

CONSUMERTARIAN DEFAULT RULES

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I

INTRODUCTION

Default rules fill in missing terms in contracts. A great deal of contracts scholarship from recent decades tackles the question of how courts and other legal institutions should pick gap-filler terms. In this Article we advocate an approach that we call “consumertarian default rules.” Rather than trying to identify the missing term that judges or legislators think both parties to a consumer contract would have agreed to in the absence of transaction costs, we propose focusing solely on the missing term that consumers in general expect.

Part II of this Article situates consumertarian default rules among well-known alternative approaches to filling in missing contractual terms, such as majoritarian default rules and penalty default rules. It explains that the consumertarian approach can, in some contexts, address major shortcomings associated with the more familiar alternatives. In the main, we suggest that it is easier for courts or other decision-makers to identify the contents of a consumertarian default rule, and that a consumertarian default rule is a penalty default rule whose contours are relatively easy to determine *ex ante* and that often provides an appropriately titrated penalty to promote information revelation. Part III points to a few instances where courts already use consumertarian default rules, albeit without providing a strong theoretical explanation for that approach. Part III also considers more fully the *ex ante* incentives created by consumertarian default rules.

Part IV reports on the results of an original study undertaken by the authors. In the study, we collect data from a census-weighted sample of American adults on consumer privacy expectations and preferences. Though consumer preferences and expectations reveal heterogeneity with respect to common uses of their data and precautions taken with their data by major technology firms like

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Google, Amazon, Facebook, and 23andMe, there are many domains in which a rather clear consensus exists. After analyzing these data, we argue that defining the content of consumertarian default rules is reasonably straightforward. The study thus functions as a proof of concept for the consumertarian approach.

Part V discusses important variations in the consumertarian default rule approach. We show how introducing friction can enable consumertarian defaults to resemble mandatory rules. We also examine the design choices to be made about whether consumertarian default rules are best tied to consumer expectations or preferences where the two differ, and how they might be used outside of the adversarial legal system. We conclude this Part by discussing the application of the consumertarian approach to questions involving contractual ambiguity, which may present distinct challenges from those associated with contractual silence. In short, we argue that in various important contexts, consumertarian default rules will be superior to alternatives such as majoritarian default rules, mandatory rules, or penalty default rules that impose undesirable terms on both parties.

II

DECIDING ON DEFAULT RULES

To make things concrete, let's begin our analysis with a simple example. Suppose Jane goes out of town and visits her destination airport's Budget Rental Car agency to rent a vehicle. Who can drive the car? The answer to this and any other contract question depends on some combination of the words of the rental agreement and any applicable default and mandatory rules provided by law. We know what Budget's rental terms say because the terms were relevant to the outcome of a recent United States Supreme Court case.¹ In this instance, the question of who can drive the rental car is explicitly addressed by the following language in Budget's rental agreement:

I understand that the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's co-employee (with the renter's permission, while on company business), or a person who appears at the time of the rental and signs an Additional Driver Form. These other drivers must also be at least 25 years old and validly licensed.

PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT. THIS MAY RESULT IN ANY AND ALL COVERAGE OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID AND MY BEING FULLY RESPONSIBLE FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD PARTIES.²

This language seems relatively clear cut, and the use of all-caps highlights Budget's effort to emphasize the importance of limits on who is authorized to drive the vehicle that Jane is renting.

1. *Byrd v. United States*, 138 S. Ct. 1518 (2018).

2. *Id.* at 1524.

The language entitles Budget to cancel the agreement if an unauthorized driver operates the vehicle. Budget presumably emphasizes this language because Budget expects that the person who rents a car is otherwise entitled to authorize any other licensed driver to drive it. This is consistent with property law's general resistance to restraints on alienation—a car renter can lend the car to a friend by default for the same reason that an apartment renter can lend the home to a cat sitter while he is on vacation.³ Absent limits imposed by contracts or statutes, renters can temporarily transfer their interests in property to third parties.

Going beyond that first principle, rental car companies might have reasons to be concerned even when their contract with a renter explicitly limits the renter's right to alienate an interest in the vehicle. Indeed, the case law governing rental cars in at least some jurisdictions suggests as much. Courts have held that even language like that contained in Budget's contract can be inadequate to protect the insurance company under statutory "no-fault" regimes if the person driving the vehicle at the time of a collision did not realize that he was excluded from coverage.⁴

In light of this case law and the contract language, the question of what follows if various people drive the car that Jane is renting turns out to be somewhat complicated. By the terms of the contract, Jane, her spouse, and her co-workers—on company business—can drive the car if they are twenty-five or older and have valid licenses. So can someone who signs an Additional Driver form at the time Jane rents the car from Budget. If Jane authorizes someone else to drive the car, then Budget can deem its rental agreement with Jane voided, but this may not protect Budget against liability if that unauthorized driver is involved in an accident, unless Budget can show that this driver knew he or she lacked Budget's permission to drive the car.

Now suppose a rental agreement provides no explicit terms regarding what happens if the customer authorizes someone else to drive the car, and that driver gets involved in a collision. Can Budget be liable if the non-authorized driver is judgment proof? The standard approach from legal scholarship would be to supply a majoritarian default rule. The terms of this default rule would be determined based on what most customers and rental companies would prefer. In determining what most customers and rental companies prefer, the law usually would focus on what real-world, boundedly rational consumers and firms actually

3. For more on restraints on alienation generally, see Susan-Rose Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

4. See, e.g., *Metro. Prop. & Cas. Ins. Co. v. Hertz*, 981 P.2d 1091, 1092–94 (Colo. 1999) (en banc) (holding that under the Colorado Auto Accident Reparations Act—a no-fault regime—the self-insured car rental company is responsible for providing coverage because the driver was a “permissive user” once given consent by the lessee); *Progressive N. Insur. Co. v. Concord Gen. Mut. Ins. Co.*, 864 A.2d 368, 374–78 (N.H. 2005) (ruling that an insurance company is liable for coverage of an accident even if the driver is not covered if that driver has implied consent to drive the vehicle).

want or expect.⁵ Identifying the rule that both parties would prefer has the significant advantage of minimizing transaction costs—the law is supplying the contractual provision that we think the parties would have agreed to if they had the time and resources to specify their preferences *ex ante*.⁶ The problem is that this process is much easier in theory than it is in practice.

At first blush, identifying the majority preference among consumers should not be especially difficult. It would be relatively straightforward to survey rental car customers and ask who else, besides the person signing the rental car agreement, should be authorized to drive the car.⁷ It seems plausible that customers would agree that when the contract is silent, the renter's spouse gets to drive. Consumers may make this assumption because those who have rented cars before were generally told that their spouses could drive without the need to sign an additional form. This established practice could create a corresponding consumer expectation. Or perhaps customers want and expect their spouses to be able to drive without a separate form because it is very convenient—sometimes one spouse will head to baggage claim and the other will go to the rental car counter to save time. Or occasionally the spouses will arrive on separate flights a day or two apart. Making the later-arriving spouse go to the rental counter as well imposes real transaction costs. Additionally, many couples will want to divide driving duties, especially on longer trips. These normative preferences may engender an expectation—consumers could expect to have a right because they deem the right beneficial.

Here is where things get complicated, though. There is no such thing as a free lunch. Consumers might expect to get particular rights under a contract, but likely only if the cost of respecting those rights is relatively low for the counterparty. For instance, suppose the cost to the rental car company of letting spouses drive automatically is ten dollars per renter per day and suppose that consumers are, on average, willing to pay no more than five dollars per day for that perk. Is it appropriate to say that the consumer expects automatic spousal driving privileges in that scenario? Even if doing so introduces into the contract a priced term that, on balance, the average consumer does not want? It is hard to make progress on this question theoretically, but progress might be made empirically as scholars try to determine what consumers expect in various contractual arrangements. They can also try to determine whether consumers' expectations are driven largely by wishful thinking or by pragmatic judgments about which kinds of rights are likely to come at a cost that most consumers will want to bear.

5. See Yair Listokin, *The Meaning of Contractual Silence: A Field Experiment*, 2 J. LEGAL ANALYSIS 397, 398–99 (2010).

6. See, e.g., *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1027–28 (Del. 2001).

7. See Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, 92 N.Y.U. L. REV. 1753, 1753 (2017) (advocating the use of surveys to determine the meaning of disputed terms in contracts); see also John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791, 1797–98 (2019) (advancing a similar approach); John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 639–40 (2017) (same).

A further complication deals with heterogeneity among consumers. Perhaps the legal system will become more efficient by segmenting consumers into different like-minded groups and giving each individual group the default terms that their members prefer, which may be the opposite of what other groups of consumers prefer or expect.⁸ Answering such questions will impose higher assessment costs on courts. Errors are inevitable. Determining what an individual consumer would have expected at the time of contract formation could be challenging because consumers will often take self-serving positions and judges may have a hard time getting inside their heads. In contrast, determining what the median consumer expects in a survey of disinterested respondents is less complicated.

Let us be clear about argumentative burdens before we continue. Our goal here is not to convince readers that determining what consumers want or expect is trivially easy. On the contrary, the process can be hard. Our goal is instead to point out that it is easier to determine what the consensus expectation is on one side of a consumer transaction than it is to determine accurately the expectations on both sides of that transaction.⁹ Returning to our rental car example, figuring out what the rental car company prefers is cumbersome too. At first glance, the firm might want nobody other than the driver appearing at the rental desk to be an authorized driver. This would reduce the company's exposure if a driver is involved in a collision and would allow rental car companies to vet each potential driver more easily. But not so fast. Women get into fewer accidents than men on average,¹⁰ and it may be that married heterosexual men are more likely than married heterosexual women to appear at the rental counter in instances where both have made the trip. A policy that lets heterosexual wives drive automatically could result in safer drivers doing more of the driving, resulting in fewer collisions involving rental cars.¹¹

Moreover, in a competitive marketplace, companies that offer the convenience of automatic spousal driving privileges may generate more revenue

8. See Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1417 (2014); Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 7 (2013).

9. When courts do this without the benefit of hard data, they are largely relying on intuitions or anecdotes that may be misleading. An example of a court doing so is *Dilullo v. Joseph*, 792 A.2d 819, 822–23 (Conn. 2002), which purports to characterize landlord and tenant expectations in reliance on treatise writers' commentary rather than on any serious survey data.

10. This gender dynamic appears to exist for adolescent drivers, even accounting for young women driving fewer miles than young men. See Alice Mannocci et al., *Male Gender, Age, and Low Income Are Risk Factors for Road Traffic Injuries Among Adolescents: An Umbrella Review of Systematic Reviews and Meta-Analyses*, 27 J. PUB. HEALTH: FROM THEORY TO PRAC. 263, 270 (2019). Interestingly, however, with respect to adult drivers the gender disparity may be tied to differing activity levels by gender. By some estimates men drive twice as much and are involved in twice as many accidents. See Patrick Butler et al., *Sex Divided Accident, Mileage, and Insurance Cost Data Show that Auto Insurers Overcharge Most Women*, 6 J. INSUR. REG. 243, 259–61 (1988).

11. This result is less likely if the aggregate distance that a married couple travels in a rental car will be held constant, however, if accident rates do not vary by gender on a per-mile basis. See Butler et al., *supra* note 10, at 259–61.

and incur fewer costs than companies with more restrictive policies. Married drivers are less likely to be involved in accidents than unmarried drivers.¹² Yet car rental firms do not charge differential rates based on renters' marital status. This choice makes it unwise for rental companies to adopt pricing policies that make the company's cars more attractive to unmarried drivers and less attractive to married drivers. Such a pricing scheme could prompt significant adverse selection that would generate a higher accident rate.

Where there is a widespread customer preference that brings lucrative business in the door, companies usually will satisfy that preference. But companies might still prefer the less consumer-friendly rule if they think they can get away with it, perhaps because of asymmetric information. So figuring out what term the company prefers will depend on the extent to which the company's adoption of a less consumer-friendly term will be publicized to marginal consumers.

Even when a company, for competitive or other reasons, would generally prefer to adopt the same terms preferred by consumers, the law might go astray. Opportunities for judges to craft default rules will usually arise after high-stakes accidents, where the parties are litigating. In those instances, the company might be reluctant to admit that a consumer-friendly default rule is what the company prefers too, because such a concession may result in significant and certain liability in the case of an accident that has already occurred. It is far better for the firm to just adopt the consumer-friendly provision in its boilerplate contracts after the litigated case is resolved. Judges aren't perfect, so they may have a difficult time realizing that a consumer-friendly default term would be preferable to the company in the abstract, the company's insincere protests to the contrary notwithstanding.

Competitive dynamics would make things harder still for judges. If a company has a dominant market position, say in a smaller city, then it might well prefer to keep things simple and adopt quite restrictive rules about who can drive its cars. In those circumstances the company's preferences and their customers' preferences may diverge, with the result being that there is no clear majoritarian default rule. What then? If majoritarian default rules are based on welfare rather than opinion, what is the right standard? Are majoritarian default rules supposed to be Pareto efficient, or will Kaldor-Hicks efficiency suffice?¹³ If the standard requires Pareto efficiency then there should be many situations in which identifying a majoritarian default rule is impossible.

To complicate matters still more in our Budget rental car scenario, it seems entirely plausible that other important relationships besides marriage would

12. David Hemenway & Sara J. Solnick, *Fuzzy Dice, Dream Cars, and Indecent Gestures: Correlates of Driver Behavior?*, 25 ACCID. ANAL. & PREV. 161, 163 tbl. 1 (1993).

13. An allocation is Pareto efficient if any reallocation to make one individual better off makes another worse off, whereas a resource reallocation is Kaldor-Hicks efficient if the winners gain more than the losers lose, such that the former could compensate the latter enough to make everyone better off. See James M. Buchanan, *Positive Economics, Welfare Economics, and Political Economy*, 2 J. L. & ECON. 124, 125 (1959).

generate similar dynamics. Jane might want her fiancé, father, adult daughter, best friend, or nanny to be able to drive the vehicle. It is far from clear in the abstract what most consumers expect in these circumstances, and because consumer preferences are uncertain, company preferences may be too. Consumers generally would appreciate more flexibility about who can drive their rental cars with their permission,¹⁴ but they might actually recognize that as rental companies have less information about who their customers might share a rental car with, adverse selection could occur.¹⁵ The insurer would need to pass along the costs of losses associated with accidents by non-customers to all renters.

An alternative approach to this problem would be to develop a penalty default rule or information-forcing default rule. That approach, introduced by Ayres and Gertner in a now canonical article, would intentionally select an unattractive default term that would be used in instances of contractual silence or ambiguity.¹⁶ The classic formulation of a penalty default rule is a term that is undesirable for both parties—like the Uniform Commercial Code’s provision stating that if the parties do not specify a quantity of a product in their contract the courts will assume the desired quantity is zero.¹⁷ However, Ayres and Gertner also include within the definition of penalty default rules doctrines like *contra proferentem*¹⁸ that are onerous for only one of the parties to a transaction.¹⁹ As Ayres and Gertner note, such penalty default rules generally make sense when they incentivize the more sophisticated party to initiate an interaction that will result in the parties opting out of the penalty default.²⁰ Penalty default rules should rarely penalize consumers, who generally do not read contractual text and often do not know much about substantive contract law.

One of the challenges for a court or legislature in creating a penalty default rule is to identify exactly what the penalty term should be. It is perhaps not too hard to identify defaults that will be unattractive to one or both parties, though in an adversarial system the litigants are not likely keen to supply a court with information about what terms would be genuinely unappealing to both of them. But how severe should the penalty be? If the penalty is determined *ex post*, courts may struggle to identify the penalty that will create optimal incentives going

14. There may be some cases where a consumer does not want a sibling or other relative to drive a rental car but would prefer to not have to refuse a request. This tension among adult siblings is a plot point in the classic Sam Shepard play, *True West*, for example. In those circumstances “blaming the rental company” by pointing to language that voids the agreement could be a welcome restriction from the customer’s perspective. See SAM SHEPARD, *TRUE WEST* act 1, sc. 2.

15. A party with a terrible driving record might encourage a third party to rent a vehicle that the bad driver could then borrow.

16. See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

17. *Id.* at 95–97 (citing U.C.C. § 2-201(1) (1976)).

18. *Contra proferentem* is a doctrine requiring “that, in the interpretation of documents, ambiguities are to be construed unfavorably to the drafter.” *Contra proferentem*, BLACK’S LAW DICTIONARY (11th ed. 2019).

19. See Ayres & Gertner, *supra* note 16, at 105 n. 80.

20. *Id.* at 98–99.

forward. And if the penalty is not precisely specified *ex ante*, how significant will the problems of suboptimal incentives be?

For these reasons it may well be efficient for the law of consumer contracts to decide *ex ante* that the terms of a penalty default rule will be determined based on consumer expectations. Such an approach provides a metric for deciding upon the default that (1) is relatively easy to replicate; (2) might be predictable *ex ante* if the parties anticipate the relevant gaps in a contract; and (3) will consistently provide moderate incentives for sophisticated parties to supply contractual terms in advance. To be sure, there will still be some over- and under-deterrence, but using consumer sentiment, as determined by rigorous surveys, to supply the terms of a penalty default rule will supply a relatively coherent framework for determining the contents of penalty default rules.

III

UNDERSTANDING CONSUMERTARIAN DEFAULT RULES

Consumertarian default rules identify the approach expected by a majority of those similarly situated to the unsophisticated party in transactions with a sophisticated entity.²¹ As we envision them, and as we explain in more depth below, these consumertarian default rules can be crafted either to be easy to opt out of or to be sticky, via frictions introduced by the legal system. The difficulty of altering these consumertarian default rules can move them along a spectrum between impossible-to-waive mandatory rules and easily-waived defaults.²²

A perusal of the case law identifies some contexts in which courts have embraced what appear to be consumertarian default rules. For example, in determining when pension rights vest, the Wisconsin Supreme Court appeared to focus on the expectations of retirees while ignoring the expectations of their former employers.²³ In deciding whether subrogation was permitted against an insured policy holder's uninsured fiancé, whose negligence had caused a fire, the Connecticut Supreme Court honed in on the expectations of the policy holder and fiancé while largely ignoring the expectations of the insurer.²⁴ Indeed, courts construing insurance contracts often focus entirely on the reasonable expectations of the insured, construing any ambiguities in favor of the

21. This idea is mentioned, but not discussed at length, in Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Default Rules*, 33 FLA. ST. U. L. REV. 589, 597–98 (2006).

22. See Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2087–88 (2012).

23. See *Roth v. City of Glendale*, 614 N.W.2d 467, 472–73 (Wis. 2000) (ruling that in the absence of contract language or evidence to the contrary, a vesting presumption applies to retirees' contracted-for health benefits).

24. See *Allstate Ins. Co. v. Palumbo*, 994 A.2d 174, 184–88 (Conn. 2010); *id.* at 280, 290 (Zarella, J., dissenting) (“The majority . . . turns what should be an analysis of the expectations of *all* of the interested parties—the insurer, the insured and the defendant—into a totality of the circumstances test that omits *any* consideration of the insurer's expectations.”).

consumer.²⁵ Some states have even gone so far as to privilege the expectations of insurance consumers over the unambiguous text of the insurance contract, at least where the consumer requested a certain type of coverage and was incorrectly told by an insurance agent that the policy in question would provide that coverage.²⁶

The case for consumertarian default rules is partially based on efficiency arguments, though the focus here will be on assessment costs—the costs for the legal system of reaching the right answer²⁷—rather than the more familiar territory of transaction costs.²⁸ For the reasons mentioned above, an information-constrained judge may have an easier time ascertaining what consumers as a whole expect, rather than determining what companies actually prefer. This is because company preferences will depend on dynamic interactions with consumer sentiment, the competitive environment, and asymmetric information.

More importantly, company perspectives may differ substantially *ex ante* and *ex post*. This can occur when the stakes in litigation are high and when different constituencies within a firm—say, the sales managers versus the customer service managers versus the parts department—have very different preferences and expectations with respect to relevant contingencies. These internal tensions can be resolved by the CEO or General Counsel if conflicting expectations are identified *ex ante*, but a lot of contract litigation involves determinations that either were never made by management before contract execution or were deemed too low-stakes to bother inserting relevant language. Indeed, contractual silence sometimes may be a symptom of strong internal disagreement over what contract terms a firm prefers, with the company lawyers or management electing to finesse the issue by having the contract say nothing about the pertinent contingency. In those instances, reconstructing what the company would have preferred at the time the contract was executed is a tall order for judges.

What's more, the sophisticated party in a consumer transaction, typically the firm, drafts the agreement and is a repeat player who can likely anticipate which scenarios may arise. Failures to clarify ambiguous terms in a contract or to supply explicit terms to deal with a situation are problems for which the firm is almost always the least cost avoider. This is the core insight behind the contract doctrine

25. See, e.g., *Chase v. State Farm Fire & Cas. Co.*, 780 A.2d 1123, 1127 (D.C. 2001) (“[A]mbiguities in an insurance policy are construed against the insurer and in favor of the reasonable expectations of the purchaser of the policy”) (citation and internal quotation marks omitted).

26. See *Nunn v. Mass. Cas. Ins. Co.*, 758 F.3d 109, 114–17 (2d Cir. 2014) (construing Pennsylvania law).

27. See James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 453–57 (1995).

28. To be sure, there is also a transaction costs justification for consumertarian default rules. Where consumer expectations are widely shared, a savvy and attentive consumer can presume that her expectations are the same as most peoples' and bargain accordingly, with newfound knowledge of the most likely resolution of any dispute concerning the import of contractual silence. It should be easier for the typical consumer to identify the common expectation among consumers than it would be for that consumer to identify the term that firms and consumers would collectively prefer or the term that would maximize the parties' joint welfare.

of *contra proferentem*.²⁹ Compelling firms to live with consumers' preferences when the contract is murky or silent incentivizes firms to specify those terms that are salient in the deal beforehand.

Lastly, and relatedly, the consumertarian default rule penalizes the party that has a meaningful opportunity to initiate the conversations that will generate the kind of information that penalty default rules are designed to elicit. Sometimes, as Ayres and Gertner argue, it is valuable for firms and consumers to reveal private information to each other.³⁰ These benefits can be significant for firms and consumers alike, but it is unrealistic to put the onus of initiating these information exchanges on unsophisticated consumers. In a transaction between a firm and a consumer, the firm is much more likely than the consumer to be aware of the relevant default rule than the consumer. Unless the consumer regularly purchases the good or service at issue, she is likely to be ignorant about both the gaps in a contract and how the law fills those gaps. Filling in a missing term with a provision that disadvantages the consumer therefore makes little sense.

To the extent that the consumer-friendly default term is inimical to the firm's interests, the firm will have an incentive to either supply an explicit contractual term that makes the default irrelevant or to initiate the relevant conversation with the consumer. In transactions between a sophisticated firm and an unsophisticated consumer, the penalty default rule that provides an unappealing choice to both parties is typically wasteful overkill.

IV

PRIVACY EXPECTATIONS AND PREFERENCES AS BASES FOR CONSUMERTARIAN DEFAULT RULES

As we have indicated, consumertarian default rules are a type of penalty default rule that may be particularly appealing in contexts where consumers have relatively clear and coherent expectations, and where consumers are much less sophisticated than the firms on the other side of their transactions. This idea raises further questions, however—are consumer expectations reasonably well-defined and coherent? Is there any such thing as a majoritarian consumer expectation that can be gleaned from survey research? Do consumer expectations track more aspirational consumer preferences? We weren't sure, so the two of us designed a survey experiment to help figure out the answer.

In choosing a topic for our experiment, we focused on settings involving consumer privacy and security, a domain that has generated enormous interest of late in legal and policy circles. A further reason why the privacy and security setting is an appealing setting in which to pose these questions has to do with growing pressure to conform U.S. law to the General Data Protection Regulation

29. See Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1202 (2006).

30. Ayres & Gertner, *supra* note 16, at 94, 99.

(GDPR). Some aspects of GDPR foreground consumer expectations in their interactions with data processors. Namely, under Recital 47 of the GDPR, “the reasonable expectations of data subjects based on their relationship with the controller” may create a legal basis for the processing of personal information.³¹ This aspect of European law takes on heightened importance for American audiences because so many U.S. corporations have to deal with GDPR, both because the law is in some ways a template for what some states are doing about consumer privacy, and because there is significant pressure towards harmonization to facilitate trans-Atlantic data flows.

The study we describe here relied on a survey of a census-weighted representative sample of American consumers recruited by the survey research firm Dynata. The sample of 1,955 respondents was matched to U.S. adult census weights for gender, age, race, education, and region.³² These survey respondents were randomly assigned to answer a series of questions about either the level of privacy they expect or the level of privacy they desire. They were also asked to confront some of the tradeoffs associated with life in the modern world, where consumers often trade personal information in exchange for a zero-cost service.

Respondents were asked a series of questions, and we often employed seven-point Likert scales with a “1” representing complete disagreement with a statement and a “7” representing complete agreement with a statement. Thus, mean responses above a “4” indicate that respondents were, on average, likely to agree with a statement. Other questions were administered as binary queries.

We asked questions about how Amazon, Facebook, Google, and 23andMe customers think that those companies use their data, and what they believed their rights to these data were. On the whole, the majority of the respondents had similar answers to these questions. Like previous research, this study reveals that

31. Regulation 2016/679, of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 47.

32. More precisely, the sample included 47% men and 53% women; it was 76% Caucasian, 13% African American, 4.5% Asian American, 14% Latino, and 6% other races. Six percent of the sample lacked high school educations, 30% had only high school diplomas, 30% attended college but did not graduate or earned an associates’ degree, 21% were college graduates, and 13% had graduate or professional degrees. The main regions of the country and age ranges in the sample were proportional to the adult U.S. population. The sample was very close to census-weighted targets across all dimensions, with the exception of those with less than a high school degree. People who hadn’t graduated from high school accounted for 6% of our sample but are approximately 11% of U.S. adults. Sampling poorly-educated Americans online is a persistent challenge, both because they are more likely to lack Internet access and because their levels of literacy will be lower, which can prompt higher rates of attrition and failed attention checks.

Note that these data we collected and report here was also summarized in the Stigler Committee on Digital Platforms, Market Structure and Antitrust Subcommittee Report, July 2019, a white paper that we co-authored. Stigler Committee on Digital Platforms, Market Structure and Antitrust Subcommittee Report, July 2019, available at <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BC/C560B7FEF7A81E1F95C1DDC5225E&hash/=2D23583FF8BCC560B7F/EF7A81E1F95C1DDC5225E> [<https://perma.cc/7FA3-WGU6>].

there was substantial heterogeneity in terms of how consumers expect companies to collect, use, and safeguard personal information.³³ That said, identifying a consensus consumer sentiment is pretty straightforward in key concepts, suggesting that the practical problems associated with identifying consumertarian default rules are manageable.

For example, we asked a series of questions about a smart speaker patterned after the Amazon Echo and its Alexa virtual assistant. Half of respondents were told about a scenario involving the Echo and the other half were told the same facts with respect to a start-up that was competing with Amazon. In general, using a company familiar to consumers versus a fictitious start-up had no significant effects on subjects' responses, so we report responses that collapse the real and fake company vignettes here. In a binary question, a supermajority of respondents (71%) understood that Amazon would store voice commands that a consumer gave to an Echo smart speaker, and among those respondents who understood such storage would occur, the majority stated that this information would be deleted either when a user actively deleted that information (48%) or when Amazon elected to do so (32%). This consensus understanding is consistent with Amazon's policies, which enable deletion by the company or the user. Only 21% thought the information would be automatically deleted by default, either within a year (10%) or after a period longer than a year (11%). Respondents were rather evenly divided on whether the law permitted Amazon to pool information with Fitbit to identify customers who were likely to be training for long-distance races (mean = 3.88 on a 7-point scale; standard deviation (SD) = 1.98). A narrow majority was not inclined to believe the law permits Amazon to sell information it collects via Echo devices to companies, such as music streaming services (mean = 3.57; SD = 2.04). U.S. law presently does not prohibit such transfers of data.

From a review of its privacy policies,³⁴ it appears that Amazon probably does not sell personally identifiable Echo data to third parties like music streaming services. Though the policy is not clear in this respect, there do not appear to be any limits on the transfer of aggregated data, and the policies could be changed by Amazon at any time. It is not evident from Amazon's privacy policies that there are limits on the company's ability to purchase data from a third party like Fitbit, aggregate that database with Amazon's own data, and then identify particular kinds of consumers—for example long-distance runners—on that basis.

Respondents who were asked about Amazon Echo smart speakers were divided on the question of whether they would be willing to pay extra for a

33. See, e.g., Serena Zheng et al., *User Perceptions of Smart Home IoT Privacy*, 2 *PROC. ACM HUMAN-COMPUTER INTERACTIONS* 200:1, 200:1, 200:17 (2018); Aleecia M. McDonald, & Lorrie Faith Cranor, *Beliefs and Behaviors: Internet Users' Understanding of Behavioral Advertising*, Paper presented at 2010 TPRC—43rd Research Conference on Communication, Information and Internet Policy (2010), 1, 27.

34. *Amazon Privacy Notice*, AMAZON (Aug. 29, 2017), <https://www.amazon.com/gp/help/customer/display.html?nodeId=468496> [<https://perma.cc/6SUZ-A2QE>].

version of the Echo that did not share users' personal information with other companies. About 38% of respondents said they were willing to do so, and on average they stated that they would be willing to pay an extra \$58 to \$79 for such a privacy-protective option after being told that the base price for an Echo was about \$150, though the standard deviations were very high. The data suggest a substantial minority of consumers might be willing to pay significantly more for a smart speaker with these features, though even if these contingent valuations are reliable it is possible that Amazon generates more than this amount of revenue from the information supplied by each household with an Echo.

When researchers examine respondents' normative views it becomes evident they view the storage and transfer of data from Amazon Echo devices as distressing. A clear majority believe Amazon should not store such information, and there is a strong consensus among respondents that it would be undesirable for Amazon to share information it collects with a music streaming service (mean = 1.98; SD = 1.66) or merge Echo data with Fitbit data to identify long-distance runners (mean = 2.40; SD = 1.82). Respondents were also much more likely to say that Amazon should delete users' voice commands automatically and within a year of their collection (31% of sample) than was true in the descriptive condition.³⁵

There were similar dynamics at play when respondents were asked about the use of facial recognition data by Facebook and similar social networking platforms. Most respondents understood that Facebook does use facial recognition technology to help it create templates to recognize its users in uploaded photos (mean = 4.58; SD = 2.01), and that it retains these data until a user or Facebook deletes it: 44% said until a user deletes; 36% said until Facebook chooses to delete it, and 21% said it is automatically deleted. Users were divided over whether Facebook is allowed to share facial recognition information with a third party such as a maker of police body cameras, though a narrow majority of the representative sample said the practice was not permitted (mean = 3.66, with "1" indicating "definitely impermissible"; SD = 2.08).³⁶ When asked for a normative judgment about such information-sharing with a body

35. Respondents were either given entirely descriptive or entirely normative questions to reduce confusion, and there was random assignment between the two conditions.

36. By mid-2019, we believe that only Oregon and New Hampshire had laws prohibiting the use of facial recognition technology in police body cameras. See Reis Thebault, *California Could Become the Largest State to Ban Facial Recognition in Body Cameras*, WASH. POST (Sept. 11, 2019), <https://www.washingtonpost.com/technology/2019/09/12/california-could-become-largest-state-ban-facial-recognition-body-cameras/?noredirect=on> [<https://perma.cc/9EKP-XQ3U>]. Interestingly, about six months after we collected these data, California's legislature approved legislation prohibiting the use of facial recognition technology in police body cameras. See Anita Chabria, *California Could Soon Ban Facial Recognition Technology on Police Body Cameras*, L.A. TIMES (Sept. 12, 2019), <https://www.latimes.com/california/story/2019-09-12/facial-recognition-police-body-cameras-california-legislation> [<https://perma.cc/V9KD-PUGQ>] ("Taking one of the toughest stands in the nation against police use of facial recognition technology, California lawmakers on Thursday passed legislation barring police from installing it on body-worn cameras for three years."). If these prohibitions spread to other states, we will be in a strong position to study precisely whether and how changes in the law altered consumer preferences and expectations.

camera firm, respondents were much more hostile (mean = 2.40; SD = 1.95). It appears from Facebook's full data use policy that Facebook does not engage in such third-party transfers of user information, though the prohibition applies to sales and could be altered by Facebook, at least outside of Illinois.³⁷

Respondents were also close to evenly divided on the question of whether Facebook uses information from its facial recognition algorithm to tag users in photos uploaded to the site by other users (mean = 4.40; SD = 2.05)—Facebook does engage in this practice unless a user objects. Again, posing the question to consumers as a normative one about what the law should permit lowered these values by a little over one point (mean = 3.30; SD = 2.07). The divide between consumers' expectations and their preferences is particularly stark when consumers are presented with binary choices. Fully 67% of respondents said that Facebook is allowed to store users' facial information that it connects with its facial recognition technology but only 36% of respondents said that Facebook should be able to store such information.

The same basic pattern played out with respect to Google and its collection and storage of information from Google Maps. A supermajority of respondents (68%) believe that Google retains data about a Google Maps user's geolocation after the completion of the trip, and that this information is retained until either Google (37%) or the user (34%) elects to delete it. A majority of respondents (mean = 4.31; SD = 2.08) believe that Google Maps is permitted to track a user's location whenever the phone is turned on, even when the app is not in use, as long as the user consents to this when first using the app. On the other hand, most people had normative objections to such tracking, with a mean response of 2.44 (SD = 1.95). Respondents were pretty evenly divided over questions involving Google's sharing of geolocation information collected through Google Maps. About half of respondents (mean = 4.13; SD = 2.08) thought Google is legally permitted to share data about individual users' whereabouts with stores and restaurants that wanted to deliver advertisements to customers who were nearby, though again normative views were rather hostile (mean = 2.70; SD = 2.04). A little less than half of respondents thought Google is legally permitted to sell data it collected about individual users to generate the revenue necessary to provide other services to consumers free of charge (mean = 3.74; SD = 2.15). And a clear majority again said Google should not be permitted to engage in such behavior (mean = 2.44; SD = 1.95).

This is not to say that users are hostile to data collection by Google. A significant majority of respondents (mean = 5.16; SD = 1.87) agreed that Google can collect data on where Google Maps users go when using the app, and a narrow majority (mean = 4.11; SD = 2.17) even agreed that it was normatively acceptable for Google to do so. In short, users anticipate that Google will collect

37. Illinois has enacted the Biometric Information Privacy Act., 740 ILL. COMP. STAT. 14 (2008) (imposing restrictions on how private entities collect, keep, and disclose biometric information, like facial recognition data). For discussion of the Act, see *Rosenbach v. Six Flags Entm't Corp.*, 129 N.E.3d 1197 (Ill. 2019).

geolocation data, and many subjects find that behavior acceptable, but they object to the downstream transfer of that information and to its transfer, retention, and collection while the app is not in use.

Genetic testing is another area where consumer privacy concerns can become salient, and testing companies like 23andMe have satisfied their customers' curiosity about their genetic information, while raising privacy alarms. The privacy externalities associated with 23andMe are particularly grave—one member of a family can expose the genetic information of all their relatives to scrutiny by providing a DNA sample, and there is not really anything someone can do to prevent their biological relatives from compromising their genetic information in that way.

The dangers of shared genetic information perhaps explain why the disconnect between what consumers expect and what consumers say 23andMe should be able to do was so large. Fully 74% of respondents said that 23andMe is allowed to store information about their genetics whereas just 23% said the company ought to be allowed to retain that information. Similarly, respondents mostly thought that 23andMe is not allowed to sell customers genetic data to pharmaceutical companies for research purposes (mean = 3.38; SD = 2.04), to consumer goods companies that wanted to deliver targeted ads (mean = 3.23; SD = 2.03) or sell it so as to lower the cost of 23andMe's services and increase the company's profits (mean = 3.23; SD = 1.96). Responses were even harsher when these questions were framed normatively, with mean responses of 2.08 on the research question (SD = 1.72), 1.89 on the targeted ads question (SD = 1.60), and 2.09 on the decreased prices and increased profits question (SD = 1.72).

There are few limits in existing U.S. law concerning who 23andMe can transfer genetic information to, though there are some limits on what health insurers and employers can do with genetic information obtained from 23andMe.³⁸ The data suggest a promising opportunity to use consumertarian default rules to limit such transfers, at least as a starting point.

Another domain where both consumer expectations and consumer preferences are strongly protective of privacy involves the encryption of personal information. In each of the technological contexts we studied, respondents were asked whether firms either are or should be required to use encryption to decrease the chances of a data breach. Respondent sentiment was rather uniform. Consumers said Google is required (mean = 4.85; SD = 1.84) and ought to be required (mean = 5.60; SD = 2.03) to encrypt any data it collects from its users' emails.³⁹ This trend holds true with any Google Maps data stored by the company

38. See Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended at 42 U.S.C. §§ 2000ff–2000ff-11 (2012)).

39. The data reported here reflect the aggregate responses of consumers who were asked about Gmail and a fictitious start-up competing with Gmail called Mail Me. In general, consistent differences did not emerge in terms of what respondents expected or preferred from established companies and start-ups, so we collapsed the categories for the sake of our analysis. In some of our questions, consumers did seem to expect more privacy when an established company like Google held email compared to a new entrant. So the descriptive mean was 5.11 for Gmail and 4.70 for Mail Me. But in other questions—

(descriptive mean = 5.03; SD = 1.94; normative mean = 5.58; SD = 1.95). Consumers had the same basic take on Amazon's encryption of voice commands, with a mean response of 5.78 (SD = 1.68) to what should be required of smart speaker companies and a 4.20 mean response (SD = 1.65) to what is required of them.

The divide between normative and descriptive answers shrunk in the case of Facebook's use of data from its facial recognition algorithms, with a mean of 5.37 (SD = 2.05) in the normative condition and 4.80 (SD = 1.91) in the descriptive condition. When the topic shifted to geolocation information gathered by a phone carrier from cell towers, means were quite similar. The mean response was 5.50 (SD = 1.99) in the normative condition and 4.81 (SD = 1.88) in the descriptive condition. Finally, genetic information held by 23andMe and similar companies generated the most privacy protective means on the descriptive query. Respondents gave a mean response of 4.97 (SD = 1.86) when asked whether 23andMe is required by law to encrypt any genetic data it stores about its customers in order to decrease the chances of a data breach. Subjects' normative responses were also at the high end of the scale (mean = 5.75; SD = 1.88).

A few aspects of the encryption data deserve emphasis. First, in every single instance where subjects were surveyed, the majority sentiment reflected both an expectation of encryption and a stronger preference for encryption. This is striking because, as we see above, consumers are often rather cynical about the level of privacy protections that is required by law. Fascinatingly, however, those expectations of legally-required encryption of data are off-base in this case. Although the fear of class action lawsuits stemming from data breaches or of Federal Trade Commission enforcement actions for unfair and deceptive practices could provide firms with incentives to encrypt sensitive personal information, there is no federal law that broadly requires the encryption of this kind of information. Consumers, then, seem to presuppose a legal requirement that does not really exist, and their reliance on this mistaken assumption may heighten their comfort level with companies' storage and processing of their personal information.

In these circumstances, where consumers broadly expect—and very broadly want—a level of data security that firms are not providing, it is particularly appropriate to employ consumertarian default rules. If firms are not in fact going to encrypt sensitive genetic, geolocation, email, or biometric information, then they ought to be required to make it very clear to consumers that these precautions are not being employed, so that consumers can adjust their priors, alter their behavior, or take their business elsewhere. Boilerplate disclosures buried in terms and conditions or privacy policies are plainly inadequate to correct widespread erroneous consumer expectations.

Facebook versus the start-up entrant Pixelle—the mean expectations were not statistically different (4.87 versus 4.77) and in one question—Verizon Wireless versus the start-up phone company Quantum Wireless—respondents actually had higher encryption expectations of the start-up: 4.75 for Verizon versus 4.87 for Quantum.

We share the data on subjects' expectations and preferences with respect to privacy and security for several reasons. First, the data provide a useful pilot test of the feasibility of using consumer sentiment to fill in default terms in contracts. Consumer preferences tend to be rather protective of privacy, and this is true even when they are asked to consider the tradeoffs that companies make in a market economy, where personal information is treated as a substitute form of currency. Consumer expectations, on the other hand, often recognize that their data may be used in ways with which consumers are uneasy, and in some cases consumers are evenly divided. Where consumer preferences and expectations align, using either one to fill in the default rule is easy enough. In those instances where they diverge, however, choosing which one should inform the content of a default rule requires further thought. We consider that issue in more depth in part V.

Second, the data indicate that in some substantive domains, a reasonably strong consensus exists among consumers. To be sure, there is some heterogeneity, both in terms of what consumers expect and what they prefer. But consumer views are not randomly distributed. Provided the ground rules of which metrics to use are resolved *ex ante* and the choice architecture presented to consumers is not unduly biased, consumer sentiment can provide coherent answers to the question of how defaults should be determined across a variety of privacy and security domains.

Third, the data presented are interesting in their own right. One common critique of rendering lay expectations legally relevant, particularly where privacy is concerned, is that such expectations are circular. At first glance, the law drives lay expectations, which would in turn determine the law. In other work, one of us has pushed back strongly on this idea, presenting data showing general stability in privacy expectations before and after significant changes in relevant law.⁴⁰ For the present study, we lack a baseline level of privacy expectations with these companies and vignettes. So we cannot say right now whether and how expectations have shifted over time. But in several instances, practices that companies are evidently engaged in, like 23andMe's sale of genetic information to pharmaceutical partners,⁴¹ is contrary to the evident expectations of the majority of American adults. If a company claims that consumers know what the company is doing with their data and acquiesce through their inaction, it is making a fundamentally empirical statement that can be confirmed or falsified with the kind of data we have collected.

40. Matthew B. Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747, 1747 (2017).

41. David Pierson & James Paton, *23andMe sells \$300-million stake to GlaxoSmithKline and will help develop drugs*, L.A. TIMES (July 25, 2018) <https://www.latimes.com/business/technology/la-fi-tn-23andme-gsk-20180725-story.html> [<https://perma.cc/ENN4-FXNL>].

V

VARIATIONS AND FLEXIBILITY UNDER A CONSUMERTARIAN APPROACH

One of the potentially appealing aspects of consumertarian default rules, and also a potential pitfall, is that they can be tailored to provide greater or lesser protection to consumers. Here we will discuss major levers that can be used to calibrate the extent of protection under a consumertarian approach, depending on the policy preferences of the relevant policymaker.

The first key fork in the road is the decision to tie consumertarian default rules to consumer preferences or consumer expectations. As the data presented above suggest, this decision will sometimes be outcome-determinative. For example, Americans seem to understand that 23andMe is collecting and storing its customers' genetic information or that Google Maps is allowed to store its users' geolocation information, but they object to both practices. Perhaps the cleanest illustration of this phenomenon arose in a survey question we posed about Verizon Wireless's collection of geolocation information—65% of our respondents said that Verizon is allowed to store information about its customers' locations and 65% of respondents said Verizon should not be allowed to do so. In that situation, what is the consumertarian default?

Using consumer expectations presents a more natural fit with existing law. Many states already use existing consumer expectations to fill gaps in contracts; for example, in insurance disputes.⁴² In our view, however, either expectations or preferences can provide a defensible benchmark for consumertarian defaults. The less principled but perhaps more satisfying approach of averaging the two may be appealing in the alternative.⁴³ In any event, we suspect the normative versus descriptive divide is not limited to privacy and security contexts at all. Rather, there often will be a disconnect between what consumers aspire to receive and what they expect. This divide could well be larger for lower-priced goods and services as opposed to luxury goods and services, where consumers may be paying a premium for firms' "customer is always right" ethos. With respect to privacy preferences, we can be rather confident that choosing consumer expectations as a benchmark for consumertarian default rules will result in relatively producer-friendly defaults. Different jurisdictions might choose one benchmark or the other based on their political values and the preferences of the legislature. The main goal should be to pick a metric and then keep it stable and consistent across different classes of goods and services. That will make the law predictable and easier to enforce.

A second key lever for calibration to policy preferences involves the ease or difficulty of opting out of the consumertarian default. As everyone now

42. See, e.g. *Chase v. State Farm Fire & Cas. Co.*, 780 A.2d 1123, 1127 (D.C. 2001).

43. Obviously, in the Verizon situation, averaging subjects' normative and descriptive responses results in an equal divide over whether storage of geolocation information is permitted. Where opinion is that closely divided consumertarian default rules will not offer much help. Of course, neither will majoritarian default rules, since determining what term consumers would agree to is an essential part of determining the content of a majoritarian default rule as well.

understands, consumers do not read terms of service, nor do they read other dense provisions in contract text.⁴⁴ One worry about shifting from majoritarian default rules to consumertarian default rules is that this shift will prompt firms to invest more heavily in identifying contingencies and contractual ambiguities *ex ante*, and then adding boilerplate language that addresses the situation, often in a way that is more favorable to the firm than to the consumer. Related research by Lauren Willis shows that banks have been quite effective at convincing consumers to waive default protections conferred on them by federal law concerning bank overdraft fees.⁴⁵ She finds that firms can be successful at overcoming sticky defaults when (1) they have a strong motivation to do so; (2) they have opportunities to ask consumers to waive their rights; (3) consumers find the decision-making environment confusing; and (4) consumer preferences are not well-defined. The result could be that consumertarian default rules do not actually help consumers that much and also contribute to the creation of consumer contracts that are even longer than the ones that currently exist. These are legitimate concerns and a potentially perverse side-effect of consumertarian default rules. That said, these dynamic effects are not inevitable.

The reason they are not inevitable has to do with the ability of policymakers to impose friction on opt-outs of the consumertarian default. In the privacy context, for example, firms might be prohibited from bundling together different provisions, and the law might require that any opt-out directed at consumers be clear, conspicuous, and narrow in its scope. Thus, in order to get consumers to waive the default protections, the law might require firms to obtain consent for each and every meaningful deviation from consumer expectations. To take an example from our survey data, 23andMe could be required to get consumer consent to share genetic information with pharmaceutical researchers, a separate consumer consent to share genetic information with behavioral marketers, and still another separate consent if the company wanted to transfer the information to law enforcement for the creation of a DNA database.

Asking consumers to waive particular consumertarian default rights means imposing on customers' time. With anti-bundling provisions patterned after the kinds of single subject voting rules that exist in states that have referenda and initiatives,⁴⁶ the law could prevent companies from getting consumers to waive rights they value by pairing such waivers with access to goods and services that

44. See, e.g., Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 1 (2014) (“[O]nly one or two of every 1,000 retail software shoppers access the license agreement”); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 445–454 (2002) (arguing that “rational” market failures, social forces, and cognitive factors may all unite to limit consumers’ incentive to read boilerplate contracts).

45. See Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1192–1201 (2013) (arguing that banks use tactics playing on consumers’ fear of change, use language that appears mandatory, and provide incentives to making an immediate decision without further thought to induce consumers to waive these default protections).

46. See Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 687 (2010).

consumers value more. The law can also regard efforts to secure consent via user interfaces that employ dark patterns and other manipulative techniques as inadequate to secure valid waivers of consumer rights protected by default.⁴⁷ Under a stricter approach, waivers of consumertarian default rules would have to meet the standard that prevails in American courts where key rights are at stake—there must be a knowing and voluntary waiver of a right. Rituals that some courts have deemed sufficient to create a contract—for example presenting consumers with an avalanche of complicated text that the firm knows nearly no consumers will read—would not satisfy this heightened standard.

With such friction added to the system, consumertarian default rules will become stickier, and in some cases they could begin to resemble mandatory rules. Firms might not want to initiate those kinds of conversations very often, and they will not want to do that with respect to low-stakes issues. Rather, they will of necessity pick their battles. Asking consumers to waive rights would squander some goodwill that firms have accumulated with consumers and would risk losing customers. The benefits of making contracts customizable will be greater when consumer sentiment is more heterogeneous.⁴⁸

Moreover, in cases where personal data is concerned, contractual silence will no longer benefit firms if a company is using that personal data in ways that counter consumer expectations and preferences. Rather, such silence will become an obstacle that firms need to overcome if the benefits of obtaining meaningful customer consent are high enough. Some firms will decide that the process of informing their customers of what they want to do and why they want to do it will spook enough of their customers away from using their good or service to render it unwise to seek permission to waive a default. Requests that would reveal unsavory or controversial data practices may bring unwelcome regulatory scrutiny as well.

47. See Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 1 (Univ. of Chi. Law Sch. Pub. Law, Working Paper No. 719, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3431205 [<https://perma.cc/L48A-YTDK>] (“Dark patterns are user interfaces whose designers knowingly confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions [by] exploit[ing] cognitive biases and prompt[ing] online consumers to purchase goods and services that they do not want, or . . . reveal[ing] personal information they would prefer not to disclose.”).

48. This discussion may raise in the minds of many readers the following question: Why not go all the way towards mandatory consumertarian rules? Such an approach offers some of the virtues of consumertarian defaults but would also prevent firms from exploiting the tendency of consumers to not read contractual boilerplate or the text of waivers. There are and should be a role for mandatory rules, but the domain where default rules are more appropriate is important too. For instance, suppose a company is using a novel business model that holds significant promise but flies in the face of existing consumer expectations. A mandatory rule would suffocate the business model in the crib. A consumertarian default rule would place hurdles in the path of a company seeking to push the envelope, but not in a way that precludes them from trying something new and potentially beneficial. The key takeaway is that consumer expectations do shift over time, sometimes in response to company practices, and using default rules rather than mandatory rules creates a space for innovation that, at least in some contexts, can improve the welfare of both consumers and shareholders. Mandatory rules that are tied to consumer sentiment will be appropriate in some contexts, especially where consumer expectations are homogenous and intense, but their tendency towards ossification is an important downside.

Another important issue concerning the implementation of default rules concerns institutional design and comparative institutional competency. When a consumertarian default rule is implemented as part of adjudication over a missing contractual term, determining the contents of the rule will fall upon the courts. In making these decisions, courts will be dependent on their assessments of the evidence offered by expert witnesses, typically psychologists, business, or legal scholars who have developed rigorous survey instruments to identify the existence of a consensus consumer expectation or preference. The adversarial process is obviously imperfect, and there will be some inevitable motivated reasoning on the part of experts. The aforementioned divide between consumers' preferences and expectations is one lever that experts can manipulate to produce results that, at the margins, will be better for their clients. Another lever would be subtle shifts in language that frame queries in ways that are more likely to generate the desired results. None of these problems would be unique to the consumertarian default rule context—similar problems arise in trademark litigation, for example, and those problems are real but manageable.⁴⁹ Judges deciding how to resolve these disputes and weigh this evidence would not be reinventing the wheel.

Dueling experts called by litigants need not be the only model here, though. Identifying consensus consumer expectations and preferences is a natural job for administrative agencies like the Federal Trade Commission, and legislatures also have the resources and expertise to develop reliable data about the contents of consumertarian defaults. Organizations like the American Law Institute, individual academic researchers, and consumer-oriented nonprofits could play important roles in collecting and vetting these data as well. Moreover, firms themselves will have incentives to collect such data *ex ante* so they are better able to predict the unwritten terms of their contracts with customers or employees. Some firms may decide that it is appropriate to disclose their survey results publicly. Courts might give more credence to data that are collected by firms before a particular dispute arose and that was publicly disclosed and critiqued before the precise stakes of a controversy became clear.

A final variation on consumertarian default rules extends it beyond the realm of contractual silence, using it to resolve cases of contractual ambiguity, which is the primary focus of the authors contributing to this symposium. The easiest case for extending the approach arises in instances of intentional ambiguity. Sometimes parties to a contract recognize that they have differing preferences with respect to a relevant term, and they worry that hammering out an explicit agreement will scuttle the deal, so they adopt an intentionally ambiguous term that finesses the conflict. The parties kick the can down the road so it can be resolved by the parties at a later date or by a court if necessary. This form of

49. See Ben-Shahar & Strahilevitz, *supra* note 7, at 1780–82 (highlighting how courts can conquer the challenge of policing biases in survey data resulting from asymmetric information: courts could rely on each party to scrutinize survey results and highlight defects, threaten to disregard “tainted” surveys to induce competent ones, or appoint experts to evaluate such surveys).

ambiguity is analytically identical to contractual silence. In both settings there is no meeting of the minds, and the courts can justifiably determine the missing term based on default rules of some sort.

Instances of accidental ambiguity are distinct, though here too the consumertarian approach can be useful. In a situation involving accidental ambiguity, the parties did think they were addressing a contingency in the text of the contract, but they employed language that was not up to the task—perhaps because of bad lawyering by the drafters or an unanticipated scenario that falls within the spirit of the parties' understanding but not the language they employed. Alternatively, the parties might have had competing interpretations of the same text, commonly with each party believing that the language embodied a resolution that was more favorable to its side.

*Storybook Homes Inc. v. Carlson*⁵⁰ is a plausible example of this kind of dispute where both parties think the contractual language favors them. In an agreement between an employer and employee, both sides believed they had agreed upon language that served their economic interests, with the employer believing that a contingent bonus would be small and the employees believing it would be large.⁵¹ The court had to decide whose interpretation of the text was plausible. A jury sided with the employees, but the trial and appellate courts invalidated the jury verdicts as a matter of law.⁵²

It turns out that when researchers, including one of us, ran an experiment with the language employed in *Storybook Homes* by a large number of lay respondents, by a wide margin they sided with the employees, just as the jury did.⁵³ But when the researchers tweaked the language to reduce the ambiguity of the bonus clause in a way that supported the employers' interpretation, lay respondents swung substantially in the employers' favor.⁵⁴

Cases like *Storybook Homes* that involve purportedly ambiguous language lend themselves to a slightly varied consumertarian approach. In cases involving ambiguous language in contracts between sophisticated and unsophisticated entities, the consumertarian approach would survey only lay respondents about what the contractual text means, ignoring the views of sophisticated respondents, and adopt the meaning preferred by the majority of consumers where a consensus emerges. In cases where lay respondents effectively split over the meaning of the text, the consumertarian approach would adopt the interpretation that substantively favors the consumers, under the rationale of *contra proferentem*. By contrast, sophisticated signatories to a contract would prevail where lay respondents prefer their interpretation of disputed text by a reasonably wide margin, such as a sixty-to-forty percent consensus. The existing research suggests

50. 312 N.E.2d 27 (Ill. App. Ct. 1974).

51. For further discussion of *Storybook Homes*, see Ben-Shahar & Strahilevitz, *supra* note 7, at 1788–92.

52. *Storybook Homes*, 312 N.E.2d at 28–30.

53. Ben-Shahar & Strahilevitz, *supra* note 7, at 1791.

54. *Id.*

that lay respondents may have a slight tendency to favor interpretations that benefit the little guy but that for most respondents these substantive preferences are swamped by reasonably clear contractual language.⁵⁵ So the choice to rely exclusively on the interpretations of non-drafters and to require firms to establish that at least a small supermajority of lay respondents embrace their preferred interpretation of the contractual text has the same substantive skew as consumertarian default rules that would resolve instances of contractual silence.

VI

CONCLUSION

What we call consumertarian default rules are varieties of penalty default rules that fill in missing terms of a contract based on the expectations of consumers writ large. Consumertarian default rules can cut the assessment costs for courts to identify gap-filler terms roughly in half, by directing them to ignore the expectations or preferences of the sophisticated party that typically drafts an agreement. Our Article presents a normative case for consumertarian default rules as well as empirical data about the content of consumertarian defaults in various privacy and data security domains. It turns out that in key contexts, consumers overestimate the extent to which the legal system protects their interests in privacy and security, and they may be trusting third parties with their data on the basis of those mistaken assumptions. Contract law might act, through consumertarian default rules, to give them the benefit of the bargain they suppose they are striking.

Our Article also analyzes several key variations on the consumertarian theme, including (1) using consumer preferences rather than expectations to define the content of default terms; (2) adding friction to opt-outs in order to make consumer expectations or preferences a much stickier basis for consumer contracts; (3) the role of legislatures and agencies in developing consumertarian default rules; and (4) using the consumertarian approach to address instances of ambiguous contract language as well as instances where the contract is silent. We expect that consumertarian default rules will play an important role in supplementing existing tools like majoritarian default rules, mandatory rules, and dual-sided penalty default rules.

55. *Id.* at 1790–92, 1795–97.