PART I

The Concept

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Introduction

Who worries about the substance of the convoluted contract they sign when they buy a mobile phone? Or is kept awake late at night because Congress passed an omnibus bill that is 1,000 pages long that even the congressmen involved concede they do not understand? How much unintelligible or overwhelming information do we ignore every day – from the pages of safety warnings and instructional inserts in consumer products, to the convoluted boilerplate that permeates every aspect of American daily life?

The simple fact of the matter is that excessive, incomprehensible information is everywhere. Lawyers are particularly well acquainted with it. Unnecessary complexity and incomprehensibility complicate efforts to extract meaning from long, convoluted statutes; overwhelm more than a few advocates who try to participate in public rulemaking proceedings; and infiltrate corporate disclosures documenting various financial and environmental activities.

And, for the most part, we have become resigned to that situation. The incomprehensibility that infiltrates so many of our legal, economic, and even personal relationships is accepted as a given. We shrug our shoulders when large segments of the public sign legally binding contracts or are bombarded with intricate product warnings they can never hope to understand, or when participation in complicated rulemakings consists only of industry experts who have the resources to navigate the morass of technical details, without equally savvy public-interest representatives. The assumption is that this unrelenting torrent of undigested information pouring into the legal system is inevitable and unstoppable. And so, many of us – perhaps especially in the legal field – have become complacent. We accept that incomprehensibility is a necessary feature of our contemporary world and conclude that nothing can be done about it.

But it doesn't have to be this way. And in this book, we argue just the opposite – that to surrender to incomprehensibility is a bad mistake. Incomprehensibility is *not*

inevitable. Information overload is *not* just a force of nature or the price to be paid for entering the information age.

On the contrary, incomprehensibility is to some extent a self-inflicted wound that results from clumsy legal design. Legal architects have become quite adept, over the years, at devising rules that discourage privileged parties from hiding information. But they have neglected the corresponding imperative that this shared information must also be comprehensible and useful. Some of the deluge of incomprehensible information exists, in other words, because we have invited and even encouraged it.

Nobel prize-winning economist Herbert Simon warned way back in the 1940s that if we did not get ahead of the constant flood of information and figure out a way to manage it, we would find ourselves swept away and unable to make sense of it. He warned that legal and social institutions must be carefully structured to anticipate and ensure that the deluge of information that continues to inundate our markets and public institutions is understandable and usable.[1]

In this book, we argue that legal architects failed to heed Simon's warning and, as a result, the integrity of a number of legal programs has been compromised. Drawing together evidence from cutting edge work in diverse fields such as consumer protection, financial regulation, patents, chemical control, and administrative and legislative process, we identify a number of important legal programs that depend on vigorous communication and yet are afflicted with this same structural flaw. These legal programs are not designed to ensure that the incoming information is usable. Instead, the programs are built on a foundational assumption that, when it comes to information, "more is better" and that the problem of usefulness will take care of itself.

This oversight is not a fine detail or niggling technicality. On the contrary, when the effectiveness of a legal program depends on facilitating the communication of critical information, but that program neglects to ensure the information is also comprehensible, the system is poised for breakdown. Indeed, in extreme cases, if the imperative of comprehensibility is ignored, legal interventions initially intended to correct market failures or social inequities can actually make problems worse.

I SCOPING OUT THE PROBLEM

Return to the examples of information deluge at the start of this chapter. Contracts, financial forms, package inserts – each of these features of everyday life is highly regulated by laws, common law principles, and public and private enforcement – and each has been tweaked, adjusted, and amended for decades. These programs exist to *ensure* effective communication by the speakers and other actors. Large financial entities must explain their financial arrangements rigorously and clearly so investors can evaluate and compare them. Sellers need to ensure the average consumer understands the nature of their product so that the competitive market works and products are used safely.

But these programs (and, as we will soon see, many others) stop short of insisting on comprehensible communications. Yes, they require all information to be shared. And yes, an itemized list of facts is singled out for disclosure to make sure the transparency is complete. Indeed, in some programs, actors are even forced to fit their communications into user-friendly templates, draft in plain English, and place main messages in ALL CAPS or yellow highlights.

Despite these gestures, however, many legal programs do not close the circle and ensure that the speaker is eager to communicate meaningfully with the audience. Instead, if we step back and trace the incentives structure, we see the speaker in these situations is often better off remaining incomprehensible. Indeed, in some cases the speaker's profits increase in lockstep with the speaker's resourcefulness in confusing the target audience, rather than engaging and illuminating them.[2]

Take disclosure requirements. In the United States, we have hundreds of disclosure laws intended to ensure that various audiences are not misled.[3] The very point of the disclosure requirement is to facilitate meaningful communication of key information. But most mandated disclosures stop short of ensuring that the resulting information is actually comprehensible to the intended audience.[4] A firm eager to manipulate its consumers to gain an edge in the market need apply only a little creativity to devise a way around a required disclosure while still complying with the letter of the law. Indeed, firms may find themselves compelled to do this in order to survive.[5] As Lauren Willis observes: "Even without any intent to deceive, firms not only *will* but *must* leverage consumer confusion [in the consumer market] to compete with other firms that deceive customers."[6]

This same story is replayed in other important legal environments. After more than 40 years of regulating chemical manufacturers, we still know next to nothing about the toxicity of most of their chemicals. Indeed, most of what we do learn comes after the fact, once thousands of gallons of a chemical spill into a river or leach into the environment and jeopardize the survival of an endangered species. The spectacular failure of this regulatory design is explained, in part, by the fact that manufacturers bear almost no responsibility for understanding or communicating the hazards of their chemicals.[7] Instead, manufacturers' legal incentives are pointed in the reverse direction: encouraging strategic ignorance and obfuscation of what is known about product hazards. The more onerous the regulator's burden to assess the chemical, the less likely the regulator will be able to develop binding regulatory requirements.

Likewise, the patent process has been the topic of reform for decades since inventors regularly obtain patents that they do not deserve. Here again, however, we see the same story: a structural flaw in the design of the patent process itself. In patent law, the burden is on the patent examiner to understand the novelty of each invention. When the examiner is not sure about the invention's value, she is encouraged – by law – to grant, rather than reject, the claim. From this legal design, inventors discover that one way to obtain a patent is to craft a description that is so complicated that it outstrips the examiner's resources to make sense of it.[8] It is not

worth the trouble (or money) to draft a concise, clear application since the burden is on the examiner to process it, with all errors cutting in favor of patent approval.

Even institutional processes intended to ensure rigorous democratic deliberation are designed in ways that miss the key step of encouraging decision-makers to be comprehensible. Congress has developed intricate procedures, rules, and practices governing how it can pass laws. But none of these institutional controls require that a bill be comprehensible to other members of Congress. Indeed, for some controversial laws, a powerful sponsor's net incentives can encourage the crafting of incomprehensible legislation that moves a bill through the process so quickly that it cannot be analyzed by members who might disagree with it.[9]

II THE CENTRAL ARGUMENT

Each of these institutional examples occupies a very different part of the legal system. But they all reveal the same essential lesson: Expert actors are often not required to master or effectively communicate the information they load into the system. Instead, the gears are set in reverse: to encourage more and more information, regardless of whether it is understood by those generating it. Even the most dedicated, public-minded company or civil servant can find themselves guided by rules that lead them away from ensuring their audience can reasonably understand their communications. Their effort is directed toward generating long paper trails that frequently lead nowhere, rather than ensuring their audience's overall comprehension. Instead of encouraging information that is useful, the design of many legal programs attracts undigested information like a gravitational force and passes it along to an unequipped, disadvantaged audience.

However, each example yields an additional lesson as well. Not only is excessive information detrimental to communication, but because our legal designs ignore this simple fact, some actors exploit this oversight. Savvy actors sometimes derive a significant advantage in the market or political process from imposing excessive processing costs on their disadvantaged audiences. Companies make money, patent applicants are rewarded with patents, and members of Congress gain power by deploying strategies that exploit their audience's limitations in processing voluminous and unduly complicated content. In fact, in some cases, extraneous information can serve as a kind of intimidation tactic: causing audiences to give up, even if they really want to understand the information in front of them.

Thus, as we connect the dots in each of these programs, we consistently find, at the end of the causal chain, a legal structure that sets up the wrong incentives. The law is unilaterally focused on the enlightening power of information – more is almost always better. Yet in their zeal for transparency and complete information, legal architects neglect the equally important, dual objective of ensuring that information is also comprehensible to its target audience. By erring on the side of too much information – without any provisions for ensuring that information is meaningful – the functioning of many legal programs is deeply compromised.

This state of affairs results in what we call "comprehension asymmetries." Comprehension asymmetries are similar to the familiar "information asymmetries" in adversely impacting communications, but the two concepts differ in the nature of their impediments. "Information asymmetries," which have been factored into institutional analyses for decades, occur when one actor in a conversation has superior access to relevant information that he or she does not share with the other party (e.g., a land negotiation where the sellers know there is a hazardous landfill buried under the farmhouse, while the buyers do not). By contrast, "comprehension asymmetries," a term that we introduce in this book, arise when one party has a greater ability to understand or process the relevant information relative to his or her conversational partner. A large financial entity, for example, might have significant advantages in processing and understanding important information about the risks of its investments relative to the purchaser. That's not to say that the consumers know nothing; in fact, in many cases, the seller, company, or agency will have to go to great lengths to make sure that the audience has access to all relevant data. But, ultimately, if that information isn't comprehensible to the audience – either because there's too much to be reasonably digestible, or it's too complicated, or it's made purposely confusing – a comprehension asymmetry exists. Even though all relevant information is on the table, the competitive situation remains deeply unbalanced.

As a consequence, comprehension asymmetries mimic incomplete information. They can undermine the functioning of the market or institutional program and make the audience vulnerable to the risks of manipulation. But comprehension asymmetries create communication challenges that are different from those of standard information asymmetries. In fact, as we will see throughout this book, attempting to redress information asymmetries often provides the foundation for burgeoning comprehension asymmetries. The two are thus related in complicated but not always supportive ways.

From this backdrop our central argument takes shape. We advance three sequential propositions in the chapters that follow:

1 When legal programs depend on, or try to force, communication – for example, by requiring disclosures to improve market functioning – legal design should not stop at requiring complete information. It is essential to ensure that the key information being communicated is also comprehensible to the target audience.
2 When significant comprehension asymmetries are not rectified, the target audience will operate largely in the dark, without informed choices or meaningful opportunities to engage. This communication failure may, in turn, embolden some speakers to take advantage of the situation since they can now exploit their audience's limited processing capacity by playing information games.

3 When the audience is at a significant disadvantage in processing key information relative to the speaker, but the speaker is not inclined to invest time and energy in communicating effectively, legal intervention may be necessary to correct the underlying "comprehension asymmetries." In effect, legal reform must introduce incentives so that the speakers face more benefits than costs to engage in meaningful communication with their target audiences.

Of course, when speakers face strong incentives to communicate meaningfully with their target audience, all confusion and complexity will not magically disappear. Even when a speaker succeeds in making a message reasonably comprehensible to its target audience, some fraction of the audience may still not understand the message. Additional problems on the audience side may thus also deserve intervention, but these challenges lie outside of the reach of our analysis. We focus here only on the first, crucial step in a communication: ensuring the speaker is held responsible for being reasonably comprehensible.

III A ROADMAP OF THE BOOK

To make this argument work, however, the concept of incomprehensibility must be sufficiently defined and specified so that it can serve as a viable, diagnostic probe. To that end, we dedicate Part I, the first third of the book, to delineating the concept of a comprehension asymmetry. In the next two chapters we construct a model for how to think about comprehensibility in a number of different legal programs that depend for their success on meaningful communication. The model synthesizes existent work on information overload with basic economic concepts to identify a point at which – in an individualized setting – communications become incomprehensible. From this, we then identify a simple conceptual test for assessing when a legal program is poised to encourage effective or cooperative communication: examining the speaker's net incentives to be comprehensible. Comprehensibility in communications is costly, and in some cases, incomprehensibility reaps more benefits than costs for the speaker. An assessment keyed to assessing the speakers' incentives also provides a way to sidestep difficult optimization problems that otherwise plague the measurement of incomprehensibility.

Part II (Chapters 4–7) applies this model to assess a variety of very different legal programs with respect to how well those programs encourage comprehensible communications. Given the vast and decentralized nature of the law, generalizing across diverse areas is treacherous. But in the six chapters that comprise Part II, we will notice that, from program to program, our current legal architecture typically focuses on demanding that the information is complete, while neglecting the equally important requirement that it be comprehensible to its target audience.

We also see through a study of diverse legal programs that the "incomprehensibility" problem is not simply one that afflicts the masses in consumer markets who are preyed upon by payday lenders and credit card companies. Rather, incomprehensibility's victims can include powerful Wall Street investors, expert regulators, and elected officials who run our country.

Moreover, and perhaps more strikingly, the effects of incomprehensibility are uniquely bipartisan. We will see instances where this design flaw cuts to the heart of what Republicans value most – efficient regulations that do not drain needless resources from important economic actors. And we will see how this omitted structural element also undermines the Democratic platform of providing greater government support for those at the bottom of the socioeconomic ladder and the protection of collective goods, such as public health and environmental protection.

The individual application chapters in Part II are written to be self-contained. Each chapter provides evidence in support of our argument, and each chapter closes with individualized proposals for reform based on the analysis. Readers can thus select individual chapters of interest within Part II, rather than reading all of them front to back, without losing the central argument of the book.

In Part III, the last chapter of the book, we summarize the key lessons for institutional design and reform emerging from our close-up study of individual legal programs in Part II. We underscore that, at its core, reform must involve turning the focus of legal architects to an oft-overlooked step in legal design – the speaker's responsibility for effective communication. And even though our diagnosis of a systemic structural weakness may initially seem discouraging, in this final chapter we argue that its pervasiveness may ultimately be an advantage for enacting meaningful reform. Rather than trying to patch up a dilapidated legal infrastructure, afflicted with hundreds of loopholes and defects, we will identify a single, foundational element that – once corrected – can begin to right the collapsing building.

Of course, existing economic and political elites will attempt to keep the status quo in place since they generally benefit from this architectural oversight. However, if we are right – and neglected comprehension asymmetries *do* explain some of our legal failures – then the ubiquity of this structural flaw will become an important focal point for reform. In effect, despite the protestations of certain entrenched actors, the *best* way to address the problem of comprehension asymmetries will be through a large-scale overhaul of the current incentive structure. Rather than employing dispersed, fragmented groups to address inequities and inefficiencies in isolated specialty areas, reformists can join forces behind a shared project: ensuring comprehensible, as well as accurate and complete, communication.

Clearly, a study of legal programs pitched at such high altitude necessarily entails taking liberties with nuances and details. And some of the simplifications may go too far. However, evidence amassed from a diverse group of scholars recounted in the pages that follow exposes a recurring foundational instability. Thus, even if our effort to map comprehension asymmetries misses important particulars, one must start

somewhere. And the cumulative evidence suggests that, with respect to this specific neglected and important structural feature, such a conversation is long overdue. Phrased differently: Even if we miss some key elements, it is our hope that, by bringing the skeletal structure of this problem to light, we will spark a conversation about the role and importance of ensuring comprehensible communications within our legal system.

The first crucial step, however, requires elucidating the underlying problem of incomprehensibility. It is to that discussion we now turn.