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Rulli, Louis S. and Leckerman, Jason A., "Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and its Impact on the Poor" (2005). *Faculty Scholarship at Penn Law*. 676. https://scholarship.law.upenn.edu/faculty_scholarship/676

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Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and its Impact on the Poor

*Louis S. Rulli and Jason A. Leckerman**

Disability and poverty historically have traveled hand-in-hand.¹ Years of exclusion from the workplace and most aspects of American life have left people with disabilities socially isolated, poorly educated, and financially dependent.² Congress passed the Americans with Disabilities Act (ADA)³ in large part to end this relationship and to finally break down historic barriers that have stood between people with disabilities and equal opportunity, financial security, and economic independence.⁴ At the time of the passage of the ADA, studies showed that almost 30% of people with work disabilities lived below the poverty line⁵ and 45% of families headed by a person with a disability lived in poverty.⁶ Yet, thirteen years after the passage of the ADA, the disabled remain disproportionately poor.⁷ Today, people with disabilities are three times more

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1. See 135 Cong. Rec. 8506, 8506 (1989) (statement of Sen. Thomas Harkin).

2. See *infra* Part II.A.

3. 42 U.S.C. §§ 12101-12213 (1994); 47 U.S.C. § 225 (1994). Title I of the ADA, which protects against disability discrimination in employment, went into effect on July 26, 1992, for employers of twenty-five or more employees. 42 U.S.C. § 12111(5)(a). Employers of fifteen or more employees came under the ADA on July 26, 1994. *Id.*

4. See *infra* Part II.A. See also Findings and Purposes of the ADA, 42 U.S.C. § 12101.

5. See 135 CONG. REC. 8506, 8506 (1989) (statement of Sen. Thomas Harkin) (discussing 1986 Harris survey).

6. See *Poverty Trends, 1980-88: Changes in Family Composition and Income Sources Among the Poor, Testimony before the Subcomm. on Human Resources, House Comm. on Ways and Means*, 138 CONG. REC. D. 1088 (1992) (Sept. 10, 1992) (statement of Richard L. Linster, Dir. of Planning and Reporting, Program Evaluation and Methodology Division, U.S. General Accounting Office), cited in Bob Dole, *Are We Keeping America's Promises to People with Disabilities—Commentary on Blanck*, 79 IOWA L. REV. 925, 928 (1994).

7. Elizabeth A. Pendo, *Substantially Limited Justice?: The Possibilities and Limits of New Rawlsian Analysis of Disability-Based Discrimination*, 77 ST. JOHN'S L. REV. 225, 249 (2003).

likely to live in poverty⁸ and their unemployment rates have remained relatively constant.⁹

Indeed, despite measurable success in gaining access to public and private institutions, people with disabilities still appear largely excluded from the workplace.¹⁰ Quite clearly, the ADA, through its main employment provision, Title I, has not achieved nearly as much success in the workplace as many had thought it would.¹¹ Advocates for the disabled, who once heralded the ADA's passage as a watershed moment in the history of civil rights, have been relegated to accepting a number of set backs as *de rigueur* and finding solace in the fact that the non-employment provisions of the Act have achieved more success.¹² Thirteen years on, many fear that Title I of the ADA ultimately may fail the worker (or the aspiring worker) with disabilities.

During the past half-century, the nation's federal courts have played a vital role in protecting civil rights and combating illegal discrimination.¹³ Private parties and governmental agencies alike have turned to the courts to enforce federal law and remedy irrational discrimination and, as a result, the judgments of federal courts actions have empowered other victims of discrimination to come forward and challenge illegal conduct. For Title I, however, federal courts have not played this same, vital role in protecting the workplace rights of people with disabilities.¹⁴

In this article, we explore the relationship between enforcement of the ADA in federal courts and the reasons that the ADA has not, so far, been as successful in opening the doors of the workplace as many had hoped. In doing so, we emphasize how the ADA's failure to live up to its potential in this respect has had, and will continue to have, great ramifications for people who are poor. We have divided the article into two parts. Part I analyzes the general goals of the ADA and the success that the ADA has had in achieving those goals. We begin our analysis by discussing Professor Thomas Stoddard's thoughtful framework for analyzing legislation in which he identified the narrow rule-shifting capacity and the much broader culture-shifting capacity of

Adding to this, is the stark fact that people without disabilities largely "are unable to identify with people with disabilities . . . [and] significantly and unreasonably devalue lives of people with disabilities." *Id.* at 266-67. See also U.S. Census data from 2000, *infra* at note 168.

8. *Id.*

9. See *infra* Part II.A; see also *infra* note 163.

10. See *infra* note 163.

11. See *infra* Part I.B.

12. See *id.*

13. The most significant demonstration of this vital role is probably the Supreme Court's landmark decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), which ended *de jure* racial segregation in education.

14. See *infra* Part I.C.

law. We conclude that the ADA was intended to be culture-shifting. Next, we measure the success of Title I and the other provisions of the Act in achieving this goal and conclude that the ADA, mainly due to the failure of Title I to play its part, has only partially begun to fulfill its culture-shifting purpose and likely will not be able to achieve this ultimate goal without substantial change. We then address why Title I's contributions to a culture shift have failed to materialize. In doing so, we focus heavily on judicial outcomes in *filed* cases under Title I. We compare our findings with those of other published studies assessing *reported* cases under Title I and conclude that, year after year, employers continue to win in 92% to 97% of cases that reach a final judicial outcome. We close the first part of our article by examining the impact that such one-sided outcomes have on the willingness of lawyers to undertake new federal litigation under Title I. Relying on current statistical evidence, we conclude that lawyers are quickly retreating from Title I enforcement in our federal courts.

In the second part of the Article, we look more closely at the nexus between disability and poverty and ask whether the poor are able to confront discrimination in the workplace by turning to the federal courts. We discuss the special problems that the poor face in obtaining access to counsel and in trying to litigate on their own. Once again, based on statistical evidence, we conclude that poor people with disabilities have largely turned away from federal courts as a means of enforcing their rights under Title I.

Finally, in an epilogue, we summarize our findings and offer some suggestions that, if adopted, might bring us closer to the day when culture-shifting change arrives in the workplace for people with disabilities.

I. THE FADING PROMISE OF TITLE I OF THE ADA

A. Congress Intended the ADA to Bring about a "Culture Shift"

In his essay *Bleeding Heart: Reflections of Using the Law to Make Social Change*, Professor Thomas Stoddard¹⁵ offered the idea that the law has two main capacities: "rule-shifting" and "culture-shifting."¹⁶ Measuring the ADA against this standard provides a useful means for framing the analysis of the efficacy of the Act's employment provisions. As will be seen, Congress and the supporters of the ADA, in passing the Act, did not merely seek to establish new rules governing the treatment of persons with disabilities; rather, they sought to transform the way that people who have disabilities deal with society, and, in

15. Thomas B. Stoddard, *Bleeding Heart: Reflection on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967 (1997) (published posthumously).

16. *Id.* at 972-73.

turn, how society treats people who have disabilities. The promise of transformation, though, has gone largely unfulfilled. The fault for this shortcoming lies mainly with Title I.

As Professor Stoddard described it, his essay blossomed from a disappointing trip to New Zealand.¹⁷ Prior to his trip, Professor Stoddard was encouraged by his study of New Zealand's anti-discrimination laws, and how, on their face, they appeared extremely progressive in the protections they afforded gays and lesbians.¹⁸ During his visit to the country, however, Professor Stoddard discovered that the culture did not reflect the law.¹⁹ Much to his surprise (and chagrin), attitudes towards gays and lesbians in New Zealand did not rival the level of cultural acceptance Stoddard believed was present in the United States.²⁰ Professor Stoddard reflected on the differences and in his article he sought to make sense of them. He concluded that the law mainly has two capacities: "rule-shifting" and "culture-shifting."²¹ The "rule-shifting" capacity refers to laws enacted "[t]o create new rights and remedies for victims," "[t]o alter the conduct of the government," or "[t]o alter the conduct of citizens and private entities."²² Professor Stoddard described these goals as "the traditional role of the law in expressing the formal rulemaking function for a society."²³ The "culture-shifting" capacity of the law refers to laws enacted "[t]o express a new moral ideal or standard" or "[t]o change cultural attitudes and patterns."²⁴ Professor Stoddard noted that these goals portray the law as seeking "to advance the rights and interests of people who have been treated badly by the law and by culture, either individually or collectively, and to promote values we think of to be rights."²⁵

The Civil Rights Act of 1964 (the "Civil Rights Act"),²⁶ according to Professor Stoddard, is the "statutory paradigm" of "culture-shifting" legislation.²⁷ In the Civil Rights Act, Congress prohibited discrimination based on race, color, religion, national origin, and sex in most aspects of the American

17. *Id.* at 967-970.

18. *Id.* at 969.

19. *Id.* at 969-70.

20. *Id.* at 969-70.

21. Stoddard, *supra* note 15, at 972-73.

22. *Id.*

23. *Id.* at 972.

24. *Id.* at 972-73.

25. *Id.* at 973.

26. Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000 *et seq.* (2000)).

27. Stoddard, *supra* note 15, at 973.

experience, with “[the] most far-reaching and significant provisions prohibit[ing] discrimination in public accommodations and publicly owned or managed facilities (titles II and III), in programs receiving federal financial assistance (title VI), and by employers, labor unions, and employment agencies (title VII).”²⁸ The Civil Rights Act made available both public and private enforcement.²⁹

The Civil Rights Act achieved all five aims of the law, the three described as “rule-shifting” and the two described as “culture-shifting.” As Professor Stoddard explained, “It gave victims of discrimination new rights and remedies. It instructed the government to promulgate and enforce new rules of conduct for itself. It altered the conduct of the private entities and citizens It expressed a new moral standard. And . . . it changed cultural attitudes.”³⁰ Explaining further why the Civil Rights Act was more than a rule-shifting piece of legislation, Professor Stoddard noted that the law did not “represent a recrafting of the applicable rules and remedies”; “merely rewrite the canons of employment law”; or “mean only that in the future, employers, merchants, and the government (if law-abiding) would have to adhere to a new set of guidelines.”³¹ Rather, “[t]he Act brought into being a whole new model of conduct that, consciously and deliberately, overturned doctrines embedded in American culture—and, more widely speaking, European culture—for several centuries,”³² and its enactment “constituted a formal, national rebuke of th[e] detestable, but time-honored concept” of “white privilege.”³³

The ADA likewise was intended to bring about a culture shift, as the legislative history and the precise language employed by the law make clear. Prior to the ADA, the Rehabilitation Act of 1973³⁴ constituted the primary piece of federal legislation designed to protect the rights of the disabled. Section 504 of the Rehabilitation Act prohibits discrimination against persons with a disability in federal programs or in the activities of recipients of financial assistance from the federal government.³⁵ Congress restricted the Rehabilitation Act to “covered entities,” a definition which did not reach into

28. See *The Civil Rights Act of 1964*, 78 HARV. L. REV. 684, 684 (1965).

29. *Id.*

30. Stoddard, *supra* note 15, at 974.

31. *Id.*

32. *Id.*

33. *Id.*

34. Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. §§ 701-796 (2000)).

35. 29 U.S.C. §§ 793, 794.

realm of private employment or affect completely non-public entities.³⁶ As noted, Professor Stoddard identified one of the three possible rule-shifting options as “altering the conduct of the government.”³⁷ The Rehabilitation Act defines this definition like a glove.

The legislative history of the Rehabilitation Act itself reveals its narrow focus. The Report on the Rehabilitation Act of 1973 of the Senate Committee on Labor and Public Welfare explained the impetus for the Act:

Highlighted in these hearings were particular problems which may be summarized as follows: (1) failure of the basic vocational rehabilitation program to respond to the particular needs of individuals with the most severe handicaps; (2) lack of alternative services within the community to provide services to individuals with the most severe handicaps who do not *at the present* time have identifiable vocational goals but who could be brought to that point through the provision of self-help services and training; (3) diminution of emphasis at the Federal level on research and training of personnel in rehabilitation problems, particularly in the areas of medical technology and bio-medical engineering, and the failure of the program to make use of existing technology for rehabilitation needs; (4) the lack of special emphasis on target populations whose needs were not being met through rehabilitation programs; (5) the lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, e.g., employment discrimination, lack of housing and transportation services and architectural and transportation barriers, and (6) the failure of leadership in the area of vocational rehabilitation by the responsible Federal agency, the Rehabilitation Services Administration Believing that it was necessary to emphasize that the final goal of all rehabilitation services was to improve in every possible respect the lives as well as livelihood of individuals served, the Committee placed particular emphasis on developing a method of providing services which would be responsive to individual needs and would ensure that no individual would be excluded from the program merely because his handicap *appeared* to be too severe.³⁸

Discernibly, Congress intended that the Rehabilitation Act help alleviate

36. *Id.*

37. Stoddard, *supra* note 15, at 972.

38. S. REP. NO. 93-318, at 3 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2078-79 [hereinafter *Senate Report*]. In its Report on the ADA, the House Committee on Education and Labor noted that “[s]everal witnesses also explained that title I of the ADA . . . is modeled after regulations implementing the Rehabilitation Act.” H.R. REP. NO. 101-485(II)(1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 315.

limitations faced by persons with disabilities and foster rehabilitation programs that would eliminate those limitations (hence the moniker “rehabilitation”), with only a limited goal of addressing “employment discrimination, lack of housing and transportation services and architectural and transportation barriers.”³⁹ The narrow goal fossilized over time. Nearly twenty years after its passage, the Rehabilitation Act was seen as a mere stepping-stone to the ADA.⁴⁰

In the years following its enactment, the limitations of the Rehabilitation Act became unacceptable. As Senator Harkin, one of the architects of the legislation, explained:

In 1973, some 15 years ago, the Congress finally adopted section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of handicaps. However, this legislation only prohibits discrimination by recipients of Federal aid. It does not cover discrimination by private employers; nor does it prohibit discrimination in public accommodations. Thus, today under our Nation’s civil rights laws, an employer can no longer say to a prospective employee, “I will not hire you because of the color of your skin, or because you are a woman, or because you are Jewish.” If they did, a person could march over to the courthouse, file a lawsuit, win and collect damages and attorney’s fees. Yet, to this day, nothing prevents an employer or an owner of a hotel or a restaurant from excluding Americans with disabilities. The courthouse door is still closed to Americans with disabilities.⁴¹

Supporters of the legislation consistently invoked this message, as newspaper articles from the time detail,⁴² and similar words echo throughout

39. *Senate Report, supra* note 38, at 2078. In fact, the Senate Committee on Labor and Human Resources noted in the legislative history that it was most concerned with only a portion of the population with disabilities: “The Committee saw the need for definite legislation which would not only provide more service for more people, but provide special emphasis on services to those with severe handicaps. The focus of the Committee bill is very much on that group, and the burden of reaching them has been placed squarely on the rehabilitation agencies throughout the bill.” *Id.* at 2092. The Committee did note with some force, however, its desire that the Act address employment opportunities within the federal government:

Federal employment policies with regard to handicapped individuals continued to be found wanting. The Committee emphasizes that this equal opportunity must apply fully to handicapped individuals. The Committee, therefore, expects the [Civil Service Commission] to ensure that there is no discrimination in employment for handicapped individuals within the Federal Government, and to take all necessary steps to ensure that the special needs of handicapped individuals are met.

Id. at 2122. Still, the focus of the legislation in the employment context is remarkable for its narrowness.

40. S. REP. NO. 101-116, at 107 (1989).

41. Harkin, *supra* note 1, at *936.

42. See, e.g., H. Jane Lehman, *Disabled Hoping New Law Will Improve Building Access: Activists Say Goal Is Better Integration Into Society*, WASH. POST, Dec. 29, 1990, at E4.

the legislative history and in the legislation itself. In its Report on the legislation, the Senate Committee on Labor and Human Resources said the following of the need for the legislation:

The Committee, after extensive review and analysis over a number of Congresses, concludes that there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector, public accommodations, public services, transportation, and telecommunications.⁴³

The Committee continued by stating that “[c]urrent Federal and State Laws are inadequate to address the discrimination faced by people with disabilities in these critical areas.”⁴⁴ These views were adopted and incorporated into the ADA in its “findings and purposes.”⁴⁵

Indeed, many people involved in the passage of the legislation noted the vast indifference that the law exhibited towards the disabled at the time. For instance, United States Attorney General Dick Thornburgh, testifying on behalf of then-President Bush, stated: “Despite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in the Nation still lead their lives in an intolerable state of isolation and dependence.”⁴⁶ In its report, the Senate Committee on Labor and Human Resources summarized the current state of the country’s treatment of persons with disabilities:

In sum, the unfortunate truth is that individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the ability of such persons to participate in and contribute to society.⁴⁷

43. S. REP. NO. 101-116 (1989) (A&P ADA Comm. Print 1990 28(A), at *103).

44. *Id.* at *104.

45. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (1994).

46. S. Rep. No. 101-116, at 9; *see also, e.g.*, Jonathan M. Young, *Equality of Opportunity: The Making of the Americans with Disabilities Act*, app. G (1997) available at <http://www.ncd.gov/newsroom/publications/equality.html> (*reprinting* President Bush’s remarks upon signing the ADA: “Three weeks ago we celebrated our nation’s Independence Day. Today, we’re here to rejoice in and celebrate another ‘Independence Day,’ one that is long overdue. With today’s signing of the landmark Americans with Disabilities Act, every man, woman and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom”).

47. S. REP. NO. 101-116 (A&P ADA Comm. Print 1990 28(A), at *113).

The statistics in the Report summarize it even more forcefully: “Individuals with disabilities experience staggering levels of unemployment and poverty. [A]bout 8.2 million people with disabilities want to work but cannot find a job.”⁴⁸ Perhaps no other quote best exemplifies the transformative purpose of the ADA legislation than that of President Bush upon signing the Act, when he referred to the passage as “an historic opportunity” and noted that “it signals the end to unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.”⁴⁹ This statement reveals the perceived problems that the Act was intended to address, and it shows the Act’s goal: integration into society.

Not only was Congress concerned with the rights of persons with disabilities, it also wanted to tackle the way Americans interact with and refer to people with disabilities. One of the more overlooked changes the ADA was intended to bring about was in the vocabulary used by Americans. In the legislative history, it is noted that the ADA aimed to eradicate the use of the term “handicapped” and, with that, change the way that people refer to persons with disabilities.⁵⁰ As the Senate Committee noted in describing the definition of the term “disability” found in the statute:

The use of the term “disability” instead of “individual with handicaps” represents an effort by the Committee to make use of up-to-date, currently accepted terminology. In regard to this legislation, as well as in other contexts, the Congress has been apprised of the fact that to many individuals with disabilities the terminology applied to them is a very significant and sensitive issue.⁵¹

President George W. Bush echoed these sentiments in his commemoration of the twelfth anniversary of the ADA, referring to the progress the ADA has made in treating people with disabilities “with dignity and respect” and “chang[ing] attitudes that once seemed unchangeable.”⁵² Quite clearly, the ADA was intended to change not only the lives of people with disabilities, but also the lives of those not disabled—in other words, to bring about a culture shift.⁵³

48. *Id.*

49. Statement by President George Bush Upon Signing S. 933, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990).

50. S. REP. NO. 101-116 (A&P ADA Comm. Print 1990 28(A), at *119).

51. *Id.*

52. Press Release, The White House, President Commemorates 12th Anniversary of Americans with Disabilities Act (July 26, 2002), available at <http://www.whitehouse.gov/news/releases/2002/07/20020726-8.html>.

53. See S. REP. NO. 101-116 (A & P ADA Comm. Print 1990 (28A), at *1) (“This major piece of civil rights legislation, passed overwhelmingly by the Congress, is designed finally to

Perhaps the clearest evidence of the culture-shifting intent behind the ADA is the fact that the ADA was largely modeled on the Civil Rights Act,⁵⁴ *i.e.* the paradigmatic example of “culture shifting” legislation.⁵⁵ The legislative history of the ADA contains a number of comparisons to the Civil Rights Act, with many speakers likening the ADA’s projected impact to that of the Civil Rights Act.⁵⁶ The relationship manifests itself in the titles of the Act as well. The three main titles, Titles I, II, and III, have sister titles in the Civil Rights Act.⁵⁷ These titles were, quite like the goals of the Civil Rights Act discussed above, aimed at eradicating discrimination in employment and in access to both public and private accommodations.

Given all of this, it can hardly be gainsaid that Congress had a “culture-shifting” purpose in passing the Act. And, most important for the purposes of this article—as we emphasize in a later section—the group that most expected (and welcomed) this culture shift consisted of people with disabilities who suffer from poverty.⁵⁸ Before we discuss how and whether the ADA has impacted poor persons, however, we look to see if the “culture-shifting” aspirations of the ADA have begun to bear fruit.

B. The ADA Has Only Partially Begun to Fulfill Its Promise

It may be too early to ask whether the ADA has brought about a shift in the nation’s culture. Such a transformative change, by definition, requires patience

extend full rights to a significant segment of our population who have been denied equal access for too long. It is good for persons with disabilities and good for America.”); Pendo, *supra* note 7, at 235 (referring to the ADA, as an anti-discrimination law, as a basic part of what Rawls described as “property owning democratic society”—an “indispensable component of a basic structure that justly distributes the benefits and burdens of social cooperation.” (quoting Rawls)). Moreover, the make-up of the Act itself—specifically its main three titles—reveals the intended transformative nature of the statute. Title I prohibits discrimination in the employment of persons with disabilities. *See* 42 U.S.C. § 12112. Title II prohibits discrimination in state and local governmental services. *See* 42 U.S.C. § 12132. Title III prohibits discrimination in public accommodations operated by private entities. *See* 42 U.S.C. § 12182. Looking at these three titles, it is easy to view them as parts of a pyramid leading to integration at its tip. Title I establishes the foundation, bringing financial independence to persons with disabilities. Title II takes the next step of opening up the doors of public entities. Title III, in turn, opens the doors of private entities, a right that likely cannot fully be taken advantage of without the benefits of Title I.

54. *See, e.g.*, Harkin, *supra* note 1, at *936; *see also* Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 241 (2001) (“ADA employment discrimination litigation is patterned on Title VII of the Civil Rights Act of 1964 . . . and section 504 of the Rehabilitation Act of 1973 (section 504).”).

55. Stoddard, *supra* note 15, at 973.

56. *See, e.g.*, Harkin, *supra* note 1, at *936; *see also* Colker, *supra* note 54, at 241.

57. Compare Title II, 42 U.S.C. § 2000a (2003), and Title VII, 42 U.S.C. § 2000e (2003), of the Civil Rights Act with Title I, 42 U.S.C. §§ 12101-117 (2003), Title II, 42 U.S.C. §§ 12131-150 (2003), and Title III of the ADA, 42 U.S.C. §§ 12181-189 (2003).

58. *See infra* Part II.

lasting beyond thirteen years. Nevertheless, the question remains: is the ADA even moving in the intended direction? To answer this question, we divide the ADA into two main parts. One part applies to employment rights, set out in Title I,⁵⁹ and the other applies to rights of access, those rights set out more or less in the other titles of the Act.⁶⁰ In analyzing the two parts, it becomes evident that the titles other than Title I have had much greater success than Title I. The nation's culture has not been "shifted" completely, but, thanks to the titles other than Title I, it has nudged in that direction. Unfortunately, given the state of litigation under Title I of the ADA, the culture will not likely shift much further. Title I has failed to lay the necessary foundation for that shift.⁶¹

1. Non-Title I Rights

Although it is difficult to apply Professor Stoddard's criteria in a precise manner, it is apparent that the non-employment provisions of the Act—primarily rights of access—have begun to play their respective parts in changing American culture. Professor Stoddard identified four factors that "must be engaged" before "ruleshifting" becomes "culture-shifting":

1. A change that is very broad or profound;
2. Public awareness of that change;
3. A general sense of the legitimacy (or validity) of the change; and
4. Overall, continuous enforcement of the change.⁶²

According to Professor Stoddard, if all four are not engaged, only "rule shifting" has occurred.⁶³ Beginning with rights to access, application of the factors identified by Professor Stoddard shows that the non-Title I rights have had success in helping to lay the foundation for a "cultural shift."

A change that is very broad or profound. Even at this early stage, it seems clear that the non-employment titles have begun to bring about "a change

59. 42 U.S.C. §§ 12111-117.

60. The nomenclature employed in this paper—employment rights and rights of access—is not entirely accurate. Although Title I contains the chief protections in the employment realm, Title II contains those protections as they apply to federal, state, and local governments. See 42 U.S.C. § 12132 (2003). With this explanation in mind, we will employ these terms throughout this paper.

61. See Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 20 (2000) ("Indeed, almost a decade after its enactment, the judicial landscape dealing with claims of employment discrimination under the ADA looks far more bleak than one might expect, given the ambitious hopes placed on the ADA and the celebration that accompanied its enactment.").

62. Stoddard, *supra* note 15, at 978.

63. *Id.* at 978.

that is very broad or profound." The breadth of the change in accommodations for the disabled is remarkable; accommodations for the disabled are seen in all aspects of daily life, from electronic lifts on buses, designated areas for wheelchairs on buses and trains, elevators leading to subways, ramps leading to restaurants and stores, curb cuts in streets, wider bathrooms, the proliferation of elevators, municipal transportation services whose sole purpose is to help the disabled, schools, and reserved seating areas at concert arenas, sporting arenas, and theaters. As one commentator has written:

Buildings are more accessible. Community activities are more communications-accessible. Transportation is more accessible. Assistive technology, the great equalizer for people with disabilities, is more accessible. The images of people with disabilities are changing as they are seen as consumers in print and broadcast ads, and as they are elected to public office.⁶⁴

Of course, great strides still must be made to ensure access for people with disabilities, but the foundation has been laid.⁶⁵

Public awareness of that change. According to Professor Stoddard, "Ordinary citizens must know that a shift has taken place for that shift to have cultural resonance."⁶⁶ Without conducting a poll, it is difficult to determine whether ordinary citizens are aware of changes in accommodations. Nonetheless, given the visibility and pervasiveness of the changes noted above, it seems highly unlikely that they have gone unnoticed by the public even if most people are unaware that the ADA deserves credit for these accomplishments. Passengers of buses and trains no doubt note the increased use by persons with mobile disabilities and observe the signs that say something along the lines of "federal law requires the accommodation of disabled passengers." Often, drivers or people working in public transportation help those with disabilities to board and ensure that they are safely accommodated. The same can be said for shoppers and diners. The changes are unmistakable. Awareness of these changes seems to extend to smaller communities as well. The Disability Rights Section of the U.S. Department of Justice, in examining

64. John M. Williams, *The Business of the ADA is Business* (Sept. 13, 2001), available at <http://www.nod.org/content.cfm?id=463>.

65. Since the tenth anniversary of the passage of ADA, a number of newspaper articles have documented the perception that society has become more accessible than it was in 1990. See, e.g., Peter Geier, *Americans with Disabilities Act turns 12*, DAILY RECORD (Baltimore, MD) July 27, 2002; see also Ruth Colker, *supra* note 54, at 240 (citing Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000) (stating that "ADA enforcement can be credited with improvements in the accessibility of public accommodations."). Our similar conclusion that great strides have been made should not be confused with a conclusion that society has become accessible to people with disabilities. Society still has a long way to go in this regard. Our point simply is that we can see a foundation being laid for the eventual transformation.

66. Stoddard, *supra* note 15, at 980.

the extent of compliance with Title II, has concluded that “the vast majority of communities are aware of their ADA obligations.”⁶⁷

A general sense of the legitimacy (or validity) of the change. According to Professor Stoddard, “[a]wareness must be accompanied by public acceptance—which must inevitably be grounded in a sense of legitimacy or validity.”⁶⁸ A recent poll conducted by Louis Harris Associates (“Harris”) shows that the ADA still has the support of “[o]verwhelming majorities of Americans—79% to 88%.”⁶⁹ According to the poll,

Fully 88% of all adults support the principle that “public places like restaurants, hotels, theaters, stores and museums may not discriminate against customers on the basis of disability.” However, those who support it are down from 95% four years ago to 88% now, and those who oppose it have increased from 4% to 8%.

Fully 87% of the public supports the principle that “new public transportation vehicles must be accessible to people with disabilities.” But here again, support has slipped four points from 91% four years ago.⁷⁰

Despite slight decreases in support, the fact remains that an overwhelming majority of Americans support the rights to access laid out in the ADA and this support has remained relatively consistent over time; thus, the Act’s legitimacy, in this respect, seems largely unquestioned.⁷¹

Overall, continuous enforcement of the change. As Professor Stoddard notes, “Rules that are not enforced, particularly if they are dramatic or controversial, will simply be disregarded by all or part of the public.”⁷² Enforcement, however, like the other criteria, is difficult to measure. Still, there are some clear indications that the rights of access are being enforced. In many areas, requirements of access are continually enforced through building code

67. *Project Civic Access Fact Sheet* (last updated Sept. 4, 2003), at <http://www.usdoj.gov/crt/ada/civicfac.htm>; see also Leonore Schwager, *13 Years of the ADA, Still Much More Work to Do*, THE ITHACA J. (July 10, 2003).

68. Stoddard, *supra* note 15, at 982.

69. The Harris Poll #41, *Thirteenth Anniversary of the Americans with Disabilities Act (ADA)* (July 26, 2003), at http://www.harrisinteractive.com/harris_poll/index.asp?PID=390. The Poll did note, however, that the key components of the ADA have suffered “some erosion in support and an increase in the small number of people who do not support them.” *Id.*

70. *Id.*

71. This fact is extraordinary considering the popular media’s well-documented negative portrayal of Title I. See Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler’s Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223 (2000); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99-101 (1998).

72. Stoddard, *supra* note 15, at 986.

four years ago.⁸⁴

Discussing this decline in public awareness, the report on the poll notes:

Polls, and pollsters, are better at describing changes in opinion than at explaining it. However, it is normally true that awareness of something declines if not frequently covered in the media. We suspect that there has been less said and written in the media about the Americans with Disabilities Act over the last four years, since our 1999 survey, than there had been previously.⁸⁵

The statistics as to the awareness of Americans with disabilities speak for themselves and certainly belie any notion that the ADA will achieve the intended culture shift.⁸⁶ Moreover, there seems to be no trend toward enforcement. As we detail in Part I.D, enforcement of Title I rights, as measured by case filings, has experienced a substantial downward trend—undermining any chance that Title I will help the ADA obtain its “culture-shifting.”⁸⁷

C. Why Has Title I Failed to Contribute to a Cultural Shift?

Although an exhaustive list is beyond the scope of this Article, some reasons for the failure of Title I to live up to its promise are apparent. One of the reasons among the most frequently cited by commentators for the disappointment in Title I is the constraining judicial interpretation of the statute.⁸⁸ The Supreme Court has narrowly defined many of the Act’s provisions, which, in turn, has increased the scope of employer protection from

84. The Harris Poll #41, *supra* note 69. The report goes on to say:

Awareness is one thing and support for the principles is something else. And it is more difficult to account for the modest decline in the high levels of support for the key provisions of the ADA. It is certainly possible that this also is a result of less media coverage of disability rights and issues. One possible explanation is that, in the absence of media coverage, more people do not think that there is a problem that needs to be addressed and therefore do not support government regulations to address it.

Id.

85. *Id.*

86. See also Diller, *supra* note 61, at 20 (2000) (“Still, there are reasons to fear that, at least in the area of employment, the ADA has not yet had the transformative impact that its supporters predicted.”).

87. See *infra* Part I.D.

88. See National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, No. 7: The Impact of the Supreme Court’s ADA Decisions on the Rights of Persons With Disabilities* (Feb. 25, 2003), available at <http://www.ncd.gov/newsroom/publications/decisionsimpact.html>.

liability and decreased the scope of employee protection from discrimination far more than many advocates believe was intended.⁸⁹ An analysis conducted by the National Council on Disability has determined that “as a result of the Supreme Court’s definition cases, the lower courts have” construed the Act even more narrowly.⁹⁰ It points to decisions that have:

- ruled that persons who use mitigating measures are not protected by the ADA;
- ruled that persons whose impairments could be mitigated by medication are not protected by the ADA;
- made it much more difficult for individuals to establish that they are substantially limited in the major life activity of working;
- required individuals to prove not only that they are substantially limited in major life activities, but in “activities central to daily life”;
- made it almost impossible for individuals to establish that they fall within the “regarded as” prong of the ADA’s definition of disability.⁹¹

Other commentators have lamented the Supreme Court’s treatment of the ADA as well,⁹² and some have said that the Supreme Court has been downright

89. The so-called narrowing-definition cases are: *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (concluding, *inter alia*, that (1) to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives; (2) the impairment’s impact must also be permanent or long term; and that (3) it is insufficient for an individual attempting to prove disability status to merely submit evidence of a medical diagnosis of an impairment, but rather must show how the disability affects her directly); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (concluding that (1) individuals with monocular vision are not per se “disabled” within meaning of the ADA but, rather, must prove their disability on a case-by-case basis by offering evidence that the extent of the limitation on a major life activity in terms of their own experience is substantial, and that (2) former employer could use its compliance with applicable DOT safety regulations to justify its visual-acuity job qualification standard, despite existence of experimental program by which DOT standard could be waived in an individual case); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (concluding that the ADA’s determination whether employee’s impairment “substantially limits” one or more major life activities is made with reference to the mitigating measures he employs); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (concluding that corrective and mitigating measures should be considered in determining whether individual is disabled under ADA).

90. See National Council on Disability, *supra* note 88.

91. *Id.*

92. See, e.g., Charles B. Craver, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 LAB. LAW. 417 (2003); Katherine R. Annas, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams: Part of an Emerging Trend of Supreme Court Cases Narrowing the Scope of the ADA*, 81 N.C. L. REV. 835 (2003).

hostile towards the ADA.⁹³

The effect of these constraining decisions has been intensified by two other Supreme Court decisions affecting Title I enforcement in other respects. In *Board of Trustees of the University of Alabama v. Garrett*, the Court concluded that plaintiffs may not sue states under Title I of the ADA.⁹⁴ This ruling significantly narrowed the number of employees protected by placing them outside of its umbrella state employees. In *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*,⁹⁵ the Court determined that the right to obtain attorney's fees under the fee provisions in anti-discrimination statutes, such as the ADA, required that the underlying litigation result in a court-sanctioned change.⁹⁶ This departed from the predominant "catalyst theory," under which a party that began litigation resulting in a positive change was entitled to fees. By narrowing the types of outcomes that would support a court award of fees, the incentive for lawyers has diminished as well.

Two other contributing causes seem fairly obvious as well. One is the expense of enforcing Title I rights through litigation. Title I litigation necessarily involves extensive discovery and, often, the use of vocational and medical experts, and often other experts. It simply may be too costly for persons with disabilities, and their lawyers, to enforce rights under Title I in many instances.⁹⁷ The other possible contributing cause is the likelihood that misinformation or disinformation has contributed to the disappointing lack of enforcement of Title I. Several commentators have identified and debunked popular misconceptions that seem to pervade the public's understanding of the ADA.⁹⁸ For instance, Professor Robert L. Burgdorf, Jr. has identified sixteen myths, most of which apply to Title I.⁹⁹ These include the perceptions that: the

93. In fact, it has been reported that Supreme Court Justice O'Connor has taken the unusual step of publicly criticizing the ADA as poorly written. See Patricia Manson, *Plaintiff Attorneys See ADA as Growing Infirm*, CHI. DAILY L. BULL., Apr. 26, 2003, at 11.

94. *Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

95. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001).

96. *Id.*

97. R. Pepper Crusher, Jr., *Disability Law and Employer Policies in Mississippi*, 62 MISS. L.J. 665, 687-88 ("We who have cut our teeth on Title VII and National Labor Relations Act doctrine will find that the ADA compels us to become much more interdisciplinary. We must learn how to work with occupational rehabilitation specialists, orthopedists, and psychiatrists.").

98. See, e.g., U.S. Dep't of Justice, *Myths and Facts about the Americans with Disabilities Act*, available at <http://www.usdoj.gov/crt/ada/pubs/mythfct.txt> (last visited Sept. 19, 2004) ("The overwhelming majority of the complaints received by the Justice Department have merit."); U.S. Dep't of Labor, *Dispelling Myths about the Americans with Disabilities Act*, available at <http://www.dol.gov/odep/archives/ek96/lawmyth.htm> (last visited Sept. 19, 2004).

99. Professor Robert L. Burgdorf, Jr. for the National Council on Disability, *The Americans*

ADA includes affirmative rights (as opposed to prohibitions against discrimination); an applicant for a job who has a disability must be given an advantage over other applicants; it is easy to qualify as “disabled” under the Act; the ADA absolutely protects an employee who has a disability from being fired; the ADA prevents an employer from disciplining an employee who has a disability; and complying with the ADA is prohibitively costly.¹⁰⁰ These myths, no doubt, contribute to the reluctance of some employers to proactively comply with the ADA, and, moreover, they likely harden an employer’s opposition to the ADA and shape the employer’s litigation posture.

D. Title I Litigation Outcomes

All of these reasons, however, might matter little if more plaintiffs were able to successfully enforce their rights under Title I. The statistics, however, show that the majority of Title I plaintiffs experience only *de minimis* success.

In 1998, the American Bar Association’s Commission on Mental and Physical Disability Law (the “ABA Commission”) began publishing annual surveys on the outcomes of employment cases under Title I.¹⁰¹ The surveys involved cases available in traditional legal reporters, found in online databases, or brought to the attention of the ABA Commission by the media.¹⁰² The most recent survey shows that employers prevailed—*i.e.*, the employee’s complaint was dismissed or the employer won on the merits—in 94.5% of the Title I cases studied.¹⁰³ This success rate has remained at the same, or about the same, level since the 1998 survey, which reported that employers prevailed in 94.4% of the Title I cases.¹⁰⁴ According to the author of the most recent survey report, Amy L. Albright, the statistics “clearly show a continuation of the pattern of employers prevailing and employees losing in an overwhelming majority of the

with Disabilities Act Policy Brief Series: Righting the ADA, No. 5 Negative Media Portrayals of the ADA (Feb. 20, 2003), available at <http://www.ncd.gov/newsroom/publications/2003/negativemedia.htm>.

100. *Id.* Most disturbing is the possibility that employers are simply choosing to ignore the requirements under the ADA. Given the astounding success rates that employers have at the administrative, trial, and appellate levels, employers might simply decide that under a strict monetary cost-benefit analysis, it does not “pay” to attempt to comply with the ADA, even if the cost is relatively minimal. At least one defense lawyer has intimated that this may be the appropriate result of a “risk analysis.” Burton J. Fishman, *ADA: Much Ado about Nothing*, 9 No. 4 HR ADVISOR: LEGAL & PRAC. GUIDANCE 37 (July/Aug. 2003).

101. Amy L. Albright, *2002 Employment Decisions Under the ADA Title I B Survey Update*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 387, 387 (2003). The ABA Commission also looked at EEOC statistics on Title I administrative complaints. Employees fared better in administrative adjudications, though certainly not well, prevailing in 21.9% of the cases resolved on the merits. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 389.

final court outcomes.”¹⁰⁵

The statistics found in the ABA Commission’s surveys are consistent with those compiled by Professor Ruth Colker in her highly regarded study of judicial outcomes under Title I.¹⁰⁶ Professor Colker determined that, of cases available on Westlaw from 1992-1998, defendants prevailed in more than 92.7% of ADA employment discrimination cases decided on the merits at the trial court level.¹⁰⁷ Putting these figures in perspective, studies of litigation outcomes show that under the Age Discrimination in Employment Act defendants prevailed in 80% of cases litigated to a final outcome¹⁰⁸ and that, overall, defendants prevail in 42.03% of all civil cases filed in federal court.¹⁰⁹

Making matters worse, prevailing Title I plaintiffs experience a similar lack of success at the appellate level. Professor Colker determined that employers prevailed in approximately 84% of the appellate cases reported on Westlaw during 1992-1998.¹¹⁰ In a more recent study, Professor Colker has determined that “[d]efendants attain a full reversal in 42% of appellate litigation and obtain a reduction in the damages award in an additional 17.5% of cases,” while “[p]laintiffs, by contrast, obtain a reversal of a pro-defendant judgment in only 12% of cases.”¹¹¹ Again, putting these figures in perspective, Professor Colker determined that Title VII plaintiffs obtained a reversal in 34% of the cases they appealed.¹¹² Neatly summarizing her studies, Professor Colker concluded that “plaintiffs appear to fare worse at the trial court and appellate court levels under [Title I of] the ADA than in other areas of the law.”¹¹³

What is more, the outcomes of these studies seem to parallel an analysis of *filed* cases. In a previous article, we examined filed cases in the United States District Court for the Eastern District of Pennsylvania (“Eastern District of Pennsylvania”), in part in an effort to try to examine the “whole universe” of Title I cases so that we could determine if the studies of reported cases were

105. *Id.* at 387.

106. Colker, *supra* note 71, at 109.

107. *Id.*

108. George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 513 (1995); *see also* Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213, 1216 (2003) (analyzing this study).

109. Rulli, *supra* note 75, at 368; *but see* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 581 (1998) (calling win rate studies “the slipperiest of all judicial data”). Since many claims are withdrawn or settled prior to judgment, official outcomes alone are viewed by some to be limited in value. *See id.* at 586-87.

110. Colker, *supra* note 71, at 108.

111. Colker, *supra* note 54, at 248-49.

112. *Id.* at 248, 253.

113. *Id.* at 257.

indeed representative.¹¹⁴ The Eastern District of Pennsylvania sits primarily in Philadelphia, but also conducts hearings elsewhere and serves the residents of ten Pennsylvania counties. Highly regarded for the quality of its bench and bar, the Eastern District of Pennsylvania has a busy docket of ADA cases, when compared to other district courts for which statistics are available.¹¹⁵ The Eastern District of Pennsylvania is an excellent district for conducting the study because it has a great many legal services and public interest organizations and law firms, including a larger than average number of employment lawyers as well as an employment panel from which the district court may appoint counsel for *pro se* litigants.¹¹⁶ Studying filed cases is important because it allows for close examination of who is filing suit (which we discuss in more detail in Part II) and how the courts are treating their cases. To examine filed cases in the Eastern District of Pennsylvania, we obtained the official docket sheet for each case involving an ADA employment claim so that we could look at pleadings and outcomes.¹¹⁷ We were able to isolate Title I claims by utilizing identifiers¹¹⁸ that plaintiffs included in the civil cover sheet required for each filing.¹¹⁹ In our initial study, we looked at filings from 1996-1998.¹²⁰ Of the cases concluded by way of judicial determination, we found that only 2.7% of Title I plaintiffs prevailed,¹²¹ thus yielding an extraordinary 97.3% success rate for employers.¹²²

For this article, we have updated the study by analyzing filed-case

114. See Rulli, *supra* note 75. Although Professor Rulli wrote the article, the pronoun “we” will be used for ease of reference.

115. See *infra* Part I.D.

116. See *infra* Part II.B.

117. In the initial study, the clerk’s office helped us to identify the appropriate court docket number to obtain all dockets. In the updated study, we used the court’s electronic court filing system, known by the acronym PACER (Public Access to Court Electronic Records). See <http://pacer.psc.uscourts.gov/pacerdesc.html>. We found that, in regard to the ability to search case filings, the Eastern District of Pennsylvania was well ahead of most other districts. In examining cases filed during a given year, we declined to count cases that had been re-opened during that year to avoid double counting—case filings were allocated only to the year in which they were originally filed. The statistical information from the PACER system is based on the data available at the time of our research, and may not reflect any updated data that the federal courts have added to the PACER system subsequent to our review.

118. These identifiers were the “nature of suit” and “statute” as listed in the Electronic Court Filing System.

119. Accordingly, there is a chance that there are more Title I cases, but that these were misidentified by plaintiffs.

120. See Rulli *supra* note 75, at 368.

121. *Id.* That is, those cases that ended on a motion under Fed. R. Civ. P. 12, a motion under Fed R. Civ. P. 56, or a verdict.

122. *Id.*

outcomes in 2000 and 2001. Our updated study has revealed little change. Plaintiffs succeeded at least partially in 8% of cases, but, in real numbers, this consisted of full or partial victories in only two of twenty-five Title I cases during 2000-2001, representing an employer victory rate of 92%. Consistent with the study of reported cases, the vast majority of plaintiffs lose at the motion to dismiss or summary judgment stages.¹²³ The importance of this last figure is critical considering that such “nontrial adjudications” constitute 50% percent of all filed cases in federal court.¹²⁴

Quite clearly, measured by judicial outcomes, the state of things under Title I of the ADA for all people with qualifying disabilities may be summed up succinctly as a promise not much closer to fulfillment than it was thirteen years ago. The studies of reported cases, appellate cases, and filed cases show that, as many have concluded, enforcement under Title I, from the worker’s perspective, is largely a loser’s game. And, as perpetual losers in Title I litigation, plaintiffs ultimately will fail to bring about the intended cultural shift.¹²⁵

E. Lawyers Are Being Driven Away from Title I

Considering all of this, it is not surprising to learn that it appears that lawyers are being driven away from litigating under Title I. The National Council on Disability has referred to a “chilling effect” on lawyers.¹²⁶ But, the reality may be much worse. Our study of case filings in the Eastern District of Pennsylvania and other jurisdictions found a precipitous decline in Title I enforcement over the last five years that sharply contrasts with upward trends in non-employment ADA litigation, Title VII litigation, and disability discrimination charges filed with the EEOC.

The statistics show unequivocally that significantly fewer Title I cases are being filed. Our study measured filings in the Eastern District of Pennsylvania from 1996 through 2003, with the figures for 2003 through December 1 of that year. The following chart summarizes the findings:

123. Albright, *supra* note 101, at 387 (noting that only 3.9% of “employer ‘victories’” were “resolved on the merits”). In twenty of the twenty-five cases filed and litigated to final outcomes during 2000-2001, the defendant-employer won on a motion to dismiss or at the summary judgment stage, and only three of the twenty-three employer verdicts occurred at or after trial.

124. Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1.

125. By emphasizing judicial outcomes, we do not mean to discount the important benefits obtained by plaintiffs in informal settlements reached in Title I litigation. However, as described in our previous article, such benefits are difficult, if not impossible, to measure because of confidentiality and other factors. See Rulli, *supra* note 75, at 373-375.

126. National Council on Disability, *supra* note 88, at 15.

Year	No. of Title I Cases Filed in the Eastern District of Pennsylvania
1996	56
1997	72
1998	95
1999	124
2000	98
2001	64
2002	70
2003 (through 12/01/03)	63

The result is a bell curve. In 1996, plaintiffs filed fifty-six claims in the Eastern District of Pennsylvania under Title I. The number of filings reached its zenith in 1999—the year the Supreme Court decided the “*Sutton* trilogy” that interpreted the ADA narrowly¹²⁷—with 124 filings under Title I. Between 1996 and 1999, therefore, the number of filings increased 121.4%. By December 1, 2003, however, the number of filings fell to 63—a decrease of 49.2% from the 1999 peak. Therefore, even in a highly active district with a number of resources available for plaintiffs, attempted enforcement has substantially ebbed over the last four years. In order to place these findings in perspective, we also studied other districts. The largest of the districts, and the one most comparable to the Eastern District of Pennsylvania, was the United States District Court for the Southern District of New York (“Southern District of New York”). The Southern District of New York sits primarily in Manhattan, but also conducts hearings elsewhere, and serves the residents of eight counties. Like the Eastern District of Pennsylvania, it is located in what is considered a hotbed for legal activity, with an immense number of law firms,

127. The so-called “*Sutton* trilogy” consists of *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and is commonly considered to have resulted in a precipitous drop in efforts to enforce Title I protections. See generally Diller, *supra* note 61, at 19.

and legal services and public interest organizations. The following chart summarizes our findings:

Year	No. of Title I Cases Filed in the Southern District of New York
1998	39
1999	76
2000	66
2001	24
2002	16
2003 (through 12/1/03)	4

These statistics reveal trends that are remarkably similar to those for the Eastern District of Pennsylvania. Between 1998 and 1999, filings increased 94.9%. Between 1999 and December 1, 2003, however, filings fell an astounding 94.7%. From these statistics, the same conclusion may be drawn as was drawn for the Eastern District of Pennsylvania: attempted enforcement has substantially ebbed over the last four years. To further test these findings to see whether the Eastern District of Pennsylvania statistics may be considered illustrative of the general state of enforcement under Title I, we studied nine other federal district courts for which filing statistics were available through the Case Management Electronic Court Filing System.¹²⁸ Of these districts, the District Court for Northern Indiana (“Northern Indiana”), the District Court for Eastern Missouri (“Eastern Missouri”), the District Court for Western Missouri (“Western Missouri”), and the District Court for Southern Ohio (“Southern Ohio”) had the largest number of filings, and were the only districts with more than 200 Title I filings from 1996-2003.¹²⁹ Accordingly, we included only

128. The other District Courts available at the time of study were the following: Northern Indiana, Kansas, Eastern Kentucky, Maine, Eastern Missouri, Western Missouri, Nebraska, Western New York, and Southern Iowa. Accordingly, the study was restricted to those courts that had searchable online databases at the time we began the study.

129. We did not use the statistics for any of the other district courts referred to in footnote 128 because we did not feel that they offered a significant enough number of filings over the eight-year period. The total number of filings in any of the five district courts did not come within 40 filings of the four districts we have focused on.

these districts as a part of the study. As we note in the margin,¹³⁰ these districts differ from the Eastern District of Pennsylvania and Southern District of New York in that they are not centered in cities nearly as densely populated (both with people and lawyers) as Philadelphia or Manhattan. The following chart summarizes our findings:

Year	No. of Title I Cases Filed in Northern Indiana	No. of Title I Cases Filed in Eastern Missouri	No. of Title I Cases Filed in Western Missouri	No. of Title I Cases Filed in Southern Ohio
1996	65	60	46	19
1997	42	60	42	26
1998	49	48	38	31
1999	52	40	20	32
2000	40	43	19	22
2001	32	52	30	32
2002	34	36	14	34
2003 (through 12/1/03)	31	25	9	19

These figures show a 40.4% decline in Title I cases filed over the four years since 1999 in Northern Indiana, a 37.5% decline in Eastern Missouri, a 55% decline in Western Missouri, and a 40.6% decline in Southern Ohio. The average decrease in filings since 1999 in all four of the districts was 43.38%. This decline clearly paralleled the 48.4% decline in the Eastern District of

130. The District Court for Northern Indiana has offices located in South Bend, Hammond, Fort Wayne, and Lafayette, and serves the residents of thirty-two Indiana counties. The District Court for Eastern Missouri mainly sits in St. Louis and serves the residents of twelve Missouri counties. The District Court for Western Missouri is based in Kansas City but is divided into five divisions: Western (Kansas City), Central (Jefferson City), Southern (Springfield), Southwestern (Joplin), and St. Joseph (St. Joseph), and serves the residents of sixty-six Missouri counties. The District Court for Southern Ohio serves the residents of forty-eight counties and has two divisions: the Eastern Division sits at Columbus and the Western Division sits at Cincinnati and Dayton.

Pennsylvania (though it was not as precipitous as the decline in the Southern District of New York). From these figures, a clear picture of the state of Title I enforcement in the country seems to emerge. People are simply not attempting to enforce their Title I rights in federal courts to anywhere near the extent they did in 1999. This conclusion sharply contrasts with the recent determination that litigation in general has increased in federal courts.¹³¹

These contrasting trends play out at the administrative level as well. The Equal Employment Opportunity Commission (EEOC), the administrative arm of the Federal Government given enforcement power over the ADA, has also decreased its litigation under the ADA. As the National Council on Disability has documented, “[d]ata from the Equal Employment Opportunity Commission (EEOC) shows that the number of ADA lawsuits filed by the EEOC decreased significantly after the trilogy of ADA decisions in 1999 (*Sutton, Murphy, and Kirkingburg*) and decreased again after the 2002 trilogy (*Williams, Barnett, and Echazabal*).”¹³² In contrast, “EEOC lawsuits filed under other federal employment discrimination laws during those years increased.”¹³³

The downward trend in Title I enforcement also contrasts sharply with the trend in non-Title I ADA enforcement in the Eastern District of Pennsylvania. A study of filed cases in the Eastern District of Pennsylvania shows a substantial increase in filings since 2000. The following chart summarizes our findings:

Year	No. of Non-Title I Cases Filed
2000	22
2001	32
2002	34
2003 (through 12/1/03)	124

This represents a sharp 54.5% increase in litigation under titles other than Title I under the ADA in a mere two years and an extraordinary 464% increase in just three years. We caution, however, that this statistic may not be representative of the state of non-Title I enforcement in general, considering that the other districts we were able to study did not show nearly as drastic an

131. Liptak, *supra* note 124.

132. National Council on Disability, *supra* note 88.

133. *Id.*

increase.¹³⁴ Still, those districts showed consistent enforcement, as opposed to a substantial decrease, a trend that also contrasts with the downward trend in Title I enforcement.¹²⁵

Finally, we looked at charge statistics for the EEOC for disability discrimination available on the agency's website¹³⁶ to see if the decrease in federal court filings might be explained by increased voluntary compliance with Title I by employers and a resulting decrease in charges alleging disability discrimination filed with the EEOC, *i.e.* to see if there was a comparative decrease in potential Title I plaintiffs. This, however, was not the case, though a slight decrease did occur. The following chart shows the statistics:

Year	No. of Disability Discrimination Charges Filed with the EEOC ¹³⁷
1999	17,007
2000	15,864
2001	16,470
2002	15,964

In 1999, the EEOC received 17,007 charges alleging disability

134. We also looked at non-Title I filings in Northern Indiana, Eastern Missouri, Western Missouri, and Southern Ohio. The statistics for Southern District of New York were not available. In all but one of the districts, the number of filings increased. Nonetheless, because the filings averaged less than ten per year per district during the same period (2000-2003), we do not feel that the number can be used as support for the notion that non-Title I filings have increased.

135. It is also worth noting that factors, mainly social and economic, outside the realm of the law likely have had an impact on the ADA's progress. For instance, David M. Engel and Frank W. Munger have identified a number of non-legal factors that influence whether a person with disabilities is likely to invoke the ADA. According to the authors, there are "particular social factors that tend to complicate or interfere with the effectiveness of the ADA's employment provisions," David M. Engel & Frank W. Munger, *Re-intepreting the Effect on Rights: Career Narratives and the Americans with Disabilities Act*, 62 OHIO ST. L.J. 285, 330 (2001), including the failure of persons to "recognize that they have a disability as defined by the ADA," *id.*, the individual's reluctance to reveal that she has a disability, *id.*, fear of a "backlash of resentment among co-workers" for invoking rights, *id.* at 331, and lack of awareness of the rights under the ADA. *Id.* Moreover, they concluded that race and class seem to have a profound effect, *id.*, stating: "[P]ersons of higher socioeconomic status and members of racial minorities are also unlikely. . . to invoke the ADA." *Id.* at 312-13.

136. See EEOC Website, at <http://www.eeoc.gov> (last visited Sept. 19, 2004).

137. EEOC, Chart, Number of Disability Discrimination Charges Filed with the EEOC, at <http://www.eeoc.gov/stats/charges/html> (last visited Sept. 19, 2004).

discrimination. For the last available year, 2002, the EEOC received 15,964. This represents only a 6.1% decrease in charges filed. Although the statistics do not cover 2003, as the studies of federal court filings did, the percentage decrease in charges (6.1%) compared to the percentage decrease in filings in the district courts studied (ranging from 37.5% to 94.7%) is so drastically different that it seems safe to assume that any decline in charges in 2003 would not approach the decline in cases filed in federal court. In any event, this point is also illustrated if the case filings statistics are considered from 1999 to only 2002. The number of filings from 1999 to 2002 decreased in the Eastern District of Pennsylvania by 43.5%, in the Southern District of New York by 78.9%, and in the other four districts by a combined 18.1%—all much greater than the 6.1% decline in charges filed.

The decline in newly filed enforcement litigation, unaccompanied by an equivalent decline in charges filed with the EEOC, brings into focus the fading promise of Title I. In many respects, a statute once seen as empowering has, over time, become disempowering.¹³⁸ It certainly offers a distinct contrast to the seemingly overwhelming impression that litigation under the ADA has reached a breaking point of some sort.¹³⁹ Moreover, even if plaintiffs were litigating more frequently under Title I, it is likely that little would change. A plaintiff who does not settle would have nearly as good a chance of winning playing roulette at a casino as she would bringing a Title I claim in court.¹⁴⁰ It is painfully clear that Title I has not become the panacea for plaintiffs with disabilities that many had hoped, and there is no reason to believe that Title I, as it now stands, will soon, if ever, begin to effectuate much of a change in the lives of persons with disabilities.

II. THE INTERTWINED FATE OF POVERTY, DISABILITY, AND TITLE I ENFORCEMENT

If skewed litigation outcomes and restrictive judicial rulings cause private lawyers to back away from enforcing Title I in federal court, what is the likely impact upon poor people with disabilities, for whom the ADA holds special

138. Ruth Colker, *The Death of Section 504*, 35 U. MICH. J.L. REFORM 219, 220 (2002) (arguing that the ADA has resulted in a narrowing of the rights available under Section 504 of the Rehabilitation Act). Moreover, it seems that the Civil Rights Division of the Department of Justice is not substantially filling in the gap either. It is well-documented that the current administration has litigated substantially fewer employment discrimination cases than during the prior administration, and has investigated substantially fewer investigations as well. Shannon McCaffrey, *Civil Rights Division Backs Away from Initial Activism*, PHILA. INQUIRER, Nov. 23, 2003, at A8.

139. See also Colker, *supra* note 71, at 99 (“The popular media has often portrayed the Americans with Disabilities Act (ADA) as a windfall statute for plaintiffs.”).

140. See Terrence R. Chorvat, *Ambiguity and Tax Income*, 23 CARDOZO L. REV. 617, 618 n. 9 (2002) (“Assuming a standard roulette wheel consisting of thirty-six numbers, the probability of the ball landing on any one number should be 1/36.”).

significance and promise? In the second part of this Article, we look more closely at whether the disabled poor, whose fragile economic interests are most tied to the success of the ADA, are engaged in federal litigation to overcome employment discrimination that restrains their progress toward economic independence.

In our prior study, we examined case outcomes in civil actions filed under the ADA between 1996 and 1998, and then looked at the litigants themselves and the lawyers involved to gain a better understanding of who was turning to our federal courts for enforcement of their federal rights under Title I.¹⁴¹ In so doing, we acknowledged that the financial status of individual litigants is not easily ascertained from court records, but that it is possible to obtain reliable data on litigation activities of poor people by examining several indices related to poverty. Our review of the number of *in forma pauperis* filings, the associational relationships of counsel of record, and the nature of the employment positions at stake, among other factors, led us to conclude in those cases that there were “serious questions about the ability of the poor to enforce their rights under Title I as long as legal representation is unavailable and federal agency enforcement appears unresponsive.”¹⁴²

In our current study, we reviewed similar poverty-related factors in all 295 employment discrimination cases filed under the ADA in the Eastern District of Pennsylvania between January 1, 2000 and December 1, 2003 to see if, over additional time, the poor had obtained greater access to lawyers and to the courts for the enforcement of their Title I rights. The results were disheartening.

A. *The Nexus Between Disability, Poverty and Unemployment*

1. Being Disabled Increases the Likelihood of Being Poor

People with disabilities are much poorer than the rest of Americans.¹⁴³ On the eve of the ADA’s passage, individuals with disabilities experienced staggering levels of unemployment and poverty.¹⁴⁴ Surveys conducted by Louis Harris found that *not working* was perhaps the “truest definition of what it

141. Rulli, *supra* note 75, at 375-84.

142. *Id.* at 390.

143. Christine M. Tomko, *The Economically Disadvantaged and the ADA: Why Economic Need Should Factor into the Mitigating Measures Disability Analysis*, 52 CASE W. RES. L. REV. 1033 (2002) (citing H.R. REP. NO. 101-485, pt. 2, at 43-47). See also DEFINITION OF POVERTY: MEASURING POVERTY: A NEW APPROACH (Constance F. Citro & Robert T. Michael, eds. 1995).

144. Tompko, *supra* note 143, at 1033.

mean[t] to be disabled in America."¹⁴⁵ Two-thirds of all disabled Americans between the ages of 16 and 64 were not working at all, although 66% of those not working stated that they wanted to work.¹⁴⁶ More than eight million people with disabilities wanted to work but could not find a job.¹⁴⁷

The Harris poll summarized the financial condition of people with disabilities: "By almost any definition, Americans with disabilities are uniquely underprivileged and disadvantaged. They are much poorer, much less educated and, have much less social life, have fewer amenities and have a lower level of life satisfaction than other Americans."¹⁴⁸

Employment discrimination has played a pernicious role in keeping people with disabilities out of the workplace. Responding to a Harris poll, top managers, equal opportunity officers, and department heads stated that they believed that individuals with disabilities often encounter job discrimination from employers, and that employment discrimination is an inexcusable barrier to increased employment of disabled people.¹⁴⁹ Moreover, without comprehensive legislation to combat disability discrimination in the workplace, high rates of unemployment and poverty among the disabled were considered likely to continue and remain unchallenged because the prevalent culture accepted the general notion that "these are the inevitable results of disabling conditions."¹⁵⁰ These forces combined to make unemployment among persons with disabilities a bigger problem than among any other demographic group of working-age Americans.¹⁵¹ In 1988, then Vice-President Bush described people with disabilities as the "poorest, least educated and largest minority in America."¹⁵²

Individuals with disabilities voiced their plight in congressional hearings preceding the passage of the ADA. The Committee noted:

A popular health guide quotes a woman as saying, "We are not

145. LOUIS HARRIS & ASSOCIATES, *THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 50* (1986), *cited in* H.R. REP. NO. 101-485, *reprinted in* 1990 U.S.C.C.A.N. 303, 314 (statement of Senator Harkin); 135 CONG. REC. S10708-01 (1989)(citing LOUIS HARRIS & ASSOCIATES, *THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 50* (1986)) (statement of Senator Harkin).

146. *Id.*

147. *Id.*

148. *Americans with Disabilities Act of 1990: Hearing on S. 933 Before the Senate Subcomm. on the Handicapped*, 101st Cong. 9 (1987) (testimony of Humphrey Taylor, Louis Harris and Associates), *reprinted in* 1990 U.S.C.C.A.N. 303, 313.

149. 135 CONG. REC. S10708, S10712 (1989) (statement of Sen. Harkin).

150. 135 CONG. REC. E1575-01 (1989) (statement of Rep. Coelho).

151. *Id.*

152. H.R. REP. NO. 101-485, at 32-33 (1990) (statement of Vice President Bush), *reprinted in* 1990 U.S.C.C.A.N. 303, 314.

disabled; it is society which disables us by being so unsupportive.” Perhaps this unsupportive attitude helps to explain the troubling association between people with disabilities and poverty. The average earnings for people with disabilities in 1980 was \$6000, compared with \$11,300 for the non-disabled. About 7% of working-age nondisabled households had family income below the poverty level. By contrast, some 24% of the households with a family member who was severely disabled had family income below the poverty level (and that includes the help that they may get from the government).¹⁵³

The increased focus on the disparate financial plight of people with disabilities fueled an urgent sense of legal and moral responsibility to remedy historical wrongs that had cast the disabled into “virtual outcasts from the mainstream of society: jobless, homeless, penniless, hopeless.”¹⁵⁴ In the words of one witness, “[W]e are responsible to hundreds of thousands of our fellow citizens who die, literally die, years and decades before their time.”¹⁵⁵

Congress understood this when it enacted the ADA, expressly finding that “[c]ensus data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.”¹⁵⁶ Congress was determined that economic dependency not be an inevitable consequence of having a disability,¹⁵⁷ and that individuals with disabilities be brought “into the economic and social mainstream of American life”¹⁵⁸ by assuring “equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”¹⁵⁹

The gateway to economic independence and self-sufficiency for people with disabilities flows directly through Title I of the ADA and its promise of ending disability discrimination in the workplace. Yet, more than twenty-five years after the enactment of Section 504 of the Rehabilitation Act, and some thirteen years after the passage of the ADA, individuals with disabilities

153. *Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Senate Comm. on Labor and Human Resources and the Senate Subcomm. on the Handicapped*, 101st Cong. 2nd Sess. 374 (1989).

154. *Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Senate Comm. on Labor and Human Resources and the Senate Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 20 (1989).

155. *Id.* at 1041 (statement of Justin W. Dart, Jr., Chairperson, Task Force on the Rights and Empowerment of Americans with Disabilities).

156. 42 U.S.C. 12101(a)(6)(2004).

157. Tomko, *supra* note 143, at 1048 (citing H.R. REP. NO. 101-485, pt. 2, at 39-41 (1990)).

158. H.R. REP. NO. 101-485, pt. 2, at 99.

159. 42 U.S.C. 12101(a)(8)(2004).

continue to experience among the highest unemployment rates and comprise the largest number of people living in poverty of any group in American society.¹⁶⁰ EEOC Commissioner Paul Steven Miller recently tied disability discrimination to poverty when he cautioned that, “[b]arriers and stereotypes continue to impede the integration of disabled people into the workplace.”¹⁶¹ An industrial relations researcher concluded much the same when she found that “[e]mployment and earnings levels are generally low among people with disabilities in the United States While a portion of the employment and earnings gaps may reflect lower productivity associated with many disabilities, prejudice and discrimination also appear to play a role.”¹⁶²

There is ample statistical support for this conclusion. A 1998 Harris poll of 1,000 individuals with disabilities aged sixteen and older found that disabled people lag well behind other Americans in many of the most basic aspects of life and that employment is the area with the widest gulf between those who are disabled and those who are not.¹⁶³ The 1998 survey found that only three in ten working-age adults with disabilities (29%) are employed full- or part-time, compared to eight in ten non-disabled adults (79%).¹⁶⁴ The survey found that working age adults with disabilities are no more likely to be employed today than they were a decade ago, even though almost three out of four who are not working say that they would prefer to be working.¹⁶⁵ In addition, two out of three adults with disabilities (67%) say that their disability has prevented (41%) or made it more difficult (26%) for them to get the kind of job they would like to have.¹⁶⁶ Clearly, low employment rates among the disabled greatly contribute to such a high incidence of poverty.¹⁶⁷

The national census conducted in 2000 reconfirmed that people with

160. Paul Steven Miller, *Reclaiming the Vision: The ADA and Definition of Disability*, 41 BRANDEIS L.J. 769, 770 (2003). Mr. Miller is Commissioner, U.S. Equal Employment Opportunity Commission, and delivered these remarks as part of the Carl A. Warns Jr. Lecture on Labor and Employment at the Louis D. Brandeis School of Law at the University of Louisville on June 6, 2002.

161. *Id.*

162. Lisa A. Schur, *Barriers or Opportunities? The Causes of Contingent and Part-Time Work Among People with Disabilities*, 42 INDUS. REL. 589, 591 (2003).

163. See 1998 National Organization on Disability/Louis Harris & Associates Survey of Americans with Disabilities, July 23, 1998, Executive Summary, available at <http://www.nod.org/presssurvey.html> (visited 10/22/99) (on file with authors). This was the first national poll taken by Harris in cooperation with the National Organization on Disability since 1994, and the third conducted by Harris since 1986.

164. *Id.*

165. *Id.*

166. *Id.*

167. Barbara Vobejda, *Survey Finds No Job Gains for Disabled*, WASH. POST, July 23, 1998, at A20.

disabilities are significantly more likely to be impoverished than people without disabilities.¹⁶⁸ Nationally, 18% of people with disabilities live below the poverty line, compared with 11% of people without disabilities.¹⁶⁹ Perhaps most disturbing is the notion that, despite substantial economic prosperity in the nation during the 1990's, little, if any, economic benefit was experienced by people with disabilities. Indeed, while the national unemployment rate fell from 6.6 percent to just 4.1 percent (between 1994 and 1999), the *employment* rate for working disabled people appears to have dropped from 28.1% to 22% during the same period.¹⁷⁰ If this is true, it suggests that people with disabilities continued to lag behind non-disabled people both in obtaining employment and

168. US Census data from 2000 can be accessed on American Factfinder at the US Census website: http://factfinder.census.gov/servlet/DatasetMainPageServlet?_lang=en.

169. *Id.*

170. See Carolyn Lockhead, *Collecting on a Promise*, SAN FRANCISCO CHRON., July 26, 2000, at A1 (reporting that the disabled say they are still in a fight for rights 10 years after the enactment of the ADA). See also Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 1019-20 (2003) (finding that the failure of the ADA to increase employment rates for individuals with disabilities may be due to restrictive judicial interpretations); Hoffman, *supra* note 108, at 1241 (referencing other studies concerning the employment of individuals with disabilities since the enactment of the ADA and finding that the "news is not encouraging"). Note, however, that measuring employment rates of the disabled over the life of the ADA is extremely tricky. The National Council on Disability has found that there is an absence of reliable statistical data on disability employment levels. See National Council on Disability, *National Disability Policy: A Progress Report* (July 26, 2002), available at http://www.ncd.gov/newsroom/publications/2002/progressreport_07-26-02.htm. Studies on this question have been inconclusive because the results are largely dependent on how each study defines and measures disability. Compounding the difficulty is the fact that disability is self-reported and individual assessments of work disabilities do not easily translate to disabling conditions actually covered by the ADA's protections. Moreover, the definition of disability under the ADA itself has been a moving target as Supreme Court decisions have increasingly narrowed the statutory definition of disability in a series of interpretative decisions. See discussion *supra* Part I.C. For an excellent discussion of this difficult subject, see Peter Blanck et al., *Calibrating the Impact of the ADA's Employment Provisions*, 14 STAN. L. & POL'Y REV. 267 (2003). See also Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, 42 INDUS. REL. 31, 64 (2003) (finding that employment increased when using alternative measures of disability); Paul Steven Miller, *The EEOC's Enforcement of the Americans with Disabilities Act in the Sixth Circuit*, 48 CASE W. RES. L. REV. 217, 219-21 (1998) (noting that the number of people with disabilities in the work force has increased since the passage of the ADA). Despite the difficulties in determining whether individuals actually covered by the ADA have experienced higher or lower rates of employment since the enactment of the ADA, it can be said with confidence that the "ADA has not resulted in the hoped-for dramatic increase in employment rates for individuals with disabilities, and two-thirds to three-quarters of this population remains outside the workforce." Hoffman, *supra* note 108, at 1244 & n.190 (citing Susan Schwochau & Peter David Blank, *The Economics of the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 271, 272 (2000)). See also National Council on Disability, *NCD Progress Report* (July 26, 2003), available at http://www.ncd.gov/newsroom/publications/2002/progressreport_07-26-02.htm (finding that "whatever set of statistics one chooses from among the varying estimates of disabled Americans' employment rates, the rate and level of employment for this population remain far too low").

in earnings, even during the best of economic times.¹⁷¹ President Clinton acknowledged this sad reality when he said, "Not everyone has shared in the American economic renaissance. We all know there are people . . . who have been left behind, including millions of Americans with significant disabilities who want to go to work."¹⁷²

This lag in economic gain is particularly troublesome today as the financial boom of the 1990s has ended and poverty is again on the rise. The U.S. Census Bureau reports that the national poverty rate rose from 11.7% in 2001 to 12.1% in 2002, resulting in an additional 1.7 million people in poverty in 2002.¹⁷³ The median household income also declined by 1.1%.¹⁷⁴ The U.S. Census Bureau's report addressing poverty in the United States confirms that 6.8 million families lived in poverty in 2001 and that this figure has increased to 7.2 million families for 2002.¹⁷⁵

With the overall poverty rate again on the rise, the disabled feel the sting most severely. Even before the jump in poverty from 2001 to 2002, 29% of people with disabilities lived in households with annual incomes of \$15,000 or less, as compared to 10% of people without disabilities.¹⁷⁶ By the same token, only 16% of people with disabilities were likely to live in households with greater than \$50,000 annual income, as compared to 39% of people without disabilities.¹⁶³ People of color with disabilities are most impoverished.¹⁷⁸

171. Tomko, *supra* note 143, at 1033 (citing E. Scott Reckard, *Disabled are Behind in Economic Boom*, L.A. TIMES, Nov. 18, 2000, at A1).

172. *Id.* at 1033.

173. U.S. Census Press Release (Sept. 26, 2003), available at www.census.gov/Press-Release/www/2003/cb03-153.html. The Department of Health and Human Services' poverty guidelines designated the poverty threshold for a family of four in 2002 as \$18,100 in annual income. 2002 HHS Poverty Guidelines, available at <http://aspe.hhs.gov/poverty/02poverty.htm>.

174. *Id.*

175. *Id.*; see also BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES 2001 (Sept. 2002). In addition, poverty is also on the rise in Pennsylvania, the eastern part of which constitutes the geographic service area of the Eastern District of Pennsylvania. The *Philadelphia Inquirer* reports that about 9.5 percent of Pennsylvania's residents were living in poverty last year, up from 9.1 percent the previous year. See Genaro C. Arms, *Poverty Grows in U.S. for 2nd Year*, PHILA. INQUIRER, Sept. 27, 2003, at A1.

176. Tomko, *supra* note 143, at 1038-39 (citing Executive Summary of the 2000 N.O.D./Harris Survey of Americans with Disabilities, at <http://www.nod.org/hs2000.html> (last visited Sept. 10, 2000)).

177. *Id.*

178. A study conducted by Katherine Seelman, director of the National Institute on Disability and Rehabilitation Research (NIDRR), found that the average income level of the population as a whole exceeds that of people with disabilities by 34%. Disabled people who are African-American or Hispanic have even lower income levels than whites with disabilities. See Katherine Seelman, NIDRR, study conducted in 1995 and cited in Beth Haller, *Disability Rights and Wrongs*, HORIZON, ¶ 35 (Nov. 1999) (reporting that in 1988 the average household income was \$34,017, while the average household income of whites with disabilities was only \$18,000 and the average household

Higher poverty rates are experienced by people with disabilities around the globe where the causes of such abject poverty stem from many of the same root problems as in the United States: exclusion from social, economic and political life.¹⁷⁹

2. Being Poor Increases the Likelihood of Being Disabled

Being poor and disabled in America is a vicious cycle. Not only do disabled people experience disproportionately higher rates of poverty, but being poor dramatically increases the likelihood of developing an impairment.¹⁸⁰ A recent General Accounting Office study concluded that 44% of all Temporary Assistance to Needy Families (TANF) recipients had a physical or mental impairment.¹⁸¹ “Poverty is the primary screening indicator of the many variables that increase the risk of disability.”¹⁸² People with disabilities are twice as likely as non-disabled people to experience delay in getting needed health care because they cannot afford it.¹⁸³

Moreover, families with incomes below 200% of the official poverty level are almost 50% more likely to have a disabled child than higher-income families.¹⁸⁴ Families receiving welfare benefits are almost twice as likely as high-income families to have a child with a disability.¹⁸⁵ Single mothers receiving TANF benefits have a 38% rate of having a disability themselves. This is more than twice the rate for higher-income single mothers.¹⁸⁶

The 2000 census found that 26.4% of blacks of working age, 24% of

income of African-Americans with disabilities was only \$8,000), at www.horizonmag.com/poverty/disability-rights.asp (last visited Oct. 17, 2004).

179. See Rebecca Yeo, *Chronic Poverty and Disability* 5, 9 (Aug. 2001), available at <http://www.chronicpoverty.org/pdfs/add.pdf> (noting that studies in England, for example, show that one-third of disabled adults of working age are unemployed).

180. *Id.* at 15.

181. General Accounting Office, GAO-02-884, *Welfare Reform: Outcomes for TANF Recipients with Impairments*, 3 (2002), available at <http://www.gao.gov/new.items/d02884.pdf>. The General Accounting Office is a non-partisan research arm of Congress. See also *TANF and Disability – Importance of Supports for Families with Disabilities in Welfare Reform* (Mar. 14, 2003), available at <http://www.ncd.gov/newsroom/publications/2003/familysupports.html>.

182. Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425, 431, n.24 (2001).

183. Tomko, *supra* note 143, at 1036.

184. SUNHWA LEE ET AL., *DISABILITIES AMONG CHILDREN AND MOTHERS IN LOW-INCOME FAMILIES* (2002). (analyzing 1996 U.S. Census Bureau Survey of Income and Program Participation, and finding that low-income single mothers are especially likely to have disabled children and have disabilities themselves), available at <http://www.iwpr.org> (purchase only).

185. *Id.*

186. *Id.*

Hispanics, and 16.8% of whites, report a disability.¹⁸⁷ In addition, the proportion of people of color with severe disabilities is higher than that of whites.¹⁸⁸ “African-American children, who are twice as likely as white children to be poor, disproportionately experience illness and disability.”¹⁸⁹ Foley and Johnson, two health policy researchers, report that “more than any other factor poor health in individuals and populations is correlated directly with poverty.”¹⁹⁰ The presence of institutional racism, and its resulting barriers to employment, housing, medical care, and insurance, expose people of color to more health risks. The high incidence of AIDS/HIV, lead poisoning, and asthma among minority populations illustrates a close correlation among poverty, racism, and disability.¹⁹¹ Moreover, because poor families are disproportionately female-headed,¹⁹² women are at greater risk for suffering illness and disability than members of the population at large.¹⁹³

In short, the close relationship between poverty and disability presents an enormous challenge for policymakers. One legislative aide described the nexus between disability and poverty in terms of two categories of people: those born with a disability and those who become disabled later in life.¹⁹⁴ The former “is born into poverty,” the aide stated, and “the rest wind up in poverty after becoming disabled.”¹⁹⁵

187. See U.S. Census Bureau, *Disability Status: 2000, Census 2000 Brief*, (stating that working age is defined as ages 16 to 64), at <http://www.census.gov/hhes/www/disable/disabstat2k/disabstat2k.txt.html> (last visited Dec. 19, 2003).

188. See Pokempner & Roberts, *supra* note 182, at 434 (citing the 1994-95 Survey of Income Participation).

189. *Id.*

190. *Id.* at 434 (citing MARIANNE FOLEY & GLENN R. JOHNSON, HEALTH CARE OF BLACKS IN AMERICA'S INNER CITIES, IN HEALTH CARE ISSUES IN BLACK AMERICA: POLICIES, PROBLEMS AND PROSPECTS 212 (Woodrow Jones Jr. & Mitchell F. Rice eds., 1987)).

191. See *id.* at 435-40. Discrimination in the workplace, especially in low-wage, entry-level markets, remains a substantial problem. Recent experiments have revealed that workplace discrimination is a potent factor in the economic lives of black Americans. See David Wessel, *Racial Discrimination is Still at Work in U.S.*, 2003 WL-WSJ 3978719, Sept. 4, 2003, at A2. When race is coupled with disability, barriers in the workplace invariably grow higher.

192. Female-headed families composed the majority (53%) of poor families in 1999. Pokempner & Roberts, *supra* note 182, at 440 n.80 (citing Joseph Dalaker & Bernadette D. Proctor, U.S. Census Bureau, U.S. Dep't of Comm., *Poverty in the United States 1999*, available at <http://www.census.gov/prod/2000pubs/p60-210.pdf>).

193. *Id.* at 440.

194. Diane E. Lewis, *Access and Closed Doors Despite Federal Act, Number of Disabled With No Job is Rising*, BOSTON GLOBE, July 4, 1999, at G7 (quoting Connie Garner, advisor to Senator Edward Kennedy, regarding a proposed work incentive bill intended to encourage workers with disabilities to enter the workplace without having to risk their health benefits).

195. *Id.*

B. Enforcement of Title I Protections by the Poor

The close nexus between disability and poverty underscores the great stake that poor people with disabilities have in the success of the Americans with Disabilities Act. Adopting a civil rights approach to battling discrimination against the disabled,¹⁹⁶ Congress labeled people with disabilities as a discrete and insular minority, identified them as isolated and powerless, and adopted remedial and administrative provisions from the Civil Rights Act of 1964, including a financial incentive for lawyers to act as private attorneys-general assisting the government in remedying civil rights violations.¹⁹⁷ Congress understood that civil rights enforcement is difficult and that a fee-shifting mechanism would encourage individuals injured by civil rights violations to seek judicial relief.¹⁹⁸

Despite such fee-shifting incentives, our study of filed cases demonstrates that private lawyers have sharply reduced their involvement in Title I litigation. Because the subject area holds such dim prospects of litigation success, the small number of cases that are filed, presumably, are those that present strongly documented facts and realistic potential for sizeable monetary recovery. But if this is so, we wondered whether filed cases are likely to include the claims of the poor, who tend to have modest economic damages and often poorly documented claims, especially as they try to enter the workforce for the first time or struggle to hold on to minimum wage jobs? And, if private lawyers are not available, will the voice of the disabled poor be heard through the efforts of public interest lawyers, government agencies, volunteer lawyers, or, as a last resort, on their own through *pro se* filings? As previously noted, we looked at almost four years of Title I filings in the Eastern District of Pennsylvania from January 1, 2000 through December 1, 2003. In addition to studying judicial outcomes discussed in part I, we examined poverty-related factors in these cases from the docket entries and filed pleadings. For example, we reviewed whether plaintiffs had filed their complaints *in forma pauperis*; whether they had received free legal assistance from a legal aid or non-profit, public interest organization, government agency, or *pro bono* lawyer appointed by the district court; and whether they chose to proceed without legal counsel by filing *pro se* complaints. This comprehensive review revealed that poor people with disabilities, by and large, are not litigants in Title I cases pending in federal court and are not challenging employment discrimination in the workplace

196. For a discussion of the ADA's civil rights model, see Diller, *supra* note 61, at 31.

197. The ADA provides: "The court . . . , in its discretion, may allow the prevailing party. . . a reasonable attorney's fee, including litigation expenses and costs . . ." 42 U.S.C. § 12205 (2004). The ADA's provision was modeled in large part on the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976).

198. See *Kay v. Ehrler*, 499 U.S. 432, 436 n.8 (1991) and *Newman v. Piggie Park Enterprises, Inc.* 390 U.S. 400, 401-02 (1968) (*per curiam*), both cited in *Buckhannon*, 532 U.S. at 636.

beyond the agency level. Apparently, the disabled poor who should qualify for protection under the ADA do not feel empowered to confront disability-based employment discrimination through federal litigation.¹⁹⁹

1. In Forma Pauperis

The federal *in forma pauperis* statute²⁰⁰ is intended to ensure that indigent persons have meaningful access to the federal courts. By waiving prepayment requirements, the statute enables low-income individuals to have access to federal courts for redress of their rights.²⁰¹ Since the federal filing fee is a hefty \$150,²⁰² the cost can be quite burdensome to a poor person living on a fixed budget. Impoverished litigants, therefore, often submit sworn affidavits to federal courts attesting to their poverty in order to obtain waivers of this cost.²⁰³

The granting of a request to proceed *in forma pauperis* (*IFP*) documents the presence of a low-income litigant, although the absence of an *IFP* request does not necessarily reveal the involvement of a non low-income litigant. In some cases, lawyers may advance filing fees on behalf of their clients, without regard to whether their clients might qualify for a filing fee waiver. Still, lawyers who are experienced in representing low-income clients are generally quite familiar with *IFP* procedures and do not hesitate to utilize this simple mechanism to waive court fees for their clients. For this reason, *IFP* filings are a reliable, albeit not definitive, indicator of the involvement of poor people as plaintiffs in federal litigation. Our prior review of *IFP* requests in Title I cases filed between 1996 and 1998 revealed that less than 1% of such cases were filed *in forma pauperis*.²⁰⁴ We revisited this measure of indigence in our review of Title I filings from January 1, 2000 through December 1, 2003, and found again

199. See Hoffman, *supra* note 108, at 1250 (reviewing EEOC statistics and finding that only 15.3% of EEOC charges filed between 1992 and 2002 involved individuals with conditions most commonly acknowledged as disabilities, such as hearing impairments, vision impairments, paralysis and non-paralytic orthopedic impairments, suggesting that many of the most seriously disabled persons do not attempt to enter the workforce and those who do may not feel empowered to combat unlawful discrimination by seeking governmental intervention).

200. 28 U.S.C. § 1915(a)(1) (2000) provides that "any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor."

201. See Jody L. Sturtz, *A Prisoner's Privilege to File In Forma Pauperis Proceedings: May it be Numerically Restricted?*, 1995 DET. C.L. MICH. ST. U. L. REV. 1349, 1358 (1995).

202. U.S. Courts, Frequently Asked Questions, Filing a Case, *available at* <http://www.uscourts.gov/faq.html>.

203. Tomko, *supra* note 143, at 1053 (citing 28 U.S.C. § 1915 (1994)).

204. Rulli, *supra* note 75, at 376. Our prior study documented a much higher *IFP* rate of court filings for non-Title I ADA filings.

a dearth of *IFP* filings. As the following chart demonstrates, the overall number of *IFP* filings in Title I cases has dipped so low as to have almost disappeared entirely from Title I litigation:

Year	Total Number of Title I Filings	Requests for In Forma Pauperis Status	Grants of In Forma Pauperis Status
2000	98	1	1
2001	64	1	0
2002	70	0	0
2003 (through 12/1/03)	63	0	0

Of 295 newly-filed Title I cases during this time period, there were only two requests for *IFP* status, of which only one request was granted, an *IFP* grant rate of 0.3%. In other words, 99.7% of all Title I complaints were paid filings. Surprisingly, no plaintiff has proceeded on an *IFP* basis since calendar year 2000. While *IFP* filings dominate other kinds of civil rights filings brought by the poor,²⁰⁵ the absence of *IFP* filings under Title I strongly suggests that poor people with disabilities are substantially under-represented in federal court litigation seeking to remedy employment discrimination.²⁰⁶

205. See, e.g., Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 420 n.8 (1993) (finding that in a pre-Prison Litigation Reform Act study more than 95% of prisoner cases involved *IFP* filings).

206. There is a strong correlation between *pro se* plaintiffs and in forma pauperis filings. See Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 323 (2002). The low rate of *pro se* filings in Title I cases in the Eastern District of Pennsylvania, as documented in our study, also helps to explain the extremely low rate of *in forma pauperis* filings. Interestingly, our review of all filed cases in the U.S. District Court for the Southern District of New York during the three year period of 2001 through 2003 reveals a similarly sharp decline in overall Title I filings, and in *IFP* filings as well, although they do show a significantly higher percentage of *IFP* filings generally. We found that there were ten *IFP* complaints filed under Title I in 2001, seven in 2002, and just one in all of 2003. These filings reflect an *IFP* rate of 41.7% in 2001, 43.8% in 2002, and 25% in 2003. Undoubtedly, higher *IFP* rates in New York are tied to higher *pro se* rates, as discussed later in this article, but they too have dropped significantly, such that very few Title I cases are commenced *IFP* in the Southern District of New York at this time.

2. Publicly Funded Legal Services and Non-Profit, Public Interest Advocacy Organizations

Active legal representation by legal aid and non-profit, public interest organizations that provide free legal services to financially qualified individuals is, of course, a reliable indicator that poor people are able to secure counsel and seek enforcement of their rights.²⁰⁷ As noted, the Eastern District of Pennsylvania, and Philadelphia in particular, are home to many highly regarded legal services programs and public interest organizations that have received national and local awards for their advocacy of poor and disadvantaged people.²⁰⁸ If poor people with disabilities are enforcing their rights under Title I, one would expect to find that some of these organizations, and their experienced staff attorneys, would appear as counsel of record with some frequency. For this reason, our study of all Title I cases filed between January 1, 2000 and December 1, 2003 also looked at the lawyers of record, and their organizational affiliations.

In our prior study, we discussed the importance of obtaining access to legal representation and the disadvantages the poor face when attempting to navigate federal cases on their own.²⁰⁹ In the three-year period of 1996 through 1998, we reported that only one Title I case was filed by a traditional legal aid organization and only five cases were brought by public interest lawyers or organizations.²¹⁰ We lamented this low involvement rate of the public bar and expressed grave concern for the lack of access poor people have to counsel in this area of the law.²¹¹ We were eager to revisit this question to see whether access to free legal representation had changed with the passage of time. Unfortunately, our current review reveals that access to legal representation in Title I cases has not improved.

Upon reviewing all 295 Title I complaints filed from January 1, 2000 through December 1, 2003, we found no cases brought by a legal aid organization and only five cases brought by non-profit, public interest

207. See, e.g., Pennsylvania Legal Services, *Results and Capabilities 2002* (Feb. 2003) (documenting that 98,639 low-income clients and their families were provided with direct legal representation by legal services programs in Pennsylvania), available at http://www.palegalservices.org/annual_report/PLS_2002_report.pdf.

208. See, e.g., Allen Redlich, *Who Will Litigate Constitutional Issues for the Poor?*, 19 HASTINGS CONST. L.Q. 745, 773 (1992) (finding that the most successful of all legal services programs is Community Legal Services of Philadelphia).

209. Rulli, *supra* note 75, at 375-385.

210. *Id.* at 378-79.

211. Our prior study found that legal aid and public interest lawyers brought only 2.1% of the Title I cases filed during this three year period. Rulli, *supra* note 75, at 379. During the most recent four year period, that percentage dropped to 1.6%, with no involvement at all by a legal aid organization.

organizations.²¹² The yearly totals were as follows:

Year	Total Number of Title I Filings	Total Number of Title I Plaintiffs Represented by Private Counsel	Number of Title I Plaintiffs Represented by Legal Aid or Non-Profit, Public Interest Organizations
2000	98	91	1
2001	64	61	0
2002	70	68	2
2003 (through 12/1/03)	63	61	2

These statistics confirm that virtually all Title I plaintiffs are represented by counsel and that their attorneys are private lawyers, unaffiliated with legal services or public interest organizations. Unquestionably, years of cutbacks in federal funding to legal aid, along with restrictions placed on attorney's fees, class actions and certain lawyering activities,²¹³ as well as financial difficulties experienced by non-profit, public interest organizations, have all combined to decrease the role that legal aid and public interest lawyers are able to play in civil rights enforcement in the workplace on behalf of the disabled.²¹⁴

212. An entry of appearance by a federally-funded legal services program would necessarily mean that its client was impoverished under federal poverty guidelines, since legal representation is strictly limited by poverty guidelines published by the Legal Services Corporation. See 45 C.F.R. § 1611.3 (2004). On the other hand, an entry of appearance by a non-profit, public interest organization as counsel may signal, but does not necessarily mean, the presence of a poor person as its client. Many private, non-profit, public interest organizations represent clients in litigation who would not qualify for free legal services under federal guidelines where enforcement of the client's legal claims furthers the overall mission of the organization.

213. See Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 *FORDHAM L. REV.* 2187 (1999) (describing how Congress has closed the door as well by prohibiting legal services programs that receive federal funding from seeking or receiving attorney's fees). The federal prohibition on attorney's fees leaves already over-burdened resources of legal services program stretched even further, making it increasingly unlikely that such organizations can undertake such time and resource-demanding employment discrimination litigation on behalf of individuals.

214. See Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 *HASTINGS L.J.* 197, 262-63 & n.336 (1997); see also Houseman, *supra* note 213 (discussing the restrictions and examining their ethical implications).

The four cases brought by a public interest organization during 2002 and 2003 were filed by the Center for Disability Law and Policy, a non-profit, public interest law center located in Philadelphia that provides advocacy and legal services to individuals with disabilities throughout Pennsylvania.²¹⁵ The organization provides legal representation to non-indigent individuals in a traditional attorney-client arrangement, as well as assistance to low-income individuals through a specially funded Client Assistance Program. The four Title I cases filed by the Center for Disability Law and Policy sought to vindicate important rights of the disabled, but did not involve poor people as plaintiffs.²¹⁶ For example, one case involved a claim of disability discrimination brought by an assistant professor at a Philadelphia college who had been denied tenure.²¹⁷

Therefore, during the four-year period studied, only one of the plaintiffs represented by a public interest organization in Title I litigation was impoverished.²¹⁸ We encountered similar results in our review of Title I cases filed in the Southern District of New York between 2001 and 2003, where out of a total of 44 newly-filed cases, only one case was filed by a legal aid or public interest organization.²¹⁹ Undoubtedly, legal aid and public interest organizations must make very difficult decisions about how to direct their scarce resources; for the most part, they have decided not to litigate Title I claims in federal court on behalf of low-income people with disabilities.

3. Attorney's Fees are Indispensable to Promoting Title I Enforcement, Especially on Behalf of the Poor

The involvement of lawyers in Title I cases, especially on behalf of the poor, is also directly affected by the potential availability of attorney's fees. As

215. See website of the Center for Disability Law & Policy, at <http://www.equalemployment.org>. (last visited Dec. 17, 2003).

216. Telephone interview with Jamie Ray, attorney for the Center for Disability Law & Policy (Jan. 8, 2004) (discussing *Michelson v. Philadelphia Univ.*, 2:03-cv-04505 (E.D. Pa. filed Aug. 4, 2003), *Hassey v. ABF Freight Sys., Inc.*, 2:03-cv-04606 (E.D. Pa. filed Aug. 7, 2003), *Griffin v. Univ. of Pa.*, 2:02-cv-00249 (E.D. Pa. filed Jan. 16, 2002), and *Spivey v. Children's Hosp. of Pa.*, 2:02-cv-08884 (E.D. Pa. filed Dec. 4, 2002)).

217. See *Michelson v. Phila. Univ.*, 2:03-cv-04504 (filed on Aug. 4, 2003).

218. See *Beatty v. Temple Univ. Hospital*, 2:00-cv-06470 (E.D. Pa. filed on Dec. 21, 2000), brought by the Public Interest Law Center of Philadelphia. The initial complaint filed in the district court was a paid complaint, but following the entry of judgment in favor of the defendant the plaintiff filed an appeal in forma pauperis to the Third Circuit Court of Appeals.

219. See *Banchieri v. City of N.Y., et al.*, No. 1:01-cv-01853, (S.D.N.Y. filed Mar. 2, 2001) (involving the Urban Justice Center and Washington Legal Services, Inc., as counsel of record on behalf of an impoverished plaintiff). Since March of 2001 (and through the end of 2003), our research documents that no legal aid or public interest organization has filed a Title I case in the Southern District of New York.

previously noted, Congress intended that “people with disabilities should have the same remedies available to all other minorities under Title VII of the Civil Rights Act of 1964,” including court-awarded attorney’s fees to encourage the active participation of lawyers in the enforcement of rights under the ADA.²²⁰ In our first study, we observed that relatively few Title I cases went to trial and therefore benefits for plaintiffs were most likely to be obtained through negotiated settlements.²²¹ We discussed the vital importance of recovering attorney’s fees in negotiated settlements if plaintiffs were to have access to counsel in such time-consuming and expensive litigation under Title I. In addition, we were sanguine about the future of attorney’s fees in light of the Supreme Court’s pronouncement in *Evans v. Jeff D.*,²²² which undercut the position of plaintiffs and permitted, indeed encouraged, defendants to condition their settlement offers upon attorney fee waivers. Over time, the Court’s holding in *Jeff D.* has profoundly affected settlement behavior by strengthening the leverage of defendants and converting settlement negotiations into the functional equivalent of personal injury negotiations, employing lump sum offers as the rule. This has led to the under-compensation of plaintiffs’ lawyers, especially where damages are not the primary objective of the litigation or where the measure of damages is not large enough to support a reasonable attorney’s fee.²²³

These concerns apply with particular force to the claims of low-income plaintiffs who are not able to insulate their lawyers from such defense tactics.²²⁴ Not surprisingly, the litigants most adversely affected by such economic disincentives to attorney compensation are those who are most vulnerable. The poor and under-employed lose out because their low earnings yield damages

220. See H.R. REP. NO. 101-485, pt. 2, at 82 (1990), reprinted in 1990 U.S.C.C.A.N. 365.

221. Rulli, *supra* note 75, at 381.

222. *Evans v. Jeff D.*, 475 U.S. 717 (1986) (allowing negotiation of attorney’s fees to take place simultaneously with negotiations on the merits of pending claims).

223. See Davies, *supra* note 214, at 199-200.

224. To try to ameliorate the effects of *Jeff D.*, many lawyers require their clients to sign retainer agreements that hold clients responsible for all attorney’s fees incurred in the event that they agree to settlement terms that waive attorney’s fees. Typically, these retainer agreements provide for attorney payment on a contingent fee basis and, if fees are waived, a client is responsible to pay the lawyer’s lodestar rate for hours expended on the case. See *id.* at 215. However, this mechanism is ineffectual if the client is too poor to satisfy any such obligation and the settlement of the lawsuit primarily involves equitable relief or very modest monetary damages. In such a case, the lawyer obtains the primary objective of the litigation for the client but loses out, wholly or partially, on an ability to recover attorney’s fees. The result is that lawyers representing the poor (both private lawyers and public interest lawyers) soon turn away from such time-consuming cases when faced with little likelihood of sufficient compensation to warrant their heavy expenditure of scarce resources. “[T]he amount of damages is a primary consideration in deciding whether to take a case.” See *id.* at 232-33. See also, National Council on Disability, *supra* note 88, at 14-15.

that are too meager to offer adequate attorney compensation in settlements.²²⁵ Over time, attorneys stop taking their cases, leaving “the promise of civil rights legislation more and more illusory.”²²⁶ Justice Brennan’s haunting prediction that the Court’s holding in *Jeff D.* would “make it more difficult for civil rights plaintiffs to obtain legal assistance”²²⁷ and to “vindicate their rights by means of settlement or trial” has proven largely true.²²⁸

Our concern for the effectiveness of fee-shifting in Title I litigation assumed heightened proportions after the Supreme Court’s decision in *Buckhannon*.²²⁹ The *Buckhannon* Court’s elimination of the long-approved catalyst theory of attaining prevailing party status means that plaintiffs in ADA cases that informally settle on terms wholly favorable to a plaintiff, but that lack an entry of judgment or a court-approved consent decree (or some similar act of judicial imprimatur), will no longer be entitled to attorney’s fees.²³⁰ *Buckhannon* has become a powerful sword for defendants to avoid or delay compliance with Title I requirements, knowing that, if sued, they may settle informally without having to incur the cost of attorney’s fees. The natural effect of *Buckhannon* is to silence the poor.²³¹ In her dissenting opinion in *Buckhannon*, Justice Ginsburg stressed the importance of attorney fee-shifting to the enforcement of civil rights when she stated, “If private citizens are to be able to assert their civil rights, and if those who violate the Nation’s fundamental laws are not to proceed with impunity, then citizens must have the

225. Davies, *supra* note 214, at 200.

226. *Id.*

227. *Jeff D.*, 475 U.S. at 743 (Brennan, J., dissenting).

228. *Id.* at 741.

229. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001).

230. *See Dorfsman v. Law Sch. Admission Council*, 2001 WL 1754726, at *5 (E.D. Pa. Nov. 28, 2001) (holding that a plaintiff who successfully settled her claims was not entitled to an award of attorney’s fees because a plaintiff must obtain judicial relief and not merely ‘success’ in order to be deemed a prevailing party). *See also* *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003) (holding that settlement between parents and a school district in which the parents achieved most of their objectives concerning the educational needs of their child lacked judicial imprimatur and therefore parents were not prevailing parties for an award of attorney’s fees under the Individuals with Disabilities Education Act); *John T. ex rel. Paul T. v. Del. County Intermediate Unit*, 318 F.3d 545 (3d Cir. 2003) (holding that the plaintiff, John T., was not a prevailing party under the Individuals with Disabilities Education Act despite having obtained a preliminary injunction, a contempt order, and an acceptable individual educational plan) *rev’g on other grounds*, 2003 WL 22006810, at *2 (E.D. Pa. Aug. 22, 2003) (allowing plaintiff’s attorney to recover partial fees related to contempt adjudication).

231. *See* David Luban, *Silence! Four Ways the Law Keeps Poor People from Getting Heard in Court*, 2002-JUN L. AFFAIRS 54, 58 (May/June 2002). One study that included interviews with practicing lawyers revealed that claims of low wage earners were not considered economically feasible to litigate unless there was excellent proof of emotional distress or a potential for punitive damages. *See* Davies, *supra* note 214, at 235.

opportunity to recover what it costs them to vindicate these rights in court.”²³² The Supreme Court’s narrow definition of *prevailing party* has closed the door even further to access to federal courts for those least able to afford legal representation.

4. Equal Employment Opportunity Commission

In our prior study, we discussed the importance of active EEOC enforcement of Title I rights in federal court, especially for the poor.²³³ Apart from the EEOC’s adjudicatory role, Congress empowered the federal agency to enforce the employment rights of the disabled through litigation, if necessary, and it desired that the Federal Government play a central role in ADA enforcement.²³⁴ Therefore, our study focused on the prominence of the EEOC as an institutional litigator to determine whether the agency aggressively pursued meritorious Title I claims and filled gaps in representation created by the economic realities of the private market and scarce public funding.

We were encouraged by our prior finding that when the EEOC acts as a litigator, it appears to have a substantial, beneficial effect. The litigation it brought in federal court on behalf of plaintiffs from diverse backgrounds and employment settings produced tangible results that were documented in the public files.²³⁵ Others, as well, have noted that EEOC participation can be an important predictor of success for plaintiffs in ADA litigation.²³⁶ Still, we expressed great concern that the EEOC was not a litigator frequently enough, having filed or intervened in only ten cases in the Eastern District of Pennsylvania over a seven-year period.²³⁷ We expressed hope that the agency would undertake a greater litigation role in the future.

Unfortunately, our expression of hope went unheeded. Studying all cases filed from January 1, 2000, through December 1, 2003, we learned that the EEOC was involved in only one federal case in the Eastern District of Pennsylvania.²³⁸ Instead of participating at a meager rate of 1.4 Title I cases

232. Buckhannon, 532 U.S. at 636 n.9, referencing S. REP. NO. 94-1011, at 2 (cited in National Council on Disability, *supra* note 88, at n.118).

233. Rulli, *supra* note 75, at 387-88.

234. *Id.* at 385 n.235.

235. *Id.*

236. See, e.g., Colker, *supra* note 54, at 276-77 (finding that participation by the EEOC improves a plaintiff’s chance of success in appellate litigation. Colker found that a plaintiff’s predicted success rate increased from 2.8% to 18.0% in appellate ADA litigation when the EEOC intervened as an amicus party).

237. The period studied was from July 26, 1992 until November 1, 1999. See Rulli, *supra* note 75, at 387 n.249.

238. The EEOC uses two categories to describe its involvement in federal litigation: direct

per year, as the agency had done over the first seven years of the ADA, the EEOC now participates at an almost invisible average rate of .25 cases per year. The one Title I case filed by the EEOC's Philadelphia office in the Eastern District of Pennsylvania during the four years studied was brought on behalf of a female account executive who earned \$50,000 at the time of her termination in 2000.²³⁹

These case statistics from the Eastern District of Pennsylvania suggest that the EEOC has largely closed its doors to the poor and, for that matter, to all victims of disability-based employment discrimination. The primary federal agency charged with enforcement of Title I has abandoned its "central role" of litigating in the trial courts to remedy discrimination and, thus, has failed to sound a serious warning message that employers must comply with federal law. Moreover, the EEOC's extremely low rate of involvement in Title I litigation at the trial level in the Eastern District of Pennsylvania appears to be replicated in other districts around the nation.²⁴⁰ For example, our review of Title I cases filed in the Southern District of New York revealed that the EEOC had not participated in a single case during the calendar years of 2001, 2002, and 2003. In contrast, during the same time period, the number of lawsuits filed by the EEOC under other federal employment discrimination laws increased, suggesting that the EEOC itself may be backing away from Title I enforcement in the district courts.²⁴¹

5. *Pro Se* Filings

If public and private lawyers are unable or unwilling to enforce Title I in federal court on behalf of the poor, low-income workers may still be able to vindicate their rights by filing civil litigation on their own. *Pro se* civil litigants are typically indigent and cannot afford counsel.²⁴² In recent years, federal

suits and interventions. Direct suits are those EEOC filings against an employer alleging employment discrimination, while interventions are those instances in which the EEOC joins an a lawsuit filed by a private litigant. See <http://www.eeoc.gov/stats/litigation.html>.

239. Equal Employment Opportunity Commission, No. 2:03-cv-02200 (E.D. Pa. filed on Apr. 8, 2003).

240. According to the EEOC's own published reports of district court cases during the year 2000, the agency participated in only two Title I cases in Chicago, one Title I case in New York, and no Title I cases in Atlanta, Miami, or San Francisco. Nationally, the EEOC reported that it participated in 25 Title I cases during 2000, while at the same time it was involved in 127 gender-based employment discrimination cases and 96 race or national origin employment discrimination cases. U.S. Equal Employment Opportunity Commission, Legal Unit Summary of Lawsuits Filed by Bases-Fiscal Year 2000, available at <http://www.eeoc.gov/litigation/study/table6.html> (last modified Aug. 13, 2002).

241. See National Council on Disability, *supra* note 88 (citing <http://www.eeoc.gov/stats/ada-charges.html> and <http://www.eeoc.gov/press/2-6-03.html>).

242. See Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se*

courts have witnessed a “huge expansion of federal litigation” and a significant percentage of increased filings may be attributed to *pro se* litigants.²⁴³ Studies have documented a strong correlation between *pro se* complaints and civil rights litigation, particularly in employment discrimination cases.²⁴⁴

In theory, *pro se* litigation serves as a safety valve for the poor who have the least access to counsel to pursue their claims.²⁴⁵ While *pro se* complaints can be time-consuming and troublesome for federal courts, and therefore unwelcome,²⁴⁶ they also may reflect healthy confidence in the judicial system among ordinary citizens that justice is obtainable, even without the help of lawyers.²⁴⁷ Studies of *pro se* litigation can be helpful, as well, in detecting inadequacies in our justice system. For example, a dearth of *pro se* complaints filed under Title I, when compared to robust numbers of *pro se* complaints in other types of employment discrimination litigation, might suggest that individuals with disabilities face unique barriers to obtaining access to our courts, beyond that of other unrepresented litigants, such as a fundamental lack of awareness that such rights exist or a lack of confidence that their claims will be heard. In particular, *pro se* statistics might tell us something important about the nation’s poorest workers with disabilities, since they are the group most likely to be unable to obtain legal help.

Our study of all filed Title I cases in the Eastern District of Pennsylvania between January 1, 2000 and December 1, 2003, revealed very few *pro se* complaints:

Plaintiff, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 476 (2002). Many low-income litigants appear without counsel because they cannot obtain counsel. *Id.* at 481 n.32. Studies of the unmet legal needs of the poor suggest that over eighty percent of the legal needs of the poor and working poor are unmet with currently available resources. *Id.* at 481 n.32. *But see* Spencer G. Park, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 823 (1997) (finding in Northern District of California in San Francisco that “[s]eventy percent of pro se litigants did not even apply to proceed in forma pauperis”).

243. Bloom & Hershkoff, *supra* note 242, at 479 n.19 (citing studies of prisoner pro se case filings in ten U.S. district courts).

244. Park, *supra* note 242, at 823.

245. Perhaps this theory is illustrated best by the landmark case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), in which a *pro se* petitioner was successful on his state habeas corpus petition before the United States Supreme Court, on certiorari, seeking appointment of counsel as a fundamental constitutional right in a criminal proceeding. *Id.* at 343-45.

246. *Pro se* filings complicate the task of the judge, the magistrate, the clerk, and other court personnel. Bloom & Hershkoff, *supra* note 242, at 480-81. *See also id.* at 478 n.15 (citing Rya W. Zobel, *New Statutes Add to Challenges Posed by Pro Se Cases in the Federal Courts*, 9 FJC DIRECTIONS 1, 1 (1996)).

247. In addition to prisoner pro se filings, federal courts have experienced a sharp increase in pro se filings in social security appeals and non-prisoner civil rights claims. Many filings in the latter category are attributable to employment discrimination, affected by fluctuations in the employment market based upon economic downturns and the passage of new legislation such as the ADA. *See* Bloom & Hershkoff, *supra* note 242, at 481.

Year	Total Number of Title I Filings	Total Number of Represented Plaintiffs	Total Number of Pro Se Plaintiffs
2000	98	92	5
2001	64	61	3
2002	70	70	0
2003 (through 12/1/03)	63	63	0

These statistics document that there have been only eight *pro se* complaints filed in the Eastern District of Pennsylvania from among 295 Title I complaints filed during the four years studied, or a *pro se* rate of only 2.7%. Perhaps, most strikingly, these statistics reflect that *pro se* complaints filed under Title I have actually declined and that there has not been a single *pro se* complaint filed in the past two years. Low-income workers with disabilities are not only unable to obtain counsel, they apparently lack the requisite knowledge or confidence to file litigation on their own.²⁴⁸ This stands in sharp contrast to the rise of *pro se* filings in other types of civil litigation. A review of prisoner civil rights cases in three federal districts, for example, found that every prisoner case was filed *pro se*.²⁴⁹ A study of *pro se* filings in the United States District Court for the Eastern District of New York, one of the nation's busiest districts,²⁵⁰ documented that 15% of all new civil filings in that district during 1999 were attributable to *pro se* filings, and of those 12.7% were *pro se* filings in employment discrimination matters.²⁵¹ Our own review of newly filed Title VII actions in the Eastern District of Pennsylvania documented a *pro se* filing

248. Another explanation might be that there is simply no client demand that is unmet. Presumably, this argument posits that employment discrimination against low-income people with disabilities has either ended or is now completely remedied by voluntary adjustments of employers or by agency adjudications of the EEOC, while at the same time that disability discrimination practiced against more financially-heelied workers persists. In light of statistics reflecting that people with disabilities have not made gains in employment over the life of the ADA, the authors find this argument not credible.

249. See Eisenberg, *supra* note 205, at 490 n.8.

250. The Eastern District of New York covers the counties of Kings, Queens and Richmond in New York City and Nassau and Suffolk counties on Long Island.

251. Bloom & Hershkoff, *supra* note 242, at 494.

rate of 8.4%.²⁵² Other studies of filed cases have documented the strong correlation between *pro se* litigation and civil rights actions, particularly in employment discrimination cases.²⁵³ With access to counsel so limited, one might expect to find a sizeable number of *pro se* complaints among Title I cases. Our study, however, documented that *pro se* complaints are conspicuously absent from Title I employment discrimination litigation.²⁵⁴

6. Appointment of Counsel

In the infrequent instances when Title I complaints are filed *pro se*, plaintiffs often inform the court that they want counsel and that they have contacted numerous attorneys in an effort to retain counsel, but no attorneys were willing to take their cases.²⁵⁵ Believing that their claims possess merit and that having counsel would make a difference to the outcome of their cases, these *pro se* plaintiffs ask federal judges to appoint counsel for them. Unfortunately, many will not receive legal representation.

A request for the appointment of counsel by an unrepresented litigant makes good sense because having a lawyer *does* make a difference. A plaintiff without counsel is much more likely to lose an ADA case than a plaintiff represented by counsel,²⁵⁶ and having counsel greatly improves a litigant's chance of settling a filed case.²⁵⁷ Studies of EEOC administrative decisions also reveal that "having an attorney ha[s] a substantial effect on the type of

252. In utilizing the federal court's PACER document retrieval system, we found that computerized access to Title VII filings in the Eastern District of Pennsylvania became available only recently. We were able to study a full year of Title VII filings brought under 42 U.S.C. § 2000(e) during the time period of May 1, 2002 through April 30, 2003. The PACER system reveals that of eighty-three new cases filed under this cause of action statute related to job discrimination, seven cases were commenced by *pro se* plaintiffs.

253. See Park, *supra* note 242 (concluding that non-prisoner *pro se* litigation tends to involve predominantly civil rights claims).

254. As mentioned earlier, our review of Title I filings in the Southern District of New York from 2001 through 2003 revealed a higher number of *pro se* filings than in the Eastern District of Pennsylvania, but they too declined sharply during that three-year time period studied. In 2001, there were fifteen *pro se* complaints, in 2002 there were seven *pro se* complaints, and in 2003 there were only three *pro se* complaints. Unlike the experience in Philadelphia, where almost all Title I complaints were filed by lawyers, a sizeable percentage of Title I complaints in New York were filed by unrepresented plaintiffs. However, even this changed radically: only one unrepresented plaintiff filed a Title I complaint in all of 2003 in the Southern District of New York.

255. See, e.g., *Donohoe v. Food Lion Stores, Inc.*, 253 F. Supp. 2d 1319, 1321 (N.D. Ga. 2003).

256. Colker, *supra* note 54, at 276-77 (finding that one of the most important predictors of success by plaintiffs in ADA appeals is having the assistance of counsel).

257. Rosenbloom, *supra* note 206, at 337.

charge resolution experienced.”²⁵⁸ A comprehensive study of the EEOC administrative process conducted by Kathryn Moss and colleagues documented that withdrawal with benefit rates (party initiated settlements) were significantly higher for individuals using attorneys, as were beneficial outcome rates (right-to-sue resolutions) and the size of monetary benefits received by charging parties.²⁵⁹ Unquestionably, individuals with attorneys do better than those without.²⁶⁰

Since the ADA incorporates the powers, remedies and procedures available under Title VII of the Civil Rights Act, federal courts have discretion to appoint counsel in Title I cases.²⁶¹ Although Congress has given federal courts this discretion, it has not provided them with special funding to encourage their use of this grant of authority.²⁶² As a result, the absence of funding weighs heavily when federal courts consider whether to grant requests for counsel.²⁶³

Nonetheless, federal judges should readily exercise their discretion by appointing counsel when they are aware that an unrepresented plaintiff may not be able to enforce a federal right without the benefit of counsel. To guide such discretion, federal courts routinely examine several factors before deciding whether to appoint counsel in an ADA case. Courts look to (i) the merits of the plaintiff’s claim in fact and in law; (ii) the plaintiff’s ability to present his or her case; (iii) the difficulty of the particular legal issues; (iv) the degree to which factual investigation will be required and the ability of an indigent plaintiff to pursue such an investigation; (v) and whether the case is likely to turn on

258. Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 98-101 (2001). Although the authors’ research found that the overall benefit rate for individuals with attorneys was nearly identical to the overall benefit rate for individuals without attorneys, significant differences become apparent when right-to-sue cases were segregated for purposes of calculating the predetermination settlement rate. Attorney involvement had a significant impact upon right-to-sue resolutions (31.4% with attorneys compared to 7.4% without attorneys).

259. *Id.*

260. While it is clear that results are more favorable when attorney representation is secured, it is unclear whether the work of attorneys causes this result or whether attorney involvement simply signals the presence of stronger cases. According to Professor Moss’ study, EEOC staffers denied that the involvement of attorneys influenced charge processing and outcomes, but this is something that is very hard to gauge. *See id.* Moreover, it is likely from experience in other forums that attorneys do help parties to obtain better and quicker relief. *See id.* at 100-01.

261. Title VII provides that “[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant.” 42 U.S.C. § 2000e-5(f)(1)(2004).

262. *See, e.g.,* Donohoe v. Food Lion Stores, Inc., 253 F. Supp. 2d 1319, 1321 (2003) (stating “the court must keep in mind that Congress has not provided any mechanism for compensating such appointed counsel.”).

263. *Id.*

credibility determinations.²⁶⁴ As the first part of this article noted, Title I cases are time-consuming, fact-intensive, and expensive to litigate. Even with counsel, Title I cases offer a very low rate of probable success and, more times than not, fail to survive aggressive pre-trial motions filed by defense counsel. It is extremely difficult to navigate an employment statute that requires individuals to be so disabled that they qualify for protection under the Act but not so disabled that they fail to be "otherwise qualified" for the employment in question. Individuals with serious disabilities, commonly thought of as qualifying under the ADA, find, to their surprise, that they are not protected by the Act because of restrictive judicial interpretations of statutory definitions.²⁶⁵ In short, Title I litigation is a minefield for even the most experienced of counsel, and, therefore, quite predictably, nearly impossible to navigate by untrained and unsophisticated non-lawyers.

When these realities are coupled with the difficulties in obtaining counsel in the private market, or from publicly funded counsel, one might reasonably expect that federal courts would be eager to grant requests for appointment of counsel in Title I cases. Indeed, apart from the usual considerations, Title I plaintiffs may experience physical or mental limitations that hamper their ability to investigate and marshal the facts, research the law, and provide the court with a factual and legal basis upon which to obtain a favorable ruling. Despite these compelling considerations, some federal courts continue to engage in the fiction that counsel need not be appointed in Title I cases because the claims before them "are not so complex" that plaintiffs cannot handle them on their own.²⁶⁶ Inexplicably, these courts praise the competence of unrepresented plaintiffs and justify their denial of appointed counsel on the basis that the plaintiffs before them are adequately representing their own

264. See *Snelling v. Covington*, 1996 WL 515904 (E.D. Pa. 1996) (relying on the Third Circuit's announced factors in *Tabron v. Grace*, 6 F.3d 147 (3d Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994)). Although *Tabron* involved a request for appointment of counsel pursuant to the federal *in forma pauperis* statute, 28 U.S.C. §1915(d)(1996), the same factors are routinely applied in Title VII and ADA litigation. See also *Donohoe*, 253 F. Supp. 2d at 1321, (identifying three factors: (1) plaintiff's ability to afford counsel; (2) plaintiff's diligence in searching for counsel; and (3) the merits of plaintiff's case. The *Donohoe* court also noted that other jurisdictions sometimes add a fourth factor examining the plaintiff's capacity to prepare and present the case without the aid of counsel.).

265. See Diller, *supra* note 61, at 31.

266. *Donohoe*, 253 F. Supp. 2d at 1323. See also *Haines v. Bethlehem Lukens Plate Steel*, 1999 WL 718564, at *1 (E.D. Pa. 1999) (rejecting request for appointment of counsel to an ADA plaintiff on the basis that "the issues presented in this case are not complex, and the Court discerns no impediment (other than a lack of legal training) to plaintiff's ability to gather and present crucial facts"); *Snelling*, 1996 WL 515904 (finding that the ADA plaintiff, unlike a prisoner, did not have his liberty restricted and therefore had the full opportunity and ability to secure counsel and represent himself, notwithstanding that the plaintiff reported that he had contacted three attorneys without any success).

interests in litigation.²⁶⁷

It is no surprise that unrepresented plaintiffs fare worse than represented litigants, as they confront difficult procedural rules and complex substantive legal concepts that place them at the mercy of experienced opposing lawyers who routinely appear upon behalf of employers.²⁶⁸ Consequently, unrepresented plaintiffs in employment discrimination cases, as a whole, tend to request appointed counsel at higher rates than in other *pro se* litigation.²⁶⁹ However, even when federal courts grant requests to appoint counsel, they still may find it difficult to obtain lawyers who are willing to accept appointments on a *pro bono* basis.

In the Eastern District of Pennsylvania, the court maintains two *pro bono* panels, the Prisoner Civil Rights Panel and the Employment Discrimination Attorney Panel, and it actively encourages lawyers to accept appointments from both panels.²⁷⁰ In addition, the district court maintains a Public Interest Civil Litigation Fund to provide limited funds to reimburse lawyers for out-of-pocket expenses incurred for discovery costs, expert witness fees, and related litigation expenses, and it conducts annual training sessions in conjunction with the local bar, at which attendees receive continuing legal education credit.²⁷¹ All of these efforts are designed to enhance volunteer participation by the bar and to promote the value of *pro bono* representation to the court, the litigants, and the public at large, so that claimed violations of federal law may be properly heard and adjudicated.

Despite these outstanding efforts, it remains difficult to obtain sufficient levels of *pro bono* representation in employment discrimination cases. For example, between July 1, 1996, and October 31, 2003, the statistical report of the Employment Discrimination Attorney Panel revealed that there were 224 orders for appointment of counsel granted by the district court, but only ninety-

267. See, e.g., *Donohoe*, 253 F. Supp. 2d at 1319; *Ackridge v. Comm'r, Dep't of Human Serv. City of Phila.*, 3 A.D. Cases 575, 1994 WL 184421 (E.D. Pa. May 5, 1994).

268. See *Rosenbloom*, *supra* note 206.

269. *Id.* at 332-33 (finding that in the Southern District of New York *pro se* plaintiffs filed applications for appointment of counsel in 15.1% of social security cases, 20.8% of civil rights cases, and 39.7% of employment discrimination cases). The *Rosenbloom* study also found that plaintiffs in civil rights and inmate cases received appointments of counsel more frequently than in employment discrimination cases. *Id.* at 334. At the same time, plaintiffs in employment discrimination cases were able to obtain counsel on their own, without the court's assistance, more frequently than in other areas. *Id.*

270. See *Rulli*, *supra* note 75, at 380 n.216; see also Shannon P. Duffy, *3rd Circuit Forms Task Force to Secure Counsel for Indigent Civil Litigants*, THE LEGAL INTELLIGENCER, Mar. 19, 1998, at 3.

271. The district court publishes Public Interest Civil Litigation Fund Guidelines to guide the bar in securing reimbursement for qualifying expenses. (Guidelines on file with authors).

five actual appointments.²⁷² Unfortunately, these reports do not identify the types of employment discrimination cases involved, making it impossible to discern the percentage of actual appointments obtained in cases under the ADA generally, or Title I specifically.²⁷³ It is fair, however, to say that *pro bono* resources are limited and, at this point, insufficient to provide counsel in even one-half of all employment discrimination cases in which the district court has granted requests for appointment of counsel.²⁷⁴

EPILOGUE

When Congress enacted the Americans with Disabilities Act amidst great fanfare, it expressly found that discrimination against people with disabilities persisted in employment, and that unlike victims of race, gender, or age discrimination, the disabled often had no legal recourse to redress that discrimination.²⁷⁵ Over time, this fundamental flaw in our legal system has contributed greatly to causing people with disabilities to occupy an inferior status in our society in which they are severely economically disadvantaged.²⁷⁶ To remedy this deficiency, Congress intended that Title I embody a “clear and comprehensive national mandate for the elimination of discrimination” through “clear, strong, consistent, and enforceable standards.”²⁷⁷

In our current study, we examined official dockets and court records from the full universe of *filed* cases in one federal district, and conducted more limited review in several other districts, in order to learn more about the state of Title I enforcement at the ground level in our federal trial courts. In particular, we wanted to know whether, after more than a decade of experience under the ADA, people with disabilities—and especially the poor—were finally able to access the courts to redress employment discrimination and obtain meaningful

272. Report of Employment Discrimination Attorney Panel, United States District Court for the Eastern District of Pennsylvania, statistics through October 31, 2003 (on file with the authors).

273. *Id.*

274. Of course, there may be many reasons, beyond scarcity of resources, why individual grants of appointed counsel do not result in actual counsel. There may be conflicts of interests that preclude an attorney's involvement or, after reviewing the facts of an individual case, a lawyer may determine that, in his or her opinion there is insufficient merit to warrant the lawyer's involvement. Still, the Prisoner Civil Rights Panel reports that from July 1, 1996 through October 31, 2003 there were 259 orders for appointments of counsel, of which 174 resulted in actual appointments. *Id.* In other words, the bar accepted 67% of prisoner civil rights cases referred by the court for pro bono representation, while the bar accepted only 42% of referred employment discrimination cases. *Id.* The difference in acceptance rate may, in part, reflect a greater reluctance by lawyers to volunteer in such difficult and time-consuming employment cases.

275. See 42 U.S.C. § 12101(a)(3),(4) (2004).

276. See 42 U.S.C. § 12101(a)(6) (2004).

277. See 42 U.S.C. § 12101(b)(1),(2) (2004).

remedies, such that culture-shifting change in the workplace might appear on the horizon.

Our examination of *every* filed case under Title I in the Eastern District of Pennsylvania for a period of seven years, supplemented by a review of ADA litigation in the Southern District of New York and several other federal districts, yielded several important findings related to Title I enforcement. First, of cases which are resolved by judicial ruling in favor of one party or the other (either at trial or prior to trial), employers almost always won. During the multiple years studied, employers won roughly somewhere between 92% and 97% of the time. This incredibly high win-rate percentage for employers has remained constant over the life of the ADA and shows no sign of changing. Moreover, this finding based upon a comprehensive review of *filed* cases, is completely consistent with outcomes noted in published studies of *reported* cases under Title I.

Second, our study showed that skewed outcomes and judicially created obstacles are taking a toll on *attempted* enforcement of Title I through federal litigation. Private lawyers are sharply reducing, if not abandoning altogether, this area of practice, and the resulting decline in newly filed Title I cases is striking. While the media persists in creating a public perception of a litigation explosion under the ADA, actual court dockets show that Title I enforcement actions are dying on the vine. Since 1999, the year of the Supreme Court's *Sutton* trilogy, the Eastern District of Pennsylvania has experienced a 48.4% decline in newly filed Title I cases, and the Southern District of New York has experienced a 94.7% decline. In real numbers, Title I filings have dropped from 124 to 63 in Philadelphia and from 76 to 4 in New York. The four additional federal districts located in the Midwest that we reviewed experienced similar rates of decrease in Title I filings.²⁷⁸ For certain, private lawyers are backing away quickly from Title I enforcement in our federal courts.

Third, our study showed that poor people with disabilities, many of whom are seeking their first jobs or are trying to retain or advance in low-wage employment, are not seeking help from the federal courts when confronted with employment discrimination. We were struck by the conspicuous absence of *in forma pauperis* filings, *pro se* filings, and entries of appearances by lawyers from legal services programs and non-profit, public interest organizations. Clearly, poor persons with disabilities seldom use litigation as a tool to enforce their Title I rights, and, when they do, federal courts appear reticent to appoint counsel for them. Even when courts are willing to appoint counsel, more often than not they are unable to successfully obtain counsel willing to enter their appearances on behalf of indigent Title I plaintiffs. Finally, while the Equal Employment Opportunities Commission plays a vital role in investigating and

278. The four large mid-western federal districts that we examined experienced percentage decreases in Title I filings as follows: Western Missouri (55%), Southern Ohio (40.6%), Northern Indiana (40.3%), and Eastern Missouri (37.5%).

adjudicating claims of disability discrimination in the workplace, the agency lacks a meaningful presence as a litigator in the trial courts. Our research shows that the EEOC filed just one Title I action in the Eastern District of Pennsylvania over the past four years and it failed to file any Title I complaints in the Southern District of New York over the past three years. In short, court dockets reveal that agency lawyers, as well as private lawyers and public interest lawyers, have backed away from Title I enforcement litigation.

Regretfully, these trends have disempowered people with disabilities. By any objective measure, our federal courts are severely underutilized by people with disabilities, and especially by the poor, when it comes to remedying Title I violations.²⁷⁹

The legislative history of the ADA reminds us of what is at stake in our federal courts:

[Limitations for people with disabilities] are not inherent results of their handicaps, but are due to unnecessary barriers and discrimination. Yet, year after year, these barriers persist, and they take their toll on the lives of our citizens with disabilities. They are not going away by themselves, despite supposedly enlightened attitudes. State laws help, but are inconsistent and incomplete. Voluntary measures, unfortunately cannot be counted upon to work. Discrimination will sometimes be overcome by appealing to our better instincts or rationality; but more often, it takes the moral persuasion of the law to fortify those good instincts and rational arguments. Once through the door and in the classroom or on the job, people with disabilities prove themselves and are their own best advocates. But as a nation we must make sure everyone can get through the door.²⁸⁰

As EEOC Commissioner Paul Steven Miller recently noted, inequality in the workplace does not occur just randomly or by chance and therefore vigorous enforcement is needed to end all types of discrimination.²⁸¹ In the workplace, however, enforcement is lagging and thus failing to meet the goal of corrective justice.²⁸² For federal litigation to be an effective remedial tool for people with disabilities, more aggressive action will be needed to erase deep levels of unemployment and poverty in our lifetimes.²⁸³ But if poor people with disabilities are unable to obtain counsel and are not empowered to enforce their

279. See Bloom & Hershkoff, *supra* note 242, at 479 n.17.

280. 134 CONG. REC. S5106, S5116 (1988) (statement of Senator Simon).

281. See Miller, *supra* note 160, at 777.

282. Hoffman, *supra* note 108, at 1250.

283. See Mark C. Weber, *The Americans with Disability Act and Employment: A Non-Retrospective*, 52 ALA. L. REV. 375, 418 (2000).

rights on their own, it is difficult to see how this will be accomplished in the near future.

It need not be this way. Our findings derived from filed cases, combined with the findings of others in studies of Title I litigation outcomes, confirm that plaintiffs fare far worse under this statute than in other areas of law.²⁸⁴ In fact, the reality is that few plaintiffs have succeeded under it,²⁸⁵ and so “there’s a long way to go.”²⁸⁶ Employment continues to be the area with the widest gulf between people with disabilities and the rest of the population.²⁸⁷ Although there have been encouraging changes, some might even say sweeping changes, in access to public transportation and public facilities that are visibly empowering, and that may be nothing short of culture-shifting, the disabled feel that they have been left out when it comes to the workplace. One leader of a nonprofit organization that trains people with disabilities put it this way:

We’ve bypassed them [individuals with disabilities], and they’ve become discouraged . . . [T]he real break is that when they finally do get a job, it’s like watching a flower starting to blossom.²⁸⁸

The sad truth is that “perhaps in no area of public policy has the expectations gap so stubbornly resisted our efforts to achieve equality.”²⁸⁹

The resurgence of hope and optimism, evident at the time of the bipartisan passage of the ADA, requires the rebirth of clear, enforceable standards that our federal courts will uphold. After thirteen years, it is clear that Title I is broken and the gateway to economic independence is clogged. Even citizens with severe disabilities find themselves outside the protection of the ADA when they turn to federal courts to overcome discrimination.²⁹⁰ As a result, employment lawyers have filed far fewer Title I cases, leaving those who are most vulnerable—the disabled poor—with virtually no access to counsel or the courts. This problem cannot and will not be remedied by our federal courts

284. Colker, *supra* note 54, at 257.

285. Erwin Chemerinsky, *Unfulfilled Promise: The Americans With Disabilities Act*, 35-SEP TRIAL 88, 89 (1999).

286. Vobejda, *supra* note 167, at A20.

287. Lewis, *supra* note 194, at G7 (citing the 1998 Louis Harris and Associates survey that found that 71 percent of people with disabilities who are of working age were unemployed in 1998, 5 percentage points higher than in 1986, when the study was first conducted).

288. *Id.* (quoting Hank Cheney, president of Work, Inc., a nonprofit organization that trains people with disabilities and helps them to find jobs).

289. National Council on Disability, *National Disability Policy: A Progress Report* (July 26, 2003), available at http://www.ncd.gov/newsroom/publications/2003/progressreport_final.htm#Employment (last visited Sept. 20, 2004).

290. See Diller, *supra* note 61, at 31.

alone.²⁹¹

Congress must revisit the Americans with Disabilities Act to restore its original purpose and to provide clear, strong guidance to our federal courts in order to promote the active enforcement of Title I rights. During the better part of the 1990's, Congress *reformed* areas of federal practice that it believed needed legislative attention.²⁹² Congress can achieve the true meaning of *reform* by making needed changes to the ADA that will bring the nation much closer to achieving employment integration for people with disabilities. Legal remedies under Title I should not depend upon medical minutiae relating to the severity of an individual's impairment when discrimination prevents a qualified individual from obtaining or retaining employment.²⁹³ While some scholars have expressed understandable reluctance at the thought of asking Congress to revisit the ADA in the current political climate,²⁹⁴ and, certainly, it is never easy to ask Congress to fix an existing law,²⁹⁵ a national conversation on the failings of Title I is now overdue. Elected officials should be reminded that the ADA was the culmination of a strong, bipartisan effort that promised, but has not yet delivered, culture-shifting change in the workplace.

Effective civil rights enforcement will also require more encouragement for lawyers to undertake the representation of victims of disability discrimination. Congress should restore a sensible definition to the term *prevailing party* in fee-shifting statutes, so that lawyers will again have ample incentive to act as private attorneys general and be willing and able to vindicate important federal civil rights. When plaintiffs succeed at achieving the objectives of their litigation, either formally through judicial determinations or informally through court-encouraged settlements, their lawyers should be fairly compensated for the benefits they have obtained. As Justice Ginsburg so

291. On the day that the Supreme Court heard oral arguments in *Tenn. v. Lane* 124 S.Ct. 1978, 1982 (2004), a case raising the issue of whether states may be sued under the ADA for failing to provide access to courthouses and other governmental buildings, disability rights leader Andy Imparato stated, "[T]here has been a real disconnect between the sensibility that Congress had when it passed the ADA and where a majority of justices stand on the issue." "If anything, the majority sees these as luxury issues, not core civil rights issues." Stephen Henderson, *Rights of Disabled and States Loom Large in High Court Case*, PHILADELPHIA INQUIRER, Jan. 14, 2003, at A2.

292. See, e.g., Prisoner Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). The term reform is in italics in the text because, to some, newly enacted reform statutes, such as the PLRA, were regressive measures enacted under the guise of reform. See Davies, *supra* note 214, at 246 (stating that the Prison Litigation Reform Act of 1995, which makes prison conditions litigation much more difficult to pursue, is further evidence of Congress' antipathy to some types of civil rights litigation.).

293. See Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 164-65 (2000).

294. See, e.g., Hoffman, *supra* note 108, at 1287.

295. Feldblum, *supra* note 293, at 164.

poignantly explained in her dissenting opinion in *Buckhannon*, “[a] lawsuit’s ultimate purpose is to achieve actual relief from an opponent . . . the judicial decree is not the end but the means. . . .”²⁹⁶ If a court determines that a party has achieved the result sought by the litigation, the litigant should be deemed a prevailing party and be awarded attorney’s fees.

Even these measures will not be enough to secure adequate representation for poor people with disabilities, whose claims are too modest to attract counsel in the private market. In these instances, public interest lawyers must be available to fill the gap. Congress confronted a similar problem when it enacted the Civil Asset Forfeiture Reform Act of 2000.²⁹⁷ There, Congress was troubled by a high rate of uncontested forfeitures in civil forfeiture litigation and the real threat that poor people might be losing their homes simply because they lacked sufficient access to counsel to defend their interests.²⁹⁸ To provide meaningful access to the courts in these federal cases, Congress created an automatic right of counsel for indigent homeowners whose primary residences were the subject of civil forfeiture actions brought by the government.²⁹⁹ Congress funded this right with special, earmarked compensation directed to the Legal Services Corporation in order to ensure that representation of the poor would be available when needed.³⁰⁰ Congress should consider adopting a similar funding mechanism so that low-income workers will have a lawyer when they seek to overcome discrimination that prevents their access to employment and economic independence.

Additionally, the EEOC must become a more active litigator under Title I in the trial courts. The EEOC’s own statistics reveal that many charges of discrimination found by the agency to possess reasonable cause to believe that discrimination has occurred do not result in successful conciliation at the agency level.³⁰¹ What, then, becomes of these unconciliated claims? The EEOC needs to devote greater resources and attention to obtaining relief for these claimants.

In short, unless action is taken, employers will continue to prevail at astronomical rates in Title I litigation, private lawyers will continue to file fewer cases with each succeeding year, poor people with disabilities will continue to be deprived of meaningful access to the courts, and, most importantly,

296. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. at 634 (2001) (Ginsburg, J., dissenting) (citing *Herwitt v. Helms*, 482 U.S. 755, 761 (1987)).

297. Pub. L. No. 106-185, 114 Stat. 202, (codified at 18 U.S.C. § 983).

298. See Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENTENCING REP. 87, 95 n.12 (2001).

299. 42 U.S.C. § 2996f(a)(11) (2004); see Rulli, *supra* note 298, at 95 n.28.

300. Rulli, *supra* note 298, at 95 n.29.

301. Moss et al., *supra* note 258, at 98-101.

discrimination in the workplace will continue unabated. The gateway to financial independence through employment will remain largely closed to the disabled. More than a decade after the passage of the ADA, people with disabilities will still be left to wonder when, or if, they will see the transformative change in the workplace that is finally occurring in other areas of their daily lives.