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## Love, Sex and Politics? Sure. Salary? No Way: Workplace Social Norms and the Law

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### Recommended Citation

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# “Love, Sex and Politics? Sure. Salary? No Way”: Workplace Social Norms and the Law

By Leonard Bierman<sup>†</sup> and Rafael Gely<sup>††</sup>

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## I.

## INTRODUCTION

*A. The Conflict*

A recent article in the *New York Times* captioned "Love, sex and politics? Sure. Salary? No way" discusses Americans' strong aversion to talking about their salaries.<sup>1</sup> The piece notes that while discussion of financial matters is often acceptable in some parts of the world, it is generally considered "crass" in the United States.<sup>2</sup> In short, discussion by individuals of their salaries and related matters can be seen as violating an American "social norm."<sup>3</sup> One-third of United States private sector employers have reinforced this norm by adopting specific rules prohibiting employees from discussing their wages with co-workers, rules known as pay secrecy/confidentiality ("PSC") rules.<sup>4</sup> Moreover, legal and human resource management experts recognize that in addition to workplaces with specific PSC rules, a significant number of other employers have more informal expectations that employees "keep their lips sealed about their salaries."<sup>5</sup>

However, employer PSC rules and even informal employer expectations of employee "discretion"<sup>6</sup> in this area conflict directly with the law. Section 7 of the National Labor Relations Act (NLRA) protects the rights of all employees, whether represented by a union or not, to engage in

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1. See Abby Ellin, *Want to Stop the Conversation? Just Mention Your Finances*, N.Y. TIMES, July 20, 2003, § 3, at 9.

2. *Id.*

3. See *infra* notes 71-108 and accompanying text.

4. See *More Employers Ducking Pay Confidentiality Issue: HRnext.com Survey Shows Many Employers View Issue as Hot Potato*, available at <http://www.hrnet.com> (last visited Nov. 16, 2003) [hereinafter "HRnext Survey"]; Mary Williams Walsh, *The Biggest Company Secret: Workers Challenge Employer Policies on Pay Confidentiality*, N.Y. TIMES, July 28, 2000, at C1.

5. See Sacha Cohen, *Shhh, They're Talking Salary*, USA TODAY Job Center, available at <http://www.USAtoday.com/jobcenter/jobhunt/salary/2002-12-salary-talk-x.html> (Dec. 20, 2002).

6. *Id.*

“concerted activity for the purpose of . . . mutual aid or protection.”<sup>7</sup> The National Labor Relations Board (NLRB) and the federal courts have regularly held that discussions among employees regarding their wages represent “protected concerted activity” per section 7 of the NLRA.<sup>8</sup> Indeed, as one former member of the NLRB recently noted,<sup>9</sup> the right of employees to talk to each other about pay is as fundamental as any activity intended to receive NLRA protection, given that pay discussions among disgruntled employees are often at the heart of unionization activity.<sup>10</sup> Thus, it is not at all surprising that in the relatively limited number of cases on point, the NLRB and the federal courts have routinely found employer PSC rules to be unlawful under the NLRA because these rules impermissibly chill employees’ rights under section 7 of the NLRA.<sup>11</sup>

In sum, the NLRA essentially outlaws most employer PSC rules. Nevertheless, pursuant to prevalent social norms, employer PSC rules continue to flourish throughout the country. The issue is what, if anything, should be done about this rather anomalous situation.

### *B. Addressing the Conflict*

The extant conflict between employer PSC rules and the NLRA has not escaped the attention of policy-makers. For example, legislators have introduced a number of bills in the U.S. Congress on the subject,<sup>12</sup> and the state of California recently enacted state legislation dealing with the issue.<sup>13</sup> Moreover, commentators have made rulemaking proposals to the NLRB with respect to strengthening NLRB enforcement powers in this general area.<sup>14</sup>

This essay engages this debate by examining the controversy from a

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7. 29 U.S.C. § 157 (2003).

8. See, e.g., *Fredericksburg Glass & Mirror, Inc.*, 323 N.L.R.B. 165, 173-74, 79 (1997); *NLRB v. Main St. Terrace Ctr.*, 218 F. 3d 531, 534 (6th Cir. 2000).

9. Telephone Interview with John E. Higgins, Member, National Labor Relations Board (July 3, 2003).

10. See, e.g., Aaron Nathans, *Love the Worker, Not the Union, A Store Says as Some Organize*, N.Y. TIMES, May 24, 2003, at C1 (noting employee dissatisfaction with “subjective” pay increases as a significant issue in a recent successful union organizing drive at the Whole Foods Market in Madison, Wisconsin).

11. See, e.g., *Jeannette Corp. v. NLRB*, 532 F. 2d 916, 918 (3rd Cir. 1976).

12. See, e.g., Paycheck Fairness Act, S. 76, 108th Cong. § 3(d) (2003); Fair Pay Act, H.R. 1362, 107th Cong. (2001); Wage Awareness Protection Act, S. 2966, 106th Cong. (2000).

13. CAL. LAB. CODE §§ 232, 232.5 (West 2002).

14. See Rulemaking Petition of Professor Charles J. Morris to the National Labor Relations Board (Feb. 9, 1993) (on file with authors) [hereinafter “Rulemaking Petition of Prof. Morris”]. For an extensive theoretical discussion of the issues underpinning Professor Morris’ bringing this rulemaking petition to the NLRB see Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673 (1989) [hereinafter “Morris, *NLRB Protection in the Nonunion Workplace*”].

social norms perspective, and asks the question whether new federal and/or state legislation should address this conflict. The essay asserts that a workable system of legal regulation can be formulated only by understanding the social norms surrounding the situation. In this regard, the piece attempts to build on the recent work of Professor Lior Strahilevitz examining the interplay between copyright law and the widespread social norm-generated prevalence of music file-swapping,<sup>15</sup> and on recent writing dealing with the interplay of social norms and the law in Southern states prior to the Civil War.<sup>16</sup> This essay examines the role social norms have played in the enforcement of employment law and the NLRA.

Part II of this essay briefly discusses PSC rules and their illegality under the NLRA. Part III addresses the general interplay of social norms and the law, and by examining the work of Nobel Laureate Professor George Akerlof<sup>17</sup> and others, it reviews the important role social norms play in the workplace.<sup>18</sup> Next, the essay examines a variety of important norm-related considerations that operate in favor of employer PSC rules. Part IV takes our analysis a step further by pointing out the various other forces operating at the workplace that could lead employees to deviate from the social norm of silence, opposing forces that help explain the existence of PSC rules. Part V examines the various recent congressional and academic proposals on the subject, as well as the relevant California legislation. It argues, somewhat counterintuitively, that new legislation in this area is neither necessary nor consistent with prevalent social norms analysis.

## II.

### PSC RULES AND THE NLRA

#### A. PSC Rules

The issue of workplace pay confidentiality or secrecy has been around since ancient times. Indeed, the famous New Testament parable involving the phrase “the last shall be first, and the first last” actually involved a

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15. See Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505 (2003) [hereinafter “Strahilevitz, *Charismatic Code*”].

16. See C.A. Harwell Wells, Note, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805 (2001) [hereinafter “*Vanderbilt Note*”].

17. See, e.g., George A. Akerlof, *Behavioral Macroeconomics and Macroeconomic Behavior*, 92 AM. ECON. REV. 413 (2002) [hereinafter Akerlof, “*Behavioral Macroeconomics*”].

18. See, e.g., Ernst Fehr, et al., *When Social Norms Overpower Competition: Gift Exchange in Experimental Labor Markets*, 16 J. LAB. ECON. 324 (1998); William Encinosa, et al., *The Sociology of Groups and the Economics of Incentives: Theory and Evidence on Compensation Systems* (Nat’l Bureau of Econ. Research, Working Paper No. 5953, 1997); Donald Roy, *Quota Restriction and Goldbricking in a Machine Shop*, 57 AM. J. SOC. 427 (1952).

dispute over the rights of laborers to know what other laborers were being paid.<sup>19</sup> The practice of pay secrecy or confidentiality continues to be a contentious issue in today's workplace, with employers confronted with the decision whether to allow employees to discuss their pay openly or instead to require them to keep information regarding their compensation confidential.<sup>20</sup>

PSC rules are workplace rules prohibiting employees from discussing their wages with their co-workers or others.<sup>21</sup> The rules are commonly found in employment manuals<sup>22</sup> or orally conveyed to employees at the time of hiring or at some later point in the employment relationship.<sup>23</sup> Variants of these rules apply only to certain proprietary information; for example, an employee who works in the payroll department of a business is prohibited from disclosing information obtained in the course of his or her employment.<sup>24</sup>

PSC rules are quite common in United States workplaces. As noted above,<sup>25</sup> survey data shows that over one-third of private sector employers have rules of this kind. In contrast, only about one in ten employers have actively adopted "pay openness" policies.<sup>26</sup> About fifty-one percent of employers surveyed stated they did not have any specific policy regarding pay secrecy or confidentiality.<sup>27</sup> As noted above, however, some of these employers may communicate expectations of employee pay confidentiality informally.<sup>28</sup> As one leading legal observer recently noted, it is generally "the unwritten law" that American employees keep their mouths shut about their salaries.<sup>29</sup> Similarly, a comprehensive study of employment practices in the United States and Canada found that pay secrecy was "an important fact of life in many organizations."<sup>30</sup> Finally, a consistent finding in

19. *Matthew* 20: 1-16.

20. See *infra* notes 21-31 and accompanying text.

21. See Julio D. Burroughs, *Pay Secrecy and Performance: The Psychological Research*, 1982 COMPENSATION REV. 44 (1982) (discussing the effects of pay confidentiality rules on employee performance); Paul Thompson & John Pronsky, *Secrecy or Disclosure in Management Compensation?*, BUS. HORIZONS, June, 1975 at 67 (comparing open and confidential pay systems).

22. See, e.g., *Fredericksburg Glass & Mirror, Inc.*, 323 N.L.R.B. 165, 168 (1997) (challenge to pay confidentiality rule found in the employment manual).

23. See, e.g., *NLRB v. Main St. Terrace Ctr.*, 218 F.3d 531, 535 (6th Cir. 2000) (involving a statement by a supervisor indicating that employees "were not allowed to discuss our paychecks with anyone").

24. See, e.g., *IBM*, 265 N.L.R.B. 638 (1982) (upholding the discharge of an employee for releasing confidential information collected and classified as confidential by the employer).

25. See HRnext Survey, *supra* note 4.

26. *Id.*

27. *Id.*

28. See Cohen, *supra* note 5 and accompanying text.

29. *Id.* (quoting Lee E. Miller, Esq., former co-chair of the labor and employment law department of a leading law firm, and a prominent author and consultant in the employment law area).

30. PAUL W. MULVEY, ET AL., *THE KNOWLEDGE OF PAY STUDY* 26 (2002).

academic research dating back to the 1970s is that a large proportion of managers agree with the use of PSC rules.<sup>31</sup>

### B. Legal Framework Under the NLRA

What makes the prevalence of these rules so interesting is that the NLRB and federal courts have rather consistently found them illegal under the NLRA.<sup>32</sup> Section 7 of the NLRA affords employees the right to engage in “concerted activity for the purpose of . . . mutual aid or protection,” and employer actions which “interfere with, restrain, or coerce employees” with respect to the exercise of employees’ Section 7 rights constitute unlawful or unfair labor practices.<sup>33</sup>

For example, in *Fredericksburg Glass & Mirror, Inc.* the NLRB considered a PSC rule included in an employee manual.<sup>34</sup> The given rule stated that employees’ earnings were “a confidential matter between the employee and his earnings supervisor,” and thus that any discussions among employees involving earnings “will result in dismissal and/or disciplinary action at the supervisor’s discretion.”<sup>35</sup> The NLRB upheld an earlier administrative law judge finding that the PSC rule unlawfully interfered with employees’ Section 7 rights.<sup>36</sup>

Courts have reached similar conclusions in cases where the given PSC rule has been orally communicated to employees during the course of their employment.<sup>37</sup> Indeed, the Sixth Circuit in *NLRB v. Main Street Terrace Center* found an employer’s orally communicated PSC rule to be illegal, even though the rule was not regularly enforced.<sup>38</sup> The court held that irregular enforcement of the PSC rule was irrelevant since in unfair labor practice cases of this kind “the actual effect of a statement is not as important as is its tendency to coerce.”<sup>39</sup>

In sum, employer PSC rules have generally been struck down because they directly interfere with employees’ NLRA Section 7 rights.<sup>40</sup> Section 7 of the NLRA applies to employees in nearly all private sector workplaces in

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31. See, e.g., Charles M. Futrell & Omer E. Jenkins, *Pay Secrecy Versus Pay Disclosure for Salesmen: A Longitudinal Study*, 15 J. MARKETING RES. 214 (1978).

32. See *supra* notes 7-11 and accompanying text.

33. 29 U.S.C. § 157 (2003).

34. See 323 N.L.R.B. 165 (1997).

35. *Id.* at 165.

36. *Id.*

37. See, e.g., *NLRB v. Main St. Terrace Ctr.*, 218 F. 3d 531 (6th Cir. 2000).

38. *Id.* at 531, 534-39.

39. *Id.* at 539.

40. The NLRB and federal courts have, to date, given relatively short shrift to various defenses/legitimate business justifications raised by employers for having PSC rules. See, e.g., *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976) (rejecting employer arguments that PSC rules were necessary to reduce conflict among employees).

the United States, regardless of whether such employees are formally represented by a labor union.<sup>41</sup> Despite this, however, PSC rules continue to flourish in workplaces throughout the United States.

### III.

#### SOCIAL NORMS AND PSC RULES

##### *A. The Interplay of Law and Social Norms*

Social norms are “social regularities” or behaviors that are widely adopted in society.<sup>42</sup> Moreover, they are activities that “society holds that people should do.”<sup>43</sup> As Professor Lawrence Lessig observes, social norms “frown on the racist’s joke; they tell the stranger to tip a waiter at a highway diner; they are unsure about whether a man should hold a door open for a woman.”<sup>44</sup> Social norms differ among cultures, and within given cultures during different periods of time.<sup>45</sup> Using Professor Lessig’s example of whether a man should hold open a door for a woman, different social norms likely govern this issue differently in various countries throughout the world.<sup>46</sup>

While long one of the most important constructs in the field of sociology, social norms have only recently received significant attention from legal scholars.<sup>47</sup> In path-breaking work in the 1990s, Yale Law Professor Robert C. Ellickson,<sup>48</sup> University of Chicago Law Professor Lisa Bernstein,<sup>49</sup> and others began examining the interplay between social norms and the law.<sup>50</sup> Much of the early work in this area focused on how social

41. See Morris, *NLRB Protection in the Nonunion Workplace*, *supra* note 14; *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9 (1962).

42. See *Vanderbilt Note*, *supra* note 16, at 1809.

43. *Id.*

44. See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998).

45. For example, in many countries today, and even historically in some parts of the United States, social norms favored the use of mass transit as a way to get to work. Today in the United States, however, there is a fairly strong social norm favoring solo commuting in one’s own car. See Lior Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California’s Carpool Lanes*, 79 IND. L. J. 1231 (2000) [hereinafter “Strahilevitz, *Changes in Property Regimes*”].

46. Clearly social norms regarding gender roles have varied widely historically, and continue to vary widely throughout the world. See RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN’S MOVEMENT CHANGED AMERICA* (2000); MARY JOE FRUG, *WOMEN AND THE LAW* (1992).

47. See Bruce E. Kaufman, *Expanding the Behavioral Foundations of Labor Economics*, 52 IND. & LAB. REL. REV. 361, 370 (1999).

48. See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

49. See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1995).

50. See, e.g., Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) [hereinafter “Sunstein, *Social Norms*”]; Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U.



norms can serve as an effective substitute for formal laws. For example, Professor Bernstein examines successful self-regulation by Jewish diamond merchants in her classic work, "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry."<sup>51</sup> Professor Ellickson develops a similar theme involving rural cattle ranchers in his seminal 1991 book, "Order Without Law: How Neighbors Settle Disputes."<sup>52</sup>

As noted earlier, more recent work examines how social norms may lead to noncompliance or indifference toward laws that conflict with social practice.<sup>53</sup> For example, a 2001 piece in the *Vanderbilt Law Review* entitled "The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America," explores the eighteenth and nineteenth century American social practice of Southern (and other) "gentlemen" resolving disputes by having a "duel."<sup>54</sup> Beginning around 1800, Southern states began passing a wide array of anti-dueling laws.<sup>55</sup> Social norms, however, prevented these laws from being enforced for over sixty years.<sup>56</sup> Not until the Civil War, and the war's elimination of much of the pro-dueling "aristocracy" of the "Old South," did social norms in this area give way to the law.<sup>57</sup>

Professor Lior Strahilevitz explores a more contemporary interaction between norms and law in "*Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*,"<sup>58</sup> Professor Strahilevitz examines the present conflict between copyright law and social norms: guided music file-swapping conducted in violation of this law. Other legal scholars have entered the Napster/Gnutella/Kazaa social norms versus copyright law debate. Professor Marci A. Hamilton, for example, has forcefully argued that the current "anti-copyright culture" needs to be stopped, and that college students need to be sued for "illegal music downloading."<sup>59</sup> Other observers, however, argue that the courts have more

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PA. L. REV. 1697 (1996); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status and Race Discrimination*, 108 HARV. L. REV. 1003 (1995); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135 (1996).

51. See Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

52. See ELLICKSON, *supra* note 48. Through self-regulatory "contractual" schemes, for example, parties can engage in business relations without entering into formal contracts enforceable in courts of law. See generally Bernstein, *supra* note 51.

53. See *supra* notes 15-16 and accompanying text.

54. See *Vanderbilt Note*, *supra* note 16.

55. *Id.* at 1825-30.

56. *Id.* at 1831-38.

57. *Id.* at 1832-42.

58. See Strahilevitz, *Charismatic Code*, *supra* note 15.

59. See Marci A. Hamilton, *Why Suing College Students for Illegal Music Downloading Is Right*, available at <http://www.cnn.com/2003/LAW/08/07/findlaw.analysis.hamilton.music> (last visited Aug. 7,

important things to focus on, and that the music industry should “hang loose” on the issue.<sup>60</sup>

### B. Workplace Social Norms

As Professor Jon Elster observes, the “workplace is a hotbed for norm-guided action.”<sup>61</sup> Social norms, for example, have long had an important impact on gender roles in employment and work/family concerns.<sup>62</sup> Moreover, one of the central conclusions of industrial experiments of the 1930s was that employee work effort is significantly influenced by the norms of the employee’s workgroup with respect to what constitutes an appropriate work level or output.<sup>63</sup> Applying this analysis, employees are deemed rational when they do not increase output in response to increased employer incentives such as pay because they are simply responding to workplace social norms.<sup>64</sup>

Professor George Akerlof argues that in some workplaces a norm-guided “code of honor”<sup>65</sup> exists which regulates, for example, the extent to which current employees are willing to train newly hired workers.<sup>66</sup> Professor Akerlof has further argued that workplace rates of pay are not infrequently determined in response to such codes of honor and other workplace social norms.<sup>67</sup> Other observers have pointed out that in the workplace, breaching norms can sometimes have more “serious consequences” than breaching the law.<sup>68</sup>

An examination of PSC rules from a social norms perspective builds directly on the work of Professor Akerlof and others in this area. Much like Professor Akerlof’s workplace “code of honor,” a “code of silence” exists with respect to the issue of pay in a large number of workplaces throughout the country. The social norms behind the establishment of these codes of silence are strong, and the potential consequences of breaching these norms are seen by many as being serious. In the next section we describe in detail various workplace norm-related considerations that might help explain the

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2003).

60. See Steven Levy, *Pirates of the Internet*, NEWSWEEK, Aug. 4, 2003, at 48.

61. Jon Elster, *Social Norm and Economic Theory*, 3 J. ECON. PERSP. 99, 101 (1989).

62. See, e.g., Belinda M. Smith, *Time Norms In the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271 (2002); FRUG, *supra* note 46.

63. See Kaufman, *supra* note 47, at 370.

64. These employees don’t want to be ostracized by their fellow workers as “ratebusters.” *Id.* See also Akerlof, *Behavioral Macroeconomics*, *supra* note 17, at 415.

65. Pursuant to such a “code of honor” workers develop their own code of workplace self-regulation and rules of behavior.

66. See George A. Akerlof, *A Theory of Social Custom, of Which Unemployment May be One Consequence*, 94 Q. J. OF ECON. 749, 753 (1980).

67. See Akerlof, *Behavioral Macroeconomics*, *supra* note 17, at 415.

68. See Smith, *supra* note 62, at 349.

existence of this “code of silence.”

### *C. Norm-Related Considerations Favoring Employer PSC Rules*

#### *1. Privacy Considerations*

As developed at the beginning of this essay, Americans have a strong aversion to talking about their salary and related matters. For many individuals their rate of pay is a very private matter.<sup>69</sup> They do not want their employer telling everyone their rate of pay, and they do not want inquisitive co-workers constantly asking them about this matter.<sup>70</sup>

The reasons individuals want to keep such information private are quite complex.<sup>71</sup> Some individuals might not want pay or related information revealed because it might lead others to think less well of them, while others may be concerned that the revelation of such information may jeopardize an unusually “sweet deal” they have at work.<sup>72</sup> In other cases, individuals may be concerned about flaunting their success and wealth.<sup>73</sup> 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.<sup>74</sup>

Employee concerns for privacy in this regard are consistent with general recent trends in American society toward greater “individualism.”<sup>75</sup> While always something of an individualistic society, there is considerable evidence that the overall social structure of the United States has become even more individualistic and solitary in recent decades.<sup>76</sup> In an important work entitled “*Bowling Alone: America’s Declining Social Capital*,” Professor Robert Putnam highlights a general decline in “civic engagement” on the part of Americans,<sup>77</sup> and others have pointed out general societal

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69. See *supra* notes 1-3 and accompanying text.

70. See John Case, *When Salaries Aren’t Secret*, 79 HARV. BUS. REV. 37, 44 (2002) (quoting a statement by Victor Sim, Vice President, Prudential Insurance Company).

71. See Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460, 473 (2002).

72. See *id.* at 473.

73. See Elster, *supra* note 61, at 110.

74. See generally Jay R. Schuster & Jerome A. Colletti, *Pay Secrecy: Who Is For and Against It?*, 16 ACAD. MGMT. J. 35 (1973); Alex Markels & Lee Berton, *Executive Pay, Special Report, Something to Talk About: Do You Know What Your Colleagues Make?*, WALL ST. J., April 11, 1996, at R 10, Col. 1.

75. See Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor’s Decline*, 16 HOFSTRA LAB. & EMP. L.J. 133, 138-41 (1998); ROBERT N. BELLAH, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

76. See Margalioth, *supra* note 75, at 152.

77. See Robert D. Putnam, *Bowling Alone: America’s Declining Social Capital*, 6 J. DEMOCRACY

declines in levels of “trust”<sup>78</sup> and in extended familial relations.<sup>79</sup> In an insightful article, Professor Sharon Margalioth notes how this greater societal emphasis on individuality and distrust of others has helped lead to the decline in unionization in the United States.<sup>80</sup> The world is a much less “collectively” oriented place today than it was nearly seventy years ago when the NLRA was enacted.<sup>81</sup> In such a world, employee support for the privacy afforded by employer PSC rules in many ways seems very appropriate.

Finally, employee support for PSC rules on privacy grounds comports with increased employer concerns about protecting the proprietary nature of their employee compensation plans. As Professors Lucian Bebchuk and Jesse Fried have recently pointed out, many U.S. corporations put considerable effort into designing employee compensation plans, often paying considerable sums to outside compensation consultants to assist in this endeavor.<sup>82</sup> Human resources professionals believe that properly designed employee compensation programs can represent a source of company competitive advantage.<sup>83</sup> Therefore, employers also have expressed legitimate concerns about protecting the privacy of workplace pay and related information.

## 2. Workplace Conflict Avoidance Considerations

Social psychologists have long emphasized the important social norm-related consideration of avoiding “conflict” in the workplace.<sup>84</sup> From a variety of perspectives, employer PSC rules help achieve this goal. Employers argue that PSC rules are necessary to limit “jealousies and strife among employees.”<sup>85</sup> This argument is based on the understanding that knowledge of differentials in wages among employees will generate

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64-73 (1995). See also ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

78. See Lawrence M. Friedman, *American Legal Culture: The Last Thirty-Five Years*, 35 ST. LOUIS L.J. 529, 533 (1991); Margalioth, *supra* note 75, at 152-54.

79. See Margalioth, *supra* note 75, at 152-54.

80. *Id.* at 136-53.

81. *Id.* at 152-57.

82. See Lucian Arye Bebchuk, et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751 (2002).

83. See Barry Gerhart, *Compensation Strategy and Organizational Performance*, in COMPENSATION IN ORGANIZATIONS: CURRENT RESEARCH AND PRACTICE 151 (Sara L. Rynes & Barry Gerhart eds., 2000).

84. See, e.g., Gerald S. Leventhal, *The Distribution of Rewards and Resources in Groups and Organizations*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 92 (Leonard Berkowitz & Elaine Walster eds., 1976); Gerald S. Leventhal, et al., *Beyond Fairness: A Theory of Allocation Preferences*, in JUSTICE AND SOCIAL INTERACTION 167 (Gerald Mikula ed., 1980).

85. See, e.g., *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3rd Cir. 1976).

conflicts among employees.<sup>86</sup> Employees observe wage differentials without the full information necessary to evaluate the justifications for the differing wages.<sup>87</sup> This, in turn, strains relationships among employees and creates a climate of workplace conflict.<sup>88</sup>

In addition, pursuant to equity theory, an individual who is happy with her rate of pay will likely become unhappy if she learns that an employee she deems to be a peer is being paid more.<sup>89</sup> This is particularly true given the fact, as Professor Herbert Hovenkamp has noted, that systems for rewarding individuals can be less than perfect, and relevant information about the reasoning behind specific rewards imperfectly communicated.<sup>90</sup>

Moreover, workplace pay openness may foster greater employee efforts to engage in “influence behavior,” whereby employees try through various methods to persuade their employer to give them a raise.<sup>91</sup> Ongoing employee activities of this kind have the potential to create conflict among employees, and between employees and their supervisors. Thus, leading economists argue that employers engage in pay secrecy because the cost of the manipulative employee behavior resulting from pay openness policies makes pay openness inefficient.<sup>92</sup>

### 3. Remuneration Risk-Sharing Considerations

Two additional factors that reinforce the social norm of pay secrecy are employee risk-aversion and employer prevention of worker opportunism. In a recent article entitled “*Wage Secrecy as a Social Convention*,”<sup>93</sup> economics professors Leif Danziger and Eliakim Katz discuss the interplay

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86. See Case, *supra* note 70, at 48. See generally Robert L. Opsahl, *Managerial Compensation: Needed Research*, 2 ORG. BEHAV. & HUM. PERFORMANCE 208 (1967) (arguing that open pay systems make individual differences too readily apparent, leading to negative effects on group cohesion and satisfaction).

87. See Case, *supra* note 70, at 48; see also George A. Akerlof & Janet L. Yellen, *The Fair Wage-Effort Hypothesis and Unemployment*, 105 Q. J. ECON. 255, 264 (1990); George T. Milkovich & Phillip H. Anderson, *Managerial Compensation and Secrecy Policies*, 25 PERSONNEL PSYCH. 293 (1972).

88. See Case, *supra* note 70, at 46.

89. See Miriam Dornstein, *The Fairness Judgments of Received Pay and Their Determinants*, 62 J. OCCUP. PSYCH. 287 (1989); MIRIAM DORNSTEIN, *CONCEPTIONS OF FAIR PAY: THEORETICAL PERSPECTIVES AND EMPIRICAL RESEARCH* (1991).

90. See Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 54 n.133 (1994).

91. See Kathryn M. Bartol & David C. Martin, *Effects of Dependence, Dependency Threats, and Pay Secrecy on Managerial Pay Allocations*, 74 J. APPLIED PSYCH. 105, 106 (1989); Gerald R. Ferris & Timothy A. Judge, *Personnel/Human Resources Management: A Political Influence Perspective*, 17 J. MGMT. 447 (1991).

92. See JAMES A. BRICKLEY, ET AL., *MANAGERIAL ECONOMICS AND ORGANIZATIONAL ARCHITECTURE* 375 (2003).

93. Leif Danziger & Eliakim Katz, *Wage Secrecy as a Social Convention*, 35 ECON. INQUIRY 59 (1997).

between pay confidentiality and these factors. Professors Danziger and Katz note that employees generally are “risk-averse” and strongly prefer fixed or guaranteed wage streams, as opposed to wage streams that are dependent on general business conditions and/or given period work performance.<sup>94</sup> Most employees would rather be paid a fixed \$5000 per month (\$60,000 per year), rather than wages that vary widely per month based on business conditions and/or employee performance, even if ultimately they were to receive the same \$60,000 per year. Most employees view income volatility as a “cost,” especially when such volatility or variability is at least partially caused by factors beyond their control such as macro-economic business conditions, weather, and general economic trends.<sup>95</sup> The result is that employers generally bear these macro-economic and other risks and simply pay employees their fixed monthly stipends.

Bearing these risks also comes with potential costs to employers. Knowing that their monthly incomes are fixed, some workers may work less hard or “shirk” their duties.<sup>96</sup> Moreover, other workers may stay with their current firm only during the bad times, and then move on to “greener pastures” when economic conditions improve. Labor mobility of this kind is facilitated by workers’ ability to talk to fellow employees about pay, including other job offers employees have received.<sup>97</sup> Thus, Professors Danziger and Katz argue that employers adopt pay secrecy policies to help prevent employee “opportunism” in risk-shifting compensation policy situations.<sup>98</sup> In sum, by helping reduce labor mobility, employer PSC rules help further the important social goal of guaranteed employee remuneration.

#### 4. Internal Labor Market Considerations

The development of internal labor market norms in workplaces throughout the United States is a growing trend.<sup>99</sup> This development has become more pronounced as greater numbers of employees find work in complex “knowledge economy” computer, scientific, and other related

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94. *Id.* at 60-69.

95. See Haig R. Nalbantian, *Incentive Compensation in Perspective*, in INCENTIVES, COOPERATION, AND RISK SHARING: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON EMPLOYMENT CONTRACTS 3, 10-15 (Haig R. Nalbantian ed., 1987); Eugene F. Fama, *Time, Salary, and Incentive Payoffs in Labor Contracts*, 9 J. LAB. ECON. 25, 37 (1991).

96. See Danziger & Katz, *supra* note 93, at 60-69.

97. *Id.*

98. *Id.*

99. See, e.g., Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 SO. CAL. L. REV. 363 (1995); Stewart J. Schwab, *Life Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993); 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 (1988).

types of jobs.<sup>100</sup> According to internal labor market theory, employees increasingly are required to make “firm specific” investments in their given firms.<sup>101</sup> Such firm specific investments, however, may be hard to value. To the extent employers value such investments highly,<sup>102</sup> such valuations may be extremely controversial among other employees.<sup>103</sup> By preventing discussion of high rewards given to employee firm-specific investments, employer PSC rules facilitate the maintenance of internal labor markets.

For example, perhaps a university has a strong football tradition and the law school dean wants a certain law faculty member (perhaps a former football player) to serve on a special university committee that meets to study the merits of retaining this tradition. This commitment is a “firm specific” investment by the professor and an investment in the “internal labor market” of the given university. The hours the professor spends on this endeavor may win the faculty member some “good citizen” points at that university, but that experience will likely be of little interest to other universities should the professor apply for a job in the future. Indeed, from the perspective of other universities, i.e., the “external labor market,” the professor would be much better off spending that time working on an article for publication in a prestigious law journal.

The dilemma is thus clear. The organization wants the employee to make the firm-specific investment, but the employee may resist. The faculty member, especially if untenured, wants to keep his options open by developing a general skill set that is readily marketable in the external labor market.

One way organizations deal with this dilemma is by giving especially large salary increases to employees who make firm-specific investments. Indeed, the professor making this investment in the law school’s internal labor market may argue that he is entitled to an especially large pay increase since his special committee work has left him generally less “marketable.”<sup>104</sup> However, such large pay increases are by their nature

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100. See Peter Drucker, *The Age of Social Transformation*, ATLANTIC MONTHLY, November, 1994, at 53, available at <http://theatlantic.com/politics/ecbig/soctrans.htm> (last visited Dec. 19, 2003); Brook Manville & Josiah Ober, *Beyond Empowerment: Building a Company of Citizens*, 81 HARV. BUS. REV. 48 (2003); Paul S. Adler, *Markets, Hierarchy, and Trust: The Knowledge Economy and the Future of Capitalism*, 12 ORG. SCI. 215, 216 (2001).

101. See Bierman & Gely, *supra* note 99, at 370-83.

102. For one, internal labor market investments may create something of a “lock-in” effect for employees making such investments, limiting their outside employment opportunities. Thus, their present employer may need to specially reward such employees. See Schwab, *supra* note 99, at 13.

103. In part this is because it is much harder to value things like service on a special organizational committee etc. than it is some other employee performance criteria, e.g., number of billable hours in a law firm. To avoid this conflict, in the legal profession, for example, some British law firms pay partners on the basis of seniority. See *Lawyers Go Global, the Battle of the Atlantic*, THE ECONOMIST, Feb. 26, 2000, at 79-80.

104. See Schwab, *supra* note 99, at 13.

highly subjective in nature and potentially controversial. In short, pay secrecy can be extremely helpful to managers running organizations where employee firm-specific investments are seen as being important. PSC rules help managers non-disruptively reward employee internal labor market investment, in an economy where employee investments of this kind are increasingly important in nature.<sup>105</sup>

#### D. Summary

We argue that a number of factors that operate in workplaces across the United States help explain the adoption of employer PSC rules and employee observance of these rules. However, the factors described above provide only a partial explanation for the adoption of these rules by employers. If employees on their own prefer not to have discussions about wages, why is there a need for employers to act and affirmatively adopt such rules, particularly where those rules are illegal under current law? That is, why are PSC rules needed in the face of social employee norms that support their existence? To fully answer this question we consider what other forces make employer PSC rules so common.

### IV.

#### OPPOSING FORCES

Like laws, norms and related considerations do not prevent non-compliant behavior absolutely.<sup>106</sup> While both laws and norms impose some consequences on deviant behavior, violations do occur. In order to fully understand the dynamics of employer PSC rules, we also need to identify the forces that may lead workers to deviate from these norms.

##### A. *The Seductive Sound of Talking: Role of the Prisoners' Dilemma*

On average, individuals in a group must believe that they are better off complying with a norm than disregarding the norm.<sup>107</sup> That is, the net effect on social welfare for those subject to the norm must be positive. As in many other kinds of scenarios involving group action, such as the OPEC oil cartel, the application of norms involves a collective action problem.<sup>108</sup>

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105. See Augustine A. Lado & Mary C. Wilson, *Human Resource Systems and Sustained Competitive Advantage: A Competency-Based Perspective*, 19 ACAD. MGMT. REV. 699, 704-05 (1994).

106. See Strahilevitz, *Changes in Property Regimes*, *supra* note 45, at 1281 (describing the dynamics of non-compliant behavior regarding carpooling norms).

107. See Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 380-81 (1997) (discussing the process of internalization of norms). The cost/benefits tradeoff might not be sufficient to explain the formation of norms, but it is certainly a factor in their formation.

108. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1960). See also Keith N. Hylton, *A Theory of Minimum Contract Terms with Implications for Labor Law*, 74 TEX. L. REV. 1741, 1763-69



While the group will be better off by obeying the norm, individuals (or in the case of OPEC, certain oil-producing countries) might benefit from defecting or cheating.<sup>109</sup> A so-called “prisoners’ dilemma” is thus formed.<sup>110</sup>

The norms against discussing wages in the workplace appear to create such a situation. 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.

While, on average, groups of employees might be better off following these norms, for certain individuals there might exist some incentives to defect or cheat. Information about wages, performance, and rewards structures can be useful for individual employees.<sup>111</sup> Armed with such information, employees may negotiate better compensation. The incentive to defect will be particularly strong if the employee sees few adverse consequences resulting from the non-compliant behavior.<sup>112</sup> For example, an individual with no expectation of long-term employment at a particular workplace will probably be more likely to defect than an individual who sees the current job as a long-term prospect. Since the adverse consequences of violating norms, particularly workplace norms, are likely to be in large measure social, an employee who intends to leave soon correctly figures that violating the norm may make sense. In short, some individuals might have incentives to cheat and violate norms.

### *B. Keeping Up with the Joneses: the Relative Preferences Theory*

According to the theory of relative preferences, individuals care not only about their absolute income levels, but also about their relative income standings among their peers.<sup>113</sup> Individuals constantly engage in a tradeoff

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(1996); Cass R. Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041 (1984).

109. See McAdams, *supra* note 107, at 352-54.

110. *Id.*

111. For one, such information clearly gives employees better data on which to base “influence behavior.” See *supra* note 92 and accompanying text.

112. See Strahilevitz, *Changes in Property Regimes*, *supra* note 45, at 1272-84.

113. See Robert H. Frank, *Are Workers Paid Their Marginal Products?*, 74 AM. ECON. REV. 549, 570 (1984) (arguing that in a model that assumes that individual preferences are relative, the wage structure within a firm must be one in which individuals are not paid their marginal products) [hereinafter “Frank, *Marginal Products*”]; ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 3-34 (1985) (developing the theory of relative preferences).

between wages and income based status within an organization. Those who have strong preferences for status will “pay” for the privilege to be the highest paid employee by accepting a wage less than their marginal productivity.<sup>114</sup> Those who care less about status will require a wage premium for being at the bottom of the status hierarchy.<sup>115</sup>

Therefore, the existence of markets for local status suggests that some employees concerned with status will prefer to have open discussions about wages and other terms and conditions of employment.<sup>116</sup> To properly evaluate the tradeoffs that they have made between status and income, employees for whom status matters significantly will need to know their position in the local hierarchy by, for example, making wage comparisons.<sup>117</sup>

### C. Bringing it All Together

We have identified both the dynamics that are consistent with the norm against the public discussion of wages at the workplace and the forces that might lead employees to violate this norm. We are now in a position to explain more completely the common occurrence of PSC rules in workplaces across the United States. We provide two explanations: (1) PSC rules complement social norms, and (2) PSC rules legitimize social norms.

First, while norms of silence exist, forces that generate deviant behavior also exist. For example, some employees might see

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See also Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 3 (1992) (developing the implications of the theory of relative preferences for a number of legal issues).

114. See Frank, *Marginal Products*, *supra* note 113, at 551.

115. The wage premium is in the form of a wage rate above that employee’s marginal productivity. *Id.*

116. The market for local status explains why, unlike as predicted by neoclassical economists, workers often do not appear to get paid their marginal productivities. See *id.* at 553-55. Traditional neoclassical economists have long advanced the argument that workers will be paid their marginal products, that is workers are paid an amount equal to their contributions to the total revenue of the firm. Otherwise, it has been argued, employees that are paid less than their marginal product will leave to go to firms that will agree to pay the higher wage. *Id.* at 549-50. This standard account has been criticized as inconsistent with the compensation practices observed in many organizations. *Id.* at 555-64. Considerable evidence has been advanced that shows that wage differentials within firms tend to be considerably smaller than what the neoclassical marginal productivity model would predict, suggesting that the most productive workers are being paid less than their marginal productivities, while the least productive workers are being paid more than what they contribute to the revenues of the firm. *Id.*

117. If what employees’ value are not only absolute levels of compensation (“how much I am paid”) but also relative levels of compensation (“how much I am paid in comparison to others”), it will be important for these employees to have information about wages in their local hierarchies. Indeed, the employer could be expected to voluntarily disclose that information. Overall the wage bill for the employer remains the same – all that is changing is the distribution of wages inside the firm, but not the total cost of labor. Furthermore, facilitating the market for local status leads to better matching between workers’ preferences and jobs and also leads to potential efficiency gains for employers.

individual/short-term advantages to violating the silence norm or might be hypersensitive to local status issues. In this scenario, a norm of silence might not be enough to eliminate non-normative behavior. Accordingly, PSC rules would be necessary to complement the social norm of silence.

In addition, we believe that by formally enacting PSC rules, employers provide some legitimacy to the norms of silence. Legitimacy is provided in two ways. First, PSC rules help to disseminate and clarify the norm. Conveying the norm at some point during the hiring process (whether formally or informally) facilitates implementation of the norm and minimizes potential misunderstandings.<sup>118</sup> Second, adoption by employers of PSC rules helps give the norm of silence an air of authority. In short, while PSC rules are consistent with the norms of silence existing in the workplace, they may also be necessary for these norms to flourish, given that forces exist that may result in non-compliant behavior.

#### *D. Do PSC Rules Have a Place in Current Law?*

During the past decade or so, the interplay of the law and social norms has received increased attention. As in the case of college student music file swapping/downloading, social norms sometimes lead individuals to ignore or even disobey the law. Social norms and the potential for deviance from social norms have led a significant number of employers in the United States to adopt PSC rules, even though they generally violate the law. We now turn to how this inconsistency can be resolved.<sup>119</sup>

### V.

#### BALANCING THE LAW AND SOCIAL NORMS REGARDING EMPLOYER PSC RULES

##### *A. Overview*

As noted earlier, the prevalence of PSC rules despite their general illegality under the NLRA has commanded considerable recent legislative attention.<sup>120</sup> The basic thrust of proposed and enacted federal/state legislation has been strict censure of employers who use PSC rules.<sup>121</sup> To

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118. PSC rules are commonly found in employment manuals (see *Fredericksburg Glass & Mirror, Inc.*, 323 N.L.R.B. 165, 168 (1997)), or orally conveyed to employees at the time of hiring, or later in the employment relationship (see *NLRB v. Main St. Terrace Ctr.*, 218 F.3d 531, 535 (6th Cir. 2000)).

119. Do we, as various members of Congress have proposed, for example, seek greater enforcement of the laws prohibiting PSC rules or do we, as some have suggested in the music file swapping situation, more or less just “hang loose” and maintain the status quo? It is to these questions that we now turn. See Levy, *supra* note 60, at 48.

120. See *supra* notes 12-14 and accompanying text.

121. See *infra* notes 128-135 and accompanying text.

the extent that social norms favor PSC rules, however, it seems questionable whether stricter enforcement alone will eliminate non-compliance with the law. Somewhat analogously, for example, recent enforcement efforts by the recording industry to overcome strong social norms favoring college student music file-swapping have been met with fierce resistance by various universities<sup>122</sup> as well as efforts to establish music-sharing server services on off-shore platforms beyond the reach of the U.S. recording industry.<sup>123</sup> In short, it appears very difficult, absent perhaps an extraordinary allocation of governmental or other resources, for the law to overcome strong social norms on issues like student music file-swapping or employer adoption of pay confidentiality policies.<sup>124</sup>

In a sense, then, the issue becomes primarily one of how to best balance law versus social norms. This essay argues, somewhat counterintuitively, that the NLRA already balances these competing values reasonably well. The one area where reform does seem appropriate, again similar to the situation that exists with respect to music file-swapping,<sup>125</sup> is with respect to increasing employee/consumer education.<sup>126</sup> What follows is a discussion of this argument in the context of recent relevant efforts for reform and insightful work by Professor Cass R. Sunstein dealing with workplace norms and employee rights.<sup>127</sup>

## *B. Efforts Towards Stricter Enforcement of PSC Rules*

### *1. Bills in the U.S. Congress*

PSC rules have caught the attention of the U.S. Congress. In the 106<sup>th</sup> Congress, the 107<sup>th</sup> Congress, and in the current 108<sup>th</sup> Congress, legislators have introduced bills dealing with this subject.<sup>128</sup> All of the proposed bills

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122. See Maureen Tkacik, *Two Colleges Can Keep Data From Record Industry*, WALL ST. J., Aug. 11, 2003, at A3.

123. See Gwendolyn Mariano, *File-swapping Services Seek Refuge Overseas*, available at <http://www.news.com/2100-1023-3-253530.html>, published Mar. 5, 2001 (last visited Dec. 23, 2003).

124. By way of further example, think about the problems that existed with police trying to enforce old fifty-five mile per hour highway speed limits. *But see* Cynthia A. Williams, *Corporate Compliance With the Law In The Era of Efficiency*, 76 N.C. L. REV. 1265, 1334 (1998) (discussing the importance of strongly enforcing speed limit laws).

125. See Strahilevitz, *Charismatic Code*, *supra* note 15, at 505-10.

126. See *Laws Don't Stop Music Swapping, Study Finds*, HOUSTON CHRON., Aug. 1, 2003, at A26 (discussing the importance of consumer education in the area).

127. See Sunstein, *Social Norms*, *supra* note 50. See also Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205 (2001) [hereinafter "Sunstein, *Human Behavior*"].

128. See Fair Pay Act of 2001, S. 684, 107th Cong.; Paycheck Fairness Act, S. 77, 107th Cong. (2001); Fair Pay Act of 2001, H.R. 1362, 107th Cong.; Paycheck Fairness Act, H.R. 781, 107th Cong. (2001); Wage Awareness Protection Act, S. 2966, 106th Cong. (2000); Paycheck Fairness Act, S. 74,

have taken the form of amending sub-sections of the national wage and hour law, the Fair Labor Standards Act of 1935 (“FLSA”),<sup>129</sup> to make workplace pay confidentiality/secretcy illegal. For example, in the 106<sup>th</sup> Congress Senator James Jeffords of Vermont introduced the “Wage Awareness Protection Act,” which would have made it illegal for employers to take any adverse employment action against any employee for inquiring about or discussing wages.<sup>130</sup> The Jeffords bill would also have made it illegal for any person “to make or enforce a written or oral confidentiality policy that prohibits an employee from inquiring about, discussing, or otherwise disclosing the wages of the employee or another employee.”<sup>131</sup> This legislation would have made it per se illegal for employers to have PSC rules, even if there is no history of employer enforcement of such rules. Relevant proposals presently before Congress take a generally similar approach to the issue.<sup>132</sup>

## 2. California Legislation

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.<sup>133</sup> The statute states that employers cannot “discharge, formally discipline, or otherwise discriminate against” employees who disclose to others the amount of their wages.<sup>134</sup> The recent amendments, however, do limit the rights of employees to discuss their “working conditions” by providing that the legislation “is not intended to permit an employee to disclose proprietary information, trade secret information, or information that is otherwise subject to a legal privilege without the consent of his or her employer.”<sup>135</sup> This statutory limitation does not appear to apply with respect to employee wage discussions. Thus, the new California law does not recognize any privacy or other limitations on the rights of employees to discuss their pay.

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106th Cong. (1999); Paycheck Fairness Act, H.R. 541, 106th Cong. (1999). See also Paycheck Fairness Act, S. 76, 108th Cong. (2003).

129. 29 U.S.C. §§ 201-19 (2000).

130. See H.R. 781, 107th Cong. § (4)(a); S. 2966, 106th Cong.

131. H.R. 781, 107th Cong. at § 2(a)(2).

132. See S. 76, 108th Cong.

133. CAL. LAB. CODE § 232 (2002).

134. *Id.*

135. *Id.* at § 232.5(d).

### *C. Problems With Recent Congressional Proposals/State Legislation*

The recent proposals in Congress and the California state legislation make 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.<sup>136</sup> For example, one United States House of Representatives co-sponsor of the proposed anti-PSC legislation noted that this legislation would keep employers from “gagging employees by threatening them with sanctions for freely discussing and learning the wages of their co-workers.”<sup>137</sup> The problem, however, is that a substantial percentage of employees appear not to view PSC rules as “gags.”<sup>138</sup> These employees may want to keep their pay to themselves as a matter of privacy, and to avoid the potential workplace back-biting or conflict that might come with free discussion of wages.<sup>139</sup> Moreover, these employees may be in favor of strongly rewarding employee firm-specific investments and of providing employees non-volatile paychecks, activities that are facilitated by employer PSC rules.<sup>140</sup> Thus, the entire thrust of the California legislation and the proposals in Congress on the subject appears to directly conflict with prevailing social norms. While the new California legislation recognizes, to some extent, the importance of privacy considerations with respect to employee discussion of general “working conditions,” it does not recognize the existence of such considerations in the wage discussion area.

In addition, it appears that legislators have failed to recognize that effective mechanisms to enforce these laws may not exist. The California Labor Department’s Division of Labor Standards Enforcement, for example, has fewer than eighty field enforcement personnel conducting workplace labor inspections of the roughly one million businesses in the State of California.<sup>141</sup> Moreover, enforcement of regulations such as child labor laws and overtime payments to workers tend to command far more attention from these Labor Department field enforcement personnel than enforcement of Labor Code section 232’s “pay openness” mandate.<sup>142</sup> Similar enforcement limitations exist at the Wage and Hour Division of the U.S. Department of Labor, the division which would have jurisdiction over the issue under the relevant congressional proposals.<sup>143</sup> Finally, as noted

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136. See *supra* notes 70-105 and accompanying text.

137. See Press Release, Office of Delegate Eleanor Holmes Norton (June 12, 2001) (on file with authors).

138. See *supra* notes 70-105 and accompanying text.

139. See *supra* notes 70-92 and accompanying text.

140. See *supra* notes 93-105 and accompanying text.

141. Telephone Interviews With Various Top Officials (anonymity requested), State of California Labor Department, Division of Labor Standards (Aug. 1, 2003).

142. *Id.*

143. See Williams, *supra* note 124, at 1334 n.260 and accompanying text (discussing the limited

above, in some workplaces pay confidentiality policies exist on such an informal basis that it might be virtually impossible for government enforcement personnel to cite a business for any clear statutory violation during an inspection visit, even if field enforcement personnel directly inquired about this issue.<sup>144</sup> In sum, there seem to be considerable problems both with recent congressional proposals and the California legislation dealing with pay secrecy rules.

#### *D. Flexibility within the Current NLRA Approach*

On its face, current NLRA regulation of the workplace pay confidentiality area seems problematic.<sup>145</sup> On closer examination, though, the current NLRA regulatory regime is at least semi-workable. Professor Cass Sunstein advocates flexible legal rules in today's workplace, arguing forcefully against "one-size-fits-all" employment rules and endorsing the development of schemes of "waivable" workers' rights.<sup>146</sup>

Looked at through this lens, the NLRA creates a semi-workable balance between the norm favoring PSC rules and the law by "de facto" creating what might be termed a "reactive right" to pay openness. Unlike the California Department of Labor, for example, the NLRB has no field enforcement staff to enforce workplace pay openness policies. The NLRA/NLRB enforcement mechanism is completely reactive in nature, with the NLRB taking action only when an employee or union brings a formal charge alleging a violation of the NLRA.<sup>147</sup> If no employees or unions complain about employer PSC rules, these rules continue to exist without any action by the NLRB even though they are clearly illegal under the NLRA. Put another way, workplace 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 regulatory scheme essentially gives employees a right to pay confidentiality unless they consciously decide to waive this

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enforcement capabilities of the Wage and Hour Division of the U.S. Department of Labor).

144. See *supra* notes 70-105 and accompanying text.

145. In earlier writing we have noted that the continued existence of employer PSC rules despite their general illegality can, from one perspective, be seen as a sign of the NLRA's "impotence." Nevertheless, because of the numerous valid reasons for PSC rules we argue against amending the NLRA with respect to this issue. See Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, U. PA. J. LAB. & EMP. L. (2003).

146. See Sunstein, *Human Behavior*, *supra* note 127, at 207.

147. See Fact Sheet on the National Labor Relations Board, National Labor Relations Board, available at <http://www.nlr.gov/nlr/press/facts.asp> (last visited Dec. 19, 2003). This attribute of the NLRA has traditionally been described as a liability. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1533-37 (2002). We argue, however, that in the context of PSC rules, the "reactive" nature of the NLRA is an asset, since it allows contrary norms to develop, until there is enough of a counterforce to challenge the existing norm.

right and step forward in a manner which forces the NLRB to enforce the law.<sup>148</sup>

The sharp decline in recent decades in the percentage of private sector unionization to only about nine percent of the workforce,<sup>149</sup> as well as the sharp decline in the annual number of labor representation elections,<sup>150</sup> has made it increasingly unlikely that labor unions will confront the NLRB on this issue. Moreover, recent trends toward greater employee “individualism” and interest in privacy have probably decreased the likelihood that individuals will bring the issue to the NLRB.<sup>151</sup> Since the NLRB only reacts to charges brought on the matter, if no charges are brought, workplace PSC rules will continue to flourish. Or, as Professor Cass Sunstein might more elegantly put it, the “default rule” in American workplaces today is one of pay confidentiality, with employees essentially waiving their statutory right to pay openness under the NLRA.<sup>152</sup> Thus, the NLRA has proven in this regard to be a flexible statute, a statute in sync with prevailing social norms.

#### *E. The “Notice” Problem: A Suggested Reform*

There is one problem with the above analysis, a problem that resulted in our labeling the present-day NLRA construct as only “semi-workable” in nature. To the extent individual employees, for example, are essentially waiving their rights to pay openness by not bringing charges on the issue to the NLRB, it is important to make sure employees know exactly what rights they are waiving.<sup>153</sup> However, there is strong evidence that employees in non-union work settings have little idea about their rights under the NLRA.<sup>154</sup>

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148. A rather rough analogy thus might be the military’s famous “don’t ask, don’t tell” policies regarding gay rights, which basically stated that rules prohibiting gays in the military will not be enforced unless someone steps forward to force the military to react and enforce these rules. See *U. S. Military’s “Don’t Ask Don’t Tell” Policy Panders to Prejudice*, Human Rights Watch, HUMAN RIGHTS NEWS, available at <http://www.hrw.org/press/2003/01/us012303.htm>. (Jan. 23, 2003).

149. See Keith N. Hylton, *Law and the Future of Organized Labor in America* at 2, 4 (Boston Univ. Sch. of Law, Working Paper Series, Law and Econ., Working Paper No. 03-14, 2003) (on file with authors) (describing the decline in private sector union representation).

150. In 1975 over 7700 NLRB representation elections were held involving close to half a million workers, while in 2002 less than 2900 such elections were held involving far less than half that number of workers. See National Labor Relations Board, Summary of Field Operations, Office of General Counsel, Feb. 4, 2003 (on file with authors).

151. See Margalioth, *supra* note 75; see also Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000) (recognizing the individualistic tendencies at play in today’s civil society, but arguing that opposite forces might operate at the workplace).

152. See Sunstein, *Human Behavior*, *supra* note 127, at 206.

153. *Id.* See also Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997).

154. Kim, *supra* note 153, at 106.



As noted above, Section 7 of the NLRA explicitly protects all employees who engage in “concerted activity for the purpose of . . . other mutual aid or protection.”<sup>155</sup> This said, the application of the NLRA in nonunion settings is, as Professor William R. Corbett has noted, “one of the best-kept secrets” of employment law.<sup>156</sup> Thus, many employees simply have no idea that they have a statutory right to pay openness in their workplaces.<sup>157</sup> Consequently, their “de facto” waiver of this right is not truly “informed.” As Professor Cass Sunstein has argued, employees should be entitled to adequate information about their workplace rights before they engage in any sort of waiver of these rights.<sup>158</sup>

Professor Charles Morris raises one promising, at least partial, solution to this problem. Noting that unorganized employees may not know of their rights under the NLRA, and that there is an “urgent need” to inform them of such rights, Professor Morris filed a rulemaking petition on this subject with the NLRB.<sup>159</sup> In his petition, he proposed a general notice and posting requirement for all employers subject to NLRA jurisdiction.<sup>160</sup> More specifically, this rule would require employers to prominently post in their workplaces a poster, similar to that presently required with respect to the minimum wage under the FLSA, setting forth employee/employer rights under the NLRA.<sup>161</sup>

Although filed over a decade ago, Professor Morris’ petition is still pending before the NLRB.<sup>162</sup> The NLRB should expeditiously adopt Professor Morris’ petition. It would represent an important first step in making sure all employees are better informed about their rights regarding PSC rules, and make the NLRA’s regulatory scheme in this regard more “workable.” Prevailing social norms are such that even fully knowing their rights under the NLRA, the vast majority of employees are still highly unlikely to bring charges regarding this matter to the NLRB. That said, employees should be allowed to make a clearly informed choice.<sup>163</sup>

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155. This protection applies not just to employees represented by labor unions, but also to nearly all private sector employees in the United States, and the U.S. Supreme Court has upheld NLRA’s broad-scale protection of non-unionized workers in this regard. See Morris, *NLRB Protection in the Nonunion Workplace*, *supra* note 14; *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9 (1962). See also *supra* notes 32-41 and accompanying text.

156. See William Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMPL. & LAB. L. 259, 267 (2002).

157. See generally Kim, *supra* note 153.

158. See Sunstein, *Human Behavior*, *supra* note 127, at 242-45.

159. See Rulemaking Petition of Prof. Morris, *supra* note 14.

160. *Id.*

161. *Id.*

162. Telephone Interview, Jeffrey D. Wedekind, Solicitor, National Labor Relations Board (July 3, 2003).

163. See Sunstein, *Human Behavior*, *supra* note 127, at 207 (discussing the need for employees to have full information about employment terms so that they can make informed choices).

VI.  
CONCLUSION

The widespread existence of employer PSC rules in the United States represents a fascinating case study of the interplay between law and social norms. In this case, the reactive nature of the NLRA has allowed social norms to overcome weakly enforced law. Recently introduced congressional bills would conflict with these norms, as does the already enacted legislation in California. This essay argues that these legislative proposals/legislation are flawed. The social norms favoring workplace pay secrecy/confidentiality make both practical and economic sense, and should not be disturbed. Moreover, it seems unclear, at best, to what extent laws trying to overcome these norms can realistically be enforced. In this regard, the NLRA's regulatory framework of enforcing the law only after employees and others complain appears to be the preferred approach. However, per Professor Morris' rulemaking petition, employees should be afforded better information about their rights to pay openness in the workplace. As Professor Sunstein has forcefully argued, employees are entitled to adequate information about their workplace rights prior to any sort of waiver of these rights.<sup>164</sup>

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164. *Id.*

