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INVISIBLE SETTLEMENTS, INVISIBLE DISCRIMINATION

MINNA J. KOTKIN*

Now the norm in employment discrimination litigation, secret settlements resolve actions through private contractual agreements with confidentiality clauses that prohibit the plaintiff and her attorney from revealing not only the payment amount but even the existence of and the facts surrounding the underlying claim. The court record indicates only that the action was dismissed by stipulation, for which no judicial approval is required. Successful outcomes for discrimination victims are shielded from judicial and public attention, lending credence to claims that discrimination in the workplace largely has been eradicated. Thus, these invisible settlements make discrimination in the workplace itself invisible.

Invisibility defeats the intent of the discrimination statutes; skews empirical studies of discrimination litigation, which inform the public debate about the prevalence of bias; and hampers lawyers' ability to counsel and negotiate on behalf of discrimination claimants. The roots of invisibility can be traced to an increasingly privatized model of statutory enforcement, which ignores the deterrence function of public resolutions.

Increased transparency could be achieved by several means. First, and perhaps most immediately effective, the EEOC could, by regulation, insist on agency or judicial approval of settlements, just as it requires a public record of settlements in litigation that it brings. This policy is followed by the United States Department of Labor with regard to the worker protection statutes that it administers. Second, the civil rights bar could take a stand against

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secrecy, as the personal injury bar has done, and gain agreement from clients in advance to reject settlements that require confidentiality. Finally, at the very least, the courts could require submission of the specific terms of stipulated dismissals, without party identification, so that aggregate data about the nature and extent of settlements in civil rights litigation could be publicly available.

INTRODUCTION.....	928
I. THE PRIVATIZATION OF EMPLOYMENT DISCRIMINATION LITIGATION	933
A. <i>From Fee-Shifting to Contingency Fees</i>	933
B. <i>Upping the Ante</i>	942
C. <i>The Push To Settle</i>	944
II. THE CONFIDENTIAL SETTLEMENT DEBATE	945
III. THE COURTS' APPROACH TO SECRET SETTLEMENTS	950
A. <i>Invasion by Third Parties</i>	950
B. <i>Gambale v. Deutsche Bank AG: One Court Takes a Stand</i>	954
C. <i>Analogies Positive and Negative</i>	959
IV. THE IMPACT OF INVISIBLE SETTLEMENTS.....	961
A. <i>The Problem of Empiricism</i>	962
B. <i>The Problem of Representation</i>	967
V. REMEDYING INVISIBILITY	971
CONCLUSION.....	978

INTRODUCTION

Plaintiff, and her attorneys, agree to keep confidential and not to disclose to any person or entity (1) the terms, conditions, or existence of, and amount paid under this Agreement, or any negotiations relating thereto; (2) the existence of this litigation and the allegations of employment discrimination raised against defendant; and (3) the alleged facts underlying those allegations. Plaintiff will execute a stipulation of dismissal with prejudice, without reference to this Agreement.¹

1. From a confidential settlement agreement on file with the author.

Invisible settlements make discrimination in the workplace invisible. Mandated by private contract, they have become the norm in individual employment discrimination litigation. A substantial majority of cases filed against private defendants under the various federal discrimination statutes do not end by pre-trial motions, trials, or even stipulations of settlement filed with the court and recording the parties' agreement.² Instead, the only record of their resolution is a stipulation of dismissal, which makes no reference to the terms upon which the action was concluded.³ According to the case docket, it appears that the plaintiff simply gave up. The actual terms of the settlement are unavailable to the court or the public. They are reflected only in a settlement contract that contains a confidentiality clause, such as the one quoted above,⁴ prohibiting parties from discussing monetary payments or other relief, or in some cases even the fact that an action was brought.

Corporate defendants insist on such clauses, fearing that any public record of settlement will result in a deluge of suits with every disgruntled employee claiming an entitlement to a cash payment because of a discriminatory discharge. Employers regularly assert that no settlement will be reached without confidentiality. Discrimination lawyers and their clients acquiesce to these conditions apparently without complaint. To the extent the issue has been considered at all, the lower courts have signaled that secret resolutions of discrimination claims are by and large perfectly acceptable.⁵ As one federal judge commented, "If a party is doing something that they do not want the public to know about—and many parties do—then sign settlement agreements and give the court

2. See generally Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (showing increasing rarity of trials); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters*, 1 J. EMPIRICAL LEGAL STUD. 459, 468 (2004) (noting that "trials were 19.7% of all civil rights dispositions in 1970 and 3.8% in 2002"); Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1 (describing decline in federal civil trials); Judicial Facts and Figures, <http://www.uscourts.gov/judicialfactsfigures/contents.html> (last visited Feb. 20, 2006) (providing data on disposition of all federal civil cases). For the year ending March 31, 2005, only 6.6% of all civil rights actions actually reached trial in the U.S. district courts. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT tbl.C-4 (2005).

3. Invisible settlements occur only in individual actions, since class action settlements must be approved by the court. See FED. R. CIV. P. 23 (e)(1)(A).

4. See *supra* note 1 and accompanying text.

5. See *infra* Part III; see also Emily Fiftal, *Respecting Litigants' Privacy and Public Needs*, 54 CASE W. RES. L. REV. 503, 518–19 (2003) (noting litigation involving the ability of parties to keep the terms of a settlement secret).

a stipulation of discontinuance. All I am signing is a stipulation of discontinuance pursuant to a private settlement agreement.”⁶

There has been little scholarly attention devoted to invisible settlements⁷ in the discrimination realm. Today, settlements and alternative dispute resolution (“ADR”) overwhelmingly are viewed as the preferred means of resolving claims,⁸ and, as a result, any means of promoting that end largely are immune from criticism.⁹ Although secret settlements have been questioned when public health and safety concerns are at issue, particularly in the context of product liability claims,¹⁰ these concerns are not significantly implicated in the discrimination context. But invisible settlements demand a closer look because they have far reaching implications for the future of civil rights enforcement. As discussed more fully below, the employment discrimination statutes were neither structured to envision nor intended to promote secret settlements. The whole thrust of equal employment legislation was that, by facilitating employee suits, discrimination would be brought to public attention and the litigation process would serve to deter other employers from similar conduct.

In addition to their derogation of statutory intent, invisible settlements hamper lawyers’ efforts to evaluate cases, counsel clients, and negotiate effectively on clients’ behalf. Most importantly, this Article contends invisible settlements do not figure into the judicial or public perceptions of employment discrimination litigation—

6. See Panel IV: *Secrecy and the Courts: The Judge’s Perspective*, 9 J.L. & POL’Y 169, 193–94 (2000) (including remarks of Judge Denise Cote, Southern District of New York, distinguishing between such stipulations and settlement agreements “so ordered” by the court, which are part of the public record).

7. The term was first used by Samuel R. Gross & Kent D. Syverud in *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 3 (1996). The authors use the terms in a more general context, however, to refer to the importance of public trials in contrast to settlements, which do not attract the same level of public attention. *Id.* at 4.

8. See, e.g., Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 156–59 (2002) (documenting judicial preference for out-of-court settlement); see also Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1474 (1994) (describing devices of judges and lawyers for private resolution of conflicts).

9. Reservations have been voiced by a few scholars, of course. See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (critiquing the settlement process); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (revisiting Fiss’s critiques of settlement).

10. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428, 477–82 (1991) (evaluating the arguments of those seeking to restrict protective orders on information related to public health and safety).

specifically because they are invisible.¹¹ Those perceptions significantly inform the public policy debate about equal opportunity in the workplace. In fact, the discourse about employment discrimination is skewed against workers by virtue of secrecy.

A recent spate of empirical studies demonstrates that although there has been a substantial growth in employment litigation, plaintiffs are unlikely to prevail in comparison with other federal court actions.¹² Commentators have suggested that this is the result of bias on the part of the factfinders, or alternatively, because the claims are largely frivolous.¹³ These studies succeed in reinforcing negative judicial perceptions of employment claims. The judiciary has not been shy in voicing these perceptions for public consumption,¹⁴ and, in the courtroom, judicial hostility sometimes can be palpable.¹⁵ Judges do not hesitate to suggest that most plaintiffs

11. See *infra* Part IV.

12. See Clermont & Schwab, *supra* note 2, at 429; David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 535–49 (2003) (examining gender and ethnic differences in type of employment suit filed and plaintiff success rates); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 557–61 (2001) (presenting data to show that plaintiffs in employee discrimination suits fare worse than other civil plaintiffs).

13. See Oppenheimer, *supra* note 12, at 558 (claiming that bias is “the reason federal employment discrimination cases are unusually hard to win”); Selmi, *supra* note 12, at 561 (stating discrimination claims are hard to win because of the courts’ biases); *id.* at 569 (explaining that employment discrimination suits may be difficult to win due to frivolous claims). For other explanations of low win rates, see George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (presenting an economic model of the choice between trial and settlement); Peter Siegelman & John J. Donohue, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects To Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427 (1995) (discussing the effects of business cycles on employment litigation).

14. See, e.g., Kenneth Conboy, *Trouble in Foley Square*, N.Y. TIMES, Dec. 27, 1993, at A17 (editorial by federal district judge, complaining that discrimination cases usurp too much judicial attention and display “high levels of acrimony and subjective claims of victimization”).

15. A 1997 Second Circuit report details attorneys’ perceptions that judges dislike discrimination claims. One attorney reported that a judge referred to the cases as “skunk work.” Sharon E. Grubin & John M. Walker, *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 124, 342 (1997). The report also notes that a “Long Range Plan for the Federal Courts” recommended that cases involving “employment litigation by individuals” should be diverted to the state courts or administrative agencies. *Id.*; see also Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following Mattern: Will Courts Know It When They See It?*, 14 LAB. LAW. 373, 413 (1998) (quoting a federal judge who expressed his opinion that far too many frivolous employment discrimination cases have “flooded” the federal courts); Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU. L. REV. 751, 757 (1992) (claiming that Title VII

are whiners and complainers, and not true victims of discrimination.¹⁶ Their hostility is a natural consequence of invisible settlements. Judges overwhelmingly see the negative outcomes, since the many favorable outcomes are shielded from judicial imprimatur.

This Article reveals and explains the growth of invisible settlements in the face of arguably contrary legislative intent and examines their effect. In Part I, I contend that invisible settlements are the direct result of Supreme Court decisions concerning civil rights attorney's fees. By authorizing lump sum settlements, the Court has undermined the "private attorney general" conception of civil rights enforcement,¹⁷ privatized discrimination litigation, and rendered it indistinguishable from tort actions. The Court's acceptance of ADR methodologies to resolve civil rights claims furthers the trend toward privatization.¹⁸ Part II addresses the general debate about secrecy in settlements as it applies to employment discrimination. I then consider in Part III the degree to which the courts have invaded secret settlements as a matter of public policy and the applicability of those cases to invisible discrimination settlements. In Part IV, I address the impact of invisible settlements in two respects. First, the failure to recognize and account for invisible settlements skews the discourse about discrimination litigation spurred by empirical research. Second, the ubiquity of invisible settlements impedes plaintiffs' lawyers in evaluating cases, counseling clients, and effectively negotiating with employers. Part V offers some means for ameliorating the effect of invisible settlements. While legislative action requiring court approval of discrimination settlements or declaring secret settlements void is unlikely, the Equal Employment Opportunity Commission ("EEOC") could mandate judicial involvement. In fact, in litigation that it brings in its own name, the EEOC will not enter into confidential settlements because they detract from the deterrence function of civil rights enforcement.¹⁹ An analogous rule requiring judicial approval of settlements under the Family and Medical Leave Act was adopted by

claims are "overloading" Article III federal courts and that Article I courts should be established to alleviate the burden); John Edward Davidson, Note, *The Temptation of Performance Appraisal Abuse in Employment Litigation*, 81 VA. L. REV. 1605, 1614-17 (1995) (noting the tremendous escalation of federal employment discrimination cases).

16. See Oppenheimer, *supra* note 12, at 559-60 (describing judicial dismissiveness of judges toward discrimination claims).

17. See *infra* text accompanying note 29.

18. Recently, the Court approved employment contracts that mandate arbitration of discrimination claims. See *infra* notes 227-34 and accompanying text.

19. See *infra* notes 312-13 and accompanying text.

the Department of Labor, and the rule was upheld by the Fourth Circuit in July 2005.²⁰ Short of mandating judicial involvement, I argue that the courts should collect aggregate data when cases are dismissed by stipulation, thereby providing a more accurate picture of discrimination litigation outcomes without jeopardizing confidentiality.

I. THE PRIVATIZATION OF EMPLOYMENT DISCRIMINATION LITIGATION

The proliferation of secret settlements is a direct result of the privatization of employment discrimination litigation. No longer are such cases viewed as civil rights matters worthy of public attention and concern. Rather, they have become a species of tort law,²¹ and thus, secrecy has become just another bargaining chip easily acceded to in order to facilitate settlement. In this Part, I trace the privatization trend to three developments: the adoption of a contingency fee model for compensating plaintiffs' attorneys; the heightened involvement of the private bar due to greater availability of damages; and the increased emphasis on settlement and ADR in the federal courts.

A. From Fee-Shifting to Contingency Fees

One significant indicator of the public nature of employment discrimination claims was Congress's decision to depart from the "American rule" and require employers to pay attorney's fees to prevailing plaintiffs.²² But a series of Supreme Court decisions resulted in a shift from fee-shifting to contingency arrangements with fees paid out of the plaintiff's recovery, which in turn encouraged private contractual settlements, as this Section explains.

In 1964, in response to the growing civil rights movement, Congress enacted Title VII to combat discrimination in the workplace.²³ As well-documented by a number of scholars,²⁴ the

20. *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 374–75 (4th Cir. 2005).

21. See, e.g., Jeffrey A. Van Datta, "Le Roi Est Mort; Vive le Roi!": An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After *Desert Palace Inc. v. Costa* into a "Mixed-Motives" Case, 52 *DRAKE L. REV.* 71, 81–83 (2003) (discussing Title VII as a species of tort law); Cheryl Krause Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 *STAN. L. REV.* 175, 193–97 (1993) (discussing the transformation of Title VII claims into tort claims).

22. See Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 *TEX. L. REV.* 291, 323 (1990).

23. *Id.*

statute's legislative history makes clear that it was intended to perform a public function that Congress recognized was beyond the resources of government: to rid the workplace of discrimination.²⁵ That goal was manifest in the creation of a private right of action and in the decision to depart from the American rule, under which the parties to an action bear their own attorney's fees regardless of result.²⁶ In the early twentieth century, the American rule gave rise to the widespread use of contingent fee arrangements in tort actions, allowing injured parties to initiate claims without incurring fees.²⁷ Rather than relying on contingencies in employment actions, Congress took the innovative step of authorizing successful plaintiffs to recover attorney's fees from employers without reducing their own recovery.²⁸

The genesis of fee-shifting in this context is the private attorney general doctrine. In short, the doctrine is an acknowledgment that when important social policies must be vindicated, it is not sufficient to rely on litigation brought by the government. Those suffering from discrimination are in essence deputized to enforce the civil rights laws.²⁹ Congress recognized the difficulty of attracting qualified attorneys to this venture. With monetary relief limited to back pay,³⁰ contingency fee representation was not a sufficient financial incentive

24. See, e.g., Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1312-20 (1990) (describing the legislative process that led to Title VII's reliance on private complainants). See generally John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) (discussing how employment discrimination litigation has changed since Congress implemented Title VII).

25. See 42 U.S.C. § 1988(b) (2000); S. REP. NO. 94-1011, at 2 (1976), as reprinted in 1976 U.S.C.C.A.N. 5908, 5910-11. See generally Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (discussing how the current Supreme Court has undercut the private attorney general concept).

26. Brand, *supra* note 22, at 323.

27. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 253-54 (2004); Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1974-88 (2002).

28. See, e.g., Aylesha Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (holding that each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary). See generally Brand, *supra* note 22 (discussing the Supreme Court's impact on fee-shifting legislation).

29. See *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401 (1967) (per curiam) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.").

30. Before the 1991 amendments to Title VII authorizing compensatory and punitive damages, monetary relief was limited to back pay. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (codified as amended at 42 U.S.C. § 1981(b)).

for the private bar. The potential for fee-shifting offset the likelihood of small recoveries.³¹ Title VII's progeny—the statutes governing age and disability discrimination—all contain provisions for the award of attorney's fees to the prevailing party.³²

In the forty years since Title VII's passage, its public function has diminished, largely as a result of the doctrine that grew up around fee awards in civil rights actions—most significantly the allowance of lump sum settlement offers. As explained below, a series of Supreme Court decisions has necessitated the use of contingent fee arrangements in any employment discrimination action brought by private counsel.³³ As a result, the litigation has been privatized and is now largely indistinguishable in structure from tort claims. Contingent fee arrangements create substantial settlement incentives for plaintiffs' lawyers and to some extent for their clients as well.³⁴ Confidentiality, which creates the absence of public scrutiny, is viewed as a bargaining chip easily sacrificed for a quicker or bigger recovery. The model envisioned in 1964 of the civil rights lawyer as private attorney general is long gone.

Beginning shortly after the passage of the Civil Rights Act of 1964, the courts struggled to elucidate the purpose and boundaries of fee-shifting in dozens of decisions.³⁵ Two competing doctrinal strands are apparent.³⁶ One set of decisions views civil rights cases as an exceptional breed, so that fee awards need not conform to general principles of the legal marketplace.³⁷ The other concludes that civil rights cases are no different from tort claims, and fee awards should follow that model.³⁸ Early decisions in the "exceptional" camp

31. See *Newman*, 390 U.S. at 402.

32. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001). The Supreme Court has interpreted fee-shifting statutes consistently. *Id.* at 603 n.4. See, e.g., *Newman*, 390 U.S. at 402 (explaining the necessity of attorney's fees awards in civil rights cases); see also Karlan, *supra* note 25, at 205–08 (describing the evolution of fee awards in statutory discrimination claims).

33. See generally Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197 (1997) (surveying practitioners regarding the effect of Supreme Court fee decisions on their fee arrangements).

34. See KRITZER, *supra* note 27, at 260–65.

35. See Brand, *supra* note 22, at 316–39 (surveying the Court's fee-shifting cases).

36. The Supreme Court recently had occasion to review many of these early decisions in *Buckhannon*, 532 U.S. at 603–05.

37. See *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (specifically rejecting notion that civil rights actions for damages are nothing more than a private tort suit).

38. See *Marek v. Chesny*, 473 U.S. 1, 10 (1985) (stating that the "civil rights claims were" not to be on "any different footing from other civil claims insofar as settlement is concerned").

emphasized the need to attract qualified counsel by generously interpreting fee award statutes.³⁹ Thus, the Court held that a prevailing plaintiff is ordinarily entitled to fees if he prevails on any significant issue,⁴⁰ while a prevailing defendant recovers only when the action was frivolous, unreasonable, or without foundation.⁴¹ The Court also approved an advantageous method of calculating awards that entailed multiplying the number of hours a prevailing plaintiff's lawyer reasonably expended by the market's hourly rate, regardless of whether counsel actually billed those rates, or in the case of representation by a nonprofit group, the client paid no fee at all.⁴²

In *Maier v. Gagne*,⁴³ the Court first addressed the application of fee-shifting principles to settlements.⁴⁴ The case involved a constitutional challenge to state public assistance regulations.⁴⁵ A settlement decree was entered by the district court, which included a statement that the decree was not intended to constitute an admission of fault.⁴⁶ The Second Circuit upheld the district court's ruling that plaintiffs were prevailing parties within the meaning of the statute.⁴⁷ On review, the Supreme Court gave short shrift to the argument that a settling plaintiff could not be considered to have prevailed, noting that nothing in the statutory fee-shifting provisions requires "a judicial determination that the plaintiff's rights have been violated."⁴⁸ Justice Stevens then quoted with approval the legislative history, stating that a plaintiff may be a prevailing party "through a consent judgment or without formally obtaining relief."⁴⁹ In *Hewitt v.*

39. *Rivera*, 477 U.S. at 580.

40. See *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam) ("Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims."); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1967) (recognizing that the award of attorney's fees to successful plaintiffs encourages individuals injured by racial discrimination to seek judicial relief).

41. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.").

42. *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1982).

43. 448 U.S. 122 (1980).

44. *Id.* at 124.

45. *Id.*

46. *Id.* at 126.

47. *Id.* at 127.

48. *Id.* at 129 ("The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees.").

49. *Id.* (internal quotation marks omitted).

Helms,⁵⁰ the Court indicated that this principle is not limited to injunctive relief: a settlement consisting of the payment of money before judgment also entitled the plaintiff to prevailing party status.⁵¹

Maher confirmed what had already been the accepted practice in employment discrimination litigation. Settlement was a two-part process: first, a negotiation on the merits and then, on the fees. If the merits were resolved, but the fee award could not be agreed upon, the issues were put before the trial court for decision. As part of the fee determination, the terms of the settlement would necessarily be before the court, since the degree of success is one significant factor in the fee calculation.⁵² Those terms would necessarily become part of the public record.

The Court also recognized the exceptional nature of civil rights fee awards in *City of Riverside v. Rivera*.⁵³ There, the plaintiff received a jury award of \$33,350 in an excessive force case and then sought almost \$250,000 in attorney's fees.⁵⁴ The Court held that a fee award need not be proportionate to the amount of damages recovered, despite the City's contention that a private tort model should be applied in damages cases.⁵⁵ Spelling out the "exceptional" doctrinal strand at length, the Court rejected the "notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs."⁵⁶ It relied on two principles drawn from the legislative history. First, the Court established that plaintiffs were securing "important social benefits . . . not reflected in nominal or relatively small damages awards," and that the public has an interest in the vindication of civil rights.⁵⁷ Second, the Court affirmed that full fee recovery was necessary to attract qualified counsel and "contingent fee arrangements that make

50. 482 U.S. 755, 763-64 (1987) (declining to award attorney's fees where plaintiff received no damages, no injunction or declaratory judgment, no consent decree, and no settlement).

51. *Id.* at 761 ("If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced, the plaintiff has 'prevailed' in his suit, because he has obtained the substance of what he sought. Likewise in a declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed."). In *Buckhannon*, 532 U.S. 598, 605-07 (2001), however, the Court questioned the holdings in *Hewitt* and *Maher*, and thereafter, many lower courts have refused to follow them.

52. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

53. 477 U.S. 561, 574 (1986).

54. *Id.* at 564-65.

55. *Id.* at 574.

56. *Id.*

57. *Id.*

legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases."⁵⁸ The Court also made passing reference to another policy justification: the damage recovery "contributes significantly to the deterrence of civil rights violations in the future."⁵⁹

Reflecting its ambivalence about the interpretation of civil rights fee-shifting provisions, however, the year before *Rivera*, the Court decided *Marek v. Chesny*,⁶⁰ a decisive step towards privatizing employment discrimination litigation and encouraging the invisible settlement culture. With the dissenting justices in *Rivera* constituting the majority, the Court considered whether, in making a Rule 68 offer,⁶¹ the defendant could propose a lump sum figure, including both damages and attorney's fees.⁶² In approving lump sum settlements, the Court was motivated exclusively by the value of promoting settlement.⁶³ It noted that defendants would be reluctant to make offers if they would still be exposed to an award of attorney's fees at any amount to be fixed by the district court: "There is no evidence . . . that Congress . . . had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned."⁶⁴

The *Marek* Court did not address the ramifications of lump sum settlements from the perspective of the attorney-client relationship. At the time of the decision, retainer agreements generally provided that plaintiff's counsel would seek fees from the court. In *Evans v. Jeff D.*,⁶⁵ decided a year after *Marek* and contemporaneously with *Rivera*, the privatization of the attorney-client relationship was completed. In *Evans*, a legal services office brought a class action against the State of Idaho challenging the adequacy of its educational programs and health care for disabled children.⁶⁶ Shortly before trial,

58. *Id.* at 577.

59. *Id.* at 575 (citing *McCann v. Coughlin*, 698 F.2d 112, 129 (2d Cir. 1983) (emphasis omitted)).

60. 473 U.S. 1 (1985).

61. *Id.* at 5. Federal Rule of Civil Procedure 68 provides that if a timely pretrial offer of a settlement is not accepted "and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." FED. R. CIV. P. 68.

62. The plaintiff's objection to the unbifurcated offer did not stem from any consideration of civil rights enforcement policy, but rather from the difficulty for plaintiff to assess the wisdom of accepting the offer. *Marek*, 473 U.S. at 5.

63. *Id.* at 6-7.

64. *Id.* at 10.

65. 475 U.S. 717 (1986).

66. *Id.* at 720.

the State proposed a settlement which provided all of the injunctive relief sought but contained a waiver of attorney's fees.⁶⁷ Because of what he viewed as his ethical obligation to his clients, plaintiff's counsel felt compelled to sign the agreement, subject to approval by the district court, as required by the class action rules.⁶⁸ The Supreme Court considered whether a district court must reject a class settlement because it contains a fee waiver.⁶⁹ Building directly on *Marek*, the Court held that the demand for waiver did not violate the Civil Rights Attorney's Fees Act.⁷⁰ The Court also concluded that in both individual and class actions, the Fees Act does not prohibit simultaneous negotiation of defendant's liability on the merits and for attorney's fees.⁷¹

In balancing the competing values of settlement efficiency and promoting representation for civil rights claimants, settlement won hands down. The Court viewed as remote "the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run," shrink the pool of lawyers willing to undertake civil rights claims.⁷² Justice Brennan, writing for the dissenters, saw the balance differently. He argued that the value of encouraging litigation to enforce civil rights by attracting counsel trumps the value of facilitating settlement.⁷³ He emphasized that fee-shifting in a civil rights matter is intended to protect the public interest in widespread enforcement of the laws "over and above the value of a civil rights remedy to a particular plaintiff."⁷⁴ In short,

67. *Id.* at 722.

68. *Id.* at 723 (noting that at oral argument before the district court, the plaintiffs' attorney "contended that petitioners' offer had exploited his ethical duty to his clients—that he was 'forced,' by an offer giving his clients 'the best result [they] could have gotten in this court or any other court,' to waive his attorney's fees" (citation omitted)). The plaintiffs' attorney argued to the Supreme Court that the Civil Rights Attorney's Fees Act "must be construed to forbid a fee waiver that is the product of 'coercion,' " and that

a "coercive waiver" results when the defendant in a civil rights action (1) offers a settlement on the merits of equal or greater value than that which plaintiffs could reasonably expect to achieve at trial but (2) conditions the offer on a waiver of plaintiffs' statutory eligibility for attorney's fees.

Id. at 729.

69. *Id.* at 727.

70. *Id.* at 730–38. The Fees Act allows courts to award prevailing parties in civil rights actions reasonable attorney's fees. 42 U.S.C. § 1988 (2000).

71. *Evans*, 475 U.S. at 738 n.30.

72. *Id.* at 741 n.34.

73. *Id.* at 761 (Brennan, J., dissenting).

74. *Id.* at 752.

Brennan argued that fee awards are not simply another form of relief, subject to the same kind of negotiation as damages.

Justice Brennan differentiated simultaneous negotiation from fee waiver, however.⁷⁵ He envisioned that the demand for waivers would become the norm⁷⁶ and would therefore seriously impair the availability of legal assistance⁷⁷—in direct contravention of congressional intent, which must take precedence over the judicial policy favoring settlement.⁷⁸ Simultaneous negotiation should be permitted, however, because defendants have a legitimate interest in knowing the full extent of their liability as long as a reasonable fee is included in the settlement.⁷⁹ The dissent also considered certain ameliorating measures that might address the disincentives created by the majority holding.⁸⁰ In particular, Justice Brennan suggested that civil rights attorneys obtain agreements from their clients barring the waiver of fees, replicating the private market model in which an attorney is not required to “contribute his compensation” in order for the plaintiff to obtain an advantageous settlement.⁸¹

The double whammy of *Marek* and *Evans* compelled major changes in employment discrimination representation.⁸² Since monetary relief is the primary goal in cases involving individual plaintiffs, contingency fee arrangements were the only way a lawyer could ensure that she would receive any fee at all. A defendant could request a fee waiver in settlement negotiations, but more commonly the defendant would refuse to bifurcate merits and fees, offering a lump sum amount.⁸³ Without a prior agreement, an attorney faced with a lump sum offer would have to enter into a second negotiation with her client about the amount of her fee. *Marek*, taken together with *Evans*, condoned the decision of a client who demanded that the settlement be accepted and that he receive the entire amount, thus

75. *Id.* at 764–65.

76. *Id.* at 758.

77. *Id.* at 758–59.

78. *Id.* at 759.

79. *Id.* at 762.

80. *Id.* at 765–66.

81. *Id.* at 766 n.21.

82. See generally Davies, *supra* note 33 (discussing whether Supreme Court interpretation of the fee-shifting provisions makes civil rights attorneys hesitate to represent some plaintiffs); Margaret Annabel de Lisser, Comment, *Giving Substance to the Bad Faith Exception of Evans v. Jeff D.: A Reconciliation of Evans with the Civil Rights Attorney's Fees Award Act of 1976*, 136 U. PA. L. REV. 553 (1987) (proposing an interpretation of the bad faith exception that is consistent with the legislative intent behind the Fees Act, while implementing the Court's goal of encouraging settlement).

83. Davies, *supra* note 33, at 199.

resulting in the equivalent of a fee waiver. Therefore, a retainer agreement specifying a contingent fee arrangement in the case of a lump sum offer was a lawyer's only protection from having to forego any payment.

According to Julie Davies, who authored a study of civil rights attorney behavior in the 1990s, this is exactly what happened.⁸⁴ Contrary to Justice Brennan's concern, defendants in employment discrimination cases did not seek waivers, since plaintiffs' lawyers quickly adopted retainer agreements either authorizing them to refuse waiver requests or requiring the client to pay waived fees. But after *Evans*, lump sum offers and contingency fee retainers became the norm.⁸⁵ After conducting extensive interviews with the civil rights bar in several states, Davies concluded that discrimination claims were "treated as the equivalent of torts in the settlement process."⁸⁶

The norm of contingency fees was further cemented by two Supreme Court decisions in the late 1980s. In *Blanchard v. Bergeron*,⁸⁷ the Court held that in an application for statutory fees, the award is not limited to the amount that plaintiff's counsel was entitled to under a contingent fee agreement.⁸⁸ Plaintiffs' lawyers also benefited from the decision in *Venegas v. Mitchell*,⁸⁹ which held that when the amount to which the lawyer is entitled under the contingency exceeded the statutory award, she is entitled to receive the excess amount from the plaintiff.⁹⁰ Thus, lawyers had nothing to lose and everything to gain by entering into contingent fee arrangements.

Lump sum offers and simultaneous negotiations were a boon to defendants, however. Take, for example, the following scenario. An employee earning \$30,000 per year claims discriminatory termination, and it takes him a year to find an equivalent job. Settlement discussions begin after the conclusion of discovery. Both sides perceive their likelihood of prevailing at fifty percent. Attorney's fees to this point are an additional \$30,000. In a bifurcated negotiation, the plaintiff would presumably settle for \$15,000. The lawyer would then engage in his own negotiation, legitimately arguing that he was entitled to his full fee, having prevailed through

84. *Id.* at 248–56 (describing attorney behavior).

85. *See id.* at 199 (describing the use of a lump sum offer).

86. *Id.* at 221.

87. 489 U.S. 87 (1989).

88. *Id.* at 93.

89. 495 U.S. 82 (1990).

90. *Id.* at 86–87.

settlement.⁹¹ Thus, the employer has potential liability of \$45,000, with the total cost of the settlement dependent on how much the lawyer will discount his fee. With a lump sum simultaneous negotiation, however, the employer could offer a lump sum of \$30,000 and be assured of his total liability. The plaintiff would come away with \$20,000, while the lawyer, under a one-third contingency arrangement, would receive only \$10,000. More importantly, the defendants would no longer face the risk inherent with bifurcation: an agreement on the merits, followed by an unsuccessful fee negotiation. In that case, the fee would be set at the district court's discretion. Indeed, if the settlement represented a significant portion of the plaintiff's possible recovery, as in the example above, her lawyer might successfully argue that since the plaintiff was "the prevailing party" she—the lawyer—was entitled to compensation for 100% of the time she expended at full market rate.

B. *Upping the Ante*

Another development contributing to privatization was the amendment of Title VII in 1991 to permit compensatory and punitive damages up to a \$300,000 cap for larger employers, in addition to back pay, and to allow for jury trials.⁹² This amendment was part of a larger legislative package, intended primarily to overrule several Supreme Court decisions that limited damages in constitutionally-based race discrimination claims.⁹³ Although the legislative history of the Title VII amendment is not extensive, the expressed intention was that additional remedies were necessary to deter discrimination.⁹⁴

91. Of course, the *Buckhannon* decision may well vitiate such a claim, since it called into question whether a private settlement, without judicial involvement, triggers an entitlement to attorney's fees. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602, 605–07; Karlan, *supra* note 25, at 207–08.

92. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (codified as amended at 42 U.S.C. § 1981(b) (2000)).

93. See, e.g., H.R. REP. 102-40 (II), at 2–4 (1991), as reprinted in 1991 U.S.C.C.A.N. 694, 694–96 (explaining that "[t]he Act overrules the Supreme Court's . . . decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), which held that . . . [42 U.S.C. § 1981] does not prohibit racial harassment on the job and other forms of race discrimination occurring after the formation of a contract;" that "[t]he Act also overrules key aspects of the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989)," which held that "victims of discrimination must prove that the discriminatory practices are not significantly related to a legitimate business objective;" and that the Act overrules *Marek v. Chesny*, 473 U.S. 1 (1985), by "provid[ing] that plaintiffs who reject an offer of settlement more favorable than what is thereafter recovered at trial will not be barred from recovering attorney's fees incurred for services performed after the offer is rejected").

94. *Id.* at 2, 1991 U.S.C.C.A.N. at 695.

The effect of the amendment was profound in several respects. By increasing potential monetary relief, the negative financial consequences of contingent agreements became less pronounced. If, with the hypothetical plaintiff discussed above, the employer faced possible additional damages liability equal to twice the amount of back pay (\$60,000) and he discounted that amount by the likelihood of success, the settlement would be increased by \$30,000, for a total of \$60,000 (fifty percent of the total of \$30,000 in back pay, \$60,000 in damages, and \$30,000 in fees). The plaintiff's attorney then would receive a contingency fee of \$20,000. Moreover, the availability of a jury trial made the threat of much greater damages a substantial bargaining chip for the plaintiff.

The amendment also affected the visibility and perception of discrimination claims in several ways. First, this new calculus attracted a different segment of the bar. Employment discrimination no longer was the exclusive province of the public interest and civil rights bar whose interest in litigation stemmed at least as much from its public and political function as from its remunerative benefits.⁹⁵ As one litigator put it, commenting on the 1991 amendments, "Not only has the legal landscape changed, so have the players. Many trial lawyers, who once focused their practice on more traditional personal injury cases, now find a new field to plow in employment discrimination cases."⁹⁶ Litigating a client's entitlement to compensatory and punitive damages was "familiar territory" for personal injury lawyers, as was the presumption of contingent fee agreements.⁹⁷

Second, and more frequently discussed, the number of cases filed greatly increased. One recent statistical study shows a total of 102,847 employment discrimination actions filed between 1979 and 1991, compared to 162,509 between 1992 and 2000.⁹⁸ In 1991, 8,303 cases were concluded, compared to 22,359 in 2000⁹⁹—this is a 270% increase.¹⁰⁰ Although the passage of the Americans with Disabilities

95. See Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws* 25 (Harvard Law and Econ. Discussion Paper No. 498, 2004), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/Jolls_498.pdf.

96. Lewis R. Hagood, *Claims of Mental and Emotional Damages in Employment Discrimination Cases*, 29 U. MEM. L. REV. 577, 578 (1999).

97. *Id.*

98. Clermont & Schwab, *supra* note 2, at 457.

99. *Id.* at 433.

100. *Id.*

Act in 1990 accounts for some of the increase,¹⁰¹ those cases make up only ten percent of the employment discrimination docket.¹⁰² Whether because more employees saw litigation as financially advantageous, or more lawyers were available to represent them, the generally-accepted explanation for the increase is the passage of the 1991 Act.¹⁰³

C. *The Push To Settle*

One other factor contributed significantly to civil rights privatization. The increase in employment discrimination litigation during the 1990s coincided with what has been termed a "paradigm shift" towards alternative dispute resolution in the federal courts.¹⁰⁴ That effort began modestly in 1983 with an amendment to Federal Rule of Civil Procedure 16, requiring judges to address at pre-trial conferences the possibility of using ADR.¹⁰⁵ The 1990 Civil Justice Reform Act went further: it authorized the implementation of pilot projects setting up court-annexed ADR programs.¹⁰⁶ These experimental efforts led to the passage of the Alternative Dispute Resolution Act, which mandates that each district court establish an ADR program and authorizes judges to require parties to participate in non-binding mediation.¹⁰⁷ Many district courts use the growing

101. Americans with Disabilities Act (ADA), Pub. L. No. 102-166, 105 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (2000)).

102. Clermont & Schwab, *supra* note 2, at 434.

103. See, e.g., Gregory Todd Jones, Note, *Testing for Structural Change in Legal Doctrine: An Empirical Look at the Plaintiff's Decision to Litigate Employment Disputes a Decade after the Civil Rights Act of 1991*, 18 GA. ST. U. L. REV. 997, 1028 (2002) (concluding from a study of outcome data from federal employment discrimination cases filed between 1970 and 1995 that "the Civil Rights Act of 1991 did, in fact, engender a significant structural change in legal doctrine that has had a dramatic effect on the plaintiff's decision to escalate an employment dispute to litigation").

104. See *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1851, 1860 (2000).

105. *Id.*

106. *Id.* at 1861; see also 28 U.S.C. §§ 471-482 (2000).

107. *Developments in the Law—The Paths of Civil Litigation*, *supra* note 104, at 1861. The United States District Court for the Western District of New York is an example of a court with a voluntary court-annexed ADR program. See ELIZABETH PLAPINGER ET AL., ADR & SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS 201-03 (Fed. Judicial Ctr. & CPR Inst. for Disp. Resol. 1996), available at www.fjc.gov (follow "Publications" hyperlink). Under its rules, most civil cases qualify for court-annexed ADR. Parties are notified that they may consent to arbitration, in addition to the mandatory settlement conferences held by magistrate judges. The Western District of New York was one of ten pilot voluntary court-annexed ADR programs. The court maintains a roster of approved arbitrators or parties can select their own. When parties choose to consent to arbitration, the arbitrators are paid by the court. Once referred to arbitration, the case proceeds in its usual way with the assigned

number of magistrate judges to preside over settlement negotiations or to engage in formal mediation with the parties.¹⁰⁸ The Judicial Conference has encouraged this approach to settlement.¹⁰⁹

The push towards ADR and the use of magistrate judges rather than Article III judges to encourage and supervise settlement negotiations has added to the privatization of employment discrimination litigation. Lump sum settlement offers have virtually eliminated the litigation of motions for attorney's fees, thereby shielding settlement figures from the view of the judiciary and the public. Mandated mediation and the delegation of settlement supervision to magistrate judges has added to that trend. Legal scholars have been left to debate the consequences of the trend towards private and secret resolutions.

II. THE CONFIDENTIAL SETTLEMENT DEBATE

It is generally perceived that secret settlements are quite common and their numbers growing.¹¹⁰ Empirical support for this proposition is meager, however. Not surprisingly, no researcher has undertaken the task of reviewing the seventy percent of civil cases that terminate neither by motion nor trial but by stipulated dismissal to determine how many contain the actual terms of, or at least some reference to, settlement.¹¹¹ Moreover, such a study in some respects would be fruitless, since it would reveal only one of two types of secret settlements. In the first type, the court record would indicate that the action is dismissed pursuant to a private settlement contract, or that it was resolved by a private settlement contract known as a stipulation of settlement under seal.¹¹² The second and perhaps more

judge until the order designating the arbitrators is filed. Arbitration hearings occur within thirty days of being requested and are usually concluded in one day. The arbitrator has ten days to file the award and parties have thirty days to request a trial de novo. *Id.*

108. Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 673 (2005).

109. See Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 716-17 (1994).

110. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 775 (3d Cir. 1994) (discussing the "increasing frequency and scope of confidentiality agreements that are ordered by the court"); *City of Hartford v. Chase*, 942 F.2d 130, 137 (2d Cir. 1991) ("Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders . . .").

111. See Selmi, *supra* note 12, at 558-60.

112. A recent study examined the prevalence of sealed settlements. See ROBERT TIMOTHY REAGAN ET AL., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 1 (Fed. Judicial Ctr. 2004), available at www.fjc.gov (follow "Publications" hyperlink). The Federal Judicial Center looked at 288,846 civil cases in a mostly random sample of fifty-two districts. *Id.* at 3. One in 227 cases had sealed settlement agreements,

common type of secret settlement is truly invisible and defies any attempt at calculation, because all that the court record indicates is a stipulation of discontinuance or dismissal. While a likely explanation is that these cases have been settled with some remuneration to the plaintiff, there are certainly other possibilities: the plaintiff decides not to pursue the matter or decides to file it in a different court, for example.

The debate over the propriety of secret settlements has focused on products liability and mass tort litigation, with little attention given to the impact of secret settlements on civil rights laws.¹¹³ In this Part, I review the arguments, pro and con, articulated in the torts context, and then consider how the arguments relate specifically to employment discrimination litigation. Here again, a chronological narrative is helpful to an understanding of the debate.

In the late 1980s, several investigative reports in the media revealed that secret settlements were concealing information about hazardous products and environmental dangers.¹¹⁴ The resultant public outcry led a number of state legislatures to enact "Sunshine in Litigation" statutes, which generally required judges to consider public health and safety concerns before sealing court records.¹¹⁵ The Association of Trial Lawyers of America ("ATLA") took the position that lawyers and the courts should resist secrecy agreements, citing the danger to the public.¹¹⁶

The academic debate followed soon thereafter, with the sides sharply drawn. Led by Arthur Miller, the proponents of

or 1,270 total cases. *Id.* The study found that sealed settlement agreements are filed in less than 0.5% of civil cases. *Id.* In 97% of these cases, the *complaint* is not sealed. *Id.* at 6. Twenty-seven percent of the cases with sealed settlement agreements are employment cases. *Id.* at 5. Another 10% are other civil rights cases. *Id.*

113. See generally Miller, *supra* note 10 (responding to discovery reform proposals in the context of cases involving public health and safety); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. STUD. LEGAL ETHICS 115, 118 (1999) (criticizing secret settlements in cases involving public health and safety).

114. See Barry Meier, *Deadly Secrets: System Thwarts Sharing Data on Unsafe Products*, NEWSDAY (N.Y.), Apr. 24, 1988, at 21; Barry Meier, *Legal Merry-Go-Round: Case Highlights Lack of Data Sharing*, NEWSDAY (N.Y.), June 5, 1988, at 24; Elsa Walsh & Ben Weiser, *Public Courts, Private Justice* (pts. 1-4), WASH. POST, Oct. 23-26, 1998, at A1.

115. See, e.g., 1990 Fla. Laws 20 (codified as amended at FLA. STAT. § 69.081 (2004)); TEX. R. CIV. P. ANN. 76a (Vernon 2003).

116. See Philip H. Corboy, *Secret Settlements: The Challenges Remain*, TRIAL, June 1993, at 122, 122. Of course, secret settlements also had the effect of inhibiting lawyers from publicizing their successes to attract new clients.

confidentiality raised a series of concerns.¹¹⁷ The first argument is wholly instrumental. The proponents widely claim that without confidentiality, defendants would simply refuse to settle cases.¹¹⁸ And settlement, of course, is viewed as a positive good, without which litigants would be forced to expend unnecessary funds, and the overloaded courts would cease to function.¹¹⁹ Second, proponents of confidentiality argue that both parties are protected from vexatious claims: plaintiffs are not harassed by long-lost relatives, and defendants are shielded from claimants with meritless actions, looking for a deep pocket.¹²⁰ Third, they assert that parties to litigation should not have to give up all rights of privacy¹²¹ and should be able to maintain their freedom to enter into contracts.¹²² Fourth, they contend that plaintiffs' lawyers have an ethical duty to maximize their clients' recovery and, therefore, are bound to use secrecy as a bargaining chip.¹²³

None of these claims addresses the backbone of the argument against confidentiality: the right of the public to know. The Miller camp acknowledges that in rare instances, some public access to information may be appropriate, but there is never reason to make public the amount of a settlement: "It is difficult to imagine why the general public would have anything more than idle curiosity in the dollar value of a settlement"¹²⁴

The public access camp responds to each of the proponents' arguments. First, there is no empirical evidence demonstrating that settlement rates decrease without guaranteed confidentiality or that public settlements encourage frivolous claims.¹²⁵ No studies have been done in those states with sunshine legislation, although ATLA

117. See generally Miller, *supra* note 10 (arguing against public access to litigation information reforms).

118. See, e.g., Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 959, 1009 (1988) (discussing the importance of confidentiality agreements as a negotiating tool).

119. Miller, *supra* note 10, at 486–87.

120. *Id.* at 485.

121. *Id.* at 464–67.

122. David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1220; Miller, *supra* note 10, at 467–74.

123. Miller, *supra* note 10, at 489–90.

124. *Id.* at 484–86.

125. See, e.g., Dana & Koniak, *supra* note 122, at 1225 (noting that "there is no evidence that these differences among jurisdictions have translated into differences in settlement timing and/or settlement rates"); Zitrin, *supra* note 113, at 118 (noting that even where states have enacted restrictions on secret settlements, there was "no indication of a resulting court logjam, or even that settlement rates have gone down").

asserts that the volume of litigation has decreased since Florida enacted its version of the law.¹²⁶ Moreover, contractual terms that violate public policy are never enforceable.¹²⁷ Similarly, while lawyers owe an ethical duty to maximize client recovery, they may not up the settlement figure by allowing clients to enter into agreements that would require the client to commit illegal acts, for example.¹²⁸

Public access advocates contend secret settlements are affirmatively dangerous in two respects. First, they sometimes endanger public health and safety.¹²⁹ To use just one example, the danger of some breast implants was kept from the public through secret settlements for years, while women continued to undergo this procedure.¹³⁰ Second, they reduce the deterrent effect of litigation, which, along with compensation, is the goal of the tort system.¹³¹

Nevertheless, most public access advocates recognize that, under current rules of ethics, for a lawyer to reject an advantageous settlement that the client wishes to accept because the defendant insists on secrecy would constitute an ethical violation.¹³² Professional responsibility scholars have proposed Rule amendments as a remedial measure.¹³³ Such an amendment recently was rejected by the ABA, however, on the grounds that the issue was more appropriate for a legislative solution.¹³⁴

126. See Dana & Koniak, *supra* note 122, at 1225 n.18. "The authors further note that the complete absence of any reports of studies suggesting a decrease in settlement rates following the enactment of restrictions on secret settlements is notable given the substantial resources of those interest groups that favor secret settlements, and their ability to fund research." *Id.*

127. *Id.* at 1221.

128. *Id.* at 1220.

129. See generally Zitrin, *supra* note 113, at 119–21 (discussing several cases where secret settlement agreements kept information about dangerous products from the public).

130. See Laleh Ispahani, Note, *The Soul of Discretion: The Use and Abuse of Confidential Settlements*, 6 GEO. J. LEGAL ETHICS 111, 119–21 (1992).

131. Zitrin, *supra* note 113, at 118.

132. Heather Waldbeser & Heather DeGrave, Current Development, *A Plaintiff's Lawyer's Dilemma*, 16 GEO. J. LEGAL ETHICS 815, 820–26 (2003) (finding no option for an attorney who opposes a confidential settlement, except perhaps to withdraw).

133. See, e.g., Dana & Koniak, *supra* note 122, at 1217 n.1 (reporting that the ABA Ethics 2000 Commission rejected a proposed rule change on secret agreements); Zitrin, *supra* note 113, at 115–17 (proposing amendment of ABA Model Rules of Professional Conduct); Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883, 904–06 (2004) (discussing Zitrin's proposed rule change for South Carolina); Kevin Livingston, *Open Secrets*, RECORDER, May 8, 2001, at 1 (discussing Zitrin's proposal to the ABA 2000 Ethics Commission).

134. Dana & Koniak, *supra* note 122, at 1217 n.1 (reporting grounds for rejection included belief that state legislative action would be more appropriate); Richard A. Zitrin, *The Judicial Function*, 23 HOFSTRA L. REV. 1565, 1594 (2004) (detailing proposed

Both sides of the debate acknowledge that there is an obvious and relatively simple fix to the public health and safety concerns. The trial courts should exercise their inherent authority to determine whether documents and settlements should be sealed.¹³⁵ The pro- and anti-secrecy camps differ, however, on the standard of scrutiny: should settlements be presumptively confidential or presumptively public? In any case, such judicial oversight is available only when the parties seek court involvement in the settlement by requesting confidentiality, and case law indicates judges will generally favor secrecy in order to control their docket.¹³⁶ The debate over judicial scrutiny is meaningless in the context of invisible settlements, however, where the court is not even made aware of the fact of settlement, let alone the terms, and there is no request to seal anything.

David Luban has provided the most nuanced consideration of secret settlements.¹³⁷ He begins by returning to Owen Fiss's proposition that settlement itself is problematic because it does not result in the articulation of public values in the way that adjudication does.¹³⁸ Luban argues that settlements can, in many respects, serve the same function, but not if they are secret.¹³⁹ He views the debate as between those who consider adjudication as a private problem-solving mechanism and those who consider it to be a means of articulating public values and an integral element of the political process.¹⁴⁰ Luban also acknowledges the problem of invisible settlements. He proposes that courts should refuse to enforce secrecy contracts as contrary to public policy.¹⁴¹

As with reliance on judicial scrutiny, this solution is hardly realistic for an individual employment discrimination litigant. The plaintiff employee would have to breach the confidential settlement agreement by disclosing, and the defendant employer would have to institute a breach of contract action. The former plaintiff, who must employ counsel to defend the action would, of course, take a risk that

amendment); Waldbeser & DeGrave, *supra* note 132, at 823–24 (2003) (noting the ABA's rejection of the proposed amendment); Livingston, *supra* note 133 (reporting that the ABA rejected Zitrin's proposed amendment).

135. *Cf.* Miller, *supra* note 10, at 501 (stating that it is appropriate to let judges decide when to maintain confidentiality).

136. Dana & Koniak, *supra* note 122, at 1235.

137. *See* Luban, *supra* note 9, at 2648–58.

138. *Id.* at 2626–40; *see also* Fiss, *supra* note 9, at 1075 (stating that settlement should not be encouraged).

139. Luban, *supra* note 9, at 2648–50.

140. *Id.* at 2632–35.

141. *Id.* at 2648–58, 2661–62.

the court would uphold the contract, and he would have to pay damages for the breach. There would have to be substantial accumulation of precedent for such a course of action to be at all advisable. The next Part will look at the present state of the case law.

III. THE COURTS' APPROACH TO SECRET SETTLEMENTS

Although academic attention devoted to secret settlements has focused on torts rather than civil rights, the courts have acknowledged the public policy concerns at issue in the employment context as well.¹⁴² These decisions provide little ammunition for resisting secret settlements, however, because they address narrow factual situations, usually involving third party attempts to gain access to the contractual agreement. In one recent Second Circuit decision, however, the concerns raised by secret settlements were squarely addressed.¹⁴³

A. *Invasion by Third Parties*

Judicial opinions on secret settlements arise in several different circumstances: a request to seal a settlement, or more commonly, for a protective order to seal discovery or motion papers; a new action by a third party to invade a confidentiality agreement; or a breach of contract action against a party who has revealed secret terms. Not surprisingly, few reported decisions address the last situation.¹⁴⁴ Likewise, a request to seal a settlement is generally not opposed, and therefore is not reflected in reported decisions, since it is a condition of the settlement. Parties will seek to file a settlement only when they wish the matter to remain under the court's jurisdiction for

142. Cf. *Gambale v. Deutsche Bank*, 377 F.3d 133 (2d Cir. 2004) (discussing the need for a presumption in favor of public access to judicial documents, especially those related to the disposition of a suit); *Calvert v. Mehville*, R-IX Sch. Dist., 44 S.W.3d 455 (Mo. Ct. App. 2001) (holding that defendant school board could disclose the existence of a confidentiality agreement pursuant to local open meeting laws).

143. See *Gambale*, 377 F.3d at 140.

144. In fact, reported cases seem to exclusively concern the enforcement of confidentiality agreements by former plaintiffs. See, e.g., *Calvert*, 44 S.W.3d at 455-56 (terminated employee sues former employer for disclosing fact of settlement agreement under state open meetings law); *Mackey v. Cannon*, 996 P.2d 1081, 1082-84 (Utah Ct. App. 2000) (terminated employee sues employer for making statements to press about sexual harassment suit). But see *Camp v. Eichelkraut*, 539 S.E.2d 588, 590-92 (Ga. Ct. App. 2001) (employer sues employee for speaking to police and insurance fraud investigators). See generally Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151 (1998) (exploring the competing considerations undertaken by courts in determining when to enforce confidentiality agreements against former employees).

enforcement purposes.¹⁴⁵ With regard to the sealing of other filed papers, courts generally will abide by a stipulation of the parties. If confidentiality is contested, the courts will use a "good cause" standard and are generous in protecting information claimed to be trade secrets, or more commonly in employment cases, personnel files of third parties.¹⁴⁶

Thus, most reported decisions relating to secret settlements concern third party attempts to obtain settlement information or to release a party from a gag order.¹⁴⁷ In several cases, the EEOC has sought such relief. *EEOC v. Astra USA, Inc.*,¹⁴⁸ is illustrative of the courts' approach. The district court had granted the EEOC's request for a preliminary injunction to enjoin enforcement of pre-complaint confidential settlement agreements that the employer entered into with a number of employees who had potential sexual harassment claims.¹⁴⁹ These agreements included provisions barring the employees from discussing the settlement terms.¹⁵⁰ During an investigation of class-wide sexual harassment, the EEOC determined that employees felt bound not to talk to its investigators and sought an injunction restraining the employer from enforcing the agreements.¹⁵¹ The First Circuit characterized the issue as balancing the public interest in private dispute settlement and the public interest in EEOC enforcement.¹⁵² It ruled that the balance tipped in favor of the EEOC's mission to investigate and enforce the anti-discrimination laws.¹⁵³ Although the *Astra* court invoked public policy, it made clear that it did not intend to impinge upon secret settlements as such, but only to the extent that they interfered with the EEOC's mission.¹⁵⁴ Moreover, even in this situation, it specifically endorsed maintaining the confidentiality of the settlement

145. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994); see also *REAGAN ET AL.*, *supra* note 112, at 5 ("Sealed Settlement agreements appear to be filed typically to facilitate their enforcement.").

146. 1 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 5.34 (3d ed. 2005).

147. See, e.g., *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 226 (1998) (regarding plaintiffs who sought to release a former GM employee from a confidentiality agreement so the employee could testify in the plaintiffs' product liability action against GM).

148. 94 F.3d 738 (1st Cir. 1996).

149. *Id.* at 741-42.

150. *Id.* at 741.

151. *Id.* at 741-42.

152. *Id.* at 744 ("[W]e must weigh the impact of settlement provisions that effectively bar cooperation with the EEOC on the enforcement of Title VII against the impact that outlawing such provisions would have on private dispute resolution.").

153. *Id.* at 744-45.

154. *Id.* at 744-45.

amount. *Astra* therefore does little to deter secret settlements in the general run of employment discrimination cases.

In *Kalinauskas v. Wong*,¹⁵⁵ the United States District Court for the District of Nevada took a slightly broader approach. There, an employee suing for sex discrimination sought to depose a former employee who had settled a similar action pursuant to a sealed settlement agreement with a confidentiality clause.¹⁵⁶ The court permitted the deposition, again finding that the balance of interests favored the discovery of highly relevant information over the promotion of efficient dispute resolution through confidential settlements.¹⁵⁷ Nevertheless, the court also protected the disclosure of the substantive terms, including the amount of the settlement.¹⁵⁸

Another case that comes closer to—but ultimately skirts—the real issue is *EEOC v. Rush Prudential Health Plans*.¹⁵⁹ In this case, an employee filed a charge with the EEOC alleging that her employer had discriminated against her on the basis of age and disability.¹⁶⁰ When its attempts to negotiate with the employer failed, the EEOC brought a disability discrimination action.¹⁶¹ The employee, now represented by private counsel, intervened in the EEOC's action.¹⁶² While the EEOC and the employer engaged in settlement negotiations, the employee agreed to a confidential settlement and her action was dismissed.¹⁶³ The EEOC sought disclosure of the amount of recovery, arguing that disclosure was relevant "to its determination of whether the public interest requires [it] to proceed further with the lawsuit" or to enter into a consent decree.¹⁶⁴ As the court noted, whether the settlement was nominal or substantial would have an impact on the public interest in further litigation.¹⁶⁵ The court ordered disclosure, subject to a protective order barring the EEOC from revealing the settlement amount.¹⁶⁶ Significantly, the court rejected the EEOC's arguments of more general applicability: that public awareness of settlement figures is necessary to deter other

155. 151 F.R.D. 363 (D. Nev. 1993), *aff'd*, No. 95-16645, 1997 U.S. App. LEXIS 2766 (9th Cir. Jan. 14, 1997) (mem.).

156. *Id.* at 365.

157. *Id.* at 365-66.

158. *Id.* at 367.

159. No. 97 C 3823, 1998 U.S. Dist. LEXIS 4170 (N.D. Ill. Apr. 1, 1998) (mem.).

160. *Id.* at *2.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at *5.

165. *Id.* at *6.

166. *Id.* at *14.

employers from discrimination¹⁶⁷ and to make settlement payments more than just a cost of doing business.¹⁶⁸

Again in the third party intervenor context, the Third Circuit considered the added complication of invisible, rather than sealed, settlements: what happens when the settlement agreement is the subject of a confidentiality order but is not filed with the court? In *Pansy v. Borough of Stroudsburg*,¹⁶⁹ a local newspaper sought to intervene to obtain the settlement agreement, subject to a confidentiality order, in a § 1983 action in which a police chief challenged his termination.¹⁷⁰ Had the settlement been filed, it would have been accessible under a state sunshine law, but the court held that an unfiled agreement, even when it had been reviewed by the trial court, was not a “judicial record” subject to the statute.¹⁷¹ The newspaper therefore sought also to vacate the confidentiality order.¹⁷² The court held that confidentiality orders relating to settlement agreements must be reviewed under the “good cause” standard, using the typical balancing test.¹⁷³ In vacating the order, the court gave great weight to the fact that the action involved a public entity and “matters of legitimate public concern.”¹⁷⁴ The court also emphasized that “where it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against . . . an order of confidentiality.”¹⁷⁵ However, the court also pointed to the obvious means of sidestepping its decision: if good cause cannot be shown, the parties “have the option of agreeing privately” to confidentiality and enforcing the agreement through a contract action, a result that “may in fact be preferable to the current trend of increasing judicial secrecy.”¹⁷⁶

A recent New Jersey case, *Llerena v. J.B. Hanauer & Co.*,¹⁷⁷ comes close to confronting the broader policy objections to secret settlements. An employee suing on a sexual harassment claim

167. *Id.* at *9.

168. *Id.* at *9–10.

169. 23 F.3d 772 (3d Cir. 1994).

170. *Id.* at 775–76.

171. *Id.* at 781; *see also id.* at 782 (“Simply because a court has entered a confidentiality order over documents does not automatically convert those documents into ‘judicial records’ accessible under the right of access doctrine.”).

172. *Id.* at 783–84.

173. *Id.* at 786–88 (establishing good cause by showing that disclosure will work a clearly defined and serious injury to the party seeking closure).

174. *Id.* at 788.

175. *Id.* at 791.

176. *Id.* at 788–89.

177. 845 A.2d 732 (N.J. Super. Ct. Law Div. 2002).

learned of a similar action against the employer that had been settled, but he was precluded from learning more due to a confidential settlement agreement.¹⁷⁸ Finding that the terms of the settlement would be probative with regard to the employer's knowledge and action concerning other instances of harassment,¹⁷⁹ the court weighed the balance in favor of access.¹⁸⁰ Unlike the decisions discussed above, the court explicitly considered the need to vindicate the public interest in non-discriminatory employment practices as favoring the invasion of confidentiality.¹⁸¹ Nevertheless, as in *Rush Prudential Health Plans*, the plaintiff was prohibited from further dissemination of the settlement terms.¹⁸²

Cases such as these acknowledge the public policy in favor of openness only in its most narrow formulation: discovery may be permitted in aid of enforcement efforts, particularly when the government is involved, but public access as a means of deterrence is trumped by dispute resolution values. This is the same calculus that drives the Supreme Court's decisions relating to attorney's fees and is further confirmed by the Court's decisions approving compelled arbitration of discrimination claims.¹⁸³ The policies enunciated in these cases leave little room for a generalized attack on secret settlements.

B. *Gambale v. Deutsche Bank AG: One Court Takes a Stand*

The more generally applicable policy implications of secret settlements finally attracted direct judicial attention in a highly unusual factual situation considered by the Second Circuit. One district judge clearly was concerned with whether secret settlements are contrary to the intent of the civil rights law and took matters into his own hands.¹⁸⁴ He encouraged defense counsel to reveal the amount of a confidential settlement and then issued an opinion that disclosed the amount in general terms, apparently with the belief that

178. *Id.* at 734-35.

179. *Id.* at 736.

180. *Id.* at 739.

181. *Id.*

182. *Id.* The court also noted that "the confidential agreement does not provide for absolute secrecy," in particular allowing for disclosure if "required . . . by subpoena or court order." *Id.* at 738-39.

183. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (enforcing compelled arbitration for a state-law employment discrimination claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (enforcing compelled arbitration in an age discrimination claim).

184. See *Gambale v. Deutsche Bank AG*, 02 Civ. 4791 (HB), 2003 U.S. Dist. LEXIS 11180, at *6-7 (S.D.N.Y. July 2, 2003).

the public had a right to know about discrimination by a major bank.¹⁸⁵ In *Gambale v. Deutsche Bank AG*,¹⁸⁶ the Second Circuit did not take kindly to this tactic, but with “the cat out of the bag,” it could only admonish the lower court with the direction that confidential agreements must be respected.¹⁸⁷

In *Gambale*, a bank executive brought a sex discrimination claim.¹⁸⁸ Following common practice, the parties stipulated to the confidentiality of certain discovery documents relating to salaries of other employees and to gender diversity statistics.¹⁸⁹ When the plaintiff filed these documents as exhibits to her motion opposing summary judgment, a magistrate judge issued a temporary protective order sealing the documents until their confidentiality could be considered by the trial judge.¹⁹⁰ Ten days after the bank’s motion for summary judgment was in large part denied, the parties advised the district judge that they had reached a settlement.¹⁹¹ The district judge ordered that the parties appear at a conference “to present a stipulation of discontinuance pursuant to the settlement agreement.”¹⁹²

On the day of the conference, the parties executed the settlement agreement, which contained a confidentiality clause governing the entire contract including the amount of payment, and a clause agreeing that the documents would remain under seal.¹⁹³ At the conference, the parties requested that the court retain jurisdiction to hear any future disputes about payment.¹⁹⁴ In response to the court’s inquiry, defense counsel revealed the amount of the settlement, with the understanding that it would remain confidential.¹⁹⁵ The judge then “wondered aloud why the public should not know about discrimination at a major banking institution.”¹⁹⁶ Despite defense counsel’s argument that the agreement contained “no admission of liability” and that disclosure would deter settlement, the court requested briefing of the issue but sealed the conference transcript.¹⁹⁷

185. *Id.* at *5–7, 9.

186. 377 F.3d 133 (2d Cir. 2004).

187. *Id.* at 136–37.

188. *Id.* at 134–35.

189. *Id.* at 135.

190. *Id.*

191. *Id.* at 136.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

At a second conference, the court notified the parties that it would disclose the settlement terms "unless the Bank agreed to conduct a global gender review," to be evaluated by the judge to determine whether further action was necessary to combat discrimination.¹⁹⁸ After the bank rejected these conditions, "the parties filed a stipulation of dismissal," and the bank then asserted that "the court no longer had jurisdiction" to disclose the settlement terms or unseal documents.¹⁹⁹ The court invited the bank to move to have the sealing order made permanent.²⁰⁰ Without addressing the merits, the bank argued only that the court was without jurisdiction to entertain the motion.²⁰¹

The court then issued an opinion unsealing the documents.²⁰² It ruled that because the documents had been relied upon in the summary judgment ruling, they were "judicial documents," and therefore entitled to the presumption of public access.²⁰³ The opinion also made reference to "a multi-million dollar settlement," which became immediately available to the public through online databases.²⁰⁴

Upon application by the bank, the Second Circuit stayed the release of the documents pending appeal, but denied the bank's motion to seal the district court's opinion, as it was by then already publicly available.²⁰⁵ Because plaintiff's counsel took no position on access to the documents, the court appointed a private firm as *amicus curiae* counsel to argue for public disclosure.²⁰⁶ With regard to the unsealing order, the Second Circuit affirmed the district court, holding that the stipulation did not divest the court of the power to determine whether documents should remain sealed, and that the court had not abused its discretion in ordering their unsealing.²⁰⁷ It relied on the presumption in favor of public access to documents that directly affect adjudication and the court's inherent supervisory powers over its own records.²⁰⁸

198. *Id.* at 136-37.

199. *Id.* at 137.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 137-38.

204. *Id.* at 137.

205. *Id.* at 138.

206. *Id.*

207. *Id.* at 142.

208. *Id.* The bank did not argue in the district court that there was good cause for the protective order, relying instead entirely on its jurisdictional argument. *Id.*

Judicial disclosure of the amount of the settlement, however, “[stood] on starkly different footing,” according to the appeals court.²⁰⁹ With little discussion, the court first determined that there was no presumption of access to an unfiled agreement that does not form a basis for adjudication.²¹⁰ It noted also that if confidentiality facilitates settlement, the courts should honor the parties’ agreement.²¹¹ Second, with regard to the transcript of the conference, during which the district judge “insisted on learning the settlement amount,” only a weak presumption of access is applicable.²¹² Although the transcript is a judicial record, the revelation of the settlement amount was couched in terms of confidentiality and did not relate to the adjudication of the matter.²¹³ Without a “showing of public interest in the disclosure,” the bank’s articulated reasons for confidentiality—the agreement was a private contract and did not contain any admission of wrongdoing or promise to change its policies—were sufficient to overcome the “weak presumption of access,” and the court ordered that the transcript remain under seal.²¹⁴ Finally, the court considered the language of the lower court’s unsealing order, and found that its reference to the magnitude of the payment “was a serious abuse of discretion.”²¹⁵ Since “the genie [was] out of the bottle,” however, the court had no power to remedy the breach of confidentiality.²¹⁶

Although the Second Circuit made passing reference to the “public interest,”²¹⁷ it did not address the issue raised by the lower court: why shouldn’t the public know about discrimination by a major bank?²¹⁸ Because the bank’s counsel saw the direction in which the district court was headed, it changed its procedural strategy and effectively removed this policy question from the court’s purview.²¹⁹ Originally, the defendant had requested that the court retain jurisdiction and “appoint a special master to hear future [payment] disputes.”²²⁰ This request would have entailed the filing of the stipulation, presumably under seal to maintain confidentiality. Once

209. *Id.* at 143.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 143–44.

215. *Id.* at 144.

216. *Id.*

217. *Id.* at 143–44.

218. *Id.* at 136.

219. *Id.* at 137.

220. *Id.* at 136.

the court made clear that it would not seal the settlement without a consideration of public access, the bank withdrew its request for continuing jurisdiction, and by filing a stipulation of dismissal, hoped to divest the court of its power to consider whether confidentiality was appropriate.²²¹

The Second Circuit rejected the jurisdictional argument as to the sealed discovery documents and considered the merits of disclosure, but it did not do so for the unfiled settlement agreement. It was satisfied with the representation that confidentiality was "the parties' express wish," which must be honored to encourage settlement.²²² The court seemed to suggest, however, that settlement agreements may not be completely immune from judicial scrutiny: "We cannot and do not conclude that there can never be a circumstance or a showing that would require such disclosure."²²³ Although this language in *Gambale* may be viewed as opening the door to further review of secret settlements, the "circumstance" or "showing" to which the court alludes is hard to envision.²²⁴

In the typical employment discrimination case, defense counsel does not seek a special master or ask the court to retain jurisdiction and therefore has no need to request a settlement agreement to be filed under seal. Certainly, after *Gambale*, no defense counsel who wants to maintain confidentiality would do so, since the decision suggests that even with a confidentiality clause, there may be a presumption of public access to any filed document. Nor will defense counsel discuss the terms of a signed, confidential agreement even at the urging of the court. In essence, *Gambale* actually legitimizes and serves to cement the mechanisms that keep settlements secret. In addition, *Gambale* highlights the fact that no one represents the public interest in these situations. The circuit court had to appoint amicus curiae counsel to argue in favor of disclosure, and it does not appear that counsel actually advocated for the release of the settlement amount.²²⁵

Could *Gambale* have been decided differently? The court recognized that secrecy in judicial proceedings is highly disfavored, and a court must balance the right of public access against the need for confidentiality.²²⁶ The argument can be made that this principle is

221. *Id.* at 136-37.

222. *Id.* at 143.

223. *Id.*

224. *Id.*

225. *Id.* at 138.

226. *Id.* at 143.

equally applicable to settlements. Relying on the purpose and intent of the discrimination statutes, the Second Circuit could have found that the district court was entitled to inquire whether a need for confidentiality existed other than because the parties had agreed to it to facilitate settlement. Moreover, a district judge, by individual rule, presumably could require the parties to attend a conference prior to filing a dismissal stipulation, at which time the balancing of interests could be addressed.

C. Analogies Positive and Negative

The public policy relating to secret settlements, and the likelihood of judicial change, may be informed by two disparate analogies: mandatory arbitration of employment disputes and the confidentiality of sexual abuse settlements.

Regardless of the language in *Gambale*, it seems unlikely that the lower courts will put a brake on secret settlements, not only out of their interest in caseload control, but also because the Supreme Court has signaled that it would not endorse such an approach. The Court's sense of the balance between public access and efficient resolution was made apparent in its decisions regarding the arbitrability of discrimination claims. In *Gilmer v. Interstate/Johnson Lane Corp.*,²²⁷ the Court held that an age discrimination claim is subject to a mandatory arbitration provision covering employment-related disputes.²²⁸ It flatly rejected the argument that discrimination litigation not only resolves individual grievances but also furthers broad social policies.²²⁹ The Court took the view that the vindication of the statutory claim in arbitration serves both remedial and deterrent goals.²³⁰ As to the contention that arbitration prevents public knowledge of discrimination, the Court noted that the applicable rules required written award decisions to be "made available to the public."²³¹ The dissent did not take issue with either of these assertions and was concerned only that because arbitration could not address "class-wide injunctive relief," it thereby frustrated an essential purpose of discrimination statutes.²³² In *Circuit City*

227. 500 U.S. 20 (1991).

228. *Id.* at 27-29.

229. *Id.* at 27-28.

230. *Id.* at 28.

231. *Id.* at 31-32. The arbitration was pursuant to the rules of the New York Stock Exchange. *Id.* at 40 (Stevens, J., dissenting).

232. *Id.* at 41-42 (Stevens, J., dissenting).

Stores, Inc. v. Adams,²³³ the Court expanded the *Gilmer* holding, interpreting the Federal Arbitration Act to encompass all employment contracts, except for those involving transportation workers.²³⁴

The arbitration cases have been widely criticized by legal scholars concerned about anti-discrimination values.²³⁵ Legislative and lobbying efforts underway to overturn the decisions are unlikely to be successful, however.²³⁶ Those knowledgeable about arbitration argue that the Court vastly overrated the deterrent aspect of awards; the claim that awards are available to the public can only be described as disingenuous.²³⁷ In the securities industry, for example, awards may be publicly available, but they are not published or indexed; access requires knowledge of the case number and a visit to the organization that administers the system.²³⁸ Nevertheless, the movement towards employment arbitration has grown dramatically: one study indicates that the percentage of private employees using arbitration grew from 3.6% in 1991 to 19% in 1997.²³⁹ The arbitration cases make clear that in the employment discrimination context, the court will privilege docket control through alternative dispute resolution over the general deterrent function of public access through litigation.²⁴⁰ Thus, there is little hope that the lower courts will be receptive to the claim that private settlements violate the underlying goals of the anti-discrimination statutes.

On the other hand, there has been a tremendous groundswell against secret settlements in a different context: the Catholic Church's sexual abuse scandal. As that scandal grew, dozens of people who had settled claims under confidentiality agreements came forward in the media with details of their abuse and the payment they

233. 532 U.S. 105 (2001).

234. *Id.* at 119.

235. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 397 (1999).

236. See, e.g., Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 781 (2003) (stating that "a concerted lobbying effort has been mounted in federal and state legislatures for legislation which would curtail employment arbitration despite the ruling in *Circuit City*").

237. *Id.*

238. Moohr, *supra* note 235, at 432.

239. Hill, *supra* note 236, at 779.

240. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31-32 (1991). The Court rejected *Gilmer's* argument that because arbitrators do not issue written opinions, the public will lack knowledge of employer's discrimination policies. *Id.* The Court relied on the EEOC's authority to mediate ADEA claims to show a statutory intent to further the "out-of-court dispute resolution." *Id.* at 29.

received.²⁴¹ It was generally acknowledged that although the secrecy clauses might be legally enforceable (unless declared void as violative of public policy), any attempt to silence abuse victims would be a public relations disaster.²⁴² Some church officials said publicly that they would take no action against those who spoke out.²⁴³ The press also questioned why lawyers and judges acquiesced to secrecy demands, given the danger to other children posed by predatory priests.²⁴⁴ Several lawyers expressed regret for their actions.²⁴⁵ One lawyer claimed that he now tells clients at the outset that he will not enter into a confidential settlement, under the belief that advance notice would obviate potential ethical concerns.²⁴⁶

If employment discrimination plaintiffs felt compelled to engage in similar civil disobedience, or employment lawyers amended their retainer agreements to have clients prospectively reject confidentiality clauses, perhaps the harm created by secrecy would begin to capture public attention. Indeed, it is possible to imagine a sexual harassment claimant breaching an agreement in order to protect others from a predatory boss. However, the analogy to sexual abuse may be of limited utility: unlike in the Catholic Church situation, employers can legitimately assert that no wrongdoing has been proved, and it is unlikely that they would feel the same constraints with regard to enforcing confidentiality agreements. Secret settlements in discrimination matters work less dramatically but more insidiously to subvert the public interest.

IV. THE IMPACT OF INVISIBLE SETTLEMENTS

Because of invisible settlements, no one knows—or has the capacity to determine—what really is going on with employment discrimination litigation. Are there too many frivolous or, at the very least, weak claims filed? Are most cases settled for nuisance value, as many employers contend? Or are many employees recovering six or seven figure settlements? Of course, all secret settlements can be

241. See Adam Liptak, *Price of Broken Vows of Silence*, N.Y. TIMES, May 26, 2002, § 1, at 20; Daron Madhari, *Breaking a Vow of Silence on Abuse*, CHI. TRIB., Apr. 14, 2002, at A1.

242. Liptak, *supra* note 241.

243. Richard Nangle, *Secrecy Agreements Criticized*, TELEGRAM & GAZETTE (Worcester, Mass.), May 10, 2002, at A1, available at <http://www.telegram.com/static/crisisinthechurch/051002a.html>.

244. Liptak, *supra* note 241.

245. Eileen McNamara, *Court Must End Secrecy*, BOSTON GLOBE, Feb. 27, 2002, at B1.

246. *Id.*

criticized in general terms as violative of democratic values, transparent process, and open government.²⁴⁷ But this Part focuses more specifically on their impact with regard to civil rights enforcement.

A. *The Problem of Empiricism*

The information vacuum created by invisible settlements has resulted in possibly erroneous, and certainly skewed, conclusions being drawn from the very limited available data about discrimination claims. Recent empirical studies attempt to draw conclusions about employment discrimination litigation outcomes by analyzing the results in cases decided by summary judgment or after trial.²⁴⁸ These studies claim that plaintiffs prevail at a substantially lower rate than other federal court claimants. Several authors have undertaken these projects explicitly to respond to conservative critics, who see employment discrimination legislation as primarily creating a new kind of lottery for protected classes, adding to the “litigation explosion,” and disadvantaging American business by necessitating the expenditure of resources on account of frivolous employment claims.²⁴⁹ They argue that bias on the part of factfinders causes the difference in success rates.

Despite the good intentions standing behind this empirical work, discussed in detail below, these studies are likely to provide fodder for those who believe that real employment discrimination has been eradicated. The “Occam’s razor” principle seems applicable: the simple and obvious explanation is most likely the correct one.²⁵⁰ Thus, the critics to whom these studies are addressed will conclude that the authors merely demonstrate that most employment discrimination plaintiffs have weak cases and lose at trial because they cannot show that they have suffered discrimination; employers are quick to settle any case where the plaintiff has a likelihood of success. Rather than persuading judges and policymakers of bias in

247. See Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 630–31 (2004) (stating that settlements, generally, are not consistent with ideals of the democratic process).

248. See *infra* text accompanying notes 251–90.

249. See *infra* text accompanying notes 251–90.

250. This principle, attributed to and named after medieval philosopher William of Occam states: “[E]ntities should not be multiplied needlessly. This rule is interpreted to mean that the simplest of two or more competing theories is preferable and that an explanation for unknown phenomena should first be attempted in terms of what is already known.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1216 (Joseph P. Pickett ed., 4th ed. 2000).

factfinding, these studies reinforce the existing perceptions about the prevalence of meritless claims. Indeed, this viewpoint might be more effectively countered by demonstrating that success in employment claims matches that in tort claims, a conclusion that finds support in some of the data discussed below. Moreover, the impact of these studies is vastly exaggerated because data suggesting the contrary conclusion—that employment claimants receive reasonable compensation through settlement—is unavailable. Successful claims are made invisible by secret settlements. Demonstrating that most plaintiffs lose will not deter but rather will encourage critics of civil rights litigation.

Michael Selmi sets out to disprove empirically what he views as a common misperception—fueled by conservative interest groups—that employment discrimination cases are easy to win.²⁵¹ This perception, he argues, affects judges as well as the general public, and has led the courts to view these employment claims, particularly in the race area, as often “unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way.”²⁵² Using data from the federal Administrative Office of the Courts for the years 1995–97, Selmi compares plaintiff success rates in three categories: jobs, insurance, and personal injury. For jury trials, plaintiffs’ win rate is 39.9% in the jobs category, 51.3% in insurance, and 40.8% in personal injury; for non-jury trials, the percentages are 18.7%, 43.6%, and 41.8%, respectively.²⁵³

Selmi suggests that the disparity between the jury and non-jury plaintiff verdicts in the jobs category supports his claim of judicial bias.²⁵⁴ He rejects the possibility that the statistics merely show that there are fewer meritorious discrimination cases.²⁵⁵ He argues that, since attorneys who litigate these cases are motivated by their profit potential, they will not accept weak cases.²⁵⁶ But attorneys often do not have access to complete information at the time of filing.²⁵⁷ If discovery disproves the plaintiff’s account, Selmi suggests that there

251. Selmi, *supra* note 12, at 557 (citing, in support of the proposition that employment discrimination claims are easy to win, RICHARD EPSTEIN, *FORBIDDEN GROUNDS* (1992); PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* (1994); and WALTER K. OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* (1997)).

252. *Id.* at 556.

253. *Id.* at 560.

254. *Id.* at 561.

255. *Id.* at 569.

256. *Id.* at 569–70.

257. *Id.* at 570.

would be more voluntary dismissals in discrimination matters than in other types of cases, however, which is not borne out by the data.²⁵⁸ But he does conclude that there are a number of employment discrimination cases that should never have been filed, and he urges attorneys to engage in careful case selection.²⁵⁹ He also encourages plaintiffs to present expert testimony on the nature of unconscious or subtle discrimination, in an effort to “countermand judicial bias.”²⁶⁰

A closer look at Selmi’s statistics reveals data that might call into question some of his conclusions. Interestingly, the percentage of plaintiff jury verdicts in the categories of jobs and personal injury is virtually identical: 39.9% and 40.8%.²⁶¹ Although the insurance case percentage is higher,²⁶² these claims are largely contractual and not comparable. But most importantly, Selmi fails to consider the significance of a much larger percentage of case dispositions that fall into the category of “other dismissals”: 67% in jobs and 64% in personal injury.²⁶³ It is fair to assume that the vast majority of these cases are stipulated dismissals behind which stand confidential settlement agreements. These invisible settlements at least should be noted in the evaluation of plaintiff outcomes.

Like Selmi, David Oppenheimer sets out to inform the public policy debates that rely heavily on negative outcomes²⁶⁴ by studying verdict reports in California employment law cases. Finding evidence of substantial disadvantage to women and minorities, he also attributes disparities to judge and juror bias.²⁶⁵ He suggests the problem of bias is further exacerbated by the “false claims and heated rhetoric”²⁶⁶ about employment litigation, including claims that litigants get “enormous unwarranted benefits.”²⁶⁷

Oppenheimer’s data show that in California in the two-year period 1997–98, plaintiffs won statutory discrimination claims 50% of the time, with a median verdict of \$200,000.²⁶⁸ But for certain claimants the success rate was much lower: age discrimination plaintiffs, 27%; non-white race discrimination plaintiffs, 36%; female

258. *Id.*

259. *Id.* at 571.

260. *Id.* at 573.

261. *Id.* at 560.

262. *Id.*

263. *Id.* at 559.

264. Oppenheimer, *supra* note 12, at 514.

265. *Id.*

266. *Id.* at 515.

267. *Id.* at 518.

268. *Id.* at 535.

sex discrimination non-harassment plaintiffs, 35%.²⁶⁹ The 50% win rate encompasses actions in which whites sued for discrimination, which had a 100% success rate and sexual harassment actions, which represented one-third of the total and had a win rate of 68% for women alleging harassment by men, and 100% for men alleging harassment by other men.²⁷⁰

Oppenheimer raises some questions about the reliability of the data, however, and suggests that it reflects higher success rates and verdicts than a study of court records would show.²⁷¹ He notes that verdict services rely on lawyers to report trial results, and winning lawyers with substantial verdicts obviously are the ones most likely to submit information.²⁷² But he does not acknowledge the tremendous impact on his data of confidentiality clauses, which bar almost all reporting of settlements.

Oppenheimer rejects several possible explanations for his findings. Because of the difference in success rates between sexual harassment claims and discriminatory discharge cases, it is difficult to attribute lower win rates in the latter type of cases to employers' advantages as repeat players, or because they have more to lose or have more resources.²⁷³ He concludes that judicial or juror bias against certain classes of litigants—particularly older women and black women—accounts for the differences, citing public opinion surveys indicating that white respondents do not believe that blacks still suffer from job discrimination and any inequality is the result of blacks' "lack of motivation."²⁷⁴ Public opinion is further influenced by the recent assault on anti-discrimination laws in a number of popular books, which make claims that employers are being forced to use quotas and settle meritless claims at the risk of ruinous verdicts based on the few highly publicized instances of large verdicts.²⁷⁵

Clermont and Schwab's 2004 study, *How Employment Discrimination Plaintiffs Fare in Federal Court*,²⁷⁶ provides a more detailed, longitudinal, and up-to-date analysis of the same data that Selmi considered, but in essence reaches the same conclusion: plaintiffs "have a tough row to hoe."²⁷⁷ Although, unlike Selmi and

269. *Id.* at 517.

270. *Id.* at 535–40.

271. *Id.* at 554.

272. *Id.* at 550.

273. *Id.* at 553.

274. *Id.* at 561.

275. *Id.* at 562–63.

276. Clermont & Schwab, *supra* note 2, at 429.

277. *Id.*

Oppenheimer, Clermont and Schwab posit no explanatory theories, they do suggest a trend towards more equivalent outcomes.²⁷⁸

With little discussion, the authors make note of data demonstrating that the success of employment claims may be approaching the personal injury norm. Looking at statistics from 1979 to 2001, they found that in the "jobs" category, the percentage of cases tried has dropped from 18.2% to 3.7%.²⁷⁹ The percentage of bench trials also dropped substantially: in 2000, 87% of trials went to a jury, as compared to 10% in 1979.²⁸⁰ Simply by combining certain disposition codes used by the Administrative Office of the Courts coding system, they conclude that almost 70% of employment discrimination cases are resolved by settlement.²⁸¹ These include the category for settlement, but also the "voluntary dismissals," and by far the largest category, "other dismissals."²⁸² The gap between plaintiff win rates in employment discrimination as compared to other cases has narrowed substantially: in 1979, 16.5% compared to 40%; in 2001, 39.5% compared to 44.3%.²⁸³ Looking just at jury trials, win rates are almost even, and win rates before judges show a marked upward trajectory.²⁸⁴ One difference in employment discrimination cases is the frequency of pre-trial adjudication, most commonly summary judgment. Clermont and Schwab's appendix shows that between 1979 and 2001 non-trial adjudication accounts for similar percentages in jobs and non-jobs cases, 19.24% compared to 19.13%, but pre-trial adjudication plaintiff win rates show a large discrepancy, 4.23% in jobs, 22.23% in non-jobs.²⁸⁵ However, since plaintiffs are rarely in a position to move affirmatively for judgment, the relevant statistic would be the percentage of motions granting summary judgment to the employer.

Berger, Finkelstein, and Cheung look specifically at the issue of summary judgment in employment discrimination cases, in an effort to provide some hard data that would be useful to litigants and mediators in settlement negotiations.²⁸⁶ As they note, when cases are

278. *Id.* at 441.

279. *Id.* at 438-39.

280. *Id.* at 438.

281. *Id.* at 440.

282. *Id.* at 440 n.14.

283. *Id.* at 441.

284. *Id.* at 441-42, app. at 457.

285. *Id.* at 444.

286. Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. (forthcoming 2005) (manuscript at 48-49, on file with the North Carolina Law Review).

referred for mediation, negotiations often revolve around the likelihood of the case being dismissed on summary judgment: the plaintiff may lose entirely, but if the claim survives, trial—with the attendant costs and uncertainty²⁸⁷—becomes inevitable. Analyzing summary judgment dispositions in two federal district courts in New York City using dockets sheets available through the courts' online Public Access to Court Electronic Records ("PACER") database, they found that defendants made summary judgment motions in 22.8% of employment cases, with motions denied in 36.4% of those.²⁸⁸ Thus, 14.5% of all filed cases were dismissed on summary judgment, and 8.3% were to go forward to trial, absent settlement. But when pro se cases (which represent 18.87% of employment filings overall and 33.3% of employment filings in the PACER data) are eliminated, denials go up 46.4%.²⁸⁹ Thus, it is fair to say that plaintiffs win close to half of the summary judgment motions.

This study makes a small inroad into the secrecy surrounding settlement and the misperceptions of success rates for plaintiffs. Extrapolating from this data, it appears that summary judgment denials occur in 8.3% of all employment cases and in 10.5% of non-pro se employment cases. In effect, the denial of summary judgment results in what should be considered a plaintiff win. Noting that a denial often results in a settlement and raises the settlement value of the case,²⁹⁰ the authors understate the significance of such a decision. Cases that survive a summary judgment motion are worth substantially more than the proverbial "nuisance value."

B. The Problem of Representation

All of these studies are related to and, in a sense, represent a subset of, the burgeoning literature on the "vanishing trial" phenomenon in the federal courts, currently a subject of much debate by procedure scholars.²⁹¹ Marc Galanter's extensive study revealed that the overall trial rate has dropped from 11.5% in 1962 to 1.8% in 2002.²⁹² Civil rights cases in 2002 were tried at a higher rate, 3.8%, representing over a third of all trials, and have replaced torts as being

287. *Id.*

288. *Id.* (manuscript at 53, 55).

289. *Id.* (manuscript at 55 nn.48, 56).

290. *Id.* (manuscript at 48–49).

291. See, e.g., Galanter, *supra* note 2, at 459 (discussing "the decline in the portion of cases that are terminated by trial and the decline in the absolute number of trials in various American judicial fora").

292. *Id.*

the most likely to reach trial.²⁹³ It is assumed, but not fully investigated, that as trials have decreased, settlements have increased. Indeed, many of the hypotheses advanced by Galanter for the decrease—diversion of cases to ADR, litigation expense, and managerial judging, with its heightened emphasis on mediation²⁹⁴—would naturally result in more settlements.

Procedure scholars are now considering the consequences of the demise of trials, which mirror the ramifications of, and are exacerbated by, invisible settlements. Galanter notes that in the absence of trials, settlements, which once entailed “bargaining in the shadow of the law,” cannot be guided by authoritative determinations of fact.²⁹⁵ Lawyers cannot “make reliable estimates of expected trial outcomes.”²⁹⁶ He suggests that all litigation will come to resemble Janet Alexander’s description of securities class action litigation cases:

[B]ecause securities class actions rarely if ever go to trial, settlement judges, like lawyers, have little relevant experience to draw on other than their knowledge of settlements in similar cases. In these circumstances, their role becomes not to increase the accuracy of settlements, but to provide an impetus to reach *some* settlement. In the absence of information about how similar cases fared at trial, settlement judges could be an important force in maintaining a “going rate” approach to settlements.²⁹⁷

The problems resulting from secret settlements in employment discrimination claims are even more pronounced than in the securities area. In class actions, although there may be few trials, settlements become public by virtue of the rule requiring their judicial approval.²⁹⁸ In fact, Alexander was able to determine that in almost all securities class actions, the final settlement represented twenty-five percent of the amount at stake.²⁹⁹ No such benchmarks are available when settlement amounts are kept confidential.

293. *Id.* at 468.

294. *Id.* at 515–20.

295. *Id.* at 525.

296. *Id.* at 526.

297. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 566 (1991).

298. FED. R. CIV. P. 23(e)(1)(A) (“The court must approve any settlement . . . of a certified class.”).

299. Alexander, *supra* note 297, at 517, 545.

Thus, invisible settlements in discrimination claims infect the process of representing discrimination claimants, particularly with regard to case selection, counseling, and negotiation. Take, for example, the situation in which a woman consults an attorney claiming that she was the target of sexual harassment and failed to receive a promotion at her job with a major corporation. The calculation of back pay may be relatively straightforward, but how is the lawyer to evaluate possible compensatory and punitive damages? Trial verdicts and settlement reports are the traditional sources for such information; in the tort area, for example, extensive verdict and settlement reporting services perform this function. In fact, in tort law, the volume of data available has led to the development of a “common law” of settlement. Formulas for calculating damages—such as medical expenses multiplied by two—are commonplace.³⁰⁰

Confidentiality clauses have made the broad compilation of such data impossible in employment cases. Highly specialized lawyers may rely on their own experiences with settlement,³⁰¹ but most employment lawyers do not litigate a sufficient volume of cases to make such evaluations very reliable. Informal and formal lawyer networks provide another common source of information for case evaluation, but again confidentiality concerns inhibit the discussion of cases in all but the most general terms.³⁰²

What if the client suggests—as many do—that other claims may have been made against her employer, and the diligent attorney undertakes her own research? If the existence of another action is discovered, with federal “notice” pleading, the complaint may contain only the barest of factual allegations. Since Federal Rule of Civil Procedure 5 was amended in 2000 to mirror the local rules of many districts, discovery materials are no longer filed with the court.³⁰³ Assuming the matter is settled confidentially prior to a summary judgment motion, the case file will contain a stipulation of dismissal and nothing else of a substantive nature. The existence of a prior lawsuit suggests the possibility of a problem in the workplace. But without any information about the substance of the settlement, it has little predictive value. The settlement agreement in the earlier case

300. *Id.* at 541.

301. See generally Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, 43 No. 1 JUDGES' J. 19 (2004) (discussing how the collection of settlement data can educate judges and parties as to appropriate settlement outcomes).

302. Blanca Fromm, Comment, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 698 (2001).

303. See FED. R. CIV. P. 5(d).

bars the plaintiff and her attorney from discussing the allegations or the outcome.

Secrecy affects the subsequent litigation in a number of ways. First, for the lawyer working on a contingency basis, knowledge of the underlying facts and the settlement amount would greatly affect the likelihood of undertaking representation. Second, an attorney might counsel the client differently about potential outcomes, depending on whether the settlement was for \$2,000 or \$200,000. Finally, knowledge of the prior settlement amount would have a substantial impact on settlement negotiations. Taking the most concrete example, plaintiff's counsel cannot effectively respond to defense counsel's assertion that the prior litigation was settled for nuisance value. The corporate defense lawyer has a substantial "repeat player" advantage. Even the specialized plaintiff's lawyer cannot reveal details of prior litigation. Simply asserting that a former client received a \$100,000 settlement in a similar action does not go far in the negotiation process.

Invisible settlements, along with the decline of trials, also hamper a judge's ability to assist with the settlement process. As discussed above, some seventy percent of employment cases will simply disappear from the docket, most commonly through stipulations of dismissal, with no formal judicial action.³⁰⁴ It may be that some judges are active in precipitating settlements that result in these dismissals, but the final terms still are not disclosed or made part of the court record. Increasingly, however, judges delegate this function to magistrate judges, or court-annexed mediators, thus further limiting their settlement "database."³⁰⁵

Invisible settlements, vanishing trials, ADR—all of these developments keep civil rights claims out of the public eye. The concept of public law no longer holds sway. Trials tell stories and provide official and public vindication. Settlements can tell stories, too, but not when they are immune from public scrutiny. The proliferation of invisible settlements has left us with a highly circumscribed view of discrimination in the workplace. Certainly, not every settlement is proof that an employer has engaged in biased decisionmaking. But considered in the aggregate, acquiescence to

304. See *supra* text accompanying notes 111, 281.

305. Baker, *supra* note 108, at 661 (discussing the increasing responsibilities of the Article I judiciary and its profound impact on the federal courts); cf. Denlow & Shack, *supra* note 301, at 19 (detailing an effort in Illinois to compile a database of settlement data for use in increasingly prevalent settlement conferences).

demands of confidentiality endangers the future enforcement of our discrimination laws.

V. REMEDYING INVISIBILITY

A number of means exist to address the problem of invisible settlements, all of which—until recently—seemed to have little chance of seeing the light of day. Now, however, the stir over vanishing trials suggests a slight swinging back of the pendulum between public and private dispute resolution. This Part discusses several approaches that specifically address the problem of secrecy in the context of discrimination claims: legislative or regulatory changes; resistance, organizational efforts and publicity directed against secrecy by the plaintiffs' employment law bar; and the collection of aggregate, anonymous settlement data. Of these options, this Part contends that regulatory action by the EEOC holds the most promise for providing real transparency and for ease and efficiency of administration.

The most obvious way to enhance the public function of discrimination laws and return to the "private attorney general" concept of enforcement would be to require judicial approval of settlement agreements, which would then become part of the public record, unless perhaps good cause could be demonstrated for sealing the record. The rationale is not unlike, although less compelling than, that which necessitates approval of class action settlements: there are unnamed parties who will be affected by the result. In the case of employment discrimination, although a settlement does not curtail the rights of other employees, it does have an impact on the future assertion of claims.

Even without statutory amendments, there is precedent for the adoption of such a judicial interpretation. The Fair Labor Standards Act of 1938 ("FLSA")³⁰⁶ gives workers a cause of action against employers who fail to pay overtime wages and permits the recovery of back pay and an additional equal amount as liquidated damages.³⁰⁷ Shortly after the FLSA's passage, the Supreme Court held that an employee cannot bargain away through settlement his right to wages or damages.³⁰⁸ Although the statute did not directly address this issue, the Court reasoned that settlements endangered the public

306. 29 U.S.C. §§ 201–219 (2000).

307. *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 115–16 (1946); *see also* 29 U.S.C. § 216(b) (setting forth the damages that an employee may claim).

308. *D.A. Schulte*, 328 U.S. at 116.

purpose of the law, and given the unequal bargaining power of employees, more than a private agreement is necessary.³⁰⁹ The Court indicated that compromise could be effectuated through the entry of stipulated judgments, however, noting that “we think the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises by the parties.”³¹⁰

In a dissent that echoes much of current Supreme Court jurisprudence, Justice Frankfurter criticized the majority, commenting that the policy underlying a statute “should be drawn out of its terms . . . , and not, like nitrogen, out of the air.”³¹¹ It is hard to imagine that this reasoning would not prevail today against the argument that the purposes of Title VII require judicial approval of settlements. And in this era of docket control, it is unlikely that Congress would amend the statute or the courts would adopt a statutory interpretation that would expand the judiciary’s workload. Nevertheless, the Supreme Court’s interpretation of the FLSA still stands, and even the articulation of the argument might call attention to the ubiquity and dangers of invisible settlements.

On the other hand, the EEOC, which is charged with interpreting the employment discrimination statutes, as well as bringing significant litigation, could—and should—take up the cause of public accessibility through the issuance of regulations that would limit confidential settlements by requiring judicial approval of negotiated agreements. Indeed, with regard to the settlement of actions that it commences, the agency prohibits confidentiality agreements and requires that “resolutions . . . must contain all settlement terms and be filed in the public court record.”³¹² The agency considers its policy as mandated both by the right of the public to “have access to the results of the agency’s litigation activities,” and because “one of the principal purposes of enforcement actions . . . is to deter violations by the party being sued and by other entities subject to the laws. Other entities cannot be deterred by the relief obtained in a particular case unless they learn what that relief was.”³¹³ For those who argue that cases would not settle without

309. *Id.*

310. *Id.* at 114 n.8.

311. *Id.* at 121–22 (Frankfurter, J., dissenting).

312. OFFICE OF THE GEN. COUNSEL, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, REGIONAL ATTORNEYS’ MANUAL pt. 3, at 58 (2005), available at <http://www.eeoc.gov/litigation/manual/pdf/part3.pdf>.

313. *Id.*

confidentiality, the EEOC policy counsels otherwise. In addition, such a regulation would have a salutary side effect: employers who strongly valued confidentiality would have an added impetus to resolve claims through mediation at the agency level, where confidentiality is the rule.³¹⁴

Given the EEOC's articulation of statutory purposes, it would seem appropriate for the agency to issue a regulation that would call on courts to approve discrimination settlements and make them part of the court record, absent special circumstances. Just recently—in July 2005—the Fourth Circuit approved this approach as to claims brought under the Family and Medical Leave Act (“FMLA”), relying on Department of Labor (“DOL”) regulations that require court or agency approval of settlements.³¹⁵ In *Taylor v. Progress Energy, Inc.*, the plaintiff brought an action alleging that she was deprived of her right to medical leave and terminated in retaliation for complaining about her employer's violation of the FMLA.³¹⁶ At the time of her termination, she was offered and accepted additional compensation in exchange for a release of any claims under the discrimination statutes and “any other federal, state or local law.”³¹⁷ Relying on the release, the employer moved for summary judgment. In response, Taylor claimed that the release was unenforceable because of a DOL regulation providing that “employees cannot waive, nor may employers induce employees to waive, their rights under FMLA,” without DOL or judicial approval, as is the case under FLSA.³¹⁸ The court rejected the only other judicial interpretation of the regulation, the Fifth Circuit's holding that it barred only prospective waivers of substantive FMLA rights.³¹⁹ Rather, the court found that the regulation on its face barred all waivers, including retrospective claims of discrimination and retaliation, and that although the statute was silent on this issue, DOL acted within the bounds of Congress's delegation of rulemaking authority.³²⁰ Moreover, in enacting the 1995 regulation, DOL had explicitly rejected employers' arguments that the agency should adopt Title VII's allowance of waivers, and instead chose to model enforcement on the FLSA.³²¹ In addition, using the *Chevron* test, the court held that the regulation was based upon a

314. See 29 C.F.R. §§ 1601.22, 1601.26 (2005).

315. *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 365 (4th Cir. 2005).

316. *Id.*

317. *Id.* at 367.

318. *Id.* at 368 (citing 29 C.F.R. § 825.220(d)).

319. *Id.* at 371–72.

320. *Id.* at 372.

321. *Id.*

permissible construction of the statute.³²² Significantly, it rejected the employer's argument that the regulation worked against the general public policy favoring settlement, finding that the agency need not have privileged that concern over the protection of employee rights.³²³

While there are differences between the DOL-administered statutes and the discrimination statutes under the EEOC's purview, there are important parallels. Like Title VII, neither the FLSA nor the FMLA make any reference to judicial approval. The requirement was first created by the Supreme Court as a purely public policy gloss³²⁴ and taken up by the enforcing agency. Certainly, the public policy underlying the discrimination statutes is at least as compelling. Because the EEOC is not authorized under Title VII to issue rules interpreting substantive statutory provisions, its substantive regulations are not accorded *Chevron* deference and are more closely examined for consistency with congressional intent.³²⁵ But Congress did authorize the agency to issue "suitable procedural regulations to carry out the provisions of" the employment discrimination statutes.³²⁶ Although the issue has not been definitively addressed, several justices have expressed the view that such procedural rules are entitled to full deference.³²⁷ Thus, a strong argument can be made that an anti-secrecy regulation enacted by the EEOC should be given the same deference as the *Taylor* court showed to the DOL regulation. Some employment law experts have suggested, however, that given the conflicting circuit court opinions, *Taylor* may find its way to the Supreme Court,³²⁸ where congressional silence might receive different treatment.

Other existing approaches to limiting secret settlements—local federal court rules, state statutes, and ethics rules—are largely designed to address public health and safety concerns, and often do

322. *Id.* at 375.

323. *Id.* at 373.

324. *See* D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 116 (1946) (inferring that neither wages nor damages can be reduced through compromise because that would violate congressional intent).

325. EEOC v. Arabian Amer. Oil Co., 499 U.S. 244, 257 (1991); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976).

326. 42 U.S.C. § 2000e-12(a) (2000).

327. *See, e.g.,* Edelman v. Lynchburg Coll., 535 U.S. 106, 122 (2002) (O'Connor, J., concurring) (stating that the EEOC's regulation is entitled to *Chevron* deference).

328. *See, e.g.,* Francis W. Connolly & Larry R. Seegull, *Fourth Circuit: No Waiver or Release of FMLA Claims Without DOL or Court Approval*, DLA PIPER RUDNICK GRAY CARY, Jul. 26, 2005, <http://www.dlapiper.com/us/experience/publicationdetail.aspx?id=4195> ("[T]he enforceability of waivers of prospective substantive FMLA claims may be primed for resolution by the Supreme Court.").

not provide a remedy for invisible settlements of civil rights claims. For example, the federal district court in South Carolina recently adopted a local rule prohibiting sealed settlement agreements in most circumstances, but it explicitly permits "parties, by agreement, to restrict access to documents which are not filed with the Court."³²⁹ Several states have enacted "sunshine in litigation" legislation, which declare as void and contrary to public policy contracts that have "the purpose or effect of concealing a public hazard," to use the language of Florida's law.³³⁰ A proposed ethics rule would bar lawyers from agreeing to prevent public access to information that concerns "substantial danger to the public health or safety."³³¹ In a recent article, Richard Zitrin details the specifics of these efforts, arguing that they do not go far enough.³³² But his concern is with open access to documents relating to "a known harm—whether it is a defective product, toxic waste, or a molesting soccer coach,"³³³ and he makes no reference to the civil rights context. Zitrin suggests that scholarly and media attention to litigation secrecy is creating something of a groundswell for legislative action.³³⁴ Advocates for openness have all but ignored secrecy in the discrimination context, however. More broadly worded statutes, barring enforcement of secret settlements found to be against the public interest, would allow for the inclusion of civil rights claims.

Surprisingly, Zitrin is willing to forego disclosure of settlement amounts, even when the statutes do not, because he views monetary relief as affecting a "non-substantive issue."³³⁵ A recently defeated sunshine bill in California specifically exempted disclosure of monetary relief.³³⁶ In employment discrimination settlements, however, there is little of true public interest other than the identity of the parties, the fact of the settlement, and the settlement amount. Particularly because every agreement contains a disclaimer of legal liability, the amount paid to the plaintiff is an important indicator of possible culpability. Moreover, as discussed above, knowledge of

329. Zitrin, *supra* note 133, at 884.

330. *Id.* at 891 (citations omitted); see *supra* notes 115–16 and accompanying text.

331. Zitrin, *supra* note 133, at 905.

332. *Id.* at 895.

333. *Id.* at 887.

334. *Id.* at 890.

335. *Id.* at 887 n.17.

336. Assem. Bill 1700, 2005–06 Assem., Reg. Sess. (Cal. 2005); E-mail from Richard Zitrin, Adjunct Professor of Law, U.C. Hastings, to the law clinicians' discussion list at Washburn School of Law (Mar. 1, 2005, 04:03 EST) (on file with the North Carolina Law Review).

settlement amounts is critical in case evaluation, client counseling, and negotiation.

Still another approach would be for the plaintiffs' employment law bar to "just say no" and organize a campaign against secrecy. Civil rights lawyers have said no before, refusing to negotiate in the face of fee waiver demands, for example, and including authority to do so in their retainer agreements.³³⁷ Similarly, if plaintiffs' lawyers obtained their clients' prospective agreement to refuse settlements containing confidentiality clauses, the balance of power in negotiations could shift.³³⁸ Just as defense counsel now claim that they will never settle without confidentiality, the plaintiffs' bar could become equally assertive. It is likely that cases would continue to settle at the same rate, as was the case when Florida adopted a sunshine statute.³³⁹

For this approach to work, however, public attention must be focused on the unfairness and harm caused by secrecy. ATLA, which represents a substantial segment of the plaintiffs' personal injury bar, has actively pursued such an agenda with regard to tort claims.³⁴⁰ It has officially condemned secret settlements and lobbies for legislation restricting them.³⁴¹ Its website is a rich source of information and data supporting the anti-secrecy position.³⁴² The National Employment

337. Davies, *supra* note 33, at 216 (stating that attorneys flatly refused to waive fees but would cut fees below amount in retainer agreements when settlement offers were made); E. Richard Larson, *Recent Developments in the Law of Attorney's Fees*, C742 A.L.I.-A.B.A. CONTINUING EDUC. 781, 844 (1992) (suggesting that no-waiver clauses are the most common strategy for dealing with fee-related conflicts).

338. There is some question, however, whether a retainer agreement that restricts a client from accepting a confidential settlement would be viewed as ethically proper. Bar associations have split on the propriety of retainers that prohibit a client from accepting a settlement that contains a waiver of attorney's fees, with a few states finding that they improperly interfere with a client's right to control settlement decisions. See Daniel Nazar, Note, *Conflict and Solidarity: The Legacy of Evans v. Jeff D.*, 17 GEO. J. LEGAL ETHICS 499, 518-20 (2004).

339. See Zitrin, *supra* note 133, at 891-92.

340. See ATLA Press Room: Secrecy in the Courts News: Background, <http://www.atlanet.org/pressroom/FACTS/secrecy/index.aspx> (last visited Feb. 28, 2006).

341. *Id.*

342. The website of the Association of Trial Lawyers of America contains a number of reports on secrecy in the courts. See ATLA Press Room, Secrecy Provisions 2005 (2005), <http://www.atla.org/pressroom/facts/secrecy/antisecrecyprovisions2005.pdf> (listing court rules and statutes by state); ATLA Press Room: Secrecy in the Courts: Research, <http://www.atlanet.org/pressroom/facts/secrecy/research.aspx> (last visited Feb. 20, 2006); ATLA Press Room: Why Americans Should Oppose Secrecy in Litigation, http://www.atlanet.org/pressroom/facts/secrecy/why_oppose_secrecy.aspx (last visited Feb. 20, 2006) (explaining ATLA's position on secrecy); ATLA Press Room, Key Findings of the Federal Judicial Center's Study on Sealed Settlement Agreements, <http://www.atlanet.org/pressroom/facts/secrecy/FJCStudy.aspx> (last visited Feb. 20, 2006) (reporting statistics

Law Association (“NELA”) is a fast-growing organization of plaintiffs’ counsel, but apparently it has not publicly addressed the issues of confidentiality and invisible settlements. NELA should mount a lobbying effort to encourage passage of sunshine legislation that encompasses civil rights claims as it has done to oppose mandatory arbitration.

Yet even if these suggestions are not accepted, the importance of data collection—for practicing lawyers, the judiciary, and policymakers—cannot be underestimated. Empiricists caution against replacing no data with bad data.³⁴³ Relying on trial outcomes to draw conclusions about the state of employment discrimination law does just that. In this regard, I suggest an experiment that would allow for information-gathering without jeopardizing the policies that support contractual confidentiality. The Administrative Office of the Courts is developing a new data-collection system that will take advantage of the federal courts’ adoption of electronic case and docket management.³⁴⁴ It should take this opportunity to find out more about settlements. Presumably, it would be possible to require parties to provide additional information when a case is terminated by a stipulation of dismissal—at least whether it is the result of a settlement contract. If so, while the parties’ names could remain confidential, the amount of the settlement and the general characteristics of the matter could be recorded and entered into a database.³⁴⁵ Thus, for example, it would be possible to determine with accuracy the percentage of sexual harassment cases settled in

on civil cases in federal courts); see also Laurie Kratky Dore, *The Confidentiality Debate and the Push to Regulate Secrecy in Civil Litigation* (2000), <http://www.roscoepond.org/new/00kratky.pdf> (unpublished manuscript for the Roscoe Pound Institute, on file with the North Carolina Law Review) (advocating a “functional” approach that sets up hurdles for confidentiality proponents in any given case).

343. See Stephen B. Burbank, *Vanishing Trial and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah*, 1 J. EMP. L. STUD. 591, 605 (2004). See generally Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003) (analyzing how errors in data entry affect how the data can be used); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004) (highlighting the importance of auditing federal courts’ data to assess the rates of trial settlements versus public nontrial adjudications).

344. Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 581 (2004).

345. The District Court for the Northern District of Illinois has created such a database to assist judges in holding settlement conferences. See Denlow & Shack, *supra* note 301, at 19.

any particular judicial district and the mean, median, and average recoveries. In addition, data relating to procedural history, including summary judgment, utilization of ADR resources, and the gender and race of the plaintiff would allow a more nuanced understanding of our civil rights laws, both substantively and procedurally.

CONCLUSION

The trends that have contributed to the increasing prevalence of invisible settlements are not likely to be reversed. In fact, the tort-based contingency fee model of employment discrimination litigation appears to be more firmly entrenched than ever, given the Supreme Court's recently announced view—challenging a long line of cases—that settlements never merit a judicial award of attorney's fees.³⁴⁶ As a result, there is little in the way of a database to inform public discourse. Unsupported rhetoric plagues the debate over the prevalence of discrimination in the workplace and the utility of our civil rights laws, with the left claiming that bias pervades the factfinding process and the right arguing that employers are being held hostage by nuisance claims. Because recent empirical studies rely on a tiny and probably unrepresentative fraction of claims brought, they do not add much in the way of real information.

The collection of aggregate data would be of some use, but given the factual intricacies of each matter, identifying comparables to aid in negotiation is difficult. A better solution is for the EEOC to adopt a rule equivalent to what the agency itself enforces with regard to its own litigation: as a matter of policy, settlements must be a matter of public record. If employers are so fearful of this result, they will settle at the administrative stage, where confidentiality can remain the rule, thus reducing federal court filing and the need for court-annexed ADR. In fact, open settlements should garner support from both sides of the political debate, since the availability of the data will allow for reasoned discourse about the status of discrimination in the workplace.

346. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (holding that attorney's fees will not be awarded based on the "catalyst theory"—when the plaintiff claims that its lawsuit was the catalyst for the defendant's voluntary change in policy or practice—and suggesting that private settlements, unlike consent decrees, do not merit fee-shifting).