INCOME INEQUALITY AND PAY RATIO DISCLOSURE: A MORAL CRITIQUE OF SECTION 953(B)

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Congress passed a pay ratio disclosure rule in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Under Section 953(b) of the Dodd-Frank Act, a company is required to disclose the ratio of the annual total compensation of its CEO to the median of the annual total compensation of all its employees.[1] In 2015, five years after the passage of the Dodd-Frank Act, the Securities and Exchange Commission issued its final implementation of Section 953(b) among considerable controversy about the justification of this pay ratio provision.[2] Neither the text of Section 953(b) nor the legislative history surrounding its passage contains an explicit statement of any intended benefits of the rule. In this article, I explore a broad range of moral reasons that might count against inequalities within a company's pay schedule. The moral reasons I identify derive from the extensive literature on egalitarianism in moral and political philosophy. The importance of these egalitarian reasons indicates that Congress had a strong justification for passing a pay ratio disclosure rule as part of the Dodd-Frank Act. That said, I argue that Section 953(b) is ultimately unjustifiable and stands in need of revision because the relevant egalitarian reasons count in favor of an alternative pay ratio disclosure rule that is both more justifiable and readily available. Congress should amend Section 953(b) accordingly.

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1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §953(b), 124 Stat. 1376, 1904 (2010) [hereinafter Dodd-Frank Act].

2. Pay Ratio Disclosure, 80 Fed. Reg. 50,104 (Aug. 18, 2015) (codified at 17 C.F.R. pts. 229, 240, 249).

INTRODUCTION

Executive compensation has been rising over the past few decades in publically traded companies[3] in the United States.[4] Moreover, executive compensation has been rising at a faster rate than the average pay of the U.S. worker.[5] Accordingly, the gap between the pay of chief executive

3. Throughout this article, I refer only to companies that are publically traded in the United States. More precisely, I refer only to companies that are governed by the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78pp (2012)).

4. *See, e.g.*, LAWRENCE MISHEL & ALYSSA DAVIS, ECON. POLICY INST., ISSUE BRIEF NO. 380, CEO PAY CONTINUES TO RISE AS TYPICAL WORKERS ARE PAID LESS 1-6 (2014), http://www.epi.org/files/2014/ceo-pay-continues-to-rise.pdf [https://perma.cc/W7BT-3DWR] [hereinafter MISHEL & DAVIS, CEO PAY] (reporting the vast growth of CEO pay, especially when considered against typical workers); LAWRENCE MISHEL & ALYSSA DAVIS, ECON. POLICY INST., ISSUE BRIEF NO. 399, TOP CEOS MAKE 300 TIMES MORE THAN TYPICAL WORKERS 1-5 (2015), http://www.epi.org/files/2015/top-ceos-make-300-times-more-than-typical-workers.pdf [https://perma.cc/2C8B-YMB6] [hereinafter MISHEL & DAVIS, TOP CEOS] (same); Lucian Bebchuk & Yaniv Grinstein, *The Growth of Executive Pay*, 21 OXFORD REV. ECON. POL'Y 283, 283-95 (2005) (same); Carola Frydman & Dirk Jenter, *CEO Compensation*, 2 ANN. REV. FIN. ECON. 75, 77-80 (2010) (same); Carola Frydman & Raven E. Saks, *Executive Compensation: A New View from a Long-Term Perspective, 1936-2005*, 23 REV. FIN. STUD. 2099, 2106-07 (2010) (same); Thomas Piketty & Emmanuel Saez, *The Evolution of Top Incomes: A Historical and International Perspective*, 96 AM. ECON. REV. 200, 204 (2006) (same).

5. *See, e.g.*, MISHEL & DAVIS, CEO PAY, *supra* note 4, at 6-7 (noting that the rate of pay for the typical worker has been growing at a marginal rate compared to CEO pay); MISHEL & DAVIS, TOP CEOS, *supra* note 4, at 5-6; (same); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q. J. ECON. 1, 31-33 (2003) (same); Jon Bakija et al., Jobs and Income Growth of Top Earners and the Causes of Changing Income Inequality: Evidence from U.S. Tax Return Data 1-2 (April 2012) (unpublished manuscript) (on file at

officers (CEOs) and the pay of the average worker has also been increasing. As the gap has increased, so has public concern over (a) the justification of current levels of executive compensation[6] and (b) the effects of rising levels of income inequality in companies and in society more generally.[7]

Against the background of this public concern, Congress passed a pay ratio disclosure rule in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[8] According to Section 953(b) of the Dodd-Frank Act, a company is required to disclose (a) the annual total compensation of its CEO,[9] (b) the median of the annual total compensation of all its employees,[10] and (c) the ratio of the two amounts.[11]

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https://web.williams.edu/Economics/wp/BakijaColeHeimJobsIncomeGrowthTopEarners.pdf [https://perma.cc/H6HK-4LNW]) (same); Lawrence Mishel & Alyssa Davis, ECON. POL'Y INST. (July 1, 2015), *CEO Pay Has Grown 90 Times Faster Than Typical Worker Pay Since 1978*, http://www.epi.org/publication/ceo-pay-has-grown-90-times-faster-than-typical-worker-pay-since-1978 [https://perma.cc/A48U-4E8M] (same).

6. *See, e.g.*, LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 1-7 (2004) (proposing that executives do not truly produce an equivalent amount to the compensation they receive); GRAEF S. CRYSTAL, IN SEARCH OF EXCESS: THE OVERCOMPENSATION OF AMERICAN EXECUTIVES 96-100 (1992) (same); Jeffrey Moriarty, *Do CEOs Get Paid Too Much?*, 15 BUS. ETHICS Q. 257, 257 (2005) (arguing that CEOs are overpaid under three views of justice in wages).

7. *See generally, e.g.*, JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY (2013) (describing the effects of growing inequality on the United States government and justice system).

8. Dodd-Frank Act § 953(b) (2010).

9. More precisely, Section 953(b) requires disclosure of the annual total compensation of "the chief executive officer (or any equivalent position)" of the company. *Id.* § 953(b)(1)(B). In its final implementation of Section 953(b), the Securities and Exchange Commission (SEC) interprets this part of the rule to require disclosure of the annual total compensation of a company's "principal executive officer" (PEO). Executive Compensation, 17 C.F.R. § 229.402(u)(1)(ii) (2016).

10. More specifically, Section 953(b) requires a company to disclose the median of the annual total compensation of all its employees, "except the chief executive officer (or any equivalent position)" of the company. Dodd-Frank Act § 953(b)(1)(A) (2010). The decision of Congress to exclude the CEO's compensation from the calculation of the median compensation of all of a company's employees is puzzling to anyone with an understanding of the statistical distinction between a "median" and an "average." Because executive compensation can be extraordinarily high, its exclusion could very well have a material effect on the calculation of the "average" compensation of a company's employees. But as just one employee's compensation among many others, the exclusion of the CEO's pay should not have a material effect on the calculation of the "median" compensation of a company's employees. *See* J. Robert Brown, Jr., *Dodd-Frank, Compensation Ratios, and the Expanding Role of Shareholders in the Governance Process*, 2 HARV. BUS. L. REV. ONLINE 91, 94 n.19 (2011), http://www.hblr.org/wp-content/uploads/2011/10/Brown-Executive-Compensation-and-Shareholders.pdf [https://perma.cc/GC58-BE9J] (noting that removing the CEO's pay from the calculation of the median is not meaningful to the calculation).

Thus, under Section 953(b), a company is required to disclose the ratio of the pay of its CEO to the pay of its median employee.[12] In 2015, five years after the passage of the Dodd-Frank Act, the Securities and Exchange Commission (SEC) issued its final implementation of Section 953(b) among considerable controversy about the justification of this pay ratio provision.[13]

The controversy over the passage and implementation of Section 953(b) concerns both the expected costs and benefits of the rule.[14] Two potential costs are noteworthy. First, commentators worry that the rule will

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11. Section 953(b) requires companies to disclose this information in any filing described in 17 C.F.R. § 229.10(a) (2016). Dodd-Frank Act § 953(b)(1) (2010). Companies must begin disclosing this information for their first fiscal year beginning on or after January 1, 2017. Executive Compensation, 17 C.F.R. § 229.402(u) Instruction 7 to Item 402(u) (2016) (Transition Periods for Registrants). Section 953(b) also requires companies to determine the compensation of an employee in accordance with Summary Compensation Table, 17 C.F.R. § 229.402(c)(2)(x) (2010), which was in effect the day before the Dodd-Frank Act was enacted. Dodd-Frank Act § 953(b)(2) (2010).

12. By a company's "median employee," I refer to the employee whose annual total compensation represents the median of all the company's employees. In this article, unless noted otherwise, whenever I refer to an employee's pay, I mean the employee's annual total compensation.

13. The SEC Commissioners approved the implementation of the rule by a vote of three to two. Jeff Drew, *SEC Approves CEO Pay Ratio Rule*, J. ACCT. (Aug. 5, 2015), http://www.journalofaccountancy.com/news/2015/aug/ceo-pay-ratio-rule-201512774.html [https://perma.cc/L6NZ-ZXES] (noting that 287,400 comment letters, including 1500 unique letters, were received on the proposed rule). When the SEC approved the rule, SEC Chair Mary Jo White stated: "To say that the views on the pay ratio disclosure requirement are divided is an obvious understatement. Since it was mandated by Congress, the pay ratio rule has been controversial, spurring a contentious and, at times, heated dialogue." Public Statement, Mary Jo White, SEC Chair, Statement at Open Meeting on Security-based Swap Rules Under Title VII and on Pay Ratio Disclosure (Aug. 5, 2015), https://www.sec.gov/news/statement/statement-at-open-meeting-on-sbs-and-pay-ratio-disclosure.html [https://perma.cc/KV4J-6C3F].

14. *See, e.g.*, Public Statement, Michael S. Piwowar, SEC Commissioner, Dissenting Statement at Open Meeting on Pay Ratio Disclosure (Aug. 5, 2015), https://www.sec.gov/news/statement/dissenting-statement-at-open-meeting-on-pay-ratio-disclosure.html [https://perma.cc/MH5P-X3WX] [hereinafter Piwowar, *Dissenting*] (describing the rationale and arguments against requiring the disclosure of the ratio between the CEO's pay and the median employee's pay); Public Statement, Michael S. Piwowar, SEC Commissioner, Additional Dissenting Comments on Pay Ratio Disclosure (Aug. 7, 2015), https://www.sec.gov/news/statement/additional-dissenting-statement-on-pay-ratio-disclosure.html [https://perma.cc/AL8F-PMBH] [hereinafter Piwowar, *Additional Dissenting*] (same); Public Statement, Daniel M. Gallagher, SEC Commissioner, Dissenting Statement at an Open Meeting to Adopt the "Pay Ratio" Rule, (Aug. 5, 2015), https://www.sec.gov/news/statement/dissenting-statement-at-open-meeting-to-adopt-the-pay-ratio-rule.html [https://perma.cc/JS7Q-SWJ6] (same); Recent Regulation, *Pay Ratio Disclosure*, 129 HARV. L. REV. 1144 (2016) (same).

end up "shaming" CEOs and their companies.[15] The worry seems to be that the pay gap between a company's CEO and its median worker will appear unjustifiably large to the public, indicating excessive executive compensation.[16] In response, the public will express its objection to the pay gap and the CEO's level of compensation. The CEO and others in the company will feel humiliated as a result.

Second, in addition to the experiential costs of shame that CEOs and their companies could suffer personally, the compliance costs of Section 953(b) are expected to be significant.[17] Companies are already required to calculate and disclose the compensation of their CEOs.[18] However, Section 953(b) imposes on a company a new obligation to identify and disclose the compensation of its median employee.[19] For a company without a consolidated payroll system, the costs of complying with this new disclosure obligation could be especially high.[20] Initially, a company will need to identify the employee whose annual total compensation represents the median of the annual total compensation of all its employees.[21] Then

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15. Peter Schroeder, *Disputed Rule Intended to Shame CEOs*, THE HILL (Feb. 2, 2012), http://thehill.com/business-a-lobbying/208161-disputed-rule-intended-to-shame-ceos [https://perma.cc/6D25-XX6P]; Piwowar, *Dissenting*, *supra* note 14; Piwowar, *Additional Dissenting*, supra note 14; Gallagher, *supra* note 14.

16. *See infra* text accompanying notes 110-12 (discussing the concept of excessive executive compensation).

17. *See* Pay Ratio Disclosure, 80 Fed. Reg. 50,104, 50,154-62, 50,178-83 (Aug. 18, 2015) (discussing the SEC's estimates of the compliance costs of its implementation of Section 953(b)).

18. *See* Executive Compensation, 17 C.F.R. § 229.402 (2016) (establishing what information must be disclosed concerning executive compensation and the manner in which to do so).

19. Certain companies are exempt from Section 953(b). These include smaller reporting companies, emerging growth companies, foreign private issuers, and U.S.-Canadian Multijurisdictional Disclosure System filers. Pay Ratio Disclosure, 80 Fed. Reg. 50,104, 50,114-16 (Aug. 18, 2015); *see also* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 102(a)(3), 126. Stat. 306, 309 (2012) (exempting emerging growth companies from the requirements of Section 953(b)); Executive Compensation, 17 C.F.R. § 229.402(u) Instruction 8 to Item 402(u) (2016) (same). The definition of "employee" under Section 953(b) does not include a company's independent contractors or "leased" workers whose compensation is determined by an unaffiliated third party. Executive Compensation, 17 C.F.R. § 229.402(u)(3) (2016).

20. *See* Pay Ratio Disclosure, 80 Fed. Reg. 50,104, 50,146 (Aug. 18, 2015) (acknowledging that registrants without a centralized, consolidated payroll system would incur increased costs associated with transitioning).

21. The SEC's final implementation of Section 953(b), though, does ease the burden of identifying a company's median worker in several ways. For example, to identify its median employee, a company is permitted to use statistical sampling techniques over its full employee population, and a company is granted flexibility in terms of the specific compensation measure used to identify its median employee. *See* 17 C.F.R. § 229.402(u) Instruction 4 to Item 402(u) (2016) (Methodology and Use of Estimates). A company is

the company will need to determine the annual total compensation of its median employee, which could require calculating certain aspects of the employee's compensation that are not usually quantified by a company for non-executive workers.[22]

Given the expected costs of Section 953(b), commentators skeptical of the rule doubt whether the required pay ratio disclosures would have any comparable value, especially to shareholders.[23] Neither the text of Section 953(b) nor the legislative history surrounding its passage contains an explicit statement of any intended benefits of the rule.[24] In its implementation of the rule, the SEC speculates that Congress intended the pay ratio disclosures to provide information that investors could use somehow to evaluate the justification of a CEO's compensation, that is, whether or not the CEO's pay is excessive.[25] Other commentators suggest that the value of pay ratio disclosures might be connected to the productivity of a company's workers.[26] These disclosures could provide investors with information about how well a company's pay schedule is promoting productivity among its workforce.

There are two competing ways in which pay gaps between employees within a company might affect their productivity. On the one hand, differences in pay could motivate workers to increase their productivity, increasing either the quantity or quality of what they produce.[27] In a

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required to identify its median worker only once every three years unless the company reasonably believes there has been a change that would significantly affect the disclosed pay ratio. 17 C.F.R. § 229.402(u) Instruction 2 to Item 402(u) (2016). In some cases, a company is even permitted to exclude up to 5% of its non-U.S. employees when identifying the median. 17 C.F.R. § 229.402(u)(4)(ii) (2016). But although the SEC's numerous accommodations reduce the costs of identifying a company's median worker, the remaining costs will still be significant.

22. *See* Pay Ratio Disclosure, 80 Fed. Reg. 50,104, 50,138-41 (Aug. 18, 2015) (outlining the calculation of annual total compensation and the discretion or flexibility given to registrants in this calculation). Here too the SEC eased the burden of calculating the annual total compensation of a company's median employee by permitting the use of estimates. 17 C.F.R. § 229.402(u) Instruction 4 to Item 402(u) (2016) (Methodology and Use of Estimates).

23. *See, e.g.*, Piwowar, *Dissenting*, *supra* note 14; Piwowar, *Additional Dissenting*, *supra* note 14; Gallagher, *supra* note 14.

24. Pay Ratio Disclosure, 80 Fed. Reg. 50,104, 50,105 (Aug. 18, 2015).

25. *See* Pay Ratio Disclosure, 80 Fed. Reg. 50,104, 50,105-07 (Aug. 18, 2015).

26. *See, e.g.*, Public Statement, Luis A. Aguilar, SEC Commissioner, The CEO Pay Ratio Rule: A Workable Solution for Both Issuers and Investors n.7 (Aug. 5, 2015), https://www.sec.gov/news/statement/statement-on-open-meeting-on-pay-ratio-aguilar.html [https://perma.cc/3PTE-UM8F] (proposing that the new requirement for disclosure will promote accountability for executive compensation).

27. *See, e.g.*, Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841 (1981) (showing that compensation based on ordinal rank produces the same allocation of resources as a payment schedule based on

tournament model, positions within a company are organized along a hierarchy, and higher-ranking positions come with higher compensation. Lower-ranking employees can be motivated to increase their productivity as a means of improving their prospects of earning a promotion and higher compensation.

On the other hand, pay gaps could have the opposite effect. Differences in pay can lead workers to decrease their productivity, decreasing the quantity or quality of what they produce.[28] If differences in pay seem unjustifiably large, lower-paid employees could feel treated unfairly by their companies.[29] So the lesser-paid employees can feel less motivated to produce for their companies for a variety of reasons. For example, employees can feel less loyal and committed to companies that they perceive to be unjust to them.

In this article, I go beyond these potential negative effects on employee productivity to explore a broader range of moral reasons that might count against inequalities within a company's pay schedule. The moral reasons I identify derive from the extensive literature on egalitarianism in moral and political philosophy.[30] The importance of these

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output); Olubunmi Faleye et al., *The Determinants and Effects of CEO-Employee Pay Ratios*, 37 J. BANKING & FIN. 3258, 3258-59 (2013) (payment based on the outcome of sequential promotion tournaments allows ordinary employees to recognize opportunity in higher pay ratios).

28. *See, e.g.*, J. Stacy Adams, *Inequity in Social Exchange*, *in* 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 267, 283-88 (Leonard Berkowitz ed., 1965) (arguing that when inequities are reduced, individual productivity increases and operating costs decrease); James A. Cotton, *Toward Fairness in Compensation of Management and Labor: Compensation Ratios, A Proposal for Disclosure*, 18 N. ILL. U. L. REV. 157, 180-81 (1997) (finding that oversized executive compensation packages undercut employee morale and productivity); Douglas M. Cowherd & David I. Levine, *Product Quality and Pay Equity Between Lower-Level Employees and Top Management: An Investigation of Distributive Justice*, 37 ADMIN. SCI. Q. 302 (1992) (finding that large gaps between the pay of higher echelon and lower echelon workers may lower product quality); *cf.* Jae Yong Shin et al., *Determinants and Performance Effects of Executive Pay Multiples: Evidence from Korea*, 68 ILR. REV. J. WORK & POL'Y 53, 73-75 (2015) (analyzing the effects of vertical pay disparity on employees in Korea).

29. *Cf. infra* text accompanying notes 106-148 (discussing the relation between fairness and income inequalities).

30. *See, e.g.*, Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 289 (1999) (dismissing "equality of fortune" as an egalitarian theory and defending "democratic equality" as integrating principles of distribution with the demands of respect); Derek Parfit, *Equality or Priority?*, *in* THE IDEAL OF EQUALITY 81, 84-116 (Matthew Clayton & Andrew Williams eds., 2000) (describing and comparing different egalitarian views); T. M. Scanlon, *The Diversity of Objections to Inequality*, *in* THE IDEAL OF EQUALITY 41, 57 (Matthew Clayton & Andrew Williams eds., 2000) (outlining various reasons for pursuing greater equality and concluding that they play "a large part of the importance that equality has in our political thinking"); Samuel Scheffler, *What is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5, 15-23 (2003) (criticizing luck egalitarianism as diverging from the more

egalitarian reasons indicates that Congress had a strong justification for passing a pay ratio disclosure rule as part of the Dodd-Frank Act.[31] That said, I argue that Section 953(b) is ultimately unjustifiable and stands in need of revision because the relevant egalitarian reasons count in favor of an alternative pay ratio disclosure rule that is both more justifiable and readily available to Congress.

Section 953(b) is an example of what I call a "max-median" pay ratio disclosure rule. Under a max-median rule, a company is required to disclose: (a) the compensation of its CEO; (b) the compensation of its median worker; and (c) the ratio of the two.[32] In this article, I argue that a more justifiable alternative to Section 953(b) would be what I call a "max-min" pay ratio disclosure rule. Under a max-min rule, a company is required to disclose: (a) the compensation of its CEO; (b) the compensation of its lowest-paid worker; and (c) the ratio of the two.[33] In short, I argue that a max-min pay ratio disclosure rule is more justifiable than a max-median rule because the compensation of a company's least paid worker has greater moral significance than the compensation of its median worker.[34] Congress should amend Section 953(b) accordingly, converting it to a max-min pay ratio disclosure rule.[35]

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familiar way of understanding equality); Larry S. Temkin, *Inequality: A Complex, Individualistic, and Comparative Notion*, 11 PHIL. ISSUES 327, 329-30 (2001).

31. Although I argue there were strong reasons in favor of Congress's passing a pay ratio disclosure rule, I do not presume that any member of Congress was actually aware of these reasons when it enacted Section 953(b) as part of the Dodd-Frank Act. A law can be justified for reasons not appreciated by the lawmaker.

32. On my terminology, I take "max-median" to be an abbreviation of "maximum-median." Throughout this article, I presume the CEO of a company is the highest-paid employee of the firm. Therefore, I assume the CEO's pay represents the "maximum" compensation of any employee in the firm.

33. On my terminology, I take "max-min" to be an abbreviation of "maximum-minimum." The income of a company's lowest-paid employee represents the "minimum" compensation of any employee in the firm.

34. *Cf.* Thomas Nagel, *Equality*, *in* MORAL QUESTIONS 106, 118 (1979) ("[W]hat makes a system egalitarian is the priority it gives to the claims of those whose overall life prospects put them at the bottom."); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 39-66 (Erin Kelly ed., 2001) (defending a theory of justice under which the "basic structure of society" should be organized to provide "the greatest benefit" to "the least-advantaged members of society"). Although the life prospects of the worst-off members of society have special moral significance in theories of justice, such as John Rawls's, the life prospects of the "median" member of society (or any other organization) have no special moral significance in any theory of justice defended in the literature on moral and political philosophy.

35. For two possible amendments to Section 953(b) worth considering, see *infra* text accompanying notes 204-206.

I. TWO TYPES OF EGALITARIANISM

Two general kinds of egalitarian reasons could count against pay gaps between a company's workers: intrinsic egalitarian reasons and instrumental egalitarian reasons.[36] According to intrinsic egalitarianism, it is bad in itself if someone is worse off than others through no fault of her own.[37] On this view, undeserved inequalities between people are intrinsically bad independently of whether such inequalities produce further bad effects.[38] According to instrumental egalitarianism, it is bad if some people are worse off than others precisely because such inequalities would have bad further consequences.[39]

Given the distinction between intrinsic and instrumental egalitarianism, it is important to note that these views are not mutually exclusive. An egalitarian could endorse both views. That is, an egalitarian might object to inequalities on the basis of both sorts of reasons. An inequality might be objectionable both because it is intrinsically bad and because it results in bad further effects.

In the next section, I focus on the intrinsic egalitarian reasons that might count against inequalities within a company's pay schedule. In the section following the next, I discuss the instrumental egalitarian reasons. I argue that considerations of both intrinsic and instrumental egalitarianism support the adoption of a pay ratio disclosure rule, and both sorts of reasons favor a max-min rule over a max-median rule, such as Section 953(b).

II. INTRINSIC EGALITARIANISM

A. *An Argument*

Assume some workers in a company are paid less than others in the company through no fault of their own. Then intrinsic egalitarians might contend that those income inequalities are bad in themselves. That is, those

36. *See, e.g.*, Temkin, *supra* note 30, at 331-32 (drawing a similar distinction between "instrumental egalitarianism" and "non-instrumental egalitarianism").

37. *See, e.g.*, Parfit, *supra* note 30, at 84, 122 n.8 (referring to intrinsic egalitarianism as "telic" egalitarianism); Temkin, *supra* note 30, at 333-34 (illustrating the relationship between the concern for equality and the concern for fairness).

38. *See* Parfit, *supra* note 30, at 86 (arguing that there is a practical difference between thinking inequality is bad in itself and thinking it is bad because it has bad effects).

39. *See, e.g.*, Parfit, *supra* note 30, at 86 (explaining the difference between the instrumental value of equality and the intrinsic value of equality); Temkin, *supra* note 30, at 331-32 (offering a distinction between instrumental and non-instrumental egalitarianism); *cf.* Martin O'Neill, *What Should Egalitarians Believe?*, 36 PHIL. & PUB. AFF. 119, 121 (2008) (referring to "non-intrinsic egalitarianism").

differences in pay could be intrinsically bad independent of whether they result in any bad further effects, such as decreasing the motivation of employees to be productive.[40] If inequalities within a company's pay schedule are intrinsically bad, then the company has a moral reason to mitigate those inequalities.[41]

Stakeholders[42] who are socially responsible also have reason to learn the extent of the pay differences between a company's employees on the assumption that those differences in pay could be bad in themselves.[43] These stakeholders can include, among others, socially conscious investors,

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40. Not all intrinsic egalitarians are committed to the claim that income inequalities are intrinsically bad. Intrinsic egalitarians can hold different views about the relevant measure for determining whether one person is worse off than another in the sense that would make the inequality intrinsically bad. Intrinsic egalitarians who *do* take income inequalities to be intrinsically bad could take the relevant measure to be material resources or advantages. *Cf.* G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 907 (1989) (defending an ideal of "*equal access to advantage*" (emphasis in original)); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 340-45 (1981) (defining an ideal of equality of resources) [hereinafter Dworkin, *Equality of Resources*]. Intrinsic egalitarians who *do not* regard income inequalities as bad in themselves might take the relevant measure to consist in, for example, welfare, opportunities for welfare, or capabilities. *Cf.* AMARTYA SEN, INEQUALITY REEXAMINED 4 (1992) (defending an ideal of equality of "capability to achieve functionings"); Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77, 88-90 (1989) (defending an ideal of equality of opportunity for welfare); Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185, 191-220 (1981) (discussing, albeit critically, claims of equality of welfare). Even if income inequalities are not themselves intrinsically bad, there could still be intrinsic egalitarian reasons to object to income inequalities insofar as they result in other sorts of inequalities that are intrinsically bad, such as inequalities of welfare, opportunities for welfare, or capabilities.

41. It is important to note that moral reasons of an egalitarian nature are not necessarily overriding: they may compete with countervailing reasons to promote other moral ideals, such as efficiency. So even if egalitarian considerations provide a company with a reason to flatten its pay schedule, the company could still be, all things considered, justified in maintaining significant pay differences between its employees. For example, at some point, an egalitarian reason to minimize income inequalities between workers could be outweighed by a reason of efficiency to maintain pay differences as a means to providing workers with appropriate incentives to be productive. In short, at some point, a gain in equality might be outweighed by a loss in efficiency. *See, e.g.*, SEN, *supra* note 40, at 138-40 (discussing the "incentive" argument in favor of inequality); *supra* text accompanying note 27.

42. *See, e.g.*, R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 31-81 (1984) (discussing the concept of stakeholders and the role of stakeholders in the governance of a company); Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 66-88 (1995) (examining aspects of the stakeholder theory).

43. Once again, the reason to learn the extent of inequality within a company's pay schedule is not necessarily decisive. *Cf. supra* note 41. This reason can compete with other reasons to promote other moral ideals, such as minimizing costs. At some point, the informational value of pay ratio disclosures might be outweighed by the compliance costs of these disclosures. *Cf. supra* text accompanying notes 15-20.

consumers, and employees who are committed to supporting ethical companies and helping companies in general improve their corporate social performance.[44] Thus, the possibility that pay gaps between a company's workers could be intrinsically bad can count in favor of requiring companies to comply with a pay ratio disclosure rule. The pay ratios disclosed might provide socially responsible stakeholders with information about the extent to which inequalities within a company's pay schedule are intrinsically bad and in need of mitigation.

In light of the case for a pay ratio disclosure rule on the basis of intrinsic egalitarianism, we can see that there are at least three reasons why intrinsic egalitarians should also favor a max-min pay ratio disclosure rule over a max-median rule like Section 953(b). First, on any plausible measure of evaluating the overall badness of the overall inequality in a distribution of goods, such as income, the gap between the best-off and worst-off individuals matters more than the gap between the best-off individual and the median individual.[45] Other things being equal, the worst-off individual has the strongest moral claim against inequality.[46] So, other things being equal, improving the lot of the worst-off individual by a certain amount would make the overall inequality in a distribution of goods

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44. Here I presuppose that companies and their investors can have a legitimate interest in promoting not only the objective of maximizing profits, but also other moral objectives as well. *See, e.g.*, Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 787-92 (2007) (discussing the expressed aims of corporations themselves to be socially responsible); Jeanne M. Logsdon & Harry J. Van Buren III, *Justice and Large Corporations: What Do Activist Shareholders Want?*, 47 BUS. & SOC'Y 523, 527-29 (2008) (discussing issues of social justice advocated by activist shareholders); BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE: 2016 1, 25-27 (2016), https://businessroundtable.org/sites/default/files/Principles-of-Corporate-Governance-2016.pdf [https://perma.cc/8S3H-HADH] (recognizing that corporations have obligations to stakeholders other than shareholders). Even a strong proponent of the profit motive, such as Milton Friedman, acknowledges that investors, who are the owners of companies, typically have an interest in constraining their companies' objective to maximize profits by at least some ethical concerns. Friedman writes:

> In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in *ethical* custom.

Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, *in* CORPORATE ETHICS AND CORPORATE GOVERNANCE 173, 173-74 (Walther Ch. Zimmerli et al. eds., 2007) (emphasis added).

45. *See, e.g.*, Larry S. Temkin, *Inequality*, 15 PHIL. & PUB. AFF. 99, 102-06 (1986) (focusing on the "complaints" of particular individuals through the lens of inequality).

46. *See id.* at 341-42.

better than improving the lot of anyone else, including the median individual, by the same amount. Conversely, harming the worst-off by a certain amount would make the overall inequality worse than harming anyone else, including the median individual, by the same amount.

Consequently, the information conveyed under a max-min pay ratio disclosure rule has greater moral significance than the information conveyed under a max-median rule. Reducing the gap between the highest- and lowest-paid workers in a company should take priority over reducing the gap between the highest-paid worker and the median worker. So socially responsible stakeholders have more reason to learn the pay ratio disclosed under a max-min rule than the pay ratio disclosed under a max-median rule.[47]

Second, if inequalities within a company's pay schedule are generally regarded as intrinsically bad (or objectionable for some other reason), then under a pay ratio disclosure rule companies will face public pressure to minimize the pay ratio disclosed.[48] Under a max-median rule, like Section 953(b), a company can reduce the disclosed pay ratio by redistributing compensation from workers below the median to workers at the median.[49] In other words, a company can minimize the pay ratio disclosed under a max-median rule by transferring compensation from its lowest-paid workers to its higher-paid workers at the median. Thus, a max-median rule provides a company with a perverse incentive to redistribute compensation

47. To clarify, this is a comparative claim. I do not deny that there is an egalitarian reason to learn the pay gap between a company's median worker and its highest-paid worker. I only contend that there is a stronger, more urgent egalitarian reason to learn the pay difference between a company's highest-paid and least-paid employees.

48. In the future, companies could face a more direct financial incentive to lower the pay ratio disclosed under a rule, such as Section 953(b). For example, in 2016 the city of Portland, Oregon voted to raise the business-income tax rate on companies whose CEOs earn more than 100 times the pay of their median employees. Gretchen Morgenson, *Portland Adopts Surcharge on C.E.O. Pay in Move vs. Income Inequality*, N.Y. TIMES (Dec. 7, 2016), https://www.nytimes.com/2016/12/07/business/economy/portland-oregon-tax-executive-pay.html [https://perma.cc/5B8N-Q52Y]. In 2014, the California state legislature considered, but ultimately rejected, a bill that would reduce a company's tax rate if the ratio between its CEO's pay and the pay of its median worker were sufficiently low. Gary Cohn, *Overcompensation: Tying Corporate Taxes to CEO Pay*, CAPITAL & MAIN (Aug. 6, 2014), http://capitalandmain.com/features/california-expose/overcompensation-tying-corporate-taxes-to-ceo-pay/ [https://perma.cc/M84G-DRLY]; Harold Meyerson, *California's Bid to Tax CEOs Who Don't Share the Wealth*, WASH. POST (Apr. 30, 2014), https://www.washingtonpost.com/opinions/harold-meyerson-californias-bid-to-tax-ceos-who-dont-share-the-wealth/2014/04/30/fc08619c-d07e-11e3-a6b1-45c4dffb85a6_story.html [https://perma.cc/AE5V-HEE6].

49. Huan Lou, Comment Letter on Pay Ratio Disclosure Rule 20 (Dec. 2, 2013), https://www.sec.gov/comments/s7-07-13/s70713-518.pdf [https://perma.cc/93CX-3N23]; Pay Ratio Disclosure, 80 Fed. Reg. 50,104, 50,162 (Aug. 15, 2015).

from its lower-paid workers to its higher-paid workers. Under no sensible conception of intrinsic egalitarianism would such regressive transfers of income improve the overall inequality in a company's pay schedule.[50] On the contrary, regressive transfers of pay would make the overall inequality worse.

Unlike a max-median pay ratio disclosure rule, a max-min rule would not provide a company with perverse incentives to make regressive transfers of compensation across employees. To reduce the pay ratio disclosed under a max-min rule through a redistribution of pay across a company's workers, the company must transfer compensation from its higher-paid workers to its lower-paid workers. That is precisely what is demanded by any sensible conception of intrinsic egalitarianism.

Third, the administrative costs of complying with a max-min pay ratio disclosure rule should be lower than the costs of complying with a max-median rule. The data collection and analysis required to determine the least-paid worker in a company should be simpler than what is required to determine the median worker. To determine the median worker in a company with several operating segments, the company must consolidate, in a single ranking, compensation data on all its employees (or a sufficiently large sample of all its employees) across all of its operating segments. But to determine its lowest-paid worker, the company need only consolidate, in a single ranking, compensation data on the lowest-paid employee of each of its operating segments. Relative to a max-median rule, a max-min rule not only provides a better measure for evaluating the intrinsic badness of the inequality in a company's pay schedule, but also does so at a lower compliance cost to companies.[51]

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50. *See, e.g.*, LARRY S. TEMKIN, INEQUALITY 320-21 (1993) (discussing the Pigou-Dalton principle for individual transfers); Hugh Dalton, *The Measurement of the Inequality of Incomes*, 30 ECON. J. 348, 351-52 (1920) (illustrating the "principle of transfers"); *see* SEN, *supra* note 40, at 24 (same). To clarify, a max-median pay ratio disclosure rule would not provide companies with exclusively perverse incentives to make only regressive transfers of pay. Under a max-median rule, a company would also have an incentive to transfer income from its CEO to its median employee. Nevertheless, there would remain a perverse incentive to make regressive transfers to the median employee from those who are paid less.

51. At this point, I should note that in addition to simple max-median and max-min pay ratios, there are alternative, more complex ways of measuring the inequality within a company's pay schedule. *See, e.g.*, Filipe Morais & Nada K. Kakabadse, *The Corporate Gini Index (CGI) Determinants and Advantages: Lessons from a Multinational Retail Company Case Study*, 11 INT'L J. DISCLOSURE & GOVERNANCE 380, 380 (2014) (discussing the Corporate Gini Index as a measure of a corporation's pay inequality). *See generally* TEMKIN, *supra* note 50 (providing an exhaustive analysis of alternative ways of evaluating the inequality in a distribution of goods). For two reasons, though, I do not consider the relative merits of alternative, more complex pay ratio disclosure rules in this article. First, the compliance costs of such alternative rules would likely be higher because their data

B. *Critical Analysis*

1. The Levelling Down Objection

Critics might object to any attempt to defend a pay ratio disclosure rule based on intrinsic egalitarianism. Critics could object to the very premise of intrinsic egalitarianism. They might argue that an inequality of any kind, including income inequality, is never bad in itself.[52] To see why, consider a company with two types of workers: white-collar and blue-collar. The white-collar workers earn a higher salary than the blue-collar workers, creating an inequality within the company's pay schedule. Now suppose the managers of the company reduce the salary of the white-collar employees to the level of the blue-collar employees. But rather than redistributing pay from the former to the latter, the managers simply destroy the money previously intended to provide the white-collar workers with a higher salary.

If income inequality were intrinsically bad, then there would be something good about merely reducing the salary of the white-collar employees to the level of the blue-collar employees even if no one were to benefit from the reduction in any way. Such a reduction would, after all, eliminate an inequality. But contrary to the premise of intrinsic egalitarianism, critics might contend that there would be nothing good about merely harming some under conditions in which no one else benefits. Therefore, no form of inequality, including income inequality, is intrinsically bad.

In response to critics, this levelling down objection does provide a strong reason to doubt that an inequality of any kind is ever bad in itself. Because of this, any defense of a pay ratio disclosure rule based on intrinsic egalitarianism must remain controversial. Nevertheless, the levelling down objection is not necessarily decisive, and intrinsic egalitarians have some resources to defend themselves.[53] Consider again the purported counterexample to intrinsic egalitarianism. Intrinsic egalitarians are committed to the claim that there would be something good about merely lowering the salary of the white-collar workers to the level of the blue-

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collection and analysis requirements would likely be more demanding. Second, more complex measures of a company's pay inequality would likely be less intuitive to ordinary users of a company's financial disclosures. Such measures would presuppose a more sophisticated background in statistical analysis. The conceptual simplicity of a max-min pay ratio disclosure rule is an added virtue.

52. The following challenge to intrinsic egalitarianism is an example of the "Levelling Down Objection." Parfit, *supra* note 30, at 98-99.

53. *See id*. at 110-15 (detailing responses to the levelling down objection that are available to intrinsic egalitarians).

collar workers. Such a reduction would eliminate an inequality between these employees.

Intrinsic egalitarians, though, are not committed to the stronger, more objectionable claim that a brute reduction in the pay of white-collar workers would be all things considered justified.[54] No sensible egalitarian regards equality as the only thing of intrinsic value. Intrinsic egalitarians can adopt a pluralistic conception of value, which assigns intrinsic value to more than just equality.[55] For example, intrinsic egalitarians can also regard utility as being intrinsically valuable.[56] On the basis of a pluralistic conception of value, intrinsic egalitarians can contend that the loss in utility from merely reducing the salary of white-collar workers to the level of blue-collar workers would outweigh the gain in equality. Therefore, such a brute reduction in the pay of white-collar employees would not be all things considered justified even though it would bring about more equality between employees. By adopting a pluralistic conception of value and distinguishing all things considered judgments of value from value judgments focused only on equality, intrinsic egalitarians can sensibly object to the mere levelling down of anyone's benefits, including income.[57] In this way, intrinsic egalitarians can mitigate the force of the levelling down objection.

2. The Fundamental Unit of Concern

Even if pay differences between workers can be intrinsically bad, critics might still doubt the case for a pay ratio disclosure rule, whether a max-min rule or a max-median rule, on the basis of intrinsic egalitarianism. Critics could endorse a diachronic conception of intrinsic egalitarianism such that the fundamental unit of egalitarian concern is a person's life considered as a whole.[58] Under a diachronic conception, what is intrinsically bad is if some person's life considered as a whole is worse than another person's life considered as a whole. Under a diachronic

54. *See id.* at 111-12 (distinguishing "Strong Egalitarians," who would consider a brute reduction justified, from "Moderates," who would balance gains in equality against losses in other values).

55. *See, e.g.*, *id.* at 85, 99 (defining a "pluralist egalitarian view" in which it would be better to have both more equality and more utility); Temkin, *supra* note 30, at 336 (distinguishing between monistic egalitarians and egalitarians who hold a pluralistic conception of value).

56. Parfit, *supra* note 30, at 84-85.

57. *Id.* at 110-15.

58. Nagel, *supra* note 34, at 120; Temkin, *supra* note 30, at 328, 340, 349-50; Dennis McKerlie, *Equality and Time*, 99 ETHICS 475, 475-76 (1989) (describing the "complete lives view" of the fundamental egalitarian concern).

conception of intrinsic egalitarianism, pay differences between employees are not necessarily bad in themselves.

To illustrate, suppose a company compensates its workers on the basis of seniority. More senior employees earn more than those less senior, and more senior employees tend to be older than those less senior. Under a diachronic conception of intrinsic egalitarianism, the fact that more senior workers are paid more than those less senior in the company does not necessarily generate an income inequality that is intrinsically bad. The company could still compensate all its employees equally over the entire course of their careers.

In response to critics, there are at least two reasons why a diachronic conception of intrinsic egalitarianism is consistent with support for a pay ratio disclosure rule on intrinsic egalitarian grounds. First, a diachronic conception of intrinsic egalitarianism is consistent with a synchronic conception. Under a synchronic conception, it is bad in itself if one person is worse off than another person considered at a specific time.[59] An intrinsic egalitarian could endorse both a diachronic conception and a synchronic conception of the fundamental unit of egalitarian concern.[60] According to such a hybrid view, an inequality between persons considered at a specific time could be intrinsically bad, and an inequality between the lives of persons considered as a whole could also be intrinsically bad.

Consider income inequalities between the workers of a company. An intrinsic egalitarian might contend that it would be bad in itself if some employees earn less than others over the entire course of their careers. But even if these workers earn the same over their careers considered as a whole, there might still be something intrinsically bad if some of the workers earn less than others at specific times. According to the hybrid egalitarian ideal under consideration, it would be best if there were no income inequalities between employees considering their careers as a whole or at specific times.

Second, not every company can justify the pay gaps between its employees on the basis of a diachronic conception of intrinsic egalitarianism. Not every company compensates its employees on the basis of seniority or otherwise ensures that its workers earn the same over the course of their entire careers. Furthermore, a pay ratio disclosure rule need not unduly prejudice companies that do ensure this. Any sensible rule will permit companies to disclose voluntarily a separate narrative discussion of

59. *See* McKerlie, *supra* note 58, at 481 (describing the "simultaneous segments view" of the fundamental egalitarian concern); Temkin, *supra* note 30, at 349-50 (considering an egalitarian view that focuses on simultaneous or corresponding segments of individuals' lives).

60. McKerlie, *supra* note 58, at 491; Temkin, *supra* note 30, at 349-50.

any considerations that justify the pay ratio disclosed under the rule.[61]

3. Personal Responsibility

On a standard formulation of intrinsic egalitarianism, only undeserved inequalities are intrinsically bad.[62] On this view, what is bad in itself is one person's being worse off than another through no fault of his own.[63] Insofar as someone is worse off than others as a result of choices for which he is personally responsible, this inequality need not be bad in itself.[64] Critics might object to an intrinsic egalitarian defense of a pay ratio disclosure rule on the grounds that pay differences between employees can be deserved.

More specifically, some workers might receive less pay than other workers as a result of choices for which the lower-paid are personally responsible. Perhaps lower-paid employees freely chose to accept a lower-paid position over a higher-paid one. Maybe the lower-paid position involved less difficult work. Or perhaps lower-paid employees freely chose not to develop the skills necessary to qualify for higher-paying jobs that add more value to their companies. Whatever the reason, income inequalities that result from choices for which the lower-paid are personally responsible need not be intrinsically bad. So intrinsic egalitarianism provides no reason to require companies to disclose those income inequalities, which are deserved.[65]

In response to critics, intrinsic egalitarians can concede that not all income inequalities are bad in themselves. In some cases, the lower-paid earn less than others as a result of their own fault. But it is implausible to suggest that all inequalities within every company's pay schedule are deserved.[66] Insofar as pay differences between employees might not be deserved, intrinsic egalitarianism provides one reason to favor adopting a pay ratio disclosure rule. And once again, such a rule need not unduly

61. In its final implementation of Section 953(b), the SEC sensibly permits companies to make such additional narrative disclosures at 17 C.F.R. § 229.402(u) Instruction 9 to Item 402(u) (2016).

62. Temkin, *supra* note 30, at 334-35; Temkin, *supra* note 45, at 101 n.3.

63. Temkin, *supra* note 30, at 334-35; Temkin, *supra* note 45, at 101 n.3; Parfit, *supra* note 30, at 84, 122 n.8.

64. *Cf.* Arneson, *supra* note 40, at 88 ("[I]t is morally fitting to hold individuals responsible for the foreseeable consequences of their voluntary choices"); Dworkin, *Equality of Resources*, *supra* note 40, at 311 (contending that different choices can result in inequalities that are not necessarily objectionable).

65. *See infra* text accompanying notes 166-193 (discussing the possibility that an employee's income might be deserved or underserved).

66. *See* Moriarty, *supra* note 6, at 267 ("The desert view of justice in wages condemns the current disparity between CEO and employee pay.").

prejudice companies that do ensure that their lower-paid employees earn less than other employees only when they are personally responsible for earning less. Insofar as a company can justify a disclosed pay ratio on the basis of the personal responsibility of its employees, the company should be free to disclose voluntarily a separate narrative discussion of this justification under any pay ratio provision.

III. INSTRUMENTAL EGALITARIANISM

A theory of intrinsic egalitarianism can provide some support for a pay ratio disclosure rule. Moreover, considerations of intrinsic egalitarianism also favor the adoption of a max-min pay ratio disclosure rule over a max-median rule, such as Section 953(b). Any intrinsic egalitarian argument, though, must remain controversial, especially in light of the levelling down objection.

In this section, I discuss some less controversial instrumental egalitarian reasons that favor the adoption of a pay ratio disclosure rule.[67] These are reasons to object to pay differences between employees not because those income inequalities are intrinsically bad, but because they risk having bad further consequences.[68] I show that considerations of instrumental egalitarianism also favor the adoption of a max-min pay ratio disclosure rule over a max-median rule. Thus, the instrumental egalitarian arguments I defend in this section are also a call for Congress to amend Section 953(b) accordingly.

A. *Welfare*

Inequalities within a company's pay schedule could be objectionable on grounds of the welfare[69] of the company's employees.[70] Higher-paid

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67. My identification of the relevant instrumental egalitarian reasons is especially indebted to Scanlon, *supra* note 30.

68. Like the reasons of intrinsic egalitarianism discussed earlier, the reasons of instrumental egalitarianism that I discuss below are not necessarily overriding. All egalitarian reasons may compete with countervailing reasons to promote other moral ideals. *See generally supra* notes 41, 43.

69. I remain neutral on the contentious issue of what a person's welfare or, in other words, well-being consists in. Competing conceptions of well-being might take it to consist in, among other things, the realization of certain mental states, the satisfaction of certain desires, or the obtaining of certain objective goods. For an extended discussion of the concept of well-being, see JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE 7-72 (1986). For a more succinct discussion, see SHELLY KAGAN, NORMATIVE ETHICS 29-41 (1998).

70. *Cf.* Scanlon, *supra* note 30, at 42-43 (describing a "humanitarian concern" to eliminate inequalities).

workers might use their additional compensation to attain higher levels of well-being than lower-paid workers. For example, higher levels of income can be used to obtain a more nutritious diet or better housing, which would directly improve the quality of one's life. By redistributing compensation from higher-paid to lower-paid employees, a company might improve the welfare of the lower-paid employees without sacrificing anything of comparable moral importance in the lives of the higher-paid employees.[71] Three general reasons grounded in the well-being of a company's workers could count in favor of such progressive redistributions of pay. Each reason not only supports the adoption of a pay ratio disclosure rule in general, but also counts in favor of a max-min rule over a max-median rule, like Section 953(b).

1. Poverty

The major institutions in a society, including companies, might have a moral duty to help ensure that no member of the society or its institutions has a standard of living that falls below some minimally acceptable level.[72] Provisionally, we can think of this level in terms of the poverty line.[73] If a company's pay schedule contains large inequalities, those pay differences could be objectionable if the company's lower-paid employees are living in poverty. More precisely, the company might be paying its lower-paid workers a wage that is below what is required to live above the poverty line.

The company could also be in a position to help lift its lower-paid employees out of poverty by transferring income to them from its higher-paid employees. If that is the case, the company might have a moral duty

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71. *Cf. id.* at 42 ("If some people are living under terrible conditions, while others are very well off indeed, then a transfer of resources from the better to the worse off, if it can be accomplished without other bad effects, is desirable as a way of alleviating suffering without creating new hardships of comparable severity."); Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972) ("If it is in our power to prevent something bad from happening, without sacrificing anything of comparable moral importance, we ought, morally, to do it.").

72. *See* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 283 (2004) ("[A] minimally just and decent society would provide all its citizens with a minimum threshold amount of certain key opportunities or 'capabilities'"). *Cf.* Scanlon, *supra* note 30, at 42-43, 46 (describing a humanitarian reason to benefit "those who are . . . living under conditions which we regard as seriously deficient" and to "relieve suffering or severe deprivation").

73. *See* Ronald Dworkin, *Why Liberals Should Care about Equality*, *in* A MATTER OF PRINCIPLE 205, 208 (1985) ("It is, I think, apparent that the United States falls far short now [of the ideal of equality of resources]. A substantial minority of Americans . . . earn wages below any realistic 'poverty line'").

to flatten its pay schedule accordingly to minimize the extent to which its employees live in poverty. A pay ratio disclosure rule could be justified as a means of providing socially responsible stakeholders with information about whether any of a company's workers are living below the poverty line and, if so, the extent to which the company is in a position to improve the quality of their lives.

Critics might object, though, that a pay ratio disclosure rule cannot be defended on the basis of the possibility that U.S. workers are living in poverty. The U.S. has in place various safeguards providing a social safety net for U.S. citizens. For example, there are federal and state minimum wage laws.[74] Social welfare programs also provide benefits to both employed and unemployed U.S. citizens living under conditions of hardship.[75] Because there is a social safety net for U.S. citizens, U.S. companies need not concern themselves with the possibility that any of their workers are living below the poverty line.

In response to these critics, there are at least two reasons why the possibility of poverty is still relevant to U.S. companies. First, some might reasonably doubt the sufficiency of the social safety net provided to U.S. citizens. They could reasonably doubt whether the labor laws and social welfare programs in the U.S. go far enough to help U.S. citizens rise above the poverty line.[76] Second, not all employees of U.S. companies are U.S. citizens or living in the United States.[77] Some U.S. companies are

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74. *See Minimum Wage Laws in the States*, WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, https://www.dol.gov/whd/minwage/america.htm [https://perma.cc/VGT8-SVL8] (last updated Aug. 1, 2016) (documenting the minimum wage in each state for 2016).

75. *Cf.* IRWIN GARFINKEL ET AL., WEALTH AND WELFARE STATES: IS AMERICA A LAGGARD OR LEADER? (2010) (analyzing U.S. social welfare programs in relation to those of other developed nations and arguing that social welfare programs in the U.S. are quite large).

76. *Cf.* CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014 12 (2015), http://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf [https://perma.cc/W42S-DWWQ] (noting that in 2014, the official poverty rate in the U.S. was 14.8 percent).

77. Under Section 953(b), a company is required to include employees located in jurisdictions outside the U.S. when determining the pay of its median employee. However, in its final implementation of Section 953(b), the SEC created two exceptions permitting companies to exclude some non-U.S. employees when making this determination. First, companies may exclude non-U.S. employees living in foreign jurisdictions with data privacy laws that prevent companies from accessing the compensation information necessary to calculate the pay ratio required under Section 953(b). *See* Pay Ratio Disclosure, 17 C.F.R. § 229.402(u)(4)(i)(2016) (documenting this privacy-based exception to Section 953(b)). Second, under a "de minimis" exemption, companies are permitted to exclude up to five percent of their non-U.S. employees under certain circumstances. *Id.* § 229.402(u)(4)(ii). I leave it an open question whether this de minimis exemption is a justifiable part of the SEC's final implementation of Section 953(b). However, under a

multinational with operations abroad. These multinational U.S. companies could employ workers in less-developed countries that lack the kind of social safety net provided to U.S. citizens.[78] Such U.S. companies could then have a moral duty to compensate their employees abroad above what is legally required to lift them out of poverty.[79]

Assuming a pay ratio disclosure rule can be justified on the basis of the possibility that a company's workers are living below the poverty line, it is apparent that this justification also counts in favor of a max-min rule over a max-median rule. The compensation of a company's median worker is not a reliable indicator of whether any of the company's employees are being paid below what is required to live above the poverty line. The compensation of a company's median worker might be quite high even though the wages of its lower-paid employees force them to live in squalor. A better indication of the extent to which a company's workers could be living in poverty is the compensation of the company's least-paid employee.

In addition, insofar as companies would face public pressure to minimize a disclosed pay ratio, a max-median pay ratio disclosure rule would provide a company with a perverse incentive to lower the compensation of those employees most at risk of living below the poverty line. As we have noted, under a max-median rule, a company could lower the disclosed pay ratio by redistributing income from its lowest-paid workers to its higher-paid median worker.[80] Under a max-min rule, a company would have the right incentive to give priority to increasing the compensation of its employees who are most at risk of living in poverty.

2. The Diminishing Marginal Utility of Income

The diminishing marginal utility of income could also count against

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max-min pay ratio disclosure rule, such a de minimis exemption would be gratuitous: a company's least-paid employee might be living in a jurisdiction outside the U.S.

78. *See generally* WORLD BANK GROUP, THE STATE OF SOCIAL SAFETY NETS 2015, (2015), http://documents.worldbank.org/curated/en/415491467994645020/pdf/97882-PUB-REVISED-Box393232B-PUBLIC-DOCDATE-6-29-2015-DOI-10-1596978-1-4648-0543-1-EPI-1464805431.pdf [https://perma.cc/LMY8-VFBM] (documenting the need for social safety nets around the world).

79. As Elizabeth Anderson writes:

> As the economy becomes global, we are all implicated in an international division of labor subject to assessment from an egalitarian point of view. We have obligations not only to the citizens of our country but to our fellow workers, who are now found in virtually every part of the globe.

Anderson, *supra* note 30, at 321 n.78.

80. *See supra* text accompanying note 49.

inequalities within a company's pay schedule.[81] According to the principle of diminishing marginal utility, a person derives less utility from each additional unit of money received.[82] As a person's income increases, each additional unit of income benefits the person less. An underlying assumption here is that a person will spend any additional units of money that she receives on goods that are of decreasing importance to her welfare.[83] Presumably, a person will spend her first dollars on goods that satisfy her most urgent needs. Subsequent dollars will be spent to satisfy less urgent needs or preferences.[84]

Assuming the employees of a company have similar utility functions, the diminishing marginal utility of income provides one reason to think that the company could increase the overall utility of its workforce by decreasing the pay differences between its employees. To see why, suppose a company pays some of its workers significantly more than it does others. By hypothesis, the higher-paid employees derive less utility from their last dollar earned than the lower-paid employees would derive from it if it were redistributed to them. Thus, assuming a company has a moral duty to increase the overall utility of its workforce, the diminishing marginal utility of money can provide the company with a reason to redistribute income from its higher-paid to its lower-paid workers, minimizing the income inequality between them.[85]

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81. *Cf.* Kenneth J. Arrow, *A Utilitarian Approach to the Concept of Equality in Public Expenditures*, 85 Q. J. ECON. 409, 409 (1971) ("In the utilitarian discussion of income distribution, equality of income is derived from the maximization conditions if it is further assumed that individuals have the same utility functions, each with diminishing marginal utility.").

82. *See* Nagel, *supra* note 34, at 107 ("The principle of diminishing marginal utility states that for many goods, a particular further increment has less value to someone who already possesses a significant amount of the good than to someone who has less." (footnote omitted)).

83. *See* ABBA P. LERNER, THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS 26-27 (1944) (explaining that the principle of diminishing marginal utility of income means that things purchased with each additional "increment of income would be things that are rejected when income is smaller because they give less satisfaction . . . .")

84. For a persuasive explanation, though, of why money does not always have diminishing utility, see Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21, 24-30 (1987).

85. To clarify, the diminishing marginal utility of income does not necessarily entail that a company would maximize the utility of its workforce or overall utility by eliminating all pay gaps between its workers. For example, at some point, the decision to flatten a company's pay schedule further could have detrimental effects on the incentives of workers to be productive, ultimately reducing the benefits available to both a company's workers and other stakeholders. *See, e.g.*, Nagel, *supra* note 34, at 107 (recognizing that maximizing marginal utility must be balanced against, among other things, its effects on incentives to work and invest); SEN, *supra* note 40, at 138-40 ("Inequality may . . . play a functionally useful role in encouraging work, enterprise, and investment."); *supra* note 41 (discussing the

A pay ratio disclosure rule might be justified as a means of providing socially responsible stakeholders with information indicating the extent to which a company is in a position to increase the overall utility of its workforce by redistributing compensation between its employees. This justification also favors the adoption of a max-min pay ratio disclosure rule over a max-median rule, like Section 953(b). By hypothesis, the lowest-paid worker in a company stands to gain the most utility from obtaining an additional unit of income. Thus, the lowest-paid worker stands to benefit more than the median worker from obtaining an additional unit of pay. Therefore, the ratio of a CEO's pay to the compensation of the lowest-paid employee in a company is a better indication of how much overall utility the company is in a position to promote by redistributing income among its employees.

Insofar as there is public pressure to minimize a disclosed pay ratio, a max-min pay ratio disclosure rule would also provide a company with the right incentive to make maximally efficient transfers of pay between employees. Under a max-min rule, a company would have the right incentive to shift pay from its CEO to its lowest-paid employee. Other things being equal, that would be a utility maximizing transfer of income. Under a max-median rule, a company would have a sub-optimal incentive to redistribute pay from its CEO to its median worker. By hypothesis, that would not be a maximally efficient transfer.

3. Prioritarianism

A prioritarian theory of how to value the welfare of individuals can provide a more general reason to object to pay differences between employees. This is a reason that does not depend on (a) the absolute magnitude of the well-being of a company's lower-paid workers or (b) the empirical assumption that lower-paid workers would derive a larger benefit from receiving an additional unit of pay compared to higher-paid workers. A prioritarian case against inequalities within a company's pay schedule does not presume the diminishing marginal utility of income or that any lower-paid employees are living below the poverty line. Instead, the prioritarian case is based solely on a conception of how to value the welfare of individuals and, consequently, how to value benefits to their welfare.

According to prioritarians, benefitting a person matters more, the worse off she is.[86] In other words, the value of improving someone's well-

"incentive" argument in favor of inequality); *supra* text accompanying note 27. The case for reducing inequalities within a company's pay schedule on the basis of the diminishing marginal utility of income has its limits.

86. *See* Parfit, *supra* note 30, at 101 (addressing the notion that we should give priority

being by a particular magnitude is higher, the worse off she is.[87] To illustrate, suppose we face a choice between providing an equal benefit to the welfare of one of two individuals. That is, we could improve one's well-being by a particular amount or we could improve the other's well-being by this same amount. Suppose, though, that one of these individuals is worse off than the other – one has a lower level of well-being than the other. According to prioritarians, all other things being equal, it would be better to benefit the worse-off individual. Even though we stand to benefit both persons equally, the interests of the worse-off should take priority over the interests of the better-off.[88]

To develop a fully worked out prioritarian theory of how to value benefits to someone's welfare, there are two crucially important issues that must be addressed. First, like intrinsic egalitarians, prioritarians must determine the fundamental unit of concern in their theory.[89] When determining how much to value a benefit to someone's well-being, prioritarians must determine whether the fundamental unit of concern is (a) the quality of the person's life considered as a whole or (b) the quality of her life considered at the time of the benefit.[90] On the one hand, prioritarians might contend that benefitting a person matters more, the worse her life is when considered as a whole. On the other hand, they might claim that benefitting someone matters more, the worse her life at the

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to helping those who are worse off).

87. *See* Parfit, *supra* note 30, at 105 (stating that on the Priority View, "*utility* has diminishing marginal *moral importance*" (emphasis in original)); *see also* Larry S. Temkin, *Equality, Priority or What?*, 19 ECON. & PHIL. 61, 64 (2003) (writing that according to prioritarianism, "there is a diminishing marginal value of well-being, such that the worse off someone is in *absolute* terms, the greater importance or value is attached to improving their well-being by a given amount"). To clarify, the prioritarian thesis can be expressed as the diminishing marginal value of welfare, but not resources, such as income.

88. To clarify the relation between prioritarianism and intrinsic egalitarianism, note that these views are logically consistent. A person could coherently accept both prioritarianism and intrinsic egalitarianism. *See* Parfit, *supra* note 30, at 103 (mentioning the possibility of a "mixed view"). Nevertheless, these views are logically distinct. Intrinsic egalitarianism is an essentially comparative moral view, whereas prioritarianism is an essentially non-comparative view. Unlike intrinsic egalitarians, prioritarians as such place no intrinsic value on how one person fares relative to another. For this reason, prioritarianism is not open to the levelling down objection, which threatens the plausibility of intrinsic egalitarianism. *See* Parfit, *supra* note 30, at 103-05; *cf. supra* text accompanying notes 52-57. Like intrinsic egalitarians, though, prioritarians can incorporate into their theory an element of personal responsibility, such that how much benefitting people who are worse off really matters could depend on how much they are worse off as a result of their own fault. *See* Richard J. Arneson, *Debate: Equality of Opportunity for Welfare Defended and Recanted*, 7 J. POL. PHIL. 488, 497 (1999) (describing a view of "responsibility-catering prioritarianism"); *cf. supra* text accompanying notes 62-66.

89. *Cf. supra* text accompanying notes 58-61.

90. *See* Parfit, *supra* note 30, at 101.

time of the benefit. Alternatively, prioritarians could argue that the value of a benefit to someone's well-being is a complex function of both the quality of her life considered as a whole and at the time of the benefit.

Second, prioritarians must determine how much priority the interests of the worse-off should receive. At one extreme, prioritarians could claim that the interests of the worse-off take absolute priority over the interests of the better-off.[91] On this extreme view, it would be best to benefit the worse-off rather than the better-off no matter how much more we could benefit the better-off instead. On a less extreme view, prioritarians can contend that the interests of the worse-off take some priority over the interests of the better-off, but the priority is not absolute.[92] Although benefitting people does matter more the worse off they are, it can nevertheless be best to confer a relatively large benefit on the better-off rather than a relatively small benefit on the worse-off when the difference between the magnitudes of these benefits is sufficiently large.[93]

In light of the essential details of prioritarianism, we can see how a prioritarian conception of how to value the welfare of individuals might count against inequalities within a company's pay schedule. Suppose the lower-paid employees in a company are worse off than the higher-paid. More precisely, assume the lower-paid workers have a lower quality of life considered as a whole and at the time they are compensated compared to their higher-paid co-workers. Then benefitting the lower-paid matters more than benefitting the higher-paid. In other words, increasing the welfare of the lower-paid by a particular magnitude would be more valuable than increasing the welfare of the higher-paid by the same magnitude.[94]

Consequently, a company might promote more overall value in the lives of its employees by redistributing income from its higher-paid to lower-paid employees. Even if lower-paid workers would not derive more utility than higher-paid workers from an additional unit of income, the additional utility from another unit of income could still be more valuable in the life of the lower-paid. Hence, assuming a company has a moral duty to maximize the overall value of the welfare in the lives of its employees, prioritarianism can provide the company with a reason to reduce the pay differences between its employees by transferring income from its higher-

91. *See id.* at 122-23 (noting that on an extreme priority view, absolute priority should be given to those who are worse off).

92. *See id.* at 121 (noting that absolute priority need not be given to benefitting the worse-off under more moderate variants of prioritarianism).

93. *See id.* (questioning whether the smallest benefit to the worst-off is necessarily more valuable than a much greater benefit to the better-off).

94. *Id.*

paid to lower-paid employees.[95]

So prioritarianism can support the adoption of a pay ratio disclosure rule as a means to providing socially responsible stakeholders with a source of information about the extent to which a company might be in a position to make adjustments to its pay schedule that would increase the overall value of the well-being of its employees. Furthermore, this prioritarian case for a pay ratio disclosure rule also favors the adoption of a max-min rule over a max-median rule, such as Section 953(b).

Presumably, the lowest-paid employees in a company will be the worst-off employees in the company. Thus, the least-paid employee will presumably be worse off than the median employee. Therefore, under any prioritarian theory, the interests of the lowest-paid employee in a company should take priority over the interests of any other employee in the company, including the median employee. So compared to a max-median rule, a max-min pay ratio disclosure rule would provide a better measure of how much value a company might be able to promote in the lives of its employees by redistributing income from its higher-paid to its lower-paid employees.

And insofar as a company would face public pressure to minimize a disclosed pay ratio, a max-min rule would provide the company with the right incentive to redistribute income from its workers with the weakest claim to aid to its workers with the most urgent claim. However, under a max-median rule, a company would have a perverse incentive to give priority to increasing the compensation of its median employee at the unacceptable expense of its least-paid employee.

B. *Non-domination*

A more specific egalitarian ideal that could support the adoption of a pay ratio disclosure rule locates the value of equality in a kind of relationship that should hold between persons.[96] It is a relationship of non-

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95. Like the other moral considerations we have discussed, a company's moral duty to increase the value of its employees' welfare is not necessarily overriding: it can compete with other moral duties to respect the moral claims of other stakeholders. For example, the managers of a company also owe a fiduciary duty to its shareholders to operate the company in a way that generates a profit, where increasing profits might entail reducing labor costs. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 91 (1991) (describing how managers have fiduciary duties to equity investors). I leave it an open question how a company should balance such competing duties to its various stakeholders.

96. *See, e.g.*, Scanlon, *supra* note 30, at 43-44, 46; Anderson, *supra* note 30, at 313; Scheffler, *supra* note 30, at 33-34.

domination.[97] In this kind of relationship, persons treat each other as, in some sense, free and equal.[98] To treat another as free and equal in the relevant sense, a person must not exercise "an unacceptable degree of control over the lives of others."[99] To respect the value of non-domination, a person must not exercise an unacceptable degree of power over determining what another chooses or has the capacity to choose.[100]

The value of non-domination can certainly relate to the welfare of an individual. Coercion can harm an individual. A person could be forced to do something that would not be in her best personal interests. If the person had more freedom, she would choose to do something else that would better promote her own well-being.[101]

Nevertheless, although the value of non-domination can relate to the welfare of an individual in many cases, these values are arguably distinct moral ideals. Presumably, others could exercise an unacceptable degree of power over someone by forcing her to do what is in fact in her best personal interests. Such coercion could constitute an objectionable form of paternalism.[102] Thus, the egalitarian value of non-domination seems more closely related to the value of autonomy: a person's capacity to determine what happens in her life through her own free choices.[103]

In light of the value of non-domination, it is apparent how large inequalities of wealth could undermine this value by providing some with an unacceptably high degree of power over others. At the societal level, suppose resources are concentrated in the hands of a few. Then the have-nots might be overly dependent on the haves for obtaining a share of

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97. *See, e.g.*, Scanlon, *supra* note 30, at 44 (explaining that inequality can enable people with greater power to exercise an unacceptable degree of control over the lives of others); Anderson, *supra* note 30, at 313, 315; Frederick Neuhouser, *Rousseau's Critique of Economic Inequality*, 41 PHIL. & PUB. AFF. 193, 197 (2013). For an extended analysis of the concept of "non-domination," see PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 51-109 (1997).

98. *See* Anderson, *supra* note 30, at 327 (discussing the freedom citizens enjoy under a conception of democratic equality); Scheffler, *supra* note 30, at 31 (detailing distributive egalitarianism and its understanding of citizens as free and equal). For an analysis of the concept of "free and equal persons," see RAWLS, *supra* note 34, at 18-24.

99. Scanlon, *supra* note 30, at 43-44.

100. *See id.* at 43-44, 46 (discussing some negative effects of imbalances of power); Parfit, *supra* note 30, at 86 (noting the possibility that inequalities could have the bad effect of putting "some people in the power of others").

101. *See, e.g.*, T. M. SCANLON, WHAT WE OWE TO EACH OTHER 251-52 (1998) (describing an instrumental value of choice).

102. *See id.* at 254 (discussing reasons to object to a principle permitting "paternalistic interference in a person's life").

103. *Cf.* PETTIT, *supra* note 97, at 81-82 (comparing the ideal of non-domination with the ideal of personal autonomy or "self-mastery"); JOSEPH RAZ, THE MORALITY OF FREEDOM 369-430 (1986) (discussing the moral and political importance of autonomy).

resources necessary to living a life with dignity. The owners of resources would possess an extraordinarily high degree of bargaining power over others considered both individually and collectively. So those with resources would have an extraordinarily high degree of power over determining the terms of any agreement with those in need. Consequently, the few with resources might exercise an unacceptable degree of control over determining the options available to others and their prospects for actually obtaining those options.

In the setting of a particular company, inequalities of income could contribute in a similar way to undermining the value of non-domination in the relationships of lower-paid workers. The relevant relationships could be both internal and external to the company. Suppose the lower-paid employees of a company possess much less wealth than others inside or outside the company. As a result, the wealthier could have an unacceptably high degree of power over determining the life prospects of the lower-paid workers both internal and external to the company. Outside the company, the lower-paid could be unreasonably forced into their ways of life away from work. For example, the lower-paid might be forced to live in certain areas, in certain kinds of housing, and to engage in or abstain from certain activities that are normally the objects of free choice among others.

Inside a company, higher-paid employees could have not only more wealth than the lower-paid, but also managerial authority over the lower-paid. Assuming the lower-paid lack sufficiently good exit options, their higher-paid managers might have an unacceptably high degree of power over determining what the lower-paid do for the company and the conditions under which they do it. Hence, the lower-paid could be unacceptably vulnerable to being forced to perform work that is not sufficiently respectful of their dignity or to perform work under conditions that are not sufficiently humane. Perhaps the greater power of the higher-paid could even have a corrupting influence on them, disposing them to be less sensitive to the interests of their lower-paid subordinates.[104] In that case, the lower-paid could be not only unacceptably vulnerable, but also at an unacceptably high risk of being coerced into performing undignified work under inhumane conditions.

The fact that income inequalities within companies can contribute to undermining the value of non-domination in the relationships of lower-paid workers might provide a justification for a pay ratio disclosure rule. The pay ratio disclosed could serve as an indication of the risk that lower-paid

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104. *See* Sreedhari D. Desai et al., *Meaner Managers: A Consequence of Income Inequality*, *in* SOCIAL DECISION MAKING: SOCIAL DILEMMAS, SOCIAL VALUES, AND ETHICAL JUDGMENTS 315, 315 (Roderick M. Kramer et al. eds., 2010) (noting that power concentrations can lead managers to distance themselves from subordinates).

employees in a company are living at the mercy of others who possess an unacceptably high degree of power over the lower-paid either inside or outside the company. Socially responsible stakeholders could value this information as a means to determining whether a company should adjust its pay schedule to protect better the autonomy of its lower-paid workers.

In addition to supporting the adoption of a pay ratio disclosure rule in general, the value of non-domination also favors more specifically the adoption of a max-min rule over a max-median rule, like Section 953(b), for two reasons. First, the least-paid worker in a company is likely the most vulnerable to the worst sort of domination in her relationships both internal and external to the company. Relative to the median employee of a company, the least-paid likely has less wealth overall and worse overall opportunities both inside and outside the company. Thus, relative to the median employee, the least-paid is more at risk of relationships that harm her autonomy—relationships in which others exercise an unacceptably high degree of control over her way of life. So the least-paid worker in a company likely has the strongest, most urgent claim to protection from domination.

Second, insofar as a company faces public pressure to minimize a pay ratio required for disclosure, a max-median rule would provide a company with a perverse incentive to make its most vulnerable employees even more vulnerable to domination by others. As we have discussed, under a max-median rule, a company would have a perverse incentive to transfer pay from its lowest-paid workers to its higher-paid median worker.[105] Such an illicit transfer might benefit the autonomy of the median employee, but only at an unacceptable cost to those whose autonomy stands in more urgent need of protection.

Unlike a max-median pay ratio disclosure rule, a max-min rule would provide a company with the right incentive to protect its workers who are most vulnerable to domination. Under a max-min rule, a company would have the right incentive to transfer pay from its highest-paid employees to its lowest-paid employees. Presumably, such a transfer would reduce the power that the highest-paid have over others. Such a progressive transfer would increase the control that the most vulnerable workers in the company have over their own lives.

C. *Fairness*

Considerations of fairness could provide another ground on which to

105. *See supra* text accompanying note 48.

object to pay disparities within a company.[106] Income inequalities within a company could indicate some sort of unfairness in a competitive process for obtaining certain goods. In other words, a pay difference between employees might indicate that some have an unfair advantage in the competitive pursuit of certain goods. If so, then others would be at an unfair disadvantage in their prospects for obtaining the relevant goods. Ex ante, a pay disparity could be the result of some past unfairness in a competitive process. Ex post, income inequalities could result in producing various kinds of unfairness in future competitions for goods.

The moral ideal of fairness can relate to the aforementioned values of welfare and non-domination. Unfairness in the pursuit of certain goods can harm the well-being of persons and lead to their overdependence on the will of others. For example, imagine a society characterized by a caste system. In this society, high-paying jobs are reserved for those in the higher caste. Those in the lower caste are eligible only for low-paying jobs, where they would be subservient to members of the higher caste. Consequently, people in the higher caste typically enjoy lives of opulence, while individuals in the lower caste live in poverty under conditions dictated to them by the affluent.

Suppose membership in the higher caste is determined by membership in an exclusive set of families. Those in the lower caste can achieve upward social mobility only through the rare event of marriage or adoption into one of the privileged families. In this society, members of the lower caste are at an unfair disadvantage relative to the higher caste in their pursuit of a high-paying job, which would afford them a life with a decent level of autonomy and well-being. This unfairness would result directly in both the suffering of individuals in the lower caste and their domination by those in the higher caste. Moreover, members of both the lower and higher castes could suffer losses in their welfare because the high-paying jobs in their society are not necessarily going to those with the most merit to perform such jobs.

However, although fairness can relate to the values of welfare and non-domination in many cases, it is arguably a distinct moral ideal. An individual can have a claim against unfair treatment in the pursuit of a good even if she does not suffer a loss in her well-being or autonomy as a result of the unfair treatment. To illustrate, consider again the caste-based society just discussed. In this society, every individual in the lower caste is at an unfair disadvantage in pursuing a high-paying job given that such jobs are

106. *See, e.g.*, Scanlon, *supra* note 30, at 44 ("Some forms of equality are essential preconditions for the fairness of certain processes."); Parfit, *supra* note 30, at 88-89 (noting that considerations of fairness could constitute a "deontic egalitarian" reason against certain inequalities).

reserved for those in the higher caste, and familial relations determine membership in the higher caste. Everyone in the lower caste has a claim against such unfairness in her pursuit of a high-paying job.

Now assume an individual in the lower caste has the rare fortune of moving up in the social hierarchy by marrying into one of the privileged families. As a result of his luck, this individual obtains a high-paying job and suffers none of the losses in well-being or autonomy that typically burden those in his former caste. Nevertheless, this individual was still at an unfair disadvantage in pursuing a high-paying job in the first place, and he had a claim against such unfairness even though it did not ultimately impair his welfare or autonomy. In general, people can be treated unfairly even if the unfair treatment does not ultimately harm their welfare or autonomy.

1. The Pay Setting Process

In a capitalist economy, I presume the compensation package provided to each employee of a company should be the result of a fair situation of bargaining. The pay to each worker in a company should be the outcome of a fair process of bargaining.[107] Any unfairness in the process of negotiating a worker's pay is grounds for complaint. Not necessarily a legal complaint, but a moral complaint at the very least.

An extraordinarily large pay gap between employees of a company could indicate some kind of unfairness in the processes used to determine pay within the company. On the one hand, higher-paid workers in the company might have an unfair advantage in the negotiation of their compensation. They might have too much bargaining power over negotiating their pay. On the other hand, lower-paid workers could be at an unfair disadvantage in the pay-setting process. They might have too little bargaining power over the determination of their income.

a. *Executive Compensation*

To illustrate the first possibility, consider the CEO of a company. A CEO's compensation package is usually determined by the company's board of directors.[108] A CEO's pay is ultimately the result of a negotiation

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107. *Cf.* MORIARTY, *supra* note 6, at 258 (describing a view according to which a just wage is the outcome of a bargaining process containing "no imperfections (e.g., fraud, coercion)").

108. *See, e.g.*, BEBCHUK & FRIED, *supra* note 6, at 24 (noting that, more precisely, a CEO's pay is usually determined by the compensation committee of the board of directors, where the compensation committee is composed exclusively of independent directors).

between the CEO and the company's board. To be fair, the negotiation should be carried out at arm's length.[109] There should be no force, fraud, or biases among the board of directors favoring the CEO. Biases could result in the board's not caring sufficiently about the interests of other stakeholders who stand to be harmed by excessive CEO compensation. Examples of these other stakeholders include, among others, the company's shareholders, other employees, and customers. Presumably, excessive CEO pay could otherwise be used to increase shareholder value, raise other workers' wages, or reduce prices charged to consumers.

A variety of factors, though, could bias a board in favor of the CEO. These biases could provide the CEO with an unfair advantage in negotiating his pay with the board. With too much bargaining power, the CEO would be in a position to extract "rent" in the negotiation process.[110] In this context, rent would be excessive compensation not justified on any reasonable basis for awarding CEO pay.

To clarify, excessive CEO compensation would not be necessary to hire, retain, or optimally motivate the CEO to run the company.[111] Excessive CEO pay would not be necessary to provide optimal incentives to other workers who might aspire to increase their productivity in order to move up the company ranks.[112] And excessive CEO pay would not be necessary to signal to investors or any other relevant stakeholders anything sufficiently important about the company itself or its CEO relative to other peer firms or their CEOs.[113] In short, excessive CEO compensation would unjustifiably harm the interests of other stakeholders that the board should respect when negotiating over the CEO's pay.

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109. *Cf.* BEBCHUK & FRIED, *supra* note 6, at 23 (suggesting that shareholders would be protected from the mal-aligned interests of corporate executives and directors under the arm's-length model); CRYSTAL, *supra* note 6, at 215 (emphasizing the importance of an arm's length negotiation between a CEO and the board of directors in determining the CEO's compensation); MORIARTY, *supra* note 6, at 259 (suggesting that true arm's-length negotiations would indeed result in lower and more just levels of executive compensation).

110. *See, e.g.*, BEBCHUK & FRIED, *supra* note 6, at 62 (describing, in contrast to the arm's length model, the managerial power model, which leads to the extraction of "rents" due to unfair bargaining power); STIGLITZ, *supra* note 7, at 39-40 (noting that CEOs with unchecked powers can secure higher incomes by taking from others rather than generating wealth).

111. *Cf.* Jeffrey Moriarty, *How Much Compensation Can CEOs Permissibly Accept?*, 19 BUS. ETHICS Q. 235, 237 (2009) (defining the "*minimum effective compensation*" of a CEO (emphasis in original)).

112. *See supra* text accompanying note 27.

113. *See, e.g.*, CRYSTAL, supra note 6, at 221 (describing a company's "institutional pride" as a motivation for not paying its CEO "below the average"); Edward J. Zajac & James D. Westphal, *Accounting for the Explanations of CEO Compensation: Substance and Symbolism*, 40 ADMIN. SCI. Q. 283, 283-84 (1995); Rachel M. Hayes & Scott Schaefer, *CEO Pay and the Lake Wobegon Effect*, 94 J. FIN. ECON. 280, 289-90 (2009).

The factors that could bias a board in favor of granting a CEO too much pay can range from the obvious to the more subtle. Consider six potential biases.[114] First, a CEO might have a significant influence over who ultimately gets nominated and appointed to serve on his company's board of directors.[115] As a result, directors could be inclined to grant a CEO excessive pay as a means of strengthening their tenure on the board.[116] Directors might fear that unless they concede to a CEO's demand for excessive compensation, the CEO will oppose or not support their future re-nomination and re-appointment to continue serving on the board.[117]

Second, even if directors do not feel any fear that a CEO will oppose or not support their re-nomination and re-appointment to the board, directors might still feel a debt of gratitude to the CEO for supporting their nomination and appointment in the first place.[118] To reciprocate, directors could again be inclined to award a CEO with excessive compensation.[119]

Third, some directors might have a personal friendship with the CEO.[120] The friendship could have preceded their appointment to the board or it might have developed after.[121] Assuming friends are in some sense partial to each other's interests, a relation of friendship between directors and a CEO could motivate the directors to overpay the CEO.[122]

Fourth, a CEO might serve on the board of her own company.[123] Directors can have an interest in promoting an atmosphere of congeniality

114. The relevant biases could be either conscious or subconscious among a board of directors. *See, e.g.*, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006) (discussing the related concept of implicit biases).

115. *See, e.g.*, BEBCHUK & FRIED, *supra* note 6, at 26-27 (discussing the powerful influence that CEOs can possess, even if they are not formally on the nominating committee, over who gets nominated to serve on the board).

116. *See id.* (explaining that "sparring with the CEO over executive compensation" can create "friction and unpleasantness" which directors may wish to avoid).

117. Even in the absence of an explicit demand for excessive pay by the CEO, directors could be motivated to take the initiative in offering the CEO excessive compensation as a means of generating the goodwill between them that could improve the directors' prospects for being re-elected to the board.

118. *See* MORIARTY, *supra* note 6, at 260 (mentioning the gratitude that directors might feel for being nominated for a "prestigious, lucrative, and undemanding" job).

119. *See id.* (explaining the phenomenon in terms of "return[ing] the favor").

120. *See* BEBCHUK & FRIED, *supra* note 6, at 31 (describing friendship and loyalty as one of the social and psychological factors that compromises equitable CEO-director relationships).

121. *Id.*

122. *See id.* (suggesting that because CEOs often play a role in recruiting and onboarding directors, directors have less of an incentive to bargain effectively over CEO pay).

123. *See id.* at 32 (noting the potential for an even closer relationship).

among all board members.[124] More socially harmonious relations among directors could make serving on the board a more pleasant experience. Conversely, disharmony among directors could produce tension, making service on the board unpleasant. To promote more congenial relations with a CEO serving on the board, other directors might be inclined to pay the CEO more than they should all things considered.[125]

Fifth, a director of a company could have an economic interest in receiving higher director compensation.[126] A director could have an interest in establishing business relations with the company sometime in the future, perhaps after retiring from the board.[127] Alternatively, a director of a company could have an interest in serving on the boards of other companies.[128] To promote such personal objectives, a director of a company could benefit from the support and recommendation of the company's CEO. More generally, the director could benefit from developing a reputation for working with a CEO on favorable terms. To develop such a reputation and secure the relevant support and recommendation of a CEO, a director might also be inclined to overpay the CEO.[129]

Sixth, companies can have inter-locking boards.[130] The CEO of one company can serve on the board of another company, while the CEO of the latter company serves on the board of the former. Once CEOs start serving on the boards of each other's companies, CEO-directors can be inclined to support the grant of excessive compensation to other CEOs.[131] When one

124. *See id.* (describing an interest in promoting collegiality among directors).

125. *See id.* (making the switch from colleagues to arm's-length bargainers in compensation negotiations is challenging).

126. *See id.* at 30-31 (noting that "[d]irectors have a natural interest in their own compensation, which CEOs may be able to influence" and social and psychological factors cause directors to pursue their interest in increased compensation); CRYSTAL, *supra* note 6, at 229-30 (describing the typical game played between directors and CEOs when ensuring that directors are paid sufficiently).

127. *See* BEBCHUK & FRIED, *supra* note 6, at 27-29 (exposing the tendency for incestuous business relations and mentioning new independence standards that attempt to limit such relations but ultimately fall short).

128. *See id.* at 36 ("Earning a reputation for challenging CEO compensation has been unlikely to help [the director's case for being appointed to another board], and if anything has been likely to hurt the director's prospects of securing appointments to other boards.").

129. *See id.* at 27-29, 30-31, 36 (noting that the CEO is in a position to directly benefit directors' compensation packages, whether now or in the future, and this encourages directors to negotiate CEO pay from a collegial perspective rather than an arm's length position).

130. *See, e.g.*, *id.* at 29-30 (indicating that this phenomenon is actually quite prevalent).

131. *See, e.g.*, *id.* (describing the practice as an example of yet another source of influence that CEOs have over directors); MORIARTY, *supra* note 6, at 261 (describing the process by which CEO pay becomes inflated as a result of inter-locking boards); CRYSTAL,

company raises the pay of its own CEO, other companies can feel pressure to do the same for their CEOs, thus raising the pay of CEOs generally.[132]

One worry is that if a CEO were to receive a below average compensation package, his below average pay could be interpreted as a negative sign about the financial condition of the company itself or the ability, motivation, or contribution of its CEO.[133] In this sense, executive compensation can be subject to a "Lake Wobegon Effect," where no company wants to compensate its CEO with below average pay, at least among peer firms.[134]

In light of some ways in which a board can be biased in favor of a CEO, it is apparent that there are numerous ways in which a CEO's pay can fail to be the result of an arm's length negotiation or, therefore, a fair process of bargaining.[135] The gap between a CEO's pay and the pay of other workers in his company could be a source of information about the fairness of the process through which the CEO's pay was determined.[136] An extremely large gap, considered by itself or in relation to the gap in peer firms, could indicate that the CEO had an unfair advantage over the

supra note 6, at 227-28 (noting that when CEOs sit on the boards of other companies, CEO pay rises).

132. *See, e.g.*, MORIARTY, *supra* note 6, at 261 (pointing out that it is standard for boards to compare the compensation of their own CEOs with the compensation of other CEOs in peer firms); CRYSTAL, *supra* note 6, at 221, 227-28 (dubbing the practice "survey ratcheting" and explaining how it undermines arm's length negotiating); HAYES & SCHAEFER, *supra* note 113, at 280 (dubbing the phenomenon the "Lake Wobegon Effect").

133. *See, e.g.*, CRYSTAL, *supra* note 6, at 221 (connecting this thought process to the institutional pride argument); HAYES & SCHAEFER, *supra* note 113, at 280 (describing how the peer group justification for pay generates an "upward spiral").

134. HAYES & SCHAEFER, *supra* note 113, at 280.

135. For more extensive analysis of how the pay-setting process for determining executive compensation can fall short of an arm's length negotiation, see BEBCHUK & FRIED, *supra* note 6, at 23-44; MORIARTY, *supra* note 6, at 259-62. To clarify, though, I do not assert that executive compensation is never the result of an arm's length negotiation in any company. Some companies can have stronger, more independent boards than others. There are also in place various corporate governance provisions aimed at reducing the risk that boards in general will award excessive compensation to executives. For example, in addition to a pay ratio disclosure rule, the Dodd-Frank Act includes a number of other rules aimed at reining in excessive CEO pay. Dodd-Frank Act §§ 951-957 (2010). The extent to which boards and CEOs are engaging in an arm's length negotiation over the determination of executive compensation is an empirical issue that can vary from company to company.

136. *Cf.* T. M. Scanlon, When Does Equality Matter? 3, 36 (last visited Aug. 12, 2016) (unpublished manuscript) https://www.law.yale.edu/system/files/documents/pdf/Intellectual_Life/ltw-Scanlon.pdf) [https://perma.cc/LJ66-GQYH] (suggesting that a large inequality between the compensation of a CEO and other workers might be objectionable because of problems with the "mechanism" that determines executive compensation); COTTON, *supra* note 28, at 157 (arguing that a company's disclosure of a pay ratio could improve fairness in executive compensation).

negotiation of his pay. Thus, a pay ratio disclosure rule might be justifiable on the grounds of providing socially responsible stakeholders with information indicating whether a CEO possesses too much bargaining power over the determination of his own pay.[137]

b. *Non-executive Compensation*

Consider the compensation of lower-level workers in a company. Unlike executive compensation, the pay of rank-and-file employees is not usually determined directly by a company's board of directors. Instead, it is set by a company's managers. If there is any negotiation in the process of setting the pay of lower-level employees, the negotiation is between the lower-level employees and the managers of the company or their respective agents negotiating on their behalf.[138]

A variety of factors could disadvantage, perhaps unfairly, lower-level employees when negotiating with managers over pay. As a result of such factors, lower-level workers might have insufficient bargaining power over the determination of their compensation. In general, managers will often have significantly more bargaining power in the pay-setting process than any individual rank-and-file employee considered as such. In the standard case, an individual rank-and-file worker is easy to replace. Thus, some might contend that ordinary workers are vulnerable to being unfairly exploited in the pay-setting process unless they have the right to bargain collectively with management.[139] In jurisdictions where workers lack

137. *Cf.* SCANLON, *supra* note 136, at 36 (suggesting the possibility that a CEO could have too much "power" in determining his own pay).

138. *See generally* Joel Cutcher-Gershenfeld et al., *How Do Labor and Management View Collective Bargaining?*, 121 MONTHLY LAB. REV. 23 (Oct. 1998), www.jstor.org/stable/41844812 [https://perma.cc/2ZS2-HLZH] (surveying the process of collective bargaining between labor and management).

139. *Cf.* COUNCIL OF ECON. ADVISORS, WORKER VOICE IN A TIME OF RISING INEQUALITY 1 (2015), https://www.whitehouse.gov/sites/default/files/page/files/cea_worker_voice_issue_brief.pdf [https://perma.cc/X7XV-GWRL] (discussing the benefits to workers of higher unionization rates and the costs to them of lower unionization rates); Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 514 (2011) (same); M. Bronfenbrenner, *The Economics of Collective Bargaining*, 53 Q. J. ECON. 535, 541 n.7 (1939) (noting "the possibility of the exploitation of labor" and stating that "[c]ollective bargaining may be a force in eliminating" certain types of exploitation); DAVID COOPER & LAWRENCE MISHEL, ECON. POL'Y INST., THE EROSION OF COLLECTIVE BARGAINING HAS WIDENED THE GAP BETWEEN PRODUCTIVITY AND PAY 4 (2015), http://www.epi.org/files/2013/collective-bargaining-productivity-pay.pdf [https://perma.cc/YYX3-B5Q6] ("Any effort to reestablish a link between pay and productivity growth will need to promote policies that enable workers to once again join unions and bargain collectively.").

collective bargaining rights, lower-level workers could be unfairly disadvantaged in the process of determining their pay.[140]

Even if workers possess some collective bargaining rights, those rights could be too weak to provide them with enough bargaining power to make the pay-setting process fair. For example, sufficiently strong collective bargaining rights might deny an individual worker the right to enjoy the benefits of a collective bargaining agreement without paying his fair share of the union costs required to negotiate the agreement.[141] Some jurisdictions might make it too easy for individual workers to avoid paying their fair share of what is required to negotiate a collective bargaining agreement with their company.[142] More generally, jurisdictions might deny workers the collective right to protest effectively against management decisions that they find objectionable. Jurisdictions could unfairly limit the rights of employees to organize a strike, boycott, or other forms of effective protest against a company.[143]

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140. U.S. workers in the private sector generally have collective bargaining rights. *See* National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012) (discussing labor management relations generally). However, not all U.S. workers in the public sector have the right to bargain collectively. *See* MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 3-6 (2014), http://cepr.net/documents/state-public-cb-2014-03.pdf [https://perma.cc/L8LY-P68H] (outlining the legality of collective bargaining for firefighters, police, and teachers by state). Outside of the U.S., even workers in the private sector can be denied collective bargaining rights. *See, e.g.*, U.S. DEP'T OF STATE, SAUDI ARABIA 2015 HUMAN RIGHTS REPORT 44 (2016), http://www.state.gov/documents/organization/253157.pdf [https://perma.cc/4RUV-5GX6] (noting that the law of Saudi Arabia "does not provide for the right of workers to form and join independent unions. The law does not provide for the right to collective bargaining or the right to conduct legal strikes. The law does not prohibit antiunion discrimination or require reinstatement of workers fired for union activity").

141. In the U.S., so called "right to work" laws give an individual employee this precise right to free ride on the work of unions. *See, e.g.*, Elizabeth G. Olson, *What Right-to-Work Laws Really Mean*, FORTUNE (Jan. 30, 2012), http://fortune.com/2012/01/31/what-right-to-work-laws-really-mean/ [https://perma.cc/YZ8A-SZGR] (arguing that "right to work" laws would create a free-rider problem). For discussion of the negative consequences to workers in general of "right to work" laws, see ELISE GOULD & HEIDI SHIERHOLZ, ECON. POLICY INST., ISSUE BRIEF NO. 299, THE COMPENSATION PENALTY OF "RIGHT-TO-WORK" LAWS 1-2 (2011), http://www.epi.org/files/page/-/old/briefingpapers/BriefingPaper299.pdf [https://perma.cc/VNG4-TDRD] (listing the negative consequences of "right to work" laws and noting that "right to work" laws do not guarantee a job for anyone); ELISE GOULD & WILL KIMBALL, ECON. POLICY INST., BRIEFING PAPER NO. 395, "RIGHT-TO-WORK" STATES STILL HAVE LOWER WAGES 2 (2015), http://www.epi.org/files/pdf/82934.pdf [https://perma.cc/82ZJ-PT5Y] (stating non-paying members still get union benefits).

142. *See, e.g.*, Olson, *supra* note 141 (comparing states that have "right to work" laws with those that do not); Gould & Shierholz, *supra* note 141, at 1 (same); Gould & Kimball, *supra* note 141, at 8 (same).

143. For a dramatic illustration of a government's ability to impair workers' right to strike, albeit in the public sector, see Joseph A. McCartin, *The Strike that Busted Unions*,

And even if workers have sufficiently strong collective bargaining rights, there can still be impediments to exercising those rights. Various forms of corruption can prevent workers from effectively exercising collective bargaining rights. Companies might coerce workers not to unionize. At one extreme, companies can use violence to break up any attempt among employees to form a union.[144] Union leaders can also fall prey to corruption, violating their fiduciary duty to bargain effectively on behalf of workers in the pay-setting process. At another extreme, union leaders might accept bribes from companies they are negotiating with in exchange for accepting lower wages or benefits for union workers.[145]

Given such possible sources of unfairness, a pay ratio disclosure rule might be justified as a means to providing socially responsible stakeholders with information about the extent of any unfairness in the pay-setting process for lower-level employees. An extremely large gap between the compensation of higher-paid and lower-paid employees in a company might indicate that the lower paid are unfairly disadvantaged in the process of determining their pay. Furthermore, the size of the gap might indicate the magnitude of the unfairness: the larger the gap, the stronger the evidence of a worse degree of unfairness.

For two reasons, this fairness-based justification of a pay ratio disclosure rule also favors the adoption of a max-min rule over a max-median rule, such as Section 953(b).[146] First, insofar as companies would face public pressure to minimize a disclosed pay ratio, a max-median rule could actually exacerbate the unfairness in a company's pay-setting process for lower-level workers. As we have noted, under a max-median rule, a company would have a perverse incentive to transfer income from its

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N.Y. TIMES (Aug. 2, 2011), http://www.nytimes.com/2011/08/03/opinion/reagan-vs-patco-the-strike-that-busted-unions.html?_r=2 [https://perma.cc/7GQ2-7CR4], (discussing President Reagan's decision to fire over 11,000 air traffic controllers on strike in 1981).

144. *See, e.g.*, Sibylla Brodzinsky, *Coca-Cola Boycott Launched After Killings at Colombian Plants*, THE GUARDIAN (Jul. 23, 2003), https://www.theguardian.com/media/2003/jul/24/marketingandpr.colombia [https://perma.cc/3SLG-89XY] (describing military force used against labor organizers); Juan Forero, *Union Says Coca-Cola in Columbia Uses Thugs*, N.Y. TIMES (Jul. 26, 2001), http://www.nytimes.com/2001/07/26/world/union-says-coca-cola-in-colombia-uses-thugs.html [https://perma.cc/4UMQ-6MGQ] (same).

145. *See, e.g.*, Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Former Carpenters Union Leader Pleads Guilty in Manhattan Federal Court, Admitting Years of Racketeering, Illegal Payments, and Obstruction of Justice (Jul. 16, 2010), https://archives.fbi.gov/archives/newyork/press-releases/2010/nyfo071610.htm [https://perma.cc/VSS8-JSEW] (noting impending prosecution of a union leader).

146. Both max-min and max-median pay ratio disclosure rules could provide comparable indications of the extent of any unfairness in determining the compensation of a company's CEO. The considerations favoring a max-min rule over a max-median rule stem primarily from a concern for fairness in setting the pay of lower-level employees.

lower-paid workers to its higher-paid median worker. Such a regressive transfer of income would increase the risk of unfairness in the pay-setting process for lower-level workers.

Presumably, the lower-paid employees in a company tend to be worse off than the higher-paid, and the worse-off have the stronger claim against unfair treatment. Other things being equal, I suggest that treating the worse-off unfairly is a greater evil than treating the better-off unfairly.[147] Furthermore, I presume that lower-paid workers are also more vulnerable to unfair treatment in the pay-setting process: they have weaker bargaining power than higher-paid workers. So transferring income from lower-paid employees to the higher-paid median employee of a company would make the more vulnerable members of the company even more vulnerable to even worse forms of unfairness in the pay-setting process.

A max-min rule would tend to have the opposite effect. As we have noted, under a max-min rule, a company would have the right incentive to transfer income from its higher-paid to its lower-paid employees. Such progressive transfers would lower the risk of unfairness in the pay-setting process. These transfers would minimize the vulnerability of a company's most vulnerable workers to unfair treatment in the pay-setting process.

Second, the pay ratio disclosed under a max-min rule would have greater moral significance than the ratio disclosed under a max-median rule. Other things being equal, the claims for fair treatment of a company's least-paid workers should take priority over the claims of higher-paid workers.[148] A max-min rule would provide an indication of whether the employees with the strongest claim against unfair treatment in the pay-setting process are in fact being treated unfairly. Relative to a max-min rule, a max-median rule would provide information only about better off employees with weaker claims against unfair treatment in the determination of their pay. Thus, a max-min rule would provide socially responsible stakeholders with a more important measure of any unfairness in a company's pay-setting process for lower-level employees.

2. Equality of Opportunity

Considerations of fairness might entail that the major institutions of a society, including companies, should be organized to provide its members with, in some sense, an equal opportunity to obtain certain sorts of goods.[149]

147. Here I propose a prioritarian conception of how to assess the strength of the fairness claims of individuals.

148. *See supra* text accompanying note 147.

149. *Cf.* RAWLS, *supra* note 34, at 42 ("Social and economic inequalities . . . are to be attached to offices and positions open to all under conditions of fair equality of

In a society organized in this way, people would have, in some sense, equal prospects or, in other words, equal chances of obtaining the relevant goods.[150] The class of goods might include, among others, those of an economic, political, or social character that are ordinarily of special concern to individuals.[151] Absent some special justification, persons with worse prospects than others for obtaining the relevant goods would have a moral complaint of being treated unfairly by the institutions that caused the inequality or could rectify the inequality.

To clarify, the demand for equality of opportunity need not be indefeasible. Special considerations might defeat a moral claim against having lower chances of obtaining the relevant goods. For example, there can be considerations of personal responsibility.[152] An individual could be at a disadvantage in obtaining some benefit, such as a certain sort of occupation, because of factors for which he is personally responsible. Perhaps the person freely chose not to develop the sorts of skills or talents necessary to be qualified for the job. The resources were available to him to develop the required skills and talents, but he freely chose not to develop them from a lack of motivation.[153] In this case, the individual would have worse prospects for obtaining the relevant occupation than others who freely chose to develop the necessary qualifications. However, because he is personally responsible for being at a disadvantage, he might lack any moral claim that other people take steps to improve his prospects for obtaining the position.

Alternatively, suppose someone has worse prospects than others through no fault of her own. The person might then have a moral claim to others' redressing the inequality. Nevertheless, her claim could still be overridden by various countervailing considerations. There might be no way to satisfy the individual's claim without sacrificing something of greater moral significance.[154] Perhaps the costs of rectifying the inequality

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opportunity.").

150. *Cf. id.* at 43 ("[F]air equality of opportunity is said to require . . . that all should have a fair chance to attain" public offices and social positions).

151. *Cf.* NAGEL, *supra* note 34, at 106 ("Contemporary political debate recognizes four types of equality: political, legal, social, and economic."); RAWLS, *supra* note 34, at 57 (explaining that the range of goods covered by a principle of equality of opportunity can include "primary goods," which "are various social conditions and all-purpose means that are generally necessary to enable citizens adequately to develop and fully exercise their . . . moral powers, and to pursue their determinate conceptions of the good").

152. *See supra* text accompanying notes 62-66.

153. *Cf.* RAWLS, *supra* note 34, at 44 ("In all parts of society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed.").

154. *Cf.* SINGER, *supra* note 71, at 231 ("[I]f it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it.").

would be too high, imposing an undue burden on others. More specifically, the means of providing the individual with an equal opportunity could be unjust, violating the rights of others. In essence, the demand for equality of opportunity can compete with other moral ideals, such as considerations of utility or other principles of justice.[155] But although the demand for equality of opportunity can be defeated in some cases by countervailing moral considerations, it can still retain considerable moral weight with overriding significance in other cases.

Different egalitarians can endorse different sets of goods that people should have an equal opportunity of obtaining. These goods might include various offices, positions, material resources, or other less tangible advantages that generally have significant instrumental or intrinsic value for the welfare of individuals. As we have noted, the goods could have an economic, political, or more social character.[156]

Under an economic ideal of equality of opportunity, people should have, in some sense, equal prospects of obtaining a range of economic goods. These goods might include money, different forms of wealth, and jobs. Under a political ideal of equality of opportunity, people should have, in some sense, equal prospects of influencing their government.[157] To realize an ideal of political equality, persons should have, in some sense, equal chances of holding political offices, influencing the decisions of those who hold political offices, and determining the outcome of elections. More generally, egalitarians could contend that individuals should have an equal opportunity of obtaining certain social goods, such as the "social bases of self-respect" or esteem from others.[158] These goods might include various social roles or accomplishments that advance one's social standing or status in society and tend to strengthen one's sense of self-fulfillment and self-worth.

Given the range of goods that people might possess a claim to having an equal opportunity of obtaining, it is apparent how income inequalities within a society could undermine this egalitarian ideal in straightforward

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155. *Cf. supra* text accompanying note 55; SCANLON, *supra* note 30, at 45 (noting that an egalitarian reason could be "one moral idea among others, which might have to be sacrificed or balanced for the sake of other values").

156. *See supra* text accompanying note 151.

157. *Cf.* JOHN RAWLS, POLITICAL LIBERALISM 358 (1993) (expressing a political ideal that "citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class").

158. *See* RAWLS, *supra* note 34, at 59 (understanding the "social bases of self-respect" as "those aspects of basic institutions normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence"); JOHN RAWLS, A THEORY OF JUSTICE 440-46 (1971) (discussing the value of self-respect).

ways. Consider first economic goods in a society characterized by large inequalities of wealth, resulting in part from large inequalities of income. In this society, the haves and the have-nots, including their children, might possess the same innate abilities and be similarly motivated to succeed. Nevertheless, the haves would be able to afford better educational opportunities for themselves and their children.[159] These better educational opportunities would not be within the budget constraints of the have-nots. As a result, the haves and their progeny would enjoy better prospects for developing the skills necessary to compete for the higher-paying occupations within the society. As a further consequence, the society would exhibit low levels of "intergenerational earnings mobility."[160]

Consider a political ideal of equality of opportunity. In a society with a democratic form of government and a capitalist economy, the haves might possess political views of comparable merit to the views of the have-nots. Furthermore, their political talents might be comparable as well. Nevertheless, the haves would be able to afford to fund more effective campaigns than the have-nots, considered individually or collectively. So the haves would have better prospects for winning an election to serve in political office.

In addition, the haves would possess an advantage in lobbying current political office holders, determining the candidates and issues that go up for a vote, and influencing the outcomes of elections and voting matters more generally. In short, the haves would possess a better chance of influencing the outcomes of the government than the have-nots. The haves would enjoy this political advantage not because their political views have more merit or because they are more talented or motivated politicians than the have-nots. Rather their advantage would stem simply from their greater wealth affording them more political influence.[161]

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159. Here I presume that the relevant society, such as the U.S., has not succeeded in establishing "equal opportunities of education for all regardless of family income." RAWLS, *supra* note 34, at 44 (discussing generally the need for the greatest benefit to flow to the least-advantaged members of a society); *see also* Scanlon, *supra* note 136, at 26 (writing that a challenge of "achieving fair equality of opportunity . . . lies in the cost and difficulty of supplying all children with early childhood education that will enable them to develop intellectually"); STIGLITZ, *supra* note 7, at 24 (noting the educational inequality in the U.S.).

160. Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, 27 J. ECON. PERSP. 79, 80 (2013) (describing how higher inequality limits opportunities, and thereby mobility, for younger generations).

161. *See* Norman Daniels, *Equal Liberty and Unequal Worth of Liberty*, in READING RAWLS: CRITICAL STUDIES ON RAWL'S A THEORY OF JUSTICE 253, 256 (Norman Daniels ed., 1989) (noting that, historically, the wealthy have generally had more political influence than the poor); RAWLS, *supra* note 34, at 44 ("[A] free market system must be set within a framework of political and legal institutions that adjust the long-run trend of economic forces so as to prevent excessive concentrations of property and wealth, especially those

Consider more social goods. Suppose the haves and the have-nots compete for various awards based on their performance in certain activities, such as athletics or the arts. Or suppose they compete for the opportunity to serve in various leadership positions in social organizations. Once again, the financially better-off and the financially worse-off might have the same innate abilities and be similarly motivated to obtain these social goods. But the better-off would be in a position to afford better training and other resources necessary to compete for these goods at a higher level. Consequently, the haves would enjoy an advantage over the have-nots in obtaining the kinds of social goods that can be a strong source of self-respect and esteem.[162]

The numerous ways that income inequality within a society can undermine an ideal of equality of opportunity might provide a justification for a pay ratio disclosure rule. Principally, this is because the pay gaps between a company's workers are one source of wealth inequalities within a society. A pay ratio disclosure rule might provide socially responsible stakeholders with information about how much, if at all, a company's pay schedule is undermining an ideal of equality of opportunity in society. In response to such information, stakeholders, such as investors, regulators, employees, and consumers, might rationally take steps to encourage a company to revise its pay schedule to respect better this egalitarian ideal.

Assuming an ideal of equality of opportunity provides one justification for a pay ratio disclosure rule, we can see that this ideal also favors a max-min rule over a max-median rule, such as Section 953(b). Ultimately, the rationale behind a demand on institutions to promote an ideal of equality of opportunity can be thought of as grounded in considerations of fairness.[163] Under this egalitarian ideal, it is unfair if some have worse prospects for success than others. And as suggested earlier, other things being equal, treating someone unfairly seems worse, the worse off the person is.[164] So the worse off someone is, the stronger her moral objection to being treated unfairly. Hence, other things being equal, the worst-off have the most urgent claim against unfair treatment. The claims to fair treatment of the worst-off should take priority over the claims of those who are better off.

In a company, the least-paid worker is likely the worst-off member of

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likely to lead to political domination.").

162. *See supra* text accompanying note 158 (discussing the value of self-respect).

163. *See* RAWLS, *supra* note 34, 42-44 (proposing a principle of fair equality of opportunity as part of a theory of "justice as fairness"); Scanlon, *supra* note 30, at 44, 46 (describing various reasons for pursuing greater equality).

164. *See supra* text accompanying notes 147-148 (proposing a prioritarian conception for assessing the strength of the fairness claims of individuals).

the firm. So the least-paid worker likely has the strongest moral objection to having lower prospects of success than others. Higher-paid employees in the company, including the median worker, might also have worse opportunities for success than those even better off, and their lack of equality of opportunity might also be unfair. Thus, higher-paid workers in a company can have a claim to more income as a means to improving their prospects of success, providing them with a more equal opportunity for success compared to those even better off. But that said, the lowest-paid worker in the company is still likely to have the most urgent claim to more income as a means of obtaining a more equal opportunity for success. So presumably, the claim of the lowest-paid worker should take priority over the claims of higher-paid workers.

To elaborate, consider again the sorts of economic, political, and social goods that could be covered under an ideal of equality of opportunity. The least-paid worker in a company is likely to fare the worst with respect to each sort of good. The least-paid is likely to have (a) the worst bundle of economic resources, such as overall wealth, (b) the lowest influence on her government, and (c) the least esteem from others along with the weakest sense of self-respect.[165] Furthermore, the least-paid employee is likely to have the worst prospects for improving her lot of these goods. Consequently, the least-paid employee is likely to be the worst-off member of a company all things considered. So the least-paid worker is likely to have the most urgent claim to more income as a means to providing her with a better, more equal opportunity of obtaining the relevant goods.

Given that the claim to more equality of opportunity of a company's lowest-paid worker should take priority over the claim of the higher-paid median worker, there are two reasons why a max-min pay ratio disclosure rule would be preferable to a max-median rule. First, as we have mentioned, under a max-median rule, a company would have a perverse incentive to transfer income from its lowest-paid employees to its higher-paid median employee. By doing so, the company would improve the prospects for success of the median worker, but only at the unacceptable expense of lowering the prospects for workers who are worse off. As a result of such regressive transfers of pay, the overall fairness in the distribution of opportunities across all the company's workers would presumably decrease.

Conversely, a max-min rule would provide a company with the right incentive to make only progressive transfers of income from higher-paid to lower-paid employees. Such progressive transfers could lower the chances

165. *See supra* text accompanying note 159.

for success of those who are paid higher. But any losses in fairness to the higher-paid would presumably be outweighed by the gains in fairness to the worst-off as a result of improving their prospects for success. Thus, the overall fairness in the distribution of opportunities across all workers in a company would more likely improve under a max-min pay ratio disclosure rule. In essence, a max-min rule would provide a company with the right incentive to make only progressive transfers of pay among its employees that would better promote overall the ideal of equality of opportunity. Under a max-median rule, a company would have a perverse incentive to make regressive transfers of pay that would overall impair this egalitarian ideal.

Second, relative to a max-median pay ratio disclosure rule, a max-min rule would provide socially responsible stakeholders with more important information about how well a company is promoting an ideal of equality of opportunity. It might be unfair if the median worker of a company has worse prospects for success than more highly-paid workers in the company. So stakeholders do have reason to value any egalitarian information conveyed under a max-median rule. However, because the claim to equality of opportunity of the least-paid is more urgent than the claim of the median employee, stakeholders have even more reason to care about how the least-paid employee fares in terms of prospects for success. So stakeholders have more reason to care about the egalitarian information conveyed under a max-min rule. Other things being equal, a moral ideal of equality of opportunity entails that reducing the pay gap between the highest- and lowest-paid employees in a company should take priority over reducing the gap between the highest-paid employee and the median employee.

D. *Positive Desert*

Another potential objection to pay gaps between a company's workers could be grounded in considerations of "positive desert."[166] The concept of positive desert is contestable.[167] Reasonable individuals can hold different conceptions of what positive desert means, and they might apply the concept differently to various situations. Nevertheless, we can still outline some potentially salient aspects of the concept that at least some individuals might reasonably accept. At a basic level, a claim of positive

166. J. L. A. Garcia, *Two Concepts of Desert*, 5 LAW. & PHIL. 219, 219-24 (1986) (distinguishing a sense of "positive desert" from a sense of "negative desert").

167. *Cf.* Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299, 317 (1992) (discussing "the tension between philosophical liberalism and ordinary notions of desert").

desert is a claim that an individual deserves certain benefits in response to something about the person, such as what the person is like or has done.[168] Here we can distinguish between two different conceptions of what it means for someone to deserve a benefit.

In a weaker sense, claims of positive desert could be claims of mere value. In this sense, a claim that someone deserves a benefit entails that it would be intrinsically good that she receives the benefit.[169] More specifically, assume there is some optimal amount of a benefit that someone deserves. Then it would be good in itself that the person receives this optimal amount of the benefit.[170] So to the extent that the person receives the benefit up to the optimal amount, it would be intrinsically good.[171] To the extent she receives any less than the optimal amount, it would be intrinsically bad.[172] More controversially, proponents of positive desert might further contend that it would be bad in itself if a person were to receive more of a benefit than she deserves.[173] Thus, to the extent someone receives any more of a benefit than she deserves, that could also be intrinsically bad.[174]

In a stronger sense, claims of positive desert could be claims of justice. In this sense, a claim that someone deserves a benefit entails that he has a right to the benefit.[175] More specifically, suppose again that a person deserves some optimal amount of a benefit. Then the person has a right to this amount. To the extent he receives any less than the optimal amount, that would be a violation of his rights. That would be an injustice.

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168. *See* Garcia, *supra* note 166, at 219-20 (making the distinction between "positive desert" and "negative desert"). The relevant sense of positive desert here is "pre-institutional." Thomas M. Scanlon, *Giving Desert Its Due*, 16 PHIL. EXPLORATIONS 101, 102 (2013) (explaining how conceiving of desert in a "pre-institutional" sense allows us to understand the extent to which institutions are just). In a pre-institutional sense, what a person deserves can be assessed independently of how particular institutions, including companies, are legally required or permitted to treat him. In this pre-institutional sense, considerations of desert can serve as an independent basis for assessing the justification of how institutions are legally required or permitted to treat someone.

169. *Cf.* Shelly Kagan, *Equality and Desert*, *in* WHAT DO WE DESERVE?: A READER ON JUSTICE AND DESERT 298, 298-301 (Louis P. Pojman & Owen McLeod eds., 1999) (discussing how considerations of desert could affect the goodness of an outcome).

170. *See id.* at 300-01 (suggesting that all individuals have an optimal desert level, which, when reached, means they are receiving all that they deserve; arguing that when individuals have more or less than they deserve, then this is bad from the perspective of desert).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *See* Garcia, *supra* note 166, at 222-24 (explaining that denying someone what they deserve is unjust and defining justice in terms of respecting the rights of others).

Moreover, the gravity of the injustice would be proportional to how much the individual falls short of receiving all of the benefit that he deserves.

Whether claims of positive desert are weaker claims of value or stronger claims of justice, there is a sense in which the concept of positive desert can be thought of as a non-comparative moral notion.[176] In this sense, the positive desert of an individual does not essentially depend on the positive desert of any other individual. So how much someone deserves of a particular kind of benefit does not essentially depend on how much anyone else deserves of the same benefit or any other good for that matter.

In another sense, though, judgments of positive desert might involve a comparative element. We can ask how much more deserving of a particular benefit one person is than another person. Two individuals can be equally deserving of a particular good. Alternatively, one person can deserve more or less of a good than another person.

Some might further contend that there is special value in distributing goods in proportion to how much individuals deserve those goods relative to other individuals.[177] For example, suppose one person is twice as deserving as another person. That is, the one person deserves twice as much of a particular benefit as the other person deserves. Then the one individual should receive twice as much of the good as the other person. In short, the good should be distributed in proportion to the relative desert of the individuals who stand to receive it.

Given our outline of some potentially important aspects of the concept of positive desert, we can ask what might qualify as a positive desert basis.[178] Some might contend that labor itself could be a basis for positive desert.[179] Engaging in work could make one deserving of certain benefits. Now the question is: what properties of labor determine the proportionality of positive desert? In other words, what aspects of someone's labor determine how much she deserves for her labor?

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176. *See* Kagan, *supra* note 169, at 301 (noting the non-comparative nature of determining how deserving an individual is). *See generally* Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 298 (1974) (discussing the distinction between "comparative and noncomparative justice").

177. *Cf.* Kagan, *supra* note 169, 301-02 (endorsing a notion of "essentially comparative desert").

178. *See* Joel Feinberg, *Justice and Personal Desert*, *in* JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 55, 56-61 (1970) (discussing the concept of "desert bases").

179. *See, e.g.*, Owen McLeod, *Desert and Wages*, *in* WHAT DO WE DESERVE?: A READER ON JUSTICE AND DESERT 271, 271-72 (Louis P. Pojman & Owen McLeod eds., 1999) (noting that the performance of "contracted work" can make one deserving of a wage).

How much a worker deserves could be a complex function of a wide range of characteristics about her job.[180] To illustrate, consider three potential factors: effort, difficulty, and contribution. Regarding effort, some might contend that the more effort, whether physical or intellectual, required to perform a job, the more someone deserves for performing the job.[181] Regarding difficulty, we might say that the more stressful, unpleasant, or dangerous the work is, the more deserving the work is of the relevant benefits.[182] Regarding contribution, a worker might deserve more or less depending on the value of what she produces.[183] For example, the more valuable a worker's services or the products that she produces, the more deserving she could be on the basis of her labor. In the context of a company, the value of an employee's work might be thought of as the marginal contribution that the employee makes to the overall value of the firm.[184] The more value that the employee adds to her company, the more deserving she might be of the relevant benefits.

Now the question is: what are the relevant benefits that workers could deserve on the basis of their labor? In the least demanding sense, what workers deserve for their labor might be certain positive attitudes from others and perhaps a fitting expression of those attitudes.[185] For example, workers could deserve gratitude from the beneficiaries of their labor.[186] Or laborers could deserve esteem from others for work that was extraordinarily challenging or valuable in some way.

In a more demanding sense, workers might deserve to receive certain material resources for their labor. Most importantly, these material

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180. *See, e.g.*, Moriarty, *supra* note 6, at 262 (summarizing a wide range of factors that might affect how much pay a worker could deserve for performing her job); McLeod, *supra* note 179, at 272-80 (same).

181. *See, e.g.*, Moriarty, *supra* note 6, at 262 (highlighting physical effort as a measure for the deservingness of pay); McLeod, *supra* note 179, at 272-73 (same).

182. *See, e.g.*, Moriarty, *supra* note 6, at 262 (proposing stress, unpleasantness, and dangerousness as factors for pay desert determination); McLeod, *supra* note 179, at 275-77 (same).

183. *See, e.g.*, Moriarty, *supra* note 6, at 262 (proposing the value added by the worker to the firm as a factor for pay desert determination); McLeod, *supra* note 179, at 273-75 (same).

184. *Cf.* JOHN BATES CLARK, THE DISTRIBUTION OF WEALTH: A THEORY OF WAGES, INTERESTS AND PROFITS (1956) (developing a marginal productivity theory of income distribution).

185. *See* Feinberg, *supra* note 178, at 82 ("[R]esponsive attitudes are the basic things persons deserve and that 'modes of treatment' are deserved only in a derivative way" as a "means of expressing the morally fitting attitudes").

186. Some might contend, though, that the beneficiaries of someone's labor would be warranted in feeling gratitude toward the worker only if the worker was motivated to engage in the labor from a benevolent concern for the interests of the beneficiaries. Scanlon, *supra* note 168, at 114.

resources could include money or other forms of monetary compensation, such as shares of company stock.[187] Thus, an employee of a company might deserve to receive a certain amount of income from the company on the basis of her work for the company. In this sense, an employee's income from a company could be deserved or undeserved.

Now there might be two general ways to evaluate a company's pay schedule on the basis of positive desert. In a non-comparative sense, we can ask whether each employee of the company is paid what the employee deserves solely on the basis of the employee's own labor. To the extent a company pays its employees what they deserve, its pay schedule is good. To the extent employees receive less income than they deserve, the pay schedule is deficient. More controversially, perhaps a company's pay schedule is objectionable on grounds of positive desert insofar as the company pays its workers more than they deserve based on their labor.

In a comparative sense, we can ask how much income each employee in a company deserves relative to other employees in the company. We can then determine the extent to which the company pays its employees in proportion to their relative desert. Suppose one employee deserves twice as much income as a co-worker. Perhaps the employee works twice as hard as her co-worker, or maybe the employee performs work that is twice as valuable to the company as the co-worker's labor. Then to the extent that the company pays the employee twice as much as her co-worker, the company's pay schedule is good from a comparative perspective of positive desert. To the extent the employee is paid more or less than twice the compensation of her co-worker, the pay schedule is deficient. In short, the company's pay schedule should reflect how deserving each employee in the company is in relation to other employees in the company.

The various ways of evaluating a company's pay schedule based on positive desert could provide reasons to object to a pay gap between a company's employees. In a company, suppose some workers receive less income than others. There are at least three reasons why this pay gap could be objectionable on the basis of positive desert. First, the lower-paid workers might be receiving less (or more) pay than they deserve from the company. Second, the higher-paid employees might be receiving more (or less) pay than they deserve. Third, the difference in pay between the higher-paid and lower-paid workers might be out of proportion to their relative desert. For example, even if the higher-paid employees deserve more income than their lower-paid co-workers, the difference in income between them might exceed the degree to which the higher-paid are more

187. *See, e.g.*, Feinberg, *supra* note 178, at 88-94 (describing various forms of remuneration that employees might deserve for their services).

deserving than the lower-paid.[188]

The ways in which pay differences between employees could be objectionable on the basis of positive desert can provide another justification for requiring companies to comply with a pay ratio disclosure rule. The pay ratio disclosed could provide socially responsible stakeholders with a source of information about the extent to which a company is paying its workers less or more than they deserve. The pay ratio could also indicate the extent to which the company is compensating its employees in proportion or out of proportion to their relative desert. Socially conscious stakeholders might use such information in assessing the need for the company to adjust its pay schedule to respect better the moral ideal of paying its workers in proportion to what they deserve.

In light of the case for a pay ratio disclosure rule on the basis of positive desert, we can see that this justification also favors the adoption of a max-min rule over a max-median rule, such as Section 953(b), for two reasons. First, the least-paid employee in a company is likely more vulnerable than the median employee to receiving less pay than she deserves. The least-paid worker likely has less bargaining power over pay negotiations. The value of the work of the least-paid employee in a company is also less likely to be fully appreciated than the work of higher-paid employees.[189] For the value of the work of the least-paid is likely less salient to the company than the value of the work of the higher-paid.[190] In large part, the value of the essential work that the least-paid employees do for a company consists in freeing up higher-paid employees to perform other sorts of work for the company that receive more attention, such as work requiring more creativity or technical skills.[191] A max-min rule is preferable to a max-median rule because it provides information about the compensation of the least-paid worker whose pay warrants greater scrutiny, on grounds of positive desert, than the pay of the median worker.[192]

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188. *See* Moriarty, *supra* note 6, at 263-67 (arguing that the actual difference in pay between CEOs and lower-paid employees has been too high under any desert justification).

189. *Cf.* Anderson, *supra* note 30, at 326 (arguing that, in a system of democratic equality, low-wage workers would be appreciated for freeing up others to make more productive uses of their talents).

190. *Cf. id.* (noting how work from the least-paid frees up time for higher-paid employees).

191. *See id.* (same).

192. To clarify, I do not suggest that very low levels of annual compensation are never deserved for certain sorts of workers. For example, it is possible that the least-paid employee in a company works on a very limited part-time basis, naturally making the employee deserving of a low level of annual compensation from the company. Under any sensible max-min pay ratio disclosure rule, this company would be free to disclose a narrative discussion of why the annual compensation of its least-paid employee is deserved. The company would also be free to disclose supplementary information about the pay of any

Second, proponents of positive desert might contend that the worse-off should receive priority over the better-off in receiving the benefits that they deserve. Other things being equal, it is more imperative that the worse-off receive their deserved benefits than the better-off.[193] Assuming the least-paid employee in a company is the worst-off member of the firm, that employee has the most urgent claim to receiving all the pay that he deserves. As we have noted, though, under a max-median rule, a company intent on reducing the disclosed pay ratio would have a perverse incentive to transfer income from its lower-paid employees to its higher-paid median employee. In doing so, the company would presumably redistribute income from those with a stronger claim to receiving their deserved pay to someone with a weaker claim. Under a max-min rule, a company would have no such perverse incentive. To minimize the pay ratio disclosed under a max-min rule, a company has an incentive to adjust its pay schedule in a way that gives priority to benefiting its least-paid worker who presumably has the most urgent claim to receiving all the pay that he deserves.

E. *Shame*

1. An Argument

Another possible reason to object to income inequalities within a company focuses on the negative feelings that such inequalities could engender among the lower-paid employees of the firm.[194] When workers in a company realize that they are paid less than other workers in the firm, they might regard their lower pay as a signal that their employer values them or their work less. In response, lower-paid workers may experience feelings of inferiority to their higher-paid co-workers.

These feelings of inferiority can be, in essence, feelings of shame.[195] And shame can be detrimental to one's well-being in a number of ways, eroding the experiential quality of one's life and impeding one's motivation to engage in public activities.[196] The intensity of shame that lower-paid employees might experience could correlate with the magnitude of the pay

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other employees, such as its least-paid full-time employee.

193. Here I propose a prioritarian conception of how to assess the strength of the positive desert claims of individuals.

194. *See* Scanlon, *supra* note 30, at 43 (arguing that inequalities can produce negative feelings within those treated as inferior).

195. *See id.*

196. *See, e.g.*, NUSSBAUM, *supra* note 72, at 183 ("[S]hame involves the realization that one is weak and inadequate in some way in which one expects oneself to be adequate. Its reflex is to hide from the eyes of those who will see one's deficiency.") (footnote omitted).

gap between them and their higher-paid co-workers. The greater the difference in pay between two workers, the more shame that the lower-paid may experience in response to the pay gap. A larger pay gap could elicit stronger feelings of inferiority.

The negative feelings that income inequalities within a company could generate might provide another more specific justification for a pay ratio disclosure rule.[197] The pay ratio disclosed could indicate the extent to which a company's pay schedule results in feelings of inferiority among its employees. Socially responsible stakeholders may then use this information to encourage companies to ameliorate any feelings of shame felt by lower-paid employees.

Obviously, to mitigate such feelings of shame, a company could simply flatten its pay schedule, reducing the differences in pay between its workers. But there could be other ways to reduce the intensity of such negative feelings. For example, a company might provide its lower-paid employees with special opportunities to earn various non-pecuniary forms of recognition or rewards. Although the selective grant of non-pecuniary awards could potentially create other objectionable forms of inequality among a company's workforce, the use of such awards might still have the virtue of offsetting some of the shame that some employees feel from being paid less than others.[198]

Given the case for a pay ratio disclosure rule as a source of information about potential feelings of shame resulting from a company's pay schedule, it is apparent that this justification also favors the adoption of a max-min rule over a max-median rule for two reasons. First, the lowest-paid employee of a company likely stands to experience the worst shame from the pay disparities within the company. The least-paid is paid less than every other employee in the company, and the largest pay differences within the company will involve the lowest-paid worker. Relative to the feelings of the median employee, who is paid at least as much as half the company's workforce, the lowest-paid employee of the company will likely feel inferior to a wider range of workers, and his feelings of inferiority are likely to be more intense. A max-min pay ratio disclosure rule is preferable to a max-median rule because a max-min rule sensibly focuses attention on the class of workers who stand to suffer the worst feelings of shame from

197. Negative feelings of shame certainly harm someone's welfare, which we discussed earlier. *See supra* text accompanying notes 69-95. The egalitarian character of such feelings, though, warrants discussing them as a separate justification for a pay ratio disclosure rule. *Cf.* Scanlon, *supra* note 30, at 43 (noting that individuals who are worse off than others in material terms can experience feelings of inferiority and shame).

198. *Cf.* Scanlon, *supra* note 30, at 55-56 (describing a strategy of "diversification" for mitigating the negative feelings of inferiority and shame that some persons might experience in response to some inequalities).

inequalities within a company's pay schedule.

Second, the lowest-paid workers in a company are likely the worst-off members of the company overall, in part because they stand to experience the worst feelings of shame from the income inequalities within the company. Hence, the least-paid employees likely have the most urgent claim to reducing the pay gaps that generate their feelings of inferiority. As noted previously, though, under a max-median rule, a company intent on decreasing the disclosed pay ratio would have a perverse incentive to transfer pay from its lowest-paid workers to its higher-paid median worker. Such a regressive transfer of income would risk intensifying the worst feelings of shame that any of the company's employees stand to experience, harming the class of employees who have the strongest claim to benefits that would ameliorate their feelings of inferiority. Under a max-min rule, a company would not have this perverse incentive to make regressive transfers of income. A max-min rule would provide a company with the right incentive to adjust its pay schedule in a way that minimizes the worst feelings of shame that its worst-off employees stand to experience from pay disparities.

2. Three Drawbacks

In light of the justifications for a pay ratio disclosure rule that we have canvassed, it is important to note three potential drawbacks of such a rule on the feelings of shame experienced by at least some lower-paid workers. There are at least three possible ways in which a pay ratio disclosure rule, whether a max-min rule or a max-median rule, could have the unintended consequence of actually increasing feelings of inferiority among some lower-paid employees of a company.[199]

First, absent a pay ratio disclosure rule, some lower-paid employees in a company might be unaware of how much they make relative to other employees in the company. In particular, some might be unaware of how close they are to being the least-paid in the company, and some might be unaware of how much they are paid below or above the median of the annual compensation of all the company's workers. Without this comparative information, these lower-paid employees could be spared

199. A fourth possible way would be the disclosure of the personal identity of the lower-paid employees whose compensation is revealed under the terms of a pay ratio disclosure rule. However, any sensible rule would require the relevant pay ratio disclosures to be de-identified, scrubbed of any uniquely identifying personal information. For such a requirement under the SEC's final implementation of Section 953(b), see 17 C.F.R. § 229.402(u) Instruction 11 to Item 402(u) (2016) (addressing employees' personally identifiable information).

some feelings of shame. A pay ratio disclosure rule could provide these employees with the very information about pay disparities that would cause them to feel inferior to higher-paid co-workers.

Second, ideally a worker's sense of self-respect should not depend on the size of his salary considered by itself or in relation to the salary of others.[200] Instead, a person's sense of self-respect should depend on the extent to which the person realizes properties of greater moral significance, such as the development of a morally virtuous character.[201] However, by requiring a company to disclose publically a ratio of pay between its employees, a pay ratio disclosure rule could have the unfortunate effect of "dramatizing the value" of relative pay, leading some workers to form the false impression that their pay relative to others is of greater significance to their self-worth than it really is.[202] So in response to a pay ratio disclosure rule, some lower-paid employees might unfortunately experience greater feelings of inferiority to their higher-paid co-workers because they might be misled to attach more personal significance to the pay differences between them and their higher paid co-workers.

Third, it is possible that employees in a company do care, at least to some degree, about how much they are paid relative to every other employee in the company. But in the standard case, workers will place most weight on how they fare relative to other workers in a perceived peer group.[203] Arguably, the perceived peer group would include only workers who hold positions that are in some sense similar. Presumably, though, a pay ratio disclosure rule, including either a max-min rule or a max-median rule, would require the disclosure of a pay comparison between employees who are not in the same peer group, who hold very different positions within a company.

In reaction to a pay ratio disclosure rule, some lower-paid workers might unfortunately form the false impression that they should either expand the boundaries of their perceived peer group or attach greater personal significance to how much they are paid relative to workers outside their peer group. By caring more about their pay relative to a wider range of employees, these lower-paid workers could also be led to experience worse feelings of shame and inferiority due to a pay ratio disclosure rule.

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200. *See* Frankfurt, *supra* note 84, at 23 ("The doctrine of [economic] equality contributes to the moral disorientation and shallowness of our time.").

201. *See* Scanlon, *supra* note 30, at 55 (suggesting "good moral character, conscientiousness as a citizen, and devotion to the well-being of one's family and friends" as more important "indices of self-worth").

202. *See* Scanlon, *supra* note 30, at 54.

203. *See, e.g.*, ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 30-34 (1985) (discussing the importance to individuals of "reference groups" when making interpersonal comparisons of status).

Given the possibility of these negative externalities on the feelings of some lower-paid employees, a company has even more reason under a pay ratio disclosure rule to be vigilant about taking steps to mitigate any feelings of shame or inferiority felt among its workers in response to inequalities within the company's pay schedule.

CONCLUSION

Two Possible Amendments to Section 953(b)

When Congress passed Section 953(b) as part of the Dodd-Frank Act, the legislative history did not contain any rationale behind this pay ratio disclosure rule.[204] Commentators on Section 953(b) also expressed uncertainty and skepticism about the justification of the provision.[205] In this article, I have shown that several egalitarian reasons provide significant support for adopting some sort of pay ratio disclosure rule. A subset of these reasons follows from a theory of intrinsic egalitarianism, which assumes that inequalities can be bad in themselves. Other reasons follow from a theory of instrumental egalitarianism, which focuses on the potential bad effects of income inequalities.

Although all the egalitarian reasons we have canvassed count in favor of adopting some kind of pay ratio disclosure rule, none entails that Section 953(b) is the optimal form of such a rule. Section 953(b) is an example of a max-median pay ratio disclosure rule, and all the relevant egalitarian reasons favor the adoption of a max-min rule over a max-median rule. As a consequence, Section 953(b) stands in need of revision. Congress should amend Section 953(b) accordingly, converting it to a max-min rule.

Two possible amendments are particularly worth considering. First, Congress could revise Section 953(b) to require a company to disclose only (a) the compensation of its CEO, (b) the compensation of its lowest-paid employee, and (c) the ratio of the two. Alternatively, Congress might simply add to the current version of Section 953(b) a further requirement on a company to disclose information about the compensation of its least-paid employee. Under the terms of this latter amendment, a company would be required to disclose three ratios. More precisely, a company would be required to disclose (a) the compensation of its CEO, (b) the compensation of its median employee, (c) the compensation of its lowest-paid employee, (d) the ratio of the CEO's pay to the pay of the median employee, (e) the ratio of the CEO's pay to the pay of the lowest-paid

204. *See supra* text accompanying note 24.
205. *See supra* text accompanying note 23.

employee, and (f) the ratio of the median employee's pay to the pay of the least-paid employee. I leave it an open question which of these two possible amendments would be better, all things considered.[206]

A Positive Externality

To close, I mention one more potential benefit of adopting a max-min pay ratio disclosure rule, which could take the form of either amendment to Section 953(b) just discussed. In a number of jurisdictions across the U.S., there is an ongoing policy debate over whether to pass new laws raising the minimum wage.[207] Proponents of higher minimum wage laws are motivated to improve the life prospects of the worst-off employees in companies.[208] Opponents worry about the potentially negative effects of the additional labor costs required to raise the minimum wage.[209]

A max-median pay ratio disclosure rule, such as Section 953(b) in its current unrevised form, makes the need for higher minimum wage laws even more pressing. As we have noted, under a max-median rule, a company would have a perverse incentive to make regressive transfers of income, redistributing pay from its lower-paid workers to its higher-paid median worker. Such regressive transfers could decrease the pay of the least-paid employees of a company. Thus, under a max-median rule, a company could be led to reduce its concern for the lot of its worst-off employees, focusing instead on the lot of its median employee. Higher minimum wage laws might be needed to protect a company's worst-off workers from the harmful effects of the perverse incentives provided to companies by a max-median rule.

A max-min pay ratio disclosure rule should have the opposite effect. A max-min rule would make the need for higher minimum wage laws less

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206. Relative to the first amendment, the second would have the benefit of disclosing more information about the inequality within a company's pay schedule. However, the compliance costs of the second amendment would also be higher than those of the first. Whether these additional compliance costs would be justified by the value of the additional information disclosed under the second amendment is, again, a question I leave open for further analysis.

207. *See, e.g.*, Patrick McGeehan, *Push to Lift Minimum Wage is Now Serious Business*, N.Y. TIMES (July 23, 2015), http://www.nytimes.com/2015/07/24/nyregion/push-to-lift-hourly-pay-is-now-serious-business.html?_r=1 [https://perma.cc/KA76-4DKV] (commenting on calls to raise the minimum wage level to fifteen dollars per hour and differing opinions on such an action).

208. *See, e.g.*, *id.* ("Labor leaders argue that large increases are needed at the bottom of the pay scale to lift workers out of poverty . . . .").

209. *See, e.g.*, *id.* ("The movement to make $15 the floor for hourly wages . . . has infuriated companies large and small, which say it compels hard choices between raising prices and firing workers.").

urgent. Under a max-min rule, a company would have the right incentive to give priority to increasing the compensation of its lowest-paid employees over its higher-paid employees. To minimize the pay ratio disclosed under a max-min rule, a company has an incentive to maximize the pay of its lowest-paid employee. Consequently, a max-min rule would have the virtue of encouraging companies to increase the compensation of their least-paid employees without forcing companies to do so through additional regulation.[210] This positive externality of a max-min pay ratio disclosure rule should be a welcome effect to both proponents and opponents of higher minimum wage laws.

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210. In this sense, a max-min pay ratio disclosure rule could be thought of as "nudging" companies to increase the minimum pay for their employees. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 6 (2008) (defining a "nudge" as "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives").