TEXT ANXIETY

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I.

My thesis is that consumers who are faced with the dense text of form contracts characteristically respond by refusing to read, and that it is reasonable for them to do so. I will develop this thesis partly through a critique of Grether, Schwartz, and Wilde's paper, The Irrelevance of Information Overload: An Analysis of Search and Disclosure, which seems to take a different view.

II.

At the outset of their paper, Grether, Schwartz, and Wilde define as their target the concept of "information overload":

Some believe that consumers make incorrect decisions when they are required to process too much information. The idea here is that consumers do well with moderate amounts of data but poorly when data sets become large. In the words of a leading advocate of this view, consumers' "limited processing capacity can become cognitively overloaded if they attempt to process 'too much' information in a limited time, and this can result in . . . 'poorer decisionmaking.' " This phenomenon has a name, "information overload," and it is our subject.¹

Having defined their target, Grether, Schwartz, and Wilde introduce a model of consumer search. A product, they point out, can be defined as a set of attributes. Consumers may search for products by using "compensatory" or "noncompensatory" strategies. A compensatory

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strategy permits a product's high scores on some attributes to compensate for low scores on others. A noncompensatory strategy does not. According to the model, consumers often combine these strategies in a two-stage search. In the first stage, consumers use a noncompensatory strategy. Under this strategy, the consumer first identifies those product attributes that are very important to him. He next decides how high a product must score on each of those attributes to be acceptable—a process referred to as setting cutoff levels. The consumer then inspects a set of comparable products, such as toasters, and eliminates those that fail to score above cutoff levels on the selected attributes, thereby producing a subset for final consideration at the second stage. At the second stage, the consumer switches to a compensatory strategy, in which he chooses from the subset by scoring products on all salient attributes and allowing low scores on some attributes to be compensated by high scores on others.2

Grether, Schwartz, and Wilde then argue, partly on the basis of the model and partly on the basis of experiments conducted by Grether and Wilde and by Malhotra, that consumers do not overload.3 They also arrive at several intermediate conclusions. Among those are:

1. When choice sets are simple, people are good at making decisions that are in their own best interests.4

2. When the problems faced by the subjects in the Grether and Wilde experiments were relatively simple, the subjects did well. When the choice task became complex, they did less well.5

3. Disclosure reduces the cost of observing product attributes where the cost of direct inspection is too high. Therefore, even if the overload phenomenon is real, it would not raise a problem with disclosure as such, but only with disclosure that increases rather than reduces search costs.6

So far, so good. The two-stage model of consumer search seems useful and descriptively accurate over a fair range of cases. The intermediate conclusions set out above are carefully stated and supported by the

2. Id. at 281-82.
3. Id. at 278-79.
4. Id. at 299.
5. Id.
6. Id. at 288.
authors’ evidence. And it does seem unlikely that consumers systematically overload, at least in any sense that would have serious legal implications. To overload, as Grether, Schwartz, and Wilde use the term, is to attempt to process too much information in a limited time. All of us do this occasionally, as a result of misjudgment, but only an irrational or foolish person would do this regularly. There is no reason to believe that consumers are systematically either irrational or foolish.

III.

That consumers do not overload is hardly the end of the story. Consumers may respond to too much information not by overloading, but by refusing to load any information at all. Thus in certain cases too much information could be harmful to consumers because it could unduly raise the costs of observing the information in which they are interested. To adapt an example provided by Grether, Schwartz, and Wilde, suppose some consumers of product J want to search only attributes a, b, and c. Firms that produce J publish a pamphlet containing information not only on a, b, and c, but on d, e, and f. Although the search cost for consumers interested in d, e, and f is reduced, the search cost for consumers interested only in a, b, and c is increased, because they must read through the entire pamphlet to find what is relevant to them. If the cost of their search increases sufficiently, they may end up not even reading about a, b, and c, so that providing information on d, e, and f would actually reduce the amount of information that consumers process. As I shall show, this problem is especially salient in the case of dense-text form contracts.

Grether, Schwartz, and Wilde recognize that “when the information environment becomes very rich . . . relative to the consumer’s available time or expertise,” the consumer may end up choosing a product other than the product he would have most preferred if he had been able to acquire and adequately process all relevant information. They recognize too that normative questions are raised by this possibility. One of these questions is whether the gap between what a consumer gets and what he would have most preferred to get if he had been able to acquire and adequately process all relevant information is often large enough to justify regulatory concern.

7. Id. at 278.
8. Id. at 286.
9. Id. at 287.
10. Id.
Grether, Schwartz, and Wilde conclude that the answer to the last question is no. Furthermore, they extend their analysis to suggest that the law should not be concerned about the complexity of modern form contracts. This extension is reflected in the following assertions:

1. The analysis applicable to consumer search for products applies as well to consumer search for contract terms.\(^{11}\)
2. The best inference from the evidence is that consumers do not experience serious problems as a result of the amount of information that markets now generate.\(^ {12}\)
3. The evidence suggests that consumers are not seriously disadvantaged by their failure to choose the product they would most prefer as a result of the cost of processing information.\(^ {13}\)
4. The only experiments (presumably, those of Grether and Wilde and of Malhotra) that directly explore the problem of failure to apply an optimal search strategy because of an excessively high cost of processing information suggest that this problem should seldom cause consumers to buy products that are very far from their ideal. Unless further experiments alter this conclusion, this problem therefore should not be thought to justify regulatory intervention.\(^ {14}\)

These assertions—which I will call the density-irrelevance theses—are unsupported by the authors' evidence. There are two basic reasons why this is so. The first has to do with the mechanics of the experiments that Grether, Schwartz, and Wilde rely upon. It would be tedious to repeat all the details of these experiments here, but a few words are required. Essentially, the experiments involved apparatus such as bingo cages with numbered balls, and cards describing imaginary houses; "products" consisting of lotteries with two to five attributes and of imaginary houses with five to fifteen attributes; and student subjects playing for cash payoffs. These conditions obviously vary substantially from real life. For example, the experiments typically involved only a few alternative "products" with only a few attributes each. In real life, however, consumers are often faced with a large number of alternative products, each of which has a large number of attributes. Indeed, the experiments themselves suggest that there is a precipitous decline in the ability of consumers to select their preferred product when more than a very few

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11. *Id.* at 281 n.7.
12. *Id.* at 294.
13. *Id.* at 279–80.
14. *Id.* at 294.
alternatives or salient attributes are involved. Thus in an experiment involving compound lotteries in which one attribute was salient, when alternatives and attributes were raised from two each to five each the rate of correct choice fell almost 30%, to a total of only 58%. Even more strikingly, when there were four alternatives and four salient attributes, the subjects did no better than chance16 These results provide scant support for assertions like, "the best inference from the evidence is that consumers do not experience serious problems as a result of the amount of information that markets and the state now generate."17

The second reason why the density-irrelevance theses are unsupported by the evidence is that Grether, Schwartz, and Wilde, and the experiments they rely upon, fail to distinguish between simple narrative text that discloses a product attribute other than a contract term, and dense form-contract text that both discloses and comprises a product attribute. The same consumer who is willing to read simple narrative text that discloses a product attribute (such as a list of ingredients) is often unwilling to read the dense text that comprises a form contract.

This unwillingness is not unreasonable. The average consumer knows that he probably will be unable to fully understand the dense text of a form contract, either term-by-term or as an integrated whole. Even experts often can't understand such text. During the oral argument of Gerhardt v. Continental Insurance Co.18 before the New Jersey Supreme Court, Chief Justice Weintraub looked at the insurance policy at issue and said, "I don't know what it means. I am stumped. They say one thing in big type and in small type they take it away." Justice Haneman added, "I can't understand half of my insurance policies." Justice Francis stated, "I get the impression that insurance companies keep the language of their policies deliberately obscure."19 When the consumer knows he probably will be unable to understand dense text, why should he read it? Reading text one can't understand is both extremely inefficient and emotionally frustrating. The consumer's reaction to the prospect of reading such text is therefore likely to be anxiety and avoidance. Bingo cages with numbered balls are fun. Cards describing imaginary

15. Id. at 297.
16. Id. In Malhotra's experiment, when subjects were given five alternatives with five attributes each, 83% chose correctly, but when they were given ten alternatives and five attributes each, 58% chose correctly. With ten alternatives and ten attributes, the probability of choosing correctly dropped to 50%. With fifteen alternatives and five attributes 83% chose correctly. Oddly, the authors note, with fifteen alternatives and ten attributes, 75% chose correctly. Id. at 295.
17. Id. at 294 (emphasis in original).
houses are fun. Games with cash payoffs are fun. Even shopping for a VCR or a car may be fun. Reading dense text is not fun. Consumers faced with such text have found a very simple way to avoid information overload. They don't load any information at all.20

Grether, Schwartz, and Wilde make an argument to close the gap between their evidence and the density-irrelevance theses. They suggest that experimental subjects did “less well”21 (to be more direct, very badly) when the choice task became “complex” (four salient alternatives and four attributes!) only because the subjects didn’t have at hand a simplifying strategy that consumers would normally employ.22 But what simplifying strategy is realistically available to a consumer faced with a choice between fifteen or twenty dense-text form contracts, each with thirty, fifty, or a hundred attributes? Surely not the strategy of the two-stage search model. That model assumes that consumers will initially determine what attributes of a product are important, screen a number of products by testing those attributes, and then consider all salient attributes at the second stage. Therefore, that model is inapplicable unless consumers (1) are aware of the significance of the attributes for which they are not screening at the first stage, (2) consider these attributes at the second stage if not the first, (3) screen some number of products at the first stage, and (4) compare some number of products at the second stage. In the case of dense text, none of these criteria are satisfied. Consumers are generally unaware of most of the attributes (provisions) of their most important contracts, are seldom in a position to understand the significance of these attributes even if they were aware of them, and rarely if ever search through a number of contracts at any stage.

Another strategy for closing the gap between the evidence and the density-irrelevance theses would be to argue that consumers do a good job for themselves in most cases. If that is so, why should it matter that consumers don’t always do a good job for themselves? Can’t the law be based on the great bulk of behavior? Sometimes it can, but often it can’t. Often, the very purpose of legal rules is to deal with the few problem

20. See Jacoby, Perspectives on Information Overload, 10 J. CONSUMER RESEARCH 432, 435 (1984). ("[T]o the extent that the amount of information available in the external environment makes it more difficult or more time consuming to reach a decision or—more importantly—makes it less likely that the consumer will attend to some critical information, such amounts of information can be said to be dysfunctional. The issue is thus considerably more subtle and complex than might be suggested by the relatively simplistic information overload paradigm.").


22. Id.
cases in a mass of properly ordered transactions. Consider tort and contract law. That most people drive carefully doesn't stop us from making rules to govern those who don't; that most people perform their contracts doesn't stop us from making rules to govern those that break them. In any event, it would be hard to accept the premise that consumers do a good job for themselves in choosing among form-contract provisions that they almost never read.

IV.

The implications of consumer anxiety and avoidance in the face of dense text are too numerous to fully explore in a short Comment like this. However, two such implications are worth mentioning. First, it is clear that the "duty to read" imposed by classical contract law had no connection to human reality in the case of dense-text form contracts. Second, legislatures might be well-advised to adopt standard provisions for crucial consumer contracts, such as insurance policies and leases, which would be subject to alteration by, but only by, provisions written in clear language and separately signed.23

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23. An analogy might be drawn here to Uniform Commercial Code § 2-205, which provides that if an offer for the purchase or sale of goods is made in a form supplied by the offeree, a provision that the offer is irrevocable is valid only if separately signed by the offeror. U.C.C. § 2-205 (1978).