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Incomprehensibility and the Law

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The law needs not only to correct information asymmetries but comprehension asymmetries too.

Meaningful communication is vital to most legal processes. So when sellers **withhold** key information from customers, such as high service fees on a cell phone contract, or when companies **conceal** key information about public health or financial risks from regulators, the law is generally swift to sanction them.

In legal and economic circles, if a target audience does not have access to critical information held by the speaker, it is **called** “asymmetrical information.” And in many arenas, the law **prohibits** withholding information and demands “transparency” precisely because this asymmetrical information creates an unfair advantage.

But, as it turns out, making information inaccessible is not the only way that speakers can use their communications to get ahead. For example, what if a cell phone company **shares** all required information, but does so in a highly convoluted way intended to confuse its customers about its service fees? Or what if a large company shares mandated information with regulators, but does so by carefully burying it in a larger haystack of superfluous filings designed to overwhelm the regulator?

The end result of this kind of deliberate miscommunication is often the same as with asymmetrical information—the audience is not informed because it cannot process the relevant information. Yet, unlike typical information asymmetries, this incomprehensibility tactic is often beyond the reach of the law. Indeed, in some domains, actors who intentionally make their message incomprehensible fare better than those who try to communicate their key messages clearly.

In consumer markets, for example, sellers are permitted (and sometimes even tacitly rewarded by contract) to write excessively detailed contracts, despite the fact that few of their target customers can rationally understand the terms. In patent law, inventors can play information games with busy patent examiners to obtain undeserved patents. Chemical manufacturers can inundate regulators with junky studies and sandbag regulators’ efforts to make sense of the flawed scientific record. Law-writers and agencies are sometimes more successful at getting incomprehensible laws and rules adopted precisely because nobody understands what is in them.

And this is only a sampling of the troubled legal processes traced in my book with Will Walker, *Incomprehensible!*.

These structural problems arise, at least in part, because of how underlying legal processes are designed. Although legal requirements are now relatively good at requiring privileged actors to provide full access to relevant information, thus correcting *information asymmetries*, the second step of ensuring that relevant information is actually understandable to the target audience is regularly skipped. Social science research spotlights the fact that processing relevant information, such as

making the information practically useable, is just as vital and requires time, energy, and expertise. If a speaker is *not* motivated to process complicated information and communicate it clearly, the result for a less expert audience may be the same as if the audience did not have access to the information at all.

We **call** this a *comprehension asymmetry*. The speaker is better able than the audience to make sense of key content, but is disinclined, for a whole host of possible reasons, to invest effort or resources into ensuring the information is also understandable. Parties who are legally required to “share” unflattering information, but are not required to communicate it comprehensibly, can easily evade accountability by obfuscating and hiding the true message under details, overloading the audience with documents, and gratuitously complicating key issues. Moreover, when deployed strategically, these information tricks can be carefully crafted to comply with the letter of information-sharing requirements and sidestep fraud and misrepresentation charges, all the while still succeeding in misleading target audiences.

But the legal problems run deeper. Not only is incomprehensibility a loophole that strategic actors can exploit in legal systems, but even well-intended actors may forgo investing in comprehensibility because communicating takes more time and effort than it is worth to them. Indeed, since legal processes generally require the sharing of all relevant information, well-meaning actors are likely to err on the side of including too many details and too many citations and leave it to the audience to make sense of the deluge of information.

In other words, by focusing on information asymmetries, while neglecting its equally important partner, comprehensibility, the design of certain legal programs can actually make communication worse.

How might we begin to fix this problem? The answer lies in instituting strong incentives on the speaker for comprehensibility. Prescriptive reforms, such as plain-English requirements and mandated disclosures, fall short because they do not actually alter the speaker’s underlying incentives. If speakers are motivated to confuse, they will find ways to work around these formulaic requirements. For example, a speaker may **slip** the mandated disclosure into a larger body of deliberately complicated text.

Instead, speakers must be held legally responsible for ensuring that their target audience can reasonably understand the key message. If speakers cannot make this showing, they bear all the consequences of the resulting communication breakdown.

Instituting our general reform blueprint involves three steps. The first is to identify who the ideal target audience is for a given program. Just embarking on this first step may expose important [pathologies](#) in a legal design.

Second, if it appears that the speaker is better able to process the relevant information as compared to the audience, but is disinclined to do so, the law must create strong incentives on the speaker to do this work. The law should not let the speaker off the hook for unclear communication in settings where the speaker is best able to make sense of the relevant information.

In the third and final step, if speakers are not likely to invest in comprehensibility on their own, and the current legal design does not adequately motivate them to do so, then adjustments to legal processes are needed to ensure speakers will make their messages comprehensible.

Throughout the book, we [offer](#) suggestions for both general reforms as well as changes to specific legal programs. But we do not pretend to solve this vast and difficult problem entirely. Rather, our goal is to jumpstart a larger conversation about the phenomenon of comprehension asymmetries and how to account for them better in legal design.



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This essay is part of a six-part series, entitled [Creating Incentives for Regulatory Comprehensibility](#).

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