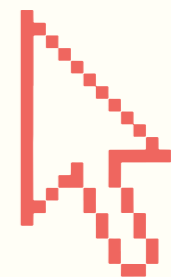
**But soon an authentic revolution started
- not only for e-advertising but also for
its human right implications: Behavioural
Targeting (BT) broke into the market.**

“While cookie technology employed by first-generation advertisement publishers allowed monitoring of general demographic information such as geographic location and computer type, **BT permits e-advertising firms to evaluate consumer attitudes based on the larger whole of an individual user’s Web activity**” (p.536). Big companies as Google, Yahoo or AOL started to acquiring prominent BT firms (Google bought DoubleClick as one of the most paradigmatic cases), supporting and strengthening this business model, elevating **“BT as one of the principal means of transitioning e-commerce away from a subscription-based model revenue towards an advertising-based model”** (p.540).

Digital technologies but also the very business model that sustains it, especially online, have changed how the information flows are govern. Now, in the digital world, we constantly produce new and different types of information, including - as Nissenbaum (2011) assert - “by-products of our activities, including cookies, latencies, clicks, IP addresses, reified social graphs, and browsing histories” (p.33).

Lately, with the mainstream of cases such as the Cambridge Analytica scandal, in which our data and other tools for psychological warfare were strategically used for political marketing, **more and more people have become aware about negative aspects of the usages of our databodies**. Many civil society organizations and academics have denounced the relentless tracking and capture of online behavior, as well as how the differential targeting of ads selected according to interests, dispositions, or propensities was inferred from online behaviors, sometimes reinforcing gender roles and/or promoting discrimination.

Nevertheless, we continue to “consent” to give away our data in a simple click of an “agree” button.



That shows us that, at some level,

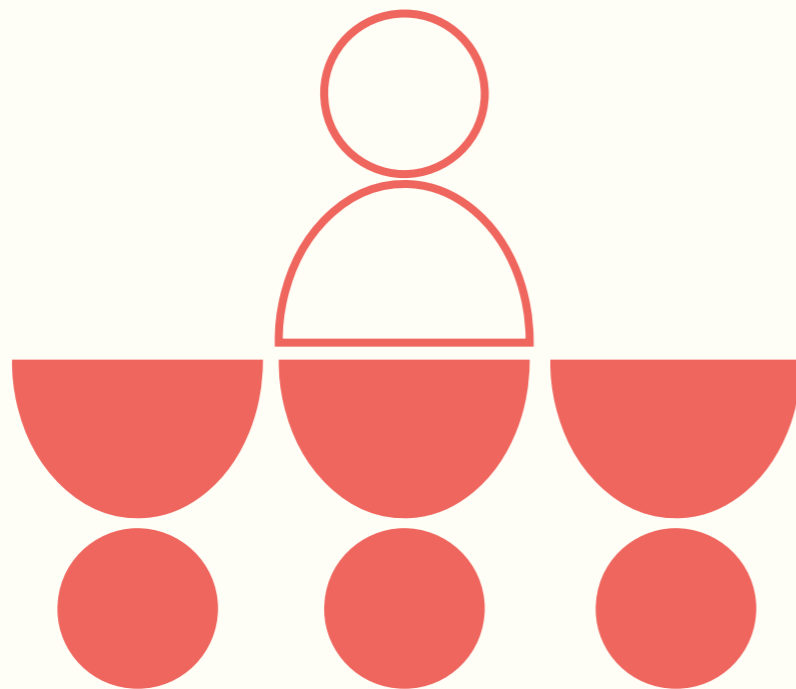
we, as consumers of services from a very few companies that hold the monopoly of the most used communications tools and social media networks, ~~are deprived of “no”~~ when we face the terms and conditions of such platforms. We are forced to take a oversimplified binary option between agree or disagree, while the latest ultimately means opting for some level of ~~digital exclusion~~.

Therefore, even if we do not desire to give away our data bodies, we ended up consenting to do so. **This situation represents structural problem, which, from the feminist perspectives that we mapped before, won't be solved by the individual level.**

You can even be a more tech savvy and privacy aware activist, acquaintance to other privacy friendly tools, therefore with the political obligation to say no alongside those who are more precarious either in terms of awareness or conditions for choice (for instance, in comparison to a citizen with low income wage whose only option to access a chat app is to use Whatsapp through controversial zero rating data plans). **Nevertheless, the structural problem will remain, unless there is a power shift towards allowing the collective possibility of consenting to something else.**

b. Notice and Consent: universal norms to set domination as paradigm

Much of these concerns, especially on privacy and data protection, have been approached from self-regulation lens, being the Federal trade Commission in the United States, one of its main sponsors. For researcher Daniel Solove (2013), under the current approach of privacy regulation - that he would call "privacy self-management", but also called "privacy as control" by other scholars (Cohen, 2018) - policymakers try to provide people with a set of rights to enable them to make decisions about how to manage their data. "The goal of this bundle of rights is to provide people with control over their personal data, and through this control people can decide for themselves how to weigh the costs and benefits of the collection, use, or disclosure of their information" (p.1880).



It is obviously a individual framing of consent, based in the assumption that we are all autonomous, free and rational individuals with capacity to consent, disregarded our possibility of doing so due to unequal power dynamics.

Responding to this self-regulatory call, the same industry has presented initiatives to mitigate privacy concerns, for example, the Network Advertising (Hotaling, 2008). **Two have been the main measures of mitigation in this framework of self regulation: anonymization and transparency & choice (also called notice & consent)** (Barocas and Nissenbaum, 2009, Nissenbaum, 2011). For Barocas and Nissenbaum (2009), this approach has an especially appealing to stakeholders and regulators basically because **notice and consent - as a way to give individual control to users - seems to adequately fit in the popular definition of privacy as a right to control information about oneself.** In the same way, notice and consent seems consistent with the idea of free market, “because personal information may be conceived as part of the price of online exchange, all is deemed well if buyers are informed of a seller’s practices collecting and using personal information and are allowed freely to decide if the price is right” (Nissenbaum, 2011, p.34).

Before to deep dive in all the criticism around the notice and consent model in digital technologies, is important to say that the idea of **anonymization - or to exclude personal identifiable information or sensitive data in data harvesting - has been also under scrutiny.** As Barocas and Nissenbaum (2009) explain, anonymization fails to respond to targeting and tracking concerns over privacy as “a detailed portrait of an anonymous user’s online behavior may enable a level of discrimination to which one would not want to be subjected. Furthermore, it may actually incorporate a sufficient range of information that, when combined, reveals precisely the kind of linchpin information that is supposedly protected by anonymization”.

c. critical adherents and consent agnostics

In general terms, the critical voices on the model of notice and consent could be divided in two general groups: One that we call - borrowing the denomination from Nissenbaum (2011)- “critical adherents”, which are moderate in their critics and focus in improving procedures of the model of consent, more than criticizing the liberal paradigm (in other words, there is a “need for change, but not revolution”);

the other group is much more radical in terms of not believing at all in the model of notice and consent, basically because they don’t believe in the paradigm of privacy as individual control and autonomy.

“critical adherents”

The main critics of this group focuses on the way consent is being offered to citizens. For example, they are critical about the idea of consent as “take it or leave it” and believe in a more granular model of consent.

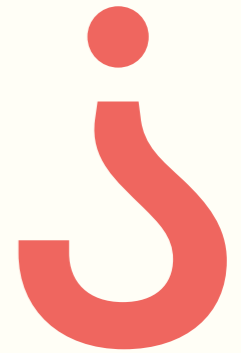
As Solove (2013) states, “the current legal view of consent is incoherent [...] law treats consent as a simple binary [that is, it either exists or it does not]. Consent is far more nuanced, and privacy laws need a new approach that accounts for the nuances without getting too complex to be workable” (p. 1901).

They are also critical about the idea of choice as “opt out” and push for a model of “opt in” (Nissenbaum, 2011 and Hotaling, 2008). Danielle Leong, for example, who is an engineer on GitHub's Community & Safety team, wrote in 2017 an article named “Consensual Software: How to Prioritize User Safety”: “The easiest way to protect user privacy is to give users the information they need to make informed, consensual decisions to use our products and to not assume passive, implicit consent”. Likewise, this group acknowledges that privacy policies are long, legalistic an really hard to digest for a common user; it is also an unrealistic burden for individuals to notice and review

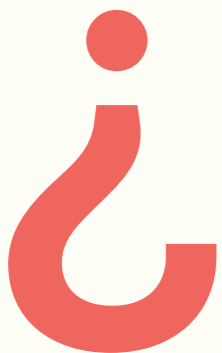
hundreds of online contracts from start to finish. Even more, as Hotaling (2008) underlines, “as the legal theory of “browsewrap” privacy policy relies upon the user obtaining actual notice of the policy’s terms, the difficulty of gaining access to the policy’s Web page acts as a significant barrier to the user’s ability to accept or reject the company’s privacy “offer”” (p.553). In this context, as Nissenbaum states (2011), “they also advocate increasing transparency: for example, stipulating shorter policies that are easier to follow, along the lines of nutritional labels. Suggestions also apply to the content of policies” (p.35).



Nevertheless, if that is the take, there is a long path to be travelled. The study “the duty to read the unreadable”, published in early January, 2019, did a linguistic readability test of around 500 sign-in-wrap contracts from popular websites in the US, among them, those proposed from platforms such as Facebook, Amazon, Uber and Airbnb. According to their analysis, 99% of them are unreadable. That considering only an English speaker audience.



In order to address this particular situation, many civil society initiatives have tried to address the problem of data collection and privacy through the idea of informing consumers about what they are agreeing with. **“Terms of Service; Didn’t Read” (short: ToS;DR) is an example of a project which aims to help fix what they call “biggest lie on the web”: the agreement we give all the time to the terms of services, which almost no one really reads.** For that, they review ToS of popular internet services and produce ratings that can help the user to get informed about its rights. After reading this analysis, an user could decide more clearly to accept or not the conditions imposed by a particular company. Initiatives like this are important and bring clarity, but, according to consent agnostics, and feminist approaches to consent, they do not address the bigger picture.



“consent agnostics”

Although notice and consent procedures became the principal regulatory tool in the U.S. system, setting the framing for most of the services of the big tech companies that we consume, and is still very important in the European legislation, for a wide range of researchers this mechanism and its procedural improvements simply will not work: “Formulations of privacy in the liberty-based language of human rights discourse are both difficult to dispute and operationally meaningless” (Cohen, 2018, p.1).

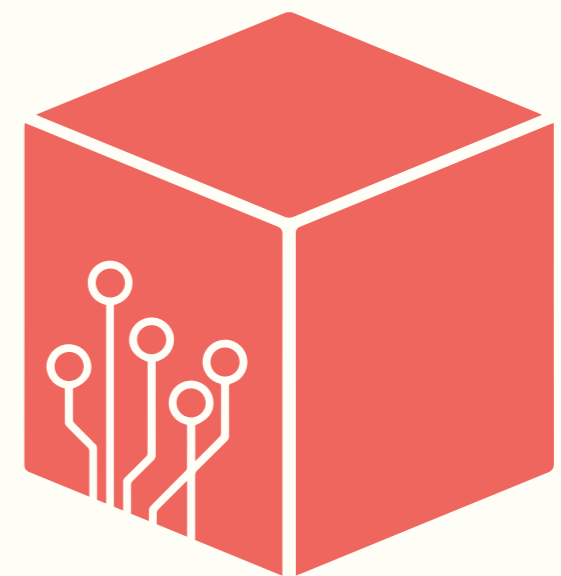
Meaningful consent requires meaningful notice. In reality, information provided about data collection, its processing and use tend to be vague and general. Moreover, according to Cohen (2018), it conflates important distinctions that are helpful to be aware of, such as consumers’ preferences, creating predictive profiles for targeting marketing, and tracking consumers across multiple platforms. As Barocas and Nissenbaum (2014) state:

“We can see why anonymity and consent are attractive: anonymization seems to take data outside the scope of privacy, as it no longer maps onto identifiable subjects, while allowing information subjects to give or withhold consent maps onto the dominant conception of privacy as control over information about oneself. In practice, however, anonymity and consent have proven elusive, as time and again critics have revealed fundamental problems in implementing both.” (p.45)

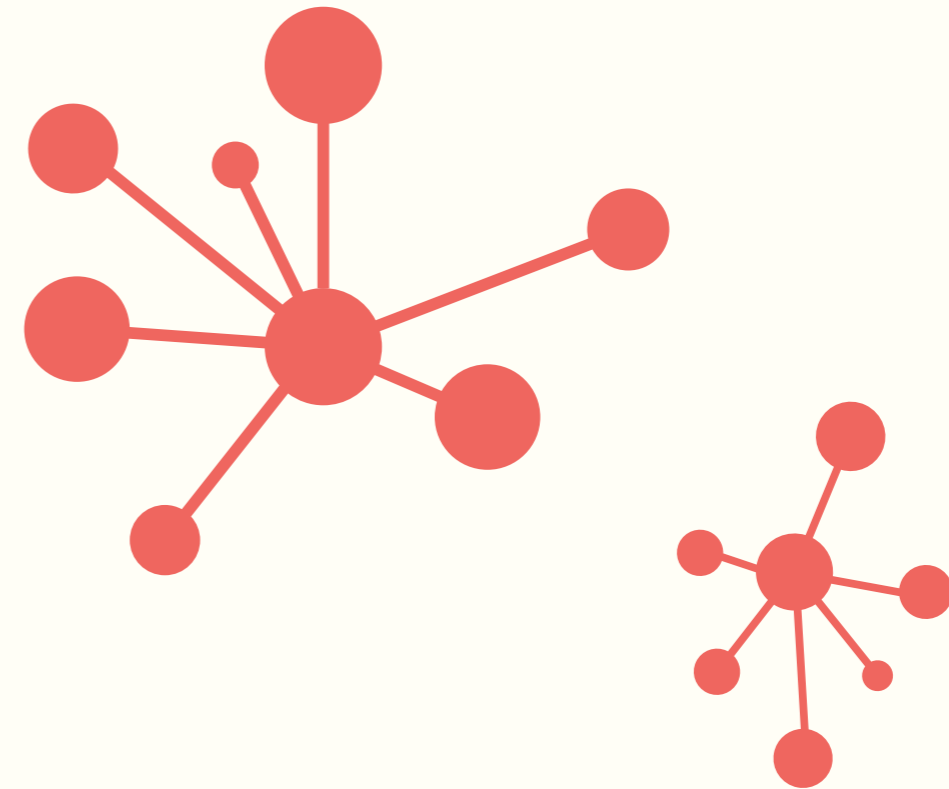
But what it is more worrisome for radical thinkers is that even if companies really want to obtain a transparent and meaningful consent, they just can't do it basically because they don't know where data is going and how it's going to be utilized (Nissenbaum in Berinato, 2018). For authors as Zeynep Tufekci (2018),

companies don't have the ability to inform us about the risks we are consenting to, not necessarily as a matter of bad faith, but because increasingly powerful computational methods as machine learning works as a black box: "Nobody — not even those who have access to the code and data — can tell what piece of data came together with what other piece of data to result in the finding the program made."

This further undermines the notion of informed consent, as we do not know which data results in what privacy consequences". For this same reason, companies and parties collecting and processing data have an incentive to left unspecified the range of potential future applications (Cohen, 2018). In an interview (Berinato, 2018), Nissenbaum asks for quitting the idea of "true" consent and, at the end, stop thinking on consent as a measure of privacy. These two ideas have been long developed in her work. For her, the traditional notion behind "online privacy" suggests that "online" is a distinctive sphere "define by the technological infrastructures and protocols of the Net, for which a single set of privacy rules can, or ought to, be crafted" (2011). This would be wrong because it seems obvious that **our offline and online life is radically interconnected**. But also - and here is a very important second argument - our online/offline life is "radically heterogeneous, comprising multiple social contexts".



This is completely different from the traditional ideal of “online privacy” where protecting personal information is always framed in the context of commercial online transactions. In this sense, Nissenbaum make a call to drop out the simplification of online privacy and adopt a more complex context. She proposes a contextual integrity framework, built from the vision of life online as heterogeneous and thickly integrated with social life; in this way, distinctive qualities of our online life (relations, transactions, relationships, etc.) are influenced by social norms - such as behavior - where there are already norms governing the flow of personal information (sharing, distributing). In an interview with Scott Berinato (2018), Nissenbaum states:



“The right conception of privacy understands the role privacy plays in promoting social values, such as education, justice, liberty, autonomy, and so forth. And finally, privacy promotes contextual or institutional values. [...] It’s time to stop bashing our heads against a brick wall figuring out how to perfect consent mechanism when the productive approach is articulating appropriate constraints on dataflows that distributes costs and benefits fairly and promotes the purposes and values of social domains: health, democracy, education, commerce, friends and family, and so on.”

A very similar approach has Julie E. Cohen. For her, to understand privacy simply as an individual right is a mistake: “The ability to have, maintain, and manage privacy depends heavily on the attributes of one’s social, material, and informational environment” (2012). In this way, privacy is not a thing or an abstract right, but an environmental condition that enables situated subjects to navigate within preexisting cultural and social matrices (Cohen, 2012, 2018).

Thus, for Cohen protecting privacy effectively requires willingness to depart more definitively from subject-centered frameworks in favor of condition-centered frameworks (2018). In this line, as the “right to data protection” is concerned with the conditions under which personal information may be collected, processed, used, and retained, this right cannot rely on notice and consent as a universal legitimating condition for satisfaction of data protection: “consent is a liberty-based construct, but effective data protection is first and foremost a matter of design” (2018).

Following Cohen, Elionor Carmi (2018) states that meanwhile **legal and tech narratives frame online consent as if people - their data self or data bodies - were a defined, static and almost tangible** piece of personal property, our everyday realities as subjects are far away from that: **we present ourselves in a fluid - never fixed** - way depending on the context: "Our data-self is incomplete, inaccurate and consists of multiple messy representations".

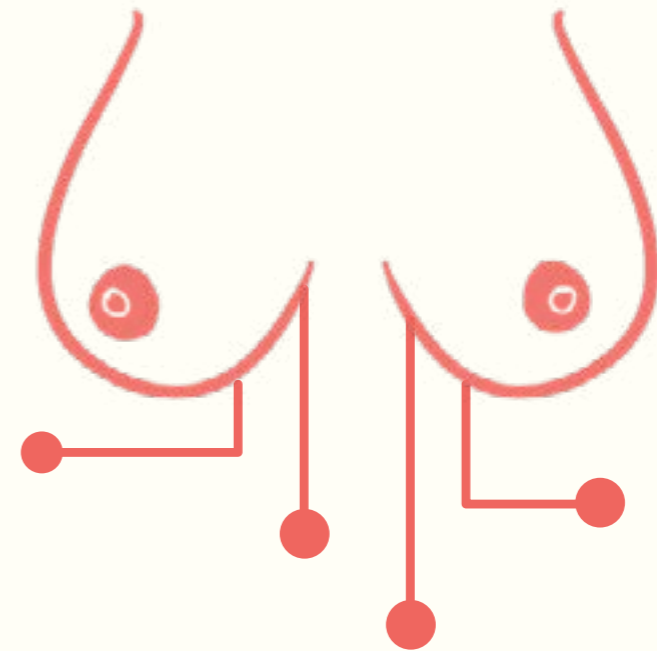
Therefore, as context is crucial to consent, we have to accept its fluid nature,

which is something that the #TimesUp movement has brought into public debate: "Context is crucial to consent, we can change our opinion over time depending on how we feel in any given moment and how we evaluate the situation" (Carmi, 2018).

Moreover, Carmi (2018) compares the Hollywood film industry with the one of online platforms and underlines that both rely on a power structure that exploits people, affecting especially those who are less privileged and marginalised. And exploitation is always a matter of control and subordination. The monopolistic online platforms hold an asymmetrical power relation towards their consumers also by controlling what they can do within a particular system: "In this way, **the concept of control mechanisms, in the shape of the consent banner, is used against people, not for people. The options available are pre-decided, limited and designed in a way that narrows and manages the way people could use and, ultimately, understand the internet**".

3 matrix of qualifiers of consent from body to data

The origin of the word consent comes from latin and means "con" (together) + "sentire" (feel), therefore, by itself, ideally, it expresses a mutual feeling. While listing a series of critics to individual and liberal notion of consent - which disregards a series of power struggles and imbalances that are needed to consider for authentically achieving such a mutual feeling - feminist theories and discourses also tend to list a series of qualifiers to make the understanding of consent meaningful. In this sense, values that are normally included as consent qualifiers reinforce that the act of consent needs to be:



- a) active, meaning actively agreeing with body and words to do so (not only the absence of no);
- b) clear and intelligible; c) informed, fully conscious;
- d) freely given, out of choice and free will;
- e) specific to a situation, therefore f) retractable and g) ongoing...

and we could even consider more qualifiers depending to the context, particularly if taking into account the power dynamics among the subjects who are meant to mutually agree to something.

On the other hand, legislations such as the European General Data Protection Regulation (GDPR) - which is a reference for countries looking for a more privacy protective standard for a data protection regulation than the US standard - while positioning consent just as one of the six bases for processing personal data (the others ones are contract, legal obligations, vital interest of the data subject, public interest and legitimate interest), also presents some qualifiers for consent. In it's article 7, it establishes conditions for consent, noting that it shall be freely given, active (opt-in), specific, informed, unambiguous and easy to withdraw. It also establishes that, where relevant, the data controller shall inform if data is being used for automatic decision making and what are possible the risks of data transfer.

While we can transpose some of the qualifiers or conditions for consent from both debates and see that there are clear overlaps, it is important to note that

while the different conditions for consent in feminist debates represent a series of different actions, the conditions of consent to our data bodies are all expressed in one single act, which is clicking on the agree or disagree button.

The table beside shows that while some of the qualifiers are overlapping in the debates of both fields,

the list of consent qualifiers in the data protection debates falls short, disconsiders some structural challenges and compiles all qualifiers in one single action of clicking in a button.

body and consent qualifiers



data and consent qualifiers



Active	Unambiguous/Affirmative Act
Clear	Intelligible (clear and plain language)
Informed/Knowing/Fully conscious	Informed
Specific	Specific (distinguishable from the other matters)
Freely given/Willing/Out of choice/Comfortable/Sincere	Freely given
Retractable/Reversible	Easy to withdraw (withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal)
Ongoing/Continuous process	_____
Mutual/Comfortable/Sincere	_____
Based on Equal Power/Equally free to act	_____
Considers historic/sociological structures	_____
Adapted to contextual situations	Universal norms _____

Rushly clicking a button to express accordance with all the conditions we listed above in a situation of power imbalance and practically no other option means we are currently deprived of no. Therefore, agree that the current situation of how procedures of consent are signed gives margin for all the critics and arguments of consent agnostics theorists.

THERE IS NO QUICK FIX.

If we are willing to give meaning to consent for data collection and processing, at least we would need to think and design technologies that allow for tangible expression of all these qualifiers listed by feminist debates and, more important, considers that there are no universal norms if there are different conditions and power dynamics among those who consent.

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