March 2005

The Law and Social Norms of Pay Secrecy

Matthew A. Edwards

Follow this and additional works at: https://scholarship.law.berkeley.edu/bjell

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38B06Z

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of Employment & Labor Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
I. INTRODUCTION ............................................................................ 41

II. PAY SECRECY OR CONFIDENTIALITY (PSC) RULES, LAW AND NORMS ............................................................................................. 43
   A. The Bierman-Gely Account .................................................. 43
   B. PSC Rules, Law and Norms: Reflections on the Bierman-Gely Account ................................................................. 47

III. THE NEED FOR A NORMATIVE THEORY OF PAY SECRECY NORMS ........................................................................................ 52
   A. The Dilemma ........................................................................ 52
   B. Normative Norms: Suggestions for Future Pay Secrecy Scholarship........................................................................... 60

IV. CONCLUSION ................................................................................ 62

[T]alking about salary is one of the last conversational taboos. You may know about your colleague’s sex life, your friend’s drinking problem, or what your neighbor really thinks of her mother-in-law. But you probably don’t know what they take home in each paycheck.¹

I.
INTRODUCTION

According to conventional wisdom, we live in a confessional age where one’s sexual practices and mental health history are common water-cooler and dinner conversation subjects. Yet conventional wisdom also tells us that people do not want to discuss their finances.² “Money talk” is

† Assistant Professor, Department of Law, Zicklin School of Business, Baruch College (CUNY). J.D., 1993, NYU School of Law. I want to thank Matthew Bodie, Sam Estreicher and Geoffrey Miller for valuable feedback on an earlier version of this essay. Inga Sokolova provided helpful research assistance.
² I will put to the side the issue of conspicuous consumption, which could be viewed as a form of communicating one’s wealth or social standing to others. JULIET B. SCHOR, THE OVERSPENT
the last conversational taboo. This, of course, does not hold true in all circumstances. Some people who do not wish to discuss matters of sex, love, and health with friends, co-workers, and relatives, are willing to discuss personal finances quite freely with trusted colleagues. For legal scholars and social scientists, the challenge is to determine the extent to which the money-talk taboo manifests itself in various contexts, whether its effects are socially beneficial or harmful, and how, if at all, lawmakers should respond to these effects.

The American workplace is one arena in which the money-talk taboo has important implications, and in a recent article, Professors Leonard Bierman and Rafael Gely explore this realm by applying social norms theory to the issue of workplace pay secrecy. In so doing, the authors make a valuable contribution to both the limited legal scholarship on pay secrecy and the vast and ever-expanding literature on social norms and the law. There is no doubt that much can be gained from viewing the

---

3. See Richard Trachtman, The Money Taboo: Its Effects in Everyday Life and in the Practice of Psychotherapy, 27 CLINICAL SOC. WORK J. 275, 278–80 (1999); Abby Ellin, Want to Stop the Conversation? Just Mention Your Finances, N.Y. TIMES, July 20, 2003, § 3, at 9; Litman, supra note 1, at 39; Carol Lloyd, Cents and Sensibility: We Readily Talk About Our Addictions, So Why Can't We Discuss Our Dividends?, N.Y. TIMES, Dec. 28, 1997, at 50 (“Nowadays people will talk about anything—their lurid sex lives, their drug addictions, their dysfunctional families—but the topic of money remains one of our last taboos.”).

4. See Saul Levmore, Puzzling Stock Options and Compensation Norms, 149 U. PA. L. REV. 1901, 1937 (2001) (“It will do no good to point to the etiquette of not speaking about money quite generally. Children may be taught that a family’s income and the value of a family’s assets or material gifts are things to be kept private, but of course there is plenty of money-talk in the workplace . . . .”).

5. My discussion here is limited to the United States, though the money-talk taboo may also exist abroad. See, e.g., Elizabeth Olson, Swiss Blush, But Reveal Some Salaries, N.Y. TIMES, Apr. 25, 2002, § W, at 1 (“We don’t like to talk about money in Switzerland . . . and less about salaries.”) (quoting Marcel Ospel, Chairman of UBS).


workplace through the lens of social norms theory, and the authors do an admirable job of laying out the legal and social landscape of pay secrecy. Although I agree with many of their descriptive claims, I believe that Bierman and Gely could have gone even further in their analysis of some of the key normative issues underlying pay secrecy norms and rules. Thus, in this reply essay, I expand on their themes and explain why I believe that further investigation into the relationship between law, social norms, and pay secrecy is required. In particular, I argue that discussions of the law and norms of pay secrecy would be enriched by the development of a normative theory of pay secrecy—a theory that specifically identifies the contexts in which pay secrecy is socially beneficial, and sets forth the metric by which social welfare is being measured in evaluating pay secrecy regimes.

II.
PAY SECRECY OR CONFIDENTIALITY (PSC) RULES, LAW AND NORMS

A. The Bierman-Gely Account

In their article, Workplace Social Norms, Bierman and Gely begin by setting forth three seemingly non-controversial descriptive claims regarding the law and norms of pay secrecy: (1) pay secrecy or confidentiality rules ("PSC rules") that forbid the discussion of a worker’s own wages, imposed by employers upon employees, are "quite common in United States workplaces," (2) courts have held that PSC rules can violate Section 7 of the National Labor Relations Act (NLRA), a law which guarantees


10. In this essay, I am using the terms wage secrecy, salary secrecy and pay secrecy interchangeably.

11. See Bierman & Gely, supra note 6.

12. Pay secrecy has been defined as a "policy of keeping confidential the compensation levels of various categories of employees, most usually those in management positions." JAY M. SHAFRITZ, DICTIONARY OF PERSONNEL MANAGEMENT AND LABOR RELATIONS 318 (2d ed. 1985). For more on the pay disclosure/nondisclosure options available to employers, see infra note 37.

13. See Bierman & Gely, supra note 6, at 171 (citing More Employers Ducking Pay Confidentiality Issue: HRnext.com Survey Shows Many Employers View Issue as Hot Potato, available at http://hr2.blr.com/Article.cfm/Nav/4.0.0.0.6957).

14. See Gely & Bierman, supra note 7, at 126–38 (reviewing judicial and administrative treatment
workers the right to engage in concerted activity for the purpose of mutual aid and protection;\textsuperscript{16} and (3) there is a social norm\textsuperscript{16} of pay secrecy—that "a 'code of silence' exists with respect to the issue of pay in a large number of workplaces throughout the country."\textsuperscript{17}

Bierman and Gely point to four "norm-related considerations"\textsuperscript{18} that explain employer adoption and employee observance of PSC rules: (1) employee and employer privacy concerns;\textsuperscript{19} (2) avoidance of workplace conflict;\textsuperscript{20} (3) reduction of labor mobility, which can foster a more stable wage regime;\textsuperscript{21} and (4) facilitation of firm-specific investment.\textsuperscript{22}

---

\textsuperscript{16} Of PSC rules under the NLRA). For examples of PSC cases, see Brockton Hosp. v. NLRB, 294 F.3d 100, 106–07 (D.C. Cir. 2002) (affirming National Labor Relations Board (NLRB) holding that employer confidentiality policy was overbroad and thus unlawful); NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531, 538 (6th Cir. 2000) (observing that the defendant did "not contest the general proposition that a rule prohibiting employees from discussing wages, absent a substantial and legitimate business justification, violates § 8(a)(1)"); Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1510 (8th Cir. 1993) ("[A]n unqualified rule barring wage discussions among employees without limitations as to time or place is presumptively invalid . . . ."); Jeannette Corp. v. NLRB, 532 F.2d 916, 918 (3d Cir. 1976) ("[W]age discussions can be protected activity and . . . an employer's unqualified rule barring such discussions has the tendency to inhibit such activity."). In NLRB v. Brookshire Grocery Co., 919 F.2d 359, 363 (5th Cir. 1990), the court noted that the employer's workplace rule that forbade discussion of confidential wage information "patently violated" the NLRA, but the court denied the employee relief because he had wrongfully obtained the confidential wage information from his supervisor's files. \textit{Id.} at 363–66.

15. \textit{See} Bierman \& Gely, \textit{supra} note 6, at 172; Gely \& Bierman, \textit{supra} note 7, at 131–38; 29 U.S.C. § 157 (2004) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."). Interference with an employee's Section 7 rights constitutes an unfair labor practice. 29 U.S.C. § 158(a)(1) (2004).

16. Bierman and Gely use the following definition of a social norm: "Social norms are 'social regularities' or behaviors that are widely adopted in society. Moreover, they are activities that 'society holds that people should do.'" Bierman \& Gely, \textit{supra} note 6, at 173 (quoting C.A. Harwell Wells, Note, \textit{The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America}, 54 \textit{VAND. L. REV.} 1805, 1809 (2001)) (footnotes omitted). For other definitions of social norms, see Alex Geisinger, \textit{ supra} note 8, at 608 (defining a norm as "a behavioral rule supported by a pattern of informal sanctions"); Richard H. McAdams, \textit{The Origin, Development, and Regulation of Norms}, 96 \textit{MICH. L. REV.} 338, 340 (1997) (explaining that the literature refers to norms as "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of fear of external non-legal sanctions, or both"); Robert C. Ellickson, \textit{Law and Economics Discovers Social Norms}, 27 \textit{J. LEGAL STUD.} 537, 549 n.58 (1998) (expressing preference for the "positivist definition that a norm is a rule supported by a pattern of informal sanctions"); \textit{Eric A. Posner, LAW AND SOCIAL NORMS} 7–8 (2000) ("[S]ocial norms are usefully understood as mere behavioral regularities with little independent explanatory power and little exogenous power to influence behavior.").

17. Bierman \& Gely, \textit{supra} note 6, at 175.

18. \textit{Id.} at 176.

19. \textit{See id.} at 176–77. Employers are concerned about "protecting the proprietary nature of their employee compensation plans." \textit{Id.} at 177.

20. \textit{See id.} at 177–78; \textit{see also infra} note 82 and accompanying text (discussing effects of disclosure on workplace relationships). In an earlier article, Gely and Bierman note that courts have specifically rejected potential jealousy and strife as a legitimate employer justification for PSC rules. \textit{See} Gely \& Bierman, \textit{supra} note 7, at 129, 142.

21. \textit{See} Bierman \& Gely, \textit{supra} note 6, at 178–79 ("Professors Danziger and Katz argue that employers adopt pay secrecy polices to help prevent employee 'opportunism' in risk-shifting
Nevertheless, they note two reasons why an employee might flout these norms. First, there is the possibility of what they term a “prisoners’ dilemma” forming if one worker defects from the secrecy norm to try to negotiate a higher salary. Second, they draw upon “relative preference theory” to suggest that some workers will want to know what others earn because they care about their relative compensation (what they earn in comparison to other workers) or “local status” in addition to their absolute compensation. In sum, employees might want comparative salary information so that they can both negotiate greater absolute and relative compensation.

Based upon their survey of PSC rules and workplace norms, Bierman and Gely conclude that PSC rules complement and legitimate the social norm of pay secrecy, and arrive at the following policy conclusions. First, they argue that laws outlawing employer PSC rules are ill-advised because such laws are difficult to enforce and conflict with existing social norms and the norm-related considerations discussed above. Thus, they support

compensation policy situations. In sum, by helping reduce labor mobility, employer PSC rules help further the important social goal of guaranteed employee remuneration.” (citing Leif Danziger & Eliakim Katz, Wage Secrecy as a Social Convention, 35 ECON. INQUIRY 59 (1997)) (footnote omitted); see also Gely and Bierman, supra note 7, at 146–47.

22. See Bierman & Gely, supra note 6, at 179–81.

23. Id. at 182.


27. For an illuminating study of the relative influence of social comparison information versus absolute salary in cases where multiple job choices are presented to a candidate for employment, see Ann E. Tenbrunsel & Kristina A. Diekmann, Job-Decision Inconsistencies Involving Social Comparison Information: The Role of Dominating Alternatives, 87 J. APPLIED PSYCHOL. 1149 (2002).

28. See Bierman & Gely, supra note 6, at 183–84; see also Frank & Sunstein, supra note 26, at 342–43 (noting that some companies respond to concerns about relative economic position “by creating a norm against public discussion of salaries, on the theory that people are likely to be happy enough with their own, but would be less happy if they found themselves making comparisons to others”).

29. See Bierman & Gely, supra note 6, at 183–84.

30. See id. at 187 ("The recent proposals in Congress and the California state legislation make
neither the recent Congressional efforts to curb PSC rules nor a California statute that protects employees from various adverse employment consequences resulting from discussion of his or her wages. Instead, Bierman and Gely conclude that the preferred legal response is the current approach: pay secrecy rules, though unlawful under the NLRA, are permitted implicitly until a covered employee registers an objection by filing an unfair labor practice claim. To facilitate this right to object, the authors suggest that employees be informed of their Section 7 rights of pay disclosure by way of a poster in the workplace, similar to the one required under the Fair Labor Standards Act. Under their plan:

[W]orkplace norms of pay secrecy or confidentiality will be maintained unless someone takes action of a kind which forces the NLRB to react to specially enforce the NLRA's mandates in this regard. The NLRA's employer PSC rules 'per se' illegal. The problem with this approach is that it appears to be contrary to prevailing social norms and norm-related considerations.


32. See Bierman & Gely, supra note 6, at 186 (“In September 2002 the California Legislature passed major amendments to Section 232 of its state labor code, making it illegal for employers to require as a condition of employment that employees refrain from discussing their ‘working conditions,’ including wages.”). California law provides:

No employer may do any of the following:

(a) Require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages.

(b) Require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages.

(c) Discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages.


33. See Bierman & Gely, supra note 6, at 188–89 (“The NLRA’s regulatory scheme essentially gives employees a right to pay confidentiality unless they consciously decide to waive this right and step forward in a manner which forces the NLRB to enforce the law.”).

34. See id. at 190; see also 29 C.F.R. § 516.4 (2004) (prescribing FLSA poster requirements).
regulatory scheme essentially gives employees a right to pay confidentiality unless they consciously decide to waive this right and step forward in a manner which forces the NLRB to enforce the law.\textsuperscript{35}

B. PSC Rules, Law and Norms: Reflections on the Bierman-Gely Account

Bierman and Gely are astute in observing a disconnect between the persistence of employer PSC rules and existing anti-PSC law.\textsuperscript{36} Although pay secrecy\textsuperscript{37} seems to be the preferred policy for many U.S. employers,\textsuperscript{38} courts consistently have stated that unqualified PSC rules violate the NLRA,\textsuperscript{39} even when non-union employees\textsuperscript{40} are involved.\textsuperscript{41} Still, while Bierman-Gely's general description undoubtedly is accurate, one must be cautious not to overstate the prevalence of pay secrecy rules and norms in American workplaces.

First, even according to the source cited by Bierman and Gely (about

\begin{itemize}
\item \textsuperscript{35} Bierman & Gely, supra note 6, at 188–89.
\item \textsuperscript{36} See id. at 172–73; Gely & Bierman, supra note 7, at 125.
\item \textsuperscript{37} While my discussion will focus on secrecy or disclosure of individuals' pay within an organization, a wide range of pay secrecy and disclosure policies are available to organizations. See WAYNE F. CASCIO, APPLIED PSYCHOLOGY IN PERSONNEL MANAGEMENT 434 (1991) ("Openness versus secrecy is not an either or phenomena; it is a matter of degree."). Employers can make specific information public, such as pay ranges for certain job titles, the sizes of raises or bonuses (individually or in the aggregate, or the factors considered in setting compensation or bonuses). See Julio D. Burroughs, Pay Secrecy and Performance: The Psychological Research, 1982 COMPENSATION REV. 44, 45–46 (1982) (describing different pay regimes); EDWARD E. LAWLER III, REWARDING EXCELLENCE: PAY STRATEGIES FOR THE NEW ECONOMY 57 (2000) (noting range of reward administration communication policies); Jerald Greenberg & Claire L. McCarty, Comparable Worth: A Matter of Justice, in RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT 265, 279 (Gerald R. Ferris & Kendrith M. Rowland eds., 1990); CASCIO, supra, at 434.
\item \textsuperscript{38} See RONALD R. SIMS, ORGANIZATIONAL SUCCESS THROUGH EFFECTIVE HUMAN RESOURCES MANAGEMENT 250 (2002) ("Although it's illegal for employers to forbid employee discussions of pay, pay secrecy seems to be an accepted practice in many organizations in both the private and public sectors in the United States."); see also supra note 13 and accompanying text.
\item \textsuperscript{39} See supra note 14.
\item \textsuperscript{40} Although the NLRA protects employees who engage in wage discussions, supervisors are excluded from the statutory definition of an employee. See 29 U.S.C. § 152 (defining "employee"). The Act defines a supervisor as follows:
\begin{quote}
The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
\end{quote}
\item \textsuperscript{41} See King, supra note 7, at 832 ("It is clear that Section 7 covers employee behavior in a private sector, non-union workplace when that behavior is both concerted and protected."). In an earlier piece, Bierman and Gely argued that employers have not been particularly bold in asserting legitimate business rationales for PSC rules. See Gely & Bierman, supra note 7, at 129 ("Surprisingly, employers have in general been rather timid in advancing possible justifications for the adoption of PSC rules.").
\end{itemize}
which I have concerns\textsuperscript{42}) only one-third of employers have pay secrecy rules in place,\textsuperscript{43} whereas 51\% have no policy on pay secrecy\textsuperscript{44} (though many more may have informal pay secrecy rules\textsuperscript{45}). Second, the trend appears to be moving away from pay secrecy towards more pay openness, perhaps due to the influence of "younger, more "open"" workers in the workplace.\textsuperscript{46} Third, no discussion of pay secrecy would be complete without noting that there are some workers whose salaries are made public by law. Just to mention two obvious examples, there is compulsive disclosure of compensation information for certain executives of publicly held companies,\textsuperscript{47} and the salaries of many public servants are a matter of public record.\textsuperscript{48} Admittedly, the percentage of people in such positions is relatively modest, but it is one area where pay secrecy gives way to mandatory disclosure.

Employer PSC rules are only one part of the landscape. Perhaps the most important descriptive claim in \textit{Workplace Social Norms} is that a "strong"\textsuperscript{49} norm of pay secrecy exists in the U.S. — that a 'code of silence' exists with respect to the issue of pay in a large number of workplaces throughout the country.\textsuperscript{50} Despite the powerful intuitive appeal of this position, there are good reasons to question the vitality of a pay secrecy norm. In support of the code of silence assertion,\textsuperscript{51} Bierman and Gely

\begin{footnotesize}
\begin{enumerate}
\item The source cited by Bierman and Gely for this proposition is an online human resources website poll of 329 unidentified respondents. Given the lack of academic research on point, it is reasonable to use any relevant available sources. But it is important to note that this was not a scholarly survey.
\item Bierman & Gely, \textit{supra} note 6, at 171.
\item Id.
\item See Sridhar Pappu, \textit{Whispered Numbers}, \textit{MONEY}, Aug. 2001, at 23 ("A full 64\% of companies surveyed allow salary talk, up from about 50\% five years ago. The change is attributed to the presence of younger, more 'open' employees, written compensation rules and potential legal problems from trying to dictate what can and can't be discussed.") (discussing the HRNext poll, \textit{see supra} note 13). My version of the HRNext poll does not contain the percentages from five years earlier.
\item One state court has held that public employees do not have a constitutional right to privacy in their salary information. \textit{See Int'l Ass'n of Fire Fighters v. Municipality of Anchorage}, 973 P.2d 1132, 1136 (Alaska 1999).
\item \textit{See} Bierman & Gely, \textit{supra} note 6, at 185.
\item Id. at 175.
\item Actually, Bierman and Gely do not provide a cite to authority at the exact point of the quote above. \textit{See id.} I have reviewed their article and attempted to identify all of the sources that they cite for this or similar propositions to support this claim. I apologize if I have missed any authorities.
\end{enumerate}
\end{footnotesize}
primarily rely upon New York Times and Wall Street Journal articles and a 1973 study on pay secrecy. The Bierman-Gely article summarizes: "All in all, surveys of employees have found that a majority are in favor of workplace pay secrecy policies, and the primary reason they give for favoring such policies is that such policies protect privacy." In fact, the modest Schuster/Colletti study (which is now over three decades old) only indicated that a plurality of workers supported pay secrecy. Schuster and Colletti even concluded their brief article by observing: "The findings show the respondents divided about equally regarding preferences for pay secrecy."

Other survey evidence is similarly equivocal. For example, in a 2001 online survey administered by WorkingWoman.com, 49% of survey respondents indicated that none of their co-workers knew what they earned while a majority of respondents stated that some of their co-workers knew what they earned.

More telling, perhaps, were the respondents' responses to the question of whether they would divulge their salaries to a co-worker in various hypothetical circumstances. Although 37% of respondents indicated that there was no situation under which they would reveal their salaries to a co-worker, a significant number of respondents replied that they would reveal their salaries to a co-worker in certain hypothetical scenarios. For example, 28% of respondents stated that they would divulge their salaries if a co-worker was also willing to share, and 19% claimed that "all anyone needed to do was ask."

This informal online poll evidence is hardly

52. See id. at 168 n.1 (citing Ellin, supra note 3, at 9).
53. See id. at 176 n.74 (citing Alex Markels & Lee Berton, Executive Pay, Special Report, Something to Talk About: Do You Know What Your Colleagues Make?, WALL ST. J., Apr. 11, 1996, at R10).
54. Id. at 176 n.74 (citing Jay R. Schuster & Jerome A. Colletti, Pay Secrecy: Who Is For and Against It?, 16 ACAD. MGMT. J. 35 (1973)).
55. Id. at 176 (citing Schuster & Colletti, supra note 54, at 35; Markels & Berton, supra note 53, at R10).
56. The survey was of "575 professional employees in a major division at a large firm." See Schuster & Colletti, supra note 54, at 36.
57. See id. at 38.
58. See id. at 39 (emphasis added).
59. I acknowledge that reliance on such online surveys is methodologically suspect. See supra note 42.
60. See Littman, supra note 1, at 39–40.
61. Thirty-eight percent who responded said that only a few of their co-workers knew what they earned, 5% said that most knew, 4% said that all knew and 4% said that about half knew. Id. at 42. Moreover, the reasons given by those who do not share their salaries might lead one to question the strength of any secrecy norm. A majority (51%) of respondents stated that the reason that they keep their salary to themselves is that talking about salaries is "impolite," while 36% responded that they had not been asked. Id.
62. Id.
63. Id. Thirty-one percent of respondents stated that they would divulge their salaries to a co-
overwhelming, but it does raise questions as to the existence or strength of the pay secrecy norm. One possibility is that a social norm exists, but it is much less substantial than a rigid code of silence. Or perhaps it is as Dean Saul Levmore has opined: "A narrower and more accurate description of the [money-talk] norm is... that we are taught not to discuss money when to do so highlights inequality and conflicting fortunes." The pay secrecy norm, therefore, may be highly dependent upon context. If we accept this view, a junior partner in a large law firm conceivably might not discuss her salary or bonus with a paralegal on her team, but perhaps she would discuss such matters with a peer or someone higher up on the compensation food chain.

Although it is valuable to debate the extent of any pay secrecy norm in American workplaces, we may also want to entertain the possibility that the phenomena that we are observing might not be a social norm at all. Addressing this point requires an understanding of what a "norm" is, and one of the more vexing problems in the literature on social norms and the law is the lack of consensus on an appropriate definition of a social norm. Scholars have pointed out the difficulties of distinguishing between social worker if it "would give another woman leverage to ask for a raise," while 29% of respondents stated that they would divulge their salaries to a co-worker if it would give themselves such leverage. Id.

64. The absence or weakness of a salary secrecy norm in no way implies the presence of a salary disclosure norm. In this case, we have the additional complication that the survey was directed at women, who may have even stronger feelings about maintaining secrecy than men do. The article cites one advocate who explains that "for women, the issue of appropriateness is particularly acute. 'We are taught that it is not nice to ask about what people make.'" Id. at 41-42 (quoting Ellen Bravo, co-director of 9 to 5, National Association of Working Women).

65. In cases of disagreement over the construction of a norm, Professor Geoffrey Miller has suggested that parties are likely to draw on two general sources of justification for a particular interpretation: social or community consensus and "abstract principles to which all right-thinking people would subscribe." Geoffrey P. Miller, Norm Enforcement in the Public Sphere: The Case of Handicapped Parking, 71 GEO. WASH. L. REV. 895, 901 (2003).

66. See John W. Jones et al., Applying Psychology in Business: The Handbook for Managers and Human Resource Professionals 387 (1991) ("[T]he academic debate currently suffers from conceptual pluralism and terminological disarray. Indeed, we lack even a basic consensus on the proper definition of a social norm. This tower of Babel quality is, in part, a reflection of the complexity of the social phenomena that we are seeking to understand.").
norms and other social practices.\textsuperscript{69} I will not attempt to resolve the issue here, but let us assume that we are using one of the more traditional definitions of a norm as “a rule supported by a pattern of informal sanctions.”\textsuperscript{70} Applying this definition to the pay secrecy context, one might observe that it is not clear how frequently transgressors of this so-called pay secrecy norm or employer PSC rules are actually punished or sanctioned by their co-workers\textsuperscript{71} or their employers.\textsuperscript{72} Although \textit{Workplace Social Norms} addresses the enforcement of other workplace norms, such as the code of honor for training new workers,\textsuperscript{73} it does not discuss the enforcement mechanism for the pay secrecy norm. It is thus possible that the purported norm against talking about one’s salary may be a mere social convention,\textsuperscript{74} not a rule enforced by informal sanctions.\textsuperscript{75}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{69} See Miller, supra note 68, at 641–42.
\item \textsuperscript{70} See Ellickson, supra note 16, at 549 n.58. This is different than the definition that Bierman and Gely use. See supra note 16.
\item \textsuperscript{71} Richard H. McAdams, \textit{Signaling Discount Rates: Law, Norms, and Economic Methodology}, 110 \textit{Yale L.J.} 625, 636 (2001) (book review) (“Social theorists generally claim that norms are informally enforced by third parties using sanctions such as negative gossip, direct rebuke, ostracism, property destruction, and physical violence.”); Miller, supra note 65, at 915 (discussing sanctions for norms violations). One could argue that the norm no longer needs to be enforced by third parties because it has been internalized. Presumably, this would suggest that at some point in the past the norm was externally enforced before its internalization was effective (unless someone is using a definition of a norm that does not depend at all on third-party enforcement). But there is little evidence of earlier enforcement in the case of the purported salary secrecy norm. For more on norm internalization, see Russell B. Korobkin & Thomas S. Ulen, \textit{Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics}, 88 \textit{Cal. L. Rev.} 1051, 1130–31 (2000); Geisinger, supra note 8, at 628–29; Robert D. Cooter, \textit{Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms}, 86 \textit{Va. L. Rev.} 1577 (2000); Robert D. Cooter, \textit{Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization}, 79 \textit{Or. L. Rev.} 1, 17–21 (2000).
\item \textsuperscript{72} See Frank & Sunstein, supra note 26, at 342–43 (observing that companies may create a pay secrecy norm to minimize employees’ harmful social comparisons). It is necessary to identify two distinct possibilities here. First, a workplace could have a salary secrecy norm that is enforced by employees upon other employees (such as by shaming), which is, in turn reinforced by employer sanctions upon employees who violate the norm. Second, a workplace could have a salary secrecy rule that is enforced primarily by employer sanctions upon employee rule violators. The question then becomes whether the salary secrecy rule in the second scenario should properly be called a norm, since it is enforced by a third party (the employer) upon workers who may have different economic interests than their employer and who might be willing to discuss salaries in the absence of employer sanctions.
\item \textsuperscript{73} See Bierman & Gely, supra note 6, at 175 (citing George A. Akerlof, \textit{A Theory of Social Custom, of Which Unemployment May Be One Consequence}, 94 Q. J. OF \textit{ECON.} 749, 753 (1980)).

\begin{quote}
Here we will define “norms” as behavioral regularities supported at least in part by normative attitudes. We will refer to behavioral regularities that lack such normative attitudes as “conventions.” This is because we think it useful to have one term—“convention”—for a mere equilibrium that plays out without anyone holding beliefs about the morality of the behavior, and another term—“norm”—for a behavioral regularity associated with a feeling of obligation.
\end{quote}
\item \textsuperscript{75} Once again, this takes us back to the definition of a norm. Conceivably, someone could define norms in a way that does not explicitly make reference to the sanction regime. See, \textit{e.g.}, Richard A.
In sum, although it may seem counterintuitive, there are reasons to question the strength of the case in favor of a widespread social norm against salary discussions in American workplaces. As suggested by the foregoing discussion, my doubts are fueled by two main factors. First, existing survey evidence (flawed as it is) suggests that, if anything, American workers are deeply conflicted about wage discussions. Second, reflecting this possible ambivalence, there is a dearth of evidence regarding non-legal social enforcement of this purported social convention. No proof has been adduced that norm violators are punished routinely for violating pay secrecy norms. Nevertheless, for the purposes of the remainder of this essay, I will assume, for the sake of argument, that there is a social norm of pay secrecy. The next section will discuss some theoretical problems that evaluation of this norm raises.

III.

THE NEED FOR A NORMATIVE THEORY OF PAY SECRECY NORMS

A. The Dilemma

Imagine a world in which there is a social norm against interracial marriage between blacks and whites. Those who support the norm claim that it promotes social peace and stability, while reinforcing the cultural separation of blacks from whites. You are brought in as an expert to evaluate the norm. Under the narrowest view of your mandate, you might ask whether the social norm serves the stated functions of promoting social peace and reinforcing racial separation. If you believed that it did so, then you might conclude that the norm against interracial marriage was effective. You probably would hesitate, however, to sign your name to this assessment because you would understand that it is a morally myopic conclusion. Instead, you likely would feel compelled to include in your calculus an evaluation of the social goals that the norm purportedly served. It would be necessary to explain why you believe that social peace and racial separation are worthwhile social goals and why the pursuit of these ends trumps other identifiable interests. In other words, evaluation of a

POSNER, FRONTIERS OF LEGAL THEORY 288 (2001) ("A social norm... is a rule that is neither promulgated by an official source, such as a court or legislature, nor enforced by threat of legal sanctions, yet is regularly complied with (otherwise it wouldn't be a rule."). Note that Posner goes on to discuss the sanctions that enforce norms. id. at 290–99. This suggests that Posner views sanctions as indispensable to understanding norms.

76. See supra notes 56–63 and accompanying text.
77. See supra note 72 and accompanying text.
social norm requires an examination of the desirability of the social ends that the norm produces, which in turn requires a normative theory to guide us in determining which interests matter and how to balance these interests against each other. Note that adding the existence of a law on point to the hypothetical should not change this analysis. In the example above, the presence of an anti-miscegenation law consistent with the social norm against interracial marriage would not obviate the need to analyze whether both the norm and law are socially beneficial. Consistency between laws and norms alone cannot justify either a law or a norm without an explicit evaluation of the social goals that the law or norms are meant to serve.

The preceding hypothetical scenario suggests a similar dilemma in the pay secrecy realm. If we assume, arguendo, that a pay secrecy norm exists, we still must determine whether pay secrecy is socially beneficial and whether and how lawmakers should intervene to support or undermine existing norms. Among the available legal regimes are: (1) mandating pay disclosure by law;79 (2) permitting employer PSC rules; (3) forbidding employer PSC rules;80 and (4) mandating pay secrecy by law.81 The choice of legal regime, along with PSC rules and norms (assuming that such norms exist) will regulate how much information workers have about their co-workers’ salaries. This flow of information, in turn, arguably can affect matters such as: (1) employee pay satisfaction and morale, which may impact the quality of the working relationships among co-workers or between workers and their supervisors;82 (2) employees’ compensation;83

79. Such mandatory disclosure exists with respect to certain corporate executives and public employees. See supra notes 47–48 and accompanying text.

80. This is essentially the approach adopted by California and Michigan, and which has been advocated in several Congressional proposals. See supra notes 31–32 and accompanying text.

81. To the best of my knowledge this approach has never been suggested or employed. I include it here simply to show the full range of options.

82. See Levmore, supra note 4, at 1938 (noting that employer preference for salary secrecy “can be understood as promoting solidarity because it is thought to lessen envy and the like and employees abide by the wishes of their employer to a remarkable degree”); ROBERT L. MATHIS & JOHN H. JACKSON, PERSONNEL/HUMAN RESOURCE MANAGEMENT 339 (6th ed. 1991) (“One reason for secret or closed pay systems is the fear that open pay systems will encourage petty complaints and create discontent and tensions.”); Jon E. Pettibone, Advising Private Sector Clients: Don’t Forget the NLRA, 40 ARIZ. ATT’Y 18, 20 (2003) (“Many employers, especially those in high technology or other emerging or expanding industries where compensation rates tend to be more dynamic, seek to avoid employee jealousies and morale problems by requiring that employees keep their own compensation rates confidential.”); Burroughs, supra note 37, at 47 (“One reason for pay secrecy, according to Lawler, is managements’ seemingly logical view that such secrecy shuts out almost all opportunity for pay comparisons that would trigger dissatisfaction in those holding the short end of the stick.”) (referring to work on salary secrecy done by Edward E. Lawler, III); Adrian Furnham, The Case for Secrecy, in ACROSS THE BOARD 7–9 Jan./Feb. 2003 (arguing that salary secrecy reduces “unhealthy, unnecessary and unproductive social-comparison processes”).

Stripping the salary veil would be tantamount to making the relative value of each employee public knowledge. Do we really want to obsess more than we already do about the office pecking order and our place in it? I may be fighting the power of market economics, but I say no. In this case, ignorance is bliss.
worker mobility; wage stability; and employer freedom in setting wage levels, which includes the power of employers to compensate workers for firm-specific investment or to implement merit-based compensation systems.

This first problem that scholars and regulators face in evaluating PSC rules, law, and norms is the empirical challenge of determining the precise effects of altering the flow of salary information on the various factors listed above. This may not be a simple matter. Consider one example from the human resources literature: the common management assumption that more openness regarding pay leads to greater discord in the workplace and presumably more dissatisfaction with pay. In contrast to this conventional wisdom, Professor Edward E. Lawler has spent several decades advocating greater openness in pay and arguing that pay secrecy can have deleterious effects. Lawler asserts:

particularly in the case of organizations that have effective pay systems and...
pay well relative to the market, there is a tremendous advantage to be gained from making pay rates and policies public. Because pay secrecy leads to misunderstandings and perceptions that are more negative than the reality of how pay is actually administered, companies that want to establish a high-performance culture can gain from making pay information public and open to discussion. Openness can increase trust, perception of fairness, understanding of the business, and respect for the organization and its management.91

To be sure, the empirical work does not demonstrate that openness is always preferable to secrecy.92 Even Lawler acknowledges that there is “no clear right or wrong approach” when it comes to pay openness and that much depends on the type of organization involved.93 For example, disclosure might cause discord in a workplace with a compensation system that seems inequitable to employees.94 It seems logical that the effect of secrecy on pay satisfaction and workplace harmony depends upon a variety of factors, including the nature of the workers, the type of employer, and the compensation system in place.95 Moreover, we should not forget the potentially dynamic nature of social norms. Salary secrecy may be

91. LAWLER, supra note 37, at 287; see also Greenberg & McCarty, supra note 37, at 280 (discussing benefits of pay openness).

92. See Burroughs, supra note 37, at 54 (surveying pay secrecy studies and finding the research “inconclusive” on the key issue as to whether relaxing pay secrecy policies reduces dissatisfaction with pay); see also Andre DeCarufel, Pay Secrecy, Social Comparison and Relative deprivation, in ORGANIZATIONS, RELATIVE DEPRIVATION AND SOCIAL COMPARISON 181, 189 (James M. Olson et al. eds., 1986) (describing studies showing that although pay secrecy may cause comparisons to be based on inaccurate information, satisfaction with compensation was not related to accuracy of perceptions in a consistent manner) (citing Thomas A. Mahoney & William Weitzel, Secrecy and Managerial Compensation, 17 INDUSTRIAL RELATIONS 245 (1978)); George T. Milkovich & Phillip H. Anderson, Management Compensation and Secrecy Policies, PERSONNEL PSYCHOLOGY 293, 302 (1972) (concluding that openness as well as secrecy may cause problems in the area of salary administration). One economist has suggested that there are certain situations in which wage secrecy can produce higher employee satisfaction and higher profits for employers. See Li Gan, The Uncertain Wage-Effort Hypothesis and Wage Secrecy, 2 TOPICS IN ECON. ANALYSIS & POL’Y 10 (2002), available at http://www.bepress.com/bejap/topics/vol2/iss1/art10. Professor Gan emphasizes that a key factor is the reference group against whom employees compare themselves. Thus, according to his theory, if a worker compares himself to his superiors, wage secrecy may be good for employers and workers, whereas “an open wage policy among peers is desirable.” Id. at 11; see also DeCarufel, supra, at 191 (“[D]ifferent comparisons can result either in feelings of relative gratification . . . or in feelings of relative deprivation . . . .”).

93. See LAWLER, supra note 37, at 57–58.

94. See Chruden & Sherman, supra note 86, at 409 (observing that “disclosure of pay rates could prove disastrous to employee performance and morale” if there are inequities in the existing pay system); LAWLER, supra note 37, at 58 (noting pressures that open pay systems place on employer’s compensation administration systems); CASCIO, supra note 37, at 434 (observing that “making pay rates public where pay is not tied to performance only will reduce the power of pay to motivate”).

95. See Paul Thompson & John Pronsky, Secrecy or Disclosure in Management Compensation?, BUS. HORIZONS 67, 73–74 (1975) (describing conditions under which an open pay system would be most effective, including the ability to measure performance objectively and a low level of interdependence among workers).
preferred by workers in a world where secrecy is the dominant approach, but this does not mean that salary disclosure could not be preferred under a different set of circumstances, such as where disclosure is the dominant approach.  

But even if social scientists possess the tools to measure the empirical effects of pay secrecy or disclosure, the second challenge that scholars and lawmakers face is determining which policy choice is preferable as a normative matter. For example, assume that pay secrecy decreases wages and worker mobility, but increases workplace harmony and firm-specific investment. Is secrecy a good policy? Without a normative theory, we cannot be sure. As Professor Pauline Kim explains: “[E]mpirical evidence alone cannot resolve the ultimate normative question of which legal rule should be adopted. More data may enhance our understanding of the practical effects of a proposed law, and such information is undoubtedly valuable. The selection of a legal rule, however, involves a choice among competing values.”

This discussion naturally leads us to ask whether Bierman and Gely have proffered a fully-articulated normative theory of salary secrecy. Their approach to norms analysis follows:

For these norms against the public discussion of wages to endure, it appears that their net effect must be an increase in the welfare of those affected by the norm. The benefits of these norms might include reduction in workplace conflict, a more efficient allocation of compensation, and greater flexibility in rewarding idiosyncratic firm-specific investments. These benefits arguably should make all workers better off than they would be under a regime in which discussions about pay are openly permitted and even encouraged.

Thus, Bierman and Gely appear to be arguing that the very existence of the pay secrecy norm proves that the norm must be welfare-enhancing (though they couch the conclusion in somewhat equivocal language). The efficiency of norms is a topic that has generated a great deal of discussion in the law and norms literature, and I will not rehearse this complex debate here. As Robert C. Ellickson, a law and norms theory pioneer and self-
proclaimed optimist, observes:

A substantive debate is brewing over the central question of to what extent norms enhance welfare. . . . I am among the optimists on that issue. Even I worry, however, that the members of a group may generate norms that impose negative externalities and that the norm-making process may go wrong when the members of a group are not closely knit. In addition, critics far more skeptical of the efficient-norm hypothesis have been surfacing. 101

This much is clear: an assumption that social norms are inherently socially beneficial because of their very existence is, to say the least, debatable. 102 To my mind, social norms, like laws, may be efficient or inefficient, 103 welfare enhancing or welfare diminishing, 104 just or unjust. 105 Moreover, a norm's status may change over time, from beneficial to harmful. 106 Only a normative theory can tell us whether or not a particular norm is socially desirable. 107 In the case of salary secrecy, there might be

102. See POSNER, supra note 16, at 172 (“Functionalism—the view that social practices and norms are efficient or adaptive in some way—is empirically false and methodologically sterile.”); see also Paul G. Mahoney & Chris W. Sanchirico, Competing Norms and Social Evolution: Is the Fittest Norm Efficient?, 149 U. PA. L. REV. 2027 (2001) (addressing whether surviving norms are likely to be economically efficient).
103. See Jody S. Kraus, Legal Design and the Evolution of Commercial Norms, 26 J. LEGAL STUD. 377 (1997) (arguing that commercial practices or norms, though efficient, are unlikely to be optimal); McAdams, supra note 16, at 338; POSNER, supra note 16, at 176 (“In sum, one can make no presumptions about whether group norms are efficient and about whether legal intervention will improve behavior in close-knit groups.”) (footnote omitted); Geisinger, supra note 8, at 642–52 (questioning the efficiency of norms as enforcement tools).
104. See Richard A. Posner & Eric B. Rasmusen, Creating and Enforcing Norms, with Special Reference to Sanctions, 19 INT'L REV. L. & ECON 369, 370 (1999) (“Norms, like laws, can be bad, so that the obstacles to their creation and enforcement may actually promote the social welfare.”).
105. Professor Edward J. McCaffery has discussed the dangers in accepting social norms without question:

[The idea of social norms] is an amorphous idea that has entered into the normative lexicon of legal theory of late. A large part of its role seems to be to supplant anything approaching the autonomous exercise of moral reasoning. Social norms just are, in the standard view—though more often than not, the project of the “social norms” school is to show how such norms represent a spontaneously generated private ordering that tends towards efficiency, in the specific sense of wealth-maximization. The normative theorist in any event is relegated to a passive acceptance of such norms. Worse, in their mere existence, the role of social norms is fully heteronomous—individual actors are constrained to accept them, there is no reasoned discourse, no wide or narrow or indeed any reflective equilibrium at all.

106. Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 HARV. L. REV. 961, 1022 n.119 (2001) (“Some social norms may have once advanced welfare but become counterproductive over time, although the norms are resistant to change.”); Posner & Rasmussen, supra note 104, at 378 (“If the transitional costs to a new norm are high enough, we have the phenomenon of a norm ‘trap,’ meaning that society is stuck with a suboptimal norm because of the costs of changing it.”); Jeffrey L. Harrison, Order, Efficiency and the State: A Commentary, 82 CORNELL L. REV. 980, 992 (1997) (“The norm we see today may just be the remnants of a norm that was efficient a generation ago, that now has simply become custom. Similarly, norms that make great sense today may make little sense in the future.”).
107. See McAdams, supra note 16, at 397 (“By whatever normative criteria one uses, some group
situations (or time periods) where a norm against wage discussions is socially beneficial, but this does not mean that such a norm is beneficial in all situations at all times.

It is beyond the scope of this essay to argue for the proper normative theory for evaluating either laws or norms\textsuperscript{108} (though I will make some suggestions for future study below\textsuperscript{109}). This essay simply makes two points: (1) some normative theory is necessary, unless one’s purpose in discussing the relationship between law and norms is purely descriptive;\textsuperscript{110} and (2) assumptions about the efficiency or welfare-enhancing status of a norm are problematic. To reiterate: the choice of the pay disclosure regime will affect the flow of information to employees, which in turn may affect a number of matters regarding wages and conditions of employment. If we assume that the consequences vary depending on the pay disclosure legal regime in place, we need a normative theory to tell us which consequences are socially desirable, and to guide us in measuring and comparing different kinds of consequences. Salary secrecy indeed may be welfare enhancing, but this conclusion should not be assumed.

It is thus hard to see how one can design a rational legal response to PSC rules without a well-defined normative theory of pay secrecy and disclosure. To illustrate, let us assume that non-union workers do not know their rights under the NLRA,\textsuperscript{111} and fail to understand that PSC rules are potentially unlawful. Workers therefore can be seen as waiving a legal right (to discuss their salaries), without receiving compensation in exchange for societal norms are desirable and some are not. Sometimes norms are the cure; sometimes the disease.

\textsuperscript{108} See Robert Cooter, \textit{Normative Failure of Law}, 82 CORNELL L. REV. 947, 972 (1997) (stating that social norms are “perfect” when law cannot improve upon them relative to standards of either Pareto or cost-benefit efficiency); Harrison, \textit{supra} note 106, at 992 (questioning whether “efficiency is always a good thing”). Judge Richard Posner and Professor Eric Rasmusen caution scholars:

The diversity of norms along such dimensions as efficacy, durability, mode of enforcement, and conformity to overall social goals limits the scope of useful generalization. Such questions as whether the United States has too few or too many norms, or whether norms are a good thing or a bad thing, or whether they “work” in a society as heterogeneous and individualistic as that of the United States are either unanswerable or misconceived. (To see this, substitute “law” for “norms.”) A more particularistic analysis is required.

\textsuperscript{109} See \textit{infra} Section III.B.

\textsuperscript{110} See Litowitz, \textit{supra} note 100, at 321–28 (discussing difficulties with a purely positivistic approach to social norms); McCaffery, \textit{supra} note 105, at 2149 (“Social norms come from somewhere. There can be better or worse norms, more or less followed. The law can or cannot support these better ones: the law is inevitably moral.”). There is nothing wrong with a purely descriptive scholarly treatment of a social norm, but since Bierman and Gely make concrete policy proposals, their discussion is clearly prescriptive.

\textsuperscript{111} See Bierman & Gely, \textit{supra} note 6, at 189 (“[T]here is strong evidence that employees in non-union work settings have little idea about their rights under the NLRA.”) (citing Pauline T. Kim, \textit{Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World}, 83 CORNELL L. REV. 105, 106 (1997); Cass R. Sunstein, \textit{Human Behavior and the Law of Work}, 87 VA. L. REV. 205, 206 (2001)).
for this waiver. An obvious comparison can be drawn to the literature on employment at will, which indicates that workers seem to misgauge their legal rights (believing that they cannot be fired without just cause), despite law to the contrary. In such cases, the norms of the workplace can help to create worker confusion about their legal rights, because the norm is more generous than the law. In the case of salary secrecy, we have the opposite effect: the norms of salary secrecy lead workers to believe that they have fewer legal rights than the law actually affords.

In light of this employee misunderstanding, Bierman and Gely argue that workers should be informed of their right to discuss their salaries, so that any waiver of their rights will be informed. The logic and apparent fairness of this position cannot be disputed, but the proposal presents an interesting issue. If PSC rules and social norms of pay secrecy are socially beneficial (however this is to be measured), it is hard to see why Bierman and Gely would support implementing a legal regime that could weaken the social norm of pay secrecy and lead to successful challenges of employer PSC rules. Put more cynically, if employees’ chronic misunderstanding of their salary disclosure rights is an integral part of a socially beneficial outcome, then why would we want to disturb this? One easy answer is that it is simply not fair to ask employees to give up a legal right without obtaining compensation in exchange for the waiver. But this argument misses the point. If pay secrecy is preferred to salary disclosure as a matter of public policy, then we could simply alter the prevailing legal regime to deny workers the right to challenge PSC rules. In other words, we could amend the NLRA to allow for PSC rules or interpret the Act as permitting such rules, which would reinforce any existing pay secrecy norms. It seems to me that this would be the logical position of those who believe that pay secrecy is welfare enhancing. In contrast, it appears somewhat inconsistent to argue that pay secrecy is welfare enhancing, but then to

112. See Bierman & Gely, supra note 6, at 189–90.
114. See Kim, supra note 9 (discussing worker confusion due to the differences between the law governing employee discharges and norms regarding termination).
115. See Bierman & Gely, supra note 6, at 190.
116. See id. at 191 (“The social norms favoring workplace pay secrecy/confidentiality make both practical and economic sense, and should not be disturbed.”).
117. See Estlund, supra note 113, at 10 (“The problem with erroneous employee beliefs about the law is that they allow employers to have it both ways. Employers enjoy the considerable benefits of employee beliefs that they are protected against unjustified discharge while escaping the costs of that legal protection.”).
118. An argument could be made that a certain level of ambiguity regarding the law or employees’ legal rights is welfare enhancing, but it does not seem that Bierman and Gely are making this claim.
propose that employees be given the right to object to such an approach.  

Once again, the comparison to the literature on employment at will provides a useful comparison. In that context, the underlying presumption is that the parties’ welfare is maximized through the voluntary contracting process between employer and employee. Thus, it makes sense that we want to satisfy the standard neoclassical conditions for a well-functioning market, such as minimizing information asymmetries, by informing employees that the current default rule is employment at will. By contrast, one who advocates the superiority of a salary secrecy norm is implicitly arguing that the free flow of information between employees, and the resulting employee-employer contracting process, is not welfare enhancing. Therefore, it seems that a proponent of salary secrecy would favor any combination of law and norms that would minimize the free flow of salary information. Accordingly, it is interesting to see that Bierman and Gely oppose outlawing PSC rules (thus favoring pay secrecy), while at the same time they support employees’ rights to be informed of their pay discussion protections under the NLRA and to object to any employer PSC rule (which undermines pay secrecy).

B. Normative Norms: Suggestions for Future Pay Secrecy Scholarship

I will conclude with a few observations and suggestions for future research that would build upon Bierman and Gely’s work on salary secrecy. First, it would be valuable for any commentators to specifically identify the normative theory being utilized to evaluate the social norm of salary secrecy. This will clarify future debates immeasurably. Scholars have produced mountains of literature debating how to judge legal actions, often debating the virtues of various consequentialist and deontological approaches. Thus, a reasonable first step would be to question whether

---

119. If one does support the right of workers to waive their salary secrecy provisions voluntarily, an unfair labor practice claim seems like an unusual mechanism to accomplish this goal. It would seem more typical to require a waiver at the outset of the employment relationship. See Estlund, supra note 113, at 23–27 (discussing potential waiver regimes for the at-will employment context). It would have been interesting if Bierman and Gely had explained why they prefer this form of waiver.

120. By “normative,” I simply mean any theory that aims to help us determine what the law ought to be, as opposed to what the law is. Thus, various versions of cost-benefit analysis would be normative from this perspective.


122. Professor Michael Dorff explains this ongoing debate as follows:

The struggle for public policy supremacy between the consequentialists and the deontologists has raged at least since the early nineteenth century. Consequentialists (or teleologists)
there are any possible deontological objections that one can raise against salary secrecy because of its restraint on expression, and, if not, what type of consequentialist theory is to be applied.

To my mind, the second step is to tackle, head on, the question of whether the purported social norm of salary secrecy is socially beneficial. This requires specifically identifying the metric used to measure social welfare, whether it is wealth, utility or some other metric, and explaining why it is the preferred measure in this context.

The third step in my agenda is suggested by Professor Geoffrey Miller's recent work applying public choice theory to the study of social norms. Miller focuses on "competitive norms"—social norms that systematically benefit one group at the expense of another. Within this category, he identifies three specific types of competitive norms: (1)
norms that protect or enhance a group’s social status;\textsuperscript{128} (2) norms that increase a group’s welfare;\textsuperscript{129} and (3) norms that reflect a group’s ideological values.\textsuperscript{130} Miller explains that the fact that the norm benefits a group does not prove its efficiency.\textsuperscript{131} Instead, we must determine whether the group that obtains the benefit values it more than those who give it up, and whether transaction costs prohibit bargaining solutions to the problem.\textsuperscript{132} This suggests two related inquiries that have yet to be answered in the salary secrecy literature: whether the norm against wage discussions systematically benefits one group over another (such as employers over employees), and whether such a benefit is economically efficient. Answering these crucial questions will add much needed clarity to the debate over salary secrecy.

IV.

CONCLUSION

The workplace is a fruitful environment to explore the interaction between social norms and the law, and Leonard Bierman and Rafael Gely’s article, \textit{Workplace Social Norms}, makes an interesting and important addition to the literature in the field by drawing attention to the complex interplay of PSC rules, norms, and law. This reply essay has suggested several potentially valuable avenues for future scholarship in the field. At the outset, the scope of the wage secrecy norm must be more precisely delineated to gain a deeper understanding of the exact ways the norm manifests itself in American workplaces. This then leads to two scholarly tasks. First, it is necessary to determine empirically the effects that the salary secrecy norm or alternative informational regimes would have on matters such as employee pay satisfaction and morale; absolute and relative compensation; worker mobility; wage stability; and employers’ capabilities to compensate firm-specific investment or implement merit-based compensation systems. This is admittedly a challenging task, but one that is necessary if scholars are to assist policy makers who must decide the extent to which pay secrecy will be favored or disfavored by the legal regime.

Second, beyond this daunting empirical task, I have argued that future treatments of the regulation of salary secrecy would benefit greatly from the example of calling certain animals “dogs” instead of “broofs.” \textit{Id.} Second, there are nonsystematic norms, which may confer benefits in particular cases, but do not systematically favor any one group over another. \textit{Id.} at 642. Miller points out that many rules of politeness fall into this category. \textit{Id.} at 642–43.

\textsuperscript{128} \textit{Id.} at 652–53.
\textsuperscript{129} \textit{Id.} at 654–55.
\textsuperscript{130} \textit{Id.} at 655.
\textsuperscript{131} \textit{Id.} at 669.
\textsuperscript{132} \textit{Id.}
adoption of an explicitly normative theory to judge and analyze the social practice of pay secrecy. Such a theory would provide regulators with the tools to determine which salary disclosure or non-disclosure regime is most likely to be socially beneficial. A key step in this process will be the endorsement of a metric to judge social welfare, and a method for trading off the various effects caused by different salary disclosure or secrecy regimes and identifying which groups, if any, are favored and disfavored by a norm of salary secrecy. In the final analysis, it may well be that there is a social norm of pay secrecy, and that it is socially beneficial. But the purpose of this essay has been to highlight the empirical and normative work that needs to be done before such conclusions can be drawn.