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COMMENT

ABOUT NOT KNOWING—THOUGHTS ON SCHWAB AND HEISE'S *SPLITTING LOGS: AN EMPIRICAL PERSPECTIVE ON EMPLOYMENT DISCRIMINATION SETTLEMENTS*

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We know absurdly little about employment discrimination settlements. Although there is much theory out there about equality and discrimination in the workplace, we suffer from a severe scarcity of reliable information about whether and to what extent antidiscrimination laws actually reduce discrimination¹ and about the role of employment discrimination litigation.² There is even less information about employment discrimination settlements.³ These limits of knowledge are common to all civil settlements. They result from both an objective reason—the difficulty of obtaining information on settle-

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¹ See John J. Donohue, *The Legal Response to Discrimination: Does Law Matter?*, in *HOW DOES LAW MATTER?* 45, 45–46 (Bryant G. Garth & Austin Sarat eds., 1998). John Donohue asks whether antidiscrimination law in the United States has generated any positive benefits and suggests that “virtually any conceivable statement can be backed up with appropriate supporting citations.” *Id.* at 46. For a discussion of the effects of employment antidiscrimination law on black workers, see *id.* at 53–70.

² See Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer–Defendants*, 38 N.M. L. REV. 333, 334–35 (2008) (arguing that despite important improvements in the working conditions of women and minorities brought about by Title VII litigation, “[t]he total elimination of bias in the workplace . . . has not been achieved” and that, in fact, bias results from such litigation, a phenomenon the article terms “litigation-induced group bias”); Tricia McTague et al., *An Organizational Approach to Understanding Sex and Race Segregation in U.S. Workplaces*, 87 SOC. FORCES 1499, 1511–12, 1517 (2009) (suggesting that patterns of workforce race segregation are stable since the 1980s despite the rise in antidiscrimination litigation); see also Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* 1–3 (The Am. Bar Found. Research Paper Series 08-04, 2008) (providing sociological context to employment discrimination litigation), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093313.

³ As Minna Kotkin suggests, “Nobody really knows what happens to [most] employment claims in the federal courts.” Stewart J. Schwab & Michael Heise, *Splitting Logs: An Empirical Perspective on Employment Discrimination Settlements*, 96 CORNELL L. REV. 931, 935 (2011) (alteration in original) (quoting Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 112 (2007)).

ments due to nondisclosure agreements—and a methodological reason—limited academic interest in settlements due to an underlying (and unfounded) assumption that settlements more or less mimic the expected outcomes of disputes at trial.⁴ This reason is particularly troubling because most employment discrimination claims are resolved through settlements.⁵ In their essay, *Splitting Logs: An Empirical Perspective on Employment Discrimination Settlements*, Stewart Schwab and Michael Heise take on the important task of charting this unknown territory and begin exploring what happens to employment discrimination claims beyond the trial.

Their essay focuses on a specific question: What are the main structural factors that explain final employment discrimination settlement amounts? As the question reveals, and as the authors explain,⁶ the question brackets nonmonetary aspects of settlements, such as employee reinstatement or promotion. Although nonmonetary results may affect final settlement amounts, their value is difficult to quantify, and thus it is left out of the analysis. With this caveat in mind, while analyzing the Chicago Judicial Settlement Project data set,⁷ the essay finds that plaintiffs' demands and defendants' offers consistently exert important influence over final settlement amounts and that these factors are more important than other factors such as the stage of the trial or the type of discrimination claim.⁸ Moreover, the analysis shows that defendants' offers exert more influence over the final settlement amount than plaintiffs' demands and that the influence of plaintiffs' demands is indirect and better understood as being expressed through defendants' offers.⁹

Their essay is a significant contribution to our knowledge of employment discrimination settlements due to both the rich and expansive data set it uses and the highly sophisticated analytical treatment the data receives. Still, it leaves the reader wanting more. In a sense,

⁴ See Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 959 (2010).

⁵ Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004).

⁶ Schwab & Heise, *supra* note 3, at 940–41.

⁷ The data set is a unique source of information on employment discrimination settlements. It includes information on 871 settlements involving nine magistrate judges in the U.S. District Court for the Northern District of Illinois spanning six years (1999–2004, inclusive). The 871 settlements include 396 usable employment discrimination cases. For more information on the Chicago Judicial Settlement Project database, see Schwab & Heise, *supra* note 3, at 940–41. For more information on how the database was created, see Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, JUDGES' J., Winter 2004, at 19, 19–21.

⁸ Schwab & Heise, *supra* note 3, at 947–53. For a list of all the variables checked for, including the type of discrimination claim, the stage of litigation, and others, and their respective influence on final settlement amounts, see *id.* at tbls.2 & 3.

⁹ *Id.* at 947, 952.

the essay serves to emphasize the limits of our knowledge in relation to the effects of antidiscrimination laws on settlements and exemplifies the limited additional tools with which empirical legal studies can provide us when we try to talk concretely about the relationship between antidiscrimination laws, workplace realities, and settlements. In this Comment, I explore some aspects of the limits of knowledge in relation to employment discrimination settlements, limits that Schwab and Heise's essay tries to push against. I focus on three limits dealing with (1) what discrimination looks like, (2) how law shapes final settlement amounts, and (3) whether empirical data can inform better policy and legislation.

LIMITS OF KNOWLEDGE I: WHAT DISCRIMINATION LOOKS LIKE

We know that trials are vanishing due to alternative dispute resolution (ADR) and settlements.¹⁰ Although employment discrimination cases settle less frequently than other types of cases,¹¹ 70% of such claims in federal courts are still resolved through settlements.¹² These numbers emphasize how limited our view of employment discrimination law is if we focus merely on trial outcomes and federal court opinions. Yet, even if we expand our view to understand employment discrimination settlements as part and parcel of employment discrimination law, the information we can gather is limited due to the private nature of settlement agreements, especially those subject to confidentiality agreements.¹³ Therefore, even considering the many great virtues settlements bring about—such as efficiency, speed, voice, informality, and preservation of relationships¹⁴—the costs associated with the limits they pose to public knowledge ought to raise questions about their net moral, cultural, and social value.

The vanishing trial is a troubling phenomenon because trials perform a social function that transcends dispute resolution. Trials “educate Americans about each other[] and the law.”¹⁵ This is

¹⁰ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461–65 (2004).

¹¹ See Clermont & Schwab, *supra* note 5, at 440–41.

¹² *Id.* at 440.

¹³ See Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869 (2007).

¹⁴ For the benefits of settlements, see Matt A. Mayer, *The Use of Mediation in Employment Discrimination Cases*, 1999 J. DISP. RESOL. 153, 162–64.

¹⁵ Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 627 (2004). Paul Butler argues that trials are “one of the few official forums for story telling. With fewer trials, we lose some public stories, and their official morals (i.e., verdicts).” *Id.* at 634; see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (calling settlement a “capitulation” that “should be neither encouraged nor praised”); Mayer, *supra* note 14, at 164–66 (outlining the “cons” of mediating employment discrimination claims).

particularly the case in relation to employment discrimination where legal claims and judicial deliberation have an important role in informing the public about the nature of discrimination, its meaning, its consequences, and its day-to-day workplace manifestations.¹⁶ The shift to settlements, therefore, significantly reduces the amount of publicly accessible information and narratives about the way employment discrimination law plays out and the daily operation of workplace discrimination. That we have less deliberation in courts, and consequently in the public sphere, about what discrimination might look like impoverishes our collective understanding of inequality and discrimination as well as the deliberative capacity of political communities to make law into a vehicle for opposing discrimination.

This consequence becomes more troubling if one accepts the historical narrative suggesting that we have now mostly passed beyond the first generation of employment discrimination and are experiencing a new kind of discriminatory reality. The term “second generation employment discrimination” was coined to describe the more subtle and complex forms of inequity that are evident in contemporary workplaces.¹⁷ The idea is that most employers by now know what first generation discrimination looks like and how to avoid certain patterns of behavior to preclude claims of discrimination. Most employers know not to *overtly* harm an employee’s working conditions or promotion prospects because of the employee’s particular identity characteristics.¹⁸ This adaptation does not mean that discrimination has disappeared but only that it has “matured” into its second generation. Accordingly, many discriminatory practices now are the result of structures of decision making, patterns of interaction, and informal workplace norms such as networking, mentoring, and evaluation that result in discriminatory outcomes. This generation of discrimination is therefore “structural, relational, and situational.”¹⁹

In the context of employment discrimination, the turn to settlements has a particular sociocultural and legal effect. Not only do we not know much about how employment discrimination claims settle, but we also might not even know what employment discrimination looks like in this second generation era. We may be able read the court files (if they too are not confidential), but when judicial deliberation about the nature of discrimination does not follow, the claimed

¹⁶ For a discussion of antidiscrimination law as a social practice, see Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 17 (2000).

¹⁷ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 458–60 (2001).

¹⁸ Susan Sturm argues that “[s]moking guns,” such as a “rejection explained by the comment that ‘this is no job for a woman’” “are largely things of the past.” *Id.* at 459–60.

¹⁹ *Id.* at 460.

facts alone might be insufficient, especially when the case involves latent, indirect, and complex forms of discrimination.²⁰ Due to the move to settlement, we lose one of the things courts do best: tell us real life stories, dress them in legal categories, and provide a public arena to deliberate over their meaning.

Even an expansive study like Schwab and Heise's reveals very little about the nature of the discrimination claims. We know only the claims' general category (e.g., race or gender). The unavailability of further information presents a significant limit to our knowledge and casts a shadow on the usefulness of such findings: empirical studies can only skirt around the periphery of the phenomenon without reaching its core.

Indeed, Schwab and Heise mention but do not engage with this aspect of their research,²¹ and I can see why: they attempt to understand the *available* data, allowing us to focus on the material outcomes of settlements even if not on their daily manifestations and normative implications. They ask: In this elusive world of settlements, who gets what and why? Final settlement amounts "travel" from employers to employees as a result of negotiation and settlement, and the authors want to understand how this distribution is determined. Asking this question makes perfect sense, but it brings me to the second limit of knowledge that lingers at the background of the essay. Their essay explores the "who gets what" aspect, but it also raises some important questions regarding the "why" and, more specifically, questions regarding what is the relation of the background legal order to the final settlement amount.

LIMITS OF KNOWLEDGE II: HOW LAW SHAPES FINAL SETTLEMENT AMOUNTS

Schwab and Heise's essay shows that the type of discrimination claim does not have much influence on the final settlement amount.²² Their findings raise the question of whether and to what extent law produced in the courtroom influences settlement negotiations. For decades now, we have been studying legal settlements under the

²⁰ Although Sturm raises questions about the suitability of courts to deal with second generation employment discrimination, *id.* at 461–62, and calls for a "de-centered, holistic, and dynamic approach to these more structural forms of bias," *id.* at 462, I would still argue that despite the structural disadvantages of trials to capture nuanced discrimination, the court's role in sharing stories of discrimination and discussing their normative implications is crucial for raising wide social awareness, as well as for encouraging structural workplace adjustments of the type Strum calls for. For Strum's description of the role of courts under her proposed model, see *id.* at 555. Moreover, confidential settlements are still even less equipped to meaningfully challenge second generation discriminatory practices than courts.

²¹ See Schwab & Heise, *supra* note 3, at 941, 948–49.

²² See *id.* at 946, 950.

Mnookin and Kornhauser paradigm, according to which the legal order—the state of the law as produced by legislatures and courts—influences negotiation dynamics and hence settlement outcomes.²³ This is the idea of bargaining in the shadow of the law. Law is not the only significant factor involved; other factors, such as bargaining strategies and personal preferences, are crucial as well. But as Mnookin and Kornhauser's model suggested, in negotiations around divorce, legal rules are important in determining the relative bargaining power of the parties. The state of the law shapes, among other things, what parties will insist on, what they are more likely to give up, and how deep the compromise could reach.²⁴

The findings in Schwab and Heise's essay seem to raise questions about the validity of the Mnookin and Kornhauser model. Their essay finds that the type of discrimination claim does not affect final settlement amounts.²⁵ But if different discrimination claims tend to generate disparate damages awards by courts,²⁶ then under the Mnookin and Kornhauser model, it would have made sense to see the same in settlement results. Have Schwab and Heise managed to refute this commonly held theory?

This conclusion might be too far reaching. I am not sure that the inability to distinguish settlement amounts by the type of discrimination claim is enough to lead to the conclusion that prevailing law has no or little impact on how settlement negotiations play out. Yet, the finding is intriguing and raises questions about the relationship between legal precedent and settlement outcomes. Schwab and Heise do not engage with the implications of this finding. Again, I can see why they choose not to do so: the state of the law can help us determine a party's decision to settle, but due to the deeply contextual nature of the calculation of damages, it is difficult, if not impossible, in most cases to find close correlations between legal precedents and final settlement amounts. Yet, the limits of our knowledge in this area

²³ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

²⁴ *Id.* at 959–66.

²⁵ While “the absolute and relative strength of the plaintiff demand and defendant offer on final settlement likely crowded out the potential influences of other independent variables,” the authors did find a relatively weak correlation when it came to race and Family and Medical Leave Act (FMLA) claims. See Schwab & Heise, *supra* note 3, at 948–49. “Interestingly, FMLA claims correspond with increased settlement amounts where race-based claims correspond with lower settlement amounts.” *Id.*

²⁶ See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 20 (1996) (showing that in 1992 Equal Employment Opportunity Commission (EEOC) litigation, there was significant variation in average recovery among different types of claims). For more recent data suggesting variation in damages awarded in different types of claims, see generally OFF. OF GEN. COUNSEL, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, FISCAL YEAR 2008 ANNUAL REPORT (2008), available at <http://www.eeoc.gov/eeoc/litigation/reports/08annrpt.cfm#3>.

glare at us from between the findings, highlighting our limited ability to trace the interaction between trial outcomes and settlement outcomes.

Schwab and Heise's findings suggest that the answer to the question of what determines final settlement amounts relies on power interactions that, to a large extent, lie outside the legal order and in the structure of the labor market itself. This brings me to the third limit of knowledge invoked by their essay: the implications for policymaking of understanding power relations in settlements negotiations.

LIMITS OF KNOWLEDGE III: CAN EMPIRICAL DATA INFORM BETTER LEGISLATION?

One of Schwab and Heise's clearest and most illuminating findings is that defendants' counteroffers exert more influence on final settlement amounts than any other single variable, including plaintiffs' initial demands.²⁷ One can interpret this finding to lend support to the claim that defendant-employers have more power than plaintiff-employees in employment discrimination settlement negotiations. Schwab and Heise do not elaborate on the normative implications of this finding, but we might want to ask what the normative implication of this finding may be.

How can the empirical data inform better legislation or regulation of employment discrimination claims processing? We might aspire, for example, to level the playing field and try to equalize the parties' bargaining positions. If we think that defendants ought not to have more power than plaintiffs in settlement processes, we might want to create a rule to empower plaintiffs in negotiations. What would such a rule look like? It would attempt to drive up defendant's cost of litigation or risk of losing. This rule could therefore shape various stages of the process, from the filing of the complaint through the evidentiary rules or damages, to name a few. One straightforward regulatory option might be an *ex post* judicial intervention in final settlement amounts.²⁸ After the parties negotiate and settle for an amount, a judge, with some guided discretion, could increase the final amount. Or, the rule can attempt to offer *ex ante* guidance by creating a mechanism that will increase the plaintiff's initial demand. Clearly, any such attempt in setting the settlement amount at a higher level, either *ex post* or *ex ante*, will be futile. Once defendants realize, with

²⁷ Schwab & Heise, *supra* note 3, at 948-50.

²⁸ This framework exists, for a different purpose, in class action lawsuits. In class actions, the federal judge overseeing the litigation needs to approve any proposed settlement of class action litigation. See FED. R. CIV. P. 23(e). For a discussion of the role of judge pursuant to Rule 23(e), see Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 84-85 (2007).

some certainty,²⁹ that such an artificial increase is predictable, the bargaining will take place in its shadow, leading to a decrease in the level of defendant counteroffers or final amounts, depending on the type of legal rule adopted. This pessimistic description might be too simplistic. With some more innovative tinkering, we may be able to come up with a more sophisticated mechanism to balance the bargaining power between plaintiffs and defendants.

Yet, even if that is the case, we should only adopt such a rule if we know that defendants do indeed have greater bargaining power in relation to plaintiffs so that a legal rule that balances their respective bargaining positions is warranted. Is my interpretation of the findings, according to which defendants have more power than plaintiffs in settlement negotiations, correct? Maybe what the empirical findings tell us is that plaintiffs are greedy or that they strategically begin the negotiation with inflated sums. Under such conditions, it may make sense that defendants' counteroffers are more realistic and that they should end up having more influence over the final amount.

To know what to make of the piece of information that Schwab and Heise offer, we need to have a better understanding of plaintiffs' and defendants' proclivities to exaggerate and act strategically, and we need to have tools to interpret their strategic actions as well as a normative position regarding the level of compensation that plaintiffs should receive in discrimination claims. We may hold different positions on these issues depending on our theoretical perspective regarding the litigation process. Laura Beth Nielsen and her colleagues offer a useful typology of such perspectives and suggest that different theoretical perspectives give rise to different positions regarding "the relationship between law, workplace discrimination, and social inequality."³⁰

Perhaps a better way to proceed in formulating legal rules in response to this finding is to create nuanced rules that do not lump all employers and employees together but rather are tailored for the dif-

²⁹ If the new rule increases uncertainty, the outcome of the rule change might not significantly affect the defendant's counteroffer or the final amounts in such a straightforward way. Mnookin and Kornhauser discuss the complication that uncertainty adds in the context of custody standards. The rule change will definitely have an effect, but its nature will depend on the characteristics of the parties: "Discretionary standards can substantially affect the relative bargaining strength of the two parties, primarily because their attitudes toward risk and capacities to bear transaction costs may differ substantially." Mnookin & Kornhauser, *supra* note 23, at 980.

³⁰ Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 176 (2010). The authors offer four perspectives to explain outcomes of discrimination cases: a formal legal perspective, a rational action/economic perspective, a legal mobilization perspective, and a critical realist perspective. Each of these positions emphasizes different axes of explanation to the outcomes of discrimination lawsuits. *See id.* at 178–80.

ferent bargaining positions of differently situated parties. For example, we can extend different rules for different types of employers and employees and dissect the data according to the plaintiff's income and profession, and possibly even according to the size of the or type of employer. Then, we might face the challenge of creating rules that are over- or underinclusive, thereby failing to provide accurate enough proxies for the relative bargaining power of the parties. Finally, we might conclude that this finding does not provide enough details about the parties' power balance and the intricacy of bargaining from which to generate any legal rule.

We are lead, therefore, to an unavoidable and important normative discussion of the role of legal rules in the labor market, the distributive potential of legal "intervention," the appropriate level of damages sufficient to compensate for discrimination and to deter future discrimination, and the relative bargaining positions of employers and employees vis-à-vis each other. For us to use the new and important information that Schwab and Heise provide to inform legislation, much more than additional information is required.

In this Comment, I focused on the frustrating character of the limits of knowledge. But it seems that even more knowledge of the type generated in Schwab and Heise's essay cannot singlehandedly show us the path toward better, more just, legal rules. For this, a complementary normative, theoretical, and political account is required as well.

