

## THE PERILS OF GLASNOST

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IN grade school, we could measure ourselves against others by seeing who got the gold star; in middle and high school, the varsity letter or membership in an honorary society could tell us how we are doing vis-à-vis the rest of our world. Such easy markers of success are harder to come by once in the workforce. Sure, there are the public announcements of a promotion or the occasional special award, but for most of us these signal public events come infrequently. By and large, we increasingly come to see our salary as the primary measure of our professional accomplishments.

As a faculty member for 22 years before becoming a dean, I was frustrated by the lack of information I was provided about faculty salaries. Of course, each June my dean told me what I was going to earn for the coming academic year, but that did not really answer my version of Mayor Ed Koch's plaintive question "How am I doin'?" I also wanted to know how my salary compared to others: not just to faculty at other law schools but, I am now somewhat embarrassed to report, also how I was doing compared to my faculty colleagues.<sup>1</sup> This level of detail about what was happening at my school was never provided (other than being told the mean raise across the University), so I tried to get benchmarks from other sources. It turns out that there wasn't much helpful information out there, either.

I knew of the effort of SALT (the Society of American Law Teachers) since 1979 to publicize salaries, but its annual report, the "Salary Survey," has never included all law schools and, in all events, it provides only the medians for "salary bands" (the ranks of Assistant, Associate, and Full Professor) by region.<sup>2</sup> There was also the salary data gathered by the American Bar Association ("ABA") in conjunction with reaccreditation (a practice that was halted in 1996 as part of the consent decree that ended antitrust litigation with the U.S. Department of Justice), but such information was distributed only to the deans of

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1. This is not an idiosyncratic curiosity; sociologists recognize the impact of "relative deprivation," which explains why workers report that their level of job satisfaction has less to do with their salaries than with how their salaries compared to their coworkers'. In short, "while money matters to people, their relative ranking matters more." John Cassidy, *Relatively Deprived: How Poor is Poor?*, THE NEW YORKER, Apr. 3, 2006, at 42.

2. See, e.g., 2004-05 *SALT Salary Survey*, SALT EQUALIZER (Soc'y of Am. L. Teachers, St. Paul, Minn.), Feb. 2005, at 1, 1-3.

ABA-accredited schools.<sup>3</sup> The fact that state schools typically must adhere to public records laws was of little avail: such information was made difficult to discover, at least from outside the particular institution.<sup>4</sup> Finally, all these external data, even if available, were already a year out of date because they were historical.<sup>5</sup>

Creighton Dean Patrick K. Borchers briefly addressed the question of salary transparency in an essay in the 2003 Toledo Law Review entitled *Leadership in Legal Education Symposium*. He observed:

One difficult policy issue for deans is how much budgetary information to share. At public universities, a huge amount of this information (including individual salaries and the like) is public information, so the balance is tipped towards disclosure from the outset. Private schools, however, do not have to contend directly with open record laws. Nevertheless, candor and honesty are still the best policies.<sup>6</sup>

After three-plus years as a dean, I now recognize that the range of issues involved in setting compensation—pay equity and salary compression, merit pay, cost of living adjustments, and the availability of internal professorships—present a complex and challenging matrix, of which salary transparency is only a part. More to the point, I have come to question whether my desire as a faculty member to be provided detailed salary data across the institution was, in fact, the best position from the decanal point of view. Despite Dean Borchers' endorsement of an open system, I am now more sensitive to why law schools that have the option—all private and likely some public institutions—adhere to the “social taboo about discussing salaries,”<sup>7</sup> providing less rather than more information.<sup>8</sup>

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3. See *United States v. Am. Bar Ass'n*, 934 F. Supp. 435, 436 (D.D.C. 1996) (the ABA agreed to cease collecting faculty salary data and considering salaries in accreditation decisions). See also George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2144 (1998) (prior to the consent decree, the ABA collected salary information, but disseminated it only to the deans at ABA-accredited schools).

4. See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762-64 (1989) (recognizing the “practical obscurity” of some information contained in public records because of the difficulty of research absent computer assistance). For example, I asked one of our senior reference librarians to find salaries at a well-regarded public law school on the East Coast. After a number of e-mails and phone calls to officials at the university and law school, it became clear that the only way to actually review the information would be to make a formal request and then travel to the campus, and then, presumably the review would take place under watchful eyes.

5. Thanks to Wake Forest Dean Bob Walsh for this observation.

6. Patrick K. Borchers, *Budgets*, 35 U. TOL. L. REV. 19, 21 (2003).

7. Jan M. Levine & Kathryn M. Stanchi, *Women, Writing, & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & LAW 551, 561 (2001).

8. Ken Myers, *Some Academic Salaries Have Increased 50 Percent. Is It Too Much?*, 16 NAT'L L.J., Oct. 18, 1993, at 1 (“At many schools, the amount of money professors make is a closely guarded secret.”). This taboo is not limited to law schools or even universities: “Nowadays, people will talk about anything—their lurid sex lives, their drug addictions, their dysfunctional families—but the topic of money remains one of the last taboos.” Carol Lloyd, *Cents and*

For this essay I decided to dig deeper and I discovered that people who study management and human relations have considered the merits of salary transparency in the workplace, and, it turns out, this is a lively issue in the “real world” as well.

I initially researched practices in the business setting generally, and there is a split of opinion on whether salary transparency is a sound policy.<sup>9</sup> Salary secrecy is the preferred policy for many employers in the United States<sup>10</sup> and it is justified on four bases. First, there is a concern with employee privacy. Second, secrecy is thought to avoid or at least reduce workplace conflict.<sup>11</sup> Third, secrecy may reduce labor mobility, which can foster a more stable wage regime. Finally, secrecy enhances firm-specific investment.<sup>12</sup> On the other hand, employees might want information about both their absolute and relative compensation for more than reasons of vanity or curiosity: this information could help them negotiate salary more effectively.<sup>13</sup>

Secrecy, then, tends to concentrate authority in the hands of managers. When only a minimum of salary information is disclosed, there is less need for a manager to discuss, let alone justify particular decisions. While this is especially likely in the context of regimes in which information is provided at the micro level—where every employee knows everyone else’s salary—it may also apply to providing information about salary bands and even mean/medians. If an employee lacks specific salary information, it is difficult to pursue grievances about his or her own pay.<sup>14</sup> Indeed, this is why employees who feel underpaid

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*Sensibility: We Readily Talk about our Addictions, So Why Can't We Talk about our Dividends?*, N.Y. TIMES, Dec. 28, 1997, at 50.

9. See John Case, *When Salaries Aren't Secret*, HARV. BUS. REV., May 1, 2001, at 37 (experts debate advisability of salary transparency).

10. Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41, 47 (2005). Because the private sector employs many more people than the public sector, the vast majority of employers are free to choose which policy to adopt. Indeed, as Professor Edwards points out, many workplaces actually have “pay secrecy or confidentiality rules” that *forbid* any discussion of a worker’s own wages with co-workers. *Id.* at 43-44 (citing Leonard Bierman & Rafael Gely, *Love, Sex and Politics? Sure. Salary? No Way: Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 171 (2004)).

11. The easy availability of this information could affect employee satisfaction and morale and the quality of working relationships, both among co-workers and between a worker and her supervisor. Edwards, *supra* note 10, at 53.

12. Bierman & Gely, *supra* note 10, at 179-81. Salary transparency might make employers reluctant to reward certain employees who are asked to make “firm-specific investments”—work that has little value external to the firm but of great value internally. *Id.* at 180-81. A good example in the law school context would be onerous committee work, like chairing an ABA self-study committee. A dean might want to reward this work, but not have it be known lest the chairs of all other important committees insist that their work is just as valuable to the institution.

13. See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 77-78 (2000) (“Although taking particular steps, such as acquiring greater information, can enhance one’s leverage in a given situation, there are usually aspects of the underlying power differential that remain fixed.”).

14. HERBERT J. CHRUDEN & ARTHUR W. SHERMAN, JR., MANAGING HUMAN RESOURCES 408 (1984) (“[P]robably one of the reasons for pay secrecy that managers may be unwilling to admit is

(but not necessarily unappreciated or unhappy) may feel the need to seek other job opportunities, only to use the new offer, and the specific salary, as a bargaining chip in negotiations with the existing employer.<sup>15</sup>

The conventional wisdom in the private sector, then, is that a policy of salary secrecy avoids unnecessary discord and dissatisfaction with pay.<sup>16</sup> But this is not a unanimous position. One long-time advocate for openness is Professor Edward E. Lawler, who wrote:

Particularly in the case of organizations that have effective pay systems and pay well relative to the market, there is a tremendous advantage to be gained from making pay rates and policies public. Because pay secrecy leads to misunderstandings and perceptions that are more negative than the reality of how pay is actually administered, companies that want to establish a high-performance culture can gain from making pay information public and open to discussion. Openness can increase trust, perception of fairness, understanding of the business, and respect for the organization and the management.<sup>17</sup>

A recent survey of the empirical literature concludes that salary transparency is not always preferable to secrecy when it comes to a worker's job satisfaction, but rather suggests a more nuanced picture, in which the advisability of a policy of transparency is influenced by the specific institutional culture.<sup>18</sup> Among the variables thought to influence the outcome are the relative age of the employees (younger workers are considered more comfortable with openness), the nature of the compensation system in place, and the fundamental attitude of workers to the fairness of that system.<sup>19</sup>

Consistent with this need to know more about the norms in specific work setting, I decided to also look at how lawyers handle compensation information in law firms. Traditionally, salary information was freely available among, at the

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that it provides them greater freedom in compensation management since pay decisions are not disclosed and there is less need to justify or defend them.”)

15. CEOs' resistance to revealing their entire compensation packages to shareholders reflects a specific aversion to salary transparency; if the rank-and-file knows that the boss takes home compensation 30-50 times higher than the employee, anger is a predictable result. See Brooke A. Masters, *A Campaign to Tighten Executive Pay*, WASH. POST, Apr. 28, 2006, at D1 (discussing how proposed SEC regulations that would require CEOs at publicly-traded companies reveal detail about total compensation are a tool for stockholders hoping to limit excessive executive compensation). Shareholder advocates should be alert to the law of unintended consequences, though: once high levels of executive compensation are revealed it may prompt less well paid CEOs to seek to seek comparable pay. See Marcel Kahan, *The Limited Significance of Norms for Corporate Governance*, 149 U. PA. L. REV. 1869, 1887 (2001).

16. See Edwards, *supra* note 10, at 54. Edwards also points out that “a wide range of pay secrecy and disclosure policies are available to organizations.” *Id.* at 47 n.37.

17. *Id.* at 54-55 (quoting EDWARD E. LAWLER III, *REWARDING EXCELLENCE: PAY STRATEGIES FOR THE NEW ECONOMY* 287 (2000)).

18. Edwards, *supra* note 10, at 55 & n.92 (summarizing empirical studies comparing pay secrecy and transparency).

19. *Id.* at 48, 55-56.

least, partners (or shareholders of LLCs).<sup>20</sup> In recent years, the increased competitiveness in private practice, both between and increasingly inside law firms, has made some consider whether a “closed pay system” might be the better approach. When all that mattered in salary-setting was the number of billable hours, firms could quickly and easily explain the basis for salary decisions. Firms are now more likely to also consider subjective factors, like time spent on business development or mentoring, making a simple matrix difficult to use. Also, firms are becoming more centralized as they grow bigger, so the influence of individual partners over salary-setting has decreased, lessening the need for broadly-disseminated information. Most of all, reconsideration is being driven by a sense that salary information can become a shibboleth that emphasizes internal competitiveness over collaboration and that can result in lateral moves of lawyers who are offended by even modest difference in colleagues’ pay.<sup>21</sup>

As might be expected, observers of higher education often perceive the academic environment as fundamentally different from other work settings. Academics work in a “distinctive collegial environment,” and leaders who try to transplant management tools from the raw capitalism of the business world do so at their peril.<sup>22</sup> A leading text on educational management observes:

[A]cademia is a collegial environment, yet merit pay systems are competitive by nature, and the idealistic, rather than materialistic, nature of higher education purports not to value money as highly as in business and industry. Further, full disclosure of salary increases is necessary to reinforce valued behavior in a merit pay system, yet the culture in higher education would in most cases reject the exposure that publishing salaries and salary increases would bring with it.<sup>23</sup>

The perception (often accurate) that each dollar someone else makes is one less for me—a zero-sum situation—creates unnecessary (or at least unpleasant) competition and professional jealousy.<sup>24</sup> In short, “[academics have] the value orientation of the scholar . . . [and] have not given up their guild orientation.”<sup>25</sup>

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20. Leigh Jones, *Law Firms Look at Closing Pay Systems*, NAT’L L.J., June 26, 2006, at A1 (“Unlike the vast majority of businesses in the United States, law firms generally operate under open systems that disclose the compensation of other attorneys.”).

21. *Id.* at A10.

22. Jack Tharp, *When Merit Pay Fails: Searching for an Alternative*, 29 NAT’L ASS’N STUDENT PERS. ADM’RS J. 75, 77 (1991). See also A. Lawrence Lauer, *Searching for Answers: Should Universities Create Merit Pay Systems?*, NACUBO BUSINESS OFFICER, Nov. 1991, at 52, 54 (“The merit pay philosophy appeals to basic American values of individualism, achievement, and rewards.”).

23. NORMA M. GOONEN & RACHEL S. BLECHMAN, HIGHER EDUCATION ADMINISTRATION: A GUIDE TO LEGAL, ETHICAL, AND PRACTICAL ISSUES 56 (1999).

24. For example, many faculty oppose systems of merit pay because they undermine “cooperation among faculty colleagues.” Peter H. Wood & Richard R. Burke, *College Faculty Attitudes toward Merit Pay*, Research Report 14 (1989) (unpublished paper, abstract available at <http://eric.ed.gov>).

25. James Steve Counselis, *Merit Compensation and Higher Education* 4-7 (Nov. 8-11, 1984) (unpublished paper presented at the Annual Meeting of the American Educational Studies Association).

Indeed, faculty self-image may recoil at materialistic measures of professional accomplishment because they are inconsistent with “self-satisfaction from educating students, engaging in meaningful research, or providing useful service.”<sup>26</sup>

On the other hand, a recent column in the *Chronicle of Higher Education* argued for “a culture of openness,” that includes salary transparency. While recognizing that secrecy can “preserve harmony and avoid bad feeling,” the author argues that such secrecy “is ultimately likely to produce the very discontent and bitterness that those well-intentioned administrators are attempting to sidestep” because accurate information could trump the paranoia created by secrecy.<sup>27</sup> Salary transparency up-and-down the line “is always and only a virtue” which could “help dissipate the us-versus-them attitude that too often plagues Academe.... Better to empower people with knowledge than cripple them with fear.”<sup>28</sup>

With my survey of the literature complete, and a renewed appreciation for how complex a dean’s job really is, I am now convinced that a policy of complete salary transparency that seemed so sensible—and right—when I was on the faculty is not the optimal approach for me as a dean. While my research suggested that a policy of total secrecy may be too extreme, providing some information about relative salaries is a sensible approach.<sup>29</sup> Such a blended regime would provide faculty with the mean/median increase in a salary cycle in the law school, but could also include the range of increases, at least within a band. This approach seems most consistent with my commitment to merit pay, especially if coupled with a candid evaluation of teaching, scholarship, and service. Providing the mean and the range would improve each faculty member’s understanding of his or her relative progress, and, thus promote maximum effort going forward.<sup>30</sup> Or so the theory goes....

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26. Glenn Bassett, *Merit Pay Increases are a Mistake*, COMP. & BENEFITS REV., Mar.–Apr. 1994, at 20, 21.

27. Gary A. Olson, *A Culture of Openness*, CHRON. HIGHER EDUC., Mar. 31, 2006, at 2, available at <http://chronicle.com/jobs/news/2006/03/2006033101c/careers.html>.

28. *Id.*

29. See Edwards, *supra* note 10, at 47 n.37 (pointing out that “a wide range of pay secrecy and disclosure policies are available to organizations”).

30. See Case, *supra* note 9, at 49 (“Every step of the way, managers must clearly define each employee’s objectives and tie rewards directly to meeting those objectives.... The most important transparency factor is ... what they need to do to earn more.”).