2005

Reaching Disclosure

Carl E. Schneider
University of Michigan Law School, carlschn@umich.edu

Recommended Citation

Schneider, Carl E. "Reaching Disclosure." *Hastings Center Rep*. 35, no. 1 (2005): 12-3.

Reaching Disclosure

by Carl E. Schneider

It is easy to forget but crucial to remember that when lawmakers decide to regulate an activity, they must select a method. The law of bioethics particularly favors one method—requiring disclosure of information. The doctrine of informed consent obliges doctors to tell patients their treatment choices. The administrative law of research ethics insists that researchers warn subjects of the risks of experiments. The Patient Self-Determination Act compels medical institutions to remind patients about advance directives. The federal government's new privacy regulations instruct medical institutions to describe their privacy regime to patients.

Not just the law of bioethics, but health law in general, repeatedly recruits disclosure requirements. For example, they are central to the recurring proposals for patients' bills of rights. Likewise, "virtually every bill . . . to regulate managed care devotes major portions to information disclosure and dissemination."[1] Proposals for "consumer-directed health care" tantalize us with the dream that well-informed patients can make markets for health care work effectively.

If disclosure requirements are popular, surely they are effective? Don't people making decisions need information, want it, and use it? Doesn't an irresistible array of arguments justify disclosure rules? The *moral* rationale for disclosure is that it liberates people from the servitude to others that ignorance creates. The *prophylaxis* rationale assumes that people can be deterred from abusing each other by requiring predators to warn the prey. The *market* rationale holds that the production and allocation of goods are best regulated through markets and that markets work best when purchasers know most. The *welfare* rationale suggests that one way to enhance people's well-being is to give them the information they need to protect themselves.

Perversely, there is good reason to doubt that disclosure requirements in health law work as intended. One way to assess disclosure rules in health law is to ask whether they succeed in the many other areas of law that require them. Are people buying worthless stocks? Securities laws say, "Disclose!" Are people borrowing money at usurious rates? Consumer protection laws say, "Disclose!" Are people injured by things they buy? Products liability law says, "Disclose!" Are police bullying criminal suspects into waiving their rights? *Miranda* says, "Disclose!"

Roughly speaking, the goal of disclosure requirements is to improve the decisions recipients make. The baseline for evaluation, then, is the quality of the decisions people would make were there no disclosure laws. Crudely defined, success means improving decisions enough to justify the costs of the disclosure requirement to the government, the disclosers, and the recipients.

If disclosure requirements prosper anywhere, it should be in securities markets, since they are dominated by institutions that have incentives and resources to exploit disclosed information. But even there, scholars cannot agree that companies would disclose less were there no securities laws (since companies have economic reasons to disclose information to investors) or that the disclosures that are made improve investors' decisions.

Nor is it clear that other disclosure regimes justify their costs. Take *Miranda* warnings. They "'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.' . . . Not only has *Miranda* largely failed to achieve its stated and implicit goals, but police have transformed *Miranda* into a tool of law enforcement."[2] And while the evidence of failure is hardly uniform, "the efforts of researchers to prove by scientific means that on-product warnings are indeed effective to modify safety-related behavior in actual or simulated real-world applications have generally yielded disappointing results."[3]

Why don't disclosure requirements work better? Principally, disclosure succeeds only if many often-onerous conditions are all met. Let us briskly review eight of them.

First, information must actually be provided. However, disclosers may have reasons to withhold it; disclosures cost money and can compromise disclosers' interest. Disclosers can respond by following the letter of the law but not the spirit, by obscuring and even suppressing information, by presenting information misleadingly, and by dressing disclosures prettily. And disclosure requirements are hard to enforce: they usually affect so many transactions that the law cannot supervise them well, and people from whom information is withheld rarely are injured enough to make suits economically sensible.

Second, the information disclosed must be the right information—relevant, accurate, and complete. However, even a willing discloser will often not know what to disclose. Some safety warnings apparently make people less cautious, not more. Some information that seems sufficient isn't: Americans now *overestimate* the dangers of smoking, but they still start smoking because they underestimate the difficulty of stopping. Yet you can't tell people everything, because that drowns them in more information than they can cope with.

Third, the audience must receive the information. Often, however, the information is and even must be inconspicuous. Further, if found, it may not be read: 40 to 44 million Americans, or approximately one quarter of the U.S. population, are functionally illiterate, another 50 million have marginal literacy skills, and many of the rest have trouble comprehending even modestly complex verbal and numerical data.

Fourth, recipients must attend to the information they perceive. But recipients commonly fail to recognize the relevance and significance of information or think they already know all they need to, and so they are easily convinced that the effort of heeding information will not be repaid. For example, one "of the most consistent findings in the literature [on warnings]. . . is that a consumer's responsiveness to warnings is strongly affected by perceived hazardousness." Those perceptions are influenced by many things, including the product's appearance, whether consumers suppose they can control the product's dangers, whether consumers can imagine ways injuries might occur, the product's familiarity, and consumers' education and intelligence. Sadly, "most of these factors are difficult to influence."[4]

Fifth, people must understand the information. This requires the kind of analytic effort most of us wisely resist. As Whitehead said, "It is a profoundly erroneous truism, repeated by copybooks and by eminent people when they are making speeches, that we should cultivate the habit of thinking about what we are doing. . . . Civilization advances by extending the number of important operations which we can perform without thinking about them. 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."[5] But even when cavalry charges are necessary we don't always bring out the fresh horses.

Sixth, recipients must believe what they are told. But people are skeptical. They scout information that does not fit their view of the world. Furthermore, recipients often have reasons (good and bad) to fear that disclosers are shaping information to serve their own interests and not the recipients'. Such attitudes make recipients all too prone to spurn even reliable information.

Seventh, people must decide to use the information. But people regularly resist incorporating new information into decisions, if only because that demands still more work. They must therefore be convinced that the information will be worth that effort. Sometimes it isn't, but how can they know until they have tried?

Eighth, recipients must use the information intelligently. The woeful infrequency of this even where you would expect it most often is suggested by the need for books with titles like *Why Smart People Make Big Money Mistakes and How to Correct Them.* Even experienced investors overvalue their own judgment, are sooner swayed by vivid than by dry data, routinely imagine that new evidence confirms their earlier opinions, and suffer from the swarm of systematic faults in reasoning that afflict us all. And so, "during the Internet frenzy, firms that announced that they were changing their name to include 'dot.com' experienced abnormal returns, regardless of whether the announcement coincided with a change in business plan."[6] In short, people's decisions do not always change, much less improve, with more information.

Why do lawmakers so often choose disclosure requirements when evidence for their success is at best elusive and at worst damning? In part, the structure of lawmaking rarely encourages assessments of disclosure rules. Those rules are generally inspired by indignation inflamed by anecdote. The effectiveness of disclosure seems axiomatic, and there is no easy way to test its effectiveness in advance. And law is made by just the people—the well-educated and well-situated—best able to take advantage of disclosures.

Furthermore, disclosure may be the only kind of regulation available to the lawmaking agency. For example, courts can create a cause of action against doctors who do not disclose information to patients, but courts cannot establish an administrative apparatus to supervise disclosure. And not least, disclosure requirements cost lawmakers little, since they shift the costs of regulation to the entities being regulated. The Patient Self-Determination Act added pennies to the federal budget, but it cost hospitals over $100,000,000 just to set up compliance programs. Finally, once disclosure rules have been implemented, courts have no resources for—or interest in—reviewing their effectiveness, and Congress moves on to other issues.

This has been an essay about the law's choice of means. One of its morals is that the law too often chooses means badly because it substitutes supposition for evidence. Yet the choice matters. When the law selects ineffective means, problems remain unsolved. Foolish means can make problems worse and engender new ones. And even bootless means divert resources from worthier uses. Perhaps legislation is like cavalry charges in a battle . . . ?

1. W.M. Sage, "Regulating through Information: Disclosure Laws and American Health Care," *Columbia Law Review* 99 (1999): 1701-1829.

2. R.A. Leo, "Questioning the Relevance of Miranda in the Twenty-First Century," *Michigan Law Review* 99 (2001): 1000-1029.

3. H. Bowbeer and D.S. Killoran, "*Liriano v. Hobart Corp.*: Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption," *Brooklyn Law Review* 65 (1999): 717-61.

4. M. Trommelen, "Effectiveness of Explicit Warnings," *Safety Science* 25 (1997): 79-88.

5. A.N. Whitehead, *An Introduction to Mathematics* (n.d.), 61.

6. S.J. Choi and A.C. Pritchard, "Behavioral Economics and the SEC," *Stanford Law Review* 56 (2003): 1-73.