JUST THE FACTS: THE CASE FOR WORKPLACE TRANSPARENCY

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In many areas of regulation, mandating disclosure of information about a firm's products, services, production processes, or governance is said to improve the efficiency and rationality of market decisions, avoid fraud, and advance public regulatory goals, all without intruding significantly upon the autonomy of market actors. Yet the idea of regulating through information disclosure has made barely a cameo appearance in the field of labor and employment law. This Article begins to fill that void. Mandatory disclosure is no panacea; it may be an overused policy tool in many areas. But in the law of work, mandatory disclosure can play a supportive role both within the ambit of existing substantive mandates and among the many terms and conditions that are above or beyond the reach of substantive mandates. Within the domain of mandatory legal rights or minimum terms, mandatory disclosure may help to improve compliance. Within the large domain that is left to private ordering, mandatory disclosure can improve the operation of labor markets by better informing employees' choices among and bargains with employers. And where neither mandates nor markets meet public aspirations for more socially responsible, fair, and egalitarian workplaces, mandatory disclosure may help to press firms to reach beyond compliance by strengthening and broadening the factual foundation for the reputational rewards and sanctions that are an increasingly significant driver in organizational behavior.

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INTRODUCTION

Decisions about whether to take or to seek a new job are among the most consequential decisions that most individuals make in their lives. To make good decisions, individuals need information about working conditions and employer policies and practices—information that may not be available from outside, or even from inside, the particular workplace. The importance of information for individual employment decisions, and its limited availability, suggest the potential value of requiring employers to publicly disclose employment-related information. Yet mandatory disclosure is a largely unexplored concept in the employment field. Except in the contexts of health and benefit plans and occupational health and safety,[1] the idea of mandatory disclosure in the workplace has garnered little attention from scholars[2] or from policy-

1. Employers must disclose the terms of health and benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (2006). *See* U.S. DEP'T OF LABOR, REPORTING AND DISCLOSURE GUIDE FOR EMPLOYEE BENEFIT PLANS (2008), *available at* http://www.dol.gov/ebsa/pdf/rdguide.pdf. OSHA's Hazardous Communication Standard adopts an information solution to certain workplace hazards. *See infra* text accompanying notes 88-89. Scholars have proposed broader use of disclosure of workplace hazards to improve safety. *See* Thomas A. Lambert, *Avoiding Regulatory Mismatch in the Workplace: An Informational Approach to Workplace Safety Regulation*, 82 NEB. L. REV. 1006, 1038-40 (2004); Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 355-60 (1988).

2. Cass Sunstein has explored both disclosure mandates and the law of the workplace, but has addressed their overlap only with regard to occupational health and safety risks. *See* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. PA. L. REV. 613, 626 (1999); Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 655-61 (1993). Other scholars have noted the potential value of disclosure in other work-related contexts. *See, e.g.*, Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 35-45 (2008) (proposing mandatory disclosure by unions in the context of represen-

makers.[3]

That is surprising, for mandatory disclosure has become a growing part of the modern state's regulatory repertoire.[4] Disclosure mandates, either alongside or in lieu of substantive mandates, have become important tools in the regulation of securities markets, consumer product and credit markets, and in the regulation of environmental hazards, health care, food and drug safety, and education.[5] Think, for example, of food labeling and its evolution from the simple list of ingredients required by federal law since 1906 to the new and improved nutritional labels that many of us rely on daily.[6]

Scholarly enthusiasm for mandatory disclosure has grown in recent decades as the cost of gathering and disseminating information has fallen, and as scholars from across the political spectrum have sounded a steady drumbeat of doubt about the efficacy of "command-and-control" regulation through substantive mandates.[7] For many law and economics scholars, disclosure mandates

tation contests); David J. Doorey, *Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation*, 43 OSGOODE HALL L.J. 353, 355-57 (2005) (proposing disclosure of manufacturing firms' supply chains); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1299, 1307-10 (1999) (proposing mandatory disclosure in corporate proxy statements of information about, inter alia, "domestic and international employment practices").

3. Two other areas of mandatory disclosure touch the law of work: advance notice of plant closing and mass layoffs under the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109, and mandatory filing of financial and other information, mainly by labor unions, under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), *id.* §§ 401-531. The WARN Act affects mainly the cessation of employment, while the LMRDA bears only peripherally on the employment relationship itself.

4. I have in mind here regular public disclosure obligations imposed on organizations, as opposed to obligations imposed on individuals within organizations to disclose, or "blow the whistle" on, incidents of wrongdoing within or by those organizations. The latter raise distinct concerns, as well as some parallel concerns that I allude to at relevant points in the analysis below.

5. *See, e.g.*, No Child Left Behind Act of 2001 § 1116(a)(1), 20 U.S.C. § 6316(a)(1) (mandating that states and localities disseminate annual report cards recording student achievement on state assessments); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) § 105(a)(8)(A), 42 U.S.C. § 9605(a)(8)(A) (establishing National Priorities List of hazardous waste sites); Wallace F. Janssen, *Outline of the History of U.S. Drug Regulation and Labeling*, 36 FOOD DRUG COSM. L.J. 420 (1981).

6. On the history of food labeling, see Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD DRUG COSM. L.J. 2 (1984); and Jean Lyons & Martha Rumore, *Food Labeling—Then and Now*, 2 J. PHARMACY & L. 171 (1993). For an interesting experimental study of the consequences of disclosure on healthy food choices, see Jessica Wisdom, Julie S. Downs & George Loewenstein, *Promoting Healthy Choices: Information Versus Convenience*, 2 AM. ECON. J.: APPLIED ECON. 164 (2010).

7. The harshest critiques of substantive mandates have come from law and economics scholars. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 41-43, 337-38 (1992); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 628-29 (4th ed. 1992). But skepticism of command-and-control regula-

are seen as a comparatively market-friendly form of state intervention.[8] From other quarters, the proponents of "New Governance" have made transparency and information disclosure central to their proposals for governance-based solutions to regulatory problems.[9] Mandating disclosure of information—information about risks, returns, costs, benefits, and other features of a firm's products, services, production processes, or shares—is said to improve the efficiency and rationality of market decisions, avoid fraud, and advance public policy goals, all without intruding significantly upon the autonomy of market actors.[10] It sometimes appears as a kind of magical minimalism that delivers significant rewards at little cost.

Indeed, because it is relatively painless, both politically and fiscally, mandatory disclosure may well be an overused regulatory tool—an easy substitute

tion, and interest in information solutions, extends to those who would reform rather than drastically reduce regulation. *See, e.g.*, STEPHEN BREYER, REGULATION AND ITS REFORM 163 (1982); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 102-12 (1995). On the popularity of disclosure solutions with the critics of regulation, including industry, see MARY GRAHAM, DEMOCRACY BY DISCLOSURE 140 (2002); and Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1092-93 (2007).

8. *See* Howard Beales, Richard Craswell & Steven Salop, *Information Remedies for Consumer Protection*, 71 AM. ECON. REV. 410, 411, 413 (1981); Paul H. Rubin, *Information Regulation (Including Regulation of Advertising)*, *in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 271, 272 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

9. "New Governance" is one umbrella term for a range of post-command-and-control strategies for social control of economic organizations and activity. For a useful collection of exemplary scholarship, see LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006). For additional examples, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 345-56 (1998); David Hess, *Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability Through Transparency*, 17 BUS. ETHICS Q. 453 (2007); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); and William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701 (1999).

10. Mandatory disclosure is thus held up by some scholars as an example of a regulatory intervention that may correct for well-documented behavioral impediments to rational decisionmaking without imposing serious burdens on "rational actors." *See, e.g.*, RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 193-96 (2008); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1230-37 (2003). For a recent review of empirical research on the impact of mandatory disclosure on firms' performance, see Aaron K. Chatterji & Michael W. Toffel, *How Firms Respond to Being Rated*, 31 STRATEGIC MGMT. J. 917 (2010). For a more pessimistic assessment, see Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure* (Univ. of Chi. Law Sch. John M. Olin Law & Econ. Research Paper, Paper No. 516, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1567284.

for substantive regulation when the latter is needed.[11] Both proponents and skeptics have recognized that regulating through information disclosure is a complicated business; it seems to work well only under certain conditions.[12] Given the difficulties that individuals face in processing information, the efficacy of mandatory disclosure as a regulatory intervention often depends on the role of savvy intermediaries with a superior capacity, and perhaps an incentive, to process, communicate, and act on information.[13]

Still, it is surprising that the idea of mandatory disclosure has made barely a cameo appearance in the field of labor and employment law. Instead, policy debates have focused mainly on markets versus mandates, especially as union representation, and the possibility of collective bargaining, has retreated to the margins.[14] Outside the shrinking domain of collective bargaining, the employment law landscape consists of outcroppings of public intervention in a field of private ordering. Substantive employment mandates are numerous and often justified. But for reasons of politics, practicality, or policy, many terms and conditions of employment that matter to employees and citizens are and will continue to be left to private ordering—above or beyond the reach of substantive mandates.

This Article seeks to make the case for expanding the use of mandatory disclosure in employment law. Mandatory disclosure can play a useful role both within the wide domain of private ordering and among the many aspects of employment that are subject to mandatory rights or minimum terms. It can improve the operation of labor markets and the satisfaction of worker preferences by supplying the information workers need to choose among employers. It can help to improve compliance with employment mandates, which are chronically underenforced in many workplaces. And where neither markets nor mandates meet public aspirations for more socially responsive, fair, and egalitarian workplaces, mandatory disclosure may help to equip stakeholders and advocates to push firms to reach beyond compliance and beyond the minimum that the market will bear.

The virtues and limitations of mandatory disclosure have been explored in

11. *See* Ben-Shahar & Schneider, *supra* note 10; Samuel Issacharoff, *Disclosure, Agents, and Consumer Protection* (NYU Law & Econ. Research Paper Series, Working Paper No. 10-33, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640624.

12. Among the problems are information overload, behavioral impediments to the processing of information, and the costs of producing information. *See* ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 73-74 (2007); GRAHAM, *supra* note 7; Dalley, *supra* note 7, at 1113-19; Sage, *supra* note 9, at 1710; Ben-Shahar & Schneider, *supra* note 10, at 38-54.

13. *See* FUNG ET AL., *supra* note 12, at 122-25; Issacharoff, *supra* note 11.

14. On the fall of collective bargaining and the proliferation of substantive mandates, see CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 52-74 (2010). On the policy debates over the efficiency and consequences of mandates, see *infra* text accompanying notes 22-27.

a wide range of regulatory settings, and especially within capital markets.[15] But markets for human labor are different from capital markets or product markets, and relations between firms and their employees are different from relations between firms and their shareholders or their customers. Those differences will affect the consequences and value of mandatory disclosure, and will be my focus here.

What is perhaps most distinctive about employment, and what may help to explain the surprisingly limited use of mandatory disclosure in this context, is that employees—unlike consumers, shareholders, or members of the public who are affected by a firm's products, services, processes, and decisions—are located within the boundaries of the firm itself (once they are hired).[16] As insiders to the firm, employees have access to information that may make mandatory disclosure seem unnecessary, and they are subject to organizational demands of loyalty and confidentiality that may make public disclosure seem inappropriate. At the same time, employees' status as insiders subject to employers' economic power may make mandatory disclosure seem insufficient (as compared to substantive mandates) on any matters that are important enough to warrant public intervention.

Hypothesizing about the explanation for a negative—for the paucity of proposals for mandatory disclosure of terms and conditions of employment—is a perilous business, and I do not want to stake too much on that hypothesis. The main point of this Article is to begin to fill the gap, and to show that mandatory disclosure in the workplace context is sometimes necessary, appropriate, and useful. But along the way we will excavate and examine some assumptions about the nature of employment relations.

For some purposes, employees are insiders, bound by contractual obligations of loyalty and confidentiality and subject to employers' legitimate authority. But in choosing whether to take or quit a job, employees are more akin to investors (of their own human capital) or consumers (of a package of "goods" associated with a job).[17] As such, they have a recognizable stake in

15. For several wide-ranging assessments, see FUNG ET AL., *supra* note 12; Dalley, *supra* note 7, at 1108-29; and Ben-Shahar & Schneider, *supra* note 10. The granddaddy of mandatory disclosure regimes in the United States—the financial disclosure requirements for publicly traded corporations—has created its own scholarly cottage industry. *See, e.g.*, Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023 (2000); John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717 (1984); Dalley, *supra* note 7, at 1093-108.

16. The boundaries of the firm are a subject of vigorous dispute. *See* Oliver E. Williamson, Michael L. Wachter & Jeffrey E. Harris, *Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange*, 6 BELL J. ECON. 250 (1975). But the location of employees within those boundaries is conventional wisdom, and I mean to suggest nothing more precise than that.

17. *See* Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1067-68 (1984); *cf.* Bodie, *supra* note 2, at 35-45 (conceptualizing union representation elections as purchases of services).

information about the job that may be hidden from them. All the while, it is crucial to keep in mind that employees are members of society and a majority of the voting citizenry.[18] Their terms and conditions of employment, in the aggregate and in the staggering disparities of wealth and opportunities that they create, shape society and give the public a large stake in learning about what goes on at work.

Part I sketches the existing landscape of workplace regulation, with its still-dominant background regime of private ordering, its many-faceted overlay of employment rights and labor standards, and its notable neglect of information disclosure as a regulatory strategy. Part II offers a brief outline of a mandatory disclosure regime for the workplace as a point of reference for the discussion that follows. (A conspicuous omission, explained below, is wage and salary information, which raises distinct and difficult issues that are better dealt with separately.)

Part III explores the overlapping benefits of information disclosure along three dimensions: improving the efficiency of employment contracts and labor markets, improving compliance with existing substantive mandates, and inducing employers to reach "beyond compliance" toward evolving norms of good employment practices and standards of social responsibility. Part IV turns to the crucial question of whether and why *mandatory* disclosure by employers is needed given the existing incentives and mechanisms for voluntary disclosure of work-related information. It turns out that, while there is a good deal of information available to prospective employees and especially current employees, at least regarding large employers, there are also significant information gaps, and hurdles to securing information, that could be usefully addressed by a disclosure mandate.

Part V takes up in a very preliminary way some issues of scope and of institutional design: What information should be excluded from a disclosure mandate? How can a disclosure mandate be formulated to insure that information is both useful to its consumers and not too burdensome for employers to produce? How should it be enforced? What might be the unintended consequences of a disclosure mandate and how might they be managed or mitigated? It is in these details where the devil is reputed to reside, and where the idea of workplace transparency might run aground. But it is not worth mapping this uncharted territory in detail unless the concept of information disclosure offers the prospect of real progress in workplace governance. This Article aims to make that case.

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18. On the civic dimension of work, see CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 105-24 (2003). In referring to the "voting citizenry," I do not mean to suggest that the law of the workplace should treat citizens differently from other workers. But I do think that the fact that most employees are eligible voters, and that most eligible voters are also employees, is relevant to the law governing the workplace.

I. THE LAY OF THE LAND OF EMPLOYMENT: MARKETS, MANDATES, AND "BEST PRACTICES"

In order to assess the value of information about terms and conditions of employment, it is necessary first to review how those underlying terms and conditions are established in the first place. Labor is bought and sold in labor markets, and its terms are set primarily by contract.[19] Unless the law has taken some issue off the bargaining table, the employment relationship is governed by the agreement of the parties. The employment contract may be terminable at will or only for cause; its terms may be express or implied, bargained individually or collectively, promulgated unilaterally by employers and "accepted" as a condition of employment, or subject to modification at the will of the employer. None of these variations detracts from the basic contractual nature of the employment relationship.

As compared to many contractual relationships, however, the employment relationship is highly regulated. A many-layered edifice of rights and minimum standards, grounded in federal and state statutes and common law, sets boundaries on the freedom of contract in employment. Employees have rights against discrimination and harassment based on certain traits (for example, race, sex, religion, age, pregnancy, and disability), and against retaliation based on certain activities (for example, supporting a union, refusing to violate the law, complaining of discrimination, or revealing harmful and illegal conduct).[20] The law sets minimum standards for some terms and conditions of employment, such as wages and hours, occupational health and safety, and family leave, and it regulates some discretionary benefits, such as pensions and health benefits.[21]

Debates over the wisdom and consequences of expanding or contracting the bite that rights and mandates take out of freedom of contract are the bread and butter of labor and employment law scholarship. Law and economics scholars have succeeded in putting some recurring questions on the table: Why not leave it to the parties to bargain over these matters? Won't those bargains better reflect the actual preferences of the parties? Will it do employees any good to impose mandates, given employers' inexorable freedom to employ or not to employ and, above a low minimum level, to set wages?[22] Proponents of em-

19. The following overview of the employment relationship is drawn from Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 383-86 (2006).

20. Protections against retaliation and discrimination are mainly litigated in connection with termination, though they also affect hiring and terms and conditions of employment. *See* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1657 (1996).

21. *See* Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (2006); Occupational Safety and Health Act of 1970 (OSHA), *id.* §§ 651-678; Employee Retirement Income Security Act of 1974 (ERISA), *id.* §§ 1001-1461; Family and Medical Leave Act of 1993 (FMLA), *id.* §§ 2601-2654.

22. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947,

ployment mandates sound several themes in response. Some seek to trump economic arguments by harkening to fundamental commitments of public morality and justice in a liberal democratic society, and rights of self-ownership and bodily integrity, equality, and freedom of speech and association.[23] Others defend mandates as a response to endemic inequality of bargaining power between employers and employees,[24] or to externalities or other market imperfections that impede efficient bargaining.[25] They point to features of modern employment that constrain most employees' ability to protect themselves through contract[26]: A worker's labor power expires each day and cannot be accumulated

962-77 (1984); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1103-05 (1989); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1325-34 (1989); Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984); Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1935 (1996); Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L.J. 29, 46-48 (2001); Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177, 181 (1989); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 909-12.

23. *See, e.g.*, Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404-13 (1967); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 519-20 (1976); *see also* Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 65-66 (1988).

24. "Unequal bargaining power" features in the preamble to the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, as an explicit basis for the federal right to form unions and bargain collectively, and appears to underlie many judicial and legislative interventions into the employment contract. For a thoughtful defense of the "unequal bargaining power" thesis, see Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2787 (1991) (reviewing PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990)). Law and economics scholars have repeatedly criticized the "unequal bargaining power" claim and argued for greater deference to contracts. *See, e.g.*, Stewart J. Schwab, *The Law and Economics Approach to Workplace Regulation*, *in* GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 91, 111-13 (Bruce E. Kaufman ed., 1997); Verkerke, *supra* note 22, at 909-12; Michael L. Wachter & Randall D. Wright, *The Economics of Internal Labor Markets*, 29 INDUS. REL. 240, 254-55 (1990).

25. *See, e.g.*, WEILER, *supra* note 24, at 20-22; Simon Deakin & Frank Wilkinson, *Labour Law and Economic Theory: A Reappraisal*, *in* LAW AND ECONOMICS AND THE LABOUR MARKET 1 (Gerrit De Geest, Jacques Siegers & Roger Van den Bergh eds., 1999); Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783 (1996); Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943 (1996); St. Antoine, *supra* note 23; David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619 (1991); John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583 (1992) (book review); J. Hoult Verkerke, *Free to Search*, 105 HARV. L. REV. 2080 (1992) (book review).

26. *See* WEILER, *supra* note 24, at 134-42; Deakin & Wilkinson, *supra* note 25, at 12-13; Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1958-59 (1996);

while awaiting a better offer. Labor power is also a "lumpy" asset that can rarely be diversified across more than one or perhaps two employers at a time. Moreover, many conditions of employment are "public goods"; they reflect employer practices or policies that affect many workers, such that efforts to seek improvements confront collective action hurdles.[27]

Whatever bargaining impediments may plague individual employment contracts, those contracts, shaped by labor market forces, control most terms and conditions of employment. Contract, or private ordering, governs the many terms of employment that are not subject to legal mandates at all, such as job security, paid vacations, and sick leave for most employees, as well as the availability of benefits that are discretionary but regulated, such as pensions and health insurance. The contract also controls most terms that *are* subject to mandatory minimum standards, such as wages, health and safety, and family leave, for those who operate above the legal floor. Indeed, private ordering plays a large de facto role even within the scope of legal mandates, given chronic and widespread noncompliance, especially at the bottom of the labor market.[28]

To say that contract and market forces control most terms and conditions of employment is not to say that social norms play no role beyond the reach of mandates. Indeed, the ability of stakeholder and advocacy groups to push firms to reach "beyond compliance" through the skillful deployment of publicity and reputational pressures has been one of the most important developments in the world of regulation in recent decades.[29] The convergence of demands for "corporate compliance" and for "corporate social responsibility" has generated significant investments by large firms in their reputation for reaching "beyond compliance"—for adhering or aspiring to "best practices" that exceed legal standards—in areas such as job safety, diversity and inclusion, and family friendliness, as well as environmental performance, financial integrity, community development, and human rights. Firms profess to go "beyond compliance" not only in their own performance but in the scope of their responsibility; they may, for example, promise to monitor the labor and environmental practices of suppliers for which they could not be held legally liable. As the struggle over sweatshops suggests, there remains a large and controversial gap between professed responsibility and performance.[30] The movement for corpo-

Gottesman, *supra* note 24.

27. *See* WEILER, *supra* note 24, at 134-42. Given the difficulties of individual "voice," employees' main recourse in case of dissatisfaction with a job is exit; but exit, and especially frequent recourse to exit, is costly to the employee. Apart from a temporary loss of income, exit sacrifices firm-specific skills and knowledge and the benefits of seniority, and may send damaging signals to future employers.

28. *See* ESTLUND, *supra* note 14, at 60-68.

29. *See id.* at 93-103; DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 16-45 (rev. ed. 2006).

30. *See* JILL ESBENSHADE, MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND

rate social responsibility, or social regulation, seeks to redirect market forces toward social goals that go beyond the actual or practical reach of legal mandates. Legal mandates may operate in the background, and may follow in the footsteps of social regulation. But the latter is still a form of private ordering.

Private ordering, through both markets and social regulation, will continue to play a large role in shaping the employment contract, even as to issues that generate public attention and concern, for several interrelated reasons: heterogeneous employee preferences and employer capabilities, complexity, politics, and change in both the supply of and demand for workplace policies.[31] All of these factors are in play, for example, in the case of employer policies regarding family friendliness or work-life balance.

A firm's "family friendliness" is reflected in policies regarding hours and overtime demands, flexible scheduling, part-time and telecommuting options, and the availability of paid or unpaid leave for child bearing, child rearing, and elder care. Employees vary widely in how highly they value such policies and in the mix of policies they would prefer.[32] Employers also vary widely in what they are willing or able to offer, depending partly on their size and sector. Employers' political opposition to new legal mandates sets a high bar for enactment of legislation, and most of the few mandates that gain passage exclude smaller employers from coverage. Moreover, legislated mandates can fall out of step with changes in what employers are willing and able to supply, and in what employees and the public demand. The legislative process may not be able to keep up, for example, with the changing norms and technology of telecommuting.

As the work-family balance issue has gained political traction over recent decades, it has produced one major federal mandate, the Family and Medical Leave Act of 1993 (FMLA), which requires larger employers to provide limited unpaid leave for specified purposes and paid leave to the extent that the employer already provides it for other purposes.[33] Bills pending in Congress would modestly expand the FMLA's coverage and purposes, and mandate up to seven days of paid sick leave per year for most employees.[34] A few states have

THE GLOBAL APPAREL INDUSTRY (2004); ESTLUND, *supra* note 14, at 97-103.

31. Heterogeneity and complexity are among the reasons Paul Weiler cites for the inadequacy of employment legislation as an answer to the shortcomings of labor markets in meeting employee needs, and the need for mechanisms of collective employee voice. *See* WEILER, *supra* note 24, at 154-61. Ed Rock and Michael Wachter cite similar issues as a reason to prefer, under some circumstances, informal enforcement of workplace "norms" to either formal judicial enforcement of those norms or legislation of uniform standards. *See* Rock & Wachter, *supra* note 22, at 1932-40.

32. Preferences depend on employees' own family responsibilities and their abilities to afford whatever wage tradeoff is entailed by accommodating those responsibilities.

33. *See* 29 U.S.C. § 2601 (2006). The FMLA covers employers with more than fifty employees. *Id.* § 2611.

34. *See* Healthy Families Act, H.R. 2460, 111th Cong. (2009) (mandating that, for every thirty hours worked, employers provide at least one hour of paid sick time that em-

gone further, requiring some paid leave, for example.[35] These are important reforms. Still, there is a large and probably growing gap between the law's minimum standards and best practices among firms that aim for family friendliness.[36] That gap will be filled to greater and lesser degrees through private ordering.[37]

The very large role of private ordering in the employment relationship is not inevitable or universal. In much of Europe, for example, legal mandates (on job security, paid vacations, and parental leave, for example) confer benefits that rival those in the most employee-friendly U.S. workplaces.[38] But given the

ployees can use for their own or a family member's illness or injury); Family and Medical Leave Enhancement Act of 2009, H.R. 824, 111th Cong. (2009) (expanding FMLA to allow employees to take up to four hours leave in any thirty-day period to attend children's school events or family members' medical appointments); *see also* Paid Vacation Act of 2009, H.R. 2564, 111th Cong. (2009) (mandating at least one week's paid vacation annually for employers with at least fifty employees, and at least two weeks for employers with at least one hundred employees).

35. *See* CAL. UNEMP. INS. CODE §§ 3300-3305 (West 2010) (allowing up to six weeks leave, at reduced pay, during a twelve-month period to care for a newborn or adopted child or a seriously ill family member); N.J. STAT. ANN. § 43:21-26 (West 2010) (extending state temporary disability benefits law to cover individuals "who need to care for family members incapable of self-care"); WASH. REV. CODE ANN. §§ 49.86.005-.903 (West 2010) (allowing up to five weeks leave, at $250 per week, during a twelve-month period to care for a newborn or adopted child).

36. The Equal Employment Opportunity Commission (EEOC) has issued its own set of best practices for workers with caregiver responsibilities. *See Employer Best Practices for Workers with Caregiving Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last modified May 22, 2009). *Working Mother* magazine has compiled one of several "best employer" lists. *See 2010 Working Mother 100 Best Companies*, WORKING MOTHER, http://www.workingmother.com/BestCompanies/2010/08/2010-working-mother-100-best-companies (last visited Dec. 28, 2010).

37. On the economic forces that are likely to constrain voluntary employer accommodation of family responsibilities, see Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 378-86 (2003). A promising legislative approach to the problem, and an example of a new kind of employment mandate, is seen in the proposed Working Families Flexibility Act, H.R. 1274, 111th Cong. (2009), which would allow employees to request a change in work location or hours and would require employers to meet with employees to discuss any requests. This "procedural mandate" would effectively require employers to *explicitly* bargain over these matters at employees' request. It would not alter the contractual nature of the employment relationship, but it would serve an information-forcing function vis-à-vis current employees, and would likely improve some employees' ability to satisfy their preferences through individual contracts.

38. *See* JANET C. GORNICK, ALEXANDRA HERON & ROSS EISENBREY, ECON. POLICY INST., BRIEFING PAPER NO. 189, THE WORK-FAMILY BALANCE: AN ANALYSIS OF EUROPEAN, JAPANESE, AND U.S. WORK-TIME POLICIES (2007), *available at* http://www.sharedprosperity.org/bp189/bp189.pdf; Nancy E. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311, 337-39 (1989); Carol Daugherty Rasnic, *Balancing Respective Rights in the Employment Contract: Contrasting the U.S. "Employment-at-Will" Rule with the Worker Statutory Protections Against Dismissal in European Community Countries*, 4 J. INT'L L. & PRAC. 441 (1995); Annie Pel-

very large role of private market ordering in establishing terms and conditions of employment in the United States, it is worth considering what might be done to enhance the ability of employees to bargain or to shop around for the terms they want, and to encourage employers voluntarily to offer more of what employees want and what the public thinks they should have.

That challenge is further complicated by the findings of behavioral economics.[39] Pointing to evidence that individuals tend to refract information about future risks or gains through irrational "endowment effects" and "framing effects," Cass Sunstein, Christine Jolls, and Richard Thaler, among others, argue for social interventions that go beyond disclosure, and that reframe decisions or nudge individuals in the direction that an unbiased chooser would choose. Sunstein thus proposes "switching the default" on some terms of employment as to which employees are inclined to display biases, to bargain badly, and to end up with suboptimal protections.[40] Employers could still contract explicitly for their favored terms; but employees would then be on notice of what they are getting and better able to bargain over the matter, to shop around for a better deal, or to demand a compensating wage premium.[41] Switching the default does not necessarily overcome individual decisionmaking biases, but it may modestly offset them.

The insights of behavioral economics sound an important cautionary note about employees' ability to make good use of more information. But the focus on impediments to employees' rational processing of information may obscure a more basic bargaining impediment: employees' and prospective employees' lack of accurate information about the terms employers are actually offering.[42]

letier, Comment, *The Family Medical Leave Act of 1993—Why Does Parental Leave in the United States Fall So Far Behind Europe?*, 42 GONZ. L. REV. 547, 560-71 (2006/07).

39. *See* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1533-37 (1998); *see also* Camerer et al., *supra* note 10, at 1230-37 (discussing how regulation can be improved by taking into account individuals' bounded rationality).

40. *See* Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 212-13 (2001) [hereinafter Sunstein, *Human Behavior*]; Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 133-34 (2002) [hereinafter Sunstein, *Switching the Default Rule*]. For example, following Issacharoff, *supra* note 25, Sunstein suggests replacing the current "at will" default term with a default "just cause" protection. Such proposals echo the case for "penalty defaults" where one party to a contract has superior access to information that affects the value of a particular term. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95-100 (1989).

41. Or so goes the theory. In fact, most employers already do contract explicitly for employment at will; yet it appears that many employees ignore or discount even clearly and broadly worded disclaimers. *See* 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, 139-40 (1997).

42. *See* WEILER, *supra* note 24, at 74-75. Employees may also lack important information about the law of the workplace, but let us set that problem aside. For discussions of that problem, see Kim, *supra* note 41. *See also* Ian H. Eliasoph, *Know Your (Lack of) Rights:*

Switching the default may be one way to redress information asymmetries by forcing employers to make their preferred terms explicit.[43] But switching the default is not always feasible, especially as to terms like work-life balance that are complex or that meet wide variations in employee preferences—in other words, for many of the same reasons for which the law imposes low or no mandatory terms in some areas. Moreover, a change in default rules does nothing to inform the public or employee advocates of the terms employers are offering.

Substantive mandates in the employment setting are sometimes appropriate and feasible; when they are not, waivable rights or new default rules may sometimes make sense.[44] But most terms and conditions of employment for most employees are beyond the reach of substantive public interventions, whether mandatory or defeasible. Both within and beyond the reach of substantive mandates, the law may yet play a useful role in insuring that prospective employees have the information they need to choose among and bargain with employers and to enforce their legal rights. Before returning in Part III to the question of *how* disclosure mandates might improve the operation of markets, substantive mandates, and social regulation, we need a rudimentary understanding of what disclosure mandates for the workplace might look like.

II. A ROUGH SKETCH OF A MANDATORY DISCLOSURE REGIME FOR THE WORKPLACE

The idea of mandatory disclosure in the workplace is sufficiently unfamiliar that a brief and tentative preview of a statutory scheme of workplace transparency may be a helpful prelude to the argument that is to come. First, what kind of information about terms and conditions of employment might employers be required to disclose?[45]

Perhaps the most essential piece of information for prospective employees

Reexamining the Causes and Effects of Phantom Employment Rights, 12 EMP. RTS. & EMP. POL'Y J. 197 (2008); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6 (2002).

43. Such a rule should also reframe the issue for employees and enhance their starting endowments, thus raising the perceived value of job security and tilting subsequent decisionmaking in favor of greater job security. *See* Sunstein, *Switching the Default Rule*, *supra* note 40, at 112-19.

44. In earlier work I have identified another point along the spectrum from mandates to free contract in the form of "conditionally waivable rights," which can be observed in existing law in the treatment of mandatory arbitration agreements and covenants not to compete. *See* Estlund, *supra* note 19.

45. There are two other kinds of information that some might find wanting, and worthy of disclosure, in the employment context: information (for employees) about employee rights under labor and employment laws, *see supra* note 42, and information (for employers) about employees' job qualifications and likely productivity. Those two categories of information raise issues very different from those relevant here, and are beyond the scope of this Article.

concerns wages—not just the starting wage in the particular job but the wages of other employees, and thus the expected returns to seniority and advancement; and not just in the target firm but also in competing firms. The starting wage for a particular job is perhaps the most transparent term of employment for a prospective employee; its obvious salience makes it easy to ask about and perhaps even to bargain over. Yet the wages of others (both in the target firm and in competitor firms) is one of the least transparent terms, for employers closely guard information about wages generally. That puzzle is only one of many that scramble the question of whether to compel public disclosure of salary information, and that will require focused attention beyond what is possible here.[46]

There remains a great deal of other information about terms and conditions of employment that prospective employees might not otherwise have and that might affect their wage demands or their choice of jobs.[47] For example:

- *Hours of work and overtime demands*: actual hours worked by employees in various categories (at least those who are covered by legal overtime requirements), and policies regarding overtime demands;[48]
- *Job-related hazards and injuries*, some of which are salient and endemic to certain occupations (mining, for example), and some of which are less obvious (such as repetitive motion injuries); in either case, risks and injury rates may vary widely across firms, depending on workplace

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

47. Prospective employees are only a subset of the potential consumers of job-related information, as I will explain below; but they are a crucial subset that may serve for now as a proxy for the interested public.

48. Employers subject to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (2006), must maintain records on each employee's occupation, wage rate, hours worked, overtime, additions or deductions to wages, and total wages paid each period. 29 C.F.R. § 516.6 (2010); *Fact Sheet #21: Recordkeeping Requirements Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB. (July 2008), http://www.dol.gov/whd/regs/compliance/whdfs21.htm. These records must be available for inspection by the Department of Labor, which may also require employers to report the data. 29 C.F.R. §§ 516.7-.8.

practices;[49]

- *Job security and internal labor markets*, not only contractual terms governing job security, but also the actual frequency of involuntary terminations, job tenure, and internal promotions;[50]
- *Policies affecting work-life and work-family balance*, including flexible scheduling, part-time and telecommuting options, and availability of paid or unpaid leave for illness, child bearing, child rearing, and elder care;
- *Agreements waiving or affecting legal rights* that employers demand as a condition of employment; for example:
    - Covenants not to compete and other posttermination restraints, which restrict employees' opportunities in the external labor market and their bargaining power in the current job;
    - Mandatory arbitration agreements, which waive the right to litigate future employment-related claims in favor of a private arbitration system designed by the employer, subject to standards set by external law;
    - Agreements to submit to drug testing or other intrusive tests, or to disclose personal information, that might otherwise amount to an invasion of employee privacy rights;
- *Workplace demographics* in various job categories or levels of the firm, particularly along lines of race, sex, ethnicity, national origin, and the like that trigger scrutiny under antidiscrimination laws.[51]

49. Employers subject to OSHA are required to record work-related injuries that result in "death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, . . . loss of consciousness," or diagnosis with a "significant injury or illness." 29 C.F.R. § 1904.7. Employers must report to OSHA any employee death or inpatient hospitalization involving three or more employees. *Id.* § 1904.39. Until recently, this data was unavailable to the public. However, historic establishment-specific data (through 2007) from these OSHA reports was made public by OSHA in 2009. *See infra* text accompanying note 76. In addition to OSHA's reporting requirements, state workers' compensation statutes generally require employers to record any injury or illness incurred by employees in the course of employment. *See, e.g.*, N.Y. WORKERS' COMP. LAW § 110 (McKinney 2010).

50. Information about contractual terms is typically found in employers' policy manuals or employee handbooks. As for facts affecting job tenure, federal law requires larger employers to give advance notice regarding plant closings or major layoffs. Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109; *see also* N.Y. LAB. LAW §§ 860, 860-a to -i (McKinney 2010) (imposing similar but broader requirements for advance notice of plant closings or mass layoffs). In addition, state unemployment compensation regimes include reporting requirements. *See, e.g.*, CAL. UNEMP. INS. CODE § 1085(a)-(b) (West 2010) (requiring employers to keep a record of workers, their statuses (i.e., employed, on layoff), and their wages).

51. Employers that are subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and have at least one hundred employees must file annual reports with the EEOC categorizing employees by job description, sex, and race/ethnicity. 29 C.F.R. § 1602.7. Employers with at least fifty employees that hold government contracts for at least

Information on these matters may be valuable to prospective employees as well as employee advocates and other members of the public (for reasons developed in Part III), and may not be readily available from outside the firm or through voluntary disclosure (for reasons developed in Part IV).

An almost endless quantity of information might be relevant to even this limited catalog of topics. In the interest of making the disclosure mandate less costly and more manageable, it would target information that employers already produce for dissemination either to current employees or to the government. That includes employer policy statements, employee manuals, and contractual instruments, as well as some of the voluminous information that employers already generate and report to the government in connection with existing legal regimes (such as data on employee hours, demographics, workplace injuries, and involuntary terminations).[52] Employers could be required to post information of this nature on the Internet (on a company website, reachable through portions of the site aimed at prospective employees, as well as through any third-party website through which job openings are advertised).

Even thus limited, the disclosure mandate would yield far too much information for prospective employees to digest and process; rather than filling an information gap, it might exacerbate an information overload. That is where intermediaries come in. Private intermediaries would be relied upon to do the slicing and dicing of information and to rate and compare employers in a particular region, industry, or occupation, or with regard to particular workplace issues.[53] Many such intermediaries already exist—private organizations, for profit and not for profit, that evaluate and compare companies on the basis of their general worker friendliness, family friendliness, diversity along lines of gender, race and ethnicity, sexual orientation, or disability, or more broadly. But these intermediaries currently depend largely on employers' voluntary disclosure, the shortcomings of which will be addressed in Part IV. Under a mandatory disclosure regime, those organizations and new entrants to the field would have more information, and more credible and objective information, not only from firms that seek a reputation as leaders in employment practices but from those that are lagging behind.

For a glimpse at how disclosure might work in practice, consider the market for young lawyers, and especially the large law firms' share of that market.

$50,000 must file the same report with the Office of Federal Contract Compliance Programs (OFCCP), 41 C.F.R. § 60-1.7, and must provide demographic information for all applicants upon request of the OFCCP, *id.* § 60-1.12.

52. *See supra* notes 48-51.

53. The idea of ranking employers may suggest an analogy, for better and for worse, to the infamous *U.S. News & World Report* rankings of colleges, universities, and their graduate and professional programs. (For a nuanced affirmative case for rankings, including the *U.S. News & World Report* rankings of law schools, see Heather K. Gerken, *In Praise of Rankings*, 19 WIDENER L.J. 1 (2009).) Rankings might be improved both by competition among ranking bodies and by greater checks on the accuracy of data. Both would be facilitated by public disclosure of the underlying data, as proposed here.

At the website of the National Association for Law Placement (NALP), an association of law school placement professionals, a law student—or indeed, anyone—can search for law firms by location, size, practice area, minimum salary, and thirty specified employee benefits.[54] So, for example, a search for a New York City law firm that pays at least $150,000 per year and provides child care subsidies, domestic partner benefits, dependent care leave, and health club membership will produce a list of eighty-five such law firms.[55] One may then click on any of those firms and peruse current information (from responses to NALP questionnaires by named individuals in each firm) about the firm or about a particular office, including demographics, compensation, attorney hours worked and billed, and pro bono policies and practices, among other matters.[56]

The NALP story illustrates the value of coordination in the type and format of information disclosure and the crucial role of intermediaries in compiling and distributing information in standardized and user-friendly formats.[57] Moreover, the NALP questionnaires offer a rough catalog of what many prospective white-collar employees might want out of a job: compensation, hours, benefits, demographics, and opportunities for pro bono (read "volunteer") work.[58] Employers are apparently capable of disclosing this kind of information under the right circumstances, and it seems to do them no harm (except perhaps by subjecting them to greater competition).

Law students seeking jobs in large law firms are among the most privileged of prospective employees, not only in the wages and working conditions to which they can aspire but also in their access to detailed, standardized, centralized information about the wages and working conditions offered by hundreds

54. Specifically, "Retirement Plan," "College Savings Plan," "Bar Association Fees," "Business Casual Dress Code," "Child Care Subsidy," "CLE," "Dental Insurance," "Domestic Partner Benefits," "Employee Assistance Program," "Family/Dependent Care Leave," "Flexible Spending Account/[P]re-tax Option," "Health Club Membership," "Life/AD&D," "Long-term Care Insurance," "Long-term Disability Insurance," "Medical Insurance," "Medical Spending Account," "On-site Child Care," "On-site Child Care—Emergency," "Parental Leave," "Parking/Transportation," "Profit Sharing," "Relocation Expenses," "Sabbatical Program," "Short-term Disability Insurance," "Sick Leave," "Technology (Laptop, PDA, etc.)," "Vacation Leave," and "Vision Insurance." *Advanced Search*, NALP DIRECTORY LEGAL EMPLOYERS, http://www.nalpdirectory.com/dledir_search_advanced.asp (last visited Jan. 4, 2010). The site also includes other legal employers—corporate, government, and public interest—but very few of these apparently submit NALP questionnaires. The site identifies only six non-law firm employers in New York City, for example.

55. Based on a search performed on January 3, 2010.

56. Not all firms report all items (total hours worked and billed are often missing), but nearly all report nearly all items.

57. NALP can perform those functions because it embraces, and effectively orchestrates, the entire relevant labor market; elsewhere, government action may be required.

58. The benefits that are actually offered by major law firms are both more uniform and more generous than those offered by most employers (though they have taken a hit in the recent economic downturn, as in nearly every sector of the economy). But whether or not any particular employer offers these benefits is of general interest.

of potential employers. There are many reasons for those advantages, not all of which can be replicated through regulation (as we will see in Part IV). But a disclosure mandate would aim to bring much of the labor market closer to the law firm labor market in terms of the quality of publicly available employment-related information. That brings us to the question of whether and why that would be desirable.

III. WHAT IS INFORMATION GOOD FOR?

Given the existing landscape of employment law, mandatory workplace disclosure along the lines sketched above would bring several distinct benefits:

- *Mandatory disclosure in aid of contract*: disclosure of information to employees and prospective employees can help make employment contracts and labor markets more efficient as to terms and conditions that are left to contract by better matching employee preferences and employers' proffered terms of employment.
- *Mandatory disclosure in aid of compliance*: disclosure of information to employees, prospective employees, and their advocates can promote employer compliance with existing substantive mandates by exposing evidence of noncompliance and facilitating enforcement.
- *Mandatory disclosure in aid of reputational rewards and sanctions*: disclosure of information to employees, prospective employees, and the public can promote goals that are not fully embodied in substantive mandates by encouraging employers to reach beyond compliance and to emulate or establish "best practices."

Each of these goals has distinct normative underpinnings. Disclosure in aid of contract assumes no normative judgment about what terms employers should be offering other than the parties' own preferences. Disclosure in aid of compliance seeks to promote the normative judgments embodied in existing substantive employment laws. Disclosure as an independent regulatory tool seeks to advance the normative goals of multiple "stakeholders"—consumers, shareholders, and influential nongovernmental organizations—whose good opinion firms seek to cultivate by reaching beyond substantive mandates toward a higher standard of corporate social responsibility.

Whether disclosure can accomplish all these good ends will obviously depend partly on how the disclosure mandate is designed and how it is enforced, issues that will be discussed briefly in Part V. It will also depend, as we will see here, on the willingness and ability of intermediaries to analyze and sometimes act on information.

A. *Disclosure in Aid of Contract*

It is axiomatic among economists that efficient "Coasean" bargaining depends on both parties having perfect information. Of course "information is never perfect" in real markets, and the cost of compelling further disclosure may outweigh the benefits.[59] For example, there may be little to be gained from mandatory disclosure in markets for "search goods" whose price and features are readily observable by buyers, and that are sold in mass transactions. In such markets, where comparison shopping is relatively easy and price discrimination is unlikely, a minority of informed consumers can help keep markets and prices competitive for others.[60] In markets for goods that are purchased infrequently or in individualized transactions, it is less likely that informed consumers can keep price or quality competitive for others, and more likely that information deficits will undermine the efficiency of markets. Mandating disclosure of information, if it can be done at reasonable cost, may then improve the efficiency of markets by making it easier to do comparison shopping.

Of course, labor markets are different from product markets. For one thing, the sellers of labor are human beings who are inseparable from the labor they are selling, and who care a great deal about the qualities of the buyer as well as about the price of their labor. In a sense, the seller of labor is also the buyer of a job. So as a first cut at the question of how mandatory disclosure might affect workers' ability to satisfy their job preferences, we might transpose the foregoing propositions for product markets such that the "goods" are jobs, the "buyers" are workers, and the "sellers" are employers. From that perspective, jobs are in some respects "search goods";[61] but their features are not easy for outsiders, including prospective "purchasers," to observe (for reasons discussed in Part IV below). Moreover, jobs are "purchased" infrequently by workers, usually in individualized transactions in which price discrimination—or higher salaries for informed buyers—is often possible. Evidence of this sort of price discrimination can be found in studies showing that workers who bargain explicitly over salary gain a significant salary premium, all else being equal, over those who do not bargain.[62] (Incidentally, the studies also show that men are much more likely to be in the first group—in other words, "women don't ask.")[63]

Thus far we have ignored behavioral impediments to rational processing of

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59. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 630, 632-39 (1979).

60. On the role of "informed minorities," see *id.* at 636-37. The ability of informed minorities to police consumer contract terms has been sharply questioned. *See* Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge that Is Yet to Be Met*, 45 AM. BUS. L.J. 723 (2008); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* (NYU Law & Econ. Research Paper Series, Working Paper No. 09-40, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443256.

61. In some respects, jobs are "experience goods"; many important features can be discovered only over time on the job. Disclosure is not a substitute for experience.

62. *See* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 1-7 (2003).

63. *See id.* at 62-84.

information. We have also ignored wide variations among jobs—for example, in the nature of the hiring process and the availability of information to prospective employees. Finally, we have thus far assumed a lack of readily available information about jobs and their features. The value of mandatory disclosure in aid of contract depends partly on how easy it is for prospective employees to acquire information on their own; that is an issue discussed in Part IV. With those qualifications, economic theory suggests that employees armed with better information about terms and conditions of employment will be more likely to find jobs that suit them at wages that reflect the actual features of the job, and employers will be more likely to deliver job features that meet employee preferences.

So, for example, some employees might accept a lower salary from an employer that is unusually accommodating of employees' family responsibilities through flexible hours and generous leave policies, or from a firm in which jobs are relatively secure. (Of course, employers might disclose some of this information voluntarily; more on this possibility later.) On the other side of the ledger, employees may demand a compensating wage premium for jobs that are especially family unfriendly, insecure, or dangerous.[64] Or, to take a different sort of risk, skilled workers in a dynamic industry may demand a salary premium, or may avoid a firm altogether, if required to sign a noncompete covenant that restricts their future mobility and opportunities in the external labor market. Ensuring that such information is disclosed up front—*if* it can be done at low cost and in a manner that renders information usable by workers—should generally produce contracts that better match workers and jobs and better satisfy parties' preferences. In other words, it should promote more efficient employment contracts.[65]

Reducing information asymmetries by compelling employer disclosure should effectively increase employees' bargaining power relative to employers.[66] Obviously, some workers—those with scarce skills in lucrative market sectors—have a good deal of bargaining power; otherwise six- and seven-figure

64. *See* PETER DORMAN, MARKETS AND MORTALITY: ECONOMICS, DANGEROUS WORK, AND THE VALUE OF HUMAN LIFE 35-36 (1996); Richard Thaler & Sherwin Rosen, *The Value of Saving a Life: Evidence from the Labor Market*, *in* HOUSEHOLD PRODUCTION AND CONSUMPTION 265 (Nestor E. Terleckyj ed., 1976). The level of danger, and accordingly any risk premium, may depend not only on the type of job—construction work is obviously more dangerous than clerical work—but on less obvious variations in employer practices and the injury rates that result.

65. *See* Schwartz & Wilde, *supra* note 59, at 656 ("If comparison shopping is convenient . . . . [and] if prices and terms in a market are quoted in standard and relatively clear fashion, the market, other things equal, is more likely than not to be competitive."). Again, this argument is based partly on the hurdles to employees' securing this sort of information by other means, a problem to which I return in Part IV.

66. The notion that workers generally suffer from a lack of bargaining power vis-à-vis employers has been the subject of withering critiques from the law and economics camp. *See* sources cited *supra* note 24.

salaries would be inexplicable. Just as obviously, workers' bargaining power varies with the state of the labor market, which affects both parties' access to alternatives (other jobs or other workers). But cutting across all of these considerations is the fact that information asymmetries confer a bargaining advantage on the more informed party.[67] Workers who lack material information about jobs—both the job that is under negotiation and possible alternative jobs—are at a bargaining disadvantage.

To be sure, workers' ability to make use of information will vary enormously. Workers with scarce skills and talents can use information to choose among employers and bargain for higher wages, while workers who lack scarce skills have fewer choices and less use for additional information about jobs and employers. In short, compelling disclosure of information about jobs and employers may not mitigate disparities in bargaining power among employees. Still, subject to caveats regarding behavioral impediments to processing of information, more and better information about jobs should reduce information asymmetries that currently handicap employees and should produce contracts that better satisfy employee preferences.

The idea of requiring employers to produce information that is relevant to bargaining over terms and conditions of employment has an important precedent in the National Labor Relations Act (NLRA), which requires employers, as part of their duty to bargain in good faith, to provide such information at the request of a union representing employees.[68] Of course, disclosure to a union on demand is not the same as mandatory disclosure to the general public. The latter would enable unions to compare terms and conditions of employment across employers in the same labor market. Our focus here has been on nonunion employment; but mandatory public disclosure of terms and conditions of employment would manifestly contribute as well to the ability of unions to engage in informed collective bargaining—and in informed union organizing.[69]

67. *See, e.g.*, Lawrence M. Ausubel, Peter Cramton & Raymond J. Deneckere, *Bargaining with Incomplete Information*, *in* 3 HANDBOOK OF GAME THEORY WITH ECONOMIC APPLICATIONS 1897 (Robert Aumann & Sergiu Hart eds., 2002). For economists, there is no such thing as "bargaining power" in perfectly competitive markets. But market failures yield potential monopoly rents, the distribution of which may depend on the parties' relative bargaining power. Significant information asymmetries are a form of market failure, which both create the possibility of monopoly rents and confer an advantage on the party with superior access to important information. Compelling disclosure and reducing information asymmetries should tend to make markets more competitive and reduce employers' bargaining power (by reducing the rents over which bargaining might take place).

68. *See* Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979); NLRB v. Acme Indus. Co., 385 U.S. 432, 435-36 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956). The duty to provide employment-related information is broad, though it may be constrained in light of employee privacy interests or employers' interest in confidentiality of trade secrets or financial information. *See, e.g.*, *Detroit Edison*, 440 U.S. at 319.

69. The full implications of mandatory public disclosure of work-related information for collective labor relations would require elaboration beyond what is possible in this Ar-

Consider, however, the self-evident proposition that explicitly underlies the existing employer duty to provide information relating to terms and conditions of employment to a union that represents its employees: such information is necessary for informed collective bargaining. That precept of collective bargaining suggests an obvious question: is access to information about terms and conditions of employment any less necessary for informed individual bargaining?[70] Indeed, if we consider how much better equipped unionized employees are to secure for themselves public goods in the workplace, including employment-related information, we should be even more concerned about enabling unrepresented individuals to get the information they need to make informed contracts. Of course, we should also be more concerned about whether and how unrepresented individuals can make good use of such information. That is likely to depend on the willingness and ability of intermediaries, including unions, to digest and disseminate information in user-friendly ways. The crucial role of intermediaries is a recurring theme in this analysis.

B. *Disclosure in Aid of Compliance*

We have seen that substantive mandates are a large and abiding feature of the employment law landscape. Yet many employment mandates are underenforced due to inadequate public enforcement resources, barriers to private enforcement, or both.[71] Compelling disclosure of information about employer policies and workplace conditions may help expose violations of substantive legal mandates and thereby promote compliance with those mandates.

Of course, the role of information in securing compliance and enabling enforcement is in one sense utterly familiar; that is why substantive mandates are typically accompanied by reporting obligations. But much of the information that firms report goes into government databases, often under promises of confidentiality; firm-specific information is often unavailable to the public even under the Freedom of Information Act (FOIA). That is problematic because we rely so heavily on employees themselves to monitor compliance with, and trigger enforcement of, employment laws. Many U.S. employment laws are enforced primarily through private litigation; even public enforcement tends to be heavily complaint driven.[72] Public disclosure of compliance-related informa-

ticle, for it must confront vigorous debates over the impact of collective bargaining on the efficiency of labor markets. For present purposes, we may consider the value of information to union bargaining and organizing to be a potential subset of the contribution of information to efficient contracting, collective as well as individual.

70. The point is not that existing law requires employers to provide this information to individuals, but only that the NLRA suggests both a precedent and a justification for the law's imposing such a requirement.

71. *See* ESTLUND, *supra* note 14, at 60-68.

72. Most lawsuits, and probably most administrative complaints, are filed by former employees. Current employees rarely sue or file complaints as long as they are employed (presumably because of fear of reprisals), and prospective employees rarely sue or complain

tion would help to promote compliance by making noncompliance more visible and enforcement more likely.

Employees play a crucial role in enforcing employment laws; but they also face familiar hurdles to doing so, such as fear of reprisals and collective action problems.[73] Many employment violations affect employees as a group; they are "public bads," the effects of which on each individual may be too small to trigger a complaint or a lawsuit. Given the hurdles that individual employees face in challenging many unlawful employment practices, there is an important role for intermediaries who formally or informally represent the collective interests of employees, such as unions, other worker advocacy organizations, or employment lawyers. To reach those who play a crucial role in enforcement—current, former, and prospective employees, as well as the professionals and organizations that help these groups enforce their rights—compliance-related information must be available to the public generally.

Consider information about occupational injuries and illnesses. Many workplace hazards are regulated but imperfectly so, given chronic shortfalls in enforcement (and subcompensatory worker compensation schemes). Accurate information about injury rates at the firm or establishment level, especially information that is standardized and comparable across firms within the same industry or job category, may be useful in identifying employers whose precautions fall short of the law's standards.[74] Of course, that is why the Occupational Safety and Health Administration (OSHA) requires such reports to be submitted to the government.[75] But public disclosure of this information would enable others—journalists, unions, and advocacy organizations, for example—to expose safety problems and violations. Until recently, this data was available to the public only in aggregate form, not for particular firms or establishments. But in 2009, after more than a decade of wrangling over public disclosure of this data, OSHA finally released establishment-level injury data, standardized to reflect incidents and days lost on a per capita basis for the years 1996 through 2007.[76] From OSHA's public website, it is now possible to search for

over even legal violations that affect them directly, such as discriminatory nonhiring (partly because of the limited individual stakes and partly because of the lack of information about why they were not hired). *See, e.g.*, John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015-19 (1991); Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 411 & n.23 (1993). Prospective employees' lack of information about the reasons for nonhiring is an information asymmetry that my proposal would at best address only indirectly.

73. Aggregate litigation thus plays an essential enforcement role under some employment statutes. On the hurdles to employees playing their essential role in enforcement of employment mandates, see ESTLUND, *supra* note 14, at 142-44.

74. *See* Lambert, *supra* note 1, at 1035-50.

75. *See supra* text accompanying note 49.

76. Specifically, the tables show the number of incidents and days lost per two hundred thousand employee hours worked per year. That is equivalent to one hundred em-

this data by establishment, by location, and by industry classification.[77]

OSHA notes that it has excluded "establishments that submitted suspect or unreliable data," and that problems and errors in the reported data remain.[78] That raises another major concern with compelling disclosure of compliance-related information: employers that are in violation of substantive mandates would seem unlikely to comply with reporting requirements. (That will depend partly on the probability and severity of sanctions for nonreporting and misreporting, an issue addressed below.) Paradoxically, however, even inaccurate information might aid enforcement. For example, employers that underreport injuries to OSHA alone may face little risk of detection; but if such reports were made public, they may be more likely to come to the attention of those with knowledge of their falsity, such as the firm's workers and their advocates (unions or worker centers, for example). Such discrepancies might point directly to the employer's violation of reporting requirements and indirectly to hazardous workplace conditions.

More generally, for employers that are knowingly in violation of substantive mandates, a disclosure mandate creates a dilemma: Should they disclose the truth (and expose their noncompliance)? Should they make a false disclosure (thus violating the disclosure mandate and potentially making the underlying substantive violation more obvious to those who know the facts)? Of course, they might simply fail to disclose; but nondisclosure may be a relatively easy violation to detect, and its detection may helpfully draw attention to the underlying violations.

Consider, too, the value of publicly disclosing the terms of mandatory arbitration and noncompete agreements. Arbitration agreements are subject to a collection of legal restrictions grounded in the Federal Arbitration Act (FAA), state contract law, and the substantive law governing underlying claims. For example, terms that establish unreasonably short limitations periods or that bar statutorily prescribed remedies (such as attorney's fees under Title VII) may be invalid.[79] But the existence of those invalid terms may deter attorneys from taking a case by raising the costs and risks of adjudication. Similarly, covenants not to compete—required by some employers as a condition of employment—are regulated by state law, sometimes quite strictly.[80] Yet the very existence of an overbroad noncompete agreement may discourage some employees from quitting and taking a better job (or may deter competing employers from hiring them). If the terms of those agreements were publicly available to employee advocates outside the context of any dispute, questionable provisions might be

ployees working forty hours per week for fifty weeks per year.

77. *See Occupational Safety & Health Administration*, U.S. DEP'T LAB., http://www.osha.gov/pls/odi/establishment_search.html (last visited Oct. 26, 2010). Thanks to Adam Finkel for alerting me to this development.

78. *Id.*

79. *See, e.g.*, Estlund, *supra* note 19, at 423.

80. *See id.* at 423-24.

identified and challenged, and their *in terrorem* effect defused.[81]

To be sure, employers would shudder at the prospect of employee advocates and plaintiffs' attorneys poring over their arbitration and noncompete agreements for evidence of legal flaws, not just in the context of a particular dispute but as a routine matter. But the law governing these agreements protects important public and private interests; the fact that employers may not want these agreements to be subject to public scrutiny, or that public scrutiny might lead to legal challenges, does not add up to a justification for keeping them confidential.

C. *Disclosure in Aid of Reputational Rewards and Sanctions*

We have observed that public goals regarding private employment may not always produce substantive mandates, or may produce mandates that fall well short of what many employees want and what many employers are capable of providing. Many large firms explicitly aspire to go beyond compliance to something like best practices.[82] As economic and technological change outpaces legislative and bureaucratic processes, the gap between public goals and legal rules and standards is growing. The public is becoming increasingly reliant on finding ways to encourage firms to regulate themselves—not only to promote compliance with existing legal mandates, but also to set substantive standards of conduct that go beyond compliance.[83]

Policymakers have increasingly turned to mandatory disclosure as a means of promoting performance above and beyond the reach of mandates. Think of nutrition labeling requirements, energy efficiency ratings on cars and appliances, and corporate financial disclosures. These schemes require periodic reporting of accurate information in standardized formats, with sanctions for both nondisclosure and inaccurate disclosure. The aspiration behind these schemes is not merely to promote informed consumer decisions, but to improve producers' performance. For example, the point of disclosing fat and calorie content on food labels is not only to inform health-conscious consumers but also to shift nutritional demand and supply toward healthier foods. The point of disclosing the energy efficiency of appliances and vehicles is not only to inform environmentally and economically conscious buyers but also to improve energy efficiency. Similarly, the point of requiring firms that emit toxic substances to disclose their emissions is not only to inform communities but also to induce

81. An effort to do this by state law was struck down in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996), which held that state laws singling out arbitration agreements for mandatory disclosure were preempted by the FAA. Congress could obviously override that. On the extent and consequences of invalid-as-written noncompete and arbitration agreements, including their *in terrorem* effects, see Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009).

82. *See* VOGEL, *supra* note 29, at 6-10.

83. *See* ESTLUND, *supra* note 14, at 93-97.

firms to reduce emissions.[84]

Archon Fung, Mary Graham, and David Weil call this policy tool "targeted transparency," and have documented its growing popularity, often alongside more traditional rules and standards: "[T]argeted transparency aims to reduce specific risks or performance problems through selective disclosure by corporations and other organizations. The ingeniousness of targeted transparency lies in its mobilization of individual choice, market forces, and participatory democracy through relatively light-handed government action."[85] Targeted transparency works partly by informing ordinary economic decisions about whether to purchase or sell and at what price; it overlaps with what I have called "disclosure in aid of contract." But targeted transparency often seeks to trigger a broader set of reputational mechanisms that affect the value of a brand or share price.[86]

Targeted transparency is ingenious in its conception, but challenging in its implementation. Fung, Graham, and Weil stress the importance of, among other things, identifying "standardized, comparable, and disaggregated information" that users can understand and use in making choices that affect disclosers.[87] It is already obvious how difficult that might be for some of the information at issue here, given its complexity. For now, it is enough to understand the concept of targeted transparency, which seeks to deploy disclosure in the pursuit of public goals that are not or cannot be fully embodied in substantive mandates.

The most significant use of targeted transparency in the existing law of the workplace is the Hazard Communication Standard (HCS) promulgated by OSHA.[88] After years of administrative rulemaking and litigation over exposure limits for just two hazardous substances, cotton dust and benzene, it became clear that substantive standard setting for one toxic substance at a time was not going to suffice. The HCS prescribes disclosure of toxins in hopes that workers themselves will demand protection, or perhaps compensatory risk premiums, once informed of the hazards they face at work, and that employers will respond by seeking to reduce exposures. The HCS appears to have greater impact on employers' than on employees' decisions, and greater impact where there is a union that can interpret and act on the rather complex information involved.[89]

Hence our recurring theme: targeted transparency sometimes relies on the presence of intermediaries to digest and publicize information to relevant pub-

84. On how disclosure mandates are supposed to advance regulatory objectives, see FUNG ET AL., *supra* note 12, at 6-7, 50-68.

85. *Id.* at 5.

86. *See* VOGEL, *supra* note 29, at 19-24; Dalley, *supra* note 7, at 1122-23.

87. FUNG ET AL., *supra* note 12, at 6.

88. The HCS seeks "to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees." 29 C.F.R. § 1910.1200(a)(1) (2010).

89. *See* FUNG ET AL., *supra* note 12, at 86-87.

lics.[90] This has obviously been crucial in the case of corporate financial disclosure, where billions of dollars flow to those who make sense of thousands of pages of filings required by the securities laws of publicly traded corporations.[91] Nothing quite like that can be expected in the context of workplace disclosure. But intermediaries—advocacy and community groups—have also been crucial in the success of disclosure regimes involving toxic emissions and mortgage lending practices, as well as the HCS.[92]

Imagine, for example, the National Employment Lawyers Association, a plaintiffs' attorney group, rating employers' arbitration agreements for their compliance with the Employment Due Process Protocol, which embodies widely accepted standards of procedural fairness in employment arbitration, but which is not legally binding.[93] If the ratings gained attention and credibility among those whose opinion mattered to employers—employees, prospective employees, journalists, civic and advocacy organizations, investors, scholars—then some employers might revise their agreements to avoid appearing among the bad actors. Or imagine other organizations rating employers' policies for family friendliness or for their policies and practices affecting diversity and inclusiveness. In fact, some organizations already do just that; and some firms already compete to place among the "100 Best Companies for Working Mothers" or "100 Best Companies for Diversity." But these private rating schemes currently depend on voluntary disclosure, a shortcoming to which we will soon turn.

Note that the role of information here goes beyond improving compliance because the relevant standards go beyond what the law requires. Firms are induced or pressured to follow evolving best practices (or at least not to fall too far behind). The concept of targeted transparency also goes beyond improving contracts because it is responsive to societal interests and not only employee interests. To be sure, labor markets and workers' preferences are crucial drivers, and are often driving in the same direction as societal preferences. But the lengths to which leading firms go to advertise their virtuous performance on matters of sustainability, diversity, ethics, and overall social responsibility suggest that more is at work than ordinary labor market or product market competition. The Corporate Social Responsibility (CSR) movement responds to the demands of socially conscious investors and advocates, outside directors, and brand-conscious consumers, as well as employees.[94]

Many large firms already do seek to cultivate a reputation for going beyond

90. *See id.* at 122-25.

91. *See* Dalley, *supra* note 7, at 1101-03.

92. *See* FUNG ET AL., *supra* note 12, at 61-62, 86-87; Karkkainen, *supra* note 9, at 316-23.

93. *See Employment Due Process Protocol*, AM. ARB. ASS'N, http://www.adr.org/sp.asp?id=28535 (last visited Jan. 27, 2010).

94. For a comprehensive assessment of the CSR movement and its drivers, see VOGEL, *supra* note 29.

compliance on salient social issues, including those that affect worker welfare. Pressure from stakeholders and activists was focused initially on labor practices overseas; but domestic labor practices have recently drawn some of that attention.[95] Mandatory disclosure of accurate information about socially salient conditions of employment (as well as other objects of CSR claims), would help to ensure that there is a factual basis for firms' claims of social responsibility, and that firms cannot easily buff up their reputation for good citizenship without improving their actual practices.[96]

IV. WHY IS VOLUNTARY DISCLOSURE INADEQUATE?

Let's face it: there is a lot of information out there about companies, jobs, and workplaces, much of it accessible on the Internet with a few mouse clicks. In fact, information overload is one of the general problems faced by mandatory disclosure regimes, and is clearly a potential pitfall here.[97] The wealth of information that firms already produce about their practices might suggest that a disclosure mandate will be simply wasteful and unnecessary. That brings us to the question of whether there isn't already enough information for anyone who cares to find it. In other words, why not rely on voluntary disclosure to accomplish the goals outlined above?[98]

One obvious answer to that question is that firms keep a tight grip on a good deal of information about terms and conditions of employment. Left to their own devices, they may hide information that may cast them in a negative light, or make them less appealing to applicants; and that is precisely the information that is most needed to advance the public and private aims discussed in the previous section. The obvious answer may be too simple, however.

A. *What Do Firms Voluntarily Disclose to the Public? Some Illustrations*

Let us begin by looking at what employment-related information firms themselves disclose to the public. On the theory that some data is better than none, I offer two very rudimentary case studies of the employment-related information that firms themselves make available to the public, including pros-

95. *See id.* at viii.

96. *See* Doorey, *supra* note 2, at 372-76; David J. Doorey, Transnational Domestic Labour Regulation: Using Domestic Disclosure Regulation to Influence Foreign Labour Practices 236-47 (Apr. 2009) (unpublished Ph.D. dissertation, Osgoode Hall Law School) (on file with author).

97. *See* Dalley, *supra* note 7, at 1115-16; Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL'Y 199, 221-23 (2005).

98. The incentives for voluntary disclosure of information (including negative information), especially in the corporate law context, are explored in Eric Talley, *Disclosure Norms*, 149 U. PA. L. REV. 1955, 1956 (2001).

pective job applicants. One is from the bluest of blue chip firms, General Electric (GE), and one was chosen more or less randomly from recent Internet job listings in Florida. But let us first return briefly to the law firm example discussed earlier.

The special case of elite law firms: Recall the wealth of employment-related information that can be called up at the website of the National Association for Law Placement (NALP). At least large urban law firms voluntarily disclose a good deal of reliable, objective, and comparable information in order to compete for top law graduates; that enables law graduates generally to do informed comparison shopping, and may spur firms to improve their offerings so that they compare favorably to rivals. NALP's collection and dissemination of information on work-family balance policies, for example, may have played some role in inducing firms to improve their own policies.[99]

At the same time, this is not a story about how well markets provide information without government intervention, for NALP's disclosure scheme depends on some very distinctive features of the legal profession. First, of course, prospective attorneys have scarce skills and talents that would give them more individual leverage than most job applicants to demand information; they are the privileged objects of a quintessential race for talent. But that does not fully account for the structured, standardized, and searchable form of the information firms disclose to NALP. That reflects the structure of the legal profession, which is highly organized and highly regulated—albeit mostly self-regulated under a state-backed monopoly. Powerful gatekeepers—top law schools and their placement offices—serve the legal profession (and perhaps especially large law firms) by recruiting, training, sorting, and certifying a new crop of law students each year and facilitating their entry into the profession. Those gatekeepers serve their students—their paying customers—by asking firms to submit a lot of information about things that students care about. Given the competition for legal talent, few firms can afford to say no to NALP, whose comprehensive jurisdiction over this segment of the labor market enables it to organize the information and make it accessible by law students and others. These factors will rarely converge outside a few highly regulated professions. Not surprisingly, legal secretaries or paralegals have no comparable source of standardized information about terms and conditions of employment at these same law firms.

The level of workplace transparency for young attorneys in large law firms offers a complex case in point, and perhaps a rare example of the exception that actually proves the rule: in a world of voluntary disclosure, very few employees or prospective employees have the amount or quality of information about employers and jobs that these employees have. So let us turn to the two case studies, offered here as illustrative, not necessarily as representative, of large and

99. Of course the role of disclosure is extremely difficult to untangle from changing norms within firms and among applicants.

small firms, respectively.

General Electric: Let's say one is considering applying for an entry-level job in the Communications Leadership Development Program (CLDP), one of several entry-level career tracks at GE (and one of the few available to nonengineers). GE is not only a Fortune 100 company but one of *Fortune*'s top ten "most admired companies,"[100] and has been rated as one of the "100 best companies for the working mother"[101] and among the "best places to launch a career."[102] For our purposes, GE serves as an illustration of the extent of voluntary public disclosure at the very top of the corporate pecking order. I focus here only on information directly relevant to terms and conditions of employment. Obviously there is a wealth of information from and about GE concerning its operations, finances, products, etc., which might be relevant to prospective employees as well.

GE's website touts its culture of ethics and good citizenship, which extends to several employment related issues ("GE seeks to lead in workplace and marketplace integrity by respecting the human rights of everyone touched by our business, and by enforcing legal and financial compliance"[103]). The website includes GE's "integrity policy," including policies regarding discrimination, harassment, and retaliation (all "no-no's"), and workplace safety,[104] and describes multiple channels for reporting employee concerns, including an ombudsperson.[105] The website also offers general descriptions of policies regarding work-life balance, training and leadership programs, information about standard health and retirement benefits, and a description of various "affinity groups."[106] For the CLDP, the website describes the program's general contours and the opportunities it opens within GE, as well as the basic qualifications (bachelor's degree, at least 3.0 GPA, geographic mobility, no prior experience required).[107]

100. GE ranked ninth. The others, in order, were Apple, Berkshire Hathaway, Toyota Motor, Google, Johnson & Johnson, Procter & Gamble, FedEx, Southwest Airlines, and Microsoft. *World's Most Admired Companies*, CNNMONEY.COM, http://money.cnn.com/magazines/fortune/mostadmired/2009/index.html (last visited Mar. 21, 2009).

101. *2010 Working Mother Best Companies*, WORKING MOTHER, http://www.workingmother.com/BestCompanies/node/7818/list?page=2 (last visited Oct. 18, 2010).

102. *The Best Places to Launch a Career*, BLOOMBERG BUSINESSWEEK (Sept. 18, 2006), http://www.businessweek.com/magazine/content/06_38/b4001601.htm.

103. *Working Environment*, GE, http://www.ge.com/company/culture/working_environment.html (last visited Oct. 18, 2009).

104. *The Spirit & the Letter*, GE, http://www.ge.com/citizenship/reporting/the-spirit-the-letter.html (last visited Oct. 18, 2010).

105. *Ombudsperson Process*, GE, http://www.ge.com/company/governance/ombudsperson_process/index.html (last visited Oct. 18, 2010).

106. *Life at GE*, GE, http://www.ge.com/careers/life_at_ge/index.html (last visited Oct. 14, 2010).

107. *See Leadership Program*, GE, http://www.ge.com/careers/students/cldp/index.html (last visited Dec. 28, 2010).

Overall the website paints an impressive yet impressionistic portrait of life as a GE employee. On work-life balance, for example: "GE is committed to enabling a healthy balance between the two. . . . To support this balance, flexible work arrangements are an integral part of the way we conduct business."[108] There is also some actual data, though this information is harder to find. GE offers some statistical information on workplace demographics,[109] reports on occupational health and safety and workplace injuries and fatalities, and an overview of survey results on employee satisfaction, among other things.[110] From the last we learn that "GE's scores, relative to the external benchmark comparisons, confirm that our employees derive great personal satisfaction from their work and are very likely to recommend GE as a place to work to others." On the other hand, "[t]he survey also showed that GE is not doing as great a job in helping employees understand how their performance is measured, the impact of that measurement on career development, and the career opportunities open to them."[111]

One would be hard-pressed to complain of a general shortage of information about employment at GE. Yet there are gaps. GE does not make publicly available, at least on its website, a comprehensive employee manual of the sort that must exist. Nowhere does the word "arbitration" appear on the website, although the company apparently does maintain a mandatory arbitration system, at least for some employees.[112] In general, there is obviously a bias toward positive information (of which there is surely plenty in this case), and there are few specifics about most matters. Nor is information standardized so as to enable comparisons across companies. Of course, GE is not the only source of publicly available information about working at GE, and we will find some additional data points when we turn to those other sources below. But let us first take on board one very different sort of employer operating very far from the exalted realm of the Fortune 100.

Freight Handlers, Inc. (FHI) which is in the business of unloading trucks, recently advertised an opening for a "freight handler" in Sarasota, Florida.[113] The North Carolina-based company appears to be a family business that has

108. *Working Environment*, GE, http://www.ge.com/company/culture/working_environment.html (last visited Oct. 12, 2010).

109. Specifically, representation of women by region and of various racial and ethnic groups both by region and in executive, professional, and other job categories.

110. *See GE Citizenship Performance Metrics*, GE, http://www.ge.com/citizenship/performance_metrics/ehs.jsp (last visited Dec. 14, 2009).

111. *GE Employee Opinion Survey*, GE, http://www.ge.com/citizenship/performance_areas/employees_survey.jsp (last visited Dec. 14, 2009).

112. *See, e.g.*, Lamb v. Gen. Elec. Consumer & Indus., No. 1:06-CV-216, 2006 WL 2228962, at *1 (N.D. Ind. Aug. 3, 2006).

113. The job was posted on several online job search sites in August 2010. *See, e.g.*, *Freight Handler, Freight Handlers, Inc.*, CAREERBUILDER.COM, http://www.careerbuilder.com/JobSeeker/Jobs/JobDetails.aspx?IPath=QHKCV0A&ff=21&APath=2.21.0.0.0&job_did=J8B68S6JKLMG810BM4N (last visited Sept. 6, 2010).

thrived; it has about one thousand employees in thirty-eight locations.[114] It is too large to qualify officially as a "small business," but it obviously contrasts sharply with GE in many respects, including the amount of information that it makes publicly available.

According to the firm's simple website, careers at FHI feature "[p]roduction-based pay," "[m]onthly performance bonus potential," a "[c]ompany-sponsored health benefits package," "[p]aid vacation," a "401(k) plan," "[p]rofessional training," and "[c]areer advancement opportunities."[115] No further specifics are offered. The company describes the particular job of "freight handler" (on job search sites) in some detail, including the need for heavy lifting and "[m]oderate twisting and turning of the body."[116] A copy of the job application form, available online, reveals a few more data points: Applicants must take a drug test and submit a "criminal history report" certified by law enforcement officials. Employment, if offered, is "on an at-will basis and may be terminated at any time by either party with or without cause."[117]

Just to belabor the obvious: Apart from publicizing far less information than GE, FHI is too small and obscure to merit any outside testimonials from *Fortune*, *Working Mother*, or the like. Potential applicants may find enough information, including some realistic negatives, to decide whether to apply for a job. But depending on what they learn during the application process (more on that below), they may not find enough information to make an informed choice among employers. Nor is there enough information to determine whether the company is in compliance with relevant labor and employment laws. (On the other hand, where noncompliance leads to enforcement, that information is easier to find than it used to be. Google informs us, for example, that FHI's "[p]roduction-based pay" system was recently found to violate the Fair Labor Standards Act; FHI settled with the Department of Labor for over $500,000 in unpaid overtime for truck unloaders.[118])

There are obviously vast differences between the two companies and the information they make publicly available (including differences that affect the incremental cost of producing information). GE and FHI illustrate two widely divergent data points on an enormous spectrum of organizations, larger and smaller, more and less sophisticated. It is worth noting that most employees

114. The chief executive officer, president, senior vice-president and chief administrative officer, and chief leadership officer all have the same last name. *See FHI Fact Sheet*, FREIGHT HANDLERS, INC., http://www.freighthandlers.com/about_factsheet.htm (last visited Mar. 21, 2009).

115. *Career Opportunities*, FREIGHT HANDLERS, INC., http://www.freighthandlers.com/careers.htm (last visited Dec. 14, 2009).

116. *See Freight Handler, Freight Handlers, Inc.*, *supra* note 113.

117. And any assurances to the contrary must be in writing from an authorized officer of the company. *Application for Employment*, FREIGHT HANDLERS, INC., http://www.freighthandlers.com/FHI_Job_Application.pdf (last visited Mar. 21, 2009).

118. *Freight Handlers Inc. to Pay for Overtime Work*, BUFF. BUS. FIRST, Nov. 15, 2004, http://www.bizjournals.com/buffalo/stories/2004/11/15/daily5.html.

work for companies that are even smaller than FHI, and certainly closer to FHI than to GE in the quality of public information that is available.[119] Yet even across the wide gulf between these two companies, there are also some instructive similarities between what GE and FHI voluntarily disclose. In particular, there is an obvious tilt toward positive information,[120] and a lack of objective or standardized information that might enable comparison across firms. That limits the usefulness of information in aid of contract and in aid of compliance, and especially as an independent regulatory tool.

B. *Filling the Information Gap Without Disclosure Mandates: Intermediaries, Interviews, Insiders, and Reputation*

There are some obvious possible responses, short of mandating disclosure, to the information gaps seen here. First, private intermediaries might fill the gap without government intervention. Second, prospective employees (if not other members of the public) can get more information during the application process by asking for it. Third, outsiders, including prospective employees, can get information from insiders such as current employees. Fourth, all of these sources may help to generate an employer's reputation. I will discuss each of these mechanisms in turn. But the bottom line is that there are significant barriers to securing information, especially negative information, information from firms that are not angling for a reputation as a "leader" on workplace issues, and information that is objective, standardized, and comparable across firms.

Intermediaries: In principle, private intermediaries could solve some problems of standardization and verification. Indeed, as we have seen, there already are intermediaries who make it their business to gather information from firms about workplace practices for purposes of compiling ratings and rankings. NALP, for example, is a private intermediary extraordinaire: if top law students care about the odds of making partner, average billable hours, pro bono opportunities, or diversity, then NALP can successfully demand this information

119. According to the Department of Labor, as of 1997, the seventeen million small, nonfarm businesses in the United States (generally those employing fewer than five hundred employees) constituted 99.7% of all employers and employed 52% of the private sector workforce. *Small Business in America*, U.S. DEP'T LAB., http://www.dol.gov/odep/pubs/ek00/small.htm (last visited Mar. 30, 2009) (citing 1997 report of the U.S. Census Bureau).

120. For employers, there may be benefits to disclosing negative information to prospective applicants, according to the Realistic Job Preview (RJP) thread of human resources scholarship. *See* James A. Breaugh, *Employee Recruitment: Current Knowledge and Important Areas for Future Research*, 18 HUM. RESOURCE MGMT. REV. 103, 105-08 (2008). The RJP thesis posits that many job applicants have unrealistic expectations; that employers contribute to these inflated expectations if they convey only positive information during recruitment; and that hiring candidates with unrealistic perceptions may lead to employee dissatisfaction and high turnover. *See id.* at 105. Empirical research on the effects of RJPs—of giving employees negative as well as positive information—has been inconclusive. *See id.* at 115-16.

from large law firms (which may then choose to alter their policies to keep up with their competitors and meet candidate demands). But there are other intermediaries in the corporate world. Firms that seek a reputation as family friendly or as good for women, for Hispanics or other racial or ethnic minorities, or for gay and lesbian employees, for example, can report their commitments and policies and their demographic makeup to the relevant organizations. If they rate highly, they can feature a "Best 100 Companies" logo on their websites. So, for example, the Human Rights Campaign (HRC) rates companies for their policies regarding equal treatment of gay, lesbian, bisexual, and transgender employees. The HRC has observed, and possibly contributed to, a significant improvement in ratings over recent years, especially among large companies; yet large variations remain even among top companies. For example, Chevron in 2009 earned the HRC's highest rating of one hundred, while its competitor Exxon scored zero.[121]

These are all useful undertakings that help to inform the public, disseminate best practices, and spur innovations among companies aspiring to lead the field. But they are limited by reliance on voluntary reporting. Voluntary disclosure through these private organizations may do little to improve the performance of the laggards as opposed to the leaders. (Of course, observers may draw negative inferences from silence, but that does little to distinguish among the nonleaders.) Moreover, these voluntary disclosure regimes are dependent on self-reporting with no sanctions for inaccuracy. Many "Best Companies" ratings appear in publications that rely heavily on advertising revenue from the self-reporting firms themselves. One surmises that puffery may be tolerated in such circumstances.[122]

Other intermediaries—especially Internet job forums and blogs—do not rely on voluntary self-reporting by employers but on voluntary reporting by employees and applicants. For example, for a modest fee anyone can enter Vault.com, which collects job-related information from and for employees and applicants at many firms throughout the labor market.[123] Similarly, Glass-

121. HUMAN RIGHTS CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2009 3 (2009), *available at* http://www.hrc.org/documents/HRC_Corporate_Equality_Index_2009.pdf.

122. Ian Ayres and Jennifer Brown offer a clever twist on the use of voluntary disclosure and intermediaries that would in principle reduce the problem of puffery. They have created a new "fair employment" (FE) certification mark, like the Good Housekeeping Seal of Approval, to recognize employers that not only promise not to discriminate on the basis of sexual orientation, but that agree to make that promise enforceable as a matter of contract. *See* IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS 79-94 (2005); Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639 (2006). It appears that the FE mark has gained little traction with employers. Voluntary disclosure is one thing; voluntary courting of additional employment litigation is quite another. I will briefly address the link between disclosure and liability, and the puzzles it poses, in Part V.

123. VAULT, http://www.vault.com (last visited Sept. 26, 2010).

door.com offers "[a] free inside look at over 84,000 companies," featuring "[s]alaries, [r]eviews, and [i]nterviews posted anonymously by employees."[124]

Sites like Vault.com and Glassdoor.com are an increasingly significant source of information for job seekers. For example, Vault.com gathers "employer reviews" on GE (and other large companies), with the lowdown from anonymous employees and applicants on various jobs in the company, especially entry-level jobs.[125] GE is a large enough company to generate many postings, some quite specific, on both sites. But the information is random, raw, and not clearly reliable. As compared to old-fashioned "word-of-mouth," these sources offer an exponential increase in the quantity of information; but there is bound to be some tradeoff in the quality of information, given the anonymity and lack of accountability of sources and the lack of trust and potential reciprocity between speaker and listener. These relatively passive Internet intermediaries have another limitation as well: they are most useful for large companies. Not surprisingly, there is no online forum—indeed, no information at all—on either Vault.com or Glassdoor.com for FHI employees and applicants. That is the case for most smaller employers.

That is today. Tomorrow will surely be different. The availability of information on the Internet, and the proliferation of Internet entrepreneurs who find ways to gather and disseminate information that consumers care about, is progressing at mind-bending speed. Just as individual consumers now produce ratings of hotels, restaurants, movies, music, and books, individual employees may eventually produce useful ratings of a much wider range of employers and workplaces than they now do. Moreover, the quantity and quality of online ratings and rankings will improve as it becomes routine for individuals to post information about their experiences online. For now, those of us who are over forty or so wonder what motivates individuals to post such information, and consequently worry about selection biases in what gets posted. In particular, sites like these that rely on voluntary, anonymous postings from employees seem likely to attract a disproportionate share of company boosters and malcontents, as compared to typical employees.

The aggregation of consumer-generated online information about products, services, and jobs may be the wave of the future. It is what Fung, Graham, and Weil call "third-generation transparency."[126] Even so, consumer-generated ratings of this sort tend to be rather undifferentiated, all-things-considered appraisals—"thumbs-up, thumbs-down," or perhaps a five-point scale—as opposed to targeted appraisals of particular aspects of work life. The former is

124. GLASSDOOR.COM, http://www.glassdoor.com (last visited Sept. 26, 2010). Glassdoor.com asks users to post their own information, in lieu of a fee, in order to gain full access to company information.

125. One can even find some spotty salary information (though even anonymous employees seem reluctant to disclose that information).

126. *See* FUNG ET AL., *supra* note 12, at 152-53.

relatively easy for individuals to process, but the latter is important to the advancement of all three of the goals of mandatory disclosure: better contracts, better compliance, and better performance on socially salient employment issues.

Interviews: Even if the general public cannot get much objective, standardized, or specific information about terms and conditions of employment, can't prospective employees simply ask the employer for it? At least in theory, information secured through the application process could advance the aim of informing employment contracting (though it may be of relatively little use in aiding compliance or in promoting public goals beyond compliance). In reality it does not do even that for most employees. First, job interviews are an exceedingly costly way of ascertaining the terms that competing employers are offering; yet it is comparative information that employees need to inform their bargaining and "shopping." Second, many prospective employees do not get the chance to ask much of anything before they receive and accept a job offer. Finally, even if applicants do have a chance to interrogate employers before they are hired, they are often in no position to ask for much of the information they might want. The reasons stem from some distinctive features of labor markets and employment contracts.[127]

In some ways, as I have suggested, prospective employees are like prospective *purchasers* of nonfungible goods or services, or like prospective investors in a very lumpy asset: They care a great deal about the qualities of the job that they are considering, not merely about the price they will be paid for their labor, and they cannot hedge their bets by diversifying their investments. They might therefore want to know about what the employer offers in terms of job security, safety, fairness, training, flexibility, or the like. The problem is that asking about such matters (beyond what the employer volunteers) may get in the way of the employee's selling his labor, physical or mental or both, to the employer. And prospective employees are usually in sell mode even in a "seller's market." There are, in short, signaling problems with asking about many features of the job.[128]

Asking about job security might signal that one is the sort of worker who might get fired.[129] Asking about drug-testing policies risks signaling drug use.[130] Asking about family-friendly policies—say, parental leave policies—

127. Other distinctive features of labor markets impede employers' ability to get reliable information about prospective employees; there are information asymmetries on both sides of the bargaining table. But those issues are beyond the scope of this Article.

128. *See, e.g.*, Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 131-32 (1998); Sunstein, *Human Behavior*, *supra* note 40, at 225-26.

129. *See* Kamiat, *supra* note 26, at 1958-59; Kim, *supra* note 41, at 118-19; David I. Levine, *Just-Cause Employment Policies in the Presence of Worker Adverse Selection*, 9 J. LAB. ECON. 294 (1991).

130. *See* Pauline T. Kim, *Collective and Individual Approaches to Protecting Employee Privacy: The Experience with Workplace Drug Testing*, 66 LA. L. REV. 1009, 1027 (2006).

may signal that one anticipates making use of those policies, which may entail short-term costs.[131] Asking about the employer's policies regarding noncompete covenants may signal that one would consider jumping ship for a competitor. Asking about mandatory arbitration may signal that one could imagine suing the employer someday. Waiting to ask these questions until one has an offer in hand does little good when employment is, as it almost always is, terminable at will.

Some of the signaling problems that employees face correspond to "adverse selection" problems that limit the kind of information employers choose to disclose voluntarily (as well as the terms they offer). Employers may not want to be known as offering the most secure jobs or the most generous family leave policies, for fear that they may become the employer of choice for those who are most risk averse and fearful of discharge, or for those who are most inclined to prioritize family responsibilities over career advancement.[132] This is not just an information problem, of course. Simple economics limits how generous employers are willing to be when generosity carries costs that do not pay off in the form of more talented, loyal, and productive employees. (Up to a point these generous policies may well pay off, but not indefinitely.) Even a perfectly designed transparency regime will not generate a "race to the top" in job security or family friendliness, for example.

The point remains that employees face serious constraints on their seeking information from the employer during the hiring process. Even in-demand professionals-to-be experience these constraints. Many aspiring law firm associates would not feel free to ask in interviews about parental leave policies or the prevalence of weekend and evening work demands. That is a problem that the nearly mandatory disclosure regime overseen by NALP has helped to address.

Insiders: There are significant gaps in the amount and quality of information that is available to outsiders and the public. But employees themselves can learn many of these things in the first few days of employment—often somewhere in the stack of papers that they are given on the first day. Unfortunately, the ability to discover information after offer and acceptance leaves much to be desired, even if we cared only about improving the efficiency of employment contracts. At that point, employees have shut down their job search. They cannot compare any newly discovered terms of employment to those offered by other firms because other firms may similarly limit disclosure of such terms to insiders, often subject to formal and informal confidentiality rules. If the newly discovered terms are sufficiently onerous or disappointing, the employee can obviously quit. But she still probably cannot discover what other firms are demanding or offering without securing and accepting a new job. Few workers can afford either the search time or the harm to their employability that is en-

131. *See* Lester, *supra* note 128; Summers, *supra* note 22, at 179.

132. *See* Levine, *supra* note 129.

tailed by that sort of hopping around. The upshot is that employees are likely to acquire some negative information about their employer only after they have started working, too late either to choose a different job or to demand a higher starting wage.

Of course, insiders are also a potential source of information for outsiders. Employers have some power to limit that source of information by imposing formal duties of confidentiality on current and even former employees. Even beyond formal constraints on disclosure, employers promulgate—and employees may internalize—strong norms of confidentiality that discourage insiders from disclosing much of what they know to outsiders who would value the information.

Still, it is clear that both employers and job seekers rely on personal connections and "word of mouth" to learn about each other.[133] Job seekers' ability to learn about a job through personal connections might avoid signaling problems (assuming that the insiders are more candid with the would-be applicant about the employer than they are with their employer about the applicant). But reliance on personal connections to learn about jobs is also limiting. It may not allow job seekers to learn about enough different jobs to identify a good job.[134] Moreover, because friendship and family ties are richer within rather than across racial and ethnic categories, reliance on those ties by employers and job seekers tends to afford disparate access to jobs and job information.[135]

Reputation: As Samuel Estreicher nicely puts it, for defenders of freedom of contract in the employment setting, "[r]eputation is often offered as a . . . deus ex machina explaining why opportunistic behavior by employers . . . is likely to be relatively unimportant," and why employee ignorance about employer conduct does not matter.[136] But Estreicher and others have ex-

133. *See* MARK S. GRANOVETTER, GETTING A JOB (1974); Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973); Harry J. Holzer, *Hiring Procedures in the Firm: Their Economic Determinants and Outcomes* (Nat'l Bureau of Econ. Research, Working Paper No. 2185, 1987).

134. *See* Michele Pellizzari, *Do Friends and Relatives Really Help in Getting a Good Job?*, 63 INDUS. & LAB. REL. REV. 494 (2010).

135. The racially disparate impact of "word-of-mouth" recruitment practices is commonly recognized, but cases are mixed on the question of whether it is a form of employment discrimination. *See, e.g.*, EEOC v. Consol. Serv. Sys., 989 F.2d 233, 237-38 (7th Cir. 1993) (holding that defendant employer's use of word-of-mouth hiring was not intentional discrimination); EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 305 (7th Cir. 1991) (holding that word-of-mouth hiring was not a "practice" that could be challenged under Title VII); Domingo v. New Eng. Fish Co., 727 F.2d 1429, 1435-36 (9th Cir. 1984) (holding that word-of-mouth hiring had unlawful disparate impact). *See generally* Melissa Hart, *Disparate Impact Discrimination: The Limits of Litigation, the Possibilities for Internal Compliance*, 33 J.C. & U.L. 547, 554-55 (2007) (discussing word-of-mouth cases under Title VII).

136. Samuel Estreicher, *Employer Reputation at Work* 1 (NYU Law & Econ. Research Paper Series, Working Paper No. 09-04, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314257.

plained why "reputation" is unlikely to be rich enough or reliable enough to keep most employers from hiding their dirty laundry.[137] In short, given the varying incentives facing employers and current and former employees, they are unlikely to produce enough or accurate enough information about things like the fairness of discipline and discharge decisions to lead to informed bargaining.

Reputation for an employer like GE is a robust and carefully cultivated asset. It may be increasingly likely to reflect negative as well as positive information, given the ability of thousands of current and former employees to add their two bits via the Internet. But it does not supply the kind of standardized, objective data that would enable prospective employees and the public to make an informed comparative judgment about employers and jobs. And for the overwhelming majority of smaller employers, reputation is merely the paltry sum of the partial and patchy information that outsiders can glean from current and former insiders. It does not fill the information deficit that we have identified.

If what we care about is not so much information as such but rather employer policies that respond to employee preferences, then perhaps it is enough that employers respond to the preferences of current employees (or at least those whose departure is most threatened and threatening to the employer). Insiders may function as an "informed minority" and an antidote to the problem of uninformed applicants.[138] In other words, even if we cannot count on informed entry into the employment relationship, we can perhaps count on informed exit (or lack of exit—call it "loyalty") to insure efficient contracts. But relying on exit to discipline employers and secure efficient contract terms confronts some objections that have been well explained by Paul Weiler: Incumbent employees face significant costs in switching jobs—especially the loss of "firm-specific human capital" and of whatever benefits accrue to seniority. Moreover, the preferences of the most mobile and marginal of incumbents may not mirror those of the median worker.[139]

When we widen our compass to include the role of disclosure in pushing

137. As Estreicher notes, reputation is not always reliable because reputation costs fluctuate, particularly in internal labor markets. *Id.* at 1-2. Reputation can function as a "brake" on cheating or opportunistic behavior, but it is an imperfect mechanism, "especially if sizeable unanticipated gains arise." Christopher Cornwell, Stuart Dorsey & Nasser Mehrzad, *Opportunistic Behavior by Firms in Implicit Pension Contracts*, 26 J. HUM. RESOURCES 704, 722 (1991).

138. *See supra* text accompanying note 60.

139. These are some of the reasons Weiler and others give in support of the need for mechanisms of "voice," and particularly collective voice, to supplement reliance on "exit." WEILER, *supra* note 24, at 218-24. But given the high hurdles to extending mechanisms of collective voice to anything like a majority of workers in the foreseeable future, it seems wise to consider additional responses to the frictions and distortions that accompany reliance on exit and loyalty in labor markets. Better informing potential entrants responds to some of those frictions and distortions.

employers to deliver terms and conditions of employment that respond to *public* preferences, the value of mandatory disclosure is all the more clear. Disclosure mandates may be especially crucial in motivating the laggards among firms—those who offer significantly worse terms and conditions than other employers in the same industry or region or of similar size and capability. Mandatory disclosure can expose the laggards to reputational sanctions that may help to drive, if not a race to the top, then at least a race away from the bottom and toward the middle of the pack.

V. SOME ISSUES OF SCOPE AND IMPLEMENTATION

Mandatory disclosure has several overlapping potential benefits, as we have seen. Of course, information may not be useful given its complexity, its sheer quantity, its presentation, or because of cognitive biases. Moreover, information is not free; the sheer expense of compiling and disseminating information must be considered in designing a mandatory disclosure regime. Finally, a public disclosure mandate is least likely to help workers at the bottom of the labor market who most need help; but another type of disclosure might come to those workers' aid. Before turning to those issues, we will briefly confront another set of "substantive" objections to mandatory disclosure based on competing interests in confidentiality.

A. *Disclosure vs. Confidentiality: When Is Secrecy Justified?*

Once we provisionally exclude salary information from the scope of disclosure, the range of potential substantive objections to disclosure narrows, but some remain. Most of the objections will come from employers, who are likely to resist public disclosure of whatever employment information they currently keep confidential within the firm.[140] But not all employer interests in avoiding disclosure count as legitimate objections. For example, employers might wish to avoid certain intended consequences of wider disclosure: demands for higher pay once employees have better information about workplace conditions, the greater probability that unlawful conduct will be detected and that mandates will be enforced, or the reputational hit that would attend truthful disclosure of damaging information. But those interests are directly at odds with the reasons for mandating disclosure. In adopting a disclosure regime, those competing interests in nondisclosure should have already been "weighed" and categorically trumped by the value of disclosure. I will develop this point further below.

On the other hand, employers might have legitimate claims against disclo-

140. Employees themselves might object to disclosure of some individualized employment-related information on privacy grounds; for example, they might object to individualized injury reports that employers are required to report to OSHA. There might be other objections of this sort that limit the scope of a disclosure mandate; but they do not put in doubt the general case for disclosure or cut back sharply on its reach.

sure of some employment-related information. In particular they may claim that some of this information is commercially valuable "proprietary information" or even a trade secret, if it is in fact kept secret enough.[141] It is well to keep in mind that trade secret law is mainly directed at private misappropriation of commercial information for competitive gain. It has much less traction as a general matter against mandatory public disclosure requirements.[142] And it does not confer an all-purpose right to secrecy. The more speculative the prospect of commercial use by competitors, the greater the risk that employers are using a trade secret claim to shield information that is of legitimate interest to the public and prospective employees (perhaps because it is embarrassing or suggestive of wrongdoing).

Even under the existing law of the workplace, the notion that employers are entitled to keep employment-related information confidential collides with employees' right under the NLRA to discuss wages and working conditions with each other and with potential allies among the public.[143] That collision points to a deeper tension between employers' proprietary claims to information and the interests of employees in learning about, discussing, and fostering public debate over their terms and conditions of employment. When legislatures seek to advance those interests by mandating public disclosure, employers should bear a very heavy burden of persuasion in contending for their right to keep such information confidential.

Consider, for example, on-the-job injury rates that employers report to OSHA. When journalists sought site-specific injury rates (from OSHA under FOIA), employers objected on the ground that such information would reveal

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141. Trade secrets are defined by state law. A widely used definition includes

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538 (2005). The secrecy requirement is unlikely to be met for most of the employment-related information targeted here—that which employers already distribute to current employees and/or to the government.

142. That point is underscored by the existence of other public disclosure regimes touching on commercial information; consider, for example, the voluminous information that publicly traded corporations are required to disclose under the securities laws.

143. Such discussions are protected by section 7 of the NLRA as a necessary prelude to employees' concerted efforts to seek better terms and conditions, which are also protected by federal law. *See, e.g.*, Freund Baking Co., 336 N.L.R.B. 847, 847-48 (2001) (invalidating confidentiality rule that employees could reasonably construe to prohibit their discussing wages, hours, and other terms and conditions with coworkers and potential allies); Aroostook Cnty. Reg'l Ophthalmology Ctr., 317 N.L.R.B. 218, 222 (1995) (invalidating policy manual provision that prohibited employees from discussing "office business" with spouses, family, or friends, and from discussing grievances "within earshot of patients").

employees' hours of work, in which they claimed a proprietary interest. The claim was rejected mainly because the information at issue was not sufficiently secret to be protectable.[144] But even if it were, and even if a competitor might discern something useful from employees' hours of work, that would seem to be a feeble justification (or even a pretext) for withholding information about the dangerousness of a workplace.[145]

Or consider the argument made by employers in *Chrysler Corp. v. Brown* and *Westinghouse Electric Corp. v. Brown* to block disclosure (again under FOIA) of detailed statistical reports, submitted to the government under federal civil rights laws, on the race and gender of their employees in various professional job categories.[146] The employers claimed this was "confidential commercial information" because it would enable competitors—competitors within the labor market, that is—to "raid" their minority employees in scientific and technical fields in which such employees were in high demand.[147] It is clear why employers would want to avoid such "raiding"; they might either lose valued employees or be forced to raise salaries to keep them. But employees may not mind being "raided" for those very reasons. The point is not that the employer's interest here is outweighed by employees' interests (not to mention the public interest in knowing how a firm's hiring and promotion patterns compare to others in the industry); it is that employers' desire to avoid lawful labor market competition for their at-will employees ought not to count at all as a legitimate commercial interest in confidentiality. It should raise no bar against a public disclosure mandate that is intended in part to improve labor market competition and employees' bargaining power.

Where the government seeks to promote legitimate public interests through disclosure, those public interests should not merely be weighed against employers' proprietary interests; they should also limit the nature of those interests.[148] Employers faced with a public disclosure mandate must justify their

144. *See* N.Y. Times Co. v. U.S. Dep't of Labor, 340 F. Supp. 2d 394, 403 (S.D.N.Y. 2004). In dismissing the suit, the court did not need to address the claim that employees' hours of work, if actually kept secret, could constitute a trade secret; that is because the hours information was outdated, and was now required to be posted in the workplace itself (a requirement that was not under challenge). *Id.* at 402.

145. Rudimentary site-specific injury data is now available from OSHA. *See supra* text accompanying note 76.

146. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 291 (1979); Westinghouse Elec. Corp. v. Brown, 443 F. Supp. 1225, 1228 (E.D. Va. 1977).

147. Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 175-76 (D. Del. 1976), *vacated*, 565 F.2d 1172 (3d Cir. 1977), *vacated sub nom.* Chrysler Corp. v. Brown, 441 U.S. 281 (1979). This was a "reverse-FOIA" lawsuit asserting that the exceptions to FOIA's disclosure mandate implicitly banned disclosure, and created a private right of action to prevent disclosure, of such information. The Supreme Court in *Chrysler* rejected the theory of "reverse-FOIA" actions (but did not reach the question whether the information was within FOIA's trade secret exception).

148. Richard Pildes has made a parallel argument about how "balancing tests" operate within constitutional law: "Contrary to the connotations suggested by the balancing meta-

claim to secrecy; the justification must be based on the value of the information to product market competitors; and it must be strong enough both to outweigh the public goals of disclosure and to ensure that the firm is not effectively seeking to subvert those goals by avoiding the legal, reputational, or labor market consequences that the disclosure regime aims to trigger. There is little information bearing directly on employees' terms and conditions of employment—particularly information that employers already disclose either to employees or to the government—in which employers have an interest in confidentiality that is both legitimate and substantial in relation to the interests of employees and the public in disclosure. At most, it may be necessary for a mandatory disclosure regime to admit exceptions for the rare cases in which employers have a legitimate commercial interest in confidentiality that outweighs the employee and public interests in disclosure.

Employers may want to keep a good deal of information about "their" employees and terms of employment within the organization. They may even derive economic benefits from keeping such information confidential. But "their" employees are also citizens, members of society, and providers for their families. Employees' terms and conditions of employment have consequences for the public and are legitimate subjects of public discussion and debate.[149]

B. *Making Disclosure Useful*

Many readers might grant that there is information about terms and conditions of employment that is valuable to prospective employees and the public, that is unlikely to be available without publicly mandated disclosure, and that triggers no significant, valid objections to disclosure (other than the sheer burdens it might impose on employers). But will the costs of disclosure outweigh the benefits? Let us turn briefly to some of the crucial design issues that would affect both the benefits and costs of mandatory disclosure. This will be more in the nature of an architectural sketch than a blueprint for reform.

On the benefits side, it is clear that information is useful only if it is comprehensible to those whose decisions might be affected and available at the point of decisionmaking. In their comprehensive study of "targeted transparency," Fung, Graham, and Weil emphasize the importance of simplicity and com-

phor, constitutional adjudication is often a qualitative process, not a quantitative one. It is about defining the kinds of reasons that are impermissible justifications for state action in different spheres." Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 711-12 (1994). On that view it is important to scrutinize asserted legitimate justifications for state action so as to flush out or rule out impermissible justifications. *Id.* at 713-14.

149. The Supreme Court has recognized a legitimate public interest in discussing employees' terms and conditions of employment in several labor cases. *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575-76 (1988); Thornhill v. Alabama, 310 U.S. 88, 102-06 (1940).

prehensibility of information as well as the time and place of its presentation. As an example of a highly effective form of targeted transparency, they describe a restaurant hygiene rating system that assigns letter grades to restaurants based on inspections, and requires restaurants to display the grades in a standardized and highly visible format at their entrances.[150]

There can be no comparably simple and digestible format for disclosure of terms and conditions of employment, given the range, volume, and complexity of the information at issue. To be sure, people probably invest more in the decision to apply for or take a job than in their choice of restaurant. But there is still a limit to how much information individuals are willing and able to process, however important the decision. Moreover, various behavioral tendencies under the umbrella of "bounded rationality" must be expected to undermine accurate processing of information about employers and workplaces—for example, information about workplace hazards.[151] Recall OSHA's Hazardous Communication Standard, which requires employers (and suppliers) to disclose the composition and health effects of various toxic substances that employees may be exposed to in the workplace. The HCS has been found to improve employers' decisionmaking, but it has had less impact on employees' decisions except in union workplaces, where the union supplies expertise and a collective voice for employee concerns.[152] One problem is that the HCS requires disclosure of information that is highly technical, perhaps irreducibly so. As a consequence, Fung, Graham, and Weil find the HCS to be only moderately effective.[153]

Given the sheer amount and complexity of workplace information that is of potential interest to prospective employees and the public, there may be insuperable difficulties in implementing the ideal model of targeted transparency for more than a few selected workplace issues. There may simply be too many targets of disclosure and too much relevant information in the workplace to faithfully apply the targeted transparency model across the board.

But that does not mean we should give up on workplace transparency. In the workplace, transparency has multifaceted and overlapping functions; it often works hand-in-hand with other regulatory tools rather than doing all the regulatory work itself. So, too, workplace transparency seeks to inform many different actors and many different decisions—not only job applicants and their employment decisions but also employee advocates and others stakeholders and their decisions to trigger enforcement or to bring reputational pressures to bear on employers. Those intermediaries may be able to comprehend and use information that is not usable by individual workers, and they may be able to translate that information into more usable forms.

In light of the overlapping uses and users of workplace information, we

150. *See, e.g.*, FUNG ET AL., *supra* note 12, at 82-83.
151. *See, e.g.*, *id.* at 86-87.
152. The role of intermediaries is discussed by Fung, Graham, and Weil. *See id.* at 187.
153. *See id*.

should perhaps bifurcate the concept of targeted transparency: public law can mandate transparency while delegating most of the targeting—the digestion, analysis, and communication of information about specific issues and specific employers—to intermediaries. The extraordinary and still evolving technology of disseminating and processing information makes this possible, albeit to varying and uncertain degrees. Intermediaries targeting particular issues, regions, occupational groups, or industries can use the publicly available information to compare, rate, and rank employers in a way that is easily grasped by prospective employees and others. Journalists and scholars can investigate and analyze trends and patterns in workplace practices. Lawyers, advocacy organizations, and socially conscious investors may act on the information by initiating or supporting litigation or publicity campaigns or by making investment decisions. Employers will not welcome this additional scrutiny. But more scrutiny and more accurate information about employer practices should contribute to more informed employment contracts, better enforcement of existing laws, and greater accountability and accuracy with regard to firms' "beyond compliance" commitments.

C. *Reducing Costs and Anticipating Unintended Consequences*

Information does not always come cheap. The sheer expense of assembling and disclosing information could theoretically outweigh the benefit to employees and the public. Moreover, employers will presumably pass on most of their costs to employees and consumers. But costs should be modest if, as forecast above, the disclosure regime focuses on information that employers are already producing, either for purposes of compliance with existing legal regimes or for distribution to current employees.

Compliance-related information: Employers already produce and report to the government a great deal of information of interest to employees and the public, including information about workplace injuries, involuntary dismissals, and workforce demographics. But much of this information is submitted under an assurance of nondisclosure, and is available to the public only in aggregate form, or not at all.[154] Firm-level data (on employee demographics, for example) is rarely made public. For all the reasons discussed above, that information should presumptively be disclosed to the public (subject to any legitimate and sufficiently weighty objections to disclosure).

There are several virtues to piggybacking on existing reporting requirements. Most obviously, employers bear no added cost of gathering information and putting it into standardized form; the added pecuniary cost of publicly disclosing that information on the Internet should be minor. Moreover, regulatory officials will have already done the work and borne the cost of defining the

154. Those assurances in turn exempt the information from disclosure under the Freedom of Information Act.

form and content of the information that is useful to regulators: they should already be requiring information that is objective and verifiable, standardized in its form, and subject to periodic updates.[155]

Piggybacking on existing reporting requirements has shortcomings as well, but none seems fatal. First, because substantive mandates and their accompanying reporting requirements vary across employers, industries, and jurisdictions, this rudimentary disclosure regime would produce wide variations in the information that is required of employers. But some of those variations are presumably based on rational distinctions (between industries or between large and small employers, for example); and in any case variations are surely no more troubling at the level of disclosure than they are at the level of substantive law. Second, information may not be reported to the government in user-friendly form. But the task of making information useable may be left, as suggested above, to private intermediaries with an interest, commercial or otherwise, in doing so. Eventually, legal reporting requirements could be retooled to make the information more user friendly to the public.

Of course, once disclosure is extended to the public, employers may have stronger incentives to misreport or to engage in gamesmanship, especially with regard to information that suggests either noncompliance or comparatively poor performance.[156] Much turns on the nature of sanctions for nondisclosure or false disclosure, addressed briefly below. These issues would have to be addressed at a finer grain of analysis than I attempt here.

Voluntarily generated documents and information: Employers routinely generate information about terms and conditions of employment for their own purposes, including for distribution to employees. Employers decide for themselves whether to create and what to include in employee handbooks, employer policy documents, arbitration agreements, and covenants not to compete. Under a disclosure regime, employers could be required to post online the documents and written policies that they provide to employees, and to update their disclo-

155. It might be possible in some cases to secure greater benefits at even lower cost by shifting the burden of public disclosure to the government itself. (Government disclosure would have to be prospective, as much information is currently submitted to the government voluntarily based on a reasonable expectation that it would not be made public.) Regulators have to assemble the data they receive into databases so as to facilitate analysis and comparison across employers; that, after all, is what we want employees and information intermediaries to be able to do with the information. Government disclosure might avoid some duplication of effort and lower the costs of digestion for intermediaries and their constituencies.

156. That is presumably one reason why most current reporting requirements include assurances of confidentiality. Such assurances may both promote honest reporting and reduce political resistance to reporting requirements. *See* James M. Gorski, Note, *Access to Information? Exemptions from Disclosure Under the Freedom of Information Act and the Privacy Act of 1974*, 13 WILLAMETTE L. REV. 135, 147-49 (1976). For more on the unintended consequences of disclosure and the problem of gamesmanship, see Dalley, *supra* note 7, at 1127-28. This is among the practical and political issues that a public disclosure mandate would confront, and that would require more detailed consideration than I can give it here.

sure whenever they distribute new information to employees. The actual administrative cost of posting existing company documents on existing company websites is likely to be trivial.

Still, this type of disclosure raises some new issues. Because the relevant documents are created and disseminated voluntarily rather than under legal constraints, the information will not be in standardized form. Moreover, mandating their disclosure is more likely to affect the content of the documents, and even the underlying employer policies. Let us distinguish between documents that purport to bind the employee to her detriment (for example, noncompete covenants and mandatory arbitration agreements), and documents that describe employer rules, policies, and procedures, and thereby shape employee expectations or perhaps confer contractually binding promises or benefits.

There should be few difficulties of implementation and little controversy in requiring disclosure of documents that can legally waive or limit employees' publicly recognized rights and interests. Employers write them with an eye to eventual disclosure in light of some existing body of substantive law that constrains enforceability. It seems unlikely that compelling disclosure of these agreements will have an undesirable impact on employer practices. To be sure, it should deter employers from including provisions of dubious legality; that is an intended benefit of mandatory disclosure. It might also deter employers from imposing some lawful agreements if disclosure were expected to bring significant employee or public disapproval. But it is not clear what the public would lose if employers were to decide that the private benefits of requiring a mandatory arbitration agreement or a noncompete covenant were outweighed by the potential harm to recruitment or reputation.[157] A disclosure requirement in this context also has—or can be made to have—a nice self-policing feature: failure to publicly disclose these documents ahead of time will render them unenforceable.

Mandatory disclosure of employee handbooks or other official descriptions of employer policies and benefits is more likely to affect the underlying policies, but not in ways that seem either dramatic or obviously harmful. These documents are already crafted and disseminated under the shadow cast by the law of the employment contract, under which employers face tradeoffs in deciding whether to make explicit representations concerning job security and other employment benefits. Such representations may elicit employees' loyalty (and stave off unionization), but they may also give rise to costly contractual liabilities unless they are accompanied by potentially unsettling disclaimers of

157. Employers' gains under these agreements come at some loss to employees and the public (public adjudication and elaboration of public rights and labor market competition, respectively). *See* Estlund, *supra* note 19, at 411-12. Even on the heroic assumption that all of the gains to employers reflect improved allocative efficiency, if those gains do not even outweigh the reputational cost of disclosing the agreements, they probably do not outweigh the other costs of the agreements to employees and the public.

promissory intent.[158] An added requirement that any such representations and disclaimers be disclosed publicly seems unlikely to have any significant or predictable impact on whether and how employers make these representations—except, that is, the obvious (and intended) incentive at the margin to offer and disclose policies that are more attractive and generous in the eyes of job seekers and other relevant members of the public.

D. *Liabilities, Sanctions, and Enforcement*

Mandatory disclosure may—indeed must—entail some new liabilities for employers.[159] That includes both whatever direct liabilities or sanctions back up the disclosure mandate itself, and potential liabilities arising out of the interaction of mandatory disclosure with existing tort and contract doctrines. Let us begin with the latter.

A large new body of public information from employers about terms and conditions of employment might conceivably trigger contract or promissory estoppel claims on behalf of employees who claim to have accepted or relied on publicly disclosed terms of employment that are not honored, or tort claims on behalf of employees who claim to have been fraudulently induced to enter into employment. It is worth noting two features of these claims that limit their reach. First, they target disclosure that is false or misleading, or betrayed by future events; it is harder to imagine tort or contract claims arising out of the simple failure to disclose.[160] Second, most common law claims arising out of mandatory disclosure would belong to those who are hired, as opposed to disappointed or would-be applicants or others.[161] A disclosure mandate might generate more employment litigation; but it seems unlikely to generate whole new classes of litigation or of plaintiffs.

With regard to contract and promissory estoppel claims, the risk of additional litigation seems quite small. Even if courts were willing to treat public

158. The law of employment contracts thus arguably aims (but sometimes fails) to prevent employers from having it both ways by promising job security or other favorable conditions while avoiding any legal accountability for those assurances. *See* Estlund, *supra* note 42, at 7, 19-20.

159. One such liability, and one intended benefit of mandatory disclosure, lies in the greater probability of discovering the violation of, and enforcing, existing substantive mandates. But that may only exacerbate employers' incentive to violate the disclosure mandate itself (by nondisclosure or false disclosure), absent direct penalties or liabilities for doing so.

160. While that feature limits the potential for vast new liabilities, it still poses a problem for the disclosure scheme as it may skew employer incentives against disclosure. If employers face much greater liability for what they disclose than for what they do not, then it may take rather hefty statutory penalties for nondisclosure to induce compliance.

161. Claims on behalf of consumers, on the ground that they were misled into patronizing a company on the basis of their supposedly generous labor policies, are not unthinkable. In *Kasky v. Nike, Inc.*, 45 P.3d 243, 262 (Cal. 2002), the California Supreme Court held that a consumer stated a cause of action under a state consumer statute against Nike for falsely claiming to ensure that its products were not produced in sweatshop conditions.

representations about terms and conditions of employment as binding promises, those representations would likely be superseded (if not duplicated) by later representations made directly to prospective employees. Moreover, public representations would presumably be at least as subject to disclaimer as the direct representations made in employee manuals. In other words, the same playbook by which employers now successfully manage their contractual liabilities to employees would seem to be equally effective in controlling any additional contractual liabilities that might possibly arise out of public representations.[162]

Tort liabilities could be more of a wild card. The main tort claims that one might imagine arising out of mandatory disclosure would be those alleging fraudulent inducement to enter into an employment relationship. Courts typically view such claims skeptically and define them narrowly, even when they arise out of individualized representations, because they risk turning many breach-of-contract claims into tort actions.[163] It seems especially unlikely that courts would treat an employer's *public* representations about employment conditions as a basis for fraudulent inducement.[164] There could presumably be no fraudulent inducement if false public representations about some crucial term of employment were corrected (before the commencement of employment) by truthful direct representations, or perhaps by disclaimers warning of the employers' right to modify terms of employment. In other words, even if there were potential tort liability for public misrepresentations about job-related information, it would be every bit as manageable for employers as the potential contractual liabilities.

Of course, the weaker the threat of significant tort or contract liability based on false disclosure or nondisclosure, the greater the opposite problem: mandatory public disclosure would be meaningless if employers were not accountable for false or misleading representations.[165] Given the costs of disclosure to employers—both the administrative costs and the sacrifice of whatever organizational, reputational, or competitive advantages flow from keeping information inside the organization and away from the public—some scheme of sanctions, remedies, or rewards is needed to deter both nondisclosure and false disclosure. The enforcement scheme should be crafted to ensure that enforcement of the disclosure mandate does not overburden the scarce resources of

162. That is not to endorse the existing limitations on employers' contractual liabilities to employees, but only to observe that those limitations, whatever they are, will also limit contractual liabilities under a disclosure regime.

163. For an argument that such skepticism is justified, see William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1232-33 (1994).

164. I am aware of no cases that do so. That may be partly because a plaintiff's reliance on public representations might be especially difficult to prove.

165. Concerns about unpredictable new common law liabilities might be dispelled, and the task of calibrating employer incentives simplified, by statutorily precluding common law tort or contract liability based on mandatory public disclosures, and by relying wholly on a self-contained statutory enforcement scheme.

overmatched public authorities.

For two large categories of information, there is a fairly straightforward way to enforce the disclosure mandate. First, with respect to compliance-related information, penalties or liquidated damages for failure to publicly and accurately disclose the information should be part of the statutory remedy in any successful enforcement action, public or private. In other words, liability for nondisclosure or false disclosure might be an add-on to the remedy for substantive violations, not a freestanding cause of action or violation. Second, with respect to agreements that employers demand as a condition of employment, and that bind employees to their detriment (noncompete agreements, arbitration agreements, etc.), advance public disclosure should be a condition of the agreement's enforceability, as suggested above. The further challenge of calibrating sanctions to induce compliance while avoiding the potentially counterproductive incentives flagged above is complex, and beyond the scope of this preliminary account.

E. *Transparency Writ Small: An Information Safety Net at the Bottom of the Labor Market*

The disclosure scheme outlined here would fail to reach many employees of small businesses and especially many low-wage workers. Small firms are exempt from some substantive employment mandates and are subject to fewer reporting requirements under existing law; in addition, they are more prone to ignoring those laws to which they are subject. Small firms also supply less information to their employees voluntarily, and would therefore be required to disseminate less to the public. Many small firms do not maintain a website, which is meant to be the main locus of mandatory disclosure.

In some respects this calibration of disclosure duties is a virtue, as it would avoid piling costly new burdens on small businesses that are least able to bear them. Following the lead and the shape of existing substantive law and existing voluntary practices would produce a kind of built-in tailoring. Of course, the logic of this tailoring is no stronger than the logic of the disparities that it replicates between large and small employers. Others have criticized the indulgence of small businesses that characterizes the American regulatory landscape.[166] In the employment context, the indulgence of small businesses overlaps with, and helps to sustain, an unregulated netherworld of small, undercapitalized, low-road contractors in which labor standards are chronically low and underenforced.[167]

166. *See* Marc Linder, *The Small-Business Exemption Under the Fair Labor Standards Act: The "Original" Accumulation of Capital and the Inversion of Industrial Policy*, 6 J.L. & POL'Y 403, 407-09 (1998); Richard J. Pierce, Jr., *Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537, 553-60 (1998).

167. *See* ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009), *available at*

These problems cannot be fixed by extending public disclosure obligations to small businesses that are currently exempt from the law's substantive mandates. Indeed, the small businesses that are prone to ignoring employment laws—especially those in labor-intensive and chronically low-wage sectors of the economy—are presumably no more likely to comply with the disclosure obligations that accompany those mandates.

However, a different kind of disclosure—one that can fairly be imposed on even the smallest of employers—can promote some though not all of the objectives of the full-fledged public disclosure scheme outlined here: employers should be required to give employees, at the time of hiring, written notice of certain basic terms and conditions of employment—wages, hours, and job duties, for example. Many other countries maintain such notice requirements.[168] But they are still exceptional in the U.S.[169]

This form of disclosure deserves fuller elaboration than I can provide here.

http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1; ANNETTE BERNHARDT, SIOBHÁN MCGRATH & JAMES DEFILIPPIS, BRENNAN CTR. FOR JUSTICE, UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 28-29 (2007), *available at* http://brennan.3cdn.net/d6a52a30063ab2d639_9tm6bgaq4.pdf.

168. All European Union member nations, pursuant to a 1991 EEC directive, must require employers to give employees written notice of certain terms and conditions of employment, including: the names of the employer and employee, the place of work, a description of the work or job title, the start date and duration of employment (if temporary or fixed term), any paid leave to which the employee is entitled, the required period of notice of termination of employment (by either party), the wage rate or salary and payment schedule, and expected hours of work per day or week. *See* Council Directive 91/533, art. 2, 1991 O.J. (L 288) 32 (EC). Similarly, China's new Labor Contract Law, enacted in 2007, requires employers to give employees a written contract specifying numerous terms and conditions of employment. *See* RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA 37-39 (2010). Similar requirements apply, for example, in India, *see* 2 INTERNATIONAL LABOR AND EMPLOYMENT LAWS 24-1 (2d ed. Supp. 2007) (citing India's Industrial Employment (Standing Order) Act); in New Zealand, *see* Section 65 of the Employment Relations Act 2000, as substituted by section 25 of the Employment Relations Amendment Act (No 2) 2004, *available at* http://www.legislation.govt.nz/act/public/2000/0024/latest/DLM58317.html; in Russia, *see* TRUDOVOI KODEKS ROSSIISKOI FEDERATSII [TK RF] [Labor Code] art. 57, *available at* http://www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/65252/E01RUS01.htm#chap10; and in South Africa, *see* Basic Conditions of Employment Act 75 of 1997 §§ 28-29, *available at* http://www.saflii.org/za/legis/num_act/bcoea1997309.pdf.

169. Federal law requires such disclosure for seasonal and migrant agricultural workers, *see* Migrant and Seasonal Agricultural Worker Protection Act §§ 201, 301, 29 U.S.C. §§ 1821, 1831 (2006), and a few states impose such requirements on some other low-wage employers, *see, e.g.*, IOWA CODE ANN. §§ 91E.1-.4 (West 2010); NEB. REV. STAT. ANN. §§ 48-2209 to -2211 (LexisNexis 2010). For example, Nebraska law requires employers that recruit and employ non-English-speaking employees to have a statement signed by both the employer and the employee that discloses minimum weekly hours, the hourly wage, job responsibilities, a description of any transportation or housing that is provided and any related costs charged to the employee, and any "occupational physical demands and hazards" of the job. *Id.* § 48-2210.

But one could expect this very modest reform to improve contracting practices both at the formation stage (by informing workers of what they are being promised) and at the enforcement stage (by providing workers with evidence of what they were promised in case of breach). If these requirements could be enforced, they would help to reduce flat out fraud and "wage theft," both of which are common in certain low-wage sectors, especially those that rely on undocumented immigrant workers.[170] This kind of disclosure should also facilitate enforcement of, and improve compliance with, labor standards at the bottom of the labor market, especially the wage and hour laws, simply because violations will be more obvious and more provable.

CONCLUSION

Work, working conditions, and the returns to work vitally shape the lives and livelihoods of workers and their families, and, in the aggregate, our whole society. For individual workers, the stakes are enormous: whether we think of the decision to take a job as the "purchase" of a life-altering good or as an undiversifiable "investment" of human capital, it is clear that workers need accurate information about jobs and employers—both their own and others—in order to make good decisions and fair bargains at the core of their economic existence. For society as a whole, the stakes are no less momentous, as the panoply of laws regulating the workplace attest. Information about jobs and employers is indispensable both to enforcing the laws that we have and to assessing whether more (or fewer) laws are needed to promote public goals and values.

There is, in short, a good deal of information about terms and conditions of employment that is important to prospective employees and the public for a variety of reasons. Much of that information is unlikely to be forthcoming without publicly mandated disclosure; and little of that information is likely to trigger significant countervailing interests in confidentiality. We have only begun to identify the crucial issues of institutional design that would affect both the costs and benefits of mandatory disclosure, including the form that disclosure should take and the nature of the enforcement regime that should back up the disclosure mandate. But the aim of this Article is to make the basic case for workplace transparency—for the claim that the public has a legitimate interest in knowing far more about workplace policies and conditions than employers currently choose to reveal, and that compelling disclosure of that information can help to make markets more efficient, mandates more effective, and reputations more reliable.

The last of these objectives—making reputations more reliable—is particularly important as we look ahead to a future legal landscape that is less domi-

170. *See* KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT (2009).

nated by markets and mandates. Throughout the world, private organizations and networks, subject to market pressures and rewards, are both the main engines of economic prosperity and the locus of social harms, including pollution and destruction of natural resources, dangerous products and processes, defrauding of consumers and investors, and discrimination. A major challenge—one that has become more acute with increasing globalization of production and capital—has been controlling those harms without smothering or driving away the engines of prosperity. In addressing that challenge, developed societies in recent decades have turned toward governance-based approaches to social control of economic actors—those that work by encouraging organizations to regulate themselves effectively. The turn to governance reflects in part the recognition that powerful dynamics and incentives operating *within* regulated organizations and networks can either frustrate or advance societal objectives; and that direct regulation is not always the best way of channeling those organizational dynamics in a socially productive direction.[171]

What is needed in the workplace setting, however, is a *return* to governance. Governance—specifically, shared governance through collective bargaining—has long been a central feature of societal efforts to improve wages and working conditions. But the traditional collective bargaining model of workplace governance has long been in decline, and is sorely in need of refurbishment and renovation. In a recent book I offer a strategy for "regoverning the workplace" by shaping and regulating firms' own internal processes of self-regulation.[172] Those internal self-regulatory systems have already been nudged along and shaped by some rather pointed legal inducements under which a firm's engagement in effective self-regulation may mitigate criminal or civil liability for corporate misconduct.[173] But existing conceptions of effective self-regulation need to be retooled, at least in the context of work law. In particular, I argue that credible internal systems of self-regulation must include mechanisms for worker representation; that is part of what the law should demand in order for firms to claim the privileges of self-regulation—lower penalties, partial defenses, and reduced direct state scrutiny—under the employment laws. The idea of regulated self-regulation in the workplace, or what I call "co-regulation," aims to build on the vast organizational resources that are going into internal systems of corporate compliance and social responsibility, and to

171. *See* Cynthia Estlund, *A Return to Governance in the Law of the Workplace (and the Question of Worker Participation), in* OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640566.

172. ESTLUND, *supra* note 14.

173. See, for example, U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2010), and doctrines under federal employment discrimination statutes, under which an employer's maintenance of internal procedures for the prevention and remediation of discrimination may reduce or avoid some liabilities. For a discussion of the legal inducements to effective self-regulation, see ESTLUND, *supra* note 14, at 75-92.

improve those systems, mainly by tapping into the monitoring and enforcement capabilities of employees.

Transparency is crucial in a system of regulated self-regulation.[174] Public disclosure of terms and conditions of employment would help to ensure that firms were living up to their claims of self-regulation and responsible corporate citizenship, and that they were not engaged in "cosmetic compliance." The value of transparency in a governance-based strategy of workplace regulation could point in several directions, toward quasi-voluntary or voluntary disclosure schemes as well as toward mandatory disclosure.

One strategy—we might call it quasi-voluntary disclosure—is to incorporate public disclosure, like employee representation, into the elements of effective self-regulation and the legally prescribed conditions for employers' securing the benefits of self-regulation under the employment laws. On that model, firms that claimed the mantel and sought the privileges of responsible corporate citizenship in employment matters would be required (among other things) to publicly disclose terms and conditions of employment, or at least those that are regulated by external law. They would do so "voluntarily" to secure legal concessions as well as whatever reputational rewards flow to responsible employers. In other words, transparency should be among the legally recognized elements of effective self-regulation.

As compared to a disclosure mandate, a structured legal inducement to voluntary disclosure along these lines would limit the reach of disclosure to self-proclaimed good citizens—to firms that seek recognition as responsible self-regulators.[175] But the inducements to voluntary disclosure (and other elements of self-regulation) can be not only legal but also reputational. The CSR movement has had considerable success in pressing firms to make commitments that go beyond compliance with legally binding rules and standards, and to invest resources in pursuing and demonstrating pursuit of those commitments, in employment, environmental, and other areas of regulation. The large firms that have climbed on the CSR bandwagon—and most large American and European

174. One way to achieve greater transparency is through the institution of independent monitoring (by unions or outside monitoring organizations working in conjunction with employee representatives). *See* ESTLUND, *supra* note 14, at 203-07. Independent monitoring by and on behalf of employees can help to ensure the bona fides and the reliability of self-regulatory systems in the workplace context. But monitoring itself would be aided by greater transparency, and by requiring employers' public disclosure of terms and conditions of employment.

175. My proposals would require good corporate citizens to meet some potentially costly conditions: employee representation, independent outside monitoring (if the employee representation is not itself through an independent union), and now public disclosure. Loading up the conditions for effective self-regulation and certifiable good citizenship, as I do, obviously raises those costs. The success of a quasi-voluntary scheme of regulated self-regulation thus depends on raising the legal benefits (and the reputational returns) to being an effective self-regulator, and the legal and reputational costs of failing to do so. For a general discussion of the issue, see *id.* at 217-23.

firms have done so to some degree—find themselves espousing standards of conduct that are set by a loose and growing network of social investors and nongovernmental organizations engaged in advocating and monitoring firms' social performance on various dimensions.[176] Those standards of conduct are both substantive and procedural; and along the procedural dimension, transparency is one of the principles that animates the CSR movement.[177]

It may thus be possible to promote norms of workplace transparency without any public legal intervention. If labor-friendly CSR actors were persuaded of the value of public disclosure in improving labor standards, both up to and beyond legal minima, then voluntary disclosure of terms and conditions of employment could become part of how they assess and rate firms. Those actors might develop a "Workplace Transparency Index," and firms would earn reputational returns and the approval of the socially responsible investor community based partly on the extent of their voluntary public disclosures. Under a wholly voluntary and private system of transparency, however, progress is likely to be confined, much like the CSR movement as a whole, to large firms with a global profile and brand. Even as to those firms, it will be difficult to coordinate the form and content of firms' disclosure so as to facilitate comparisons across firms. Finally, the development of a voluntary transparency regime, like everything else about CSR, is likely to happen haltingly over an extended period of time.

As compared to both the quasi-voluntary and the wholly voluntary approaches, government-mandated disclosure can accelerate progress toward transparency, extend its reach, and fill some of its likely gaps. In particular, mandatory disclosure would make it easier for individual workers, their advocates, and other members of the public to determine whether firms are meeting mandatory minimum standards of conduct. A system of regulated self-regulation aims to induce employers to undertake responsibility, and to institute internal measures, for ensuring (at least) compliance with societal standards of conduct. But it does so in part by maintaining a strong backup enforcement regime for those who do not make those commitments or do not make good on them. The integrity and success of such a system depends on knowing who is who: who is taking the self-regulatory high road and who is taking the low road, whether they are feigning self-regulation, failing at the attempt, or not

176. *See id.* at 93-103.

177. With respect to global labor standards, for example, corporations initially were pressured to adopt "codes of conduct" for their suppliers. Antisweatshop advocates repeatedly exposed large gaps between these early codes and actual factory conditions, and pressured firms to adopt independent monitoring and other safeguards, including transparency of supply chains, inspection protocols, and inspection results. *See* ESBENSHADE, *supra* note 30. Not all firms are equally subject to these reputational pressures, and not all have been equally motivated to meet the advocates' demands and to seek "sweat-free" status. Moreover, there remains much uncertainty and controversy over the degree to which these private labor standards regimes have been effective. *Id.*

even pretending. Mandatory disclosure would help to support all of these interlocking components: it would help to ensure the reliability of firms' claims of responsible self-regulation; to improve enforcement, public and private, against those that either betray their commitments or do not or cannot commit to responsible self-regulation; and to protect firms that responsibly self-regulate from unfair low-road competition by firms that do not.

If the future of workplace regulation does indeed lie in fostering better workplace governance, then public disclosure of terms and conditions of employment is an indispensable part of that future. Even if governance-based regulatory solutions remain only one part of a landscape dominated by markets and substantive mandates, workplace disclosure requirements would improve the workings of all of these modes of regulation.[178] Whatever may be the future of workplace regulation, workplace transparency is an essential element of good governance and an idea whose time has come.

178. Because I have set aside the complex question of how mandatory disclosure might affect union organizing and collective bargaining, *see supra* note 69 and accompanying text, I should qualify this conclusion accordingly. If mandatory workplace disclosure did strengthen unions' ability to both organize and bargain collectively, as it might well do, then I believe that would be a further contribution to workplace governance, labor markets, and the efficacy of employment mandates. But I recognize that support for this belief—both the "if" and the "then"—would require additional analysis beyond the scope of this Article.