

# Algorithmic Regulation and Personalized Law

Busch / De Franceschi

2021

ISBN 978-3-406-74391-7

C.H.BECK

of persons on the basis of generalized, stereotypical descriptions as commonly found in the current legal system.<sup>9</sup> Granular law will, for instance, allow for the possibility of addressing not all “car-drivers”, or “husbands”, or “wives”, but rather each and every single member of any legally relevant social subgroup without referring to general and stereotyping attributes. This claim seems plausible at first glance given the promise that Big-Data-driven, algorithmic search procedures already provide the technical tools for singling out each and every individual for legal purposes according to legally relevant behavior and personality traits. In this vein, it seems obvious that the “one-fits-all” solutions or coarse-grained, stereotyped distinctions made by the current legal system to identify legally relevant groups of addressees will ultimately be rendered obsolete by granular, much more precise structures of legal regulation. From this angle, the optimal state of the law seems to be one where the granular ideal of specific rules for each and every person and situation comes as close to realization as possible.

At a closer look, however, the linear correlation implied by this argument – the 6 more personalized the law, the better – is not necessarily true. One straightforward way to challenge it is on economic grounds. It can and has actually been successfully shown that more granularization does not necessarily imply more efficiency in rule-following and adjudication. In fact, the opposite can be true. One example is the personalization of the negligence standard in tort law. A convincing case can be made that personalization of negligence law will only lead to mixed results depending on different dimensions of personal negligence such as individual skill and individual risk. It is even likely that a general negligence standard with only limited pockets of personalization very close to the actual state of the law is the most efficient solution for an actual liability regime.<sup>10</sup>

Moreover, this critique implies an even more fundamental challenge to the possibility 7 and fruitfulness of individually granularized law. As the example of the negligence standard shows, it has to be questioned whether individual personality traits can and should in fact be the dominant and centrally relevant feature for the purpose of legal regulation. In many cases, tailoring a personal legal rule for each and every single individual is neither necessary nor possible for the goal of efficient incentivisation or regulation, because the structure of the social pattern relevant for the pertinent legal design does not require any distinction between single individuals. Put differently, there are relevant cases where the additional information to be achieved by distinguishing between individuals is irrelevant for the purposes of the law. It follows that the movement towards granular law will likely not be the end of typification as a means of legal regulation, i.e., the need to distinguish between generally defined social groups as opposed to individual subjects as the addressees of legal rules.

One way to put this is as an insight about the structure of social knowledge. It is a 8 fallacy to assume that the more individualized the members of modern societies regard themselves, the more diverse they also become and that this need be reflected by the law. In fact, the opposite is much more likely and should be considered: Human beings are not significantly different in relevant aspects regarding the effectiveness of legal or social control. Even the most individualized modern societies show surprising patterns

---

<sup>9</sup> For this expectation, see Porat/Strahilevitz, *supra* (fn. 4); Ben-Shahar/Porat, *supra* (fn. 4).

<sup>10</sup> This conclusion is reached by Ben-Shahar/Porat, *supra* (fn. 4). For the efficiency of the general negligence standard (“reasonable man standard”; “Learned-Hand-Formula”), see, classically, *United States v. Carroll Towing Co.*, 159 F. 2d 169 (2d Cir. 1947); cf Cooter/Ulen, *Law and Economics*, 6<sup>th</sup> edn., 2013, 197; Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, 5<sup>th</sup> edn., 2012, 184; Kötz/Wagner, *Deliktsrecht*, 13<sup>th</sup> edn., 2016, 54 at para. 114.

of conformity among social sub-groups. These patterns contain the deepest riddle of sociology, namely, why and how social structures and patterns of social conformity are possible at all under the condition of individual freedom to depart from the pattern at will at any time.

- 9 An interesting example for the pervasiveness of social conformity is consumer behavior. It is a common observation that individuals do not behave more individually with an increasing number of market options. The more market options are available, the more consumers in fact behave alike and regroup in social groups defined by consumer tastes which are remarkably predictable and surprisingly coarse-grained.<sup>11</sup> The deeper insight behind this observation is that the structure of social knowledge does not turn on individualization at all. Knowledge about social structures relevant for legal design is derived from the typical behavior not of individuals but of groups, even if they are so small as to be almost granular. This insight works both ways: Individual persons are generally not a relevant part of social knowledge because it is neither necessary nor possible to distinguish between individuals to gain information about social structures. Relevant information about social structures will generally not depend on the individual person, but rather on statistical data on the typical behavior of groups, even if they are defined by a multitude of fine-grained criteria. The generality of social knowledge structurally excludes the individual person.
- 10 This insight is highlighted by the epistemological structure of knowledge generated by Big Data. In theories of granular law, algorithmic Big Data profiling acts as a necessary epistemic source for personalizing rules over large groups of society.<sup>12</sup> What is truly novel and striking about information generated by Big Data, however, is that it does not require individual data in order to generate precise statistical predictions on individual behavior or relevant personality traits. Some Big Data mining algorithms allow to predict individual characteristics such as race or sexual orientation with greater exactness from mere data patterns, i.e., impersonal, statistical distributions of frequency read through the lens of a skillful combination of search criteria, than by directly using the personal data of the targeted groups if only the data volume used for the search is large enough.<sup>13</sup> The latter condition is always fulfilled in the modern data economy due to the exponential growth of the worldwide data volume available for Big Data searches to which we all contribute on a daily basis through our own online habits.<sup>14</sup> Against this background, it is not far-fetched to argue that the very centerpiece of Western enlightenment culture, the individual person, is losing her literally in-divisible quality by becoming increasingly “dividual”, a calculable artefact of the modern data economy, to

---

<sup>11</sup> This insight has even been the object of popular art. A remarkable example is the urban street style photography series “Exactitudes.com” by Ari Versluis and Ellie Uyttenbroek which displays a documentation of dress styles worn in metropolises like Rotterdam, Milan, New York, and Moscow between 1998 and 2014. The similarities between the individual wearers are surprising and offer evidence of the complex tension between the need of modern individuals to distinguish themselves from one another and yet to belong to defined social groups, demarcated by subtle and yet striking borders of style. See <http://www.exactitudes.com>.

<sup>12</sup> Porat/Strahilevitz, *supra* (fn. 4); cf also Kobayashi/Ribstein, Law’s Information Revolution, 2011, 53 *Ariz L Rev* 1169; Katz, Quantitative Legal Prediction – or – How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry, 2013, 62 *Emory L J* 909; McGinnis/Wasick, Law’s Algorithm, 2014, 66 *Fla L Rev* 991.

<sup>13</sup> See, e.g., Rudder, *Dataclasm: Love, Sex, Race, and Identity – What Our Online Lives Tell Us about Our Offline Selves*, 2015; cf Porat/Strahilevitz, *supra* (fn. 4). See also the recent debate on Big Data in election campaigns (“Cambridge Analytica”); e.g., Grassegger/Krogerus, Ich habe nur gezeigt, dass es die Bombe gibt, *Das Magazin* No. 48, 3 December 2016, <https://www.tagesanzeiger.ch/ausland/europa/diese-firma-weiss-was-sie-denken/story/17474918>.

<sup>14</sup> See, e.g., Porche/Wilson/Johnson/Tierney/Saltzman, *Data Flood: Helping the Navy Address the Rising Tide of Sensor Information*, 2014, 4 (further references).

use a term aptly coined by Gilles Deleuze.<sup>15</sup> In a dystopic view of a future culture of Big-Data-generated granular law, individual right thus degenerates into “dividual law”, addressing human beings as the mere results of algorithmic pattern matching and no longer as indivisible and autonomous beings. The individual person is lost behind a smokescreen of searchable data which allow for a more precise prediction of individual behavior over large numbers than even the direct human cognition of the individuals involved can provide. In the end of this digital dystopia, individuality loses its relevance as a category for the purposes of legal control when we have reached a point where algorithms virtually know human beings better than they do themselves.

This epistemological background has to be kept in mind when considering Big Data 11 patterns as a source for personalized law. The promise of granular law described above – i.e., that the rise of information technology will make it possible and meaningful to distinguish between single individuals for purposes of efficient legal design – becomes elusive when confronted with the necessarily statistical, “dividual” structure of social knowledge generated by Big Data search algorithms. It is important to note that even the most sophisticated contemporary models of algorithmic profiling build on statistical pattern matching, that is, on probabilistic distinctions between social groups which necessarily depart from the single individual as the measure of legal design.

One example is the use of the Five Factor Model, better known as “Big Five”, as a 12 means of personality profiling in the design of granular norms, as suggested by some of their proponents. The “Big Five”, namely, extraversion, neuroticism, agreeableness, conscientiousness, and openness, are widely regarded as the state of the art in psychological personality profiling.<sup>16</sup> As such, they beg for recognition in the design of personalized law wherever individual personality traits play a legally relevant role. In this vein, Ariel Porat and Lior Strahilevitz have argued that personality profiling based on the “Big Five” backed up by social media usage data can serve as a scientifically sound way of identifying legally relevant personality traits.<sup>17</sup> In particular, the “Big Five” seem to provide the necessary conceptual link between patterns of human behavior observable in social media usage and scientifically discernable, stable personality traits which arguably provide a legitimate basis for legal distinctions. According to Porat and Strahilevitz, it is possible to predict 33 % of the variation in extraversion, 26 % of the variation in neuroticism, and 17 % of the variation in individual conscientiousness on the basis of Big Data analyses of Facebook usage patterns,<sup>18</sup> while conscientiousness itself can predict up to 19 % of the individual variation of likelihood to become an organ donor.<sup>19</sup> Taking both insights together means that it is possible to infer from Big Data patterns that any single individual is 19 % more likely to become an organ donor if he or she scores high on conscientiousness, while the latter score can be predicted with 17 % accuracy from his or her social media usage.

It cannot be questioned that these and comparable findings are statistically highly 13 significant. However, their purely statistical quality again highlights that granular law must ultimately fall short of its promise that legal design can and should in fact account for the specifics of each and every individual person and situation. A lawmaker occupied with the design of a default rule on the issue of organ donation would, for instance, raise the question how the law should be designed for a person who belongs to

---

<sup>15</sup> Deleuze, *Postscript on the Societies of Control*, 1992, 59 *October* 3 (5).

<sup>16</sup> See only McCrae, *The Place of the FFM in Personality Psychology*, 2010, 21 *Psychological Inquiry* 57 (further references); cf. Porat and Strahilevitz (fn. 4) 1434.

<sup>17</sup> Ben-Shahar/Porat, *supra* (fn. 4).

<sup>18</sup> *Id.*, 1439.

<sup>19</sup> *Id.*, 1442.

the statistical group described above. If the person is likely to score high on conscientiousness, what should his or her personal default rule on the issue of organ donation be? Or, put differently: What do we actually know when we know that a certain person likely belongs to a group whose members will do something with a certain statistical likelihood? For the purposes of legal design, a level of statistical predictiveness for a certain behavior of far below 100 % or even 50 % seems insufficient as an empirical basis for justifying legal distinctions which draw clear-cut lines between groups that cannot be demarcated equally clearly in the social sphere.

- 14 More importantly, this argument ultimately does not turn on the magnitude of statistical likelihoods at all. In many cases, it is not necessary to predict individual behavior with or near 100 % certainty in order to design a meaningful and significant default rule. It may in fact be fully unnecessary or even counter-productive for the law to distinguish between social groups in order to accommodate all interests involved, even if those groups are separated by near-certain statistical likelihoods in their behaviors or preferences. One example is the negligence standard in tort law as described above.<sup>20</sup> In most cases, a single standard provides just the right level of incentivisation for careful behavior irrespective of personal care levels or risk appetites, and all this without any further need for personalization or granularization. If one concedes this point, it is inevitable to accept that typification is and will remain a necessary part of legal design even under the conditions of Big Data profiling. Legal design cannot and should not avoid typification. Legal rules depart from the properties of the individual person with epistemic necessity. Algorithmic Big Data procedures offer no way out of this epistemic structure even though they promise more powerful insights into individual personality profiles than any technology has been able to offer before. As mentioned before, individual behavior can be predicted more precisely on the basis of Big-Data-based profiling mechanisms than on the basis of the human reason of the very persons involved. Nonetheless, this somewhat disturbing insight does not change the fact that the epistemic structure of Big Data findings is and remains merely statistical and, as such, knowledge about social groups or collectives. From this epistemic reason, it follows that algorithmically generated granular law will most likely not reach a state where its design will allow a truly personal, one-by-one representation of each and every individual person within a society. But we would not want them to reach such a state in the first place, either.

## II. The Problem of Algorithmic Discrimination

- 15 If typification is inevitable as a means of legal design, the focus of the question shifts to whether granular law will lead to better and more useful distinctions between social groups with regard to legal purposes than the one-fits-all solutions or coarse-grained distinctions made by current law. This entails the further question whether granular law will help to overcome or, on the contrary, reinforce undesirable discrimination against minorities by introducing novel, supposedly scientifically backed distinctions between algorithmically distinguishable sub-groups of society.
- 16 An interesting example is the case of marital surnames.<sup>21</sup> The usual legal default regarding marital name law in Western countries is a non-discriminatory one-fits-all

---

<sup>20</sup> Cf *supra* (fn. 10).

<sup>21</sup> Sunstein, *supra* (fn. 5), at 25; Porat/Strahilevitz, *supra* (fn. 4); both with further reference to Emens, Changing Name Changing: Framing Rules and the Future of Marital Names, 2007, 74 *U Chi L Rev* 761.

solution which allows both husbands and wives to retain their premarriage surnames, unless other name choices, again strictly non-discriminatorily open to both sexes, have been preferred. This default, however, sticks for the great majority of men, but not for women. In the United States, the overwhelming majority of women change their surnames upon marriage (90 %), while only very few men do so.<sup>22</sup> If one were to design a personalized default rule on marital names considering name change preferences, a “crude” version would, therefore, simply amount to splitting up the rule along gender lines. But such a design of family law would most likely be ruled unconstitutional in many Western countries because it discriminates against women and reinforces constitutionally banned gender stereotypes.<sup>23</sup> In fact, the abolition of gendered family name laws was celebrated as a hard-won victory against patriarchal family law traditions in countries such as Germany where it took decades as well as numerous judgments by the Federal Constitutional Court to implement egalitarian constitutional values into a formerly strongly anti-egalitarian field of law.<sup>24</sup>

Against that background, the proponents of granular law have proposed that granular default rules in areas such as marital name law can make way for new, scientifically precise distinctions between individuals or very small, meaningful social groups without recourse to undesirable stereotypes. In particular, Ariel Porat and Lior Strahilevitz have suggested that “crude personalized default rules that are dependent on mere stereotypes are undesirable, but granular personalized rules based on hard data and sound science may be desirable.”<sup>25</sup> They offer the following examples for their point that it may be undesirable to split up the marital names default rule along gender lines, but that it might be highly desirable to create default rules for precisely defined social sub-groups demarcated by habits and consumer tastes alone without recourse to the category “gender”:

*“Suppose it turned out that Caucasian women who regularly shop at Wal-Mart, frequently dine at Cracker Barrel, dropped out of college, and are marrying spouses with similar characteristics adopt their husbands’ surnames 98 % of the time but that Asian American women who have a master’s degree in education, subscribe to the Vegetarian Times and Mother Jones, and take yoga classes adopt their husbands’ surnames only 7 % of the time. Would it be normatively undesirable for the state to adopt as a default rule the assumption that Caucasian women with these characteristics would see their surnames changed upon marriage but the Asian American women would not? Imagine if the data showed that 88 % of male, vegan, Prius drivers with PhDs in philosophy adopt their wives’ surnames upon marriage. Why not flip the default for these husbands to a name change unless they opted out?”<sup>26</sup>*

Leaving aside the strong social stereotypes conferred with each of these examples, it should be noted that they are, in interesting contrast to all other statistical data used by Porat and Strahilevitz, merely made up as hypothetical constructions. And this is not just an accident. In fact, it indicates a deeper problem rooted in the statistical construc-

<sup>22</sup> Emens, *supra* (fn. 21), at 785–86.

<sup>23</sup> For a strong case on sociological grounds against the desirability of state rules increasing the likelihood of female name change, see Emens, *supra* (fn. 21), at 774–85; cf also Sunstein, *supra* (fn. 5), at 34; Porat/Strahilevitz, *supra* (fn. 4).

<sup>24</sup> For Germany, see, in particular, the Supreme Constitutional Court ruling BVerfG, 05.03.1991–1 BvL 83/86 and 1 BvL 24/88, BVerfGE 84, 9; see also Dethloff/Walter, *Abschied vom Zwang zum gemeinsamen Ehenamen*, 1991, NJW 1575. In the USA, a similar development occurred during the 1970s; see *Dunn v Palermo*, 522 SW2d 679 (Tenn 1975); Emens, *supra* (fn. 21), at 772–73 (further references).

<sup>25</sup> Porat/Strahilevitz, *supra* (fn. 4).

<sup>26</sup> *Id.*

tion of exactly these examples. On the basis of actual statistical research, it is highly unlikely to find such great differences in individual variation of name choices between sub-groups of American husbands and wives as hypothesized here. The reason is that no empirical research on that matter can detach itself from the basic probability of marital name change measured across the entire population of men and women within the whole society. If the basic probabilities reported above (men: negligible, women: 90 %) are taken into account, statistical research will likely show that gender remains the single most significant indicator to predict marital name change, while other, statistically dependent factors such as consumer preferences will only have minor influence on its probability and will only in rare cases allow the prediction of its reversal.<sup>27</sup>

- 19 For this reason, it is questionable whether unconstitutional discrimination can be avoided by replacing discriminatory criteria such as gender or race by supposedly neutral granular distinctions on the basis of personal tastes or consumer preferences. The latter may effectively serve to hide undesirable discrimination behind a smoke-screen of supposedly random, free-willed personal tastes and habits. Yet, it seems impossible to avoid at least indirect recourse to the hard, constitutionally banned discriminatory criteria precisely *because* they are highly significant for personal and social profiling in many far-reaching contexts such as voting, education, employment, or housing patterns. In fact, this is the very reason *why* these criteria *are* undesirable and even legally banned as justifiable grounds for discrimination among social groups in egalitarian societies which subscribe to the principle of equal opportunities for each of its members. Against this background, granular law offers no way out of the normative and constitutional problem of unequal treatment, but will likely reinforce it by replacing direct through indirect discrimination on the basis of algorithmically generated criteria which are innocent only at first glance, whereas, at a closer look, it is impossible to circumvent the basic probabilities of hard discrimination on the basis of statistically dependent secondary criteria. To take up Porat and Strahilevitz's example once again, it looks like a promising departure from gender discrimination in marital name law to avoid "crude", discriminatory distinctions along gender lines by shifting to granular, apparently autonomy-related criteria like "preference for yoga classes". However, the resulting empirical data on name change preferences will likely be methodologically faulty in terms of the statistical sciences because the shift of criteria has no influence on the underlying basic probability of name change measured across the entire population of men and women. This basic probability will likely be reinforced and reflected by the dependent variable that someone who happens to like yoga classes tends to be a woman. That means that, in the end, gender will remain the single most significant predictive factor for marital name change. Replacing hard discriminatory criteria by granular descriptions of consumer behavior thus amounts to a mere game with statistical correlations which inevitably leads back to the hard, constitutionally banned criteria such as gender and race.
- 20 There exists, therefore, a considerable risk that Big Data-driven granularization of legal norms law will ultimately reinforce and petrify undesirable stereotypes and

---

<sup>27</sup> This insight is reflected by actual statistical information on marital name change distinguishing between specific sub-groups of women. Even among female Harvard graduates of the class of 1980, an additional advanced degree like a Ph.D. or an M.D. only led to a reduction of about 25 % in the probability of name change upon marriage, while each year of marriage delay accounted for a 1 % decline, and each year of delay in having children was related to a 1.3 % decline. Overall, "the fraction of all U.S. college graduate women who kept their surnames upon marriage rose from about 2 to 4 percent around 1975 to just below 20 percent in 2001." See Goldin/Shim, *Making a Name: Women's Surnames at Marriage and Beyond*, 2004, 18 *J Econ Persp* 143 (144, 158–59); cf Emens, *supra* (fn. 21), at 787.

discrimination against historically excluded groups by providing a novel and supposedly scientific basis for their different treatment. This amounts to the real danger of a slippery slope into arguing straightforwardly for the permissiveness of new legal distinctions on the basis of traditionally banned criteria if these criteria are only “validated” by sufficient new algorithmic evidence. As soon as one embraces the beneficial effects of statistical modelling in legal design, there seems to be no good reason to exclude even hard discriminatory criteria from legal design if they are in fact among the statistically significant criteria for predicting individual behavior (which they are). As a consequence, algorithmic and especially Big Data-based forms of granular legal design seem to provide no less than a scientific validation for the social desirability of discrimination. The burden of argument shifts from the necessity to justify discrimination to the direct opposite of having to provide reasons for equal treatment. Porat and Strahilevitz straightforwardly concede this point by arguing that “most people would probably prefer an algorithm that knows their race and gender and, as a result, more accurately predicts their preferences over a system that excludes their race and gender from consideration and consequently provides them with less accurate default rules.”<sup>28</sup>

Whether or not this is true, it should be considered what kind of society will ultimately result from such considerations and whether we are willing to live in it. That a renaissance of discrimination on a supposedly scientific basis would be socially desirable is not a novel claim, but in fact a staple of conservative and neo-conservative political thinking. One does not even have to look very closely to observe the close structural similarities between Porat and Strahilevitz’s argument and the observation that, even in Western democracies, a significant number of men and women resists – consciously or not – political activism and institutional reform into the direction of gender mainstreaming.<sup>29</sup> Regardless of whether or not that is the case as a matter of empirical fact, this argument, turned normatively and backed up with a supposedly scientific basis, amounts to a straightforward naturalistic fallacy which cannot be justified by reference to individual preferences without falling back behind the intellectual standards of decades, if not centuries of anti-discrimination discourse. We can, of course, accept or even pursue such a course of action as a matter of social policy. But we should then know just what we are doing.

### III. The Scope of Granular Law and the Rise of Consumerism

The danger of reinforcing discrimination does not, however, preclude the granular personalization of the law in areas where this is clearly beneficial or even a necessary part of the very purpose of a given legal field. Insurance law and social security law are examples for such fields. Within their scope, personalized rules and contract terms are already an accepted standard today. Big Data-driven granularization will probably not amount to a conceptual revolution in such fields, but will only provide expanded technical opportunities for the administration of their already highly personalized legal structures. This background should be kept in mind when engaging with the recent debate on granular law. This debate, too, does not pertain to the whole legal system, but is in fact centered around a small number of areas of the law where the benefits of granularization appear to be most promising. These areas, which are also the dominant

---

<sup>28</sup> Porat/Strahilevitz, *supra* (fn. 4).

<sup>29</sup> See, e.g., Cockburn, *In the Way of Women: Men’s Resistance to Sex Equality in Organisations*, 1991; Rantalaiho/Haiskanen (eds.), *Gendered Practices in Working Life*, 1997; Wittman, Looking local, finding global: Paradoxes of gender mainstreaming in the Scottish Executive, 2010, 36 *Rev Int’l Stud* 51 (66–70).



examples in the recent discussion, are default rules, liability rules, and rules about disclosures in fields such as consumer law, shareholder protection, and medical malpractice, with these field of law and pertinent legal rules obviously overlapping.<sup>30</sup>

- 23 When one looks more closely, however, the discussion is in fact centered around even more restricted issues. In particular, not all areas of default rules and liability rules seem equally likely to profit from personalization. For instance, landlord-tenant law or even negligent tort law are much less likely candidates for personalized rules than insurance law or social security law. An interesting example to understand the difference between fields governed by legal defaults where personalization is a promising course of legal policy and others where it is less likely so is, again, the law of marriage. Porat and Strahilevitz argue that legal defaults in marriage law are not likely to profit from personalization because

*“nearly everything associated with marriage entails undoing a default choice. The default choice is to remain single. Once one decides to get married, the default choice is not to serve food at the wedding, to forgo flowers, to wear pajamas during the ceremony (or no clothing at all!), and to send no thank-you notes after receiving gifts. In short, defaults are not really relevant in these high-stakes settings.”<sup>31</sup>*

- 24 Marriage is, in other words, a legal and social practice wherein individual choice is supremely important, but cannot or should not be anticipated by legal defaults: Choice matters, but legal defaults do not. But why is that so? The answer is less obvious than it may seem at first glance given the universal promise that granularization will reduce transaction costs and maximize the efficiency of individual choice within the scope of legal defaults, irrespective of what kind of choice is made. If this promise were viable, it would be a logical consequence to design a fully personalized family law which, for instance, opts individuals characterized by certain personality traits into marrying at a given age and, by default, also proposes a reasonable number of suitable marriage partners plus the complete wedding arrangement. On its face, it may seem absurd to ask why the law does not offer such opportunities given the fact that the necessary technical tools to realize them are already well-established, e.g., on dating platforms. At a closer look, however, it seems inevitable to ask questions such as this one to distinguish the fields where default personalization *as a matter of law* is appropriate from others where this is not the case.

- 25 What, then, makes some fields of the law more and others less likely candidates for personal default rules? A tentative way of answering this question could be the following: The fields where personalized defaults are considered are fields where the law promotes or even reduplicates individual preferences without, however, offering the possibility of exercising deep, meaningful, consequential levels of personal autonomy with a true impact on human life. In order to understand this, it is useful to start with the premise that, as a general rule, there is usually no need for the law to reduplicate personal preferences. If the law wants personal preferences to govern in areas such as contract law, it has two choices. One way is to generally abstain from legislative regulation and to leave the regulatory task to the private parties concerned. The other way is to offer impersonal default and sometimes impersonal mandatory rules. For the

---

<sup>30</sup> See, e.g., Porat/Strahilevitz, *supra* (fn. 4); Ben-Shahar/Porat, *supra* (fn. 4); Sunstein, *supra* (fn. 5), at 11–17.

<sup>31</sup> Porat/Strahilevitz, *supra* (fn. 4). Surprisingly, Porat and Strahilevitz disagree on this point with Sunstein, who claims that marriage law counts among the fields where “the choice of the default rule is exceedingly important”. See Sunstein, *Choosing Not to Choose. Understanding the Value of Choice*, 2015, 7.