# ARTICLE

# THE FAILURE OF MANDATED DISCLOSURE

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*This Article explores the spectacular prevalence, and failure, of the single most common technique for protecting personal autonomy in modern society: mandated disclosure. The Article has four Parts: (1) a comprehensive summary of the recurring use of mandated disclosures, in many forms and circumstances, in the areas of consumer and borrower protection, patient informed consent, contract formation, and constitutional rights; (2) a survey of the empirical literature documenting the failure of the mandated disclosure regime in informing people and in improving their decisions; (3) an account of the multitude of reasons mandated disclosures fail, focusing on the political dynamics underlying the enactments of these mandates, the incentives of disclosers to carry them out, and, most importantly, on the ability of disclosees to use them; and (4) an argument that mandated disclosure not only fails to achieve its stated goal but also leads to unintended consequences that often harm the very people it intends to serve.*



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## INTRODUCTION

### A. *The Argument*

"Mandated disclosure" is a regulatory technique that is much used but little remarked. It aspires to improve decisions people make in their economic and social relationships and particularly to protect the naïve from the sophisticated. The technique requires "the discloser" to give "the disclosee" information which the disclosee may use to make better decisions and to keep the discloser from abusing its superior position.

For example: You are shopping for a loan. Or told you need prostate cancer surgery. Or buying a computer online. Or under arrest and undergoing questioning. You have never faced this choice before. It turns on information you do not know. Mortgagees, doctors, vendors, and police *are* experienced and have interests of their own.

Mandated disclosure is supposed to give you information for analyzing your choices critically and to choose optimally. Thus, truth-in-lending laws require your lender to highlight credit terms. The law of informed consent requires your doctor to describe prostatectomies, radiation, chemotherapy, and watchful waiting. Contract doctrine requires your vendor to reveal its contract's terms, like warranties and mandatory arbitration. *Miranda* requires police to tell you your rights. Thus informed, you understand your choices well enough to make an

intelligent decision about your credit, your cancer, your computer, or your confession.

Mandated disclosure is ubiquitous. Innumerable federal and state statutes, municipal ordinances, administrative regulations, and court rulings demand sometimes marvelously elaborate disclosures from businesses that issue car, student, or automobile loans; mortgagees; home-equity lenders; credit card companies; banks accepting deposits; mutual funds; securities brokers; credit-reporting agencies; investment advisors; ATM operators; pawnshops; payday lenders; rent-to-own dealers; installment-sales vendors; insurers of property, health, life, cars, or rented vehicles; self-storage facilities, and much else; car-towing companies; car repair shops; motor clubs; residential real estate agencies, developers, and landlords; time-share programs; sellers and lessors of mobile homes; membership camping facilities; providers of home improvements, services, and repairs; home-alarm installers; vocational schools; traffic schools; agents selling electricity; immigration consultants; dog breeders and sellers; travel services and travel agencies; art dealers; police; doctors; hospitals; managed care organizations; colleges and universities; restaurants and other food establishments; halal-food dealers; and endlessly more. To say nothing, for example, of the common law obligation to disclose information prior to a contract, or federal and state campaign finance regulation, which the Supreme Court recently trimmed to little more than mandated disclosure.[1]

Mandated disclosure addresses a real problem: modernity showers us with consequential and complex decisions about which we know little. Unsophisticated people must work with, depend on, and contend with, specialized enterprises that expertly handle complex transactions. People must manage financial matters of many kinds. They face medical choices. They buy things whose mechanisms they do not understand and whose quality they cannot evaluate under terms they do not know.

Not only does mandated disclosure address a real problem, it also rests on a plausible assumption: that when it comes to decision-making, more information is better than less. More information helps people make better decisions, thus bolstering their autonomy. Since people can no longer customize most transactions, disclosure helps restore some individual control. It may also induce enterprises to behave more efficiently.

[1] *See* Citizens United v. FEC, 130 S. Ct. 876, 913-17 (2010) (striking campaign finance laws that ban corporate expenditures but upholding disclosure requirements).

Although mandated disclosure addresses a real problem and rests on a plausible assumption, it chronically fails to accomplish its purpose. Even where it seems to succeed, its costs in money, effort, and time generally swamp its benefits. And mandated disclosure has unintended and undesirable consequences, like driving out better regulation and hurting the people it purports to help.

Not only does the empirical evidence show that mandated disclosure regularly fails in practice, but its failure is inevitable. First, mandated disclosure rests on false assumptions about how people live, think, and make decisions. Second, it rests on false assumptions about the decisions it intends to improve. Third, its success requires an impossibly long series of unlikely achievements by lawmakers, disclosers, and disclosees. That is, the prerequisites of successful mandated disclosure are so numerous and so onerous that they are rarely met.

Because the disclosure mantra—more information is better than less—sounds plausible, we must be clear about our topic and our argument. We are not asking what information people need to make good decisions. We are asking whether a regulatory technique—mandated disclosure—works. We are not saying that information *never* helps people make decisions. Our argument is directed at a regulatory technique in which a lawmaker requires a discloser to give a disclosee a standard disclosure—prepackaged information that the lawmaker thinks the disclosee needs in order to choose wisely.

Our tasks, then, are to identify mandated disclosure as a distinctive regulatory method, to show the breadth of its use, to review the evidence of its failure, and to explain why it fails. Our task is *not* to propose an alternative. Mandated disclosure has been used so commonly—one might say so indiscriminately—that it is asked to solve many unrelated problems in many unrelated areas. We doubt that any single regulatory method can be so widely effective. We believe commentators and lawmakers must instead undertake the intellectually burdensome and politically painful work of tailoring solutions to problems. We close by sketching some paths toward this harder but more rewarding work.

### B. *The Method*

Our argument has four steps. The first is to identify mandated disclosure as a distinctive regulatory technique. The second is to show how extensive and intensive mandated disclosure is. For both purposes we searched for statutes that mandate disclosures in three states

(California, Michigan, and Illinois) and located several hundred of them. Less systematically, we looked for federal statutes, administrative regulations, and case law that mandate disclosures. In Part I, we provide examples of the many sectors in which disclosure is mandated, discuss the kinds of information that must be disclosed, and examine the format that disclosure takes.

Our third step is to ask whether these mandates work. They are used so prolifically in so many unrelated fields that we cannot assess them ourselves. Instead, we survey the empirical literature. Its gravamen is that mandated disclosure generally fails to achieve its goals.

The fourth step, perhaps the most substantial one, is to explain that failure. We canvass the systematic factors that keep lawmakers, disclosers, and disclosees from accomplishing all the things they would have to do to make mandated disclosure work reliably, and we explore the dynamics that make it so unreliable.

### C. *The Style*

Writing about mandated disclosure raises the same problem that mandating disclosure does: the amount of information exceeds the discloser's ability to describe it intelligibly and the disclosee's ability to understand it usefully. To survey the spectacular profusion of mandates would require marching through acres of statutes, regulations, and cases and making the same mistake lawmakers make—pointlessly burdening our audience.

In like manner, we urge readers to read only what they need. In particular, Parts I and II, which catalog information, only doubters need scrutinize. If you accept what is quickly obvious—that mandated disclosure is pervasive—you can skim Part I. If you accept what is less obvious but richly documented—that mandates have been largely ineffective—you can skim Part II. You can then concentrate on Parts III and IV, which not only do much of the Article's analytic work but also provide yet further evidence of the pervasiveness and ineffectiveness of mandated disclosure.

## I. THE DISCLOSURE EMPIRE: THE PERVASIVENESS OF MANDATED DISCLOSURE

Mandated disclosure is now a standard—one might almost say favored—weapon in the arsenals of legislatures, courts, administrative agencies, and commentators. In this Part, we describe several paradigmatic examples of mandated disclosure to show just how standard

the weapon has become, and we survey the entire landscape of the mandatory disclosure device.

### A. *Three Paradigmatic Examples of Mandated Disclosure*

#### 1. Terms of Credit

Selecting terms on which to borrow money exemplifies the kind of unfamiliar, complex, and consequential decision that mandated disclosure seeks to improve. Lenders have information relevant to the decision but may have reasons not to educate borrowers. Lawmakers have deployed truth-in-lending laws to compel lenders to inform borrowers, generally in considerable detail.

For example, the Truth in Lending Act of 1968 (TILA)[2] and many state laws make lenders disclose interest rates and fees. Sometimes these statutes specify metrics intended to summarize complex credit obligations; sometimes they specify disclosure phrases, like options to prepay, minimum payments, and much more.[3] For example, try deciphering this Illinois "mini"-TILA (which is typical of statutes that require disclosing a specific statement):

> Unearned finance charges under the Rule of 78ths are computed by calculating for all fully unexpired monthly installment periods, as originally scheduled or deferred, which follow the day of prepayment, the portion of the precomputed interest that bears the same ratio to the total precomputed interest as the balances scheduled to be outstanding during that monthly installment period bear to the sum of all scheduled monthly outstanding balances originally contracted for.[4]

TILA was a prototype consumer-protection statute and became the "template" for most consumer-credit legislation[5]—legislation that now mandates detailed disclosures for credit generally, credit cards, automobile loans, student loans, mortgages, and other home-secured

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[2] 15 U.S.C. §§ 1601–1667 (2006); *accord* 12 C.F.R pt. 226 (2010); *cf.* Truth in Savings Act § 263, 12 U.S.C. § 4302 (requiring banks to disclose interest rates and terms of demand on interest bearing accounts). The most important disclosure in TILA is the annual percentage rate (APR), a uniform measure of the cost of credit. *See* 15 U.S.C. §§ 1606, 1631–1649.

[3] *See, e.g.*, MICH. COMP. LAWS ANN. § 390.1222 (West 1997) (mandating disclosure of payment terms, penalties, and options for educational loans).

[4] 205 ILL. COMP. STAT. ANN. 670/16(m) (West 2007).

[5] Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 234 (1991).

loans.[6] Credit card issuers, for example, must disclose all of a contract's terms and highlight, in a uniform way, critical terms like annual percentage rates (APRs) and fees.[7]

Attempts to protect low-income borrowers often prompt disclosure requirements. Pawnshops—a primary financial resource for the financially vulnerable—must detail interest payments, redemption options, fees, charges, and statutory caps.[8] Payday lenders must tell borrowers that their loans will not solve their long-term problems, that other debt-management services may be available, and that borrowers cannot be criminally prosecuted to collect the loan.[9] Rent-to-own dealers must reveal the "true" cost of changing a rental to a purchase and of other fees.[10] Retail installment sales must be accompanied by information about many financial aspects of the transaction.[11]

Disclosure requirements dominate regulation of another kind of credit—mortgages, including high-risk mortgages.[12] The Real Estate Settlement Procedures Act (RESPA) of 1974[13] and the Home Ownership and Equity Protection Act (HOEPA) of 1994,[14] as implemented by Regulation Z,[15] are primarily disclosure acts. Mortgage disclosure

[6] Consumer Leasing Regulation M, 12 C.F.R. § 213.3 (2010); *see also* Press Release, Federal Reserve (Sept. 27, 1996), *available at* http://www.federalreserve.gov/boarddocs/press/boardacts/1996/19960927/default.htm (announcing revisions to Regulation M that would "simplify and clarify required disclosures for car leasing and other types of consumer lease transactions").

[7] *See, e.g.,* CAL. CIV. CODE §§ 1748.11(a), 1748.13(a) (West 2009) (requiring creditors to disclose the terms of a credit card account during enrollment and to disclose in each billing statement the effects of making less than full payment).

[8] *E.g.*, 205 ILL. COMP. STAT. ANN. 510/2 (West 2007).

[9] *E.g.*, 815 ILL COMP. STAT. ANN. 122/2-20 (West 2008).

[10] *E.g.*, CAL. CIV. CODE. § 1812.623(a) (West 2009); MICH. COMP. LAWS. ANN. § 445.953 (West 2002).

[11] *See, e.g.*, MICH. COMP. LAWS ANN. § 445.853 (West 2002) (requiring disclosure of overall price, the feeds, insurance, remaining balance, time-price differentials, and more in retail installment sale); ILL. ADMIN. CODE tit. 14, § 475.610 (2009) (detailing disclosure requirements for credit sales advertising of motor vehicles); 815 ILL. COMP. STAT. ANN. 375/2.9 (West 2007) (defining "finance charges" for purposes of disclosures for installment sales of cars).

[12] *See, e.g.*, 815 ILL. COMP. STAT. ANN. 137/95 (West 2008) (requiring mortagees to inform borrowers "YOU MIGHT BE ABLE TO OBTAIN A LOAN AT A LOWER COST. . . . CLOSING COSTS AND FEES VARY BASED ON MANY FACTORS . . . YOU COULD LOSE YOUR HOME AND ANY MONEY YOU PUT INTO IT IF YOU DO NOT MEET YOUR PAYMENT OBLIGATIONS UNDER THE LOAN. . . ." (capitalization in original)).

[13] 12 U.S.C. §§ 2601–2617 (2006).

[14] Pub. L. No. 103-325, 108 Stat. 2190 (codified at scattered sections of 15 U.S.C.).

[15] 12 C.F.R. § 226.32 (2010).

acts require written statements about obligations to obtain mortgage insurance,[16] "all material facts" in mortgage-brokerage agreements,[17] borrowers' rights to renounce obligations after entering mortgage-rescue services,[18] lenders' obligations to disclose changes in loan terms,[19] and more. Lenders must even say that defaulting can lead to foreclosure and that it is prudent to shop for low rates.[20]

### 2. Informed Consent

Patients often face unfamiliar but vital choices, which depend upon complex factors about which they understand little. Doctors understand these choices better but may lack the time, interest, inclination, or ingenuity to educate the patient. So that patients may make their own medical decisions, doctors must tell them the advantages and disadvantages of their choices.[21] Few disclosure mandates have been as richly favored as the doctrine of informed consent. Courts, legislatures, and administrative agencies have mandated it in many forms and fora for decades. The medical and research establishments have made it their conventional wisdom with barely a whisper of dissent.

Informed consent can require extensive disclosures. Ailments and treatments are innumerable, and doctors must give patients all the information a reasonable person would want in making the decision. This formulation has been understood increasingly broadly. For example, "[c]ourts are becoming more receptive to including physician-specific and financial information within the scope of informed consent."[22]

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[16] *E.g.*, 765 ILL. COMP. STAT. ANN. 930/15 (West 2001).

[17] *E.g.*, 205 ILL. COMP. STAT. ANN. 635/5-7(a)(3) (West 2009).

[18] *See, e.g.*, 765 ILL. COMP. STAT. ANN. 940/10 (West 2009) (requiring "distressed property consultants" to disclose the client's rights to cancel the consultation contract).

[19] *See, e.g.*, 205 ILL. COMP. STAT. ANN. 635/5-9 (West 2009) (ordering the licensee to disclose any material change in loan terms).

[20] *See, e.g.*, CAL. CIV. CODE § 2971 (West 1993) (directing lenders to disclose that a home equity loan is secured by the home and "failure to repay the loan for any reason could cause you to lose your home"); MICH. COMP. LAWS ANN. § 445.1637 (West 2009) (requiring lenders to provide a premortgage educational notice that instructs potential borrowers to "shop around and compare loan rates and fees" and recommends credit counseling).

[21] For two classic cases involving informed consent, see *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), and *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972). For a legislative example, see GA. CODE ANN. § 31-9-6.1 (2006).

[22] Tracy E. Miller & William M. Sage, *Disclosing Physician Financial Incentives*, 281 JAMA 1424, 1426 (1999). For example, one "court ruled that payments received from

We will pay particular attention to disclosure of conflicts of interest. In one much-noticed case, the court held "that a physician who is seeking a patient's consent for a medical procedure must . . . disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgment."[23] And one court extended the principle by observing that doctors may be obliged to tell patients about their competence to perform procedures and the superior competence of other doctors.[24]

In addition, "states have enacted limited expansions of informed consent duties, generally in response to focused advocacy by patient groups."[25] Such mandates are often intended to persuade, rather than to inform. For example, more than one-third of the states specify information doctors must give patients about treating breast cancer with lumpectomies rather than radical mastectomies.[26] Or, to take another example, some states tell doctors what to tell women seeking abortions. Indeed, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court affirmed the constitutionality of statutory provisions that required doctors to tell women

> the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician . . . must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.[27]

Informed consent reaches its acme—or nadir—in the Institutional Review Board (IRB) system. No researcher at an institution receiving federal funds who interacts with or collects "private" information about a human being may proceed without the approval of an "Insti-

a pharmaceutical manufacturer to prescribe a particular medication were within a physician's informed consent obligation." *Id.* (citing D.A.B. v. Brown, 570 N.W.2d 168 (Minn. Ct. App. 1997)).

[23] Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 485 (Cal. 1990).

[24] Johnson v. Kokemoor, 545 N.W.2d 495, 510 (Wis. 1996).

[25] William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1779 (1999).

[26] Joan H. Krause, *Reconceptualizing Informed Consent in an Era of Health Care Cost Containment*, 85 IOWA L. REV. 261, 379-81 (1999).

[27] 505 U.S. 833, 881 (1992) (quoting 18 PA. CONS. STAT. § 3205 (date)).

tutional Review Board" that (among other things) must ratify the language by which the consent of research subjects is sought.[28]

### 3. Contract Boilerplate

Truth-in-lending acts and the informed consent doctrine concern specific types of transactions. The common law, however, has long required contracting parties to make disclosures.[29] Recently, a particular area of contract disclosures has attracted much attention—the fine print. The terms of many consumer transactions are tucked away in the package, or displayed online with an "I Agree" button, or printed on the back of order forms. These terms usually concern contingent contractual rights—such as warranties, dispute resolution, and remedies. Because this obscurely written and placed boilerplate may conceal unanticipated and tricky traps, legislators, courts, and commentators have devised disclosure requirements. In response to several court decisions holding these standard forms binding even if not disclosed prior to the transaction,[30] reform has been percolating. For example, the American Law Institute's (ALI's) *Principles of the Law of Software Contracts* exclude such terms from the contract if there is no opportunity to read them before a purchase.[31] The rationale is typical: to protect the "autonomy" of consumers.[32] Similarly, the European Draft Common Frame of Reference (a proposed commercial code for the European Community) recognizes that consumers are placed "at a significant informational disadvantage" and responds by mandating disclosure.[33]

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[28] *See generally* 45 C.F.R. pt. 46 (2009) (requiring such procedures to protect human research subjects).

[29] For an illuminating discussion of the general contract law disclosure doctrine, see Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565 (2006).

[30] *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150-51 (7th Cir 1997) (enforcing an arbitration clause included in terms found in a computer's shipping box); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452-53 (7th Cir. 1996) (holding that licenses included in product packaging are enforceable if consumers do not explicitly reject them).

[31] *See* PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, § 2.02(c)(2) (2010) (requiring "reasonable notice of and access to the standard form before payment or . . . before completion of the transfer").

[32] *Id.* ch. 2, topic 2, at 118.

[33] PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW §§ II.-3:103, -3:105 (Study Grp. on a Eur. Civil Code & Research Grp. on EC Private Law, Draft Common Frame of Reference, interim outline ed. 2008) .

The "opportunity to read" principle also appears in specific contexts. For example, the Magnuson-Moss Warranty Act requires a warranty disclaimer to be "conspicuously" disclosed in "simple and readily understood language."[34] Likewise, U.C.C. § 2-316 requires warranty disclaimers to be conspicuous.[35] Similar state laws apply to issues such as mandatory arbitration,[36] risk warnings, return policy,[37] and modifications of the contract.[38] The ALLCAPS font in consumer contracts is one familiar artifact of such requirements.

The doctrine of unconscionability and consumer antideception statutes also generate precontractual disclosure requirements. Undisclosed terms can be procedurally unconscionable, especially if they conflict with consumers' reasonable expectations.[39] For example, a clause waiving liability for negligence—if not illegal per se—"must be clearly and conspicuously printed or explicitly pointed out."[40]

### B. *Other Provinces in the Disclosure Empire*

#### 1. Financial Transactions

Numerous statutes apply TILA-like rules to other financial accounts: depository, savings, mutual funds, etc.[41] These disclosures are

[34] 15 U.S.C. § 2302 (2006).

[35] U.C.C. § 2-316(2) (2009).

[36] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1363.1 (West 2008) (requiring that the disclosure of mandatory arbitration in health plan contracts be "prominently displayed on the enrollment form").

[37] *See, e.g.*, CAL. CIV. CODE § 1723 (West 2009) (instructing retail sellers with return policies to "conspicuously display that policy" in various locations); N.Y. GEN. BUS. LAW § 218-a (McKinney 2004) (detailing where retail mercantile establishments must "conspicuously post" their return policy).

[38] *See, e.g.*, 205 ILL. COMP. STAT. ANN. 635/5-9 (West Supp. 2009) (requiring disclosure of any material change in the terms of a residential mortgage loan).

[39] *See* Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 57-58 (1993).

[40] Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 523 (1981).

[41] Banks must disclose information to depositors when they open accounts or request some transactions. *See, e.g.*, CAL. FIN. CODE § 23035(d) (West Supp. 2009) (outlining disclosure requirements accompanying deferred deposit transactions); 205 ILL. COMP. STAT. ANN. 605/3 (West 2007) (requiring financial institutions to disclosure consumer deposit account terms). The Truth in Savings Act, 12 U.S.C. §§ 4301–4413 (2006)—as implemented by Regulation DD, 12 C.F.R. pt. 230 (2010)—tells depository institutions what costs and terms they must reveal and how they must do so. SEC regulations require the disclosure of mutual fund fees. *See* Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies, Securities Act Release No. 8393, Exchange Act Release No. 49,333, Investment Company Act Re-

sometimes comprehensive, as in TILA or the Good Faith Estimates in mortgage disclosures, which include numerous items, including fees, payments, rights, obligations, and explanations.[42] Other times, lawmakers "segregate" disclosures by mandating disclosure of a particular item in a separate form in an attempt to highlight its presence. For example, the Federal Reserve recently promulgated a regulation to address the problem of high overdraft fees on ATM and debit withdrawals.[43] The regulation did not limit the actual fees banks charge; rather it required consumers to opt into the scheme by receiving a disclosure notice on a separate form and signing a separate dotted line.

Financial disclosures stretch to every domain of consumer protection. Businesses planning to use clients' financial information must tell them of their right to opt out and explain, in fine print, how to do so.[44] Financial brokers must disclose their experience, obligations, and fees, and even warn clients that "THE SECRETARY OF STATE HAS NOT REVIEWED AND DOES NOT APPROVE, RECOMMEND, ENDORSE OR SPONSOR ANY LOAN BROKERAGE CONTRACT."[45] Investment advisers must confess a catalog of past misdeeds, including rule violations and disciplinary actions.[46] Credit-reporting agencies must tell consumers their federal and state rights.[47] Creditors bundling credit insurance with a loan must tell customers whether the insurance is required by law and that it may be duplicative.[48] ATM operators must caution customers against using ATMs at night, alone, or in perilous circumstances.[49]

A classic instance of mandated disclosure is the congeries of securities laws and regulations. These mainly target experts, and thus fall outside our scope. However, these disclosures also govern sales to the laity, and some of their provisions are specifically intended to help amateurs.

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lease No. 26,372, 69 Fed. Reg. 11,244, 11,245 (Mar. 9, 2004) (codified in scattered parts of 17 C.F.R.).

[42] 24 C.F.R. pt. 3500 app. C.

[43] 12 C.F.R. § 205.17.

[44] *E.g.*, MICH. COMP. LAWS. ANN. §§ 500.519, .529, .543 (West 2002).

[45] 815 ILL. COMP. STAT. ANN. 175/15-30 (West 2008) (capitalization in original).

[46] *E.g.*, ILL. ADMIN. CODE, tit. 14, § 130.847 (2009).

[47] 15 U.S.C. §§ 1681b(b), 1681g(c)(2) (2006).

[48] *E.g.*, CAL. INS. CODE § 1758.97 (West 2005).

[49] *E.g.*, 205 ILL. COMP. STAT. ANN. 695/15 (West 2007).

### 2. Insurance

Insurance transactions require complex calculations about cloudy contingencies. Insurance buyers cannot easily tell the value of their purchase because it depends on actuarial estimates that they do not know and cannot analyze. Nor can the quality of the insurance be ascertained until a loss materializes, when it is too late to switch to a better product. Insurance that is bundled with a financial investment (as in life insurance or mortgage-related insurance products) compounds these burdens. So, lawmakers try to protect the bewildered.

Some protection involves regulatory oversight, such as precertification of the standardized insurance policy, but much of it comes from a mosaic of disclosure statutes. Often insurers must not only disclose policy terms, they must also highlight terms that are especially important or may cause unexpected agonies. In Illinois, for example, insurers must disclose fees that are separate from the policy premiums.[50] Insurance financing acts require disclosure of the ways purchasers can pay premiums.[51] Insurance products with investment risks must reveal them.[52] Residential property insurance acts require a reminder that rebuilding costs may differ from market value.[53] California legislators have drafted a residential-property insureds' "Bills of Rights," which insurers must also disclose.[54] And since disclosure requirements are supposed to deter people from buying unneeded insurance, insurers must remind consumers that they need not buy insurance that is bundled with another service, like car-rental services and auto insurance[55] or self-storage facilities and property insurance.[56]

Life insurance, in particular, proliferates opportunities for customers to make bad decisions. For example, because people sometimes regret how they assigned their insurance benefits, their right to

[50] 215 ILL. COMP. STAT. ANN. 5/500-80(e) (West 2008).

[51] *See, e.g.*, CAL. INS. CODE § 778.4(a) (West 2005) (mandating disclosures by fire and casualty insurance broker-agents prior to arranging premium financing for a new or renewed policy); 215 ILL. COMP. STAT. ANN. 5/513a9 (providing the required disclosures in premium financing agreements).

[52] *E.g.*, CAL. INS. CODE § 762 ; 215 ILL. COMP. STAT. ANN. 5/1409.

[53] CAL. INS. CODE §§ 10101, 10102(a).

[54] *Id.* § 10103.5.

[55] *E.g.*, *id.* § 1758.86; 215 ILL. COMP. STAT. ANN. 5/500-105(b)(3); 625 ILL. COMP. STAT. ANN. 27/20.

[56] 215 ILL. COMP. STAT. ANN. 5/500-107(b)(2)(B).

change their minds must be disclosed.[57] Similarly, a statute might require a viatical-settlement provider to tell the viator about alternatives to selling her life insurance policy, such as accelerated benefits from the life insurer; to state all the adverse consequences of the settlement, like taxes, creditor rights, and loss of Medicaid; and to explain all the other benefits forfeited.[58]

### 3. Health Care

Informed consent is only the beginning of disclosure requirements in health law. For example, because Congress believed advance directives were insufficiently used, the Patient Self-Determination Act (PSDA) requires hospitals, nursing facilities, home health agencies, hospices, and managed care organizations to give patients

> written information . . . concerning—(i) an individual's rights under State law . . . to make decisions concerning . . . medical care, including the right to . . . refuse . . . treatment and the right to formulate advance directives, and (ii) the written policies of the provider . . . respecting the implementation of such rights."[59]

Because the Department of Health and Human Services (HHS) believed patients' privacy was endangered, it promulgated elaborate regulations pursuant to the the Health Insurance Portability and Accountability Act (HIPAA) that require institutions to tell patients the institution's privacy rules.[60] Because conflicts of interest are widely feared, health care service providers must disclose their use of "financial bonuses" in referrals or allocation of services.[61]

Another bounteous fount of mandated disclosure is a program both employers and the government have recently promoted: "consumer-directed health care." It gives consumers an economic stake in shaping their health care plan by allowing them to choose their doctors, hospitals, providers, tests, and treatments.[62] As the former HHS

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[57] *See, e.g.*, MICH. COMP. LAWS ANN. § 500.2080(6)(d) (West 2008) (giving the insured a right to revoke assignment of life insurance proceeds to cemetery or funeral services).

[58] *E.g.*, 215 ILL. COMP. STAT. ANN. 158/35. In a viatical settlement, terminally ill insureds sell their death benefits in exchange for annuities or other immediate support payments. *Id.* 159/5.

[59] 42 U.S.C. § 1395cc(f)(1)(A) (2006).

[60] 45 C.F.R. § 164.520 (2009).

[61] *E.g.*, CAL. HEALTH & SAFETY CODE § 1367.10 (West 2008).

[62] For an extended treatment, see Carl E. Schneider & Mark A. Hall, *The Patient Life: Can Consumers Direct Health Care?,* 35 AM. J.L. & MED. 7, 62-65 (2009).

Secretary said, "We have a better option, to provide beneficiaries with reliable information about the cost and quality of their care. When given that kind of information, we know that consumers will make decisions that drive costs down and the quality up."[63] This program, however, depends on patients' access to "reliable information"; thus, disclosures have both been directly mandated and indirectly necessitated.

### 4. *Miranda* Warnings

The Supreme Court famously enforced the Fifth Amendment by mandating disclosures:

> [A]n individual taken into custody . . . must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[64]

Many jurisdictions try to make the disclosure "meaningful" by requiring, for example, that interrogators use language the suspect understands, ask the suspect whether she understood the warning, and tell the suspect of her right to end questioning. A recent decision by the Supreme Court further affirms that disclosure is the main avenue of protection for suspects.[65]

### 5. Goods and Services

Many consumers encounter market-wide disclosure rules like price-labeling requirements,[66] nutrition facts,[67] or truth-in-advertising laws.[68] Less familiar are sector-specific rules. Even a glimpse at the ex-

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[63] Robert Pear, *Bush Proposes Linking the Medicare Drug Premium to Beneficiaries' Income*, N.Y. TIMES, Feb. 16, 2008, at A15 (quoting Secretary Michael Leavitt).

[64] Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

[65] *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2259-60 (2010) (holding that a suspect remaining silent is insufficient to imply that the suspect invoked his rights); *see also* Sherry F. Colb, *The Supreme Court Holds that Responding to Police Interrogation Waives the Right to Remain Silent*, FINDLAW (June 7, 2010), http://writ.news.findlaw.com/colb/20100607.html (arguing that *Berghuis* "leaves [*Miranda*] to stand as an arbitrary disclosure requirement, rather than the protection against coercive interrogation").

[66] *E.g.*, N.Y. AGRIC. & MKTS. LAW § 214-i (McKinney 2004).

[67] 21 C.F.R. § 101.9 (2010)

[68] *See, e.g.*, Federal Trade Commission Act § 15, 15 U.S.C § 55(a)(1) (2006) (defining when an advertisement is misleading); *see also* Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 495-501 (1981) (considering how to define deceptive advertisements).

tensive and eclectic list shows how much lawmakers rely on mandated disclosure.

Notorious exploitation and improvident purchases have inspired statutes dealing with "death products"—caskets, burial and funeral services, and cemetery plots.[69] The Federal Trade Commission's (FTC's) Funeral Industry Practices Rule requires price disclosures.[70] States require service providers to disclose matters relating to their expertise, the payment scheme, customers' options to withdraw from commitments, items not included in the "package," and even a notification that "THERE IS NO SCIENTIFIC OR OTHER EVIDENCE THAT ANY CASKET WITH A SEALING DEVICE WILL PRESERVE HUMAN REMAINS."[71]

Many mandated disclosures apply to car transactions. Dealers must reveal problems with resold vehicles.[72] Used-car sellers must report odometer readings (for the forgetful buyer?).[73] Car-towing services must state their charges, policies, and insurance *before* towing.[74] Repair shops and parts sellers must disclose their fee structure and the kind of parts they use in addition to giving itemized estimates.[75] Many specific repairs, like installing ball joints, have their own information mandates.[76] Car-rental agencies must describe customers' liability for lost and damaged cars and how damages may be covered if customers

[69] The classic exposé is JESSICA MITFORD, THE AMERICAN WAY OF DEATH (Vintage 2000) (1963).

[70] 16 C.F.R. § 453.2 (2010); *see also* FED. TRADE COMM'N, COMPLYING WITH THE FUNERAL RULE 6 (2004), *available at* http://www.ftc.gov/bcp/edu/pubs/business/adv/bus05.pdf (explaining the "General Price List," which mandates six disclosures).

[71] CAL. BUS. & PROF. CODE § 17530.7(c) (West 2008) (capitalization in original). For pre-need cemetery sales, see, for example, 815 ILL. COMP. STAT. ANN. 390/14(a) (West 2008); for pre-need burial, see 225 ILL. COMP. STAT. ANN. 45/1a-1(a)(3)(A) (West 2007). *See also* Illinois Consumers' Guide to Pre-Need Funeral and Burial Purchases, ILL. ADMIN. CODE tit. 38, § 610 exh. A (2009) (notifying consumers about terms, descriptions, payment method, and cancellation policy).

[72] *See, e.g.*, CAL. CIV. CODE § 1793.23 (West 2009) (requiring "Lemon Law Buyback" disclosure if a car was repurchased due to defect); 625 ILL. COMP. STAT. ANN. 5/5-104.2 (West 2008) (requiring disclosure if a car was repurchased due to failure of warranty).

[73] *E.g.*, MICH. COMP. LAWS ANN. § 257.233a (West 2007).

[74] *E.g.*, 625 ILL. COMP. STAT. ANN. 5/18d-120, 5/18d-130 (requiring disclosure to vehicle owner before towing a damaged or disabled vehicle).

[75] *See, e.g.*, 815 ILL. COMP. STAT. ANN. 306/15(a), 306/20, 306/50 (prohibiting work exceeding one hundred dollars until consumer authorization after disclosures); *id.* 308/15(b), 308/20, 308/50 (requiring disclosure of estimated and itemized repair costs); *see also* CAL. BUS. & PROF. CODE § 9875.1 (West 2008) (mandating disclosure if repair parts are derived from secondary sources).

[76] *E.g.*, CHI., ILL., MUN. CODE 4-228-120 (2010).

decline rental-company insurance.[77] Motor clubs that refer members to dealers must reveal any referral fees that they receive from dealers.[78]

Real estate agents must tell homebuyers about the agents' duties to them.[79] Residential real estate developers in California are entitled, under a variety of statutes, to over forty items of disclosure.[80] Residential landlords must admit to code violations and provide case numbers of pending litigation.[81] Timeshare programs must itemize customers' prerogatives.[82] Membership camping facilities must reveal the operator's experience, the chief officers' business backgrounds, and much more.[83] Mobile-home and mobile-home-lot sellers or lessors must annually disclose fees, obligations, and rent increases.[84]

Home-improvement, home-service, and home-repair contracts must disclose clients' rights, including a lay (but long) definition of a mechanic's lien.[85] Statutes even target specific activities: alarm installers, for example, must disclose and define any mechanic's lien.[86]

Vocational schools enjoy lengthy (and costly) disclosure mandates, including more than twenty statistics about graduation rates, reenrollments, exam pass rates, graduates' job prospects, and more.[87] Barber, nail, and cosmetology schools must disclose graduation rates and placement statistics.[88] Traffic-violator schools must astonish applicants with warnings that they might encounter repeat traffic offenders and that instructors are less robustly trained than those in licensed driving schools (who in turn disclose quite a bit themselves).[89] Colleges and universities must provide current and prospective students with crime statistics.[90]

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[77] *E.g.*, CAL. CIV. CODE § 1936(g)(1) (West Supp. 2009).

[78] *E.g.*, CAL. INS. CODE § 12150(1) (West 2005).

[79] *E.g.*, MICH. COMP. LAWS ANN. § 339.2517 (West 2004).

[80] *See* STATE OF CAL. DEP'T OF REAL ESTATE, DISCLOSURES IN REAL PROPERTY TRANSACTIONS (6th ed. 2005), *available at* http://www.dre.ca.gov/pub_disclosures.html.

[81] *E.g.*, CHI., ILL., MUN. CODE § 5-12-100 (2010).

[82] *E.g.*, CAL. BUS. & PROF. CODE §§ 11211, 11216 (West 2008).

[83] *E.g.*, CAL. CIV. CODE § 1812.302 (West 2009).

[84] *E.g.*, 765 ILL. COMP. STAT. ANN. 745/6.5 (West Supp. 2009).

[85] *E.g.*, CAL. BUS. & PROF. CODE § 7159 (West Supp. 2009); *see also id.* § 7159.10 (listing disclosures in service contracts between $500 and $750).

[86] *E.g.*, CAL. BUS. & PROF. CODE § 7599.54 (West 2008).

[87] *E.g.*, 105 ILL. COMP. STAT. ANN. 425/15.1 (West 2006).

[88] *See, e.g.*, 225 ILL. COMP. STAT. ANN. 410/3B-12(a) (West 2007).

[89] *See, e.g.*, CAL. VEH. CODE § 11200(b)(1) (West Supp. 2009) (traffic-violator schools); N.J. ADMIN. CODE § 13:23-5.16 (Supp. 2010) (driving schools).

[90] *See* 20 U.S.C. § 1092(f) (2006).

The list goes on: sellers of electricity must disclose their remuneration,[91] immigration consultants their past frauds,[92] dog dealers and breeders the buyers' rights to return sick or dead animals.[93] Travel services and agents must specify, both orally and in writing, travelers' rights to certain claims.[94] Art dealers must reveal subtleties such as medium, artist, and signature.[95] Restaurants and food establishments must warn about undercooked food.[96] They also must post their department-of-health certificate "in that part of the retail food establishment to which the public has access."[97] And food dealers must explain "the basis upon which . . . [halal] representations are made."[98]

We have not exhausted the catalog of mandated disclosures, but we have surely exhausted our readers (and ourselves). This sampling amply suggests that mandated disclosure is a staple of the regulatory repertoire, and we will show how unreliable that staple is.

## II. THE DOCUMENTED FAILURE OF MANDATED DISCLOSURE

The great paradox of the Disclosure Empire is that even as it grows, so also grows the evidence that mandated disclosure repeatedly fails to accomplish its ends. We proffer several kinds of evidence of that failure. First, disclosers do not always provide, and disclosees do not always receive, information. Second, disclosees often do not read disclosed information, do not understand it when they read it, and do not use it even if they understand it. Third, mandated disclosure does not improve disclosees' decisions. Following the model of Part I, we first discuss the evidence about the three paradigmatic examples and then survey other areas.

### A. *The Three Paradigmatic Cases of Mandated Disclosure*

#### 1. Terms of Credit

Truth-in-lending legislation is a crown jewel of the Disclosure Empire, and if mandated disclosure works anywhere, it ought to work

[91] *E.g.*, 220 ILL. COMP. STAT. ANN. 5/16-115C(e)(1) (West Supp. 2009).
[92] *E.g.*, 815 ILL. COMP. STAT. ANN. 505/2AA(e) (West 2008).
[93] *E.g.*, CAL. HEALTH & SAFETY CODE §§ 122100, 122190 (West 2006).
[94] *E.g.*, CAL. BUS. & PROF. CODE § 17550.13 (West 2008).
[95] *E.g.*, CAL. CIV. CODE §§ 1742, 1744 (West 2009).
[96] *E.g.*, MICH. COMP. LAWS ANN. § 289.6149 (West 2003).
[97] CHI., ILL., MUN. CODE 7-38-012 (2010).
[98] 815 ILL. COMP. STAT. ANN. 505/2LL(b) (West 2008).

here. Unlike with some disclosure regimes, rulemakers actually gave TILA some thought. Congress spent eight years debating it. The bill's proponents largely got the law they wanted.[99] They expected disclosure of APRs to produce sensible shopping for credit. Administrative agencies have repeatedly labored and issued regulations intended to simplify TILA and make it work.

Consumers *are* more aware of APRs, but they remain confused about using them.[100]

> One leading study, for example, indicated that as knowledge of the [APR] increased, knowledge of the finance charge itself, expressed in dollars, declined. Apparently, most consumers mistakenly believe that [the disclosed rate is] a percentage of the initial balance, rather than [the] average or declining balance. As a result, they consistently miscalculate the finance charges to be twice the actual amount. In other words, [truth-in-lending legislation] succeeded in making consumers increasingly aware, but it has not managed to explain to them what it is they have been made aware of.[101]

There is much evidence that consumers do not read TILA disclosures, are overloaded by the number of disclosures, and do not understand the basic disclosed features of the loan.[102] Furthermore, consumer understanding of terms that TILA does not cover—such as the dollar amount of finance charges in open-end credit transactions, or the financial burden of variable-rate mortgages—is poor. For example, ninety percent of consumers misunderstand the relationship between the interest rate that lenders quote and the APR, and thus consumers misperceive the cost of credit.[103] Worse, only well-educated and well-

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[99] *See* Rubin, *supra* note 5, at 242-63 (describing the "epic battle" of the debate and drafting process).

[100] *See, e.g.*, Yu-Chun Regina Chang & Sherman Hanna, *Consumer Credit Search Behavior*, 16 J. CONSUMER STUD. & HOME ECON. 207, 222 (1992) ("[M]ost consumers (80%) did not consider searching for information before purchasing credit."); James H. McAlexander & Debra L. Scammon, *Are Disclosures Sufficient? A Micro Analysis of Impact in the Financial Services Market*, 7 J. PUB. POL'Y & MARKETING 185, 186 (1988) (finding "important differences between high- and low-knowledge consumers in how they learned about and evaluate financial advisers").

[101] Rubin, *supra* note 5, at 236 (citing William K. Brandt & George S. Day, *Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-in-Lending*, 7 U. MICH. J.L. REF. 297, 302-03 (1974)).

[102] For a survey, see Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 789-98 (2006).

[103] Jinkook Lee & Jeanne M. Hogarth, *The Price of Money: Consumers' Understanding of APRs and Contract Interest Rates*, 18 J. PUB. POL'Y & MARKETING 66, 70 (1999).

off consumers seem to have enjoyed whatever increased awareness of credit terms that TILA brought.[104]

More fundamentally, there is little reason to think disclosure statutes improved the terms on which borrowers pay. For example, one study suggests that the Fair Credit and Charge Card Disclosure Act of 1988[105] did not increase competition in the credit card industry. Interest rates and funding costs did not exhibit any measurable improvement following the Act.[106]

Financial literacy education is an important component of the disclosure and informed consent paradigm, and much evidence now shows that this effort has largely failed. Several studies testing participants in financial literacy education show almost no improvement in their performance;[107] other studies demonstrate no change in behavior, no increase in knowledge, no added ability to engage in financial planning, and no effect on bankruptcy outcomes.[108] The establishment of a new Consumer Financial Protection Bureau is further evidence that existing disclosure statutes did not accomplish their goals. Ironically, though, the Bureau's inaugural ceremonies suggest that disclosures will continue to be a major focus of the new Bureau. As Secretary Timothy Geithner announced in launching the Bureau, disclosure "is one of the most powerful tools we have for getting people better information so they can make better choices about how they borrow, how they use credit, how they invest their savings."[109]

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[104] *See* Jean Kinsey & Ray McAlister, *Consumer Knowledge of the Costs of Open-End Credit*, 15 J. CONSUMER AFF. 249, 257-59 (1981) (finding wealth and education effects in a 1977 survey of Minnesota households).

[105] Pub. L. No. 100-483, 102 Stat. 2960 (codified as amended in scattered sections of 15 U.S.C.).

[106] Sherrill Shaffer, *The Competitive Impact of Disclosure Requirements in the Credit Card Industry*, 15 J. REG. ECON. 183, 195-96 (1999).

[107] *See, e.g.*, Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 208-09 (2008) (surveying studies finding that financial education programs have no effect or small paradoxical results).

[108] *See id.* at 207-09; *cf. Forum to Explore the Causes of the Financial Crisis: Hearing Before the Financial Crisis Inquiry Commission* (2010) (testimony of Annamaria Lusardi, Professor, Dartmouth Coll.; Research Associate, Nat'l Bur. of Econ. Research), *available at* http://www.fcic.gov/hearings/pdfs/2010-0226-Lusardi.pdf (analyzing the "troubling" picture painted by surveys that examine the financial capabilities of Americans).

[109] Jessica Holzer, *Geithner: New Bureau To Focus On Improved Disclosures*, FOXBUSINESS, Sept. 21, 2010, http://www.foxbusiness.com/markets/2010/09/21/geithner-new-bureau-focus-improved-disclosures (quoting Secretary Timothy Geitner).

### 2. Informed Consent

Informed consent has been conventional wisdom for long enough that many studies explore it. They show that informed consent does not achieve its purpose.[110] First, doctors do not give patients the information that they would need to make educated decisions. For example, a study examined discussions between doctors and patients, particularly

> (1) the patient's role in decision making, (2) the nature of the decision, (3) alternatives, (4) pros (benefits) and cons (risks) of the alternatives, (5) uncertainties associated with the decision, (6) an assessment of the patient's understanding of the decision, and (7) an exploration of the patient's preferences." The "completeness of informed decision making was low. . . . [F]ew decisions (9.0%) met criteria for completeness of informed decision making."[111]

Second, good ways to communicate information have proved elusive. Forms used to provide information frequently exceed readability standards.[112] "Many patients have limited health literacy and can have difficulty understanding information even when efforts are made to communicate it appropriately."[113]

Third, and critically, even when doctors lavish information on patients, most patients neither understand nor remember it. Even when asked simple questions immediately after being given far more education than clinicians could ever offer, patients commonly can answer only one-third to one-half of them.[114] Countless numbers of studies reveal that despite extravagant efforts at educating patients, patients cannot remember, and presumably have not really understood, the

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[110] For a brief exposition, see Carl E. Schneider, *After Autonomy*, 41 WAKE FOREST L. REV. 411, 417-25 (2006). For a detailed assessment, see CARL E. SCHNEIDER, THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS, AND MEDICAL DECISIONS 92-99 (1998). For an extended comparison of the law and the reality of informed consent, see the first chapter of MARSHA GARRISON & CARL E. SCHNEIDER, THE LAW OF BIOETHICS: INDIVIDUAL AUTONOMY AND SOCIAL REGULATION (2d ed. 2009).

[111] Clarence H. Braddock III et al., *Informed Decision Making in Outpatient Practice: Time to Get Back to Basics*, 282 JAMA 2313, 2315 (1999).

[112] *See* Michael K. Paasche-Orlow et al., *Readability Standards for Informed-Consent Forms as Compared with Actual Readability*, 348 NEW ENGL. J. MED. 721, 724 (2003) ("Among . . . 61 [medical] schools with specific grade-level standards [for informed consent text], only 8 percent . . . met their own standard; the mean readability exceeded the stated standard by 2.8 grade levels . . . .").

[113] Margaret L. Schwarze et al., *Exploring Patient Preferences for Infrainguinal Bypass Operation*, 202 J. AM. C. SURGEONS 445, 450 (2006) (footnotes omitted).

[114] David A. Herz et al., *Informed Consent: Is It a Myth?*, 30 NEUROSURGERY 453, 455 (1992).

risks of treatment explained to them. In addition to the numerous studies of memory of risk disclosures, there is also highly plausible evidence that patients do not properly understand the possible benefits of treatments. In one study, for example, "patients' expectations of improvements in their functional status after infrainguinal bypass operation were greater than those suggested by previous research."[115]

Fourth, despite decades of legal and medical efforts, patients regularly make life-and-death decisions without even the most basic information and with many misconceptions. In one large study, for example, fewer than one-half of breast cancer patients understood survival rates and fewer than one-fifth understood recurrence rates, even though the patients thought that those factors were important and had consulted "a relatively large variety of information sources."[116] Fifth, even if these educational problems could be solved, the information proffered would frequently go unused. Patients rarely change their minds when asked to give informed consent.[117] Patients prefer not to make medical decisions, and the sicker and older they are, the less they wish to do so. Furthermore, patients frequently make decisions before giving "consent" and often rely on a single factor in making such decisions.[118]

Could informed consent work if doctors tried harder? No. Even the most dedicated efforts disappoint. For example, one study *truly* tried to enlighten patients about conflicts of interest created by the ways that HMOs paid doctors. It "went to unusual lengths to ensure that the essential information was conveyed. Information . . . was disclosed by mail, followed by phone calls in which subjects' understanding was tested and reinforced through repetition and simple quiz questions."[119] While such efforts greatly increased patients' knowledge of incentives, a majority still could not correctly answer more than half of the questions. "[E]ven the extensive and [desperately] impractical

[115] Schwarze, *supra* note 113, at 449.

[116] Angela Fagerlin et al., *An Informed Decision? Breast Cancer Patients and Their Knowledge About Treatment*, 64 PATIENT EDUC. & COUNSELING 303, 309 (2006).

[117] *See* PAUL S. APPELBAUM ET AL., INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE 202 (1987) ("[T]he empirical and anecdotal studies of patients who refuse treatment almost never portray the process of obtaining informed consent as playing a causative role."); Ruth R. Faden et al., *Disclosure of Information to Patients in Medical Care*, 19 MED. CARE 718, 732 (1981) ("[R]efusals attributable to disclosures are rarely, if ever, seen.").

[118] *See* SCHNEIDER et al., *supra* note 110, at 92-99 (discussing the reluctance of patients to make decisions and the ways in which they do so).

[119] Mark A. Hall et al., *How Disclosing HMO Physician Incentives Affects Trust*, HEALTH AFF., Mar./Apr. 2002, at 197, 203.

methods used here to attempt to convey only limited knowledge of incentives fell well short of complete success."[120]

Even when legislatures have made special efforts to use informed consent in focused ways, the news has been discouraging. Statutes have used expert boards to formulate special disclosures about mastectomies and even threatened physician-discipline procedures.[121] But while these statutes were "associated with slight increases (6 to 13 percent)" in the use of lumpectomies, the "increases were transient, . . . lasting from 3 to 12 months."[122]

One might expect consent to operate better in the context of consent to participate in research because a regulatory agency—the institutional review board (IRB)—the disclosures' exact words and procedures in advance. But again the evidence is disappointing. For example, trials of cancer treatments are riskier than most research, so disclosures have been extensively examined. Research subjects have urgent reasons to understand their choices. In an especially careful but otherwise typical study, medical providers invested significant amounts of time educating patients about the treatments available to combat their cancer.[123] While assessing their choices, patients were free to consult other sources of information as well as to tap into family support networks. Despite the protracted effort to equip patients with the knowledge they needed to make informed decisions, serious misunderstandings persisted: "Many did not realize that the treatment being researched was not proven to be the best for their cancer, that the study used non-standard treatments or procedures, that participation might carry incremental risk, or that they might not receive direct medical benefit from participation."[124]

A final indication of the failure of informed consent is that its advocates must continue to add new disclosures for it to work. Given the failure of standard informed consent, one study recommends expanding informed consent to include *all* of the following elements: (1) in-

[120] *Id.* at 205.

[121] *See* Joan H. Krause, *Reconceptualizing Informed Consent in an Era of Health Care Cost Containment*, 85 IOWA L. REV. 261, 379-83 (1999) (discussing the unique requirements of disclosure to breast cancer patients).

[122] Ann Butler Nattinger et al, *The Effect of Legislative Requirements on the Use of Breast-Conserving Surgery*, 335 NEW ENGL. J. MED. 1035, 1039 (1996).

[123] *See* Steven Joffe et al., *Quality of Informed Consent in Cancer Clinical Trials: A Cross-Sectional Survey*, 358 LANCET 1772, 1775 (2001) (assessing the effectiveness of informed consent in clinical trials and proposing interventions that could enhance patients' understandings of the risks involved in participating in such trials).

[124] *Id.* at 1774-75.

vestigation into "patients' affective and cognitive processes"; (2) exploration of "uncertainties and limitations both in the provider's own knowledge and in the state of the science"; (3) inquiry into patients' "motivations, beliefs, and values"; (4) exploration of how patients think decisions should be made; and (5) individualized process "in the context of an ongoing relationship with a trusted health care provider."[125]

### 3. Contract Boilerplate

Even when the standard form contract is available, very few people read it. Empirical work is scant, perhaps because of the folk knowledge that no one reads boilerplate. Still, some direct as well as indirect evidence suggests that almost no consumers read boilerplate, even when it is fully and conspicuously disclosed.

An experiment by PCpitstop provides anecdotal evidence. The computer diagnostic software developer put a clause in an end-user license agreement that promised one thousand dollars to a user who responded. After four months and three thousand downloads someone finally did.[126] (All this in a forum for the technologically sophisticated and savvy.) In a more systematic study, a group of researchers found that roughly one in one thousand people actually scrolls through online boilerplate when it is disclosed prior to the agreement.[127] Worse, that one-in-a-thousand "reader" spent a median time of twenty-nine seconds on the webpage. Since these pages of legalese average over two thousand words, since people can read fewer than 150 words in that time, and since boilerplate is notoriously complex, readership is effectively zero.[128] One of the authors of this study, Flo-

[125] Gail Geller et al., *"Decoding" Informed Consent: Insights from Women Regarding Breast Cancer Susceptibility Testing*, HASTINGS CENTER REP., Mar.–Apr. 1997, at 28, 30-31.

[126] Larry Magid, *It Pays to Read License Agreements*, P.C. PITSTOP, http://pcpitstop.com/spycheck/eula.asp (last visited Nov. 15, 2010).

[127] Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 3 (N.Y. Univ. Sch. of Law Law & Econ. Working Paper Grp., Paper No. 195, 2009) *available at* http://lsr.nellco.org/nyu_lewp/195/.

[128] *See id.* (reporting an average number of words of 2271 and an average reading rate of 250 to 300 words-per-minute). Less rigorously, Robert Hillman surveyed contracts students at Cornell on their readership of boilerplate and found that only a minority of somewhere between 4% to 13% read the online contracts. Robert A. Hillman, *Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, *in* CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 283, 289 tbls.11.3A-B (Jane K. Winn ed., 2006). We suspect this study significantly overstates readership ratios. It is not clear that reports by the survey subjects—first-year law students—regarding contract readership are credible or representative. Stu-

rencia Marotta-Wurgler, found that in only 8 of 11,184 visits to sites offering a hyperlink to a list of terms next to a clickable "I AGREE" box, and in only 40 of 120,545 visits to sites offering a hyperlink to the boilerplate terms that were not juxtoaposed with an "I AGREE" box, did the user choose to access the terms.[129] Moreover, to "access" means at least one second of view time; the average length of terms was 2,300 words. Marrota-Wurgler writes, "The general conclusion is clear: No matter how prominently [end-user license agreements] are disclosed, they are almost always ignored."[130]

### B. *The Failures of Other Mandated Disclosures*

The Patient Self-Determination Act (PSDA) requires health care institutions to tell patients about advance directives so that they might decide how they should be treated if they become incompetent to make decisions.[131] The living will is the primary means of doing so. It does not appear that the PSDA encouraged people to use living wills, and living wills cannot easily reflect people's considered preferences or state them in effective ways.[132] In short, the law "has 'done a disservice to most real patients and their families and caregivers.' It has promoted the execution of uninformed and under-informed advance directives . . . . The PSDA looks like a utter failure."[133] Many efforts have been made to help consumers in the various instantiations of consumer-directed health care. Surveys of patients and clinicians suggest that report cards have little effect.[134] Patients are rarely aware of

dents did not have to actually read a contract, but merely state their readership habits. *Id.* at 286. None of their answers had any payoff implication. Indeed, some of the students' answers were puzzling, for example, by reporting a greater propensity to read free-subscription contracts than purchase contracts. *Id.* at 288-89.

[129] Florencia Marrota-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's Principles of the Law of Software Contracts*, 78 U. CHI. L. REV. (forthcoming 2011) (manuscript at 13), *available at* http://www.law.uchicago.edu/files/file/Wurgler paper.pdf.

[130] *Id.* (manuscript at 16).

[131] 42 U.S.C. § 1395cc(f) (2006).

[132] For an extended explanation, see Angela Fagerlin & Carl E. Schneider, *Enough: The Failure of the Living Will*, HASTINGS CENTER REP., Mar.–Apr. 2004, at 30.

[133] Thaddeus Mason Pope, *The Maladaptation of* Miranda *to Advance Directives: A Critique of the Implementation of the Patient Self-Determination Act*, 9 HEALTH MATRIX 139, 167 (1999) (footnote omitted) (quoting Rebecca Dresser, *Confronting the 'Near Irrelevance' of Advance Directives*, 5 J. CLINICAL ETHICS 55, 56 (1994)).

[134] *See, e.g.*, Martin N. Marshall et al., *The Public Release of Performance Data: What Do We Expect to Gain? A Review of Evidence*, 283 JAMA 1866, 1873 (2000) (reviewing studies that explore the impact of publicly disclosed health care performance and determining that patients fail to "use the currently available information to any significant ex-

these disclosures, and even more rarely understand and use them.[135] A study of Medicare beneficiaries, for example, showed that roughly 90% either knew nothing or had limited knowledge about HMOs, and only 16% percent had adequate knowledge to choose between traditional Medicare and an HMO.[136] Another study found that 67% of respondents did not have a good grasp of the differences between traditional fee-for-service and HMO plans, and many reported not knowing the most basic facts about HMO plans.[137] Notably, four out of every five large purchasers of HMO plans, such as employers, acknowledged that they did not systematically compare plans' affordability or effectiveness.[138] Most purchasers just checked whether a plan was accredited and did not investigate other aspects.[139]

Evaluations of medical care and disclosure of "report cards" might produce better care even if consumers rarely read the evaluations, since providers presumably will work to win good reviews. Also, if some of the readers of these report cards are health plan administrators and insurance companies, we should expect the information disclosed to have an impact. That is, if health plan administrators play a substantial role in directing patients to higher-quality care—in the same way that investment analysts direct retail investors to higher-value securities—then these professionals would surely know how to access and analyze the report cards. Indeed, some studies based on clinical data speak of significant improvements in care, but these findings notoriously struggle with selection biases.[140] One study showed

tent"); Eric C. Schneider & Arnold M. Epstein, *Use of Public Performance Reports: A Survey of Patients Undergoing Cardiac Surgery*, 279 JAMA 1638, 1641 (1998) (assessing patient awareness of publicly released report card on cardiac surgery mortality and finding that only a small percentage of patients knew about the data before undergoing cardiac surgery).

[135] *See* Arnold M. Epstein, *Rolling Down the Runway: The Challenges Ahead for Quality Report Cards*, 279 JAMA 1691, 1695 (1998) (exploring recent developments in health care report cards and identifying the greatest challenges to using these report cards more effectively).

[136] Judith H. Hibbard et al., *Can Medicare Beneficiaries Make Informed Choices?*, HEALTH AFF., Nov.–Dec. 1998, at 181, 186.

[137] James S. Lubalin & Lauren D. Harris-Kojetin, *What Do Consumers Want and Need to Know in Making Health Care Choices?*, 56 MED. CARE RES. & REV. 67, 70 (Supp. 1 1999).

[138] *Id.* at 91 fig.1 (citing Judith H. Hibbard et al., *Choosing a Health Plan: Do Large Employers Use the Data?*, HEALTH AFF., Nov.–Dec. 1997, at 172).

[139] *Id.* at 91-92.

[140] *See, e.g.*, Edward L. Hannan et al., *Improving the Outcomes of Coronary Artery Bypass Surgery in New York State*, 271 JAMA 761, 765-66 (1994) (contending that the decline in mortality rate from coronary-bypass graft surgery in New York was largely due to "quali-

that providers seek to protect their ratings by shifting their efforts from unreported dimensions of care toward the reported dimensions and found no evidence that overall quality of care had increased.[141] A recent and refined study concluded that report cards had undesirable consequences.[142] First, providers became reluctant to treat severely ill patients. Second, report cards led providers to sort patients by providers based on the severity of illness, treating the healthier patients in higher-rated hospitals and sicker patients in lower-rated ones. These trends, along with the tendency to substitute riskier therapies with more cautious but less effective medical therapies, led to higher costs and worse outcomes, especially for sicker patients.[143] Still, the overall effect of hospital report cards continues to be a subject of empirical exploration, with some reliable evidence demonstrating improvement in care.[144] But as we will argue below, to the extent that such success is

ty improvement" measures undertaken in hospitals after the State began collecting and analyzing health outcome data on the operation); Dana B. Mukamel & Alvin I. Mushlin, *Quality of Care Information Makes a Difference: An Analysis of Market Share and Price Changes After Publication of the New York State Cardiac Surgery Mortality Reports*, 36 MED. CARE 945, 950-53 (1998) (finding that "quality report cards" assessing health outcomes of cardiac surgery in New York State hospitals resulted in, among other things, greater market share for those hospitals with more favorable outcomes); Eric D. Peterson et al., *The Effects of New York's Bypass Surgery Provider Profiling on Access to Care and Patient Outcomes in the Elderly*, 32 J. AM. C. CARDIOLOGY 993, 999 (1998) (concluding that bypass-surgery-provider profiling is a "potential means of improving patient outcomes while maintaining access to care"). For a statistical critique of these studies, see Jesse Green & Neil Wintfeld, *Report Cards on Cardiac Surgeons: Assessing New York State's Approach*, 332 NEW ENG. J. MED. 1229, 1230 (1995), which describes controversy surrounding the publicly available data on cardiac surgery mortality rates and cautions that the data might not properly account for the degree of patients' illnesses. *See also* Timothy P. Hofer et al., *The Unreliability of Individual Physician "Report Cards" for Assessing the Costs and Quality of Care of a Chronic Disease*, 281 JAMA 2098, 2098 (1999) (examining the effects of "physician performance measures for diabetes care" and concluding that these measures could incentivize doctors to avoid "patients with high prior cost, poor adherence, or response to treatments").

[141] *See* Susan Feng Lu, *Multitasking, Information Disclosure and Product Quality: Evidence from Nursing Homes* 1-3 (Simon Sch. Working Paper No. FR 09-03, 2009) (determining that nursing homes have not improved in overall quality of care despite publicly available "report cards" because existing resources were simply reallocated to achieve better scores on those aspects of care being measured).

[142] *See* David Dranove et al., *Is More Information Better? The Effects of "Report Cards" on Health Care Providers*, 111 J. POL. ECON. 555, 555-56 (2003) (finding that cardiac surgery "report cards" in New York and Pennsylvania resulted in medical providers being less willing to take on sicker patients, and therefore caused "worse health outcomes" and "decreased patient and social welfare").

[143] *Id.* at 581-84.

[144] *See* Leemore Dafny & David Dranove, *Do Report Cards Tell Consumers Anything They Don't Already Know? The Case of Medicare HMOs*, 39 RAND J. ECON. 790, 817 (2008)

due to consumers' readership, rather than intermediaries' readership, the success is attributable to the stripped-down nature of the disclosure, which conveys feedback ratings rather than core information.

HIPAA regulations prescribe numerous rules for doctors and hospitals that are intended to protect patients' privacy. Studies show, however, that the disclosure forms are written at a readership level hopelessly beyond most people's level.[145] Other findings indicate that nobody tries to read the HIPAA forms. The University of Michigan Hospital's form runs to seven large pages of print so small that one of us cannot read it with his glasses on.[146] Mandated disclosure of privacy policies outside health care do no better. For example, a survey of Internet users found that less than one percent of them even noticed the disclosed policies.[147]

Many of our colleagues informally report personal satisfaction with mandated nutrition labeling, and there are indications that some forms of nutrition labeling do some good. Americans report being more aware of nutrition facts and changing their purchasing based on nutrition labels. For example, Alan Mathios suggests that even before mandatory nutrition labeling, low-fat salad dressing had voluntary disclosures, but mandated labeling explicitly exposed the contents of high-fat salad dressings, and thus buyers could distinguish between the worse and the worst, precipitating a decline in sales for the highest fat products.[148]

But even for food labeling—the simplest and most understandable case of daily disclosures—evidence is mixed. Another study discovered that people infrequently consult nutrition labels, and that those who do often find it difficult to comprehend and use the infor-

(finding patient response to the Medicare report cards even after controlling for independent market factors).

[145] *See, e.g.*, Steven Walfish & Keely M. Watkins, *Readability Level of Health Insurance Portability and Accountability Act Notices of Privacy Practices Utilized by Academic Medical Centers*, 28 EVALUATION & HEALTH PROFS. 479 (2005); Mark Hochhauser, *Readability of HIPAA Privacy Notices*, BENEFITSLINK.COM (Mar. 12, 2003), http://benefitslink.com/articles/hipaareadability.pdf.

[146] Carl E. Schneider, *HIPAA-cracy*, HASTINGS CENTER REP., Jan.–Feb. 2006, at 10, 11.

[147] B.J. Fogg et al., *How Do People Evaluate a Web Site's Credibility? Results from a Large Study*, CONSUMER REPORTS WEBWATCH, 86 (Nov. 11, 2002), http://www.consumerwebwatch.org/pdfs/stanfordPTL.pdf.

[148] Alan D. Mathios, *The Impact of Mandatory Disclosure Laws on Product Choices: An Analysis of the Salad Dressing Market*, 43 J.L. & ECON. 651, 673-75 (2000).

mation provided.[149] Subjects in the study particularly struggled when trying to gauge whether nutrient contents comprised a "low, medium or high amount."[150] Likewise, a review of 103 studies "found that although some consumers could understand some of the information on nutrition labelling, in general they reported finding nutrition labelling confusing, especially the use of some technical and numerical information."[151] The review identified numerous studies that contested the validity of consumer self-reported levels of nutrition-label consultation. Employing an analytical tool known as "verbal protocol analysis," the researchers in these studies recorded participants' thoughts as the participants consulted nutrition labels. The researchers analyzed the data collected to more fully understand how nutrition labels affected consumers' choice of food products. While consumers may look at nutritional information, these studies concluded that they seldom process its meaning.[152]

Even if consumers try to process the information, their ability to do so depends upon "literacy and numeracy skills"[153] (which may help explain why our colleagues report greater benefit from nutrition labeling than the evidence seems to indicate for many people). One study found that patients experienced "many difficulties interpreting current food labels" and that patients' difficulties were "highly correlated with their underlying literacy and numeracy skills."[154] This correlation remained even for more educated patients. Despite a "generally well-educated" sample, nearly 80% of which had adequate literacy skills, more than two-thirds of subjects had numeracy skills below a ninth-grade level.[155] So, for example, when 200 patients were asked twenty-four questions about actual labels, only 22% of them

[149] Gary Jones & Miles Richardson, *An Objective Examination of Consumer Perception of Nutrition Information Based on Healthiness Ratings and Eye Movements*, 10 PUB. HEALTH NUTRITION 238 (2007).

[150] *Id.*

[151] Gill Cowburn & Lynn Stockley, *Consumer Understanding and Use of Nutrition Labelling: A Systematic Review*, 8 PUB. HEALTH NUTRITION 21, 23 (2005).

[152] *Id.* at 24; *see also* Russell L. Rothman et al., *Patient Understanding of Food Labels: The Role of Literacy and Numeracy*, 31 AM. J. PREVENTIVE MED. 391, 391 (2006) (concluding that many patients struggle to understand nutrition labels and that there is a strong correlation between poor label comprehension and low-level literacy and numeracy skills).

[153] Mary Margaret Huizinga et al., *Literacy, Numeracy, and Portion-Size Estimation Skills*, 36 AM. J. PREVENTIVE MED. 324, 326 (2009).

[154] Rothman et al., *supra* note 152, at 394.

[155] *Id.* at 396.

> could determine the amount of net carbohydrates in two slices of low-carb bread, and only 23% could determine the amount of net carbohydrates in a serving of low-carb spaghetti. There were 970 errors identified on the subjects' responses to the first 12 items of the [National Label Survey]. Common errors included (1) did not attempt to apply serving size/servings per container information or used it inappropriately (*n*=325), (2) confused by extraneous or complex information (*n*=369), and (3) calculation and other errors (*n*=276). Many patients were confused by the complexity of the nutrition label and could not find the proper information on the label, or incorrectly used the information in the percent daily value column or the 2000-calorie recommended daily allowance (RDA) footnote when this information was not relevant.[156]

But assume that nutrition labeling is more successful than this study suggests. The question would then be how to distinguish between correlation and causation. Changes in consumption, especially the rise of demand for low-fat foods and the decline in demand for high-fat foods, are associated with mandated disclosure, but various factors may have set the trend before the disclosure regulation, as a result of various factors—change in consumer tastes, the obesity epidemic, aggressive advertising by low-fat food manufacturers, and more.

Furthermore, consumers have other ways to acquire nutrition information. Manufacturers highlight nutrition advantages and make comparative claims. Perversely, because of disclosure mandates in the Nutrition Labeling and Education Act,[157] the amount of nutrition information in manufacturers' advertising and voluntary campaigns has narrowed substantially. Fewer comparative claims are made, claims focus on narrower issues (e.g., total fat), and advertising of "good foods" like fruits and vegetables has fallen significantly.[158] To be sure, voluntarily disclosed information can be biased and misleading, and the FTC has been monitoring such information. But if mandatory merely replaces voluntary disclosure, then its value is questionable.

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[156] *Id.* at 393.

[157] Pub. L. No. 101-535, § 1(a), 104 Stat. 2353 (1990) (codified in scattered sections of 21 U.S.C.).

[158] PAULINE M. IPPOLITO & JANIS K. PAPPALARDO, BUREAU OF ECON. STAFF, FTC, ADVERTISING NUTRITION AND HEALTH: EVIDENCE FROM FOOD ADVERTISING 1977–1997 E-30 (2002); *see also* Pauline M. Ippolito & Alan D. Mathios, *Information, Advertising, and Health Choices: A Study of the Cereal Market*, 21 RAND J. ECON. 459 (1990) (examining the effects of information on consumer and producer behavior in the ready-to-eat cereal market); Pauline M. Ippolito & Alan D. Mathios, *Information and Advertising: The Case of Fat Consumption in the United States*, 85 AM. ECON. REV. 91 (1995) (examining how the introduction of producer advertising affected fat consumption).

It is also sobering that, while food labeling may be have an increasing effect on people's decisions, few succeed in changing their overall diets. Findings suggest, for example, that reduced consumption of one high-fat food, such as red meat, is offset by increased consumption of another high-fat food, such as dairy products.[159]

Evidence suggests that *Miranda* warnings fail for two reasons. First, people do not understand those warnings. Asked to paraphrase *Miranda* provisions directly after hearing each provision,

> [o]nly 38.5% of detainees achieved good comprehension for the easy (< sixth grade) level, and substantially fewer (20.5%) achieved good comprehension for the moderate (8th to 10th grade) level. . . . [V]ery few detainees (6.8%) accurately recalled even at the easy (< sixth grade) level that there is no cost for a court-appointed attorney.[160]

Thus, for example, when Rogers "examined whether college students espousing knowledge of their Miranda rights were accurate in their self-appraisals," he found that "[n]early all (95.6%) believed that any confession would nullify their right to counsel."[161]

Second, evidence shows that

> the overwhelming majority of suspects (some 78% to 96%) waive their rights. As Patrick Malone pointed out . . . "*Miranda* warnings have little or no effect on a suspect's propensity to talk. . . . Next to the warning label on cigarette packs, *Miranda* is the most widely ignored piece of official advice in our society."[162]

*Miranda* does not even help people with every advantage. The FBI interrogated Yale faculty, staff, graduate students, and undergraduates after a 1960s draft protest. The warnings were "almost wholly ineffec-

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[159] *See* Brenda M. Derby & Alan S. Levy, *Do Food Labels Work?* (noting studies that show reduced-fat options do not necessarily lead to less fat intake), *in* HANDBOOK OF MARKETING AND SOCIETY 372, 389 (Paul N. Bloom & Gregory T. Gundlach eds., 2001); Daniel S. Putler & Elizabeth Frazao, *Assessing the Effects of Diet/Health Awareness on the Consumption and Composition of Fat Intake* (finding "widespread 'balloon' effects, where women trade one source of dietary fat for another"), *in* ECONOMICS OF FOOD SAFETY 247, 267 (Julie A. Caswell ed., 1991).

[160] Richard Rogers, *A Little Knowledge is a Dangerous Thing . . . Emerging* Miranda *Research and Professional Roles For Psychologists*, 63 AM. PSYCHOLOGIST 776, 779 (2008).

[161] *Id.* at 781.

[162] Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L REV 1000, 1012-13 (second alteration in original) (quoting Patrick Malone, "*You Have the Right to Remain Silent":* Miranda *After Twenty Years*, 55 AM. SCHOLAR 367, 368 (1986)).

tive."[163] Each man waived his rights, and after being better informed about the legal meaning of doing so, regretted it.[164]

We could go on. We could say, for example, that disclosure by used-car dealers of items such as prior use, odometer readings, warranties, and safety checks did nothing to improve the excess price paid by poor buyers relative to more wealthy ones.[165] We could also point to some moderate successes of disclosure regimes, particularly those that rely on ratings systems.[166] But enough. Let us move on to a more fundamental step of our argument—an exploration of why mandated disclosure is so unreliable.

## III. WHY MANDATED DISCLOSURE FAILS

We have shown that mandated disclosure regularly—though not inevitably—fails to achieve its purpose of improving disclosees' decisions. Mandated disclosure is not doomed to fail, but it rarely succeeds. On analysis, one can see why failure is virtually inherent in the regulatory technique. Success requires three actors—lawmakers, disclosers, and disclosees—to play demanding parts properly. Rarely can each actor accomplish all that is needed, and therefore mandated disclosures rarely work as planned.

### A. *Lawmakers*

For mandated disclosure to work, lawmakers must succeed at several tasks. First, they must correctly identify a problem that needs a regulatory solution. Second, they must correctly decide that mandated disclosure is the appropriate regulatory method. Third, they must correctly decide what disclosure to mandate. Fourth, they must

[163] John Griffiths & Richard E. Ayres, Faculty Note, *A Postscript to the* Miranda *Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300, 318 (1967).

[164] *Id.* at 310.

[165] *See* Kenneth McNeil et al., *Market Discrimination Against the Poor and the Impact of Consumer Disclosure Laws: The Used Car Industry*, 13 LAW & SOC'Y REV. 695, 717 (1979) ("Wisconsin's disclosure law . . . did not increase *or* decrease the relative disadvantage of the poor.").

[166] *See* ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY (2007) (analyzing the success of simple disclosures). *But see* Clifford Winston, *The Efficacy of Information Policy: A Review of Archon Fung, Mary Graham, and David Weil's* Full Disclosure: The Perils and Promise of Transparency, 46 J. ECON. LIT. 704 (2008) (arguing that evidence of the alleged success of transparency regimes is inconclusive).

correctly and comprehensibly articulate the standard of disclosure. Each step is problematic; tacking all four successfully is uncommon.

These steps are so problematic because each one pushes the lawmaker toward excessive mandates. Lawmakers have incentives to regulate when regulation is unnecessary, to use mandated disclosure when it is ineffective, to set mandates too broadly, and to articulate standards too loosely. As a result, disclosure mandates grow but never diminish; disclosures are added, never removed.

### 1. Is Regulation Necessary?

Demands for action deluge lawmakers. "Trouble stories"—tales of misfortune that might represent a systematic problem—inspire many of these demands. The family that lost a home to foreclosure, the patient who died, and the consumer who has been swindled spark sympathy and anger. Indignation, political pressure, and a sense of duty drive lawmakers to regulate.

More specifically, as Bardach and Kagan observe, "[c]atastrophes are probably the most important catalysts of new regulation."[167] Legislators in our media-oriented world "transform individual acts of malfeasance into social problems requiring society-wide solutions."[168] Legislators write prohibitory legislation, which places them "on the side of the angels without having to vote for higher taxes."[169] Once regulatory bureaucracies are established, their growth is determined in part by failure of current policy, and in part by new risks and new situations that develop.[170] Noteworthy events spark that growth, including "scandals that expose presumptive laxity, corruption, or incompetency in the regulatory agency."[171]

Trouble stories, however, are dubious bases for regulation. They are anecdotes and may not represent a problem at all, much less one extensive and serious enough to necessitate regulation. For example, the atrocities of Nazi doctors and the Public Health Service research at Tuskegee have been the primary rationale for the university and hospital committees that regulate "human-subject" research. But these stories tell us little about how often and how unethical medical

[167] EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 23 (Transaction Publishers 2d prtg. 2003) (1982).
[168] *Id.* at 67.
[169] *Id.* at 14.
[170] *Id.* at xiv.
[171] *Id.* at 22.

researchers, much less unethical social scientists, significantly injure people in this country and in this era.

Another example involves a research subject who died under tragic circumstances a decade ago,. It turned out that the researcher had a financial interest in a company that might have benefited had the research succeeded.[172] This trouble story has become "proof" that researchers with financial interests in their work are dangerous. Exemplifying the overreaction that scandals provoke, "one [conflict of interest committee] chair remarked, 'The future of academic health centers depends on . . . [conflict of interest oversight] being done right.'"[173] Researchers may sometimes be tempted to take some advantage of research subjects for financial gain, but are they tempted and do they succumb often enough and harmfully enough to justify regulating conflicts of interest? Who knows? Who asks?

Not only are trouble stories dubiously representative, they are *asymmetrical*. They push in only one direction—toward regulation. What might induce lawmakers to forego or revoke regulation? What would be evidence that the problem was infrequent and minor? The pressure for *more* is salient, politically charged, and urgent; the pressure for *less* is not. The injured research subject or the defrauded consumer is conspicuous; the people who can be saved by suppressed research or the consumers who pay for regulation are anonymous and forgotten.

### 2. Is Mandated Disclosure the Best Form of Regulation?

Mandated disclosure is a Lorelei, luring lawmakers onto the rocks of regulatory failure. It is alluring because it resonates with two fundamental American ideologies. The first is free-market principles. Mandated disclosure may constrain unfettered rapacity and counteracts caveat emptor, but the intervention is soft and leaves everything substantive alone: prices, quality, entry. Instead of specifying outcomes of transactions or dictating choices, it proffers information for making better decisions.[174] Second, mandated disclosure serves the

[172] Robin Fretwell Wilson, Estate of Gelsinger v. Trustees of University of Pennsylvania*: Money, Prestige, and Conflicts of Interest in Human Subjects Research*, *in* HEALTH LAW AND BIOETHICS 229, 230 (Sandra H. Johnson et al. eds., 2009).

[173] Kevin P. Weinfurt et al., *Disclosing Conflicts of Interest in Clinical Research: Views of Institutional Review Boards, Conflict of Interest Committees, and Investigators*, 34 J.L. MED. & ETHICS 581, 583 (2006).

[174] For excellent discussions, see Beales et al., *supra* note 68, at 513-14, Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric*

autonomy principle. It supposes that people make better decisions for themselves than anyone can make for them and that people are entitled to freedom in making decisions.

The more-information-is-better mantra seems to serve both the free-market and autonomy principles. Thus, in defending mandated disclosure, the Federal Trade Commission stated, "It is a basic tenet of our economic system that information in the hands of consumers facilitates rational purchase decisions; and, moreover, is an absolute necessity for efficient functioning of the economy."[175] The ease with which lawmakers mandate disclosure further evidences the ideological appeal of the mantra. For example, a flagship disclosure statute—the Truth-in-Lending Act of 1968—passed by ninety-two to zero votes in the Senate.[176] The PSDA passed unopposed in the Senate.[177] Courts adopted informed consent with impressive confidence and many pieties (and little evidence).

Mandated disclosure appeals to lawmakers for other reasons. First, it looks cheap. It requires almost no government expenditures, and its costs seem to be imposed on the story's villain, the stronger party who withholds information.

Second, mandated disclosure looks easy. It just requires more communication between parties who are already communicating; in hindsight, the information that could have led a trouble-story victim to a better decision seems obvious. For example, Rena Truman's doctor repeatedly urged her to have a Pap smear but did not specify the consequences of not having one. She died of cervical cancer. Typically, one judge asked,

> Can it be doubted that, had the decedent in this case known that for $6 and mild discomfort she could discover the existence of cervical cancer and thus survive, she would have taken the test? Central to her failure to take the test was a clear lack of understanding of the significance of the doctor's recommendation.[178]

*Paternalism*," 151 U. PA. L. REV. 1211 (2003), and Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

[175] Proprietary Vocational and Home Study Schools, 43 Fed. Reg. 60,796, 60,805 (Dec. 28, 1978).

[176] Rubin, *supra* note 5, at 254-55.

[177] *See* Elizabeth Leibold McCloskey, *The Patient Self-Determination Act*, 1 KENNEDY INST. ETHICS J. 163, 168 (1991). McCloskey, the sponsor's aide, thinks "Reinhold Niebuhr would have enjoyed watching the legislative process," for translating "a good idea into a good law is . . . a Niebuhrian dream." *Id.* at 164.

[178] Truman v. Thomas, 155 Cal. Rptr. 752, 762 (Cal. Ct. App. 1979) (Karlton, J. concurring and dissenting), *vacated*, 611 P.2d 902 (Cal. 1980). For a detailed examina-

Third, mandated disclosure looks effective. Mandated information often seems relevant to a difficult decision. When asked, consumers say they want information. Even unenthusiastic commentators imagine that while mandates may not help, they cannot hurt. And the dogma of disclosure seems unfalsifiable: even when disclosure fails, this failure only means that the mandate should be enhanced. For example, despite a long and long-standing list of mandated mortgage disclosures, an epidemic of irrational and devastating borrowing produced a subprime mortgage disaster, a foreclosure surge, and a financial crisis. Despite proposals to regulate mortgages substantively and oversee lenders more closely,[179] commentators and reformers still consider disclosures central to the solution.[180] For example, the Housing and Economic Recovery Act of 2008 requires a lender to disclose a new, all-inclusive version of the APR three days before the deal.[181] Even catastrophes like the BP oil spill, which led to a serious debate on how to prevent such episodes, have invoked proposals for mandated disclosure. Why not disclose the oil company's safety record to its consumers at the gas station?[182]

For all these reasons, lawmakers rarely inquire into the effectiveness or burden of disclosure. For example, "only limited discussions

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tion of that case and the assumption that Ms. Truman would have behaved differently had Dr. Thomas told her the risks of not having a Pap smear, see Mark A. Hall & Carl E. Schneider, *When Patients Say No (to Save Money): An Essay on the Tectonics of Health Law*, 41 CONN. L. REV. 743, 764-67 (2009).

[179] *See, e.g.*, Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1317-66 (2002) (proposing that the government stop predatory lending by establishing a suitability standard); John A. E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. ILL. L. REV. 405, 407 (suggesting "creditor-focused reform"); *see also* HUD-TREASURY TASK FORCE ON PREDATORY LENDING, CURBING PREDATORY HOME MORTGAGE LENDING 17-18 (2000), *available at* http://www.huduser.org/publications/pdf/treasrpt.pdf (explaining the relationship between predatory lending and subprime markets).

[180] *See* HUD-TREASURY TASK FORCE ON PREDATORY LENDING, *supra* note 179, at 67 (proposing that originators be required to provide an accurate "Good Faith Estimate" of, among other things, the APR); *see also* U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 63-65 (2009), *available at* http://www.financialstability.gov/docs/regs/FinalReport_web.pdf (proposing new formats for financial disclosures that would be less technical and tested for their readability); Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1140-49 (2009) (providing one of the more nuanced and careful views of disclosure reform); Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REG. 181, 230-31 (2008) (proposing a comprehensive APR measure).

[181] 15 U.S.C. §1638(b)(2) (2006 & Supp. III 2009).

[182] Jody Freeman, *The Good Driller Award*, Op-Ed., N.Y. TIMES, July 1, 2010, at A31.

of the potential costs and benefits of the PSDA occurred during the legislative process."[183] Similarly, the courts primarily responsible for creating the duty of informed consent barely asked whether patients want to make medical decisions, whether doctors could provide and patients could use the mandated information, whether patients would make better decisions with more information, or what informed consent would cost—despite empirical grounds indicating that courts should expect troubling answers to these questions.[184]

In short, when lawmakers are besieged, mandated disclosure looks like rescue. Its critics are few.[185] Lawmakers can be seen to have acted. The fisc is unmolested. The people most visibly burdened—the disclosers—rarely dare resist vigorously and prefer disclosure to yet harsher regulation. Easy alternatives are few. Disclosure's political utility does much to explain its incessant use and its irrepressible expansion.[186]

### 3. What Is the Proper Scope of the Disclosure Mandate?

Mandated disclosure's appeal to lawmakers and the allure of the more-is-better mantra lead lawmakers to mandate disclosure too often and too broadly. Furthermore, disclosure's logic is inherently expansive. Only broad disclosure accommodates the variety of disclosees

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[183] Jeremy Sugarman et al., *The Cost of Ethics Legislation: A Look at the Patient Self-Determination Act*, 3 KENNEDY INST. ETHICS J. 387, 389 (1993).

[184] *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 786 (D.C. Cir. 1972) ("[T]he patient's right of self-decision . . . can be effectively exercised only if the patient possesses enough information to enable an intelligent choice.").

[185] For some early skepticism, see Robert L. Jordan & William D. Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285 (1966), Homer Kripke, *Gesture and Reality in Consumer Credit Reform,* 44 N.Y.U. L. REV. 1 (1969), and Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967). Some economists who expect businesses to volunteer information if consumers want it have criticized mandated disclosure, if faintly. *See, e.g.*, Michael J. Fishman & Kathleen M. Hagerty, *Mandatory Disclosure* (exploring various consequences of disclosure through economic analysis), *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 605 (Peter Newman ed., 1998); Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J.L. & ECON. 461, 479-80 (1981) (arguing that it is in a company's economic interest to disclose information, even in the absence of positive disclosure law); A. Mitchell Polinsky & Steven Shavell, *Mandatory Versus Voluntary Disclosure of Product Risks* 2-4 (Stanford Law and Econ. Olin Working Paper No. 327, Harvard Law and Economics Discussion Paper No. 564, 2006), *available at* http://ssrn.com/abstract=939546 (noting that disclosure regimes present potential unintended risks, such as chilling information gathering from firms).

[186] *See, e.g.*, William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1096-102 (1984) (describing the shift from usury laws to disclosure regulation).

and circumstances. One can always imagine that disclosing one more datum might help. Because it is hard to anticipate what data will help, safety seems to lie in broad mandates.

For example, what should researchers disclose about conflicts of interest? Conflicts may include "the award of stock contingent on certain occurrences, licensing rights, 'put' options, seed money for commercial start-ups, limited partnership and other joint venture opportunities, royalty-based payments, and specialized grant funding to individual investigators and to institutions."[187] Worse, incentives' effects

> vary in intensity and impact depending on the overall context, such as the number of other investigators sharing the same incentive, how the incentive is actually calculated, the amount of money to be earned compared to an investigator's other compensation sources, the time period over which the incentive is applied, and whether the institution as a whole shares in the incentive.[188]

All this might be relevant; what can be excluded? Similarly, mortgage disclosures are hard to specify because "predatory lending can take many forms," including overpricing loans, lending more than buyers can repay, charging fees that offset the advantages of refinancing, "a myriad of other potentially exploitive terms," and misrepresenting the loan documents.[189]

Mandates also multiply when people are unsure of what information disclosees need. For example, hospitals, physicians, and schools must disclose "report cards" about their performance, when performance depends on both the skill and the effort of the producer and the characteristics of their patients and students. However, despite decades of inquiry, scholars have not found reliable indicia of medical quality, principally because they cannot factor out all the influences on medical success. And since exceptional doctors attract risky cases, success may not reflect skill.

In addition, trouble stories never stop. No regulation eliminates problems, and mandated disclosure barely reduces them. Thus, there is constant pressure to cover newly noticed contingencies. The scope of mandates ratchets ever up, never down.

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[187] Richard S. Saver, *Medical Research Oversight from the Corporate Governance Perspective: Comparing Institutional Review Boards and Corporate Boards*, 46 WM. & MARY L. REV. 619, 716 (2004).

[188] *Id.* at 717.

[189] Debra Pogrund Stark & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POL'Y & L. 85, 90-91 (2010).

Lawmakers might set a mandate's scope by asking consumers what they want to know. Alas, they say virtually everything. When choosing health care plans, they want to know about

> (1) access . . . ; (2) amount of paperwork; (3) benefits; (4) choice of provider . . . ; (5) communication/interpersonal skills/caring of provider; (6) convenience . . . ; (7) coordination of care; (8) costs; (9) courtesy . . . ; (10) hospital ratings; (11) good value for the money; (12) plan administrative hassles; and (13) quality . . . .[190]

In one large study, 76% of the patients questioned "would want to hear of *any* adverse effects [of a treatment], no matter how rare" and 83% wanted to know about *any* "serious adverse effect, no matter how rare."[191]

If people knew how much they were asking for, they would not say such things. Given much less information, they still use much less than they are given. For example, "the Minnesota Health Data Institute distributed a 16-page, statewide report card that featured comparison tables and color-coded graphs of consumer satisfaction within categories of health plans and compared 38 plans based on 20 performance measures."[192] However, "[c]onsumers found the report cards cumbersome, complex, and detailed."[193]

Furthermore, in at least some areas (like medicine) numerous people profess themselves pleased with *whatever* quantum of information they receive, however inadequate. For example, one review of the literature reports that "[p]atient satisfaction with the quality of information provided, was usually high, despite frequent poor recall."[194]

Another reason mandates expand is that disclosees interpret information "wrongly." Thus, while patients and research subjects are supposed to be warned of the evils of doctors' and researchers' conflicts of interest, one study found that some people "perceived financial interests as a positive sign that the investigator would be invested in ensuring a study was done well."[195] Such perversity drives lawmakers

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[190] Lubalin & Harris-Kojetin, *supra* note 137, at 72.

[191] Dewey K. Ziegler et al., *How Much Information About Adverse Effects of Medication Do Patients Want from Physicians?*, 161 ARCHIVES INTERNAL MED. 706, 708 (2001) (emphasis added).

[192] Judith H. Hibbard et al., *Informing Consumer Decisions in Health Care: Implications from Decision-Making Research*, 75 MILBANK Q. 395, 395 (1997).

[193] *Id.* at 398.

[194] R. Lemaire, *Informed Consent—A Contemporary Myth?*, 88-B J. BONE & JOINT SURGERY 2, 4 (2006).

[195] Christine Grady et al., *The Limits of Disclosure: What Research Subjects Want to Know About Investigator Financial Interests*, 34 J.L. MED. & ETHICS 592, 598 (2006).

to insist on broader disclosures so that disclosees understand the problem the *right* way.[196]

### 4. Can the Quantity Problem Be Answered?

Because lawmakers tend to overuse mandated disclosure and to inflate its scope, a recurring and crucial "quantity problem" arises. This problem has two principal aspects—the "overload" effect and the "accumulation" problem. The overload effect arises when a disclosure is too copious and complex for the disclosee to handle effectively. The accumulation problem arises because so many disclosures assail disclosees that they cannot possibly attend to more than a fraction of them. Both the overload effect and the accumulation problem are in the first instance the responsibility of the lawmaker, who must evaluate them in deciding whether and how to mandate a disclosure.

#### a. *The Overload Effect*

The overload problem is ubiquitous. When mandates are too detailed, both disclosers and disclosees have trouble. Forms become so long and elaborate that disclosers have problems assembling and organizing the information, and disclosees do not read them and cannot understand, assimilate, and analyze the avalanche of information.[197]

The classic overload statement is Miller's "magical number seven"[198]—seven being roughly the number of items people can keep in short-term memory. This number is often thought too high, but many typical disclosures easily exceed it. For example, *Miranda* warnings average 96 words and range up to 408 words. Rogers invokes Miller's number and concludes that even with "verbal chunking" (combining data into a single item for easier storage) "the upper limit of information processing for Miranda warnings is likely less than 75 words . . . . Even when cued, participants with less than a 12th grade education recalled only 55.8% of the verbal material."[199] And this still overstates understanding, since "many suspects have cognitive deficits

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[196] *See, e.g.*, Eskridge, *supra* note 186, at 1165 (arguing that the correct approach to reform is to increase accuracy rather than to simply increase or decrease the number of disclosures).

[197] *See* Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1211-15 (1994) (examining the social science literature on information overload).

[198] George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 PSYCHOL. REV. 81, 90 (1956).

[199] Rogers, *supra* note 160, at 778.

and are further impaired by highly stressful circumstances," and since "the mere recitation of concepts cannot be equated with genuine understanding."[200] The same problem proliferates in medicine. In one study, for example, "[a]nesthesiologists and nurse practitioners vastly exceeded patients' short-term memory capacity" when trying to educate them, the "investigators concluded that there is an extreme tendency toward information overload by health care providers."[201]

The overload problem is omnipresent and usually inevitable because of the dynamics of mandating disclosure. Even if a mandate begins modestly—label the calories on the can of tuna—it irrepressibly expands. In part, this trend is because lawmakers discover that people need more information to interpret the first mandate correctly (e.g., information about average caloric needs or the calories from fats) and that more information is relevant to the choice (e.g., information about trans fats, carbohydrates, vitamins, salt, and so on). As information proliferates, it becomes hard to argue that yet other data are not equally relevant, and various data will have their advocates, such as the groups that want disclosures about whether food contains anything genetically modified or about a food's country of origin.

Lawmakers have no good solution to this problem. There is rarely a good solution in principle: incomplete disclosure leaves people ignorant, but complete disclosure creates crushing overload problems. Thus, a sophisticated lawmaker could recognize that "less is more" but still fear that "less is not enough." Furthermore, and crucially, the lawmaker's incentives generally push it toward ever *more* disclosure.

A particularly revealing illustration of the way lawmakers create overload problems—virtually against their will and certainly against their avowed intentions—comes from the IRB system. There, the regulator (the IRB) approves the exact words of every disclosure the researcher makes and has unreviewable discretion to impose whatever requirements it wishes. The literature, government agencies, and elite commissions agree that consent forms are too long, and there is every reason to believe that individual IRB members concur.[202] Nevertheless, in the decades during which the IRB system has regulated how researchers may solicit consent from prospective research subjects, consent forms have steadily swollen. In one study, for example,

[200] *Id.* at 778-79.

[201] Elisabeth H. Sandberg et al., *Clinicians Consistently Exceed a Typical Person's Short-Term Memory During Preoperative Teaching*, 53 SURV. ANESTHESIOLOGY 131, 131 (2009).

[202] *See* Carl E. Schneider, *The Hydra*, HASTINGS CENTER REP., July–Aug. 2010, at 9.

> [t]he length of the consent form increased roughly linearly by an average of 1.5 pages per decade. In the 1970s, the average consent form was less than one page long and often only a paragraph or two, but by the mid-1990s the average form had increased in length to over 4.5 pages . . . ."[203]

In a span of seven years, for example, between 1975 and 1982, the "mean length of consent forms nearly doubled."[204]

How can a lawmaker committed to brevity become the instigator of prolixity? A study by William Burman and others helps explain why lawmakers generally, and IRBs particularly, steadily expand both the scope, length, and complexity of disclosure mandates.[205] That study looked at the way twenty-five IRBs at "large institutions oriented toward clinical research" reviewed two protocols.[206] Review generally took over three months. The IRBs found no problem with the protocols, but they required a median of 46.5 changes in each consent form.[207] Most (eighty-five percent) of the changes "did not change the meaning of the consent form," but they did change its quality.[208] The forms got longer, the sentences wordier, the active voice scarcer, and the reading-difficulty level higher (by a mean of .9 levels), so that 41% of the forms "had an inappropriately high reading grade level."[209]

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[203] Ilene Albala et al., *The Evolution of Consent Forms for Research: A Quarter Century of Changes*, IRB: ETHICS & HUMAN RES., May–June 2010, at 7, 9 (citation omitted). "More recently, Beardsley and colleagues in Australia found that the median length of consent forms increased from seven to 11 pages between 2000 and 2005." *Id.* at 7 (citing Emma Beardsley et al., *Longer Consent Forms for Clinical Trials Compromise Patient Understanding: So Why Are They Lengthening?*, 25 J. CLINICAL ONCOLOGY, e13, e13-e14 (2007), http://jco.ascopubs.org/content/25/9/e13.full.pdf).

[204] *Id.* at 7.

[205] William Burman et al., *The Effects of Local Review on Informed Consent Documents From a Multicenter Clinical Trials Consortium*, 24 CONTROLLED CLINICAL TRIALS 245 (2003).

[206] *Id.* at 252.

[207] The range of changes was between 3 and 160.

[208] *Id.* at 249.

[209] *Id.* Furthermore, 11.2% of the changes actually introduced errors into the forms. Two-thirds of the forms "had an error of protocol presentation or a required consent form element." *Id.* Many errors were minor, but over a quarter

> were more substantive: deletions of significant side effects (e.g., the possibility of hepatotoxicity from rifampin and/or pyrazinamide), major errors in the description of study procedures (e.g., incorrect information on study duration), or the complete removal of a required section of the consent form (e.g., the right to withdraw from the study).

*Id.* at 249-51.

b. *The Accumulation Problem*

The overload effect pervades the Disclosure Republic, but it is at least well known in the literature and by lawmakers.[210] However, they hardly notice the "accumulation" problem. Lawmakers evaluate disclosure mandates issue-by-issue, but in disclosees' lives, each disclosure competes for their time and attention with other disclosures, with their investigations into unmandated knowledge, and with everything they do besides collecting information and making decisions (like working, playing, and living with their families). One disclosure by itself may seem trivial, but en masse disclosures are overwhelming. Even if disclosees wanted to read all the disclosures relevant to their decisions, they could not do so proficiently, and practically they could not do so at all. They soon learn their lesson and give up any inclination they may have had to devote their lives to disclosures.

Lawmakers are shielded from the accumulation problem. They deal with trouble stories and the social problems they symbolize one at a time, in specialized agencies or committees, or in courts confronted with a particular case or controversy. In those contexts, nothing draws their attention to the accumulation problem; nor would raising it be a politically attractive maneuver. And even if the literature eventually recognized the accumulation problem, even if the literature informed lawmakers, and even if lawmakers wanted to thin the disclosure landscape by selecting only a few critical disclosures, the lawmakers would not have the competence, incentives, or opportunity for doing so.

Furthermore, the American system of overlapping jurisdictions permits one lawmaker to act even if other lawmakers with concurrent jurisdiction believe action is unnecessary, undesirable, or even unsafe. For example, the FDA must approve the content of labels. Nevertheless, a state jury may hold a pharmaceutical company liable for injuries purportedly resulting from drugs containing labels that the FDA approved but that the jury thought insufficiently informative.[211] In another example, the FCC already limits the frequency energy that a cell phone can emit, research has identified no "conclusive evidence" that cellphone emissions are harmful, and information about emis-

[210] *See, e.g.*, Int'l Harvester Co., 104 F.T.C. 949, 1060 (1984).

[211] *See* Wyeth v. Levine, 129 S. Ct. 1187 (2009) (discussing a case arising under state law in which the jury found that a drugmaker did not provide adequate warning on its labels of risks related to using the drug intravenously).

sions is available online.[212] Nevertheless, the San Francisco board of supervisors has passed an ordinance requiring "handset makers to post in stores how much wireless radiation their phones give off."[213]

5. Can the Standard of Disclosure Be Articulated Effectively?

Suppose the lawmaker has identified a genuine problem, the problem is appropriate for mandated disclosure, and the mandate's scope has been shrewdly gauged. The lawmaker must now articulate the mandate. Standards can range from vague general statements to precise lists of specific data. Informed consent exemplifies the former end of the continuum: what information would a reasonable patient want in making her decision? *Miranda* exemplifies the latter: a set of words so specific that television addicts can recite them from memory. Alas, both ends of the continuum are problematic. The specific end requires extraordinary prescience and precision. Perversely, this precision is likeliest when information is already well known; it became easier to write intelligible cigarette warnings after the dangers of smoking were common knowledge. The vague end of the spectrum may ease these problems, but it gives disclosers scant guidance.

Lawmakers may be concerned not only with *what* must be disclosed, but also with *how*. The problem of disclosing conflicts of interest to research subjects provides a hint of the difficulties the method of disclosure poses. In one survey of researchers and regulators, some thought

> that the financial disclosure should occur early in the consent process, and some respondents suggested that a disclosure statement should appear near the top of the consent document. There was also support for highlighting the disclosure in some way, but this suggestion raises the concern that such highlighting might communicate to potential research participants that the financial disclosure is more important than other components of the consent document.[214]

To put the point differently, the lawmaker has an inherently difficult task. Both the market-failure and the autonomy rationales for mandated disclosure assume that disclosees and their circumstances, preferences, and choices are various. Given all this variety, how is a

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[212] John D. Sutter, *San Francisco to Warn Consumers About Cell Radiation Levels*, CNN (June 16, 2010), http://www.cnn.com/2010/TECH/mobile/06/16/san.francisco.cell.radiation/index.html?hpt=T2.

[213] *Id.*

[214] Weinfurt et al., *supra* note 173, at 590.

lawmaker to find language to guide each discloser to the disclosure most helpful to disclosees?

In sum, the lawmaker's incentives are to mandate disclosure even when it is inappropriate and to mandate disclosure too broadly. Furthermore, those incentives persist even after the lawmaker has acted; trouble stories will continue to reveal that the new disclosure regime has not solved every problem. And experience continually suggests more data that might improve disclosees' decisions. Thus, disclosure mandates often grow and rarely shrink.

### B. *Disclosers*

The second prerequisite to mandated disclosure is that the disclosers provide the mandated information. Even under the optimistic assumption that disclosers will truly try to comply with disclosure requirements, much will keep them from doing so effectively.

#### 1. Interpreting the Mandate

First, the discloser must determine what to disclose. But, as we have just explained, mandates can be frustratingly vague. We could invoke illustrations of mythic proportions, like the original TILA and Regulation Z that implemented it, which were contradictory at places and over time were accompanied by countless Federal Reserve Board comments. But it does not take a long technical statute to create complexity and vagueness—such downfalls can also result from a seemingly simple standard of disclosure. Consider contract law's disclosure norms. Sellers cannot imagine and describe everything any imaginable buyer might ever want to know about a contract. But if not everything, how much? The common law has struggled to find a formula. Some nondisclosures amount to fraudulent concealment and are subject to standard antifraud sanctions, but mandated disclosure is intended to go beyond antifraud rules. The Restatement of Contracts requires disclosing facts that would "correct a mistake of the other party as to a basic assumption on which that party is making the contract."[215] But the ambiguity of this rule suggests why legislators later supplemented it with bright-line rules on, say, which advertising practices are deceptive.[216]

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[215] RESTATEMENT (SECOND) OF CONTRACTS § 161(b) (1981).

[216] *See, e.g.*, 15 U.S.C. §§ 45, 52 (2006).

Or consider doctors' duty to provide information "'a reasonable person . . . would be likely to attach significance to . . . in deciding whether or not to forego the proposed therapy.'"[217] You are the doctor. A drug's side effects include

> excess stomach acid secretion, irritation of the stomach or intestines, vomiting, heartburn, stomach cramps, bronchospasm, stomach ulcers, intestinal ulcers, hepatitis, stomach or intestinal bleeding, inflammation of skin, redness of skin, itching, hives, rash, wheezing, trouble breathing, life-threatening allergic reaction, giant hives, rupture in the wall of the stomach or intestines, hemolytic anemia, large skin blotches, decreased blood platelets, decreased white blood cells, and loss of appetite.[218]

Which side effects do you describe? The likeliest? The gravest? Does your answer change if you know the drug is aspirin? If you know that NSAIDs like aspirin kill thousands of people yearly?[219]

The informed consent standard is yet more problematic, since it requires the disclosure of information patients need in order to make a decision about their treatment, not just side effects of specific treatments. A common problem, for example, is that "patients may regard a particular outcome of treatment as highly undesirable but then . . . learn to tolerate it well."[220] Many people initially refuse colostomies, but they commonly are able to adjust to them. So what should doctors tell patients? Even a "relatively complete" description of colostomies "lack[] relevant details": "What does it mean, for example, to have 'no voluntary control' of the colostomy? What is involved in maintaining a colostomy? What percentage of men will develop impotence? Moreover, the description never really shows people what a colostomy looks like or how one operates." [221]

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[217] Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir. 1972) (quoting Jon R. Waltz & Thomas W. Scheuneman, *Informed Consent for Therapy*, 64 NW. U. L. REV. 628, 640 (1970)).

[218] *Comman and Rare Side Effects for Aspirin Oral*, WEBMD, http://www.webmd.com/drugs/drug-1082-aspirin.aspx?drugid=1082&drugname=aspirin&source=1&pagenumber=6 (last visited Nov. 15, 2010).

[219] *See* Byron Cryer, *NSAID-Associated Deaths: The Rise and Fall of NSAID-Associated GI Mortality*, 100 AM. J. GASTROENTEROLOGY 1694, 1694 (2005) (citing estimates of between 3200 and more than 16,500 NSAID-associated deaths per year in the United States).

[220] Norman F. Boyd et al., *Whose Utilities for Decision Analysis?*, 10 MED. DECISION MAKING 58, 66 (1990).

[221] Peter A. Ubel et al., *Whose Quality of Life? A Commentary Exploring Discrepancies Between Health State Evaluations of Patients and the General Public*, 12 QUALITY OF LIFE RES., 599, 601 (2003).

In sum, descriptions of illnesses and treatments "are necessarily incomplete, and patients and the public are likely to fill in the blanks idiosyncratically, with . . . personal experiences or stereotypes."[222]

When a mandate is stated broadly, disclosers might think that duty requires—or prudence demands—disclosing *everything*. For example, HIPAA obligates providers to tell patients what providers may legitimately do with patients' health information.[223] This produces disclosures so detailed and deadly that we relegate our gruesome example to this footnote.[224]

The problems with the disclosure of aspirin's side effects came from a vague mandate, whereas the problems with HIPAA's came from a broad one. Equally baffling problems can result from complex mandates. For example, the Federal Reserve issued Regulation Z to tell creditors how to comply with TILA:

> Regulation Z, while it did not salvage Truth-In-Lending's basic goals, did succeed in making the statute too complex to be complied with. Well-meaning creditors could not comply with it. Well-counseled creditors could not comply with it. The pamphlets published by the Federal Reserve Board to help creditors comply with it did not comply with it. . . .

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[222] *Id.*

[223] 45 C.F.R. § 164.520 (2009).

[224] The University of Michigan Health Services Privacy notices includes the following disclosure:

> University Providers, Employee Plans and Affiliated Health Plans all use and disclose [private health information] in connection with their standard business operations, including quality assessment and improvement activities. Examples of these activities include obtaining accreditation from independent organizations like the Joint Commission for the Accreditation of Healthcare Organizations, the National Committee for Quality Assurance and others, outcomes evaluation and development of clinical guidelines, operation of preventive health, early detection and disease management programs, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives, and related functions; evaluations of health care providers (credentialing and peer review activities) and health plans; operation of educational programs; underwriting, premium rating and other activities relating to the creation, renewal or replacement of health benefits contracts; obtaining reinsurance, stop-loss and excess loss insurance; conducting or arranging for medical review, legal services, and auditing functions, including fraud and abuse detection and compliance programs; business planning and development; and business management and general administrative activities, including data and information systems management, customer service, resolution of internal grievances, and sales, mergers, transfers, or consolidations with other providers or health plans or prospective providers or health plans.

*University of Michigan Quality and Safety*, UNIVERSITY OF MICHIGAN HEALTH SYSTEMS, http://www.med.umich.edu/quality/toolkit/npp.htm (last visited Nov. 15, 2010).

> [M]any [creditors] found Regulation Z a conundrum too deep for either good will or high-priced intellect to solve.[225]

Similarly, politicians, patients, and physicians have wanted to require disclosure of conflicts of interest created by capitation methods of paying doctors. But nobody knows which interests matter, especially when conflicts are mediated by factors such as "size of the patient panel, amount of the capitation sum, refinement of risk adjustments, dollar value of stop-loss provisions, and scope of risk . . . not to mention such relative intangibles as the force of professional ethics and fear of malpractice suits."[226] HMOs "'can tell people whether [the HMOs] have a withhold, bonus payments or capitation' . . . but 'there are literally over 100,000 ways to pay, and these systems are very proprietary [and] the plans change them all the time.'"[227]

The IRB system provides a illustration of how hard it is to determine what disclosures are required. The IRB as the regulator—not the discloser—decides what information to give prospective research subjects. Yet faced with a single protocol, IRBs disagree wildly about what to tell subjects and how.[228] This illustration is damning because the discloser—which has reasons to flout mandates—is out of the picture, and yet the presumably expert agency still reaches no consensus on disclosure requirements.

### 2. Assembling the Data

If the discloser can ascertain what data to reveal, it must next locate and assemble them. But such information is often inaccessible or laborious to collect. For example, an Illinois statute requires private business and vocational schools to state their enrollments and their students' graduation, licensing, placement, and employment rates and salaries.[229] How many educational institutions keep all that informa-

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[225] Rubin, *supra* note 5, at 236-37.

[226] Lawrence D. Brown, *Management by Objection? Public Policies to Protect Choice in Health Plans*, 56 MED. CARE RES. & REV. 145, 161 (Supp. 1 1999).

[227] *Id.* (quoting Paul Lengerin, President, N.J. HMO Ass'n).

[228] *See, e.g.*, Lee A. Green et al., *Impact of Institutional Review Board Practice Variation on Observational Health Services Research*, 41 HEALTH SERVICES RES. 214, 221 (2006) (finding wide variations in consent requirements and the "standards [IRBs] applied to determine the level of review required"); Keith Humphreys et al., Letter, *The Cost of Institutional Review Board Procedures in Multicenter Observational Research*, 139 ANNALS INTERNAL MED. 77, 77 (2003) (determining that disagreement among home IRBs and local sites contributes to the high cost of IRBs).

[229] 225 ILL. COMP. STAT. ANN. 410/3B-12(a) (West 2007).

tion—or can get it, even with arduous effort (not least because much of it must come from former students)?

Some information is too complex to assemble. For example, consumer-directed health care information is endlessly intricate. Innumerable kinds of care might be offered. Infinite permutations of reimbursement systems are possible. Plan organization is endlessly variable. Quality is virtually impossible to measure. Costs are too complex and dynamic to describe.

Assembling data is also difficult where information is speculative. How does a biobank anticipate all the ways donations might be used decades later? How does a big firm lawyer anticipate the conflicts of interest that might develop over a lengthy representation?

Not only must disclosers collect information, they must also monitor and update the disclosures. Disclosers must hunt down changes and then repeat the travails of interpreting the law and assembling the data. In at least some areas, the conventional wisdom is that disclosees need detailed updates often. For example, Wendler and Rackoff argue that consent to participate in research expires when significant changes have occurred in "(a) the nature of the research itself, as determined by its purpose, risks, potential benefits, requirements, and alternatives; (b) the individual's personal and medical situations; and (c) the individual's preferences and interests."[230] Such changes trigger a need for elaborate reconsent.

### 3. Implementing the Mandate

Suppose the discloser can identify the information to be disclosed, can assemble it, and now must present it. How should a discloser present it? (Here we are discussing only *disclosers'* problems communicating information; we later discuss *disclosees'* problems reading it.) This question has looked easy to lawmakers and commentators, but consider a relatively simple mandate: *Miranda*. Two recent surveys "yielded 945 distinct Miranda warnings from 638 jurisdictions that were augmented by research on 122 juvenile English warnings and 121 general Spanish warnings."[231] These warnings "range from 21 to 408 words with an average of 95.60 words."[232] Further, "[r]emarkable

[230] Dave Wendler & Jonathan Rackoff, *Consent for Continuing Research Participation: What Is It and When Should It be Obtained?*, IRB: ETHICS & HUMAN RES., May–June 2002, at 1, 1.

[231] Rogers, *supra* note 160, at 778 (citations omitted).

[232] *Id.*

differences in reading levels are observed across Miranda warnings/waivers": a fifth are written below a sixth-grade reading level, most require a sixth- to eighth-grade level, and two percent "require at least some college education."[233]

One problem in crafting disclosure mandates is that ambiguity and even confusion are startlingly hard to avoid. For example, even "[a]bsolute terms when placed in a medical setting appear to be open to interpretation. Only 80.3% agreed that *certain* meant 100 of 100 people, and only 67.8% agreed that *never* meant zero of 100 people."[234] One study "found that physicians' interpretations of the term 'likely' . . . ranged from 25 to 75%,"[235] and another study "reported that interpretations of the term 'very likely' ranged from 30 to 90%, even when presented in a restricted medical context."[236] Much mandated disclosure attempts to help people cope with risk. But

> [d]ifferent people interpret given chance terms very differently. . . . Even the same individual may interpret a chance term differently depending on the context in which it occurs. . . . Terms that linguistically denote approximately equal probabilities show a remarkable variation . . . whereas the interpretation of terms that linguistically denote different probabilities tends to overlap . . . .[237]

And how is a discloser supposed to decide how to describe a risk when people think a term denotes a low risk applied to themselves and a higher risk applied to others?

Numbers present similar puzzles for disclosers. For example, risks can be stated as either rates or proportions. Genetic counselors (specialists in describing risks to the uninformed) conventionally believe "that women understand proportions better than rates" even though there is "no scientific evidence to support that convention."[238] On the contrary, in one study "more than three times as many women (151)

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[233] *Id.* at 779.

[234] Kimberley Koons Woloshin et al., *Patients' Interpretation of Qualitative Probability Statements*, 3 ARCHIVES FAM. MED. 961, 965 (1994).

[235] Dianne C. Berry et al., *Patients' Understanding of Risk Associated with Medication Use: Impact of European Commission Guidelines and Other Risk Scales*, 26 DRUG SAFETY 1, 2 (2003) (citing Geoffrey D. Bryant & Geoffrey R. Norman, Correspondence, *Expressions of Probability: Words and Numbers*, 302 NEW ENG. J. MED. 411 (1980)).

[236] *Id.* (citing Daniëlle Timmermans, *The Roles of Experience and Domain of Expertise in Using Numerical and Verbal probability Terms in Medical Decisions*, 14 MED. DECISION MAKING 146 (1994)).

[237] Tim Smits & Vera Hoorens, *How Probable is* Probably*? It Depends on Whom You're Talking About*, 18 J. BEHAV. DECISION MAKING 83, 84 (2005) (citations omitted).

[238] David A. Grimes & Gillian R. Snively, *Patients' Understanding of Medical Risks: Implications for Genetic Counseling*, 93 OBSTETRICS & GYNECOLOGY 910, 912-13 (1999).

judged risks correctly with rates alone, compared with only proportions (41)" and "[m]any women (129) did not understand either format."[239]

Presumably responding to such problems, two lawmakers—the European Union and the U.K. Medicines and Healthcare products Regulatory Agency—proposed substituting words for numbers. However, the EU's terms

> have been shown to lead to considerable overestimations of risk by patients, doctors and the general public. For example, according to EU guidelines the term 'common' is assigned to side effects that occur in 1-10% of people taking the medicine . . . . [O]n average, patients interpreted the word to mean around 45%, while doctors estimated the risk to be around 25%.[240]

But "even the patients receiving information as percentages assessed the risk as higher than the actual risk."[241] And these disasters came not from recalcitrant disclosers, but from lawmakers themselves.

Other problems abound, many too well known to require reiteration here. For instance, the way a fact is framed notoriously affects perceptions of it: people react differently if a treatment is said to have an eighty percent chance of success instead of a twenty percent chance of failure. Yet all information necessarily comes in *some* frame.[242]

### 4. Resisting the Mandate

We have argued that even disclosers striving to obey a mandate will encounter crippling problems. But disclosers may have reasons to disobey, lawmakers usually impose mandates when they think disclosers are withholding information for illegitimate reasons, such as conflicts of interest. And an enterprise that unscrupulously withholds information before a mandate might well continue to do so afterward.

Nevertheless, stereotypes about evil nondisclosers ought not drive policy decisions. Many disclosers are not evil; many disclosers have good reasons to behave well; and many disclosers dutifully obey man-

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[239] *Id.*

[240] Peter Knapp et al., *Communicating the Risk of Side Effects to Patients: An Evaluation of UK Regulatory Recommendations*, 32 DRUG SAFETY 837, 838-39 (2009) (footnotes omitted).

[241] *Id.* at 839.

[242] For entry to a large literature, see Annette Moxey et al., *Describing Treatment Effects to Patients: How They Are Expressed Makes a Difference*, 18 J. GEN. INTERNAL MED. 948 (2003).

dates.[243] Furthermore, even scrupulous disclosers may resist mandates for understandable, sensible, and even admirable reasons. A disclosure mandate is often one of many commands, incentives, and pressures. Usually, disclosers primarily want to get their work done, and mandates can be irrelevant to and even inconsistent with doing so. For example, disclosure requirements deluge doctors and hospitals, if only because they have so much significant information.[244] But they properly think their principal task is to cure illness and soothe suffering, and that alone wholly outstrips their available time. A typical doctor lacks time to provide just the *preventive* care the U.S. Preventive Services Task prescribes.[245] And "comprehensive high-quality management of 10 chronic illnesses require more time than primary care physicians have available for patient care overall."[246] Obviously, disclosures are not the only desirable activity doctors must perform.

Disclosers may consider a mandate not only burdensome, but ineffective and even harmful. They may learn that a costly disclosure is unread and unheeded. Disclosers may also find that no matter how precise they are, disclosees tend to give more weight to data than the data merit. For example, however side effects are revealed, patients tend to exaggerate their importance.[247] Doctors may think such overestimates discourage patients from complying with treatment instructions, and doctors know that baseline noncompliance is dismayingly high (fifty percent is a common estimate).[248] Doctors may conclude

[243] *Cf.* Florencia Marotta-Wurgler, *Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309, 312 (2009) (showing that undisclosed terms in software licenses are no worse than disclosed ones).

[244] *See* Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 951 (1963) ("Because medical knowledge is so complicated, the information possessed by the physician as to the consequences and possibilities of treatment is necessarily very much greater than that of the patient . . . . Further, both parties are aware of this information inequality, and their relation is colored by this knowledge.").

[245] *See* Kimberly S.H. Yarnall et al., *Primary Care: Is There Enough Time for Prevention?*, 93 AM. J. PUB. HEALTH 635, 637 (2003) (concluding that doctors do not have enough time to provide patients with all of the screening and counseling that the U.S. Prevention Services Task Force recommends).

[246] Truls Østbye et al., *Is There Time for Management of Patients With Chronic Diseases in Primary Care?*, 3 ANNALS FAM. MED. 209, 212 (2005).

[247] *See* Berry et al., *supra* note 235, at 5-6 (showing through four experiments that disclosure requirements affect treatment decisions by causing patients to overestimate "adverse effects").

[248] On noncompliance, see L. Stockwell Morris & R. M. Schulz, *Patient Compliance—An Overview*, 17 J. CLINICAL PHARMACY & THERAPEUTICS 283 (1992). The extent of noncompliance is commonly thought to be vast, so that "[n]oncompliance may be the most significant problem facing medical practice today." Stephen A. Eraker et al., *Understanding and Improving Patient Compliance*, 100 ANNALS INTERNAL MED. 258,

that the risk of bad outcomes from noncompliance exceeds the risk from undisclosed side effects. For example, in a French study, "[o]nly 44% of the rheumatologists regularly told their patients about possible serious side effects and only 7% about life-threatening side effects."[249] However, as many as 88% of the rheumatologists gave patients information "all the time" or "fairly often" about the adverse effects of not taking prescribed drugs. The researchers thought that a "central concern among rheumatologists may be that concern about side effects may cause poor compliance."[250]

Disclosers also discover that human situations are more complex than the lawmakers anticipated. For example, disclosers who must deliver bad news may want to soften it, and doctors and patients alike often think that desirable.[251] Thus cancer patients are even more optimistic about their prognoses than their optimistic doctors, partly because of "physician communication behaviors such as avoidance of discussing prognosis, withholding prognostic information, or presenting overly optimistic information."[252]

Disclosers have many ways to resist mandates. Mandates can be ignored, even in conspicuous circumstances. For example, "EU legislation passed during the 1990s made it mandatory for drug packaging to contain a leaflet providing all the information that is provided to health professionals in the summary of product characteristics, including all adverse effects, but in a form understandable to the patient."[253] However, in a recent study, forty percent of the leaflets "gave no indication of the likelihood of any adverse effect."[254]

Disclosers can often beautify disclosure language. When health plans had to reveal how their doctors were paid, "almost none" mentioned "the potential negative impact that incentive arrangements

258 (1984). Morris and Schulz estimate that half the patients in long-term therapy are noncompliant. Morris & Schulz, *supra* at 285.

[249] Jean-Marie Berthelot et al., *Informing Patients About Serious Side Effects of Drugs. A 2001 Survey of 341 French Rheumatologists*, 70 JOINT BONE SPINE 52, 55 (2003).

[250] *Id.* at 54-55.

[251] "Mildly but unrealistically positive beliefs can improve outcomes in patients with chronic or terminal diseases. . . . Moreover, unrealistically optimistic views have been shown to improve quality of life." Peter A. Ubel, Editorial, *Truth in the Most Optimistic Way*, 134 ANNALS INTERNAL MED. 1142, 1143 (2001) (citations omitted).

[252] Tracy M. Robinson et al., *Patient-Oncologist Communication in Advanced Cancer: Predictors of Patient Perception of Prognosis*, 16 SUPPORTIVE CARE CANCER 1049, 1050 (2008).

[253] Neil Carrigan et al., *Adequacy of Patient Information on Adverse Effects: An Assessment of Patient Information Leaflets in the UK*, 31 DRUG SAFETY 305, 306 (2008).

[254] *Id.* at 307.

might have on physician behavior."[255] They more often bathed "incentives in a positive light," by saying, for example, that they rewarded better care.[256]

Disclosers can also overdisclose in order to exacerbate the overload of disclosees. These padded disclosures are intended to overwhelm and distract consumers. Some of the chunkiness of the disclosures is indeed mandated, but some is added to bulk up the file and ensure that disclosees feel rushed, fatigued, and overwhelmed, reducing their level of attention.[257]

Disclosers can also obey the letter of a mandate but flout its spirit.[258] Doctors may use an informed consent form rather than labor to educate patients. One unit of the University of Michigan Health System thrusts a single statement for *all* its varied procedures at the patient just before the procedure commences. Many companies and government agencies have customers sign disclosure forms even when customers plainly do not read and cannot understand them. Mechanical compliance is chronic when disclosers rely on agents. Bored agents notoriously deliver information like automata, radiating weariness and impatience, urging disclosees to sign without reading, intimating that disclosures are empty technicalities. The poster example is the title company's closing agent, the funnel for many mortgage, real estate, and safety disclosures. In addition, disclosers may work outside the mandate's technical reach. For example, police may try to induce waiver or question suspects "outside *Miranda*."[259] Similarly, disclosure requirements may "create incentives for lenders to draft contract terms that evade current disclosure regulation and continue to obscure the actual contract terms."[260]

Do evaders risk trouble? If, like Holmes's bad man, they ask what "courts are likely to do in fact," they generally answer "not much." Few nondisclosures injure anybody enough to provoke litigation. While it is hard to prove this empirically, we believe that most in-

[255] Mark A. Hall, *The Theory and Practice of Disclosing HMO Physician Incentives*, LAW & CONTEMP. PROBS., Autumn 2002, at 207, 227.

[256] *Id.*

[257] Willis, *supra* note 102, at 790.

[258] *See generally* JAMES C. SCOTT, SEEING LIKE A STATE (1998) (describing the shortcomings of well-intentioned social projects over time).

[259] Leo, *supra* note 162 at 1009 & n.53, 1010 & n.56.

[260] Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1560 (2006).

formed consent suits are brought as pendants to malpractice suits, few are won, and damages are usually modest.

Disclosers may react to mandates in subtler ways. Consider the advisor's conflict-of-interest example:

> Disclosure might deter advisors from giving biased advice by increasing their concern that estimators (now thought to be alerted by disclosure) will completely discount extreme advice or attribute corrupt motives to advice that seems even remotely questionable. On the other hand, advisors might be tempted to provide even more biased advice, exaggerating their advice in order to counteract the diminished weight that they expect estimators to place on it . . . .[261]

Disclosure requirements may give disclosers not only "strategic reason" but also "moral license" to "exaggerate their advice"—to shout louder![262]

When lawmakers distrust disclosers, they may try to dictate the way information is provided by, for example, specifying details of disclosure forms (like font size)[263] and the precise data to be disclosed (like serving sizes in nutrition-fact boxes).[264] Such specifications can reach ambitious proportions. For instance, some rent-to-own regulations require conspicuous disclosure of as many as seventeen items (aspects of the goods, payments, charges, risk allocations, options, etc.).[265] Similarly, some jurisdictions require describing more than thirty aspects of a used car's condition.[266]

In sum, even a willing discloser encounters many impediments to making useful disclosures. For good reasons and bad, not all disclosers are willing, and reluctant disclosers have many ways to resist the ideal disclosure the lawmaker envisioned.

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[261] Daylian M. Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1, 7 (2005).

[262] *Id.* at 22.

[263] *See, e.g.*, Rev. Proc. 2008, 2008-5 I.R.B. 368.

[264] *See* 21 C.F.R. § 101.9 (2010) (defining "serving size" as "an amount of food customarily consumed per eating occasion by persons 4 years of age or older which is expressed in a common household measure that is appropriate for food").

[265] *See* James P. Nehf, *Effective Regulation of Rent-to-Own Contracts*, 52 OHIO ST. L.J. 751, 841-43 (1991) (identifying seventeen items of disclosure in Ohio's rent-to-own statute, OHIO REV. CODE ANN. § 1351.02 (LexisNexis 2006)).

[266] *See* McNeil, *supra* note 165, at 701 n.5 (describing Wisconsin's used-car disclosure regulations).

### 5. An Illustrative Vignette: The Clery Act

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act[267] grew out of trouble stories like the tragedy of a Lehigh student who was raped and murdered in her dorm. The Clery Act requires roughly 6600 institutions of higher education[268] to publish an annual campus security report for prospective and current students and employees that includes crime statistics for the past three years, policy statements, descriptions of crime-prevention programs, and procedures for handling sex offenses. The Act makes schools keep a public log of reported crimes and give warnings of crimes that threaten public safety. The Department of Education assures us that the Act "is intended to provide students and their families, as higher education consumers, with accurate, complete, and timely information about safety on campus so that they can make informed decisions."[269] The Department warns that complying with the Act requires significant institutional resources and support.[270] As a result,

> [c]olleges spend a good deal of money putting out crime reports of questionable value. How much the process costs, including percentages of staff salaries, is so hard to calculate that even those who work on the reports could not guess how much. The Clery Act's complexity requires perpetual training, especially as amendments continue to change colleges' reporting requirements.[271]

Are Clery Act disclosees (you are probably one) better informed? Crime statistics are notoriously unreliable because defining a crime and determining its incidence are so difficult. "Campus police officers routinely struggle with the crime classifications . . . . Nuances of a crime's location are especially confounding . . . ." How could these officers not struggle with regulations in which "[a]ggravated assaults, for example, get counted by victim, but robberies—even of five people

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[267] 20 U.S.C. § 1092(f) (2006).

[268] Sara Lipka, *Do Crime Statistics Keep Students Safe?*, CHRON. HIGHER EDUC., Jan. 30, 2009, at A1.

[269] OFFICE OF POSTSECONDARY EDUC., U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 3 (2005).

[270] *See id.* at 1 ("Compliance with the *Clery Act* is not simply a matter of entering statistics into a Web site or publishing a brochure once a year. Compliance is a whole system of developing policy statements, gathering information from all the required sources and translating it into the appropriate categories, disseminating information, and, finally, keeping records. Many people at your institution—from the president on down—should be involved.").

[271] Lipka, *supra* note 268.

by one perpetrator—should be counted by incident"?[272] One expert reports "field[ing] five or six calls a week from colleges that need help figuring out what to report. When she travels to institutions for audits, she always turns up errors in the way they are counting crimes. 'Not once,' she says, 'have I found a campus that's completely in compliance.'"[273]

If the Department of Education cannot write standards that colleges can understand (try working through the almost 200 pages of instructions issued in the handbook![274]), if colleges are confused about the rules and interpret them differently, if even an expert could not understand the colleges' resultant reports, is it plausible to expect the audience to find the reports helpful? Even if they read the reports, which are often longer than insurance policies and full of tables and charts,[275] the intended audience of prospective and current students and college employees will have no idea how crimes are reported and tallied or of the interpretive problems colleges face. Furthermore, since reports include total crimes, not rates, the mandated disclosures have little meaning unless readers somehow convert them to rates.

All this assumes a college that is trying to comply with the law. But experts "suspect that many institutions simply import numbers from the 'Clery complaint' software program sold to police departments and send off their reports," and "some colleges may manipulate their numbers."[276]

Overall, then, the money colleges spend complying with the Clery Act—and pass on to their students in the form of higher tuition—is simply wasted.[277] Worse, the Act creates perverse incentives. The more policing colleges do, and the more they encourage students to report crimes, the likelier they are to uncover crimes to report. By thus shining the light, the well-policed colleges look dangerous. Furthermore, the resources the Clery Act commandeers would be better spent actually making schools safer. Thus, one criminologist called

[272] *Id.*

[273] *Id.* (quoting Dolores A. Stafford, Chief of Police, George Washington Univ.).

[274] OFFICE OF POSTSECONDARY EDUC., *supra* note 269.

[275] *See, e.g.*, UNIV. OF MICH., ANNUAL SECURITY REPORT & ANNUAL FIRE SAFETY REPORT (2010), *available at* http://www.umich.edu/~safety/pdf/annual_report_2010.pdf (providing thirty-six pages of information for the relatively safe town of Ann Arbor).

[276] Lipka, *supra* note 268.

[277] Nor do disclosees even read Clery Act data. "[W]hen the law required colleges to print and distribute their annual crime statistics, [George Washington University's police chief] would make a point to visit freshman dormitories on the day of delivery. 'There were trash cans full of them,' she says. 'It was a colossal waste of money.'" *Id.*

the Act's reporting regulations "symbolic politics" and said that greater safety is likelier to come from practices like installing blue-light telephones and security cameras: "[t]hat's just one fix, he says, for a system that revolves around complex annual reports, a huge investment with little return. 'The focus,' Mr. Sloan says, 'ought to shift from producing a bunch of statistics that are basically useless.'"[278]

### C. *Disclosees*

We now must make some heroic assumptions. The lawmaker has accurately identified the information the consumer needs and has stated the mandate correctly and comprehensibly. The discloser has read, understood, and obeyed the mandate, has assembled the required information, and has disclosed it effectively. Now, the success of mandated disclosures depends on how much better disclosees consequently make important, complex, and unfamiliar decisions. In this section, we argue that many factors conspire to keep disclosees from profitably using the disclosures. More fundamentally, mandated disclosure rests on false assumptions: that people want to make all the consequential decisions about their lives, and that they want to do so by assembling all the relevant information, reviewing all the possible outcomes, reviewing all their relevant values, and deciding which choice best promotes their preferences. These assumptions so poorly describe how human beings live that mandated disclosure cannot reliably improve people's decisions and thus cannot be a dependable regulatory mechanism.

#### 1. Disclosures and the World of Chris Consumer

Before we identify the individual factors that keep disclosees from using disclosures, we present the trump card: the accumulation problem. People encounter too many disclosures to digest most of them. Meet Chris Consumer—the poster child of the disclosure paradigm—the person who stands at the receiving end of many mandated disclosures. Chris is Mr. Main Street, the ordinary American who makes choices that mandated disclosures aim to improve. We will chronicle a day in his life through the lens of a simulation. We will assume—recognizing that this is an outrageously ridiculous assumption—that Chris actually reads all the mandated disclosures that he encounters. But despite these fabricated elements, in an important way, Chris's tale will be realistic: it will capture the variety of real disclosures that a

[278] *Id.*

person like Chris, living the median American life, encounters on a daily basis.

*Chris starts his morning by taking his daily medication and a new vitamin product, reading the mandated warnings on the drug insert and on the vitamin bottle. He is about to shave, but when he notices a bit of rust on the can of shaving cream, he promptly reads the warning on the spray can advising him to discard it once rusted. He plugs in the toaster gingerly, after reading the sticker on the cord, warning of electric shock. Chris likes toast with butter and jam, but after reading the nutrition data on the label, he scrapes on a micro-layer. He now has time only for a quick glance at the newspaper—a story about the passage of legislation revamping consumer financial protection—and contents himself with the invoice for it, which arrived yesterday by mail, with its full statement of itemized charges.*

*This morning Chris's car will not start, so he calls a towing company, listens to their prerecorded statements, and asks for help. The tow truck driver presents a form that discloses the company's charges, policies, and insurance. Chris reads it carefully, signs, and directs the driver to the repair shop. At the shop, Chris receives a detailed disclosure of the shop's repair and pricing policies. The repair, he hopes, is covered by the car manufacturer's seven-year warranty. So he pulls the warranty statement out of the glove compartment, reads it, and recognizes, to his disappointment, that this particular repair does not apply to the "power train" and is not covered.*

*Later that morning, at the office, Chris logs in to his computer and the software update program immediately greets him, informing him that new versions of Microsoft Office and Firefox are ready to be installed.* Wasn't it just last week that I installed a previous update?, *he puzzles. Once launched, the installation is automatic, until Chris needs to click "I Accept" at the bottom of the End User License Agreement. Chris reads these agreements—4000 words for the Microsoft program and only 1100 words for Firefox (an open-source software, after all). As an average American, Chris can read 250 words per minute. Granted, these contracts are no easy read, but maybe because he read the previous versions of the terms and conditions—not identical but also not much different—reading these texts takes only twenty-five minutes. With this accomplished, and to catch a moment of leisure, Chris switches the screen to nytimes.com, but remembers to click on terms of service (2500 words) and the privacy policy (only 650 words). True, he has read these disclosed terms before, but they are modified occasionally, and blessed are the prudent.*

*The car shop calls to tell Chris the charges for parts and labor.* The charges seem inflated, *Chris thinks, wishing he had known this before choosing this shop. But Chris can hardly tow the car to another shop. He grudgingly consents. He then calls his bank to make a balance transfer for this forth-*

*coming repair payment, since he recently—after reading a bank communiqué about new regulations—decided to opt out of overdraft coverage. However, the balance transfer requires a signature, which he signs by completing an electronic form on the website and clicking to accept another set of terms, a moderately short passage of legalese he nobly reads. While on the bank's website, he checks his account activity and opens an automated message from the bank, which informs him about . . .* Ding-dong!

*FedEx arrives. Chris signs the shipping form, after reading the terms on the back. The package contains an invoice from a supplier that the office uses occasionally, which memorializes the terms from yesterday's phone call regarding a certain upcoming shipment of widgets. Chris notices that the terms on the front of the invoice are exactly as agreed, then turns to the preprinted terms at the back of the invoice, and sedulously reads them.*

*Chris lunches with colleagues at a diner where a sign warns him against food that is not overcooked. Thanks to a recent municipal ordinance, the menu lists the calories in each dish. Thus chastened, Chris orders cautiously. At the men's room, a sign reminds employees—or him too?—to wash their hands. Still hungry after his virtuous breakfast and lunch, Chris stops off at the ice cream parlor, and with no signs posted or disclosures in sight, he orders a 1000-calorie sundae.*

*Returning to the office, Chris passes a construction site where a notice tells him about the building project and that he can learn more about it at City Hall. He checks the address of City Hall on his iPhone, using the AroundMe application, but he is first invited to download an update to this application. Not so simple, though: as he logs in with his iTunes password to access the download, he is told that he must first accept the updated iTunes Terms and Conditions. He starts reading the new terms on his iPhone screen, scrolling down, until a note at the bottom says "Page 1 of 45." He chooses instead the option of emailing himself the full set of terms, which he plans to read later.*

*It is early November, so later in the afternoon Chris goes for a flu shot. A two-page form recites the risks, including Guillain-Barré syndrome and death. He glooms through the form and signs. Unfortunately, his one concern—a rumor that a version of the shot is unsafe—is not discussed (as far as he can tell). Before leaving, Chris refills a prescription, after getting a form stating that HIPAA requires the pharmacy to provide a notice "that describes how we may use your information for treatment, payment and other purposes that details your rights regarding the privacy of your health and medical information." Chris pauses to parse this sentence, fails, and turns to the notice (2023 words).*

*Back at home, Chris sorts through today's mail. A notice from his credit card provider, which initially looked like junk mail but turned out to contain*

*relevant information, introduces recent changes to the privacy policy. It is not clear whether these are favorable changes, so Chris opens the folder where he filed all prior notices—a thick dossier, to be sure—and compares the old and new terms. He learns that they are not comparable because the language is quite vague regarding the identity of the parties with whom his financial information is shared. The new privacy language assures him that his information will be shared only when "it enhances the service" to him, but it then says that his information will also be shared with "other companies to provide services to us or make services and products available to clients." Could they be saying one thing and then the opposite?* Is it just a cloud of smoke? *he wonders, as he promptly files this latest pamphlet in the binder.*

*Today's mail also contains the monthly bill from his auto insurance company, with a brochure about a change in the law that affects his coverage. Chris reads through the brochure. His daughter brought home a day-trip permission slip from school, which he has to read and sign, and a separate authorization for the school to take her pictures during the day trip. Finally, the mail packet contains a printed "Explanation of Benefits" form that details the billing of a recent visit to the dentist, showing which portions of the cost were covered and the amount of his co-pay. This dental visit took place three months earlier and Chris strains his memory to recall the assurances he received that day at the clinic—that his co-pay would be much lower. He finds no documentation to support this recollection and resigns to pay the disappointing charge in full.*

*At dinner, his son tells the family about a new movie that was just released and that he already downloaded from the Internet, free of charge. Chris recalls the FBI warnings about copying, which appear anytime he plays a DVD movie, often in two languages. But he is not sure whether this warning applies to content copied from an online source. Before dessert, the phone rings and Chris answers. After a short pause, an unfamiliar voice asks him to donate to some cause. The voice seems to be reading a prescripted text at an abnormal speed and flat intonation, so Chris asks the voice to explain the gist of the solicitation. The voice cannot, and so Chris musters his utmost resilience and asks to end the conversation. The voice manages to convince him, though, to receive more information by mail.*

*After dinner, Chris looks forward to Monday Night Football, but first he must buy a wedding gift through an online gift registry and order a new toner cartridge for the printer. Chris opens an account in the registry website—a quick choice of user ID and password and a slow read through terms and conditions and another privacy policy. He then Googles the cartridge model and finds an eBay seller who offers it at a discount. He knows nothing about this seller, and the seller's name is a bit unnerving—tonerdude101—not to mention that there is no other information on the eBay page. No terms or condi-*

*tions, no privacy statement, nothing to read! But to Chris's delight, there is one data point—a whopping 99.8% feedback score from over 50,000 sales. He clicks "Buy It Now." Lastly, while on his computer, he checks his e-mail and finds the iTunes terms he e-mailed to himself earlier that day. Oops, they are a little over 10,000 words. Too long to read, he concludes, but he spends fifteen minutes skimming the topics covered and reads only the text that is ALLCAPS.*

*Finally Chris turns on the football game—midway through the third quarter—only to hear, "This telecast is intended solely for the private, non-commercial use of our audience. Any publication, reproduction, retransmission, or any other use of the pictures, descriptions, or accounts of this game without the express written consent of . . . ." A game break signals the return of a Cialis commercial that he has watched many times before. The commercial ends with a ten-second segment in which the narrator's warm, confident voice changes its tone and pitch and becomes a rapid, condensed utterance listing the many side effects of the drug. Puzzled by the mixed message, Chris watches the end of the game and goes to bed. Michael Crichton's* Disclosure *is lying at his bedside, but Chris has read enough for one day.*

Thank heavens this is only a normal day in the life prescribed for Chris. Many important decisions did not arise: choosing a credit card, choosing a cell-phone carrier, buying a car (and getting a car loan), purchasing insurance, reviewing health plans, making retirement investment decisions, signing up for pre-need burial services, making a living will, adopting a pet, installing an alarm, and so endlessly on. Such decisions arise irregularly but routinely, and they give Chris an even denser thicket of reading.

Truly, in the modern sense of an old-fashioned word, Chris was a saint. Was he free? Was he happy? The question is absurd. The moral of Chris's story hardly needs to be drawn. Chris lost hours of his day reading disclosures he did not want, could not understand, and did not use. He did make decisions, but he did not make them better because of the disclosures. And he stole the time he spent attending to disclosures from things he needed to do, things he enjoyed doing, and decisions about which he was actually interested in learning. The disclosure paradigm, then, mistakenly asks whether people making a decision would be better off with more information. If they had nothing else in life but that decision, *perhaps* so. But since information that could be useful in a single-decision world becomes useless in the constant-decision world, the answer is generally no.

With Chris's sobering story in mind, let us return to our project of identifying all the necessary conditions for mandated disclosure to

work. We now ask what disclosees must do if disclosures are to serve their purpose.

### 2. Acquiring Disclosed Information

Disclosees cannot use information until they get it. But they often do not get it because they do not know that it exists, where it is, or how to find it, and they often doubt that they need it or that it would justify its acquisition costs. And so the long path from lawmaker to discloser to disclosee ends because disclosees do not know about or take up the proffered information. Literally or metaphorically, all those Clery Act reports are tossed in the wastebasket.

For example, the updated credit-card agreement arrives. Why? Is its information new? Relevant? Necessary? Or the tow truck comes. Does the driver have information about the towing service? Would it lead you to dismiss that service and look for one with better terms?

People have many reasons not to seek out information. Many people do not know how much the quality of goods and services varies. For example, "[m]ost consumers do not believe clinical quality varies significantly across doctors, hence the low consumer demand for clinical quality report cards."[279] Patients see LASIK eye surgery as a commodity and shop for it only considering price, even though quality differs considerably across providers.[280] Confidence can also lead people to overestimate their knowledge. As a result, "investors often do not recognize how difficult these choices are and instead rely on a belief that their innate abilities will lead to a good investment result."[281] And one "of the most disconcerting findings" of a study of doctors' attempts to teach patients about end-of-life care "was that patients expressed strong preferences about treatments that they did not understand."[282]

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[279] HA T. TU & JOHANNA R. LAUER, CTR. FOR STUDYING HEALTH SYS. CHANGE, RESEARCH BRIEF NO. 9, WORD OF MOUTH AND PHYSICIAN REFERRALS STILL DRIVE HEALTH CARE PROVIDER CHOICE 5 (2008), *available at* http://www.hschange.org/CONTENT/1028/1028.pdf.

[280] Ha T. Tu & Jessica H. May, *Self-Pay Markets in Health Care: Consumer Nirvana or Caveat Emptor?*, 26 HEALTH AFF. w217, w222 (2007), http://content.healthaffairs.org/cgi/content/reprint/26/2/w217. LASIK may be "relatively simple surgery with low complication rates, but for patients whose eyes have certain 'problem' characteristics (for example, abnormal topography, large pupils, thin corneas), quality differences can be critical." *Id.*

[281] Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 12 (2003).

[282] Gary S. Fischer et al., *Patient Knowledge and Physician Predictions of Treatment Preferences After Discussion of Advance Directives*, 13 J. GEN. INTERNAL MED. 447, 452 (1998).

Even when people know they need information, they may not want it enough to labor to acquire it. First, they must find the right document and then the right place in it. (Try finding the water-damage exclusion in your homeowners insurance policy or the privacy policy in a credit-card contract.) Disclosure documents are notoriously long: HIPAA disclosures easily run to six large pages of small type. IRBs casually require consent forms of twenty pages. To pile Pelion on Ossa, these documents are infamously a farrago of tortured language, serpentine sentences, tiny print, and irrelevancies.[283]

With all these barriers to acquiring information, no wonder, for example, that while people widely think the quality of care is the most important factor in choosing a health plan, hardly any patients review the data disclosed under mandates from quality-report-cards statutes. Indeed, less than one percent of patients surveyed knew the rating of their hospital or surgeon.[284]

### 3. Understanding the Information

Now suppose disclosees locate information, recognize its relevance and importance, and try to understand it. Many will fail.

#### a. *Illiteracy and Innumeracy*

Illiteracy prevents many people from understanding much disclosed information. Illiteracy can mean (1) not knowing what word a combination of letters represents, (2) not knowing what a word means, (3) not knowing what words combined in a sentence mean, or (4) not knowing how to extract information from a combination of

[283] When our hypothetical Chris Consumer was prescribed Prozac, Googling turned up a website that told him how to read a package insert (2443 words) *How to Read a Package Insert*, EPILEPSY.COM, http://www.epilepsy.com/epilepsy/medicine_inserts (last visited Nov. 15, 2010). It said inserts have eleven sections: "Description," "Clinical Pharmacology," "Indications and Usage," "Contraindications," "Warnings," "Precautions," "Adverse Reactions," "Overdosage," "Dosage and Administration," "How Supplied," and for some drugs, "Drug Abuse and Dependence." *Id.* Chris balked but read on: "It's a good idea to review the package insert for any new medicine and to look at it again if anything about your health changes." *Id.* Chris sighed and reached for his Stedman's medical dictionary. And then for the insert, which bade him "read the Medication Guide before starting therapy with PROZAC" and "reread it each time the prescription is renewed." ELI LILLY AND CO., PROZAC MEDICATION INSERT 24 (2009), *available at* http://pi.lilly.com/us/prozac.pdf. Chris embarked dutifully on 1993 words.

[284] Epstein, *supra* note 135, at 1694.

sentences.[285] Well over 40 million adults are functionally illiterate, "and another 50 million have marginal literacy skills."[286] In one study, nintey-seven percent of adults had reading capacities below the level necessary to understand a definition of "peremptory challenge" used to educate prospective jurors.[287] Sector-specific illiteracy—like health or financial illiteracy—is common. Four out of ten patients could not "comprehend directions for taking medication on an empty stomach."[288] Many patients misunderstand common clinical terms like "acute," "stable," and "progressive."[289]

Rates of innumeracy are worse than rates of illiteracy. A standard test asks people how often a flipped coin comes up heads in 1000 tries, what 1% of 1000 is, and to turn a proportion (1 in 1000) into a percentage. Thirty percent of women of above-average literacy "had 0 correct answers, 28% had 1 correct answer, 26% had 2 correct answers, and 16% had 3 correct answers."[290] Although most people in another study had at least some college education, 40% "could not solve a basic probability problem or convert a percentage to a proportion."[291] No wonder that "[a]fter receiving quantitative risk reduction data about the benefit of mammography, most women did not apply this information correctly when asked to estimate their risk for death from breast cancer with and without mammography."[292]

Furthermore, disclosures are chronically hard to read. Financial-privacy notices are written, on average, at a third- or fourth-year col-

[285] *See* NAT'L READING PANEL, TEACHING CHILDREN TO READ 7-15 (2000) (describing the stages of literacy development).

[286] Ad Hoc Comm. on Health Literacy for the Council on Scientific Affairs, Am. Med. Ass'n, *Health Literacy: Report of the Council on Scientific Affairs*, 281 JAMA 552, 552 (1999).

[287] IRWIN S. KIRSCH, ET AL., NAT'L CTR. FOR EDUC. STATISTICS, ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE RESULTS OF THE NATIONAL ADULT LITERACY SURVEY 82-83 (1993).

[288] Ad Hoc Comm. on Health Literacy for the Council on Scientific Affairs, *supra* note 286, at 552 (citing Mark v. Williams et al., *Inadequate Functional Health Literacy Among Patients at Two Public Hospitals*, 274 JAMA 1677 (1995)).

[289] Michele Heisler, *Helping Your Patients With Chronic Disease: Effective Physician Approaches to Support Self-Management*, 8 SEMINARS MED. PRAC. 43, 49 (2005).

[290] Lisa M. Schwartz et al., *The Role of Numeracy in Understanding the Benefit of Screening Mammography*, 127 ANNALS INTERNAL MED. 966, 969 (1997).

[291] Isaac M. Lipkus et al., *General Performance on a Numeracy Scale Among Highly Educated Samples*, 21 MED. DECISION MAKING 37, 39 (2001).

[292] Schwartz et al., *supra* note 290, at 969. Accuracy ranged from 7% to 33%.

lege reading level.[293] Two-thirds of the privacy forms academic medical centers use require a college reading level, and almost all (ninety percent) are "difficult."[294] Practically all the quality report cards given to patients use indicators the patients do not understand.[295] HIPAA authorization forms add two pages to consent materials and use language "similar in complexity to that in corporate annual reports, legal contracts, and the professional medical literature."[296] And only three to four percent of the population can understand the language in which contracts are drafted.[297]

Even sophisticated lawyers retire defeated.

> During oral argument of *Gerhardt v. Continental Insurance Co.* before the New Jersey Supreme Court,[298] Chief Justice Weintraub looked at the insurance policy at issue and said, "I don't know what it means. I am stumped. They say one thing in big type and in small type they take it away." Justice Haneman added, "I can't understand half of my insurance policies." Justice Francis stated, "I get the impression that insurance companies keep the language of their policies deliberately obscure."[299]

Credit-card contracts, subject to mandated disclosures, are no better. As Elizabeth Warren said of one, "I teach contract law at Harvard, and I can't understand half of what it says."[300] And Judge Posner was re-

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[293] *See* Mark Hochhauser, *Lost in the Fine Print: Readability of Financial Privacy Notices*, PRIVACY RIGHTS CLEARINGHOUSE (July 1, 2001), http://www.privacyrights.org/ar/GLB-Reading.htm (examining a sample of sixty privacy policies).

[294] Walfish & Watkins, *supra* note 145, at 484.

[295] *See* Judith Hibbard & Jacquelyn Jewett, *Will Quality Report Cards Help Consumers?*, HEALTH AFF., May/June 1997, at 218, 225 (finding that consumers did not understand many of the report's indicators and, in turn, gave those indicators low salience).

[296] Peter Breese et al., Letter, *The Health Insurance Portability and Accountability Act and the Informed Consent Process*, 141 ANNALS INTERNAL MED. 897, 897 (2004). Similarly, HIPAA forms in "major health-care institutions" were (on average) six pages long in ten-point font. Peter Breese, *Readability of Notice of Privacy Forms Used by Major Health Care Institutions*, 293 JAMA 1593, 1593 (2005). A "median of 80.0% of persons in the surrounding area would have difficulty understanding the privacy notices." *Id.*

[297] Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 234, 237-38 (2002) (citing KIRSCH ET AL., *supra* note 287, at 17 fig. 1.1, 19); *see also* Melvin A. Eisenberg, Commentary, *Text Anxiety*, 59 S. CAL. L. REV. 305, 309 (1986) (explaining why it is reasonable for consumers to ignore the dense textual content of contracts).

[298] 225 A.2d 328 (N.J. 1966).

[299] Eisenberg, *supra* note 297, at 309.

[300] *Elizabeth Warren Defends The Consumer Financial Protection Agency*, BUSINESS INSIDER, http://www.businessinsider.com/elizabeth-warren-defends-the-consumer-financial-protection-agency-2009-7/#ixzz137xyXGQL (view video).

ported to have said that "[f]or my home equity loan, I got 100s of pages of documentation; I didn't read, I just signed."[301]

The standard response to illiteracy and innumeracy is to demand simpler forms. But for decades experts have labored intelligently and earnestly to present complex information accessibly, and it is now clear that only modest progress is possible. For example, one sophisticated attempt at a simple guide for prostate-cancer patients had "a readability score of 7th grade," which would exclude roughly half the population.[302] A recent study of mutual-fund disclosures is to like effect.[303] Unfortunately, complexity cannot be explained simply. Sophisticated vocabularies and professional languages encapsulate complex thoughts. If only simple words may be used, everything must be spelled out. This returns us to the overload problem. Many words make forms repellently long and cognitively overwhelming.[304] Thus one effort "to come up with a 'simplified' Miranda warning backfired when several Miranda components were included in a 32-word sentence."[305]

Consider one of the plainer contracts drafted in lay language—eBay's User Agreement,[306] which affects millions of people. The comprehensible terms are those people already know, like the "fees and services" provision. But in crucial areas—those that might provoke problems—even the lay language is confusing: "When you give us content, you grant us a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicensable (through multiple tiers) right to exercise any and all copyright, trademark, publicity, and database rights (but no other rights) you have in the content, in any media known

[301] David Lat, *Do Lawyers Actually Read Boilerplate Contracts?*, ABOVE THE LAW (June 22, 2010, 2:42 PM), http://abovethelaw.com/2010/06/do-lawyers-actaully-read-boilerplate-contracts-judge-richard-posner-doesnt-do-you/.

[302] Margaret Holmes-Rovner et al., *Readability and Suitability Principles for Decision Aids* (forthcoming) (on file with author).

[303] *See* John Beshears et al., *How Does Simplified Disclosure Affect Individuals' Mutual Fund Choices?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 14,859, 2009), *available at* http://www.nber.org/papers/w14859 (finding that providing a white-collar test subject with a "Summary Prospectus" did not alter the subject's investment choice, although the subject made the decision more quickly).

[304] Even a father of the IRB system thinks it "necessary to use polysyllabic words in consent forms; it is in the nature of the language. If the prospective subject 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." Robert J. Levine, Letter, IRB: ETHICS & HUMAN RES., Jan. 1982, at 8.

[305] Rogers, *supra* note 160, at 779 (citing A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 34 (1970)).

[306] *Your User Agreement*, EBAY, http://pages.ebay.com/help/policies/user-agreement.html?_trksid=m40 (last visited Nov. 15, 2010).

now or in the future."[307] In this syntactical tangle, ten adjectival terms come between the article ("a") and the noun ("right"), which itself requires much more clarification. The terms mean little until you reach "right" and find out what the terms are modifying. Almost all the sentence's vocabulary requires special knowledge. "Content," "non-exclusive," "perpetual," "irrevocable," "royalty-free," "sublicensable," "tiers," "copyright," "publicity," "database," "rights," and "media" are words people typically do not use in the contract's sense, if at all.

What if disclosures were oral? Of course, this would place a greater burden on people's memories, and thus would be a poor strategy when disclosures inform repeat or long-term decisions. Still, at best, this would only partly solve the literacy problem (and probably exacerbate the numeracy problem). Extracting complex information from speech is like listening to a foreign language you almost know. At first you think you understand; you hear a word you do not instantly recognize; you pause to identify it; you return to find the speaker several stops along in the sentence and you struggle to catch up. Soon you are lost. (Warnings about side effects in drug advertising—especially since they are read so fast—often present this problem.) Reading at least lets you choose your pace and reread puzzling passages. And many disclosures are far too long to state orally.

Oral disclosures can reduce comprehension in other ways. Disclosees are often worried, afraid, anxious, and rushed. They cannot take in what they are told and use it effectively. For example, one paramedic who was told she had cancer reflected, "I was in a bubble. I saw his mouth moving and I was aware of a flow of words, but I was unable to process most of the information. He might as well have been speaking a different language."[308] Even Yale faculty and students who burned draft cards and whom polite law-enforcement officials interviewed at home were nervous and discomfited.[309] Alternatively, disclosees may be bored. Disclosures, after all, are not thrillers. Think about the safety announcement on airplanes, delivered orally but often unintelligibly. Does the medium improve comprehension?

Oral disclosures are also difficult for the law to police and to verify. Thus, creditors who provide their customers oral disclosures of charges and options mandated under TILA can be held in violation of the statute. In a landmark decision, the FTC found that a bank vi-

[307] *Id.*

[308] ROSALIND MACPHEE, PICASSO'S WOMAN 41 (Kodashu Int'l 1996) (1994).

[309] Griffiths & Ayres, *supra* note 163, at 314-15.

olated the disclosure mandate by giving oral, instead of written, disclosure. "Oral disclosures are inherently unreliable," the FTC held. It is "inherently inconsistent with the statutory scheme, which contemplates *written* disclosure." [310]

Empirical evidence about oral disclosures confirms its limited usefulness. For example, patients may need to know about end-of-life care, particularly CPR, since it is less effective and more unpleasant than popularly supposed. Unfortunately, doctors' conversations with patients about end-of-life care are rare and unsuccessful. In one study, discussions "did not usually concern specifics of treatment, such as artificial ventilation or cardiopulmonary resuscitation, but rather tended to deal with generalities and avoided details."[311] A study of how experienced clinicians discussed advance directives with patients they knew well found that median conversations lasted 5.6 minutes and were hardly enlightening: "Physicians used vague language to describe scenarios, asking what patients would want if they became 'very, very sick' or 'had something that was very serious.' They rarely attempted to define vague situations or to ascertain the meaning of such terms . . . ."[312] Further, "qualitative terms were used loosely to describe outcome probabilities."[313] These brief conversations scanted "the more common, less clear-cut predicaments surrounding end-of-life care."[314] In another study, even patients told about "mechanical ventilation had a poor understanding of what this procedure entails, and a significant number harbored important misconceptions."[315] If such discussions of such issues by such doctors with such people leave them so ignorant, what hope is there for the average run of disclosures?

Furthermore, the best-informed speakers are busy and costly. Therefore, doctors tell nurses to "consent" the patient or use substitutes like videotapes instead of having the careful discussion advocates of informed consent envision. Corporations shift communication to automation and spoken formulas. This can mean an operator reading

[310] USLIFE Credit Corp., 91 F.T.C. 984, 1027 (1978), *modified* 92 F.T.C. 353 (1978).

[311] Jaya Virmani et al., *Relationship of Advance Directives to Physician-Patient Communication*, 154 ARCHIVES INTERNAL MED. 909, 913 (1994).

[312] James A. Tulsky et al., *Opening the Black Box: How Do Physicians Communicate About Advance Directives?*, 129 ANNALS INTERNAL MED. 441, 444 (1998).

[313] *Id.* at 446.

[314] *Id.*

[315] Gary S. Fischer et al., *Patient Knowledge and Physician Predictions of Treatment Preferences After Discussion of Advance Directives*, 13 J. GEN. INTERNAL MED. 447, 451 (1998).

(slowly, wearily, mechanically) terms drafted by lawyers. As Judge Easterbrook said sardonically, "If the staff at the other end of the phone for direct-sales operations . . . had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten . . . ."[316] Many airline passengers would second this observation, based on their exposure to the oral flight-safety announcements preceding takeoff.

Finally, disclosure mandates are often aimed at people who may be particularly disadvantaged in trying to understand them. For example, sicker patients are considerably more vulnerable to the complexities of informed consent than healthier patients.[317]

b. *Making Sense of Information*

Illiteracy is not the only impediment to understanding disclosures. Simply comprehending disclosures of the kind that are commonly mandated takes intelligence—sometimes a good deal of it—especially when misunderstanding even a single datum can badly mislead the disclosee. "High intelligence is a useful tool in any life domain, but especially when tasks are novel, untutored, or complex, and situations are ambiguous, changing, or unpredictable."[318] Yet in areas where mandated disclosure is likeliest to be used, full and accurate understanding is vanishingly rare.[319]

When people receive information, they rarely hear exactly what they are told. Rather, they interpret the data as they receive it by putting data in the framework of their understanding. When people make decisions in their ordinary lives, their

> understanding of the rapid flow of continuing social events . . . [depends] on a rich store of general knowledge of objects, people, events, and their characteristic relationships. Some of this knowledge may be

[316] Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997).

[317] *See, e.g.*, L. Jaime Fitten & Martha S. Waite, *Impact of Medical Hospitalization on Treatment Decision-Making Capacity in the Elderly*, 150 ARCHIVES INTERNAL MED. 1717, 1720 (1990) ("[S]ignificant numbers of medically ill patients failed to substantially understand key issues in treatment despite language and form simplification of consent documents.").

[318] Linda S. Gottfredson & Ian J. Deary, *Intelligence Predicts Health and Longevity, but Why?*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 1, 2 (2004) (citations omitted).

[319] We cite numerous examples of this failure in our material on the effectiveness of mandated disclosure in Part II, especially the material on the failure of informed consent. *See supra* subsection II.A.2.

> represented as beliefs or *theories*, that is, reasonably explicit 'propositions' about the characteristics of objects or object classes.[320]

People use these theories to organize and explain the information they receive. In short, people misunderstand mandated disclosures because they lack or misunderstand background information and because they have no theories, or the wrong theories, for interpreting what they are told.

For example, patients misunderstand medical information because they do not know what their organs do, where they are, or even what they are called.[321] Patients interpret information about CPR in light of TV fantasy.[322] Few people applying for mortgages know what amortization is and how it works, which makes even lucid descriptions of balloon payments and fluctuating interest rates mysterious. In fact, many borrowers think that the "'amount financed' disclosed on the TILA statement was their total loan amount, not the loan minus prepaid finance charges, or that the 'discount fee' in the [Good Faith Estimate]" is a discount they receive, not a fee they are charged.[323]

Likewise, few people understand even the basics of the health care market.[324] This means, at best, that they lack "baseline information that could provide context for required disclosure. Therefore, health care consumers can easily misinterpret even accurate data."[325] In one study, for example, prospective plan enrollees thought high hospitali-

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[320] RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 28 (1980).

[321] Ben Watt was literate enough to have written a memoir of his illness, but had "always thought 'bowel' was just a colloquial term like 'guts' and meant somewhere near your arse." BEN WATT, PATIENT 32 (Grove Press 1997) (1996).

[322] *See* Susan J. Diem et al., *Cardiopulmonary Resuscitation on Television: Miracles and Misinformation*, 334 NEW ENG. J. MED. 1578, 1581 (1996) (observing that on television "only 28 percent of the patients had primary cardiac arrests," while in real life "75 to 95 percent of arrests result from underlying cardiac disease"); *cf.* Rebecca Dresser, *The Ubiquity and Utility of the Therapeutic Misconception*, 19 SOC. PHIL. & POL'Y, 271, 271 (2002) (arguing that research subjects "confuse research with therapy" not just because of inadequate consent forms, but also because "[p]atients are inundated with messages equating study participation with medical treatment").

[323] James M. Lacko & Janis K. Pappalardo, *The Failure and Promise of Mandated Consumer Mortgage Disclosures: Evidence from Qualitative Interviews and a Controlled Experiment with Mortgage Borrowers*, 100 AM. ECON. REV. (PAPERS & PROC.) 516, 518-19 (2010).

[324] For example, thirty percent of those surveyed in one study knew almost nothing about HMOs. Of the remaining patients, "only 16 percent had adequate knowledge (scores of 76 percent or higher) to choose between traditional Medicare and an HMO." Hibbard et al., *supra* note 136, at 185-86.

[325] William M. Sage, *Accountability Through Information: What the Health Care Industry Can Learn from Securities Regulation*, MILBANK MEMORIAL FUND (Nov. 2000), http://www.milbank.org/reports/0012sage.html (citations omitted).

zation rates for pneumonia showed leniency in approving inpatient treatment, not a failure to vaccinate.[326] Similarly, the Yale faculty and students who waived their *Miranda* rights knew they could refuse to answer but did not know the consequences of answering. "Their waiver of the right to a lawyer's advice was even less informed, since their ignorance of the significance of the right to silence was compounded by their ignorance of the functions a lawyer might have performed for them."[327]

Conflicts of interest is another area in which consumers often fail to understand the complexity of the underlying service they are receiving or the conflict of the service provider. When intermediaries receive kickbacks and incentives from businesses to provide advice to consumers, there are various types and degrees of concern, but they often are misperceived and misjudged by consumers. For example,

> *Even assuming that consumers would read and understand a contingent commission disclosure* . . . they will be ill-equipped to police the underlying conflict of interest or to assess its significance. Insurance consumers generally do not know how to assess the quality of different insurance options: the risks associated with an insurer's "fair" financial rating, for instance, are beyond the ken of most insurance consumers, including many small businesses and otherwise savvy individuals.[328]

### 4. Remembering the Information

Receiving and analyzing information about complex and unfamiliar subjects takes time, so disclosees must remember what they have been told. But memory is a sieve. Studies of informed consent, for example, repeatedly find that people correctly remember about one-third of the basic information they are given if asked open-ended questions and about half if asked multiple-choice questions.[329]

This lack of retention is inevitable. Even in the best of circumstances it is hard to remember what you have learned without effort. But information is especially hard to remember if you are unfamiliar with a subject. That is, things are most easily remembered if you can

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[326] Sage, *supra* note 25, at 1729 (citing Barbara S. Cooper, *From Bill-Payer to Purchaser: Medicare in Transition*, HEALTH SYS. REV., July–Aug. 1997, at 16, 17).

[327] Griffiths & Ayres, *supra* note 163, at 311.

[328] Daniel Schwarcz, *Beyond Disclosure: The Case for Banning Contingent Commissions*, 25 YALE L. & POL'Y REV. 289, 314-15 (2007).

[329] *See, e.g.*, Herz et al., *supra* note 114, at 454 tbl.1.

place them in some kind of context, a template, or a story.[330] Thus jurors do reasonably well at remembering the facts of a case (and at helping each other remember the facts) but do quite badly at remembering the judge's instructions about the law.[331] As the jurors hear the facts, they put them into the framework of a story. Legal rules do not fit into jurors' narrative templates.

Furthermore, people are better at remembering pleasant thoughts than unpleasant ones. Mandated disclosures are often bleak and minatory. For example, "[r]etention of information is selective and the expected benefits of surgery are recalled much better than the potential risks."[332] We need not review all the reasons for selective memory. It may be related to cognitive biases or defense mechanisms such as suppression or denial. One implication, however, is that such factors may contribute to physicians' tendency to avoid discussing prognoses, withhold prognostic information, or present overly optimistic information.[333]

### 5. Analyzing the Information

Mandated disclosure attempts to solve social problems by requiring the revelation of information. We have now looked at the likelihood that the disclosee will receive, understand, and remember information. We have seen that each step in the process is so problematic that often the disclosee will not encounter the information, assimilate it, read or hear it correctly, or understand it. The whole point of mandated disclosure is to give people good information. If they do not take up the information and learn it accurately, mandated disclosure fails.

We might well end our discussion of mandated disclosure here. But it has another fault: it addresses a large problem with a partial remedy. People make bad decisions not just because they lack information, but also because they do not effectively use the information they have. Mandated disclosure does not solve this problem. Particularly, in

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[330] *See* Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 L. & CONTEMP. PROBS., Autumn 1989, at 205, 206 (discussing evidence that jurors assimilate incoming information into a story framework they construct and often forget information that does not fit well into that framework).

[331] *See id.* at 218 (reporting that, when tested on the elements of the judge's instructions, jurors on average performed about as well as they would have if they had randomly guessed).

[332] Lemaire, *supra* note 194, at 4.

[333] *See* Robinson et al., *supra* note 252, at 1050 (discussing various cases of patient over-optimism, including those connected to patient communication behaviors).

cases where disclosures are most frequently mandated, people can have considerable—even disabling—difficulties making good decisions.

A great and growing literature in social psychology and behavioral economics documents the ways people distort information and ignore and misuse it in making decisions. That literature teaches that you do not solve the problem of bad decisions by giving people information. It may be necessary, but it is not sufficient.

Requiring that people be given information is otiose if the information does not produce better decisions. We have concentrated on disclosees' cognitive problems with disclosed information and argued that people often lack an adequate command of information to make good decisions. But even if disclosees were offered, accepted, understood, and remembered all the relevant information, they would still encounter difficulties in *using* the information that it would do them little good. To put the point differently, mandated disclosure is fundamentally misconceived because its solution to the problem of choice is information alone. But people's problems choosing go well beyond ignorance. In what follows, we discuss several problems people have in analyzing information and using it to make decisions.

a. *Coping with Complexity*

We have already said that providing complex information in large quantities makes it hard for disclosees to acquire and understand disclosures.[334] The problem worsens when they try to use such information. People can keep only a few factors in mind when analyzing a problem. A "large body of empirical work suggest[s] that the integration of different types of information and values into a decision is a very difficult cognitive process. Evidence shows that people can process and use only a limited number of variables."[335] In fact, information may *decrease* the reliability of decisions: "When individuals had more information, their ability to use it 'consistently' declined."[336] One study, for instance, asked expert handicappers to predict horse races. The more information the handicappers had, the more confident they were, but their "predictive ability was as good with 5 variables as with 10, 20, or 40." Worse, "reliability of the choices *decreased* as more information was made available."[337]

[334] *See supra* subsection III.A.4.

[335] Hibbard et al., *supra* note 192, at 397.

[336] *Id.* at 398.

[337] *Id.* (emphasis added).

It will come as no surprise, then, that consumers borrow more than is rational. The calculations required to borrow shrewdly are numerous and knotty: Consumers must compare relative costs of credit and cash, compare different financial products (such as short- versus long-term or secured versus unsecured), set the proper level of saving versus consumption, factor in the time value of money and how it might evolve, and assign each factor a weight. Faced with all this, it is hard not to overweight a few simple, easily understood factors like low present interest rates.[338]

People often simplify decisions by pruning away factors, and at the extreme they consult a single factor.

> Making trade-offs to integrate conflicting dimensions into an overall choice is such a complex cognitive task that people tend to use heuristic shortcuts that may not produce optimal decisions. These simplified strategies include selecting only one dimension and ignoring others or focusing on concrete, easy to understand concepts such as cost rather than more complicated and less precise factors such as quality indicators.[339]

The more overwhelming a decision, the more appealing radical shortcuts become.[340] Indeed, confronted with disclosures containing many items, people consider only the simplified shortcut—some bottom line. Loan shoppers, for example, when given more information about subcomponents of the loan price, were less likely to choose the cheaper loan than shoppers who saw only the bottom-line price.[341]

So (perhaps because of the anchoring heuristic) the rule for borrowing seems to be, *can I afford the monthly payment?*[342] This requires minimal calculation, but it distorts the cost of credit. It obscures comparisons between competing credit offers and between the cost of credit and the cost of paying for a household purchase out of savings.

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[338] *See* Willis, *supra* note 107, at 219-23 (arguing that most American adults lack the skills necessary to make "independent, welfare-enhancing decisions in today's personal-finance product market").

[339] Lubalin & Harris-Kojetin, *supra* note 137, at 88 (citations omitted).

[340] *See* Yaniv Hanoch & Thomas Rice, *Can Limiting Choice Increase Social Welfare? The Elderly and Health Insurance*, 84 MILBANK Q. 37, 41 (2006) (arguing that elders use decisionmaking shortcuts and "heuristic-based strategies" when faced with complex decisions).

[341] JAMES M. LACKO & JANIS K. PAPPALARDO, FED. TRADE COMM'N, THE EFFECT OF MORTGAGE BROKER COMPENSATION DISCLOSURES ON CONSUMERS AND COMPETITION: A CONTROLLED EXPERIMENT 28-29 (2004).

[342] *See* Willis, *supra* note 102, at 780-84 (explaining how consumers simplify financial decisionmaking by focusing on one dimension of a product).

Most importantly, it renders disclosure of APR and related credit terms interesting but irrelevant.

Cancer treatment provides another example. Choices for treating breast cancer are relatively simple, specialists have much experience presenting those choices to patients, and much attention has been paid to how to do so. Still, one study concluded that the leading "influence on decision-making behavior" was "perceived salience of alternatives."[343] In other words, patients let a single aspect of the treatment determine the decision. These patients "did not report conflict about what course to take or the need for further information or deliberation."[344] And indeed, breast-cancer patients seem regularly to choose a treatment with nothing like adequate understanding.[345]

The health-plan choices of employers' specialists provide yet another example for disclosed information's limited use. Only about a fifth use "some kind of system for making trade-offs and identifying high-performing, cost-effective plans," and the "system" could be as primitive as a four-cell matrix.[346] Additionally, "[t]welve percent reported that they made their choices on the basis of a single dimension such as cost or geographic access."[347]

b. *The Mysteries of the Mind*

Disclosure is not mandated to give disclosees a cognitive workout. Rather, its purpose is to help them make good decisions. Disclosure will be pointless if people can understand information but information-handling problems prevent them from making good choices. The literature on how people misanalyze problems because of defects

[343] Penny F. Pierce, *Deciding on Breast Cancer Treatment: A Description of Decision Behavior*, 42 NURSING RES. 22, 23 (1993).

[344] *Id.* A study of prospective dialysis patients observed "similarly truncated courses of decision." SCHNEIDER, *supra* note 110, at 94-95. The patients listened until they heard some arresting fact and then based their decision on it: "as soon as some patients hear that hemodialysis requires someone to insert two large needles into their arm three times a week, they opt for whatever the alternative is." *Id.* For an extended development of these points, see *id.* at 92-99.

[345] *See* Angela Fagerlin et al., *An Informed Decision? Breast Cancer Patients and Their Knowledge About Treatment*, 64 PATIENT EDUC. & COUNSELING 303, 309 (2006) (noting that "a considerable number of studies have reached similar conclusions" with regard to the low level of knowledge patients used in making health care decisions).

[346] Hibbard et al., *supra* note 138, at 177.

[347] *Id.*

in human reasoning is now so great that it cannot (and so familiar that it need not) be summarized.[348]

So we are faced once again with the overload effect. We propose to solve it with a brief and incomplete picture of the "cognitive and social psychological phenomena" that "significantly limit the effectiveness of disclosures alone" (in this case to help consumers choose mortgages well).[349] These phenomena include

> (a) inability to process user-unfriendly features of disclosure regimes; (b) lack of contractual schemas or knowledge structures; (c) inaccurate default assumptions of how contractual provisions are likely to be structured and whether the terms can be negotiated; (d) availability heuristics; (e) reason-based decision making; (f) biases in attribute estimation and evaluation; (g) positive confirmation biases; (h) acceptance of senseless explanations; (i) argument immunization; (j) sunk cost effects; (k) endowment effects; (l) temporal and uncertainty discounting; (m) a strong motivation to trust that is exacerbated when the consumer is of a lower socioeconomic status, and misplaced trust in the mortgage broker or lender; and (n) social norms and signals not to read disclosure forms.[350]

c. *Parsing Preferences*

The mandated-disclosure formula assumes that disclosees take information and use it to determine which choice best serves their preferences. However, lack of well-developed preferences can keep people from using disclosed information productively. For example, people buying insurance often know little about the coverage sought. Even if they decipher the risks, probabilities, and deductibles, do they have the skill to figure out which bundle of policy limits, scope of coverage, exclusions, deductibles, and premia is best? More coverage, fewer exclusions, smaller deductions, and cheaper premia are better, but trading off these factors is perplexing.

To take another example, a patient with a dire disease may have to choose between a treatment with a low chance of success but a low risk of death and disaster, and a treatment with a high chance of success but a high risk of death and disaster. Patients have relevant prefe-

[348] *See, e.g.*, DANIEL GILBERT, STUMBLING ON HAPPINESS (2006) (providing a psychological explanation of the limitations of human imagination in the area of forecasting the future); NISBETT & ROSS, *supra* note 320 (arguing that human error often arises when people use simplistic inferential decisionmaking strategies, rather than normative and inferential tools); TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002) (arguing that the adaptive unconscious is a powerful force, controlling many motivations, judgments, and actions).

[349] Stark & Choplin, *supra* note 189, at 89.

[350] *Id.*

rences: avoiding death and avoiding side effects. But few patients have values that will help them beyond this. We are not arguing that people generally do not know their preferences. Our narrower argument is that few people can—or want to—develop finely calibrated preferences in the often technical mandated-disclosure areas. At the very least, few develop such preferences quickly and accurately enough to use in making decisions.

Using disclosed information requires making two kinds of predictions: how you will behave in your chosen situation and how you will feel about your choice once you have started living it. A considerable and bemusing literature reveals that both predictions are hazardous. Even in some familiar situations, people mispredict their own behavior.[351] They go on dates determined to behave chastely, engage in foreplay expecting to use a condom, and initiate sex while planning to stop in time.[352] In less familiar situations, the problem worsens. For example, many credit-card users wrongly expect to maintain a zero credit balance,[353] and consumers joining health clubs often choose to pay a flat rate because they overestimate their future usage by more than one hundred percent.[354]

People's ability to use disclosures can also be compromised by, for example, a tendency to overestimate how unhappy a bad outcome will make them and to underestimate their ability to diminish that unhappiness.[355] People react to disease and disability less despairingly than they expect.[356] The sick generally evaluate their lives differently from

[351] *See* Oren Bar-Gill, *Informing Consumers About Themselves* (N.Y. Univ. Sch. of Law Ctr. for Law and Econ., Working Paper No. 07-44, 2007), *available at* http://ssrn.com/abstract=1056381 (providing numerous examples in which consumers fail to maximize their preferences in product choice and product use).

[352] *See generally* Daniel T. Gilbert & Timothy D. Wilson, *Miswanting: Some Problems in the Forecasting of Future Affective States* (describing how people incorrectly evaluate their desires over time), *in* FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION 178, 182-83 (Joseph P. Forgas ed., 2000).

[353] *See* Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50, 71 (1991) (discussing "indirect empirical confirmation of the presence of consumers who act as though they do not intend to borrow but who continuously do so").

[354] Stefano Della Vigna & Ulrike Malmendier, *Paying Not to Go to the Gym*, 96 AM. ECON. REV. 694, 706 (2006).

[355] *See* GILBERT, *supra* note 348, 175-92.

[356] *See, e.g.*, Joel Tsevat et al., *The Will to Live Among HIV-Infected Patients*, 131 ANNALS INTERNAL MED. 194, 195 (1999) (reporting that half of AIDS patients interviewed said "their life was better currently than it was before they were aware that they had HIV," while only twenty-nine percent said life was worse).

the way the well evaluate them,[357] and despite the "quality of life is more important than quantity" mantra, many patients would yield much quality even for slightly more quantity.[358]

d. *Expertise*

In most situations in which disclosure is mandated, more than facts are needed to make good decisions. Expertise—accumulated knowledge and experience—is also essential. The experts with whom disclosees deal—like bankers, doctors, police, and businesses—have experience that allows them to make better decisions than a novice. As experts accumulate experience, they develop sets of mental patterns and a certain degree of intuition. This intuition relates to the way things usually work. When experts encounter a new problem, they consult their mental file of patterns to see what is recognizable in the problem and what solutions are plausible. In other words, "[a]s a practitioner experiences many variations of a small number of types of cases, he is able to 'practice' his practice. He develops a repertoire of expectations, images, and techniques. He learns what to look for and how to respond to what he finds."[359] More precisely,

> [d]ecision makers recognize the situation as typical and familiar . . . . They understand what types of *goals* make sense (so the priorities are set), which *cues* are important (so there is not an overload of information), what to *expect* next (so they can prepare themselves and notice surprises), and the *typical ways of responding* in a given situation. By recognizing a situation as typical, they also recognize a *course of action* likely to succeed.[360]

This experience and skill in making decisions comes with practice and cannot be taught simply by instruction. A good decision results from technical experience and savvy, gained by practice, trial and error, and educated intuition—factors that cannot be passed along by simple communication, reading a treatise, or signing a disclosure. It is based on *implicit*, not *articulated* knowledge.[361] Indeed, experts

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[357] *See* Ubel et al., *supra* note 221, at 601-04 (highlighting the discrepancy between quality-of-life estimates from patients and the general public).

[358] *See* Tsevat et al., *supra* note 356, at 196 (reporting HIV patients' "mean time-tradeoff score was 0.95 ± 0.1" over a five-year period, "indicating that, on average, patients did not have a clear preference between living 5 years in their current state of health and 4.75 years . . . in excellent health").

[359] DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER 60 (1983).

[360] GARY KLEIN, SOURCES OF POWER 24 (1998).

[361] *See* Stephen A. Marglin, *Towards the Decolonization of the Mind* ("The sources of *techne* range from intuition to authority; . . . it is often implicit rather than articulate; . . . it is practical rather than theoretical, and geared to discovery rather than veri-

"usually know more than they can say. They exhibit a kind of knowing-in-practice, most of which is tacit."[362]

This is *not* to say that novices never understand information. But novices' inexpertise gives them another burden in interpreting disclosures. In the areas in which mandated disclosure is most used, novices cannot easily understand the facts they are given, how to put them in context, how to analyze them, and how to act on them. To be sure, the degree of expertise called for in the areas regulated by mandated disclosure varies. But when one surveys the range of disclosers, one realizes that most areas require expertise to understand the information subject to disclosure requirements.[363]

This brings us back, again, to the quantity question. Experts can cope with large quantities of information in ways novices cannot. For example, they build up sets of patterns they can consult almost intuitively. They build up standard solutions to problems. Like seasoned watchmakers, they reduce complexity through modularity: they break down complex problems into manageable subproblems.[364] In short, experts simplify choices so that they require fewer data and less labor.

Lawmakers and disclosers increasingly recognize the importance of expertise, and at times supplement disclosure mandates with counseling requirements.[365] For example, several states have enacted mortgage counseling requirements as a means to provide better guidance to borrowers.[366] Recently, HUD considered but eventually rejected a requirement that "a closing script . . . be completed and read by the closing agent."[367] In addition, proposals have been made for

fication . . . ."), *in* DOMINATING KNOWLEDGE 1, 24 (Frédérique Apffel Marglin & Stephen A. Marglin eds., 1990).

[362] SCHÖN, *supra* note 359, at viii.

[363] *See* text accompanying *supra* note 1.

[364] *See* SCHÖN, *supra* note 359, at 60-64 (describing a practioner's "reflection-in-action").

[365] *See, e.g.*, 11 U.S.C. § 727(a)(11) (2006) (prohibiting a debtor from discharging a debt in a bankruptcy proceeding if the debtor has not completed a personal-finance management course).

[366] *See* Stark & Choplin, *supra* note 189, at 87 & n.12 (listing statutes in Arkansas, Georgia, Indiana, New Mexico, and North Carolina).

[367] Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 68,204, 68,205 (Nov. 17, 2008). Ironically, in contrast with the rule's title, HUD projected the closing script would take forty-five minutes to read and would cost approximately $98.48 per loan. *See* Stark & Choplin, *supra* note 189, at 108 (citing Real Estate Settlement Procedures Act Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 14,030, 14,102 (proposed Mar. 14, 2008) (to be codified at 24 C.F.R. pts. 203, 3500)).

doctors and researchers to test patients and prospective research subjects on their understanding of the consent forms. Even without an official mandate, many doctors follow a "shared decisionmaking" model, intended to educate patients well enough for them to make good decisions. This model "assumes that both the patient and the doctor have a legitimate investment in the treatment decision; hence, both declare treatment preferences and their rationale while trying to build a consensus on the appropriate treatment to implement."[368]

e. *Decision Aversion*

Mandated disclosure assumes that people want to make decisions themselves and want to do so by gathering and evaluating information about their choices. In areas subject to mandates, however, both assumptions are unreliable. The empirical evidence discussed in this section shows that people resist making even crucial decisions and when they do make them, they use little information and scant reflection. For example, people frequently resist making medical decisions, and the sicker and older they are—and thus the more consequential their decisions—the more they resist.[369] When one study asked patients whether they wanted information, their mean score was 80 on a 0–100 scale; when asked if they wanted to make their own decisions, the mean score was 33.[370]

Similarly, people avoid financial decisions, and when they do make a decision, they use less information than they need and could get. For example, people famously postpone retirement planning.[371] One survey found that "[o]nly 42 percent of workers report they

[368] Cathy Charles et al., *What Do We Mean by Partnership in Making Decisions About Treatment?*, 319 BMJ 780, 781 (1999).

[369] *See* SCHNEIDER, *supra* note 110, at 41 (surveying direct empirical studies on patient preferences about autonomy).

[370] Jack Ende et al., *Measuring Patients' Desire for Autonomy: Decision Making and Information-Seeking Preferences Among Medical Patients*, 4 J. GEN. INTERNAL MED. 23, 25-26 (1989).

[371] *See* NATIONAL INSTITUTE ON AGING, GROWING OLDER IN AMERICA: THE HEALTH & RETIREMENT STUDY 57, 60 (2007) (reporting studies finding low savings rates for retirement, including one study finding that one third of survey respondents had saved nothing for retirement); *see also* James J. Choi et al., *For Better or For Worse: Default Effects and 401(k) Savings Behavior* (reporting 401(k) participation rates not exceeding seventy percent at two large companies without automatic-enrollment plans), *in* PERSPECTIVES ON THE ECONOMICS OF AGING 81, 98 tbl.2.2 (David A. Wise ed., 2004); James J. Choi et al., *Optimal Defaults*, 93 AM. ECON. REV. (PAPERS & PROC.) 180, 180 (2003) (discussing the potential effects of an optimal default-savings rule given people's tendency to procrastinate in making retirement choices).

and/or their spouse have *tried* to calculate how much money they will need to have saved."[372] Rather than choosing investments, employees often leave pension money wherever their employer puts it.[373] Consequently, despite easily available advice about the basics of investing, employees hold employer stock in risky proportions.[374]

Of course, many people make many decisions willingly and well. Many decisions cannot normally be delegated, like choosing a school or a spouse. Some decisions are enjoyable, like buying shotguns or shoes. And acquiring information can be fun, like reading box scores or gossip columns. But decisions—especially the subsets of decisions that mandated disclosure seeks to improve—are generally a means, not an end; a distraction, not a pleasure. The drudgery of learning, the agony of indecision, the risks of responsibility, the inevitability of incompetence, and the acknowledgment of perils hold charms for only a few.[375]

Furthermore, seeking plenary control can interfere with the things that really matter. Control means constant choices, time-sapping and soul-sucking. As Alfred North Whitehead wonderfully said,

> It is a profoundly erroneous truism, repeated by all copy-books and by eminent people when they are making speeches, that we should cultivate the habit of thinking of what we are doing. . . . Operations of thought are like cavalry charges in a battle—they are strictly limited in number, they require fresh horses, and must only be made at decisive moments.[376]

Not only may people resist making the sorts of decisions mandated disclosure addresses, they also resist making them in the intended *way*. For most people facing such decisions, the more-is-better mantra is wrong. In many areas, and particularly when people are confused and need "protection," knowledge is not intrinsically valued.

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[372] RUTH HELMAN ET AL., EMP. BENEFIT RESEARCH INST., ENCOURAGING WORKERS TO SAVE: THE 2005 RETIREMENT CONFIDENCE SURVEY 6 (2005) (emphasis added).

[373] *See* James J. Choi et al., *Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance* (discussing studies on "passive decisionmaking in asset allocation choices"), *in* 16 TAX POLICY AND THE ECONOMY 67, 97-99 (James M. Poterba ed., 2002).

[374] *See* James J. Choi et al., *Are Empowerment and Education Enough? Undiversification in 401(k) Plans*, BROOKINGS PAPERS ON ECON. ACTIVITY, no. 2, 2005, at 151, 156-57 (surveying research finding that 401(k) plans have high percentages of employer stock).

[375] *Cf.* SCHNEIDER, *supra* note 110, at 38-39 (describing a study finding that patients wish to defer to doctors who presumably have more expertise).

[376] ALFRED NORTH WHITEHEAD, AN INTRODUCTION TO MATHEMATICS 41-42 (Galaxy Book, 3d prtg. 1961) (1911).

People may want to know less, not more, and so they may find information a burden, not a privilege. They may begrudge the time and trouble it takes to learn and use the amount and kind of information disclosures provide. They may dislike reading contracts, manuals, warnings, notices, forms, charts, and instructions, or burrowing through endless data.

Yet everywhere people turn, information bombards them, and consequently, they strive to stem the waste of time and attention required to sort through that information. Google succeeds, in part, by giving people less information—the useful information, the "top hits"—not more. People become, in short, numb to the information in mandated disclosures. They look for and latch onto cues, signals, something familiar—indicators that are largely inconsistent with the comprehensive, systematic information toward which disclosures tend. People hope to use *less* information, not more; to break information down into easy, modular pieces, not to assemble it into comprehensive wholes; to minimize unfamiliar decisions and replace them with familiar ones. The ideal underlying mandated disclosure—systematic information—fails to recognize these preferences.

## IV. SOME UNINTENDED EFFECTS OF MANDATED DISCLOSURE

We have examined mandated disclosure's potential to inform people and improve their decisions. But disclosures may affect transactions and interactions in other ways: by creating indirect benefits and imposing selective costs. In this Part, we first look at some possible indirect benefits of mandated disclosure and we then examine some indirect and unintended costs.

### A. *The Dubious Indirect Benefits of Mandated Disclosure*

Mandated disclosure's core purpose is to supply information that people can use to make better decisions. If disclosure mandates did lead to better decisions, they would be valuable and would likely justify at least the obvious costs of regulation. However, we have just discussed a long series of conditions that must be satisfied for mandated disclosure to work, and we argued that only rarely can all be met. If a mandated-disclosure regulation fails to accomplish its purpose, it cannot be justified, even if its cost is small.

But might there be ways to analyze mandated disclosure that show it capable of justifying its costs? Might mandated disclosure serve valuable goals other than directly informing people?

### 1. An Agency Benefit?

An influential law-and-economics argument maintains that a few sophisticated readers of disclosures can discipline disclosers and force them to offer better terms, eschew hidden traps, and behave efficiently.[377] Mandated disclosure might inform these sophisticated readers, thus helping all disclosees. We doubt, however, that sophisticated disclosees are "reading agents" for other disclosees.

First, this theory conflicts with the theory of mandated disclosure. Under the agency theory, sophisticated readers induce businesses to disclose information *voluntarily* and avoid self-serving behavior. That is, recognizing the presence of sophisticated consumers and seeking to please them, businesses voluntarily disclose information and make it useful. Failure to do so would either drive the sophisticates away or reduce their willingness to pay. Mandated disclosure, by contrast, assumes that there will be no disclosure without a mandate. It thus assumes that there are not enough sophisticated consumers who know to demand, and are able to scrutinize, the information. This assumption is ordinarily correct, since the factors that discourage disclosees from scrutinizing disclosures apply to even sophisticated disclosees. If nobody reads disclosures, it does not matter that some nonreaders are sophisticated.

Even if there were enough readers, they would not be good agents for other consumers unless they were reasonably typical. But the person with the time, knowledge, skill, and determination—not to mention paranoia—to plow through disclosures is atypical, might care about idiosyncratic features, and might be willing to pay for higher quality. For example, a credit-card user who cares about the arbitration clause in the boilerplate is not likely to reflect the social demographics, the concerns, and the price-quality tradeoff of typical users. Furthermore, businesses can try to identify and segregate these readers so that the benefits the readers know to insist on will not leak to the nonreading majority. Sophisticated readers may selectively enjoy

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[377] *See* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638-39 (1979) (arguing that these effects arise because disclosers often cannot distinguish between sophisticated and unsophisticated readers); *see also* George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1346-47 (1981) (arguing that manufacturers focus warranty content to attract marginal consumers and repeat business). *But see* Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 692-97 (questioning the conditions under which readers would indeed serve as "agents" for nonreaders).

the "good" terms in the contract because they are buried in the fine print. And even if agent-readers were subject to the same oppressive terms as everybody else, they might negotiate ad hoc accommodations.[378] Therefore, the agency account militates in favor of mandated disclosure only for a market in which disclosers cannot distinguish readers from nonreaders and must give all consumers the better deal that readers insist on. But disclosure is often mandated in areas in which people use or enjoy information differently, as in medical situations, in *Miranda* situations, and in warnings about products, such as product-liability law and cigarette warnings.

There *are* market entities that specialize in reading disclosures. Consumer watchdogs and organizations that assess complex products and disseminate the information to the public could serve as reading agents. Thus, mandated disclosures might inform these market intermediaries who, in turn, might inform the population. But it is not clear that mandated disclosures help such groups fulfill their mission. Like other sophisticated readers, they can and do get information, even if it is not mandated. Moreover, it is not clear that the information they provide is based on the content of disclosures. Instead, it is often based on surveys and studies, which these organizations conduct. Consumers rely on these intermediaries to report how businesses actually behave, the quality of the businesses' products or services, and the overall rates of consumer satisfaction. Consumers do not want the watchdogs simply to tell them what is written in the disclosure.

There are, to be sure, areas in which disclosures are aimed directly at sophisticated intermediaries, and where the presence of such intermediaries produces a desirable effect for the nonreading populous. Hospitals, for example, make quality disclosures that health plans can use; employers make safety disclosures that labor unions can use; and firms make environmental disclosures that government entities can use. And, of course, most of the securities disclosures to investors are read and analyzed by sophisticated participants and their informational content is reflected in the prices of the securities. But these contexts are few and far between. The bulk of the consumer-oriented

[378] For example, the Comcast arbitration clause discussed below, *infra* note 414 and accompanying text, is a "Right to Opt Out," which requires the reader to notify Comcast. Only sophisticated readers that so notify get the benefit; naïfs enjoy no spillover effect. *See generally* David Gilo & Ariel Porat, *The Unconventional Uses of Transactions Costs*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 66 (Omri Ben-Shahar ed., 2007).

disclosures are issued directly to people in the absence of a sophisticated informational intermediary.

### 2. An Educational Benefit?

Could mandated disclosure be salvaged for its educational value if it used better educational techniques? For example, informed consent's champions place "much faith . . . in . . . various educational tools to empower patients to comprehend and manage adequately the basic information needed to satisfy informed consent aspirations."[379] These tools include "more sophisticated decision aids in the form of information technology; the provision of written handouts to patients; presentation of information in qualitative, quantitative, and graphic formats, simplified to reach the lower literate patient; and the showing of videotapes."[380] It is also said that mandated disclosure could work if supported by more general attempts to educate people about the area in which they must make decisions. Financial literacy education is a prominent example. President George W. Bush is one of many who argued that financial education is critical to a robust and effective financial marketplace.[381] It is commonly believed that while mandated disclosure may not directly improve people's decisions in the short term, it helps to educate them about problems they may face and to change their behavior in the longer term.

Tocqueville thought that "one of the most remarkable features of America" was the "universal and sincere faith that they profess here in the efficaciousness of education."[382] Attempts to make mandated disclosure work through education have consistently disappointed that faith. For example, efforts to educate workers about 401(k) retirement savings regularly fail. Only about fifteen percent of the people who leave investment seminars intending to change their investments actually do so.[383] One study even found that high school students who had taken a financial education course scored *worse* than other stu-

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[379] Marshall B. Kapp, *Patient Autonomy in the Age of Consumer-Driven Health Care: Informed Consent and Informed Choice*, 2 J. HEALTH & BIOMEDICAL L. 1, 13 (2006).

[380] *Id.* at 13-14 (footnotes omitted).

[381] *See, e.g.*, Willis, *supra* note 107, at 199 (citing *Remarks by the President in Roundtable Interview with Business Reporters*, WASH. POST (Aug. 9, 2007, 1:00 PM), http://www.washingtonpost.com/wp-dyn/Content/article/2007/08/09/AR2007080900780.html).

[382] A. BARTLETT GIAMATTI, A FREE AND ORDERED SPACE: THE REAL WORLD OF THE UNIVERSITY 33 (1988) (quoting Tocqueville).

[383] Choi et al., *supra* note 373, at 102-03.

dents.[384] Similarly, considerable "evidence indicates that early efforts to educate consumers [of health care plans] have not been very effective."[385] While some hope that "[w]ith appropriate education, over time consumers may begin to understand the role that plan structure plays relative to doctor performance in affecting their care and plan experiences,"[386] researchers have long strived to create appropriate education, with dismal results.[387]

Education presents many of the same problems that bedevil mandated disclosure. And when education is for general purposes, rather than to help someone make an immediate decision, it is even less likely to work. The problems with education are not just cognitive and not just difficulties of time and attention, although those are serious barriers. The problems also arise because behavior is affected by so many things that respond poorly to a one-size-fits-all educational campaign.

Smoking exemplifies the confounding complexity of public education. Smoking rates *are* much lower than they were fifty years ago.[388] But is it because of warnings on cigarette packaging? Surely, change came principally from more fundamental policies and cultural currents that changed social attitudes and mobilized social pressures. These include higher taxes and bans on smoking in places like offices, hotels, airplanes, and restaurants, which drive smokers from the company of their fellows.[389] Better medical and social recognition of the

[384] *See* Willis, *supra* note 107, at 208 (highlighting that this result held true even for students with their own credit cards or who helped pay for car insurance).

[385] Peter J. Cunningham et al., *Do Consumers Know How Their Health Plan Works?*, HEALTH AFF., Mar.–Apr. 2001, at 159, 165.

[386] Lubalin & Harris-Kojetin, *supra* note 137, at 73.

[387] A chastening perspective on education comes from the world of continuing medical education (CME). Despite many reasons to expect CME to work, its record is discouraging, and it delivers "messages in ways that are most often ineffective." Karen Tu & Dave Davis, *Can We Alter Physician Behavior by Educational Methods? Lessons Learned from Studies of the Management and Follow-up of Hypertension*, 22 J. CONTINUING EDUC. HEALTH PROFS. 11, 20 (2002). Despite the ineffectiveness of didactic CME, "[t]here is clear evidence that CME offerings today in North America consist mostly of the less effective change strategies such as conferences." Dave Davis, *Does CME Work? An Analysis of the Effect of Educational Activities on Physician Performance or Health Care Outcomes*, 28 INT'L J. PSYCHIATRY MED. 21, 31 (1998).

[388] *See* GARY A. GIOVINO ET AL., ROBERT WOOD JOHNSON FOUND., CIGARETTE SMOKING PREVALENCE AND POLICIES IN THE 50 STATES: AN ERA OF CHANGE 11 fig.3 (2009) (illustrating a decrease in the percentage of smokers among those over eighteen).

[389] *See id.* at 21 (listing fifteen states that have enacted legislation banning smoking in "private workplaces, restaurants and bars" and forty-four states that "increased their cigarette excise tax rate at least once" since January 2002).

mortality and morbidity that smoking causes must also have been central. Educational efforts coincided with these changes, but it is not clear how much they caused them. It is even less clear whether mandated labeling had any significant role.

Finally, and perhaps most sobering, is—yet again—the accumulation problem. Even if consumers could be adequately educated in one area, they cannot master many. Consumers must do more than just buy goods and services intelligently, plan their retirement accounts, or manage their loans. Lawmakers invoke the education rationale as the deus ex machina for many disclosure regimes in a multitude of areas. It produces, in the aggregate, a specter of public education and literacy regarding financial decisions, health-insurance choices, pensions, health care, privacy protection, Internet shopping, eating and nutrition, risk management, smoking, gambling, and much more.

### 3. A Greater Social Benefit?

Often, disclosure laws represent, and are deemed to promote, a vision of an improved society. What is at stake is not only the private utility of an informed decisionmaker, but something more fundamental about the fabric of society. Disclosures are intended to promote autonomy, dignity, civility, community, citizenship, economic growth, and a variety of other virtues. For example, "presenting consumers with an opportunity to read supports Llewellyn's idea of individual assent and autonomy, even if most consumers don't read."[390] An important thread of the literature suggests that there is a dignitary benefit to receiving information even if you do not use it. This argument appears regularly in the informed consent literature.[391] In the IRB context, many often note that the disclosure regime guarantees adhe-

[390] Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's* Principles of the Law of Software Contracts, 78 U. CHI. L. REV. (forthcoming 2011) (manuscript at 9), *available at* http://www.law.uchicago.edu/files/file/Wurgler%20paper.pdf; *see also* Robert A. Hillman & Maureen A. O'Rourke, *Defending Disclosure in Software Contracts*, 78 U. CHI L. REV. 1, 12 (forthcoming 2011) (manuscript at 23), *available at* http://ssrn.com/abstract=1596685 (arguing that disclosure can promote "economic efficiency, due process, and corrective justice").

[391] *See, e.g.*, Alan Meisel, *A "Dignitary Tort" as a Bridge Between the Idea of Informed Consent and the Law of Informed Consent*, 16 L. MED. & HEALTH CARE 210, 210 (1988) ("[I]nformed consent should promote not merely those [values]—autonomy, individualism, self-determination—that are honored in the dicta of case law . . . but the value of mutual trust and education between doctor and patient.").

rence to stricter ethical standards.[392] Furthermore, many regard financial literacy as a baseline for achieving economic growth and community improvement.[393]

Needless to say, these greater social benefits depend on the disclosures reaching and affecting people. If, as we argue, disclosures are consistently overlooked and disregarded, it is possible that the only incidental effects are negative: indifference, numbness, alienation, and even oppression. No number of "I Agree" clicks to software licenses or of mechanically signed consent forms would bolster people's sense of autonomy, respect, or dignity; any vision that these empty rituals would increase national productivity or improve communities is naïve.

### B. *The Costs of Mandated Disclosure*

Whatever benefits mandated disclosures may offer, mandates are unjustifiable if their costs outweigh their benefits. Measuring those costs is as challenging as measuring the benefits, but the costs could be considerable. We first discuss some direct implementation costs and then follow with some indirect costs that are often unrecognized and unintended.

#### 1. Implementation Costs

In Part III, we charted all the things lawmakers, disclosers, and disclosees must do for mandated disclosure to succeed. We showed why mandated disclosure often fails, but we also catalogued the implementation costs of mandated disclosure. For example, disclosers spend money figuring out what disclosures are mandated, as suggested by the rise of industries intended to tell disclosers their obligations under HIPAA, the Clery Act, and so on. TILA regulations became so complicated, bolstered by numerous Federal Reserve Board interpretations, that even sophisticated disclosers could not always know what they need to do. Consequently issuers of securities always consult specialized legal counsel.

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[392] *See, e.g.*, ROBERT AMDUR & ELIZABETH A. BANKERT, THE INSTITUTIONAL REVIEW BOARD MEMBER HANDBOOK 96 (3d ed. 2011) ("Disclosure via the informed consent process is . . . the most direct and ethically intuitive route of disclosure.").

[393] *See generally* NAACP, NAACP FINANCIAL EMPOWERMENT GUIDE 4-5 (2003), *available at* http://backup.naacp.org/pdfs/finance_fei.pdf (stating the importance of financial literacy in achieving economic success and social justice).

In addition, we canvassed disclosers' costs of acquiring and providing information. Those costs can be especially great when information has not already been assembled. Providing information can be expensive if it must be mailed, particularly if it must be mailed regularly. Often, disclosers must fund bureaucracies to comply with mandates. For example, it cost the Johns Hopkins Hospital $114,528 to establish its advance-directive PSDA program, which "incurs on-going incremental costs including document copying, file folders, audits, and personnel. It also has on-going total costs including continued training and physician education regarding advance directives."[394] This hospital is only one of thousands of institutions subject to the PSDA.

A much larger and expanding bureaucracy administers the IRB system. IRBs now have professional staffs,[395] but the principal personnel cost is the time IRB members—who are primarily physicians, scientists, and other expensive individuals—spend reviewing, discussing, and monitoring protocols. IRBs can be so populous that "[m]any social sciences and humanities departments are smaller than the IRB committee."[396] The IRB system also considerably taxes the time of researchers, another group of high-cost employees. For example, one rather modest research program spent nearly seventeen percent of its total budget dealing with its IRB.[397]

As a rule, disclosees bear a large share of the costs of mandated disclosure, if only because in commercial relationships disclosers' costs are generally passed on to disclosees. But disclosees have direct costs of their own. For example, under the optimistic view that disclosees actually read, interpret, and store the information, disclosees incur the nonmonetary cost of such acts.

### 2. Unintended Harms of Mandated Disclosure

Mandated disclosure can impose considerable costs by damaging individual and social interests. These are unintended costs that do

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[394] Jeremy Sugarman et al., *The Cost of Ethics Legislation: A Look at the Patient Self-Determination Act*, 3 KENNEDY INST. ETHICS J. 387, 393 (1993).

[395] *See* Todd J. Zywicki, *Institutional Review Boards as Academic Bureaucracies: An Economic and Experiential Analysis*, 101 NW. U. L. REV. 861, 882 (2007) ("[A]t Northwestern the Office for the Protection of Research subjects grew from two full-time professionals in the late 1990s to 25 professionals and an administrative staff of 20 [in 2006].").

[396] John H. Mueller, *Ignorance Is Neither Bliss Nor Ethical*, 101 NW. U. L. REV. 809, 822 (2007).

[397] Humphreys et al., *supra* note 228, at 77.

not arise in every setting. But there are substantial and increasing reasons to worry about them.

First, *mandated disclosure can crowd out useful information.* This is another aspect of the quantity question. Because disclosers can proffer, and disclosees can receive, only so much information, mandated disclosures effectively keep disclosees from acquiring other information. If the disclosee wants and needs to learn the mandated information, there will be little negative effect; but mandates rarely achieve such precision. Thus, mandated disclosures may "reduce the attention consumers pay to other information, conceivably leading to worse decisions rather than better ones."[398] For example, brokerage-fee disclosures can cause consumers to overestimate the total cost of loans.[399]

Similarly, marginally useful medical mandates drive out vitally necessary unmandated information. Providers must tell patients about advance directives (the PSDA), privacy policies (HIPAA), treatment choices (informed consent), side effects (FDA law), and safety (tort law and malpractice insurance). How much attention is left in the patient's reservoir (or the provider's) to learn about things that are life- and health-saving, like how to manage a chronic illness? Compliance rates with treatment regimes are often estimated to be around fifty percent.[400] Doctors must teach and persistently prompt patients to get medicine, ingest it in the proper manner, take the right dose at the right time, and continue taking it as long as necessary.[401] But mandated disclosure can crowd out such strenuous teaching.

In general, because mandated disclosures are blended with voluntarily supplied information, people have difficulty distinguishing "revealers" from "concealers." Voluntary disclosures can signal valuable information to their recipients. A patient views a doctor who is willing to spend time to volunteer information as trustworthy and dependable, but the opportunity to make such inferences is squandered when all doctors are required to recite disclosures.

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[398] Craswell, *supra* note 29, at 584.

[399] *Id.* ("[A] recent FTC study found that a proposed disclosure of brokerage fees paid to mortgage brokers caused many consumers to overestimate the total cost of loans . . . .").

[400] *See* Todd M. Ruppar et al., *Medication Adherence Interventions for Older Adults: Literature Review*, 22 RES. & THEORY NURSING PRAC.: INT'L J. 114, 115 (2008) ("Adherence to prescribed medications in older adults has been reported to range from 26% to 59% . . . .").

[401] *See id.* at 140-43 (reviewing the literature analyzing how to increase medication adherence among older adults).

Second, *mandated disclosure can have anticompetitive effects*. Disclosure costs are substantially "fixed costs"; many of them do not vary with the scope of activity or with the frequency of disclosures. These fixed costs—collecting information, drafting forms, training employees—are roughly the same for large and small disclosers. This gives larger disclosers an advantage: their burden of disclosure per "unit" is smaller. This, in turn, hurts small companies trying to enter and compete in the market.[402] Disclosures required of vocation schools illustrate such anticompetitive effects. In some states, vocational schools must address as many as twenty topics, including graduation rates, reenrollments, exam pass rates, graduates' job prospects, and much more.[403] Creating a system that collects this information requires investments in bureaucracy and recordkeeping, which disproportionately burdens small schools. It also requires internal monitoring of standardization, another fixed cost that burdens smaller competitors. This may be why federal calorie-labeling law applies only to chains of twenty or more restaurants.[404]

Third, *mandated disclosure can undermine other consumer protections*. For example, the doctrine of unconscionability and many antifraud statutes allow courts to strike oppressive terms from contracts. Usually, courts direct their scrutiny against substantively intolerable terms, but only if there was some procedural unfairness in making the contract.[405] Often the latter requirement is met by a finding that an oppressive term was "hidden" or that it surprised the consumer. If, however, the discloser performed as mandated—if the discloser can point to a form handed to the consumer—the "surprise" element is not satisfied.[406] Terms that would otherwise be regarded as "hidden" are no

[402] This argument was made in the context of securities regulation by Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 671 (1984).

[403] *See, e.g.*, CAL. VEH. CODE § 11200(b)(1) (West Supp. 2009) (mandating disclosure by schools for traffic violators); 105 ILL. COMP. STAT. ANN. 425/15.1 (West 2006) (mandating detailed information in vocational school enrollment agreements); 225 ILL. COMP. STAT. 410/3B-12(a) (2007) (requiring numerous disclosures in cosmetology, esthetics, and nail technology school enrollment agreements); N.J. ADMIN. CODE § 13:23-5.16 (Supp. 2010) (mandating disclosure by driving schools).

[404] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573 (2010) (to be codified at 21 U.S.C. § 343(q)(5)); *see also* N.Y., N.Y., NEW YORK CITY HEALTH CODE tit. IV, pt. A, art. 81, § 81.50 (2008).

[405] *See, e.g.*, Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 748 (D.C. Cir. 2000) (stating that common law unconscionability requires both a lack of "meaningful choice" and "unreasonably favorable" contract terms).

[406] *See, e.g.*, *id.* at 749-51 (finding no violation of TILA when plaintiff signed a disclosure statement the Act required).

longer so, despite people's well-known propensity to sign such disclosures without reading them. Thus, an empty but formally correct disclosure can keep the contract from being unconscionable, however problematic its terms. It is striking that lawmakers widely recognize this effect. A federal government report on predatory lending concluded that "written disclosure requirements, without other protections, can have the unintended effect of insulating predatory lenders where fraud or deception may have occurred."[407] Mandated disclosure can thus backfire in the context of boilerplate contracts.[408]

A disclosure mandate can similarly backfire when the discloser who complies with the disclosure mandate is free to engage in other forms of sharp dealing. The discloser would have a strategic reason to counteract the chilling effect of the disclosure by giving false and biased assurances, as well as the "moral" high ground to act in harsher ways against the already protected consumer. Conflict-of-interest disclosures have been shown to have such consequences.[409] In addition, disclosures backfire when they remove other incentives for firms to employ other consumer protections. This is a known consequence of product warnings (which are not directly mandated, but result from the duty to warn in product liability law). The Restatement (Second) of Torts explains that "where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."[410] The manufacturer—who could otherwise be liable for designing an unsafe product, mar-

[407] HUD-TREASURY TASK FORCE ON PREDATORY LENDING, *supra* note 179, at 67.

[408] *See* Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?* (warning that "[m]andating Web site disclosure would narrow consumer rights rather than expand them"), *in* BOILERPLATE, *supra* note 378, at 83, 89-94; *see also* Riensche v. Cingular Wireless LLC, No. 06-1325, 2006 WL 3827477, at *7-8 (W.D. Wash. Dec. 27, 2006) (rejecting an unconscionability claim because the consumer had unlimited time to review the arbitration clause and thus a reasonable opportunity to understand the terms).

[409] *See* Cain et al., *supra* note 261, at 22 (concluding that conflict-of-interest disclosure "can fail because it (1) gives advisors strategic reason and moral license to further exaggerate their advice and (2) it may not lead to sufficient discounting to counteract this effect").

[410] RESTATEMENT (SECOND) OF TORTS § 402A cmt. J (1965). Recognizing that a warning "may either not be seen or will be disregarded," the Restatement (Third) of Torts repudiates this language. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. l, reporter's note on cmt. l (2008). The Third Restatement, however, recognizes that "when an alternative design to avoid risk cannot reasonably be implemented, adequate instructions and warning will normally be sufficient to render the product reasonably safe." *Id.* § 2 cmt. l.

keting it irresponsibly, or failing to provide other forms of protection—escapes liability and does not have to make the product safer.

Mandated disclosure can undermine another form of protection: consumers' self-guard. Disclosures give a transaction a "veneer of legality" and cause consumers to reduce their level of caution and self-protection. The presence of many official-looking documents gives the false sense that the government is on guard, screening and regulating the terms, so there is less need for suspicion and care.[411]

Mandated disclosure may not only undermine other protections, but also inhibit their development. To the extent that protections must emerge from legislative and regulatory efforts, lawmakers who devised disclosure mandates may think their mission accomplished and avoid the onerous work of devising more imaginative, more effective alternatives.

Fourth, *mandated disclosure can cause inequity*. Mandated disclosure helps most those who need help least and helps least those who need help most. Information is most useful to well-educated and well-off people who have the resources and sophistication to locate, interpret, and use the revealed information. In more than one study, consumer knowledge of credit markets was closely related to family income and education.[412] Another study found that disclosures of a used car's history, odometer readings, warranties, and more did not help the poor.[413] The poor consistently receive worse terms than other buyers (for many reasons), and disclosure mandates may exacerbate this difference—perhaps because the poor are comparatively less capable of utilizing the disclosures.

In the context of contract boilerplate, disclosed terms give additional value to sophisticated consumers for which all consumers pay. For example, Comcast included this provision in the fine print sent to its customers:

> RIGHT TO OPT OUT: IF YOU DO NOT WISH TO BE BOUND BY THIS ARBITRATION PROVISION, YOU MUST NOTIFY COMCAST IN

[411] *See* Willis, *supra* note 102, at 794-95 ("Disclosures give the veneer of legality and authority to the loan process, both to the borrowers at the time they take the loan and to regulatory agencies and courts who may review the transaction down the line.").

[412] Consumers' understanding of credit and mandated disclosures is positively associated with their income and education. *See* Kinsey & McAlister, *supra* note 104, at 266 (finding that accurate consumer knowledge about APRs correlated with income); Lewis Mandell, *Consumer Knowledge and Understanding of Consumer Credit*, 7 J. CONSUMER AFF. 23, 34 (1973) ("Knowledge of credit is strongly and directly related to the income and education of the family.").

[413] McNeil et al., *supra* note 165, at 717.

> WRITING WITHIN 30 DAYS OF THE DATE THAT YOU FIRST RECEIVE THIS AGREEMENT BY VISITING WWW.COMCAST.COM/ARBITRATIONOPTOUT, OR BY MAIL . . . .[414]

People who opt out of mandatory arbitration may bring suits and perhaps class actions—something only sophisticated parties would know. But Comcast's cost of exposure to such litigation is rolled into the costs everyone pays. Likewise, the fees and high interest rates the unsophisticated pay fund advantages that sophisticated credit-card users secure (like low APRs and airline miles).[415] Disclosures help sophisticated parties avoid these fees, and high rates promote the cross-subsidy.

Perhaps nowhere is the inequity of mandated disclosure more apparent or disheartening than in health care. "A lower education level was found in most studies [of medical patients] to have a negative influence on comprehension and memory. Recall of information was also negatively influenced by older age. Studies on elderly patients have shown that both comprehension and memory performance varied directly with vocabulary level."[416] It is obvious and well proved that there are "large health disparities between the disadvantaged in the United States and those who are more privileged."[417] Resources spent obeying disclosure mandates are resources that cannot be spent giving the poor what they most need: better care. At the same time, these are resources that help the privileged more, because literature helps the literate most.[418]

Mandated disclosure not only helps the rich more than the poor, but also perversely and unintentionally obligates the poor to subsidize the rich. Good deals must be paid for. Vendors often incorporate the cost of good deals for the sophisticated into the price that everybody

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[414] COMCAST AGREEMENT FOR RESIDENTIAL SERVICES, COMCAST, ¶ 13.c (2010).

[415] *See* Ronald J. Mann, *"Contracting" for Credit* (describing methods card issuers use to exploit unsophisticated consumers, such as teaser rates and backloading less attractive terms), *in* BOILERPLATE, *supra* note 378, at 106, 110-11.

[416] Lemaire, *supra* note 194, at 4 (footnotes omitted).

[417] David Mechanic, *Disadvantage, Inequality, and Social Policy: Major Initiatives Intended to Improve Population Health May Also Increase Health Disparities*, HEALTH AFF., Mar./Apr. 2002, at 48, 49.

[418] *See, e.g.*, Ad Hoc Comm. on Health Literacy for the Council on Scientific Affairs, *supra* note 286, at 553 (reporting that patients' health literacy correlates with knowledge of their illness); Schneider & Hall, *supra* note 62, at 62-65 (examining the inequitable effects of disclosure statements, which the poor—who tend to have the highest prevalence of chronic disease—tend to be able to read and comprehend least).

pays.[419] We already mentioned the redistributive effect of hospital report cards, where mandated disclosure of "quality of care" measures disproportionately helps patients who are less sick and reduces the well-being of sicker ones.[420]

Inequity is built into mandated disclosure. The poor begin with more troubles and fewer resources. They pay higher interest than people better situated to make the payments, deal with less reputable lenders, know less about financial affairs, are more likely to encounter crippling financial reverses, find it harder to locate competent professional help, and so on. They have harder decisions to make than the prosperous do. Yet the principle of mandated disclosure is to make people responsible for their own decisions and for protecting themselves by giving them information. That is, the poor have harder problems that require more information and experience, but they have less ability to use the information. Giving everybody access to a benefit that some—the "elite"—are better able to use promotes inequity. This inequity is only aggravated if the cost of this favor is shared by the prosperous and poor alike.

## CONCLUSION: BEYOND MANDATED DISCLOSURE

This Article had four purposes. First, to identify a regulatory method that is much used but has not been analyzed across doctrinal boundaries. Second, to show how widely—even indiscriminately—that method is used. Third, to show that the method is prone to failure. Fourth, to explain why it fails and how fallible its mechanisms are.

We might have had a fifth purpose: to prescribe a regulatory alternative. That is too large a question to squeeze into the compass of this Article. But the logic of our argument is that that question cannot be answered straightforwardly, if it can be answered at all. If mandated disclosure has been used in a cavalcade of circumstances, if the decisions mandated disclosure addresses are enormously various, if the people disclosure is supposed to help are also various, it would be astonishing to find that any single substitute for it worked. In what follows, we warn against some possible misunderstandings of our argument and point the way to some useful paths of inquiry.

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[419] *See generally* Gilo & Porat, *supra* note 378, at 70-71 (explaining that suppliers hide terms favorable to some consumers in boilerplate language "to avoid frustrating the consumers who do not receive them").

[420] *See supra* notes 140-144 and accompanying text (discussing the effects of hospital report cards).

### A. *Simple Information*

We have described problems people have in acquiring and using information. As we have repeatedly emphasized, we do not deny that information can be useful. Where people make a decision regularly, they become expert at making it. But in these circumstances they are less likely to need and unlikely to feel that they need mandated disclosures.

But what about the decisions that people do not make regularly? Here, people are likely to be ignorant. Can disclosures provide information that will actually help them? A principal lesson of our review of why mandated disclosure fails is that length, complexity, and difficulty are the enemies of successful mandates. This suggests that brief, simple, easy disclosures are at least preferable. But how brief, simple, and easy must a disclosure be to be useful to more than an already-well-off few? There is little real evidence, but we find some reason to think that the answer is *very* brief, simple, and easy—perhaps to the point of using symbols instead of sentences. For example, Los Angeles County requires restaurants to disclose sanitation "grade cards" on windows (letters "A," "B," or "C"), and these seem to have influenced consumers—and, in turn, led to cleanlier restaurants.[421] This is information that anyone can understand, and the single datum is enough to affect customers' choice of restaurants. Likewise, when mandated disclosures merely report a rating of consumer satisfaction, rather than a breakdown of quality metrics, they have an empirically proven impact. For example, Medicare enrollees receiving such information shift to health plans with better consumer satisfaction grades.[422]

It may also be that brief, simple, and easy works best when it is part of a larger program of social change. Sometimes the purpose of mandates is not to give people information for making the choice that they prefer but rather to induce them to make the choice that the lawmaker thinks preferable. This inducement is the point of cigarette warnings, warnings about the effects of alcohol consumption on fetuses, many nutrition warnings, and so on. The goal of these disclosures is more to persuade than to inform. In addition, some warnings are focused on

[421] *See* Ginger Zhe Jin & Phillip Leslie, *The Effect of Information on Product Quality: Evidence from Restaurant Hygiene Grade Cards*, 118 Q.J. ECON. 409, 449 (2003) (finding evidence that "the grade cards cause a significant decrease in the number of people admitted to hospitals with food-borne illness, and that this effect is not fully explained by consumers switching from bad to good hygiene restaurants").

[422] *See* Dafny & Dranove, *supra* note 144, at 817 (identifying a "report-card effect . . . entirely due to beneficiaries' responses to consumer satisfaction scores; other reported quality measures . . . did not affect enrollment").

persuading disclosers to change their behavior rather than on communicating the information in question. Examples include sanitation report cards for restaurants and calorie disclosures on fast-food menus.

But how often, and how well, can facts of even ordinary complexity and difficulty be reduced to simple ratings, letter grades, or symbols? The advantages of simplicity have long been evident, and thus simplicity has long been a cherished goal in disclosures. Some mandated disclosures use simple rating scores. An FTC study, for example, suggests TILA mortgage forms can be simplified and better understood by borrowers.[423]

On the whole, however, history is not reassuring. Several things impede simplification, and the cure for the ills of mandated disclosure is not merely "keep it simple." First, sometimes even a simple mandate to disclose simple information could have undesirable consequences. To make a mandate simple, only very few items could be included, disproportionately focusing the attention of recipients to these items. A possible result is the "teaching to the test" effect, whereby other important aspects of the transaction are overlooked.

Second, disclosures try to describe an element of quality: calorie count, hospital-procedure fatality rate, nursing-home quality, the cost of credit, or a risk of the product. For this to be useful, people must be able to predict the effect of the disclosed fact on their satisfaction. Not only are such predictions tricky, but satisfaction depends on much else and on a variety of tradeoffs. Moreover, people vary in their ability to use information, and weaker market participants—poor, uneducated, high-need individuals—will find the information less useful. This was shown to be the case with respect to hospital report cards, and it is likely to be true of the new "country of origin" food-labeling laws.[424]

Third, people's preferences and concerns vary, and disclosures may matter to them in different degrees. Indeed, this very heterogeneity is at the ideological base of mandated disclosure for free marketers and autonomists. Some borrowers care about APRs, while others care about overdraft fees or the structure of debt. Transactions subject to mandated disclosures are complicated and multi-

[423] *See* Lacko & Pappalardo, *supra* note 323, at 518-19 (observing that study participants who received a prototype disclosure, developed for the study, "answered on average 80 percent of the loan term questions correctly, compared to an average 61 percent for participants viewing the mandated disclosure").

[424] *See* 19 U.S.C. § 1304 (2006) (mandating marking of any imported articles and containers with the country of origin); 7 C.F.R. §§ 60.200–.300 (2010) (detailing country-of-origin labeling requirements for agricultural products).

dimensional. Some aspects of these transactions might matter to some people but not to others. Simple quality disclosures fix people's attention on a particular aspect, which might fail to capture the key to their satisfaction. Between the heterogeneity of the disclosees and the complexity of the relevant information, it is normally hard to reduce an evaluation to a simple score.

Fourth, mandated disclosure succeeds only if lawmaking works well. Even if one could imagine ideal disclosure or some ideal summary of data, the lawmaker would need to identify and preserve it in that form. But as we noted earlier, much drives lawmakers toward overusing mandated disclosure and setting standards of disclosure too broadly. Additional disclosures aimed at new problems are likely to augment simple disclosures. For the very feature that can make some disclosures effective—their simplicity—also keeps them from responding to the heterogeneity of problems and people. But once a simple disclosure is bolstered and expanded, the quantity problem returns. Nutrition labeling is already on this path, as lawmakers add more and more to the package (e.g., the food's origin, GMO information, allergy warnings, and a finer breakdown of nutrients and toxins).

While we are skeptical that mandated disclosure can be fixed, we do not contend that disclosure can never work. Failure is not inherent in any information regime, nor is it the mandatory aspect that guarantees failure. Rather, it is the regulatory dynamic of this institution—the desire to solve too many problems merely by informing unsophisticated decisionmakers and expecting them to make affirmative thoughtful decisions—that undermines the system.

### B. *From Information Toward Advice*

When simple data will not do the job, when considerable information is needed to make a good decision, and when experience is required to use information well, mandated disclosure confronts the many daunting problems that we have described.

The premise of mandated disclosure is that information will help people toward the right decisions. We have shown that the empirical history of mandated disclosure is a history of failure. The quantity problem is generally unsolvable without making disclosures fatally simple-minded, incomplete, and misleading. The accumulation problem would defeat mandated disclosure even if individual overload issues could be managed. The ideological thrust of mandated disclosure—its origins in both market and autonomy theory—is to place

choice, and thus risk and responsibility, onto the ill-informed and inexpert person facing a novel and complex decision. That can have especially lamentable consequences for the vulnerable, but it also leaves ordinary people facing decisions ill-prepared and ill-equipped.

We cannot offer a new panacea to supplant the old one. Indeed, we reject the premise that a one-size-fits-all solution can miraculously work in all areas of human plight. But we can offer at least a line of hypothesis and inquiry: Mandated disclosure asks what people *should* know to make a good decision. We would ask what they *want* to know. When we abandon the unreal world of mandated disclosure and ask how people really make decisions, we see that they generally seek—and that the market often supplies—not data, but advice.

Facing choices, people sensibly ask friends for help. Whether seeking a plumber, a dentist, an insurance agent, or a mortgage broker, they consult their private network for the kind of advice that they trust and know how to use. Much of that advice comes in the form of global recommendations, based on overall satisfaction, since the best way to predict one person's satisfaction is to assess other people's satisfaction. The broader the network of recommendations, the sounder the information, but the greater the challenge of aggregating recommendations into useful guidance.

Many markets have sua sponte provided such evaluations in a particularly useful form—by aggregating recommendations from users of a good or service. Many markets depend on peer ratings. The eBay business model relies on buyers' willingness to pay upfront for goods sold by anonymous sellers, a phenomenon that is largely possible because of the reliability of sellers' ratings—a single score that tallies the percentage of satisfied customers. Similarly, Expedia.com rates hotels, Zagat rates restaurants, CNET.com rates electronic appliances and retailers, Amazon rates used-book sellers (and a cornucopia of goods), and Netflix rates movies. Some services try to improve scores by asking people to rate the raters, thus creating a smart weighted-ratings average. In short, consumers rate innumerable market transactions and services, from blenders and pizzas to doctors and professors.

Another source of help—as opposed to just information—for consumers is to give them expert advice. Expert advice comes in two forms. In some of the areas in which disclosures are mandated, an expert gives personalized advice to a particular client. This happens all the time with doctors, financial advisers, accountants, brokers, and so forth. For example, after hearing an insurance agent go through mandated disclosures, many people have the agent make a decision.

Next time, they just skip the disclosures. Similarly, patients frequently prefer that a doctor propose a treatment, explain it, and get the patient's (largely symbolic) confirmation.

The problem with expert help, of course, is that it needs to be genuinely expert and genuinely in the service of the client, free of conflicts and influences. These things are not easy to assure. Unfortunately, mandated disclosure has been one of the principal means of trying to do so. It is, at the very least, paradoxical: experts are needed in the first place because people cannot rely solely on disclosures. But how can disclosures assure the clients that the experts are dedicated? Moreover, mandated disclosure constrains even dedicated experts. The rigidity of disclosure templates confines them to provide their clients with information. Our Article has questioned whether this technique best serves clients. We noted that this may even perversely tend to make the expert feel less responsible for—and be less helpful to—the client.[425]

The second form of expert advice is advice made generally available, by purchase or otherwise. Significant elements of the market have long proffered the views of experts. Expert evaluations can be bought, as *Consumer Reports*' long history suggests, but many are free. For example, when electing a Senator, voters can consult ratings by the Environmental Defense Fund or the NRA. When choosing a restaurant, patrons can count Michelin stars. And when buying wine, oenophiles can check Robert Parker's wine scores.

Some very simple disclosures and many ratings systems can provide help in another way that does not burden the consumer with data. It appears that the sanitary grade that Los Angeles restaurants must post leads some restaurants to try to get their grades up.[426] It seems likely that consumer ratings can have the same effect. Sellers on eBay are generally concerned with avoiding negative ratings. Insofar as disclosure causes disclosers to behave better (and not merely attempt to manipulate the feedback and the ratings scores), disclosees

[425] *See, e.g.*, SCHNEIDER, *supra* note 110, at 188-90 (noting that bureaucratization of medical care and the shift of doctors' focus from individuals towards "the organizations which employ doctors" has an effect of "weaken[ing] the doctor's ties with, and sense of obligation to, the patient"). Compare the medical principle of informed consent with the very different principles that govern the relationships between lawyers and clients. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (2009) ("Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives . . . .").

[426] *See supra* note 421 and accompanying text.

need not rely on the disclosed data but can instead (as they say) shop with confidence.[427]

Sometimes advice—whether it is the aggregated experience of the multitude or the opinions of the expert—will not adequately help the naïve in their dealings with the sophisticated. Another way to try to help people make good decisions is for the law to "channel" people's choices, without mandating them.[428] The core of channelling is not to make decisions for people but rather to create defaults and incentives that lead people toward presumptively wise decisions, while leaving people to reject those choices if they wish.[429] For example, defaults may be set so that people start off and can most easily stay in the position that most people would prefer. This is what intestacy statutes do with apparent success. Because a considerable consensus supports encouraging people to save for retirement, some employers put pension funds directly into retirement savings account, letting employees opt out if they wish. Another channeling device is to require vendors to offer a basic, uniform option.[430] This makes apples-to-apples comparisons easier and improves competition. Vendors would remain free to offer more complex choices as well.

A more aggressive way to use the law to help the naïve is to outlaw practices that are too likely to result in disaster. Whether some choices are so likely to be so bad for so many people that they should be outlawed is beyond the scope of this Article. HOEPA—a 1994 statute that amended the Truth in Lending Act—went a step beyond mandating disclosures. To combat predatory lending practices, it prohibited substantive terms like prepayment penalties, balloon loans, acceleration clauses, and some default penalties.[431] Or, recent reform in credit-card markets eliminated some choices that borrowers traditionally had,

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[427] *See, e.g.*, Omri Ben-Shahar, *One-Way Contracts: Consumer Protection Without Law*, 7 EUR. REV. CONTRACT L. 221 (2010).

[428] *See, e.g.*, Scott D. Halpern et al., *Harnessing the Power of Default Options to Improve Health Care*, 357 NEW ENG. J. MED. 1340, 1343 (2007) (declaring that policymakers should set default options to "achieve legitimate and important health care goals"); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496-97 (1992) (introducing the concept that, in family law, the law has a channeling function, which "recruits, builds, shapes, sustains, and promotes social institutions").

[429] *See* RICHARD R. THALER & CASS H. SUNSTEIN, NUDGE (2008).

[430] The Obama administration recently advanced a proposal in this spirit. *See* U.S. DEP'T OF TREASURY, *supra* note 180, at 66-67 (proposing that a "plain vanilla" type mortgage, or one "easy for consumers to understand" should be offered as a simple option alongside other mortgages).

[431] 12 C.F.R. §§ 226.31–.34 (2010).

which often led to poor outcomes.[432] Obviously such prohibitions close options from which some people would benefit. Risky mortgages let some people buy and keep homes who otherwise could not have done so. Thus, at some point, the benefits of such prohibitions exceed their costs. The lawmaker's challenge is to identify that point.

The contribution of this Article is not in finding a suitable prohibition point. Rather, its contribution is in recognizing that such policies are sometimes inevitable and cannot be sidestepped by opting for seemingly easier solutions in the disclosure paradigm. If, as we have argued, mandated disclosure rarely works, lawmakers must do the hard work of carefully analyzing social problems to find the best way to promote good decisions. In any event, we need to abandon the idea that people's autonomy is bolstered by supposedly empowering them to make choices through mandated disclosure.

[432] *See, e.g.*, Credit Card Accountability Responsibility and Disclosure Act of 2009 § 105, 15 U.S.C. 1637(n) (2006 & Supp. III 2009).