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Less Than I Wanted to Know: Why Do Ben-Shahar and Schneider Attack Only

“Mandated” Disclosure?

A Comment on Omri Ben-Shahar and Carl E. Schneider, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (Princeton 2014)

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Introduction

This book is intended as a disclosure that disclosure—in the US—doesn’t work. According to the authors, as their title tells us, disclosure is a “failure.” The authors say that the (or a) purpose of the book is to persuade legislators and other regulatory actors to give up on mandated disclosure.¹ The book is a well-elaborated jeremiad about the inefficacy of mortgage forms, health forms, and forms of all kinds that are routinely delivered to consumers. The authors offer detailed chapters documenting that disclosures are ineffective because recipients are largely illiterate, innumerate, heuristically biased, and overloaded. The jeremiad is impressive—passionate and thorough—but as I will describe in Section I below, it paints with too broad a brush.

Moreover, the reader is left wondering what can be done to improve matters. The book gives the impression that disclosure is inherently and for all time a “failure”—though the authors must mean at least that its “failure” is to some extent contingent upon current economic, political, and social conditions in the US. And although the authors want politicians and other regulators to renounce disclosure, they don’t say how they

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¹ “This book was written to persuade lawmakers not to use a failed regulatory method.” *MORE THAN YOU WANTED TO KNOW*, p. 182

expect them to be persuaded to give up on it—perhaps not just by reading a book “disclosing” that disclosure is a failure. Indeed, if this book proves helpful in improving matters with regard to consumer transactions, then it will have shown paradoxically that disclosure does work, at least sometimes, and for some segments of the population. If disclosure works for consumers of books like this, we could ask what characteristics of consumers of books like this make the book effective, and what distinguishes its effective disclosure from ineffective disclosures that the authors have in their sights.²

In addition to the authors’ evident choice not to spend time on what might be done to improve the situation caused by the “failure” they see, the authors also chose to spend little time on disclosure initiated by private parties—that is, the non-mandated disclosure by the powerful firms that deliver mass-market fine-print terms to their customers, disclosing that the firms are holding customers to harsh terms and are deleting important legal rights. These fine-print forms are alleged to be contracts. Both types of disclosure, either mandated by regulation or generated by private entities themselves, suppose that people should be allowed to “choose” what terms to subject themselves to. The authors are aware that mandated disclosures are often developed in attempts to limit the abuses caused by these fine-print contracts, but chose not to offer solutions to the problem of abusive contracts.

² One thing that distinguishes this book from mandated disclosure is that its disclosure is not mandated—no regulatory body decreed its creation. Should that make a difference? Although the authors occasionally critique deceptive contracts deployed by firms, the authors seem to have largely retained an unexamined faith that disclosure produced by markets is better than disclosure produced by government. Yet firms deploying fine-print rights deletions of their own devising are often doing their best to gouge consumers or to cancel their legal rights, whereas the regulatory mandated disclosures often represent attempts --unless captured by the regulated firms--to prevent firms from doing so. (Thanks to Oren Bar-Gill for conversation on this point.)

The thrust of Ben-Shahar's and Schneider's book is that the choice—thus the individual autonomy supposedly promoted by mandated disclosure—is largely fictional. As I will mention in Section II below, so is the choice--thus the individual autonomy--supposedly promoted when consumers are said to agree to fine-print rights deletions they receive routinely from purveyors of goods and services. Because it seems that disclosure lacks efficacy when the fine print is generated by firms on their own, at least to the same extent and perhaps to a greater extent than when the fine print is mandated by regulators, Ben-Shahar and Schneider seem to assume, at least some of the time, that when the fine print is generated wholly by private firms, it is more justified or useful to consumers. This apparent position must be examined.

I. Illiteracy, Innumeracy, Lack of Salience, and “Overwhelm”

The sad facts about widespread illiteracy and innumeracy in the US cannot be denied. Neither can the rising wealth inequality--which makes me think of what has happened in the last 30 years as trickle-up rather than trickle-down--and its effects on the poor, undereducated, underemployed, and hungry. There's no question in my mind that Ben-Shahar and Schneider are right in their elaborate disclosure of the various reasons people don't and can't read many disclosures and wouldn't understand many of them if they did read them.³ Their research is detailed and compelling.

The fact that fine print is not read is certainly known to firms, and it's fair to infer that many of them are taking advantage of that fact. As Ben-Shahar and Schneider

³ At page 73-75 the authors include a list of the reasons why recipients don't read fine print and wouldn't understand it if they did read it. There's a similar list in my own book, MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (Princeton 2013), at 12.

realize, such advantage-taking is one of the reasons that regulators have tried to counter with mandated disclosures. Ben-Shahar's and Schneider's jeremiad against mandated disclosure is very well written and well calculated to give pause to those who would think that merely disclosing matters will solve problems of consumer awareness. I found especially convincing the detailed portrayal of Chris Consumer, who has no life to lead because all his time is taken up with reading disclosures.⁴ (This is a condition that the authors called "overload" and I will call "overwhelm.") I am someone who reads the fine print and writes about it,⁵ but if I were to read all of it that I receive, I wouldn't be able to lead a normal life. And even though I am a lawyer familiar with this matter, I would not be certain of the effects of all of the provisions anyway.

Nevertheless, I think the jeremiad occasionally paints with a too broad a brush.

A. Example: Food Labeling

Food labeling, for example, is not as harmful as the time-wasting piles of forms that we cannot escape and that deprive us of important rights in the midst of interminable irrelevant disclosures. Yet the authors attack food labeling as just another form of failed disclosure, apparently just as bad as all other forms of disclosure. The authors don't make clear that food labeling saves many of us from hours and days of pain and sickness caused by allergies or sensitivities to ingredients that in the past we weren't able to find out were in our food. In the case of peanut allergies, food labeling even saves some people, including many children, from death.

⁴ See MORE THAN YOU WANTED TO KNOW, chapter 7.

⁵ See note 3, *supra*, and Section II, *infra*.

Buying food in the grocery store in the old days was a crapshoot for those of us with allergies—will this make me sick or won't it? Nowadays people who need to know what's in their food can actually shop in a regular grocery store and buy regular brands, rather than shop in a specialty store or do without. Surely this is a boon rather than a hindrance to retail marketing, so food labeling (it seems to me) is not readily attackable on economic efficiency grounds. Neither is it attackable on grounds that it's useless—at least, not to consumers as a whole, because it's very important to some, and indeed I believe has saved lives.

Calorie count disclosure in restaurants and other eating establishments, which the authors also attack, is likewise not so awful as manipulative fine print accompanying a credit card, or mortgage machinations that disguise exorbitant fees or balloon payments that can result in loss of one's house. Food package labeling and restaurant calorie count statements share attributes that make them distinguishable from other failed disclosures at which the authors rightly take aim. If non-readers who know they are not allergic fail to read the labels and fail to learn what is in their food, their failure to read doesn't harm them; those disclosures can be safely ignored, so the non-reading is not "failure" in the sense the authors mean to attack. Analogously, if non-readers in a food establishment fail to learn how many calories their burger contains, the failure to read does not result, irretrievably after this one encounter, in a devastating loss such as bankruptcy or loss of their property.

There is some difference between general ingredient food labels in the grocery store and calorie counts either on such labels or in restaurants. Food labels regarding allergens can be safely ignored by those who don't suffer from allergies. Calorie counts

can be initially ignored by those who don't care about them, and are useful to those of us who do care about them,⁶ but it is apparently dangerous, at least to many people, to ignore them consistently and in the long run. The purpose of disclosing calories is to make it easier for us to avoid obesity and diabetes by maintaining healthy weight, if we care to do so; and in the long run, for the sake of disease prevention and social welfare, we hope that more people will care. The public health consequences of over-consumption of foods too heavy in calories—which, as Ben-Shahar and Schneider remind us, especially impact those who cannot afford better food—are severely costly for individuals and for society as a whole. Yet in this case there is a longer run. One instance of failure to heed calorie count is not like one instance of failure to understand an adjustable mortgage or a balloon payment. In the longer run we can hope for public education to take hold. If people don't pay attention to calorie disclosures on their initial encounter with them, it doesn't threaten to bankrupt them or cause them to lose their property from that one encounter, as credit card practices or obscure balloon payments can.

In short, food labeling is easy to ignore by those who don't want to pay attention to it, and it's very valuable to others. At the present time, calorie counts may be more valuable to wealthy people who can afford better food and who might be better educated about what food is actually better; but at least in the case of serious allergies, food

⁶ The authors say twice that restaurants must disclose calorie count, MORE THAN YOU WANTED TO KNOW at 28 and 133, but it's not true in the places I frequent. (I wish it were.) New York City pioneered calorie-count disclosure in 2009, and some states, such as California, followed suit. Under a provision of the US federal health law enacted in 2010, chains of more than 20 outlets are supposed to post calorie counts, but it doesn't seem that compliance has been widespread, and the FDA has failed to issue regulations. See, e.g, David Lazarus, Restaurants Skip Required Nutrition Info; Officials Choose Not to Care, *Los Angeles Times*, Business Section, April 28, 2014.

labeling is beneficial to everyone who suffers from them (including parents of allergic children), not just to wealthy people.

So food labeling is one portion of the authors' jeremiad that could have been more nuanced. The authors could have considered the difference between, on the one hand, fine print that can easily be ignored by those who have no need to know what is disclosed, while being extremely useful to those who do need it, and, on the other hand, fine print that is ignored once at the recipient's peril.

B. General Comments on Elaborating the Model(s)

On a more general level, the authors would have done well to have been more attentive to differentiation among different features of disclosures. Attention to nuance and differentiations may have dampened the righteous fury of the jeremiad, but it might have led to more of the target audience being convinced.

1. *Saliency*. When the disclosure is salient to the recipient, many recipients will have learned how to look for it and understand it (such as presence of peanuts to someone who will go into anaphylactic shock if she consumes a peanut). What is saliency? That term refers to aspects of circumstances that are likely to strike a person's attention.⁷ The authors include a chapter explaining the change in thinking about human decision making owing to the psychology discoveries of Kahneman & Tversky, and others.⁸ They do so primarily to show that many disclosures don't work because their terms are not salient.

⁷ As psychological research has revealed to us, human decision making often does not take into account all important features of a situation, but only those that are easy for us to see, such as those that fit in with our background presumptions, or those that are easily comparable with things that we know. See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2012). As mentioned below, Section II, this breakthrough in the psychology of decision making is changing the paradigm of economics that previously assumed a rationality that does not exist.

⁸ MORE THAN YOU WANTED TO KNOW, ch. 7.

Problems that will arise later, or perhaps never happen to us, such as possible bankruptcy if interest rates rise and we have an adjustable mortgage, tend not to be salient, whereas the immediate cheap teaser rate is salient. So it would have been a good idea to distinguish clearly between types of disclosures that are salient to consumers and those that are not.

2. *Avoiding practices that trigger biases.* The authors are aware that firms left to their own devices often use fine-print terms that take advantage of consumers' heuristic biases. But they might have been clearer that when mandated disclosure is intended as a corrective to this sort of advantage-taking, mandated disclosure could more consciously try to avoid unwittingly making the same error about salience as firms may do purposefully.

There are better and worse ways for disclosures to take account of heuristic biases and how they render important factors non-salient to consumers, some of which have been explored and some of which no doubt remain to be explored. Oren Bar-Gill has opened a very fruitful discussion by explaining how cell phone providers, credit card providers, and mortgage providers deliberately take advantage of well-understood heuristic biases of consumers to render certain terms non-salient.⁹ Regulators can and should use this understanding not only to create disclosure documents or mandates for firms that succeed in achieving actual disclosure, but indeed to disallow certain practices that have previously been allowable if "disclosed."¹⁰ Such practices include terms that disclose harms for things that consumers believe will never befall them, such as usurious

⁹ OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012).

¹⁰ In the end, Ben-Shahar and Schneider do not rule out this result, but they refer to it as a "choice between libertarianism and paternalism." *MORE THAN YOU WANTED TO KNOW* at 192. As I will argue below, Section II, this is not a perspicuous description of the matter.

interest rates after initial teaser rates, automatic deductions for endless renewals of subscription services, and outrageous fees for things consumers think they won't do, such as pay late or bounce a check.

3. *Illiteracy*. People who do not read well might be more amenable to oral or online disclosures, with the opportunity to ask questions. This is something that is easier to do online, and many firms that really, really want recipients to understand their terms have worked out ways of doing this, such as open telephone lines or online chat lines. Or, in addition to mandated disclosure, regulators could tell firms that certain terms must be adequately disclosed, and require the firms to submit evidence that their customers do understand the terms. Indeed, regulators could require firms to submit such evidence without mandating any particular disclosure as a way to accomplish that understanding.¹¹

4. *Innumeracy*. Many people in the US are more innumerate than illiterate. (Some of my elite law students are graduates of prestigious colleges, but still object to numerical examples.) Disclosures that ask consumers to understand numbers might be worse than those that ask them to understand words, at least if the words are at a suitable level of literacy. If those who write disclosures understand this, they can make warnings more understandable to many people, even if not to all.

5. *Disclosure can probably be made helpful to some, if not all*. To generalize, it seems to be an overstatement or at least premature to think or imply that no matter how hard they try, and no matter what the field in issue, regulators cannot produce a disclosure that is helpful to at least some people. In the US, the recently established Consumer Financial Protection Board (CFPB) conducted experiments to find out which

¹¹ See Lauren E. Willis, Performance-Based Consumer Law (2014)(unpublished draft on file with author)

kinds of financial disclosures people can understand.¹² It's too early to predict that such experiments will result in nothing but failures of disclosure. The failure of disclosure that the authors' research demonstrates could be relative, at least in some cases, to the kinds of disclosures that have previously been used.

The CPFBS one-page mortgage disclosure form, produced after laboratory experimentation with consumers, will be helpful to at least some people. The failure of disclosure in the past is not only more serious and more widespread in some fields than in others, it is not an absolute that must remain unshaken in the future. Now that Ben-Shahar and Schneider have opened up the field, more research is needed. How much of the serious and widespread failure of disclosure is due to wealth disparity and lack of education? How much of the failure is due to lack of salience of harmful terms? How much of the failure is due simply to “overwhelm”—the fact that we are inundated with documents purporting to affect our rights?

The circumstances of wealth disparity and lack of education can change, we hope. The situation of lack of salience might be somewhat ameliorated by requiring that important terms be foregrounded. Yet there are important terms that human decision makers cannot stop ignoring even if foregrounded (such as deletion of legal remedies), and these are the terms that should be prohibited rather than merely disclosed. The “overwhelm” situation would be slightly ameliorated if the consumers most affected by lousy mortgages and usurious credit cards were not those whose income levels force them to work two or three low-paying jobs with no spare time to think, much less read documents. It will be important in the future to study which of these factors (and others that may be discerned) are the most relevant to which kinds of disclosures.

¹² See, e.g., ELIZABETH WARREN, *A FIGHTING CHANCE*, at 194-96 (2014).

II. Failed Disclosure by Private Firms

If disclosure fails because US consumers cannot read and understand fine print, and because they are inundated with it, and because many of its terms are not salient to them, it fails at least as badly—or worse-- in transactions between a firm and consumers in which the firm has designed its own fine print as it does when a firm has some of its fine print mandated by law. In other words, fine print in “private” contracts fails just as much in efficacy, and for the same reasons, as does fine print in mortgage disclosures and others required by regulatory bodies. The authors realize that regulatory disclosure mandates are often utilized in an attempt to curtail the worst offenses in privately designed boilerplate that is harmful to consumers. But it seems that the authors might, rather tacitly, be regarding fine print in purported contracts to be nevertheless more justifiable than fine print in regulatory disclosures.¹³

¹³ In previous work, one of the authors of MORE THAN YOU KNOW, Ben-Shahar, endorsed the old-style law-and-economics reasoning that consumers are being compensated for loss of their rights and that this could be understood as “rational”. For example, he endorsed the idea that an appropriate coterie of savvy consumers could set the market price for everyone in the market, so that consumers would be paying the correct market price for a product that consisted of a functional component plus a fine-print rights-deletion component, and indeed that the non-reading consumers would be “cross-subsidized” by the savvy readers. See, e.g., Regulation Through Boilerplate: An Apologia (Review of Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*), 112 Michigan Law Review 883, 900 (2014). In MORE THAN YOU KNOW, however, the authors disavow the savvy reader hypothesis, at least as a general matter. *Id.* at 187ff.

The old-style law-and-economics reasoning that Ben-Shahar formerly professed depends upon a view of rationality that is inconsistent with the bounded rationality that is now understood to characterize human decision making. A new paradigm of law-and-economics is taking shape under the rubric of behavioral economics. It seems that in this book the authors endorse the new paradigm, as one can infer from chapter 7 on the new paradigm of bounded rationality in decision making, as well as their critique of the savvy reader hypothesis. But here and there certain tropes characteristic of old-style law-and-economics remain: for example, in the mostly tacit distinction between mandated disclosures and non-mandated disclosures, and comments that interpret legal consumer protection rules as “paternalism.” See, e.g., text accompanying note 19, *infra*.

Ben-Shahar and Schneider do mention that product warnings such as disclosure that a product or service may injure the recipient are just as useless as financial or health disclosures. As the authors point out, under the current structure of US tort law, disclosure that a lawnmower can cut off your toes likely exonerates the purveyor from the liability for marketing a dangerous product.¹⁴

Let's pause on this point. It's important that for disclosure of the lawnmower kind—"warning, my product may injure you"---it doesn't much matter whether the disclosure purports to be a contract or not. The result is the same. Traditional contract doctrines such as "reasonable opportunity to read" or "duty to read" are useless under current conditions.¹⁵ Fine print, whether mere disclosure such as the label on the lawnmower, or whether labeled "contract" such as the papers signed at a fitness facility, can erase rights of redress. This is especially true, at least in many states, of blanket disclaimers of liability involving services,¹⁶ such as the "we aren't liable for anything any

¹⁴ MORE THAN YOU WANTED TO KNOW, at 168.

¹⁵ Indeed, Ben-Shahar previously took aim at the doctrine of "opportunity to read" and presumably his critique would apply a fortiori to "duty to read." See Ben-Shahar, *The Myth of Opportunity to Read in Contract Law*, 5 *European Review of Contract Law* 1 (2009). In line with a general preference for markets over regulation, however, he suggested that consumers should rely only on their own private actions (such as creating groups that could injure a firm's reputation), whereas the unreadable fine print should nevertheless be enforceable by the firm as a contract. See Ben-Shahar, *One-Way Contracts: Consumer Protection Without Law*, 6 *European Review of Contract Law* 221 (2010).

¹⁶ Note that under the US law regulating contracts for the sale of goods, the Uniform Commercial Code (UCC), such exculpation from personal injury harm to a consumer would be presumptively unconscionable when the item sold is a product. UCC 2-719. But in the US we don't have a parallel provision for services. So purported contracts, amounting to disclosures, tell consumers that the service provider is not liable for any kind of harm. Every time I get one of these at a fitness studio, at a summer music camp, etc, and I tell the friendly people that this is at best seriously overreaching, they tell me that their insurance company requires them to do this. I suspect that insurers are widely trying to shunt to their insured's customers the very risk that the insurers are supposedly insuring against.

of us do to you or your family” paperwork we are required to sign by summer camps, daycare providers, fitness facilities, and nursing homes.

Given the reality that there often isn’t a significant difference between fine print that is merely “disclosure” and fine print that is labeled contractual, this book leads to the need to pay attention to the question whether (or when) these fine-print terms that come with transactions should properly be enforced as contracts. In other words, why did Ben-Shahar and Schneider issue a jeremiad against disclosure, but only when it is mandated by regulation? The same facts that the authors marshal, about US illiteracy, innumeracy, lack of salience, and general fine-print “overwhelm” apply to the many consumer contracts that (in the US) are largely enforceable.

For example, exculpatory clauses in contracts for services –such as nursing homes and daycare centers—purport to deny liability for any and all harm caused by the purveyor. A blatant moral hazard problem here is simply ignored. (The moral hazard is that the nursing home will feel free to cut corners on hygiene, maintenance, and other aspects of non-negligent performance.) Why does US law mostly allow this if it’s in a document called a contract? The problem would be the same if the nursing home (perhaps required by regulation) simply “disclosed” to customers—perhaps with a sign on the wall-- that their loved one is very likely to die of infected bed sores or bowel obstruction. In fact, they could very well call that sign on the wall a contract. And that’s my point: there’s not much difference between the disclosures attacked by Ben-Shahar and Schneider and the widespread fine-print rights deletions deployed by firms against consumers.

Contract theory, which justifies state coercive enforcement, doesn't read well on this particular segment of contract practice. That is, contract theory doesn't justify enforcement of mass-market contracts that consist of fine print and contain rights deletions that recipients, many thousands of them, perhaps millions of them, cannot read and understand--much less have a choice about. We need a better theory with which to regulate when these fine-print rights deletions are enforceable, and we may need to use legal structures other than contract law.

Nuance is needed. Not all disclosures to consumers are inevitably unreadable and useless. Neither does all contractual fine print relate to rights deletions consumers cannot avoid. Not all contracts made up of sewn-together boilerplate clauses are really disclosures—mostly unreadable, non-understandable-- in disguise. Yes, I've had a medical consent form shoved into my hands while I was on a gurney and the IV was in my arm—so what was I going to do, refuse the operation? But I've also entered into an individually negotiated contract with a contractor that consisted entirely of sewn-together standardized clauses; in this type of circumstance standardization can be very useful.

The problem that I find most pressing is not standardization itself, but rather mass-market deletion of rights to meaningful redress of grievances. The availability of legal redress is essential to civil society, yet not salient to individuals. No one, at the time of purchasing a product, thinks to herself, I had better check into whether legal remedies remain available, in case I need to sue someone. No one thinks she is the unlucky one that may be hurt. That is a bias that is deeply embedded in human decision making.

So what are we to do about fine-print rights deletions that are important to civil society and the rule of law, but that will not be “chosen” (that is, will be thoughtlessly

waived) by individuals, and not even thought about until the hour of need? This is happening by “mere” disclosure, whether mandated or not mandated; and also by contracts, whether their terms are mandated, or not mandated. I consider mass-market rights deletions in private transactions an aspect of “democratic degradation,” because when this practice is broadly pursued it undermines certain rights that are basic to the existence and maintenance of democracy and civil society.¹⁷ Ben-Shahar and Schneider note that hardly any individual qua individual “feels degraded” when fine print delivered to her contains clauses that in the aggregate undermine democracy and civil society.¹⁸ I am sure that they are right. In fact, I’m sure that individuals qua individuals don’t value legal remedies, or even think about them (until they need them), because heuristic bias makes us all think that the other guy will be the one who gets hurt. However, it is not true that this means that redress is therefore not valuable to individuals.¹⁹

It’s not true because we shouldn’t measure value only by subjective value to an individual, just as we shouldn’t measure values as entirely monetizable and available to trade-off in a cost-benefit analysis. I am not urging here merely that social value cannot always be perspicuously understood as merely a summing of individual subjective values.

¹⁷ See Radin, *supra* note 3, chapter 3.

¹⁸ MORE THAN YOU WANTED TO KNOW, at 192.

¹⁹ “Chicago” law-and-economics folks tend to say this repeatedly (see, e.g., Ben-Shahar, *supra* note 13); but, nevertheless, it’s not true. Civil society can be valuable to individuals whether individuals realize it subjectively or not. “Chicago” law-and-economics folks also tend to believe that deletion of remedies (for example) is efficient because it saves the firm money and the firm will pass on its savings to consumers; and that this is also indicative of consumer autonomy, because consumers would (subjectively, *ex ante*, before it turns out that they are the unlucky ones where remedy is needed) prefer to have no remedy but a cheaper price. For empirical scholars, as law-and-economics folks say they are, these propositions would need to be tested in individual markets, rather than put forward as blanket generalization. To what extent are savings passed on rather than simply pocketed? And so on. But, leaving aside the empirical questions, there remains the question of value I mention in the text: legal remedies are valuable to individuals as part of the background protection of civil society, whether individuals subjectively realize that or not.

Rather, I want to stress that the availability of redress is valuable *to each individual* whether any individual realizes it subjectively or not. In the story of why we exit the state of nature and maintain a political state, a strong component of the rationale is that we cannot watch our backs all the time, and we cannot always have with us our own protective group to do battle with predatory others who might want to divest us of possessions or life. That is why I think that certain rights are permanently in the care of the polity. Unfortunately, it's hard to get to this conclusion if one's theory of value is wholly based not merely on value to individuals, but rather on the subjective feelings or awareness of individuals.

I believe that legislators and responsible agencies should make certain basic rights non-waivable, as in the toe-slicing lawnmower example where the use of disclosure results in waiver of tort liability. When they write a consumer protection law, legislators should make its significant protections non-waivable—or at least non-waivable by mass-market fine print. Ben-Shahar and Schneider are quite correct that default rules (which can be “contracted” out of) are mostly useless in this context.²⁰ If for some reason legislators cannot make important protections non-waivable, because, for example, their election depends on the money supplied by those who would oppose this, then I think that common law judges should do it. Some judges might just be conservative enough to find that underlying rights that the polity is supposed to guarantee us are essential to our liberty, and to the maintenance of a civil society in which that liberty can flourish.

Some—perhaps including Ben-Shahar and Schneider-- would call making basic rights non-waivable “paternalism,” but in my view this is not perspicuously called “paternalism.” Instead it is a recognition of the value of civil society to everyone, and to

²⁰ MORE THAN YOU WANTED TO KNOW, at 190-91.

everyone's liberty. In my view, thinking of mandates as a choice amounting to a "trade-off" between "paternalism" and "libertarianism"²¹—as law-and-economics advocates often do—clings to some old-school law-and-economics habits of thought.²² Liberty may be enhanced and not undermined if the state took more responsibility for the matters it should. The "trade-off" formulation would not be the best way to help us think about two related questions raised by the failure of disclosure, the theoretical and the practical: What exactly is the harm to consumers caused by disclosurism? What is the best way to get the political system to do something about the situation?

Conclusion

One topic we need to think about is the rights inherent in the idea of civil society, those I call permanently in the care of the polity.²³ We should confront the fact of widespread disclosures—even disclosures masquerading as contracts—that delete basic rights of civil society for thousands or millions of people. People without redress are like the legendary people in a state of nature, who are at the mercy of those who would injure them unless they have their own means of fighting back. We can debate when and under

²¹ See *MORE THAN YOU WANTED TO KNOW*, at 192.

²² The authors of *MORE THAN YOU WANTED TO KNOW* seem to find themselves in an interesting theoretical transition that I think was not consciously confronted at the time of writing. See note 13, *supra*. As mentioned earlier, see text accompanying notes 7-8, they devote a chapter to exploring the tenets of behavioral economics and how its psychological understanding of human decisionmaking buttresses an understanding of the failure of disclosure; so they endorse the new understanding of bounded rationality. Yet remnants of the previous law-and-economics paradigm of rationality remain here and there, such as the idea that there's a "tradeoff" between autonomy and "paternalism" if certain harmful practices are outlawed rather than merely disclosed. Receipt of failed disclosures does not promote autonomous choice. Those who are not adherents of old-school "Chicago" tenets are likely to think that individual autonomy is enhanced, not undermined, when civil society fulfills its proper role in protecting individuals.

²³ See Margaret Jane Radin, *Boilerplate: A Threat to the Rule of Law*, in LISA M. AUSTIN AND DENNIS KLIMCHUK, EDS, *PRIVATE LAW AND THE RULE OF LAW* (forthcoming Oxford 2014), available at <http://ssrn.com/author=22645>

what circumstances a right essential to the maintenance of civil society and the rule of law should be freely alienable by an individual, because individuals tend not to value the background rules of civil society until they need them. But it seems clearer that such rights should at least not be divested from thousands or millions of people through mass-market fine-print contracts that we know that people don't read and wouldn't understand if they did read.