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DISCLOSURE AS DISTRIBUTION

Jeremy N. Sheff*

Abstract: This brief response to the work of Professors Omri Ben-Shahr and Carl Schneider on mandated disclosure regimes investigates the normative criteria underlying their claim that those regimes are failures. Specifically, it unpacks the pieces of those authors' implicit cost-benefit analysis, revealing inherently normative judgments about desert and responsibility at the core of their (or any) critique of disclosure regimes. Disclosure regimes may aim to improve human decisionmaking behaviors, but those behaviors are influenced in non-deterministic ways by cognitive capacities that are heterogeneously distributed among subjects of the regimes. Accordingly, any claim regarding the normative desirability of disclosure regimes (or any other regulatory regime that seeks to channel and improve decisionmaking) implicitly rests on judgments regarding individuals' responsibility for their own capacities. I argue that in evaluating such regulatory regimes, focusing on efficiency through cost-benefit analysis distracts from inescapable and logically prior distributive questions regarding desert and responsibility.

INTRODUCTION

Professors Ben-Shahar and Schneider have done legal scholars and policymakers a tremendous service by collecting, in one place,¹ various clues and traces of an undeniable truth: that regulatory regimes built on the compelled disclosure of information are endemic, and can be problematic. Reviewing their comprehensive research, I find little if anything to add to their identification of various instances of mandated disclosure regimes, nor of their analysis of the practical effects of those regimes—certainly nothing beyond the points already raised by Professor Craswell in his response to their project.² So instead, I would like to focus on the normative implications of the evidence and analysis Professors Ben-Shahar, Schneider and Craswell have assembled, an issue which still calls for further development. Like Professor Craswell, I will question whether the phenomenon of mandated disclosure—as documented by Professors Ben-Shahar and Schneider—can properly be

* Associate Professor of Law, St. John's University. I am grateful to the organizers of the Washington Law Review Symposium on "The Crisis of Mandated Disclosure," at which I presented a version of this response, and to Professor Zahr Said for the invitation to do so.

1. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011).

2. Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 335–37, 354–59 (2013).

characterized as a “failure,” if only to clarify what we mean when we use such a pejorative term.³

If mandated disclosure has failed, certainly we should be able to say with confidence *what* it has failed to do: to what end is mandated disclosure supposed to serve as a means? But beyond that, we will also have to defend that end as one *worth attaining*: some normative commitment must justify whatever ends the legal regime might serve. So the purpose of my response is both to expand on Professor Craswell’s efforts to identify possible ends for mandated disclosure regimes, and to assess the normative commitments underlying those ends—commitments on which Craswell, Ben-Shahar and Schneider seem to agree, if only in their assumptions.

I. IDENTIFYING NORMATIVE SYSTEMS

In his symposium presentation, Professor Schneider identified two species of “disclosurites”—proponents of mandated disclosure.⁴ The first species, he explained, appears to be motivated by concerns over dignity or autonomy. They claim that there is a moral obligation to respect this principle of autonomy by providing information to disclosees, regardless of the disclosures’ costs, or of their actual effects on the disclosees’ decisionmaking.⁵ But assuming Professor Schneider’s characterization of this species of disclosurite is accurate, as far as they are concerned one cannot characterize mandated disclosure as a failure at all. To the contrary, it accomplishes precisely what it should—it satisfies disclosers’ moral obligations to respect disclosees’ autonomy.

So with respect to the autonomy-based argument in favor of disclosure, Professors Ben-Shahar and Schneider are not really proving a failure, nor do I believe they claim to. Instead, they simply have a normative disagreement with some proponents of mandated disclosure, and have not attempted to justify their own normative framework as superior to the alternative espoused by those proponents. Specifically, they differ with autonomy-focused disclosurites as to the moral implications of disclosure and the appropriate scope, content, or value of autonomy or dignity in public policy—though they don’t really join the

3. *Id.* at 1–2.

4. See Ben-Shahar & Schneider, *supra* note 1, at 681 (outlining “free-market” and “autonomy” principles underlying disclosure mandates); see also Craswell, *supra* note 2, at 339.

5. See Ben-Shahar & Schneider, *supra* note 1, at 681 (“[M]andated disclosure serves the 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.”).

normative argument over what that scope, content, or value ought to be. Nor, for that matter, does Professor Craswell, who concedes that such a critique is outside his area of expertise.⁶ The bare fact of this normative disagreement is nevertheless important, because it demonstrates that a plausible set of normative criteria exist under which mandated disclosure is not a failure, but a success. This being the case, the characterization of mandated disclosure as a failure requires some defense of an alternative set of normative criteria as superior. And as I intend to argue, the normative criteria Professors Ben-Shahar, Schneider, and Craswell appear to adopt have more in common with the autonomy-based framework than they seem to realize.

The other class of disclosurites Professor Schneider identified in his remarks appear to be working within a normative framework that Professors Ben-Shahar, Schneider, and Craswell all support. We can glean traces of this framework from Professors Ben-Shahar's and Schneider's Article. They note that policymakers and legislators frequently mandate disclosure as a solution to various perceived "social problems," and that these social problems are often illusory extrapolations of "individual acts of malfeasance."⁷ They assert that disclosure is a policy measure that "aspires to improve decisions people make in their economic and social relationships and particularly to protect the naïve from the sophisticated."⁸ And they note that the tool for achieving this aspiration is "requiring the revelation of information."⁹ So we have some hints at the ends that Professors Ben-Shahar and Schneider think mandated disclosure ought to pursue: protecting naïfs from harm caused by the decisions they make when interacting with sophisticates who might benefit from those same decisions. The means to that end—the "revelation of information" to the naïfs—is, they maintain, supposed to "improve decisions" made by those naïfs, presumably so as to avert the harms they would otherwise suffer.¹⁰

6. Craswell, *supra* note 2, at 339.

7. Ben-Shahar & Schneider, *supra* note 1, at 680 (quoting EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 23 (Transaction Publishers 2d prtg. 2003) (1982)).

8. *Id.* at 649.

9. *Id.* at 720.

10. The standard by which a decision may be deemed "improved" is nowhere explicitly stated, though Professor Craswell offers a plausible metric for the consumer protection context: the extent to which a disclosure (*d*) changes consumer beliefs regarding a product's quality (*r*) to be more consistent with some presumably objective measure of that same quality (*s*), leading consumers to purchase the optimal number of those products given the risk of loss represented by *s*. Craswell, *supra* note 2, at 381–83.

However, Professors Ben-Shahar and Schneider further hold that these benefits to naïfs cannot in themselves justify disclosure. “Whatever benefits mandated disclosures may offer,” they say, “mandates are unjustifiable if their costs outweigh their benefits.”¹¹ This, then, appears to be a normative claim grounded in cost-benefit analysis, a staple tool of consequentialist normative systems such as the welfarism typical of the economic analysis of law.¹² Professor Craswell—no stranger to this mode of thinking—goes so far as to explicitly adopt such cost-benefit analysis as his normative criterion for assessing the justifiability of disclosure mandates and alternative consumer protection regimes.¹³ So all three authors would appear to be willing to defend (or assume) something like a welfarist normative framework as superior to the autonomy-based framework they all seem to dismiss. As such, they would have us quantify both the benefits and the costs of disclosure, and then net them against each other. Importantly, these are two separate steps, and the separation between them complicates the normative framework Ben-Shahar, Schneider, and Craswell would have us adopt.

II. CAUSATION, COSTS, AND BENEFITS

Assuming that a welfarist framework applied through cost-benefit analysis is in fact the most defensible one, how might it lead to a conclusion that mandated disclosure fails? Presumably a legal regime will “fail” cost-benefit analysis if it leads to benefits that are too small relative to its costs, which are relatively too large, all measured against some relevant baseline. And on the benefit side, Professors Ben-Shahar and Schneider have assembled an impressive array of evidence and analysis that ought to convince us that mandated disclosure very often fails to completely achieve ends they have set for it—the avoidance of harms to naïfs through the improvement of the naïfs’ decisionmaking.

But the absence of total success is not the same thing as failure. As Professor Craswell points out, there may be other “dynamic” benefits to disclosure—such as providing sophisticates incentives to alter their

11. Ben-Shahar & Schneider, *supra* note 1, at 735.

12. See Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHILOS. 463, 468 (1979) (defining the moral criterion of welfarism as “[t]he judgment of the relative goodness of alternative states of affairs must be based exclusively on, and taken as an increasing function of, the respective collections of individual utilities in these states”); see generally Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001) (a description and defense of a welfarist approach to legal policy from two prominent figures in the economic analysis of law).

13. Craswell, *supra* note 2, at 349–50.

behavior vis-à-vis naïfs¹⁴—which Ben-Shahar and Schneider systematically ignore.¹⁵ Moreover, even the “static” benefit of improved decisionmaking appears to be more common than one might conclude after reading Ben-Shahar’s and Schneider’s Article.¹⁶ And indeed, they concede that mandated disclosure does not always generate zero benefits—that in fact sometimes it does achieve the goal of improving disclosees’ decisionmaking, at least partially. For example, in contexts where at least some disclosees are themselves relatively sophisticated, Professors Ben-Shahar and Schneider concede that disclosure can “produce[] a desirable effect” not only for these sophisticated disclosees but for naïfs as well. These contexts—securities markets, hospital disclosures to insurers, and environmental disclosures to government agencies—arise when the responses of sophisticated disclosees have positive spillover effects for less sophisticated disclosees, increasing the magnitude of mandated disclosure’s aggregate benefits.¹⁷ So the allegation of failure at least excludes these contexts, which Ben-Shahar and Schneider claim are “few and far between.”¹⁸

In other contexts, however, the failure alleged seems to lie not in the *absence* or *rarity* of improved disclosee decisionmaking, but in the *identity* of disclosees whose decisionmaking is improved. Here, Professors Ben-Shahar and Schneider claim that mandated disclosure generates “inequity” by benefiting more sophisticated disclosees but not more naïve ones—it helps those who least need it, they say.¹⁹ Perhaps Professors Ben-Shahar and Schneider intend this argument to establish that the magnitude of a disclosure’s benefits is relatively small, but the use of the term “inequity” implies some type of distributive criteria that I will explore further below.²⁰ And of course, embedded in even this argument against mandated disclosure is an admission that cuts against the overall claim of failure: disclosure does in fact improve the decisionmaking of at least some (relatively more sophisticated) disclosees.²¹

So if mandated disclosure is “failing” despite at least partial achievement of the goals Professors Ben-Shahar and Schneider have set

14. *Id.* at 354–72.

15. *Id.* at 370.

16. *Id.* at 335 & nn.4–5.

17. Ben-Shahar & Schneider, *supra* note 1, at 732.

18. *Id.*

19. *Id.* at 740–42.

20. See *infra* Parts III–IV.

21. Ben-Shahar & Schneider, *supra* note 1, at 740.

for it, we face one of two possibilities. The first is that the accusation of failure rests on a view that the perfect is the enemy of the good—that anything short of total success is rightly considered a failure.²² I do not understand them to be making this argument. Instead, I believe they are arguing the second possibility: that whatever successes mandated disclosure has in achieving the goals set for it are outweighed by other undesirable features of mandated disclosure regimes—their costs. If we are to accept this claim, we must identify these undesirable features, assess what makes them undesirable, and understand how we are to weigh them against mandated disclosure's admitted successes.

Professors Ben-Shahar and Schneider extensively document the significant pecuniary and other burdens disclosure mandates impose on *disclosers*—even well-meaning ones—as well as on *policymakers* charged with implementing the regimes.²³ But these costs, by assumption, ultimately flow from an attempt to influence disclosees' behavior—to improve their decisions. And it is precisely the complexity of human cognition and decision-making behaviors that renders formulation of and compliance with disclosure mandates so costly to those who engage in it.

Figuring out how to provide information that will improve disclosees' decisionmaking, and then providing that information in useful ways, is exceedingly and perhaps impossibly difficult. This is so because disclosees' inherent *capacity* to improve their decisionmaking by incorporating new information is sharply limited. Ben-Shahar and Schneider ably review relevant limits on discloser capacity, framing them on the one hand as costs of disclosure regimes to disclosees themselves in time, attention, and effort, and on the other hand as obstacles to realizing benefits from disclosures such as limited cognitive capacity and forms of cognitive bias.²⁴

But these features of discloser decisionmaking are not really “costs”—that is, results—of mandated disclosure regimes; they are the root *cause* of any alleged disparity between costs and benefits. If the benefits of disclosure are low it is because many disclosees lack the capacity to realize those benefits; if the costs are high it is because inherent limits on discloser capacity make it difficult to attain the end we have set for mandated disclosure—the improvement of discloser decisions. In short, the source of mandated disclosure's “failure”—if

22. See also Craswell, *supra* note 2, at 338 (“Set the bar for success high enough, and every disclosure is a failure.”).

23. Ben-Shahar & Schneider, *supra* note 1, at 679–704.

24. *Id.* at 704–29.

indeed the allegation of failure rests on an assertion that disclosures' costs exceed their benefits to sophisticated disclosees—lies in the nature of disclosee decisionmaking itself.

III. *CUI BONO?*

Putting disclosee decisionmaking at the center of the problem of mandated disclosure complicates not only Professors Ben-Shahar's and Schneider's critique, but also Professor Craswell's efforts to partially rebut that critique. This is because the messiness of disclosee decisionmaking necessarily displaces the fundamental normative principle underlying their analyses—welfare-maximization—with other, less quantifiable normative principles that ultimately collapse into the autonomy principle all three authors attempt to elide. It forces us to choose winners and losers not by reference to costs, but by reference to judgments about moral responsibility for our own cognitive capacities.

To understand why, we can begin with Professor Craswell's effort to formalize what we mean by “improved” decisionmaking—an effort Professors Ben-Shahar and Schneider never take up. Improvement—in Professor Craswell's view—lies in the correction of decision-makers' erroneous beliefs. Thus, where a product quality has an objective value s , a disclosure will improve disclosees' decisionmaking if it moves their own subjective assessment of that value, r , closer to s than it would have been absent the disclosure.²⁵

This framing of the criterion of improvement is problematic for two reasons. First, it assumes that r deterministically affects a consumer's decision to purchase a product.²⁶ And second, it treats all consumers as if both their assessments of r and the function according to which they translate r into a purchasing decision are the same.²⁷ Professor Craswell's model requires these assumptions to be mathematically tractable, and such assumptions are exceedingly common in the economic analysis of law. But when analyzing a legal regime whose key feature is the limits of human cognition and decisionmaking, these types of assumptions obscure far more than they clarify.

This is because both assumptions are demonstrably false, as

25. Craswell, *supra* note 2, at 340–42.

26. *Id.* at 381 (assuming that where consumers know the actual value of s , they “respond to sellers' choices by choosing the quantity they purchase”); *id.* at 382–84 (adding the complication of a divergence between consumers' subjective estimate of s and its true value).

27. *Id.* at 381 (assuming for purposes of the model that all consumers are the same in all respects).

Professors Ben-Shahar's and Schneider's analysis—particularly their discussion of inequity²⁸—suffices to demonstrate. This might not be a grievous fault if the assumptions had a trivial effect on the outcome of the analysis—if they provided a good enough approximation of actual behavior to generate useful results.²⁹ But not only are the assumptions false, they are false in a way that can make a qualitative difference in our assessments of the costs and benefits of a legal regime that purports to influence human decisionmaking.

Divergences from the rational decision-making behavior Professor Craswell's model assumes are common, but heterogeneously distributed. In particular, cognitive biases and other cognitive limitations are not equally exhibited across persons, nor even by the same person across time and situations.³⁰ They are probabilistic rather than deterministic—distribution curves rather than linear relationships or binary switches—and they are subject to change with iteration.³¹ This does not simply make it difficult to determine the magnitude of any increase in welfare attributable to an improvement in discloser decisionmaking, it also means that the magnitude and even the sign of the *aggregate effect* of a disclosure on disclosers' decisions (and thus their welfare) depends heavily on the *distribution* of cognitive capacities in the population of disclosers and across time.

Turning again to Professor Craswell's model, imagine that r is not a theoretically ideal discloser's estimate of s but rather a parameter representing the estimate of each actual discloser. Suppose further that there are two classes of disclosers: naïfs and sophisticates. For the sophisticates, a particular disclosure may move r closer to s , while for the naïfs a disclosure actually moves r farther from s , though within each class the degree of this effect may vary around the class mean. In this

28. Ben-Shahar & Schneider, *supra* note 1, at 740–42.

29. Richard A. Epstein, *Second-Order Rationality*, in BEHAVIORAL PUBLIC FINANCE 355, 357 (Edward J. McCaffery & Joel Slemrod eds., 2006).

30. See generally Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 (2002).

31. For example, learning from one's own mistakes, or those of other disclosers, could theoretically make mandated disclosures more effective over time. Cf. Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111, 113–15 (2006). Indeed, there is at least some evidence that they do. Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 811–13 (2008) (citing Sumit Agarwal et al., *The Age of Reason: Financial Decisions over the Lifecycle* (Mass. Inst. of Tech. Dep't of Econ. Working Paper Series, Working Paper No. 07-11, 2007), available at <http://ssrn.com/abstract=973790>). However, there is also evidence that sometimes individuals show considerable resistance to learning, as I have previously discussed in the consumer context. Jeremy N. Sheff, *Biasing Brands*, 32 CARDOZO L. REV. 1245, 1284–95 (2011).

case, the aggregate effect of disclosure *just on disclosers themselves* would depend significantly on the relative size of each class of discloser and the discrete effect of the disclosure on each class—that is, on the distribution of cognitive capacities.

There is certainly reason to believe that this hypothetical is a more accurate description of actual human cognition than Professor Craswell's mathematical model. Indeed, in Professor Craswell's response, he notes a study that shows that disclosures of information appear to increase the accuracy of some discloser beliefs even as they appear to decrease the accuracy of other, related beliefs.³² The study does not reveal whether the same disclosers experienced these different effects, or rather whether some disclosers' experienced a pure benefit or a pure harm from the disclosure in terms of the accuracy of their beliefs.³³ And of course, for many disclosers there was likely no effect at all.³⁴ Similarly, some studies appear to show that disclosures merely exaggerate preexisting differences in the quality of decisions that members of the discloser population make. For example, the effects of a disclosure that the claims in advertisements for a nutritional supplement “have not been evaluated by the [FDA]”³⁵ appear to be somewhat correlated to education levels.³⁶ Holding these constant, such a disclosure appears to have no effect on disclosers' belief in the veracity of an advertisement's health claims, which are more likely to be believed by those with a higher background trust in government or a higher belief in the efficacy of nutritional supplements generally.³⁷

The interaction between the distribution of cognitive capacities and the distribution of costs and benefits of mandated disclosure regimes greatly complicates the task of normatively justifying those regimes, even before we come to the point of netting disclosure's effect on disclosers against the costs of disclosure to others. In the first instance, it means the welfarist must jettison Paretian criteria of justification in favor of something more like Kaldor-Hicks efficiency.³⁸ Once we do this, we

32. Craswell, *supra* note 2, at 348–50 (citing Cornelia Pechmann, *Do Consumers Overgeneralize One-Sided Comparative Price Claims, and Are More Stringent Regulations Needed?*, 33 J. MARKET RES. 150 (1996)).

33. Pechmann, *supra* note 33, at 157–58, 158 tbl.3.

34. *See id.*

35. 21 C.F.R. § 101.93(c)(2) (2012).

36. *See* Karen Russo France & Paula Fitzgerald Bone, *Policy Makers' Paradigms and Evidence from Consumer Interpretations of Dietary Supplement Labels*, 39 J. CONSUMER AFF. 27, 35–37, 46 (2005).

37. *Id.*

38. Lewis Kornhauser, *The Economic Analysis of Law*, in THE STANFORD ENCYCLOPEDIA OF

are faced with the task of trying to reduce the potentially incommensurate values held by admittedly heterogeneous subjects of the legal regime to a single cardinal metric. In doing so, we must of necessity make normative judgments regarding the appropriate weight to be given to the subjective values held by particular subjects or classes of subjects of the regime in question—judgments with which at least some holders of those subjective beliefs are likely to disagree.³⁹ Finally, adding in the costs to policymakers and disclosers requires these normatively fraught exercises to be repeated all over again.

As I noted above,⁴⁰ cost-benefit analysis entails two steps: assigning valuations and then summing them. Valuation necessarily precedes aggregation, and it is an inescapably normative and indeed distributive exercise. Professor Craswell seems to recognize this facet of cost-benefit analysis as a genuine theoretical difficulty,⁴¹ whereas Professors Ben-Shahar and Schneider seem to be content to use it as simply more ammunition against disclosure mandates.⁴² But the fact remains that some disclosees will very likely benefit from whatever disclosure is mandated; like their disclosers they can now be considered sophisticated, as contrasted with the naïfs who fall on the wrong side of the cognitive distribution and do not benefit from (or are injured by) the disclosure in question.

Indeed, all disclosure mandates impose some costs on one or more segments of society. We are operating under the assumption that they do so in order to shift some other segment from the category of naïfs to the category of sophisticates—from those who make what we would consider “bad” decisions to those who make what we would consider “good” (or at least “better”) decisions. And so in setting and implementing such a mandate, policymakers and disclosers are inevitably—even if unintentionally—choosing a point on the continuum

PHILOSOPHY (Edward N. Zalta ed., 2011), <http://plato.stanford.edu/archives/fall2011/entries/legal-econanalysis/> (identifying cost-benefit analysis with Kaldor-Hicks efficiency); Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153 (2000) (same).

39. Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CALIF. L. REV. 815, 833–35 (1990).

40. See *supra* note 13 and accompanying text.

41. Craswell, *supra* note 2, at 350 (“[H]ow we value any improvement (or any decline) in the accuracy of consumers’ beliefs is a question that cannot be answered by mathematical calculations. Instead, it requires a fundamental value judgment about the importance of a better- or worse-informed citizenry compared to the value of other uses to which the money might otherwise have been put. Cost-benefit analysis is a useful way to highlight the importance of these value questions, but it does not always provide an uncontroversial way of answering them.”).

42. See *supra* note 19 and accompanying text.

of capacities at which the naïfs will be separated from the sophisticates. When we ask whether the benefits to those disclosees justify the costs, then, we are inevitably asking whether we have drawn this line in the right place. But where a legal regime performs such a sorting function based on *capacities* rather than *preferences*, cost-benefit analysis of the regime ceases to be an optimization exercise and takes on more nakedly normative and distributive dimensions.

IV. COGNITIVE DIFFERENCES AND POSITIONAL PREFERENCES

We cannot decide where to draw the line between naïfs and sophisticates without taking a position on debatable normative questions that are independent of any concern for efficiency. For example, consider that for many individuals, positional preferences may be a stronger determinant of subjective welfare than absolute preferences.⁴³ Any cost-benefit analysis—i.e., any judgment concerning a policy choice's *efficiency*—must therefore inevitably decide how to weigh, for example, the absolute preferences of those in a relatively better position against the positional preferences of those in a relatively worse position.⁴⁴ Professor Hovenkamp helpfully illustrates the point:

Is there much doubt, for example, that a woman's sense of well-being may be affected not merely by her absolute earnings, but also by whether she earns the same amount as a male performing the same work? That a black school child's sense of well-being depends not merely on the absolute quality of his educational opportunities, but also on how those opportunities compare with those of white children? That taxpayers are concerned not merely with the absolute amount they must pay, but also with their relative burden compared to others?⁴⁵

As a society we have taken a normative stance on these types of positional preferences, particularly those grounded in, for example, gender and race. But that normative stance seems to have little to do with a cardinalized comparison of the positional and absolute preferences of those subject to our legal regimes and more to do with

43. See generally Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009); Lior Jacob Strahilevitz, *Absolute Preferences and Relative Preferences in Property Law*, 160 U. PA. L. REV. 2157 (2012).

44. See Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913, 921–27 (2000) (discussing the challenge of measuring positional preferences and incorporating them into cost-benefit analysis).

45. Hovenkamp, *supra* note 39, at 837 (footnote omitted).

moral claims regarding the appropriate bases for distributional differences—claims typically grounded in understandings of dignity, moral agency, and desert.

To these familiar examples of social inequality we may now add the relatively novel dimension of cognitive inequality, and see whether it invokes similar normative commitments regarding distribution. When attempting to calculate the social utility that a mandated disclosure generates as part of some cost-benefit analysis, we will inevitably have to answer uncomfortable questions. Specifically, we must discuss whether and how we ought to weigh the negative utility that naïfs realize—by virtue of being in an inferior *position* relative to sophisticates—against the absolute losses to the sophisticates that would attend any effort to improve the naïfs' relative position through law.

Given the examples of mandated disclosure regimes discussed by Professors Ben-Shahar and Schneider, we can thus add to Professor Hovenkamp's list the credit-worthy borrower who realizes she got a more expensive mortgage than her equally credit-worthy neighbor,⁴⁶ the cable television consumer who discovers he is barred from joining the class action begun by another customer of the same cable company,⁴⁷ and the patient who died of a disease others avoided by undergoing a screening procedure she mistakenly believed to be unduly risky.⁴⁸ One question we might ask ourselves is whether these examples trigger the same moral intuitions as the examples offered by Professor Hovenkamp.

The answer to that question is not so clear, which is in itself interesting. We may very well be more willing to impose costs on, for example, the less careful and capable reader compared to the more careful and capable one *by virtue of his lack of care and capacity* than we are on, say, the female employee over the male one by virtue of her gender, or the black school child over the white one by virtue of his race. And this points to a feature of mandated disclosure regimes that Professors Ben-Shahar and Schneider discuss only in passing⁴⁹: mandated disclosure can have the effect of apportioning moral responsibility for the injuries that befall the vulnerable onto the injured

46. Ben-Shahar & Schneider, *supra* note 1, at 665–67.

47. *Id.* at 741.

48. *Id.* at 667–70; *cf. id.* at 682.

49. *Id.* at 746 (“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 in-expert 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.”).

themselves. Given that the enactment and tailoring of a disclosure regime inevitably involve deciding where to draw the line between sophisticates and naïfs, we must recognize that these regimes inevitably imply a choice regarding the *appropriate* apportionment of moral responsibility for the consequences of what we might consider “bad” decisions. For some—the legislator who feels his obligation to respond to an injustice can be discharged by voting for a disclosure mandate, for example⁵⁰—disclosure may well provide a plausible basis to justify certain distributive choices, even to the losing end of the distribution.

Such justification may seem more plausible in the case of disclosure than in the case of other types of distributive choices precisely because the heterogeneity that generates the need for distributive choices—heterogeneity in cognitive capacities—is a form of difference that we may tend to think is more within the control of moral agents than other forms of difference such as race or gender. “If you had been more careful, tried harder, or”—more problematically given the cost of education—“gotten a better education, perhaps you would have avoided the harm that has befallen you,” we might say. The unspoken subtext, of course, is: “Because you could have—indeed, *should* have—avoided the harm yourself, I am not morally responsible for it.”

V. BRINGING MORAL DISCRIMINATION TO THE FORE

I should say that I do not believe proponents of mandated disclosure themselves see this type of moral discrimination as a purpose of the regimes they espouse—at least not consciously. Nor do I claim that moral agents do in fact have more control over the types of capacities that can determine whether mandated disclosures will “work” for them than they have over other types of differences such as race or gender. Rather, I think this feature of mandated disclosure—its potential to serve as a moral salve and even a moral license—may well be a deep and underappreciated foundation underlying most regulatory regimes that are directed at human decisionmaking. As Professor Craswell notes, disclosure mandates do not exist in a vacuum. Rather, they are one of a range of policy actions—or inactions—that might be adopted in response to the kinds of “trouble stories” that, in Professors Ben-Shahar’s and Schneider’s telling, currently tend to generate new disclosure mandates.⁵¹

50. *Id.* at 684 (“In short, when lawmakers are besieged, mandated disclosure looks like rescue. Its critics are few. Lawmakers can be seen to have acted.”) (footnote omitted).

51. Craswell, *supra* note 2, at 372–79.

Whenever we adopt a regulatory tool with the hope of influencing individual decisionmaking—be it a disclosure mandate, or an alternative such as a “nudge” or a change in architecture⁵²—we are inevitably engaging in a distributive exercise across individuals who are heterogeneous not just in their preferences, nor even in their contributions to aggregate social utility, but also in their capacities.⁵³ My claim is simply that this exercise necessarily entails judgments about the relationship between capacities and moral desert, and that those judgments are antecedent to any analysis of the costs and benefits of the regime. Whatever regime we adopt, we are acknowledging and accepting that some naïfs will still suffer as a result of decisions they make when interacting with sophisticates. Even where we purport to justify this result on a comparison of costs and benefits, we must necessarily do so by ascribing some values to those costs and benefits that those whose interests will be affected might legitimately disagree with. When we do so, we necessarily reject those alternative valuations.

It seems to me that the only basis for rejecting these alternative valuations is that we believe those proffering them are attempting to shift costs onto others that they *ought* to bear themselves. But where those “costs” are the consequences of the distribution of cognitive capacities, a claim grounded in welfarism that those on the losing end of the distribution *ought* to bear the costs is meaningfully different from the classic cheapest-cost-avoider analysis⁵⁴ that asks whether, say, a railroad company or a farmer *ought* to bear the risk of an accidental fire.⁵⁵ The claim does not rest on a comparison of any social utility deliberately produced, consumed, or foregone by the subjects of the legal regime. Rather, it reduces to the proposition that those who end up on the wrong side of the divide between naïfs and sophisticates are *more responsible* for the consequences of their naïveté than the designers and the other subjects of the regime that drew the line in the first place. This is, to put it mildly, an audacious and highly contestable claim in any context. Yet it is precisely such a claim that is inherent in any legal or regulatory regime that aims to influence human decisionmaking against a

52. See generally LAWRENCE LESSIG, CODE: VERSION 2.0 (2006); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

53. On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098, 2123–24 (2008).

54. GUIDO CALABRESI, THE COST OF ACCIDENTS 135 (1970).

55. See generally *Leroy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry.*, 232 U.S. 340, 352–54 (1914) (Holmes, J., concurring in part); R. H. COASE, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 28–34 (1960).

background of heterogeneous capacities.

My co-panelists for this symposium offer helpful illustrations of this principle. In the entertainment context Professor Said discusses, we might argue about how to value sophisticates' enjoyment of an uninterrupted, immersive entertainment experience against the effects of sponsorship disclosures on those naïfs who might benefit from them.⁵⁶ But it would be foolish for us to expect the two groups affected by our legal regime to agree on how to do so. Instead, resolution of the question is likely to turn on normative judgments about the appropriateness of sophisticates enjoying an aesthetic experience at the expense of naïfs who run out to buy the latest sponsoring product without understanding how they have been influenced. To take the extreme case, an outright ban of tobacco product placements in entertainment products that might be consumed by minors may strike us as a superior alternative to disclosure of those placements, but I doubt the primary reason for that judgment rests on cost-benefit analysis. Or to the extent it does, it can only do so because we weigh the costs to a particular set of naïfs—children—particularly heavily due to our assumptions about their responsibility for the choices they make in response to marketing embedded in entertainment.

In the online context Professors Hartzog and Stutzman discuss,⁵⁷ we might similarly argue about how to value the costs of designing and imposing alternative regimes grounded in technological and architectural features rather than regulation,⁵⁸ and how to quantify the relative benefits to internet users of privacy regimes as opposed to obscurity regimes.⁵⁹ But the outcome of these exercises is extremely likely to turn on normative judgments about what circumstances justify subjecting the user of such networks to the consequences of their oversharing. This may have less to do with the costs of prophylactic architecture or disclosure than with other circumstances that are morally relevant to allocation of costs—for example, whether we think it is right that a human being be defined for the rest of their lives by the least prudent thing they ever did as a teenager in possession of a camera phone.

I use the emotionally charged example of minors in these two scenarios to drive home the point: the distributive, and hence, moral

56. Zahr K. Said, *Mandated Disclosure in Literary Hybrid Speech*, 88 WASH. L. REV. 421, 458–66 (2013).

57. Woodrow Hartzog & Frederic Stutzman, *Obscurity by Design*, 88 WASH. L. REV. 385 (2013).

58. *Id.* at 402–18.

59. *Id.* at 390–402.

implications of heterogeneous capacities loom large in all contexts, for all disclosure regimes and for all possible policy alternatives. I would encourage us to take them as the *starting point* in our regulatory design rather than obscure them in the footnotes of a cost-benefit calculation that can only be performed after making far more difficult normative commitments.

CONCLUSION

Moral comparisons among the subjects of a legal regime are inherent in any cost-benefit analysis that evaluates the effects of the regime on a population with heterogeneous cognitive capacities. Drawing such comparative judgments and imposing their inevitable distributive consequences is bound to be an uncomfortable task for a policymaker in a pluralist society with liberal democratic ideals—it evokes all the destabilizing power struggles of Cicero's *optimates* and *populares*,⁶⁰ of Nietzsche's masters and slaves.⁶¹ But the discomfort of facing these distributive choices is no excuse for pretending we are not making them. If we think that disclosure mandates are failures, it must be not only because they are costly but also because those who *do* benefit from the disclosures *ought not benefit* at the expense of others who will bear the cost. Conversely, if we conclude they are successful, it will only be because we think the naïfs who benefit *ought* to be protected at the expense of others. These normative dimensions of policy design will present themselves in any legal regime that purports to influence human decisionmaking against a backdrop of heterogeneous capacities—which is to say, nearly every legal regime. As we continue to learn more about the nature and limits of our own decisionmaking capacities, we will have to become more comfortable answering the types of normative questions this type of policy-making forces on us.

60. CICERO: SPEECH ON BEHALF OF PUBLIUS SESTIUS 32 (Robert A. Kaster trans., 2006).

61. See generally FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge University Press 1994).