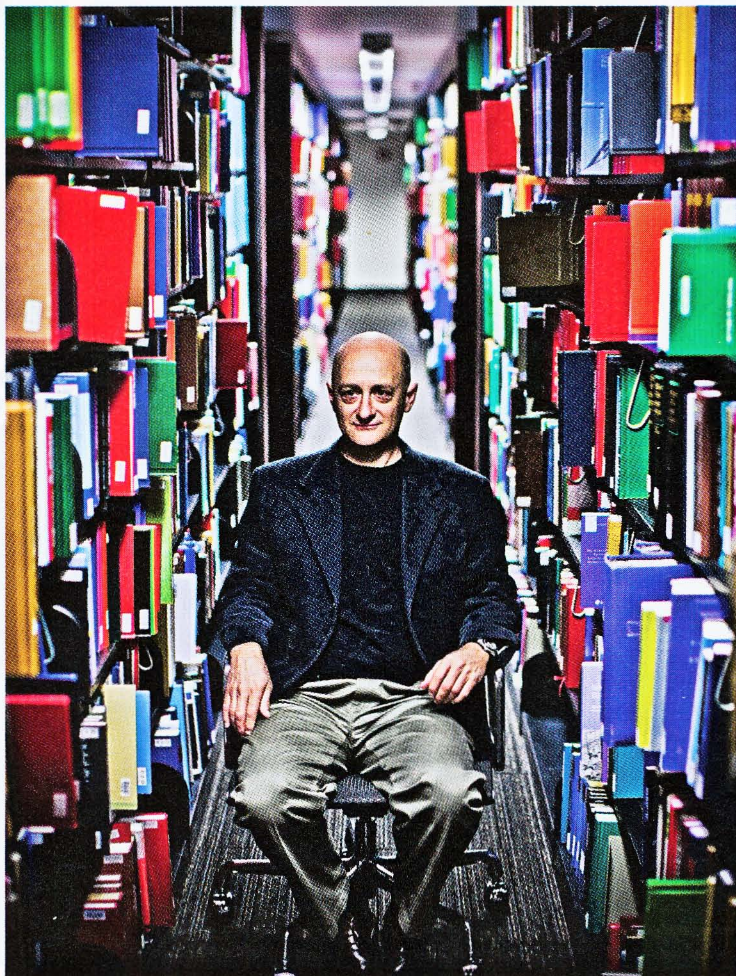
Omri Ben-Shahar and Carl E. Schneider

Disclosed to Death

It is a common presumption that providing consumers with more information helps them make better decisions. It doesn't, say these two law professors. By Kai Falkenberg



LAST MONTH 7,500 ONLINE shoppers agreed to provide the British retailer Gamestation with more than just cash. They signed over their rights to eternal life. Gamestation added an "immortal soul clause" to its terms and conditions as part of an April Fool's Day experiment. (Notice of the transfer would be announced in 6-foot-high letters of fire.) Customers who read the clause and chose to opt out received a £5 discount on their next videogame purchase. Only 12% did, proving Gamestation's point that most people agree to terms and conditions without reading them.

This seems obvious to everyone but lawmakers. With each new social problem that emerges, from financially conflicted doctors to predatory lending, the knee-jerk solution is increased disclosure. It's cheap, it's easy and it supposedly empowers people to make better decisions. Trouble is, it doesn't work. In a forthcoming law review article professors Omri Ben-Shahar and Carl E. Schneider expose the spectacular failure of this commonly used regulatory technique.

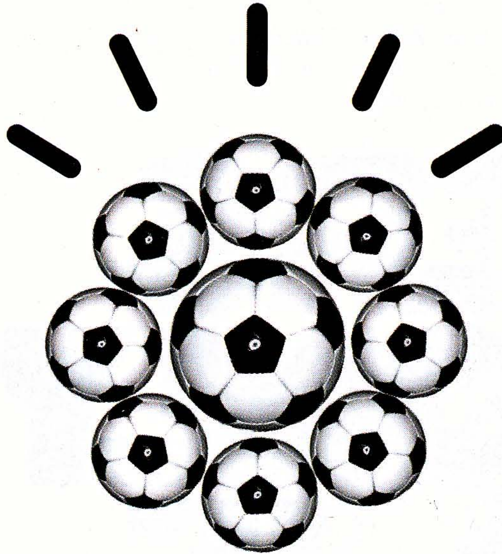
Omri Ben-Shahar *(top)*; Carl E. Schneider

In 2007 Ben-Shahar and Schneider were colleagues at the University of Michigan Law School, where Ben-Shahar taught contracts and Schneider focused on bioethics. Ben-Shahar, 47, who's now at the University of Chicago, was writing an article on the futility of boilerplate legal language in consumer transactions. Schneider, 62, had written extensively on the failure of informed consent in health law.

Over lunch one afternoon the professors had an epiphany—they realized they were both tackling the same problem from different vantage points. Delving further, they uncovered empirical evidence showing that mandated disclosure failed to improve decisions in just about every field.

Take credit cards. Truth-in-lending legislation and many state

BOB STEFKO FOR FORBES (TOP)



Impire AG is giving fans more than they expected.

Disclosure statutes are not only overused but also overly broad. Disclosure requirements continually expand to accommodate each and every newly noticed contingency. The result: Consumers are so inundated with verbiage that they become numb.

Internet users confront thousands of words of legalese on just about every website they visit. Most people, of course, don't read them, even though a 2002 decision by then appellate judge and now Supreme Court Justice Sonia Sotomayor held that such disclosures are legally binding.

In California the auto sales contract is so long it's dubbed "the bedsheet." Required to fit on one page, it's 30 inches long and double-sided, with, as Ben-Shahar describes it, "all sorts of warnings patched on like a mosaic of disclosures. It would take a long time to just read it." But to understand it "you need three years of law school."

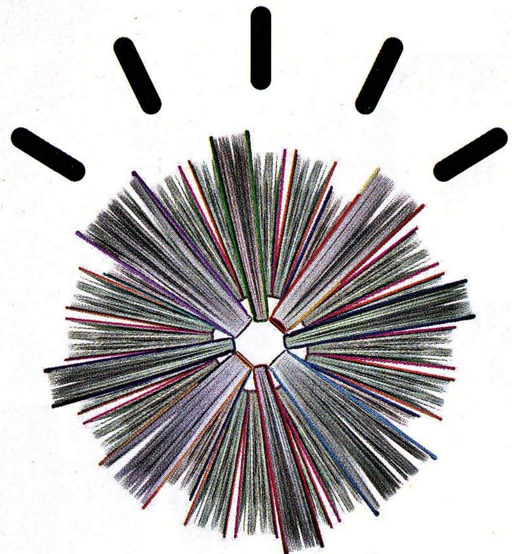
The Israeli-born Ben-Shahar went to Hebrew University in Jerusalem for his undergraduate and law degrees, then to Harvard for a Ph.D. in economics. Schneider was an undergrad at Harvard and got his law degree from Michigan, where he now teaches law and medical students.

Ben-Shahar's disenchantment with disclosure began with a movement among consumer advocates to ensure that people see the fine print in contracts. The effort, in his view, was misguided, since no one reads the fine print, as even the advocates admitted. He realized he was on to something when he was

laws require lenders to disclose interest rates and fees. Lawmakers thought disclosing annual percentage rates would prompt borrowers to shop around for credit. The laws have succeeded in educating spenders that there is something called the APR. But the studies show that people still don't understand what APR means and that disclosure has not led to lower rates. "The poster cases that regulators have in mind, the people who carry large credit card balances," says Ben-Shahar, "are the least likely to be able to understand these disclosures."

That doesn't stop lawmakers from ordering up more disclosure. In February the Credit Card Accountability & Disclosure Act went into effect, requiring companies to post credit card agreements online. But the agreements are predictably dense, and nobody reads them. Says Elizabeth Warren, the Tarp overseer, "I teach contract law at Harvard, and I can't understand half of what it says."

Legalese isn't the only problem. People are just as likely to ignore oral disclosures, says Schneider. Probably the most familiar is the Miranda warning. While *Law & Order* fans can recite it by heart, the evidence shows it doesn't work as intended. One study found that despite the warning the overwhelming majority of suspects (78% to 96%) waive their rights. Even Yale faculty, staff and grad students, following arrests in a 1967 protest against the draft, uniformly waived their rights and later regretted it. As Washington, D.C. attorney Patrick Malone puts it, "Next to the warning label on cigarette packs, Miranda is the most widely ignored piece of official advice in our society."



Bryant University is cutting back on energy, not education.

booed for expressing this heresy at a legal conference.

Schneider, meanwhile, had found similarly misguided efforts in the medical field. While the legal focus had been on disclosure and obtaining informed consent, Schneider's research showed patients were far more concerned with finding a kind and competent doctor.

Disclosure isn't always a failure. Simple disclosures do help people make better choices in familiar areas—like choosing a restaurant. One successful effort is a Los Angeles County statute requiring the display of a hygiene grade card in restaurant windows. The easily understood grading system (A, B or C) has led to improved restaurant sanitation. But many important decisions are complex and difficult to reduce to simple language. As one clinical researcher points out, if a patient "has systemic mastocytosis and we want to invite him or her to participate in a controlled clinical trial of cimetidine versus disodium cromoglycate, we must say so."

There's an even trickier problem with the more-information-is-better mantra, says Schneider. It fails because it's based on a misunderstanding of the psychology of decision making. "When you look at the way people make decisions, even very skilled people, it isn't by gathering huge amounts of information and then trying to analyze it," says Schneider. Instead, they tackle complicated decisions by reducing their focus to a few easy-to-understand factors. Breast cancer patients, according to one study, choose between a mastectomy and lumpectomy based on just one factor, like the risk of recurrence. Similarly, patients with kidney disease often decide against dialysis when they learn of the large needles required.

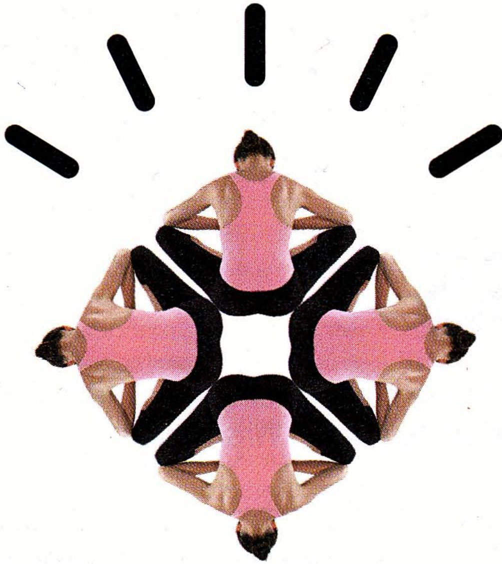
To make better decisions, people need more than just facts—they need expertise. Expertise allows them to put facts into context and simplifies their choices.

That's why, Ben-Shahar says, expert advice is more useful than raw facts. Lawmakers assume that people want to make decisions themselves, but often they really don't. Schneider says patients want their doctor to recommend a course of action. They want expertise, not more information.

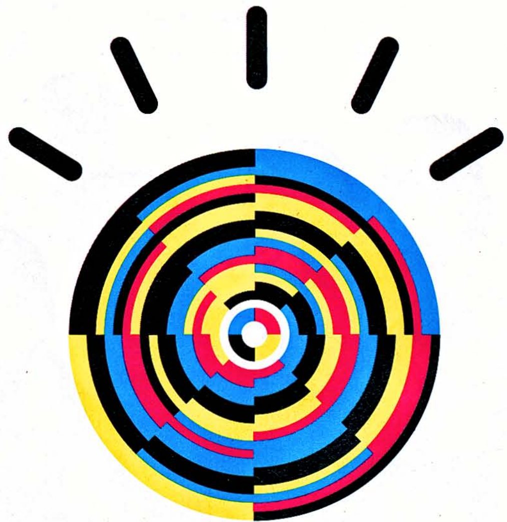
Another way to foster good decision making, the professors say, is to "channel people's choices without mandating." Choose the best option for most people, and let those who disagree opt out. If this grates against your libertarian instincts, think of the way states deal with inheritances.

You start with a default option known as the law of intestacy. In Illinois it says that half of your property goes to your spouse and the other half is evenly divided among your children. If you don't like it you are free to modify the outcome by writing a will.

Not being averse to legislative paternalism, the professors think lawmakers should abandon mandated disclosure and simply outlaw some practices. As Schneider warns, "Samuel Johnson said that a second marriage was the triumph of hope over experience. We believe that efforts to make mandated disclosure work are another triumph of hope over experience." **F**



Implanet is helping hospitals become more flexible.



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