

# INTRODUCTION

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*Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman. And publicity . . . must, in the impending struggle, be utilized in many ways as a continuous remedial measure.*

—Louis Brandeis, *Other People’s Money*

“Mandated disclosure” may be the most common and least successful regulatory technique in American law. It aspires to help people making unfamiliar and complex decisions while dealing with specialists by requiring the latter (disclosers) to give the former (disclosees) information so that disclosees choose sensibly and disclosers do not abuse their position.

For example: You are mortgaging your new house. Or considering prostate-cancer surgery. Or buying software on line. Or being questioned by the police. You’ve never faced your choice before. It turns on much you do not understand. The specialists you’re dealing with—lenders, doctors, vendors, and police—understand it well. Mandated disclosure requires the specialists to tell you what you must know to choose well. Thus truth-in-lending laws oblige your lender to describe its credit terms. Informed-consent doctrine obliges your doctor to describe treatments for prostate cancer. Contract law obliges your vendor to reveal terms like warranties and mandatory arbitration. *Miranda* obliges the police to recite your rights. Thus informed, you are supposed to understand your choices well enough to make sound decisions about your credit, your cancer, your computer, or your confession.

Mandated disclosure has been the principal regulatory answer to some of the principal policy questions of recent decades. A core response to financial crisis is to ratchet up (already considerable) disclosure mandates. Much health-care reform requires that patients be told about health plans, insurance, doctors, hospitals, treatments, and costs so that they can choose thoughtfully and thriftily. Much Internet commerce is regulated by disclosure mandates. So are many kinds of privacy. Several constitutional rights are guarded through disclosures like the *Miranda* warning. Campaign-finance regulation is now largely about disclosure.

These are just a few peaks in a mountain range. Undisclosed contract terms are generally unenforceable—hence fine print. So every “I agree” clicked, every dotted line signed is a disclosure moment. Vast stretches of consumer-protection law mandate disclosures. Mortgages, savings accounts, checking accounts, retirement accounts, credit cards, pawnshops, and rent-to-own plans are subject to disclosure mandates. Health law abounds in disclosures—in informed consent, drug labeling, research regulation, health insurance, living wills, and medical privacy. Mandated disclosures adorn food labels, travel tickets, leases, copyright warnings, time-share agreements, house sales, store return policies, school enrollment and graduation data, college crime reports, flight-safety announcements, parking-garage stubs, product and environmental hazards, and car and home repairs.

Nevertheless, mandated disclosure is a Lorelei, luring lawmakers onto the rocks of regulatory failure. This book hopes to silence its siren song. First, by identifying mandated disclosure as a distinctive regulatory method. Second, by describing its almost incontinent use. Third, by showing that it routinely fails to achieve its goals. Fourth, by explaining why it fails and cannot be fixed.

Mandated disclosure is alluring because it addresses a real problem: Modernity showers you with unfamiliar and complex decisions. Knowing little, you depend on specialists. Only a few decades ago, you made fewer choices about fewer things. You got a black telephone from AT&T. You got a mortgage from the First Local Bank, which offered only a few kinds of mortgages on quite limiting conditions. You got (often) the medical treatment your doctor thought you needed. You got a pension only

if you worked many years for one company, and you got the pension the company designed.

Today, phones come in landline, cell, and VOIP versions from many manufacturers making many models for many service providers offering many plans. National lenders proffer mortgages in a medley of forms with a cornucopia of conditions. Your doctor must describe the various treatments for your ills and their effects. Pensions are portable, come in numberless forms, and may let you choose among thousands of securities.

This is largely excellent news: You have not just more, but often better, choices. Yet proliferating choice requires increasingly elaborate and arcane knowledge. So mandated disclosure addresses the problem of a world in which nonspecialists must make choices requiring specialist knowledge. Its solution is alluringly simple: if people face unfamiliar and complex decisions, give them information until the decision is familiar and comprehensible. Don't people want to make decisions for themselves, want to make them well, and try to do so? Isn't more information axiomatically better than less? Won't people gratefully take and earnestly use information they are offered?

Mandated disclosure is alluring because it resonates with two fundamental American ideologies. The first is the free-market principle. Markets work best when buyers are informed; disclosures inform them. Buyers fear sellers' rapacity and the perils of *caveat emptor*; disclosures protect them without distorting markets by specifying prices, quality, and terms. The second ideology is the autonomy principle. People are entitled as a matter of moral right and of practical policy to make the decisions that shape their lives. Disclosures equip them to do so.

Mandated disclosure is alluring because it seems to regulate lightly. Direct regulation of economic behavior—imposing safety and quality standards or restricting sales of products or services—can be clumsy and costly; can reduce freedom, innovation, and efficiency; can inspire burdensome bureaucracy and regulations. Mandated disclosure lets sellers sell and buyers buy, as long as buyers know what sellers are selling.

Mandated disclosure is alluring because it is relatively easy to enact. With its ecumenical ideology and apparent modesty, it provokes relatively

slight political opposition. Regulated entities often prefer it to more intrusive techniques, and lawmakers know it costs the fisc peanuts.

Mandated disclosure is alluring because its failures are little noticed and soothingly explained. It has been too little recognized as a regulatory technique, and most lawmakers and many commentators do not realize that it is a method with standard characteristics and consequences that has been intensively and extensively tried. So a mandate's failures can readily be attributed to the particular way it was implemented to respond to a particular social problem rather than to defects of the regulatory form: a mandate fails because it was too narrow, disclosures were unnoticed, or forms were obscure. Mandated disclosure is a god that cannot fail.

Finally, mandated disclosure is alluring because even if it does little evident good, it does little obvious harm. If disclosures seem to burden anyone, it is the sophisticated parties to transactions who already have information and may have a moral duty to disseminate it.

So alluring is mandated disclosure—so plainly does it seem to be good regulation—that many lawmakers that enact it and commentators who urge it simply assume that its benefits exceed its costs. Some sophisticated lawmakers and commentators have begun to see it as a distinctive regulatory method. But while they acknowledge its failures, they assume that care, ingenuity, and effort can fix them. We need a term for the lawmakers and commentators who, implicitly or explicitly, favor the method. “Disclosurite” seems direct and descriptive. It includes people and institutions with varying views and faith, for it is a generalization as, say, “environmentalist” is. But it is a useful generalization because so many lawmakers and commentators embrace some version of mandated disclosure.

Mandated disclosure is alluring, but it routinely fails to achieve its ambitious goals. It is not doomed to fail, but empirical studies rarely report that disclosures lead disclosesees to good decisions. For example, Lauren Willis concludes that “disclosures currently mandated by federal law for home loans neither effectively facilitate price shopping, nor do they result in good deliberate decision making about risk.”<sup>1</sup> The National Research Council acknowledges that “[d]espite decades of research” there has been “little progress” toward “achieving informed consent.”<sup>2</sup> More

broadly, Winston's review of the empirical evidence on "federal and state information policies, including but not limited to disclosure policies, suggests that they have not made consumers significantly better informed and safer."<sup>3</sup>

Mandated disclosure's failure is as plausible as its success. Who has not derided disclosures as "fine print"? Who has not joked—ruefully or resentfully—about clicking "I agree" without reading the terms? Who has not competed to tell the most damning disclosure story? The mortgage closing, the car-rental counter, and the pharmacy checkout have become iconic moments when we all have declined to read disclosures, have failed to understand them when we tried to read them, and signed anyway.

The reason is that mandated disclosure is ill suited to its ends. Exactly because the choices for which it seeks to prepare disclosees are unfamiliar, complex, and ordinarily managed by specialists, novices cannot master them with the disclosures that lawmakers usually mandate. Consider the arcana the Federal Reserve Board thinks consumers should understand to select adjustable-rate mortgages: "indexes, margins, discounts, caps on rates and payments, negative amortization, payment options, and recasting (recalculating) your loan."<sup>4</sup> Similarly, to *begin* evaluating prostate-cancer treatments, you must understand the various therapies, why it may be best to reject them, and what their side effects are. When so much must be explained, mere disclosures rarely equip people for a well-considered decision.

Mandated disclosure fails because it depends on a long chain of fragile links. It works only if three actors—lawmakers, disclosers, and disclosees—play demanding parts deftly. Rarely can each actor meet all the part's demands. Lawmakers must correctly conclude that a problem needs a regulatory solution and that disclosure is a good one. They must correctly gauge what disclosure to mandate. They must articulate the mandate correctly and comprehensibly. Each step is hard; managing all four is uncommon, especially under the pressure that often drives lawmakers. Disclosers also face challenges. Even under the sweetly optimistic assumption that disclosers truly try to obey mandates, they must read, understand, and heed the mandate, create or assemble data, and explain them effectively.

But the lawmaker's and discloser's roles look blessedly simple next to the disclosee's. Suppose that people really make decisions the way that disclosurites imagine—that they want to make them and that they want to assemble the relevant information, identify the possible outcomes, assess their own preferences, and determine which choice best serves those preferences. Disclosees would still need to *understand* disclosures. But even experts can struggle. Elizabeth Warren, former special advisor for the Consumer Financial Protection Bureau, said of a credit-card disclosure: “I teach contract law at Harvard, and I can't understand half of what it says.”

In truth, many people cannot read most disclosures. Over forty million adults are functionally illiterate; another fifty million are only marginally literate. In one study, 40 percent of the patients could not read instructions for taking pills on an empty stomach. Innumeracy is worse. In a test of *basic* numeracy, only 16 percent could answer three (*really*) simple questions (like, how much is 1 percent of \$1000?). Yet financial- and medical-privacy notices are generally written at a college level, and only a tiny percent of the population can understand ordinary contractual language. (Even eBay's users' contract—a document written in lay language—contains sentences like this: “When you give us content, you grant us a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicensable (through multiple tiers) right to exercise the copyright, publicity, and database rights (but no other rights) you have in the content, in any media known now or in the future.”<sup>5</sup>)

Disclosurites count on simpler and better disclosure—“targeted transparency” and “smart disclosure” and “behaviorally informed” reform and “heightened” and “meaningful” disclosures tested in labs. But disclosures are unreadable and unread because you can't describe complexity simply. The problem is not just illiteracy and innumeracy. It is also the “quantity question,” which comprises the “overload” problem and the “accumulation” problem. The overload problem arises when a disclosure is too copious and complex to handle. The accumulation problem arises because disclosees daily confront so many disclosures and yearly confront so many consequential disclosures that they cannot attend to (much less master) more than a few. Disclosures, recall, should prepare people for unfamiliar

and complex decisions. Decisions are complex because so much must be learned well and used capably. But it is hard to organize and present masses of information cogently. It is hard to remember, interpret, and apply even cogent presentations. Unfamiliarity exacerbates these problems: the less you know about a choice, the more you must learn.

The disclosurite demand for simplification is in tension with the disclosurite goal of thorough information. How might you simplify? If you disclose less, disclosees can learn less. If people have a right to know how private data are used, how can a Web site tell them less than the full truth? If patients' consent to prostate-cancer treatment is to be "informed," how do you delete information? What information should a physician omit? A treatment option? A side effect? A description of the side effect? An estimate of a side effect's likelihood? A review of the factors affecting the risk of a side effect?

Or do you simplify by summarizing? Scores summarizing information, like a loan's APR, can sometimes be devised. But can that score both describe problems accurately and be understood and used by the naïve? Such problems afflict even the APR, on which lawmakers and scholars have labored for decades. The disclosurite poster child has been restaurant hygiene grades: A, B, or C. But it turns out that much is omitted or distorted in those grades and that their success is dubious.

Disclosurites also swear by simple language. But specialized words summarize complex ideas. Explanations are shorter if "brachytherapy" replaces "a form of radiotherapy where a radiation source is placed inside or next to the area requiring treatment." But because disclosees are non-specialists, these are the very terms they don't know.

Even if simple words and ideas could efficiently describe unfamiliar and complex issues, novices lack the background to understand those issues. For example, you can't evaluate the arguments against PSA screening if, as many men do, you conflate screening and prevention. Worse, to use information adeptly you need skills in processing and evaluating it that come from practice, not disclosure. As Iyengar puts it, "When we learn, through study and practice, to simplify, prioritize, and categorize elements and to recognize patterns," we can "create order in seeming chaos."<sup>6</sup>

We have been assuming that people want to make decisions and to make them in the disclosurite way. But many people avoid making decisions. Patients take their doctor's advice instead of reasoning to their own conclusion; employees duck retirement planning. This may be imprudent, but people are not deciding machines. Their family, friends, work, play, and prayer more than fill their lives. Mastering just one complex and unfamiliar choice is a struggle and a distraction; taking on even a trickle of the flood of disclosures can mean drowning.

Furthermore, many people make decisions with scant information and slight deliberation. They overlook, skip, or skim disclosures. Far from gathering information, people strip it away to make choices manageable. Thus many women base their choice of breast cancer treatment on a single factor. Furthermore, experience teaches people how little they may gain from studying disclosures and how little they may lose by ignoring them. In short, people often calculate that a well-informed decision's benefits poorly justify its costs.

After all, our eyeballs are daily drenched with disclosures old, revised, and new: online, in the mail, in doctors' offices, and at Best Buy; in inserts, boxes, and shrink-wraps; on the back of bills and the front of order forms. Disclosure is a ritual to be endured: patients are "consented," borrowers sign their way through closings, smartphone users "accept" terms, and Internet users are informed of privacy policies through linked scrolls. How can we not filter the white noise of disclosure? Lawmakers then turn up the volume to get our attention, and we close our ears to the din.

In short, mandated disclosure seems plausible only on logically reasonable but humanly false assumptions. When buying software on line, how many people click to read the terms of sale, much less read them, much less try to understand them, much less succeed? In one study only one or two shoppers in a thousand spent even one second on the terms page. At a mortgage closing how many people even skim the stack of documents they sign, much less understand them? Surely nobody, since for a simple fixed-rate mortgage that pile can include one hundred pages with forty-eight separate disclosures requiring fifty-four signatures. How many men with prostate cancer try to decipher their prospects of cure and of side effects with each of the principal treatments, much less learn

and remember enough to use the data? Nearly nobody, since patients do not read, understand, and remember *much* simpler medical information. How many people given the *Miranda* warning understand its implications? Yale faculty members and graduate students did not. How many people realize they received their bank's data-collection disclosure, much less read it? One Web site's disclosure offered \$100 to anyone noticing it; it kept its \$100.

Even if unfamiliar and complex choices could be simply presented, the dynamics of lawmaking would discourage it. Those dynamics drive lawmakers toward ever more and ever broader mandates. Chapter 2 will describe the consumer-credit disclosure that morphed from one short page to a long, two-sided "bed sheet" of disclosures jostling for attention. The terms of iTunes now stretch thirty-two feet in tiny font. Under regulators' intensive supervision, consent forms in human-subject research have swollen steadily. Each scandal in which information (if properly used) *might* have prevented disaster provokes more mandates. Each disclosure that seems to be working is extended further. (If listing the calories on a can of beans worked, why not add fat and sodium? The country of origin? Genetic modifications?) Furthermore, in our system several lawmakers can issue mandates in one jurisdiction. A single loan can be subject to a battery of disclosures mandated by federal, state, and local legislatures, agencies, and courts. Disclosure is a ratchet, expanding easily, contracting rarely.

Mandated disclosure's unreliability might not matter were it harmless. Mandates look free because they cost government little, because disclosure is rarely a line item in a discloser's books, and because disclosees do not realize that they pay its costs. Even if the administrative costs of one mandate are modest, the aggregate cost of thousands of mandates is not. And mandates can do harm. Not least, bad law drives out good: mandates spare lawmakers the struggle of enacting better but less popular reforms. Disclosures can be inequitable: complex instructions may sometimes help the affluent and sophisticated but be useless for the poor and naive. Since all disclosees ultimately pay for disclosures, the poor subsidize the rich. Mandated disclosures can crowd out more useful information (time spent "consenting" patients cannot be spent treating

them). Disclosures can shield disclosers from other regulation, like tort liability or antifraud and deception statutes. And complying with mandates can take time and effort that is little noticed but quite damaging (like disclosures to research subjects, which have become so detailed and disruptive that valuable research is slowed, damaged, and even stopped).

In sum, not only does the empirical evidence show that mandated disclosure regularly fails, failure is inherent in it. First, mandated disclosure rests on false assumptions about how people live, think, and act. Second, it rests on false assumptions about how well information improves decisions. Third, its success requires a chain of demands on lawmakers, disclosers, and disclosees too numerous and onerous to be met often.

Mandated disclosure is a regulatory response to the problems of non-specialists facing unfamiliar and complex decisions. It is broadly, almost indiscriminately, used. But it fails to achieve its goals because unfamiliar and complex decisions are much harder than disclosurite ideology assumes. Giving consumers information about such decisions cannot equip them to make the truly informed decisions that disclosurites desire. Mandated disclosure is a fundamental failure that cannot be fundamentally fixed.

We are often asked how to replace mandated disclosure. We first reply that even if lawmakers don't know what works, at least they can know what fails, and what fails should be abandoned. Second, "what would you do instead?" is the wrong question if it suggests that another panacea should be contrived, that *any* regulatory technique can do everything asked of disclosure. Nothing can be so variously effective. So commentators and lawmakers must acknowledge the limits of their tools and undertake the intellectual and political challenge of tailoring solutions to problems. This is a counsel of realism but not despair.

For one thing, people are less foolish than disclosurism assumes. *Many* disclosures fail because they are not wanted or needed. *Much* that is disclosed people sensibly ignore. They rightly calculate that reading an end-users license agreement won't change their minds. They reasonably prefer working with their doctor toward a good decision to using disclosures to make their own choice. They sensibly suppose that while a disclosure might improve a decision, the improvement is too improbable

and imperceptible to justify the time and effort. And they correctly rely on government and the market to reduce the risks of leaving disclosures unstudied.

In addition, people ignore disclosures because they can get information—sometimes better information—elsewhere. For example, people commonly prefer advice to data. Mandates require listing a company’s contract terms; Amazon’s ratings and Yelp reviews tell you whether people liked what they bought. Many enterprises—from Consumer’s Reports to Standard & Poor’s—collect and offer information tailored to their clients.

How could a regulatory technique be so common and yet so bad? Mandated disclosure asks the wrong question, “What information do people need to make good decisions?” That is an important question to which a rich and fascinating literature has begun to find answers. But it is the wrong question because for lawmakers the relevant issue is whether this kind of regulation does more good than harm. Does requiring the sophisticated party in a transaction to give the naïve party information about an unfamiliar and complex decision work? The evidence of many decades in many fields shows that mandated disclosure persistently fails to achieve its purposes, cannot be fixed, and too often causes harm. Lawmakers should stop using it, commentators should stop proposing it, and interest groups should stop advocating it unless they can convincingly show that this time it *really* is different.

# COMPLEX DECISIONS, COMPLEX DISCLOSURES

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*[H]ow intricate a work then have they who are gone to consult which of these sicknesses of mine is, and then which of these fevers, and then what it would do, and then how it may be countermined.*

—John Donne, *Devotions Upon Emergent Occasions*

Chapter 1 introduced mandated disclosure as a distinctive regulatory technique used in an impressive range of areas. It argued that while some disclosures may sometimes help some people, mandated disclosure poorly serves its goal of leading disclosees to make good decisions about unfamiliar and complex choices in interactions with knowledgeable parties. This chapter describes mandated disclosure. The problem mandated disclosure addresses is both intensive and extensive. It is intensive because decisions are so truly unfamiliar and so greatly complex that considerable learning is needed to understand them. The problem is extensive because these decisions arise so profligately.

## AN INTENSIVE PROBLEM

The decisions mandates commonly address are intensive; they turn on many factors that themselves are often intricate. To show what that means, we examine two kinds of decisions disclosure has classically tried to inform and improve—borrowing money to buy a home and choosing a medical treatment.