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More than You Wanted to Know: The Failure of Mandated Disclosure, by Omri Ben-Shahar & Carl E. Schneider

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Book Note

**MORE THAN YOU WANTED TO
KNOW: THE FAILURE OF MANDATED
DISCLOSURE, by Omri Ben-Shahar &
Carl E. Schneider¹**

DANIELLE Y. CORNACCIA

“TELLING PEOPLE MORE THAN THEY WANT TO KNOW in language they don’t understand should not have legal consequences.”² That proposition tells you almost everything you need to know about *More Than You Wanted to Know: The Failure of Mandated Disclosure*. In this entertaining book, Omri Ben-Shahar and Carl E. Schneider critique the purpose and performance of mandated disclosure—a regulatory tool designed to help lay people make informed decisions regarding various transactions while relieving disclosers of some legal liability.

An expectation that people “read the fine print”³ is largely an outgrowth of the common law of contracts and torts. But the fine print can create a safe harbour for otherwise careless disclosers. The authors define “disclosure” broadly. Species of this regulatory tool include, for example, forms for informed consent to health care, securities prospectuses, store return policies, copyright warnings, food labels, mortgage documents, and even “disclosures reminding people that comprehensive disclosures are available in writing.”⁴

1. (Princeton: Princeton University Press, 2014) 229 pages.

2. *Ibid* at 195.

3. *Ibid* at 170.

4. *Ibid* at 28.

Mandated disclosure is pilloried throughout the book's three parts and twelve chapters. Part one sketches the ubiquity of mandated disclosure, part two tells the reader why disclosure fails, and part three asks whether mandated disclosure can be saved. The short answer to the latter question is no; the authors think mandated disclosure is mostly hopeless. And the focus of their work is to explain why disclosure is hopeless rather than to offer a regulatory panacea in disclosure's place.

So why, then, is disclosure ubiquitous? This regulatory tool "resonates with two fundamental American ideologies,"⁵ the free-market principle and the autonomy principle. In the first case, "Markets work best when buyers are informed; disclosures inform them."⁶ In the second case, "People are entitled as a matter of moral right and of practical policy to make the decisions that shape their lives."⁷

Why does disclosure fail? The authors respond with a review of empirical research suggesting that "mandated disclosure rests on false assumptions about how people live, think, and act ... [and] about how well information improves decisions."⁸ The research is based mainly in behavioural economics, and the examples discussed are exclusively American. Studies suggest that people tend to be averse to decision making, to lack the competencies necessary to understand disclosures, to be paralyzed by the amount of information provided by disclosures, and to make irrational inferences no matter the amount or quality of information provided. For example, one study found only 15 per cent of shareholders reported reading the whole prospectus required under securities law.⁹ Behavioral economists have also noticed that "things vivid and disturbing are more readily remembered than things drab and routine."¹⁰ This so-called availability bias has incited "some people [to] pay more for insurance against terrorism than for insurance against a slate of risks that includes terrorism."¹¹ For these and other reasons, "[d]eciding *not* to be informed and not to use disclosures is often patently rational."¹²

5. *Ibid* at 5.

6. *Ibid*.

7. *Ibid*.

8. *Ibid* at 12.

9. *Ibid* at 68.

10. *Ibid* at 110.

11. *Ibid*.

12. *Ibid* at 56-57 [emphasis in the original].

One might infer that mandated disclosure is harmless, albeit useless. But the authors argue that it is “not harmless if its costs outweigh its benefits.”¹³ A key mischief of mandates is that they “obscure the difference between revealers (good guys who volunteer information) from concealers (bad guys who must be forced).”¹⁴ The fact that there is no clear substitute for disclosure is not a reason to continue mandating disclosure. The authors thus urge lawmakers “not to use a failed regulatory method.”¹⁵ What people really need, according to the authors, is advice from suitably experienced individuals (*e.g.*, lawyers, product reviewers) rather than disclosure.

In sum, Ben-Shahar and Schneider paint a grim picture of disclosure as resembling *el Requerimiento*—a Spanish-language text that was read by colonial Spaniards to non-Spanish-speaking Indigenous people in the New World asking them to “acknowledge the Church as the ruler and superior of the whole world,” lest they wish to face war.¹⁶ If the cited passages suggest nothing else, it is that the authors have written an engaging, down-to-earth and accessible book, which adds to a vibrant literature exploring the limits of both paternalistic and libertarian approaches to regulatory decision-making.¹⁷

13. *Ibid* at 169.

14. *Ibid* at 173.

15. *Ibid* at 184.

16. *Ibid* at 195.

17. See *e.g.* Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2013); Cass R Sunstein, “Empirically Informed Regulation” (2011) 78:4 U Chicago L Rev 1349; Lauren E Willis, “Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price” (2006) 65:3 Md L Rev 707.