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Extending the Case for Workplace Transparency to Information About Pay

Cynthia Estlund*

INTRODUCTION

Individuals need accurate information about employer policies and practices in order to make wise labor market decisions. Members of the public—including advocacy organizations, scholars, journalists, and consumers—need such information in order to identify lawbreakers and encourage compliance with employment laws, to distinguish "good" and "bad" employers, and to understand contemporary workplace practices. Yet much of the employment-related information that would be valuable to individuals and the public is not readily available to outsiders to an organization, or even to insiders.

I have argued elsewhere for expanding the use of mandatory disclosure in employment law, not as a substitute for substantive regulation, but as an aid and supplement to regulation.[1] *Just the Facts: The Case for Workplace Transparency* makes the preliminary case for a regime of mandatory public disclosure of information about selected terms and conditions of employment that is important to employees and the public but is often unavailable.[2] That article argued that mandatory disclosure could help to improve enforcement of and compliance with substantive employment mandates, and could improve the operation of labor markets and the satisfaction of worker preferences by better informing workers'

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1. Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 355 (2012).

2. *Id.*

labor market decisions.[3] Moreover, where neither mandates nor markets meet public aspirations for fair and decent work—for example, workplace diversity or family friendliness—mandatory disclosure of socially salient terms and conditions of employment can help to enable stakeholders and advocates to push firms to reach beyond compliance and above the floor set by mandates and the market.[4]

Workplace transparency is perhaps best conceived as a major improvement to the *infrastructure* of labor and employment law. It would improve the functioning of our existing patchwork of mandates, of the labor markets that determine so much of what is important to employees at work, and of the emerging mechanisms of "social regulation" that are filling some of the gaps in the existing system of markets and mandates.[5]

The question I take up here is whether the general case for workplace transparency extends to information about wages and salaries. On the one hand, one of the most important pieces of information workers may want to have about a job or prospective job is pay—not just one's own starting salary but the range of others' salaries in the organization. And yet, pay transparency raises a number of distinctive questions:

> Would mandatory wage transparency lead to higher wages (e.g., by spurring labor market competition or by improving compliance with minimum wage and overtime requirements)? Or might it lead to lower wages, at least for some workers (e.g., by facilitating employer collusion or by fueling capital market pressures to reduce labor costs)? How would wage transparency affect organizations and interpersonal relations? Would employee resentment about large disparities between and within job categories impair cooperation and collective productivity? If so, would employers respond by compressing the wage scale? What can we learn about these issues from experience in sectors of the labor market where there already is wage transparency, as in much of the public sector, the unionized workplace, and the top end of publicly traded corporations? Should employee privacy interests limit the type of wage information that should be mandated? Do employers have a legitimate commercial interest in wage and salary secrecy as against competitors? Can all these concerns be addressed by limiting the type of wage information—the level of detail—that employers should be required to disclose?

Because the distinctive difficulties posed by the idea of salary transparency threatened to obscure the general case for workplace transparency, *Just the Facts* set that large issue aside.[6] In this short Article, I return to the question.

This is not uncharted territory; both scholars and policymakers have

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3. *Id.* at 355.
4. *Id.* at 379.
5. *Id.* at 369.
6. *Id.* at 365 n.46.

examined the case for greater transparency of salary information, especially in the wake of the Supreme Court's *Ledbetter* decision, in which discriminatory salary disparities were held immune from legal challenge because they had existed, unbeknownst to the plaintiff, for too long.[7] This Article reviews arguments for and against mandatory pay transparency, using the general framework from *Just the Facts*.[8] I conclude that there is a fairly strong though not uncomplicated case to be made that mandatory disclosure of meaningful salary information would tend to produce less discrimination, less favoritism, and probably somewhat lower disparities overall. Changes should tend to be in the direction of greater fairness as that is understood by employees and the public.

I. THE BENEFITS OF PAY TRANSPARENCY IN IMPROVING THE OPERATION OF MARKETS, MANDATES, AND SOCIAL REGULATION

If the only information about salaries that workers needed were their own actual salary at any given time, there would seem to be little need to mandate disclosure. Obviously prospective employees inquire, and employers expect to be asked, about the wage or salary for a job.[9] Salary information is thus unlike some types of information that employees might want but might hesitate to ask about because of the adverse signal it might send to an employer—such as information about parental leave policies, drug testing, mandatory arbitration, or non-compete or other restrictive covenants.

Even then, there is a place for a simple form of mandatory disclosure. Clear written documentation of the promised wage can help workers—especially low-wage workers—to determine whether their employer is complying with wage and hour laws, and, if not, to pursue legal remedies.[10] This modest form of wage transparency would help to reduce some forms of "wage theft" that are especially

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7. *See, e.g.*, Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 169–70 (2004); Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41, 53 (2005); Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 1008 (2011); Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws—A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 419–35 (2013); Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1047–48 (2012).

8. *See* Estlund, *supra* note 1, at 355–57

9. *See id.* at 364–65.

10. As I argued in *Just the Facts*, even this very modest reform

> [would] improve contracting practices both at the formation stage (by informing workers of what they are being promised) and at the enforcement stage (by providing workers with evidence of what they were promised in case of breach). . . . [T]hese requirements . . . would help to reduce flat out fraud and "wage theft," both of which are common in certain low-wage sectors, especially those that rely on undocumented immigrant workers. This kind of disclosure should also facilitate enforcement of, and improve compliance with, labor standards at the bottom of the labor market, especially the wage and hour laws, simply because violations will be more obvious and more provable.

Id. at 403 (footnote omitted).

common at the bottom of the labor market.[11] The idea of requiring employers to provide written documentation to each employee of his or her own wages and hours would seem hard to oppose. The public cost is trivial, the private cost to law-abiding employers is nominal, and the value to both informed private decision making and public law enforcement is quite obvious.

In light of these net benefits, many countries (including both European Union member nations and China) now require employers to give employees written notice of certain basic terms of employment, including wages and hours.[12] Such requirements are still exceptional in the United States.[13] Still, this may be a reform whose time has come. For example, New York State's Wage Theft Prevention Act, enacted in 2011, requires all employers to give written notice of rates of pay, including overtime and manner of payment (hourly, weekly, or piecework, for example) at the time of hiring, and then annually and whenever the terms change.[14] This would be a good model for a federal law (in a more politically propitious environment).

All of the difficult questions, however, surround proposals to require disclosure of *other employees'* salaries, both to co-workers and to the public. So let us begin by considering what such information might be good for, postponing for now the potential arguments against mandatory disclosure. *Just the Facts* analyzed the potential benefits of workplace transparency in terms of promoting

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11. Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31, 67–74 (2012) (discussing the value of this kind of wage-disclosure law in combatting "wage theft"). On the forms and prevalence of "wage theft" generally, see KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 7–15 (2009).

12. All European Union member nations, pursuant to a 1991 EU directive, must require employers to give employees written notice of certain terms and conditions of employment, including "the identities of the parties; the place of work; . . . a brief specification or description of the work; . . . the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled; the length of the employee's normal working day or week." Council Directive 91/533, art. 2, 1991 O.J. (L 288) 32, 33 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1991:288:0032:0035:EN:PDF. Similarly, China's new Labor Contract Law, enacted in 2007, requires employers to give employees a written contract specifying numerous terms and conditions of employment, including wage rate. *See* RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA 37–39 (2010). Similar requirements apply in India, *see* 2B INTERNATIONAL LABOR AND EMPLOYMENT LAWS 57-26 to -28 (William L. Keller & Timothy J. Darby eds., 3d ed. 2008); New Zealand, *see* Employment Relations Act 2000, § 65 (N.Z.), *available at* http://www.legislation.govt.nz/act/public/2000/0024/latest/DLM58317.html; Russia, *see* TRUDOVOI KODEKS ROSSIISKOI FEDERATSII [TK RF] [Labor Code] art. 57 (Russ.), *available at* http://www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/65252/E01RUS01.htm#chap10; and South Africa, *see* Basic Conditions of Employment Act 75 of 1997 §§ 28–29 (S. Afr.), *available at* LEXIS, 1997 SA LABOUR 75.

13. Federal law requires such disclosure for seasonal, 29 U.S.C. § 1831 (2012), and migrant agricultural workers, *id.* § 1821, and a few states (most recently New York, *see infra* note 14) impose such requirements on some other low-wage employers. *See, e.g.*, IOWA CODE ANN. §§ 91E.1–E.6 (West, Westlaw through 2014 Reg. Sess.); NEB. REV. STAT. ANN. §§ 48-2209, -2214 (West, Westlaw through 2014 Reg. Sess.).

14. N.Y. LAB. LAW § 195(1)(a) (McKinney 2009 & Supp. 2014).

enforcement of, and compliance with, legal mandates; improving the efficiency of labor markets by informing employees' labor market decisions; and assessing firms' compliance with emerging norms of corporate social responsibility.[15] Pay transparency has potential benefits in each of those categories.

Promoting enforcement of legal mandates: Beyond its value in uncovering and preventing discrimination, to which we will turn below, greater public information about actual pay levels and practices would also help to promote enforcement of and compliance with wage and hour laws, and to combat wage theft. That is not because one can expect employers to accurately disclose knowing violations of the law, but because disclosures that can be seen by all, and that are at odds with facts that are known by some, are likely to make violations more obvious. Disclosures might also reveal some unwitting violations of the law.

To be sure, there is nothing in the nature of wage and hour violations that necessarily requires information about *other employees'* wages and hours; unlike claims of discrimination, claims under wage and hour laws require no comparative data. But many common wage and hour violations—like requiring off-the-clock work or retaining service workers' tips—are matters of employer policy or standard practice, and are likely to be exposed by aggregate information. Moreover, such information might enable advocates or public enforcement officials to identify likely lawbreakers. And to the degree that pay transparency would make it easier to discover wage and hour violations, it should also tend to discourage such violations.

But perhaps the most obvious and compelling benefit of disclosing more information about other people's salaries is that it can reveal potential pay discrimination, and thus aid in the enforcement of antidiscrimination law.[16] No one can know whether she is the victim of pay discrimination without comparing her pay to that of others, especially co-workers in similar jobs.[17] Recall the case of Lily Ledbetter, who did not learn for nearly twenty years that she was being paid significantly less than her male peers—and whose subsequent discrimination claim was held time barred by the Supreme Court.[18] A major reason for the delay was that her employer, like most private sector employers, closely guarded salary information, prohibiting or discouraging employees from sharing information even about their own salaries.[19] (We will return to these rules and norms below.)

15. Estlund, *supra* note 1, at 357.

16. *See* Eisenberg, *supra* note 7, at 982–1006; Kulow, *supra* note 7, at 427–34; Ramachandran, *supra* note 7, at 1062–67.

17. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 650 (2007) (Ginsburg, J., dissenting) ("The problem of concealed pay discrimination is particularly acute where the disparity arises . . . because male counterparts are given larger raises. Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision."), *abrogated by* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

18. *Id.* at 621–43 (majority opinion).

19. On the form and prevalence of pay secrecy rules, see Bierman & Gely, *supra* note 7, at 171; Edwards, *supra* note 7, at 47–48.

In the uproar that followed *Ledbetter*, Congress addressed the problem of long-gestating salary disparities, but only to the extent of allowing late claims; employees can still recover only for the previous two years of disparate pay.[20] And employees are still impeded from discovering pay disparities by widespread pay secrecy norms.[21]

In further response to *Ledbetter*, and in light of the obvious value of information about pay practices in uncovering discrimination, some in Congress proposed the Paycheck Fairness Act, one provision of which would require the Equal Employment Opportunity Commission (EEOC) to issue regulations requiring employers to report pay information categorized by the sex, race, and national origin of employees.[22] The information would be reported confidentially to the EEOC only; that would not help employees themselves to detect pay discrimination.[23] In any case, this bill, introduced in 2009 and repeatedly since then, has little chance of passing in the foreseeable future.[24] That is one clue that mandatory salary transparency is an exceedingly remote prospect, politically speaking. Still, it is self-evident that public disclosure of salary information would help to enable employees and their advocates to identify potentially discriminatory pay disparities.

To the degree that wage transparency tends to expose discriminatory pay disparities, it would also tend to prevent such disparities from arising.[25] Managers would obviously have to adjust their pay practices to reduce the risk of litigation, and to reduce or eliminate disparities that might suggest discrimination and would be difficult to justify on nondiscriminatory grounds. Some evidence for the tendency of wage transparency to reduce pay discrimination is found in the union and public sectors, where transparency is the norm and where studies have found significantly lower disparities linked to race or sex.[26]

Improving the efficiency of labor markets: Despite the growing role of employment mandates, for better or for worse, the United States relies heavily on labor market forces to determine most terms and conditions of employment.[27] That certainly

20. Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5(e) (2012).

21. Sarah Lyons, *Why the Law Should Intervene to Disrupt Pay-Secrecy Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms*, 46 COLUM. J.L. & SOC. PROBS. 361, 382 (2013).

22. Paycheck Fairness Act, S. 84, 113th Cong. § 8 (2013).

23. H.R. REP. NO. 110-783, at 18–19, 37 (2008) (Conf. Rep.).

24. The 2012 bill, initially given a one percent chance of enactment on a bill tracking site, was blocked by House Republicans. *S. 84: Paycheck Fairness Act*, GOVTRACK.US, http://www.govtrack.us/congress/bills/113/s84 (last visited July 22, 2013); *see* Jennifer Steinhauer, *Republicans Block Bill to Ease Suits Over Pay Bias*, N.Y. TIMES, June 6, 2012, at A10, *available at* http://www.nytimes.com/2012/06/06/us/politics/senate-republicans-block-pay-equity-bill.html.

25. *See* Ramachandran, *supra* note 7, at 1063.

26. *Id.* (citing Marta M. Elvira & Ishak Saporta, *How Does Collective Bargaining Affect the Gender Pay Gap?*, 28 WORK & OCCUPATIONS 469, 469, 480–81 (2001); and Jacqueline Agesa & Richard U. Agesa, *Market Structure-Driven Discrimination and the Earnings of Subordinate Managers: An Analysis by Union Density*, 30 J. POST-KEYNESIAN ECON. 205, 205 (2007)).

27. Estlund, *supra* note 1, at 360.

includes wages. Minimum wage rates in the United States, relative to both mean and median wages, are among the lowest of the advanced economies of the world.[28] Many factors are at work in that comparison, but among them is a more positive political disposition in the United States toward the fairness and efficiency of labor market competition.[29] There is less support in the United States than in Europe for the idea of "taking wages out of competition."[30]

But if labor markets are to work fairly and efficiently, information is critical. *Just the Facts* developed this argument in general,[31] and it obviously applies to information about wages and salaries. Conventional economic analysis suggests that "information disparities" between contracting parties—for example, between an employer and employee regarding salary patterns within the firm—are an impediment to efficient bargaining.[32] Information about one's co-workers' salaries—at least the range of salaries at different skill and seniority levels—might bear upon the fairness of one's current salary relative to co-workers, as well as future salary prospects, within the organization. Information about salaries in other organizations is similarly critical, not only to job applicants and potential job applicants, but to current employees' ability to assess their labor market options.[33]

We can characterize the benefits of salary information in the neutral-sounding terms of "market efficiency," but the benefits of forcing employers to disclose information that they already possess should generally accrue to employees. The claim, after all, is that employers currently benefit from an information asymmetry vis-à-vis employees and applicants;[34] correcting that

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28. In 2011, the minimum wage in the United States was twenty-eight percent of the mean wage and thirty-eight percent of the median wage. That was the second-lowest ratio (above only Czech Republic) among twenty-eight OECD (Organisation for Economic Co-operation and Development) countries for which data is reported. *See Minimum Relative to Average Wages of Full Time Workers*, OECD STATEXTRACTS, http://stats.oecd.org/Index.aspx?DatasetCode=MIN2AVE (last visited July 22, 2013).

29. *See* Terry Collingsworth, *American Labor Policy and the International Economy: Clarifying Policies and Interests*, 31 B.C. L. REV. 31, 31–32 (1990).

30. The antidiscrimination principle stands as an important exception to the acceptance of "market forces" in setting wages. *See* Eisenberg, *supra* note 7, at 982–1006. On the dimmer view taken in the "coordinated market economies" of Europe toward the role of market competition in setting labor standards, see Estlund, *supra* note 1, at 362–63.

31. Estlund, *supra* note 1, at 405–07.

32. *See id.* at 359; *see also* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970) (describing the effect of information asymmetry on the market for used cars); Jeffrey N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761, 770–72 (1985) (explaining how information affects pricing under the efficient market hypothesis); Joseph Stiglitz, *The Private Uses of Public Interests: Incentives and Institutions*, J. ECON. PERSP., Spring 1998, at 3, 13 ("[I]mperfect information can create an impediment to mutually productive bargains.").

33. Employers are similarly dependent on outside sources for salary information from other firms, but they are better able than employees to ascertain that information. *See* Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 790 (2002) (discussing the role of compensation consultants in setting executive pay and their ability to massage ambiguous data to arrive at the outcome desired by a corporate board).

34. *See* Estlund, *supra* note 1, at 394.

asymmetry would enhance employees' bargaining power.[35] It is hard to see how arming an employee with better information about her co-workers' or counterparts' pay could lead to the informed employee getting less than the uninformed employee might have gotten—whereas the converse seems quite likely.

Of course, each employee's bargaining does not take place in isolation. If it were the case that each employers' total wage bill is already "efficient," and effectively up against a ceiling set by product and capital market forces, then more informed bargaining by employees would simply redistribute rather than increase overall salary outflows.[36] In that case, there would be winners and losers among employees, but no gain for employees generally. But even if that assumption held true, the changes should generally favor those employees who previously were less informed (presumably those below the top echelon) and were underpaid relative to comparable workers. The latter would include not only those who might have had viable pay discrimination claims, but also those who were less astute negotiators or were not the boss's favorite. Redistribution should tend to be in the direction of greater fairness in the eyes of employees for reasons to which I will return.

So in a system that relies on markets and contract to determine most individuals' pay, accurate information about other people's salaries in one's own and other organizations is crucial to decisions about seeking a better opportunity elsewhere, asking for a raise, or simply staying on the job and accepting the status quo. In other words, information is crucial to making an intelligent choice among the familiar alternatives of "exit, voice, or loyalty"[37] with regard to one's employer.

Exit, voice, and loyalty—but especially voice—may operate at the collective as well as the individual level. Most importantly, information about salaries—their overall level as well as the rationality and fairness of salary disparities—might be relevant to an employee's decision whether to support unionization. For that reason among others, employees who share information about salaries with co-workers are engaged in "concerted activities for . . . mutual aid or protection"[38] to which the National Labor Relations Act (NLRA) prohibits employer interference, coercion, or restraint.[39] It is thus illegal under the NLRA for an employer to prohibit or discourage employees from sharing information about their own

35. Eisenberg, *supra* note 7, at 988–89.

36. *See* Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. 313, 321–25 (2011).

37. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 3–4, 76 (1970).

38. 29 U.S.C. § 157 (2012).

39. *Id.* § 158 (2012).

salaries.[40] And yet, as we have noted, such "pay secrecy rules" and norms remain common.[41]

We will return to the employer interests that lie behind "pay secrecy" policies. For now, however, the point is that employees' interest in information about other employees' salaries at their own or other firms draws some support from conventional economic analysis.

Facilitating "social regulation" of responsible corporate behavior: In recent decades, in areas like workforce diversity, family-friendly policies, and workplace health and safety, among others, corporations (especially large corporations) have been jockeying for reputational capital and the favor of various stakeholder constituencies by portraying themselves as reaching "beyond compliance" and holding themselves to higher norms.[42] To the extent that there is value in appearing to be a socially responsible corporation—and the investments in "corporate social responsibility" (CSR) would suggest there is—there is social value in enabling stakeholders to assess the accuracy of corporations' own professions. Public disclosure of accurate information on socially salient terms and conditions of employment can help to ensure that corporations follow through with these promises of social responsibility.[43]

But what does this have to do with information about salaries? That both depends on and may help to determine whether economic inequality and egregious pay disparities—currently a topic of generalized public concern and debate—can enter the pantheon of major CSR issues for which particular corporations (at least large "branded" corporations) are pressured to take responsibility.

Clearly, there is widespread concern in the United States over both stagnating wages for ordinary workers and staggering disparities between salaries at the top and the bottom of major corporations.[44] That has led to demands, some

40. Brockton Hosp. v. NLRB, 294 F.3d 100, 106–07 (D.C. Cir. 2002); Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1510 (8th Cir. 1993).

41. *See* Edwards, *supra* note 7, at 43–44; *see also* Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121, 148–49 (2003) (arguing that corporations continue to adopt pay secrecy rules in part because NLRA penalties are de minimis and most nonunion workers are unaware of the protections the law offers or unmotivated to bring suit to enforce their rights).

42. Estlund, *supra* note 1, at 360.

43. *Id.* at 379.

44. Press Release, White House, Remarks by the President in the State of the Union Address (Feb. 12, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address. In 2012, for example, average wages increased by 1.8%, *see Slower Wage Growth, Declining Real Wages Undermine Recovery*, NAT'L EMP. L. PROJECT 1, 2 (2012), http://www.nelp.org/page/-/Job_Creation/NELP.DecliningWageGrowth.pdf?nocdn=1; CEO pay increased by sixteen percent, *see* Gretchen Morgenson, *That Unstoppable Climb in C.E.O. Pay*, N.Y. TIMES, June 30, 2013, at BU1, *available at* http://www.nytimes.com/2013/06/30/business/an-unstoppable-climb-in-ceo-pay.html); and the average American CEO made 272.9 times the salary of the typical worker in his or her industry, *see* Lawrence Mishel & Natalie Sabadish, *CEO Pay in 2012 Was Extraordinarily High Relative to Typical Workers and Other High Earners*, ECON. POL'Y INST. 1, 6 (June

successful, for greater transparency regarding compensation for top managers of publicly traded corporations.[45] The idea is that public outrage over astronomical executive compensation, together with greater transparency and comparability of salary information across firms, should translate into pressure for moderation.[46] Thus far, those forces do not seem to have done much to hold down top managers' pay.[47] Indeed, some have argued that transparency may actually increase pay at the top because no corporate board wants to fall below the fiftieth percentile in executive compensation.[48]

Mandatory disclosure of salary levels further down the corporate ladder, and especially on its bottom rungs, could help to sharpen the debate. Indeed, the Dodd-Frank Act took a step in that direction in instructing the Securities and Exchange Commission (SEC) to issue regulations requiring public corporations to disclose the ratio between the pay of the CEO and the corporation's median employee; unfortunately, the SEC has not yet followed through with regulations.[49] The hope, of course, is that greater public knowledge about wage disparities within particular corporations would generate public pressure on those corporations (or at least those where disparities are greatest) to improve wages at the bottom (and perhaps to hold down salaries at the top).

There are reasons to doubt that this will work (without better-enforced and higher minimum wage levels). Raising wages at the bottom of an organizational

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26, 2013), http://www.epi.org/files/2013/ceo-pay-2012-extraordinarily-high.pdf; *see also* Elliot Blair Smith & Phil Kuntz, *Top CEO Pay Ratios*, BLOOMBERG.COM (Apr. 30, 2013), http://go.bloomberg.com/multimedia/ceo-pay-ratio/ (listing CEO–worker pay ratios by industry for the top 250 companies in the Standard & Poor's 500 Index, and noting, for instance, that Starbucks CEO Howard Schultz made 1135 times as much as the average food-service worker in 2012).

45. Federal securities laws require publicly traded corporations to disclose compensation paid to certain high-level executives. 17 C.F.R. § 229.402 (2014). The Securities Exchange Commission requests this information in a number of required filings. The salaries and allowances of public officials are more readily available to the public. *See, e.g.*, IDA A. BRUDNICK, CONG. RESEARCH SERV., RL30064, CONGRESSIONAL SALARIES AND ALLOWANCES (2008) (listing the salaries of Congress members, congressional officers and officials, and committee staff in addition to allowances available to Representatives and Senators).

46. David I. Walker, *A Tax Response to the Executive Pay Problem*, 93 B.U. L. REV. 325, 333 (2013).

47. *See id.* at 329–35 (arguing that the outrage constraint fails to limit CEO pay partly because managers are able to "camouflage" compensation); *see also* Ian Dew-Becker, *How Much Sunlight Does It Take to Disinfect a Boardroom? A Short History of Executive Compensation Regulation in America*, 55 CESIFO ECON. STUD. 434, 449 (2009) (noting that increasing disclosure requirements for executive pay since 1933 have not been shown to reduce top executive pay, and arguing that mandatory shareholder "say on pay" plus mandatory disclosure would reduce inequality).

48. *See* Walker, *supra* note 46, at 329–35.

49. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953(b), 124 Stat. 1376, 1904 (2010). As of July 2013, however, the SEC has yet to carry out this provision. *See* Editorial, *Overpaid? Or Worth Every Penny?*, N.Y. TIMES, July 14, 2013, at SR10, *available at* http://www.nytimes.com/2013/07/14/opinion/sunday/overpaid-or-worth-every-penny.html; Elliot Blair Smith & Phil Kuntz, *Disclosed: The Pay Gap Between CEOs and Employees*, BUSINESSWEEK.COM (May 2, 2013), http://www.businessweek.com/articles/2013-05-02/disclosed-the-pay-gap-between-ceos-and-employees.

pyramid, especially in the labor-intensive industries in which low wages are the norm, would be quite costly for a corporation (though there may be offsetting productivity benefits under some conditions[50]). Even minimum legal standards that directly raise labor costs for all employers meet employer resistance and evasion; efforts to promote a social norm of paying higher "decent" wages—and doing so voluntarily when some of one's competitors are not—are sure to meet stronger resistance (and to attract weaker public support). More troubling is the possibility that salary transparency could have perverse consequences for the lowest paid workers—for example, if capital markets rewarded firms that kept wages at the bottom low. Even if salary transparency had the desired effect of generating public pressure to reduce top-to-bottom disparities within firms, that could accelerate the already-powerful trend toward contracting out low-wage, labor-intensive parts of the business to less responsible and less regulated entities, thus taking the lowest wage workers "off the books" of the corporations that are subject to public pressure.[51] Much more than wage transparency would be required to hold firms responsible for the low wages that prevail at the bottom of many corporate supply chains.

But now we are beginning to confront some of the arguments against requiring salary transparency. So let us turn to those arguments directly.

II. CONFRONTING THE CASE FOR PAY SECRECY

Most of the major arguments for pay secrecy come, not surprisingly, from employers. Others have appraised those arguments, especially for how they hold up against the value of transparency in combatting pay discrimination.[52] In briefly reviewing those arguments here, I hope to cast some light on how they stand up against the broader case for pay transparency made here.

A. Employer Objections to Pay Transparency

Pay secrecy rules and policies—which prohibit or discourage employees from discussing salaries among themselves—are common (despite their illegality under the NLRA), though far from universal.[53] At the same time, it appears that few employers actually choose to disclose salary information, even if only internally.[54] We have begun to confront some of the reasons for that. But are those arguments legitimate and persuasive, and do they outweigh the benefits of

50. *See* Carl Shapiro & Joseph E. Stiglitz, *Equilibrium Unemployment as a Worker Discipline Device*, 174 AM. ECON. REV. 433, 433 (1984) (laying out the basic principles of the efficiency wage theory).

51. *See generally* Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 LEWIS & CLARK L. REV. 671, 685 (2008).

52. *See* Eisenberg, *supra* note 7, at 1015–19; Kulow, *supra* note 7, at 419–35; Ramachandran, *supra* note 7, at 1067–73.

53. *See* Bierman & Gely, *supra* note 7, at 168 (noting that one-third of American private-sector employers have adopted "specific rules prohibiting employees from discussing their wages with co-workers").

54. *See* Edwards, *supra* note 7, at 47–48; *see also* Bierman & Gely, *supra* note 7, at 168.

salary transparency, especially in uncovering, preventing, and remedying discrimination and in improving the efficiency of labor markets and the bargaining power of employees?

"Trade secrets" and proprietary information: Employers will argue, as they tend to do with respect to any information that they try to keep secret, that information about salaries is commercially valuable proprietary information that should be protected as a trade secret.[55] In *Just the Fact*s, I concluded that with few exceptions, the arguments for treating employment-related information as proprietary information or as trade secrets were very weak.[56] But the commercial case for confidentiality might be strongest with regard to salaries and salary structure. According to Professors Bierman and Gely: "Human resources professionals believe that properly designed employee compensation programs can represent a source of company competitive advantage."[57]

Let us concede that public disclosure of individual salaries, or of aggregate salary data that is broken down by job category, would be useful not only to employees and prospective employees, but also to competitors. The question is what it would be useful for, and whether that is a legitimate argument against requiring disclosure. The main concern seems to be "poaching"—the fear that other employers might use that information to compete and outbid the employer in the labor market.[58] But that should not count as a legitimate objection to disclosure. Indeed, it may actually bolster the case for disclosure. How so?

Consider the argument made by employers in *Chrysler Corp. v. Brown* to block disclosure of detailed statistical reports under the Freedom of Information Act (FOIA) on the race and gender of its employees in various professional job categories—reports that had been submitted to the government under federal civil rights laws.[59] The employers claimed this was "confidential commercial and financial information" exempt from disclosure because it would enable competitors to "raid" or "poach" its minority employees in scientific and technical fields in which such employees were in high demand.[60] It is clear why employers would want to avoid such "raiding"; they might either lose valued employees or be

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55. Estlund, *supra* note 1, at 392.

56. *See id.* at 391–94.

57. *See* Bierman & Gely, *supra* note 7, at 177.

58. *See, e.g.*, John Case, *When Salaries Aren't Secret*, HARV. BUS. REV., May 2001, at 37, 44 (expressing a vice president's fear that salary transparency would "make[] the company more vulnerable to poaching").

59. Chrysler Corp. v. Brown, 441 U.S. 281, 290–91 (1979); *see also* Westinghouse Elec. Corp. Research & Dev. Ctr. v. Brown, 443 F. Supp. 1225, 1228 (E.D. Va. 1977). This case was also discussed in *Just the Facts*. Estlund, *supra* note 1, at 393.

60. Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 175–76 (D. Del. 1976), *vacated*, 565 F.2d 1172, 1175 (3d Cir. 1977), *vacated sub nom.* Chrysler Corp. v. Brown, 441 U.S. 281, 285–86 (1979). Chrysler had argued that the exceptions to FOIA's disclosure mandate implicitly banned disclosure, and created a private right of action to prevent disclosure, of such information. The Supreme Court in *Chrysler* rejected this argument without reaching the question of whether the information in question was within FOIA's trade secret exception. *See Chrysler Corp.*, 441 U.S. at 290–94.

forced to raise salaries to keep them. But for those very same reasons, employees may not mind being "raided," or approached by a competing employer offering a higher salary.

The point here is not that the employer's interest in avoiding poaching is outweighed by employees' interests; it is that employers' desire to avoid lawful labor market competition for their at-will employees ought not to count as a legitimate commercial interest in confidentiality. It should raise no bar against a public disclosure mandate that is intended in part to improve labor market competition and employees' bargaining power.[61]

Employee morale and productivity: Employers generally fear that disclosure of salary information will lead to resentment on the part of less well-paid employees, thus producing friction and lower morale and productivity.[62] That has not been deemed a weighty enough concern to justify pay secrecy rules under the NLRA.[63] But let us take a closer look at this objection to requiring employer disclosure of salary information, first from the employer perspective. (Employees, of course, have their own interest in good morale and good relationships at work, to which we will turn below.)

Let us compare a world of internal salary secrecy to a world of salary transparency in which meaningful salary information is available to employees and others. In a world of salary secrecy, employers are presumed to pay individuals based on what it takes to hire them, keep them, and motivate them in a particular labor market. That may produce large salary disparities, even within the same job categories, between employees with the greatest productivity, market power, and negotiating skills (some of which correlate with race or gender) and their less favored co-workers.[64] But in a world of salary transparency, employers would have

61. The issue becomes slightly more complicated if the first employer has invested significant resources in training the employee, and is recovering training costs in the form of a lower salary. Such "implicit contracts" have long been under pressure with the erosion of internal labor markets and declining job tenure, and employers have struggled to develop viable contractual strategies for recovering training costs that do not unduly constrain employee mobility. *See, e.g.*, Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295, 1301–02 (2005). Mandatory salary disclosure would appear to do little to exacerbate the problem or to make the extant contractual solutions less effective.

62. This sort of objection is explored briefly and approvingly in Bierman & Gely, *supra* note 7, at 178, and critically in Eisenberg, *supra* note 7, at 1017–18, and Ramachandran, *supra* note 7, at 1069–71.

63. Such interests have not sufficed to defend pay secrecy rules under the NLRA, where they are generally outweighed by employees' statutory right to discuss their own wages and working conditions. *See, e.g.*, NLRB v. Main Street Terrace Care Ctr., 218 F.3d 531, 537–38 (6th Cir. 2000) (invalidating employer pay secrecy rule as interference with employee section 7 rights); Fredericksburg Glass & Mirror, Inc., 323 N.L.R.B. 165, 173–74 (1997) (invalidating employer rule prohibiting employees from discussing earnings with each other).

64. Apart from credentials, skills, or experience, workers' willingness and ability to bargain have a large impact on salaries. And it is a highly gendered impact, since women are significantly less likely to bargain over salaries. *See generally* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 1–6 (2003); Deborah A. Small et al., *Who Goes to the*

to consider the psychological impact of those salary disparities on employees. Employees' awareness of large salary disparities within the same or even different job categories might depress morale, generate resentment, and impede cohesiveness and cooperation.[65] The "conventional wisdom," simply stated, is that "employers have workers who are differentially productive, a fact that . . . clearly gives employers a profit-based incentive to pay workers differently. But employers are also concerned that large pay gaps between differently abled workers may reduce profits by creating 'morale' problems."[66]

This conventional wisdom assumes that individuals experience well-being in relative terms and feel less content, even with equal or greater absolute resources, when they are worse off than their peers within a relevant comparison group.[67] There is a lot of evidence for this proposition as a general matter,[68] though some empirical work in the salary context suggests that it may be overstated.[69]

The belief that pay transparency fosters friction also reflects an assumption that the truth about salaries is worse in employees' eyes than whatever they otherwise believe or suspect to be the case—that actual disparities are either greater or more arbitrary, or that employees' own relative pay is lower than what employees in the world of pay secrecy believe to be the case. But is that any more likely to be true than the opposite? Indeed, perceptions of unfairness might be more likely to flourish in the face of secrecy.[70]

Empirical research on these questions is quite limited, especially since the 1980s.[71] But the weight of the earlier studies suggest, contrary to the conventional wisdom of managers, that pay transparency tends to increase worker satisfaction and productivity, in part by fostering greater trust and perceptions of fairness.[72]

Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation, 93 J. PERSONALITY & SOC. PSYCHOL. 600, 601, 610 (2007).

65. *See* Bierman & Gely, *supra* note 7, at 177–81; Gerald S. Leventhal et al., *Inequity and Interpersonal Conflict: Reward Allocation and Secrecy About Reward as Methods of Preventing Conflict*, 23 J. PERSONALITY & SOC. PSYCHOL. 88, 89 (1972) (finding that, in order to avoid the interpersonal conflict that follows from pay inequity, managers will either pay the loudest complainers more or impose pay secrecy).

66. Gary Charness & Peter Kuhn, *Does Pay Inequality Affect Worker Effort? Experimental Evidence*, 25 J. LAB. ECON. 693, 713 (2007).

67. *Id.* at 696.

68. *See, e.g.*, Erzo F.P. Luttmer, *Neighbors as Negatives: Relative Earnings and Well-Being*, 120 Q.J. ECON. 963, 989–90 (2005) (finding lower levels of self-reported happiness when neighbors' earnings are higher).

69. *See, e.g.*, Charness & Kuhn, *supra* note 66, at 707 (finding that in a simulation, "workers" who learned of substantial pay inequity did not respond by reducing their effort, suggesting that jealousy may not be as strong a motivator as it is widely assumed).

70. *See, e.g.*, Adrienne Colella et al., *Exposing Pay Secrecy*, 32 ACAD. MGMT. REV. 55, 59 (2007) (arguing that workers in a pay transparency regime are actually more tolerant of wage disparity because secrecy and uncertainty are correlated with increased fairness concerns).

71. *Id.* at 56.

72. *E.g.*, Julio D. Burroughs, *Pay Secrecy and Performance: The Psychological Research*, 14 COMPENSATION & BENEFITS REV. 44, 50–54 (1982) (collecting and synthesizing studies); Charles M. Futrell & Omer C. Jenkins, *Pay Secrecy Versus Pay Disclosure for Salesmen: A Longitudinal Study*, 15 J.

The effects of pay transparency are likely to vary by industry, by company structure, and by workforce demographics.[73] But there is no strong empirical evidence that salary transparency leads to subjective unhappiness and organizational friction.

Perhaps that is partly because employers act differently under wage transparency. For if the salary disparities that exist in the world of pay secrecy would be expected to depress employee morale and cohesion, employers might respond by adjusting their salary structure to avoid those results—presumably to better comport with employee perceptions of fairness. In part, that should reduce the influence of favoritism and discrimination on salaries, but it might also reduce disparities generally. In other words, if most employees perceive fairness to require greater equality, employers might respond to transparency by compressing the wage scale (relative to the world of salary secrecy).[74] Employers would still have to consider the value of larger wage disparities in recruiting, retaining, and motivating the best and most demanding workers,[75] as well as in minimizing the cost of less demanding and less in-demand workers. But they would have to weigh those gains against the possible value of wage compression to morale and intergroup cohesiveness.

It is worth noting that "wage compression" is one well-documented consequence of unionization: union wages are higher in general, but especially at the bottom of the union wage scale.[76] That is partly a reflection of the collective preferences and the egalitarian values and political demands that drive unions' bargaining stance. Most workers (like the median worker, who has more clout in a union setting) do seem to prefer greater wage equality and perhaps greater wage transparency, and attempt to seek both when they have the collective economic power to do so.[77] It might also reflect the dynamics noted above: once wage

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MARKETING RES. 214, 218 (1978) (finding that pharmaceutical salesmen who switched to an open pay model, in which salary ranges were disclosed and all workers' individual compensation information was available upon request, were measurably more productive and content than those who did not switch); *cf.* Edward E. Lawler III, *Managers' Perceptions of Their Subordinates' Pay and of Their Superiors' Pay*, 18 PERSONNEL PSYCHOL. 413, 422 (1965) (finding that managers both overestimated their subordinates' pay and were less satisfied when the pay gap between themselves and their subordinates was lower, and inferring that pay transparency would therefore enhance managers' satisfaction).

73. *See* Colella et al., *supra* note 70, at 62–63 ("[N]ot all organizations will experience the costs and benefits [of pay secrecy] to the same degree.").

74. *But see* Rafael Gomez & Steven Wald, *When Public-Sector Salaries Become Public Knowledge: Academic Salaries and Ontario's Public Sector Salary Disclosure Act*, 53 CAN. PUB. ADMIN. 107, 123 (2010) (finding that the imposition of salary transparency on public universities in Ontario resulted in upward pressure on professors' wages, not salary compression).

75. Of course, if all employers faced the same transparency constraints, the risk of losing the best workers because of downward compression might not be that great; in a world of universal salary transparency, those workers could not flee to the high-variance regime of salary secrecy.

76. *See generally* David Card et al., *Unions and Wage Inequality*, *in* WHAT DO UNIONS DO? A TWENTY YEAR PERSPECTIVE 114, 151–52 (James T. Bennett & Bruce E. Kaufman eds., 2007).

77. *Id.* at 128–53.

transparency is the order of the day, as it necessarily is among union bargaining unit members, some degree of wage compression may help to maintain worker morale and productivity. To be sure, the productivity effects of greater wage transparency *and* wage compression in the union sector would be devilishly difficult to untangle from other effects of unionization, including the union wage premium, job security, and longer job tenure.[78] (Comparisons with the public sector, where pay transparency is also common, are likely to be even more difficult given the very different market and political forces operating in the public sector.) But the union example suggests that transparency and greater equality in pay levels can help promote trust and satisfy collective preferences that managers, left to their own devices, may neglect.

Managers might believe that they are maximizing productivity in adopting comparatively dispersed and secret wage structures. Some observers might be willing to assume that they are right, in which case the imposition of salary transparency and the resulting behavioral complications may look like distortions of efficient pay practices.[79] But that may give too much credence to the presumed efficiency of managerial preferences. Prevailing practices in the nonunion private sector might reflect managers' preference for maximizing their own discretion—a preference that is served by controlling information—and their belief that they can pay less to their workers overall in a regime of salary secrecy.

Mandatory salary transparency would compel managers to take into account collective and relative preferences and norms of fairness that are relatively dormant in a regime of salary secrecy—preferences for smaller salary disparities and perhaps for transparency itself. That is hard to characterize as an efficiency loss unless we somehow rule those employee preferences out of bounds. There is nothing natural about the nonunion baseline of salary secrecy, nor is there any normative principle that justifies treating the preferences triggered by salary transparency as distortions.

B. Other Objections to Pay Transparency

It is implicit in the foregoing discussion that some employees as well as employers might prefer pay secrecy to pay transparency. That is especially true if significant disparities are a given. Lower-paid employees might rationally choose

78. *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 174–80 (1984). Subsequent empirical studies of the union effects on productivity have generally found a modest positive effect or no effect on productivity. *Compare* Richard B. Freeman, *What Do Unions Do? The 2004 M-Brane Stringtwister Edition*, *in* WHAT DO UNIONS DO? A TWENTY YEAR PERSPECTIVE, *supra* note 76, at 607, 625 (arguing that the empirical evidence in this area is "favorable" to the idea that unions produce positive effects on productivity), *with* Barry T. Hirsch, *What Do Unions Do for Economic Performance*?, *in* WHAT DO UNIONS DO? A TWENTY YEAR PERSPECTIVE, *supra* note 76, at 193, 210 (arguing that limited empirical evidence in this area cannot conclusively establish (or reject) the positive productivity effect of unions).

79. *See* Ramachandran, *supra* note 7, at 1067 (noting that one potential cost of pay transparency is the "reduced ability to incentivize good performance").

to be ignorant of large disparities that would make them unhappy but that they cannot change, either individually or collectively. (Of course, that is not a likely or rational choice for employees if information about disparities would enable them to bargain more effectively, detect discrimination, and increase their pay, as suggested above.)

On the other side, higher-paid employees might favor salary secrecy if transparency were expected to lead either to co-worker resentment or to downward adjustments toward the mean. It is difficult to weigh these effects against the benefits of transparency for other employees, but it is worth noting that the higher-paid employees who would be most likely to experience either co-worker resentment or downward wage adjustments are those whose higher pay would be viewed by others as unjustified.

Employee privacy concerns: Other employee interests in salary secrecy stand on a different plane. Many employees prefer to keep their own salaries private; individualized disclosure of salaries would conflict with their genuine desire for privacy.[80] The point is not that mandated disclosure would constitute a tortious "invasion of privacy"; a public disclosure requirement (or even an employer's transparency policy announced in advance) would neatly defeat employees' "reasonable expectations of privacy."[81] But that does not tell us what the public policy (or employer policy) should be. The question is whether employees have a legitimate *interest* in the privacy of salary information that the public should accommodate.

It is worth observing that employee preferences for salary secrecy are not uniform.[82] For example, today's younger workers express less concern about privacy regarding money and a greater taste for transparency than their elders.[83] Moreover, whatever privacy interests individuals may have in their salaries, those interests are routinely surrendered by individuals who enter public service or even just public employment, or who serve as officers in publicly traded corporations or who are covered by a union contract.[84] Of course, the public interest in disclosure is more compelling in some of those cases—especially for public

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80. *See* Bierman & Gely, *supra* note 7, at 168–73 (discussing social and workplace norms regarding pay secrecy and how they conflict with protections afforded by the NLRA); Colella et al., *supra* note 70, at 62 (noting that "surveys of employees often find that the majority of employees are in favor of pay secrecy policies"); Eugene F. Stone & Dianna L. Stone, *Privacy in Organizations: Theoretical Issues, Research Findings, and Protection Mechanisms*, *in* 8 RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT 349, 360 (Gerald R. Ferris & Kendrith M. Rowland eds., 1990) (reporting that some studies find a positive correlation between subjective or "felt" employee privacy and employee performance, satisfaction, and retention).

81. *See* Robert Sprague, *Orwell Was an Optimist: The Evolution of Privacy in the United States and Its De-Evolution for American Employees*, 42 J. MARSHALL L. REV. 83, 114 (2008).

82. *See* Edwards, *supra* note 7, at 49.

83. *See id.* at 48.

84. *See* Ramachandran, *supra* note 7, at 1063–65 (noting that pay transparency is more common in these sectors).

servants and top corporate fiduciaries. But the point is that individuals' privacy interest in nondisclosure of salaries is often overridden and often given up.

Even if we were to grant that many employees have a legitimate privacy interest in personally identifiable salary information, that would require us only to modify the form of disclosure. Instead of full transparency, the law could require the disclosure of aggregate, nonpersonalized salary information that is broken down by job category. For smaller firms, where even that information might effectively reveal individual salaries to knowledgeable insiders, the law might require less by way of disaggregation, and might exempt the smallest companies altogether. But employee privacy interests are not a reason to reject meaningful salary disclosure altogether.

Employer collusion: Some might worry that mandatory disclosure of salary information could facilitate collusion among employers—price-fixing in the labor market.[85] At first blush that is a puzzling claim. Certainly employers' exchanging salary information among themselves can promote collusion. But *public* disclosure of such information seems more likely to promote competition than collusion. That is, after all, thought to be the effect of advertising prices of ordinary products.[86] Where there is heterogeneity in workers' productivity, easy access to reliable salary data should allow better workers to gravitate to higher-paying employers, and to induce employers to bid up wages to attract those workers (up to their marginal product).

At least that is the expected consequence of wage transparency if the relevant labor market is more or less competitive. Most labor economists believe that is the usual case, and that employer oligopolies are rare.[87] But they do exist. The market for nurses, for example, in a particular metropolitan area may be largely dominated by one or two or three hospitals; the normal costs and frictions associated with moving to a new city may give those employers considerable market power.[88] Collusion is a real risk in the presence of employer oligopoly, and public disclosure

85. *See* William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1733–35 (1999) (acknowledging that mandatory disclosure laws in the health care system have "the potential to facilitate collusion in concentrated markets").

86. That was the premise of the consumer plaintiffs in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), in which the Supreme Court struck down a ban on advertising of drug prices on First Amendment grounds and pioneered the protection of some "commercial speech." *Id.* at 770.

87. *See* Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1355–61 (1988).

88. The market for registered nurses is a textbook example of a monopsonistic or oligopsonistic labor market—one that is imperfectly competitive because there are too few buyers. Barry T. Hirsch & Edward J. Schumacher, *Classic or New Monopsony? Searching for Evidence in Nursing Labor Markets*, 24 J. HEALTH ECON. 969, 970 (2005). Though empirical evidence on long terms effects on wages is mixed, increased employer concentration appears to reduce the relative wages of registered nurses in the short run. *Id.* at 984. Mobility costs and imperfect information are other main sources of employer market power. V. Bhaskar et al., *Oligopsony and Monopsonistic Competition in Labor Markets*, 16 J. ECON. PERSP. 155, 172 (2002).

could increase that risk by making it easier for firms to police against defection from a tacitly or explicitly agreed-upon salary ceiling.

Of course, it is also possible that mandatory disclosure would make it easier to detect collusion. On balance, the potential for mandatory salary disclosure to facilitate employer collusion in oligopolistic labor markets is probably best dealt with by finding better ways to police against collusion.

CONCLUSION

The case for salary transparency turns out to be surprisingly complex because the consequences of salary transparency are themselves complex, uncertain, and varied. On balance, however, it seems that the main thrust of greater salary transparency would be in the direction of greater fairness in the eyes of most employees and the public. Transparency would probably tend to narrow the pay disparities among comparable employees—and especially those disparities that correspond to race or gender—both within and across organizations. It would have some tendency to squeeze out or reduce the role of favoritism, discrimination, and varied negotiation skills in setting pay, and some tendency to increase the bargaining power of employees who were otherwise the least well-informed about salaries of comparable employees in the same or other organizations. Transparency would also tend to induce employers to pay more attention to the rationality and fairness of the disparities that remain—to their correspondence to factors, such as productivity or seniority, that are legitimate in the eyes of employees and others.