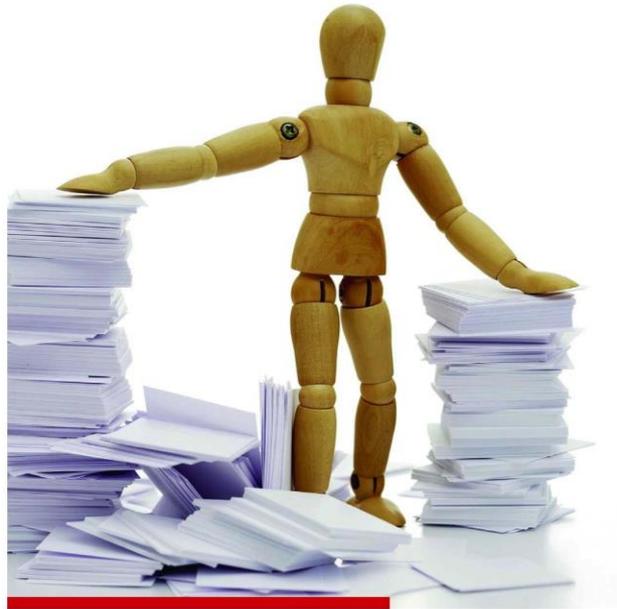# Beyond Disclosure:
a New Approach to the Regulation of Consumer Data

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. . . Where I'm coming from (1)

More Than You Wanted to Know:
The Failure of Mandated Disclosure

MORE THAN
YOU WANTED
TO KNOW

The Failure of Mandated Disclosure

OMRI BEN-SHAHAR
CARL E. SCHNEIDER

The Failure of Mandated disclosure

Failure to inform people

Failure to improve decisions

Failure to deter wrongdoing

Failure to improve overall welfare

Harmful to the weakest populations

Why Disclosures Fail

- Literacy and Numeracy

- Overload

- The "Accumulation Problem"

- Decision Aversion

- Behavioral biases

. . . Where I'm coming from (2)

The "new disclosurism":

Make Disclosures Simple!

The "Make-Disclosures-Simple" Drive

Simple mortgage disclosures
Simple credit card "nudges"
Simple consumer contracts
Simple consent forms
. . .
Simple privacy notices

SIMPLE~~R~~

THE **FUTURE** OF **GOVERNMENT**

CASS R. SUNSTEIN

Bestselling coauthor of *NUDGE*

Reasons to be skeptical (1): Theory

Failure is due to complexity of the decision problem

How can you simplify the complex?

U.S. Federal Reserve:

To choose a mortgage, you need to understand "indexes, margins, discounts, caps on rates and payments, negative amortization, payment options and . . .most importantly. . . what might happen to your monthly mortgage payment in relation to your future ability to afford higher payment."

Reasons to be skeptical (2): Experience

Simplification had long history of failure (securities disclosures, food labeling, consumer credit disclosures)

Reasons to be skeptical (3): Evidence

Ben-Shahar & Chilton, JLS 2016: no effect to simple privacy notices (lab experiment)

FTC Report: Protecting Consumer Privacy in an Era of Rapid Change

Transparency:

"present choices to consumers in a prominent, relevant, and easily accessible place. . . ; make privacy statements clearer, shorter, and more standardized; and undertake consumer education efforts to improve consumers' understanding of how companies collect, use, and share their data.

Warning Label

WARNING
Unexpected Terms

We **share data with commercial health insurance companies** that partner with us in developing the data-driven application.

We **collect additional information about you** from other public and private data sources and link them to your provided personal information.

We collect personal information that can **identify users through our online interaction** with their computer.

We **retain information indefinitely**.

We encourage our partners to take high security measures in storing users data, but we are **unable to verify their security practices**.

Where I'm headed . . .

"Data Pollution":
a new framework for the law of data protection

Main Argument

- Big Data runs the digital economy but also causes harms that are public in nature – negative externalities. I call them "Data Pollution"

- Privacy protection does not capture this problem, because it focuses on harms to the individuals whose data is taken, not on harm to others

- Data pollution is similar to industrial pollution and therefore environmental law offers a useful framework – explaining which legal solutions do not work, and how to design effective regulation

Data's Public Harm

- Harm to social environments, political and informational ecosystems
- Harm to private interests of other individuals
- Precaution/insurance externality

Futility of Private Law Solutions

Private law solutions to data pollution are ineffective for **exactly the same reasons** they failed to control industrial pollution

- Contracts
- Torts
- Mandated Disclosure

Regulatory Solutions for Data Pollution

An "environmental law" for data protection

1. Prohibitions
2. Data Tax
3. Liability for exposure

1. Prohibitions

- Quantity Restrictions (GDPR)
  - "Data minimization," purpose limitations
  - Restrict data transfers
  - Data localization

Problem: data also creates (huge) positive externalities

"Solutions": ad-hoc permit regime; "best available technology" standards; focus on "toxic" data

2. Data Tax

- Pigouvian solution, similar to carbon tax
- People's choice to use cash versus data as the currency for buying digital services is distorted, and a tax can correct it
  - o Step 1: small nominal tax
  - o Step 2: increasing marginal tax
  - o Step 3: tax reflecting sensitivity of data; necessity of collection

3. Liability for Data Spills

- Post-leak public disclosures are largely useless
- Ex Post Liability for exposure
  - "Emissions" fine equal to expected harm
  - Market share solutions
- Mandatory Liability Insurance
  - Cyber-insurers regulate prevention measures
  - Premiums inform policyholders about cost of data collection

In sum:

Digital data law should not be only about privacy

A data pollution problem exists, and it is not addressed by existing data privacy regulation

See: Omri Ben-Shahar, *Data Pollution*,

        11 Journal of Legal Analysis 104 (2019)