

ARTICLES

THE EMPLOYMENT DISCRIMINATION PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT: IMPLEMENTATION AND IMPACT

Scott Burris & Kathryn Moss***

INTRODUCTION

Signing the Americans with Disabilities Act (ADA)¹ in 1990, President George H. W. Bush described it as a “historic new civil rights Act . . . the world’s first comprehensive declaration of equality for people with disabilities.”² Others called it “a watershed in the history of disability rights, . . . the most far-reaching legislation ever enacted against discrimination of people with disabilities.”³ A substantial body of disability discrimination laws—including the Rehabilitation Act of 1973,⁴ the Education for All Handicapped Children Act of 1975 (now known as the IDEA),⁵ the Fair Housing Amendments Act of 1988,⁶ and

* James E. Beasley Professor, Temple University Beasley School of Law; Associate Director, Center for Law and the Public’s Health at Georgetown and Johns Hopkins Universities. This article is based on a background paper commissioned for the Institute of Medicine’s project “Disability in America: A New Look” and published in COMMITTEE ON DISABILITY IN AMERICA, THE FUTURE OF DISABILITY IN AMERICA 453-77 (Marilyn J. Field & Alan M. Jette eds., 2007). All opinions expressed in this paper are solely those of the authors.

** Research Professor, School of Social Work, University of North Carolina at Chapel Hill; Research Fellow, Cecil G. Sheps Center for Health Services Research, University of North Carolina at Chapel Hill.

1. Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (2000).
2. NATIONAL COUNCIL ON DISABILITY, RIGHTING THE ADA 30 (2004).
3. OFFICE OF TECH. ASSESSMENT, PSYCHIATRIC DISABILITIES, EMPLOYMENT, AND THE AMERICANS WITH DISABILITIES ACT I (1994).
4. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (2000).
5. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773

numerous state anti-discrimination disability statutes⁷—were already in place, but the ADA seemed to promise a dramatic change in the status of people with disabilities in American society. The ADA was broader in scope than existing federal laws, prohibiting discrimination not just in employment and public programs, but also in public accommodations.⁸ The ADA covers private employers and service providers, not just public and publicly-funded ones.⁹ The ADA emerged from Congress with bi-partisan support, carrying an explicit promise to people with disabilities of “equality of opportunity, full participation, independent living, and economic self sufficiency.”¹⁰ The statute would, it was predicted, significantly affect “not just persons with disabilities and persons charged with respecting and enforcing human rights, but virtually every segment of our society—all Americans.”¹¹

Many lawyers and advocates for people with disabilities think the employment section of the ADA—Title I—has failed to meet expectations. As support for this assertion, they point to the narrow reading of the statute by federal judges, and the minuscule rate of court decisions in favor of plaintiffs. They cite data that seems to indicate that the ADA may actually have *lowered* the employment rate of people with disabilities. This is an understandable reaction to several years of unrelenting bad news from the courts, but measuring the impact of a major civil rights statute is difficult.¹² The impact of a statute depends upon the complex process of implementation by the courts, but also by other enforcement agencies and employers.¹³ “Impact” can take a

(1975) (codified as amended at 20 U.S.C. §§ 1400-1487 (2000)).

6. Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3614.

7. See Christine Jolls & J.J. Prescott, *Disaggregating Employment Protection: The Case of Disability Discrimination* tbls.1, 2 (Nat'l Bureau of Econ. Research, Working Paper No. 10740, 2004).

8. See NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 33, 36.

9. 42 U.S.C. § 12111(5) (2000); Paul Steven Miller, *Genetic Discrimination in the Workplace*, 26 J.L. MED. & ETHICS 189, 190 (1998).

10. 42 U.S.C. § 12101(a)(8) (2000).

11. Lawrence O. Gostin & Henry A. Beyer, *Preface* to IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS, at xiii (Lawrence O. Gostin & Henry A. Beyer eds., 1993).

12. See generally John J. Donahue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603 (1991) (discussing the difficulty in measuring civil rights progress as a result of changes in federal policy, because standard econometric tests fail to measure social change that is brought about by its own right).

13. See ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 3 (1993); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1531-32 (1992).

variety of forms, from increases in wages and employment rates, to significant changes in social or organizational norms. The causal role of a civil rights statute is difficult to disaggregate from other social and economic factors such as labor market conditions generally, and government interventions on a number of interrelated fronts.¹⁴ In the case of Title I, assessment is further complicated by the differences between the population defined as disabled in the data sources on U.S. employment, and the narrower group of people whose employment rights are actually protected by the law.¹⁵

This paper summarizes the empirical data on the effects of Title I, including how the law has been operationalized, and how the employment experience of people with disabilities has changed since the ADA's passage. It begins with a brief overview of the ADA's provisions. The next section reviews the evidence of three kinds of effects: impact on wages and employment rates, changes in employer attitudes and practices, and the law's empowering effect on people with disabilities.

Our review of employment data finds little support for the claim that Title I has hurt the people it was passed to protect, but there is also no evidence that the statute has substantially improved their employment opportunities as a group. Many studies have found a decline in employment rates among people with disabilities in the wake of the ADA, but the evidence that these declines were *caused* by Title I is weak. While Title I protects people who require no more than a "reasonable accommodation" to perform a job in question, the employment data includes a much broader range of people, many, if not most, of whom could not meet Title I's qualification standard.¹⁶ Studies that "correct" for this difference find no, or even a slightly positive, impact on employment.¹⁷

14. See James J. Heckman, *The Central Role of the South in Accounting for the Economic Progress of Black Americans*, 80 AM. ECON. REV. 242, 242, 245 (1990).

15. See Peter Blanck, Susan Schwochau & Chen Song, *Is It Time to Declare the ADA a Failed Law?*, in THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE 301, 301-02 (David C. Stapleton & Richard V. Burkhauser eds., 2003) [hereinafter Blanck, *Time*]; Scott Burris & Kathryn Moss, *A Road Map for ADA Title I Research*, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 19, 23 (Peter David Blanck ed., 2000); Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, 42 INDUS. REL. 31, 35-37 (2003); Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?* 21 BERKELEY J. EMP. & LAB. L. 271, 298-99 (2000).

16. 42 U.S.C. § 12112(b)(5) (2000); see, e.g., Schwochau & Blanck, *supra* note 15.

17. See Blanck, *Time*, *supra* note 15, at 301.

Part of the work of any antidiscrimination regime is to encourage cultural change in the workplace. Title I's effect can also be measured by workplace attitudes and behaviors. Negative employer attitudes towards individuals with disabilities persist, but studies have found that most employers know about, and have taken steps to implement, the law.¹⁸ These steps include integrating ADA standards into their Equal Employment Opportunity policies, changing hiring procedures, and providing reasonable accommodations. A small but interesting body of evidence has found that people with disabilities themselves have been empowered by the ADA, which can change their views of what they are entitled to, and give them a tool to use in their negotiations with employers.¹⁹

In Part III of this paper, we look at how the legal system has implemented the ADA. If people protected by the statute are like other potential litigants, only a small minority of them file administrative charges when they have the opportunity. Still, more than 200,000 people filed claims in the first ten years that the law was in effect, and they represent an important measure of what it means to be protected from discrimination.²⁰ There is no denying that courts have interpreted the ADA narrowly. Changes in the text of the law may be necessary to restore protection to the people Congress apparently intended to protect. But narrow interpretation is only one part of the problem. The empirical data shows, convincingly, that state and federal administrative agencies, and the federal courts, are providing poor service to plaintiffs, and that even a broadly interpreted ADA will fail in its promise if the flaws in the enforcement system are not addressed.²¹ In computing the balance sheet for the ADA we should not forget that, for all the problems of narrow construction and poor implementation, tens of thousands of individuals with disabilities have directly benefited from filing claims under the law.

We conclude with advice to lawmakers based on the empirical data. The time has come for Congress to revisit the ADA and the promises it made in 1990. For people whose disabilities make it difficult to work, even with an accommodation, anti-discrimination law cannot have much of an effect on employment rates except as part of a comprehensive

18. See, e.g., Susanne M. Bruyere et al., *The Impact of Business Size on Employer ADA Response*, 49 REHABILITATION COUNSELING BULL. 194, 195, 199-200, 202 tbl.4 (2006).

19. See Burris & Moss, *supra* note 15, at 36.

20. Kathryn Moss et al., *Special Feature: Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 304 (2005).

21. See *id.* at 305.

policy encompassing social security, health care, training programs, and tax incentives. Only Congress can rewrite the statute to protect people who can work but whose disabilities have been excluded from coverage under the statute by the courts. Furthermore, as important as it is to rewrite the law, it is at least as important that Congress, state legislatures, and the bar take steps to repair our broken enforcement system for resolving employment discrimination disputes; more funds, greater use of mediation, and better legal services are essential to making the ADA a real remedy for employment discrimination.

I. THE ADA AND ITS EMPLOYMENT PROVISIONS: A BRIEF OVERVIEW

The ADA prohibits discrimination against individuals with disabilities.²² It is based on, and supplements, the 1973 Rehabilitation Act and other earlier laws.²³ The ADA has five sections, referred to in the law as “Titles.”²⁴ Title I contains its employment provisions, the other titles deal with matters including state and local government services and access to public accommodations.²⁵

The ADA’s definition of “disability” is a crucial factor in the effort to understand its effects. In general, people are considered disabled for the purposes of the ADA if they satisfy at least one of three criteria: they must have: 1) “a physical or mental impairment that substantially limits one or more of the major life activities,” 2) “a record of such an impairment,” or 3) are “regarded as having such an impairment.”²⁶ Title I prohibits employment discrimination only against “qualified individuals with disabilities.”²⁷ A qualified individual with a disability is one who meets the skill, experience, education, and other job-related requirements of a position, and who can perform the essential functions of the job under the same conditions as any other worker or with what is known as a “reasonable accommodation” to the disability.²⁸ “Reasonable accommodations” are defined in Title I as changes to the

22. 42 U.S.C. § 12112(a) (2000).

23. *See id.* § 12133.

24. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000); Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 918 & n.1 (2001).

25. Acemoglu & Angrist, *supra* note 24.

26. 42 U.S.C. § 12102(2) (2000).

27. *Id.* § 12112(a).

28. *See* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 457-58 (1991).

work environment, or process, that allow a person with a disability to enjoy equal employment opportunity; they include making facilities accessible, restructuring jobs, modifying work schedules, reassigning the worker to a more suitable position if one is available, and modifying equipment or devices.²⁹ An accommodation is not considered reasonable if it creates an undue burden for the employer.³⁰ “Undue burden” includes financial hardship, but also accommodations that are disruptive or that would change the nature or operation of a business.³¹

Title I applies to all employers with fifteen or more employees, both private and public, as well as to employment agencies, labor organizations, and joint labor-management committees.³² It prohibits discrimination against qualified individuals with a disability in any aspect of employment.³³ The prohibition embraces discrimination in job application procedures, hiring, firing, advancement, compensation, fringe benefits, and job training.³⁴ Inquiries about the existence, nature, or severity of a disability before hiring an individual are prohibited, though an employer may require a medical examination after a job offer has been made if it is required of all new employees, is job related, and is consistent with business necessity.³⁵

The enforcement of the ADA differs from Title to Title.³⁶ Under Title I, individuals who believe they have been subject to employment discrimination due to a disability may file an administrative charge with the U.S. Equal Employment Opportunity Commission (EEOC), or an equivalent state or local human rights agency.³⁷ Later, they may file a lawsuit, but only after receiving a “right-to-sue letter” from one of the aforementioned agencies.³⁸ Federal law provides that winning plaintiffs

29. 42 U.S.C. § 12111(9) (2000).

30. *See id.* § 12112(b)(5)(A).

31. *Id.* § 12111(10).

32. *Id.* § 12111(2), (5)(A).

33. *Id.* § 12112(a).

34. *Id.*

35. *Id.* § 12112(d).

36. *Compare* 28 C.F.R. §§ 35.170-35.190 (2006) (setting up enforcement mechanisms for Title II, by private suit or federal agencies, provided such agencies meet jurisdictional requirements), *with id.* §§ 36.501-36.506 (laying out enforcement mechanisms for Title III, including private suits by the parties, and possible intervention of the U.S. Attorney General), *and* 29 C.F.R. §§ 1601.27-1601.29 (2006) (detailing the manner in which complaining parties and the EEOC work together to prosecute civil cases under Title I).

37. 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, 29 n.147 (2001) (citing JOYCE E. TUCKER, REPORT OF THE TASK FORCE ON FAIR EMPLOYMENT PRACTICE AGENCIES (1995)).

38. 29 C.F.R. § 1601.28(e) (2006).

can recover attorney's fees from the defendant under Title I,³⁹ but offers no guarantee of legal services in the prosecution of the suit.⁴⁰

II. MEASURING THE EFFECTS OF TITLE I

Congress intended the elimination of disability-based employment discrimination to increase the ability of people with disabilities to participate in the labor market on the same basis as others.⁴¹ Here, we will consider several indicators that may be used to measure Title I's success: 1) employment rates and wages; 2) employer attitudes and practices; and 3) "empowerment" effects among people with disabilities themselves.

A. *Employment Rates and Wage Disparities*

Studies differ both on what happened to the wage and employment rates of people with disabilities in the decade following the passage of the ADA, and whether the ADA was the cause of the various changes they identified.⁴² There is a consensus that the employment rate declined in the 1990s for people reporting they had conditions limiting their ability to work, but whether this trend extended to wages, or to people more likely to be protected by Title I, is still debated.⁴³ Disagreement starts with whether the most commonly used data sets properly define disability, and extends to more arcane points of study methodology.⁴⁴ Analysis is complicated by the changing judicial interpretation of "disability" over time,⁴⁵ and by the fact that in many states people with disabilities had substantial protection from discrimination even before the ADA was passed.⁴⁶ These issues are

39. 42 U.S.C. §§ 12117, 2000e-5(k) (2000).

40. *See id.* §§ 12117, 2000e-5(f)(1).

41. *See* JULIE HOTCHKISS, *THE LABOR MARKET EXPERIENCE OF WORKERS WITH DISABILITIES: THE ADA AND BEYOND* 6 (2003).

42. *See, e.g., id.* at 70-71; Richard V. Burkhauser & David C. Stapleton, *Introduction to THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE*, 16-18, 20 (David C. Stapleton & Richard V. Burkhauser eds., 2003).

43. *See* HOTCHKISS, *supra* note 41, at 70-71; Richard V. Burkhauser & David C. Stapleton, *supra* note 15, at 16-18, 20.

44. *See* Blanck, *Time*, *supra* note 15, at 301-02.

45. *See* Chai 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, 139-60 (2000) (examining and criticizing judicial interpretations of "disability" under the ADA).

46. *See* Jolls & Prescott, *supra* note 7, at 3.

fully discussed elsewhere.⁴⁷ In this section, we will briefly summarize the findings and most significant methodological issues.

Most studies of employment rates use one of three nationally representative data sets: the Current Population Survey (CPS), the National Health Interview Survey (NHIS), and the Survey of Income and Program Participation (SIPP), all of which define “disability” primarily in terms of a self-reported health condition that limits, or entirely prevents, work.⁴⁸ Researchers analyzing these data sets generally agree that the rate of employment for working aged adults with disabilities declined during the 1990s, not only absolutely, but also relative to the rate for those without disabilities.⁴⁹

Fewer studies have looked at changes in wages over time. DeLeire analyzed SIPP data on men between 1986 and 1995 and found no significant declines.⁵⁰ Acemogolu and Angrist, using similar methods as DeLeire, analyzed CPS data on men and women between the ages of 21 and 58 over the same time period and reached the same conclusion.⁵¹ Moon and Shin, using SIPP data on men between 1990 and 1992, found that the real wages of people with disabilities had declined relative to men without disabilities.⁵²

Title I’s definition of disability excludes people who cannot work (or who require more than a “reasonable” accommodation to do so), and covers people who have no serious impairment or work limitations, but are mistakenly treated as if they had such an impairment or limitation.⁵³ Thus, the employment rate of people with serious work limitations is a flawed indicator of the statute’s effect on those it was designed to help.

47. Blanck, *Time*, *supra* note 15, at 301-02; Kruse & Schur, *supra* note 15, at 35-37.

48. See, e.g., Andrew J. Houtenville & Richard V. Burkhauser, *Did the Employment of People with Disabilities Decline in the 1990s, and was the ADA Responsible? A Replication and Robustness Check of Acemoglu and Angrist (2001)—Research Brief*, EMP. & DISABILITY INST. COLLECTION (Employment & Disability Inst., Sch. of Indus. & Labor Relations, Cornell Univ., Ithaca, N.Y.), Aug. 2004, at 3, 3-4.

49. Richard V. Burkhauser et al., *A User’s Guide to Current Statistics on the Employment of People with Disabilities*, in THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE, *supra* note 15, at 23, 23-24; Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 917 (2001); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 693-94 (2000); Houtenville & Burkhauser, *supra* note 48, at 5-6; Kruse & Schur, *supra* note 15, at 49, 53; Sangho Moon & Jaeun Shin, *The Effect of the Americans with Disabilities Act on Economic Well-Being of Men with Disabilities*, 76 HEALTH POL’Y 266, 267 (2006).

50. DeLeire, *supra* note 49, at 705.

51. Acemoglu & Angrist, *supra* note 49, at 917, 932.

52. Moon & Shin, *supra* note 49, at 266-67.

53. 42 U.S.C. § 12102 (2000); Kruse & Shur, *supra* note 15, at 36.

A set of questions on the SIPP about functional and activity limitations that do not prevent work allowed Kruse and Schur to investigate changes in a segment of the disabled population that more closely approximates the population covered by the Title I.⁵⁴ They found that employment rates did decrease, in the 1990s, for individuals reporting a work disability, but that employment rates actually increased for those with functional and activity limitations that do not prevent those individuals from working.⁵⁵ Disagreement about the validity of studies based on a work-limitation definition of disability persists, even as the Bureau of Labor Statistics works to craft new questions that are more compatible with the ADA's definition of disability for use in the CPS.⁵⁶

Researchers have tested many explanations for the employment outcomes they have found. They have studied the importance of demographic factors and education;⁵⁷ changes in the nature of work or in the job market;⁵⁸ the changing size and composition of the disabled population;⁵⁹ changes in the costs of health care and modes of health care finance;⁶⁰ and expansions of the Social Security Disability Income (SSDI) and Supplemental Security Income (SSI) programs, including both lowering eligibility requirements and increasing benefits for some recipients.⁶¹ Reviewing this data, several leading researchers concluded

54. Kruse & Schur, *supra* note 15, at 32-33.

55. *Id.* at 61.

56. See Richard V. Burkhauser et al., *Self-Reported Work-Limitation Data: What They Can and Cannot Tell Us*, 39 DEMOGRAPHY 541, 553 (2002); NATIONAL COUNCIL ON DISABILITY, IMPROVING FEDERAL DISABILITY DATA 8 (2004), <http://www.ncd.gov/newsroom/publications/2004/pdf/improvedata.pdf>; Terence McMenamin et al., *Discussion and Presentation of the Disability Test Results from the Current Population Survey* (U.S. Bureau of Labor Statistics, Working Paper No. 396, 2006), available at <http://www.bls.gov/ore/pdf/ec060080.pdf>.

57. Andrew J. Houtenville & Mary C. Daly, *Employment Declines among People with Disabilities: Population Movements, Isolated Experience, or Broad Policy Concern?*, in THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE, *supra* note 15, at 87, 88.

58. David C. Stapleton et al., *Have Changes in the Nature of Work or the Labor Market Reduced Employment Prospects of Workers with Disabilities?*, in THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE, *supra* note 15, at 125, 125.

59. H. Steven Kaye, *Employment and the Changing Disability Population*, in THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE, *supra* note 15, at 217, 217.

60. See Steven C. Hill et al., *Rising Health Care Expenditures and the Employment of People with High-Cost Chronic Conditions*, in THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE, *supra* note 15, at 181, 181-82; Aaron S. Yelowitz, *Why Did the SSI-Disabled Program Grow So Much? Disentangling the Effect of Medicaid*, 17 J. HEALTH ECON. 321, 322 (1998).

61. Acemoglu & Angrist, *supra* note 48, at 935-36; Richard V. Burkhauser, Mary C. Daly & Andrew J. Houtenville, *How Working Age People with Disabilities Fared Over the 1990s Business Cycle*, EMP. & DISABILITY INST. COLLECTION (Employment & Disability Inst., Sch. of Indus. &

that SSDI and SSI expansion played a more significant role than any other factor, including the ADA, in the decline of employment rates among individuals with disabilities.⁶²

Table 1 lists the studies that have focused on the effect of the ADA on employment among people with disabilities. Most studies used the work-limitation definition of disability and depended primarily on the temporal association between the passage (1990), or effective date (1992), of Title I of the ADA and employment changes to prove causation.⁶³ Using both simple pre-post and year-by-year analyses,

Labor Relations, Cornell Univ., Ithaca, N.Y.), Jan. 2000, at 1, 8; Houtenville & Burkhauser, *supra* note 48, at 6. For people whose disabilities are severe enough to place them on the margins of employability, the effects of Title I may be blunted by other elements of national disability policy. Social Security Disability Income (SSDI) provides cash benefits and Medicare benefits for disabled workers, and Supplemental Security Income (SSI) is a needs-based program for adults and children ineligible for SSDI, which typically triggers eligibility for Medicaid. *See* SOCIAL SECURITY ADVISORY BOARD, A DISABILITY SYSTEM FOR THE 21ST CENTURY 3, 18 (2006), <http://www.ssab.gov/documents/disability-system-21st.pdf>. Expansion of eligibility for federal social security programs made it easier for marginally employable people to get income and health benefits, a phenomenon that some believe was the main impetus behind declining employment rates among the disabled in the 1990s. Richard V. Burkhauser & David C. Stapleton, *Introduction to THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE*, *supra* note 15, at 19. Eligibility for these programs required leaving the work force and proving that one was unable to engage in any substantial gainful activity. *See* David C. Stapleton et al., *Dismantling the Poverty Trap: Disability Policy for the 21st Century: Policy Brief*, EMP. & DISABILITY INST. COLLECTION (Employment & Disability Inst., Sch. of Indus. & Labor Relations, Cornell Univ., Ithaca, N.Y.), July 2005, at 1. Historically, people receiving benefits under these programs encountered substantial disincentives to going back to work. *See id.* at 1-2. Workers returning to low-wage or part-time work faced the prospect of earning less than they received in benefits. *See id.* Since Medicare/Medicaid benefits were tied to social security disability eligibility, going back to work could also mean a gap in, or total loss of, health insurance. *See id.* Court decisions under the ADA added another wrinkle: defendants in discrimination cases may use an individual's application for, or acceptance of, disability benefits as evidence that the individual is not "otherwise qualified" to work and, therefore, not protected from discrimination. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999). The government has acted, in recent years, to reshape social security to encourage and assist beneficiaries to return to work. *See Ticket to Work and Work Incentives Improvement Act of 1999*, Pub. L. No. 106-170, 113 Stat. 1860 (1999). Legislation has expanded eligibility to programs that allow people to work and still receive benefits for a time; increased access to vocational rehabilitation programs; given state Medicaid administrators greater leeway to cover people returning to work from disability; deferred medical eligibility reviews for people trying to return to work; and funded advocacy organizations to improve communication between individuals with disabilities and state agencies. *See id.* Research is under way to assess the implementation and outcomes of these initiatives.

62. Richard V. Burkhauser et al., *A User's Guide to Current Statistics on the Employment of People with Disabilities*, in *THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE*, *supra* note 15, at 23, 52, 54; Houtenville & Burkhauser, *supra* note 48, at 5; cf. Marjorie L. Baldwin & Steven C. Marcus, *Labor Market Outcomes of Persons with Mental Disorders*, 46 INDUS. REL. 481 (2007) (finding large, unexplained differences in employment and wages of people with mental disabilities versus no disabilities).

63. Acemoglu & Angrist, *supra* note 49, at 917; DeLeire, *supra* note 49, at 701; Houtenville

Moon and Shin,⁶⁴ DeLeire,⁶⁵ and Acemogolu and Angrist⁶⁶ all found robust declines in employment rates—Moon and Shin on the order of 6%, and DeLeire of 7%.⁶⁷ Acemoglu and Angrist reported sharp drops in annual weeks of employment for men with disabilities aged 21-58 and women with disabilities under the age of 40.⁶⁸ Moon and Shin also found a decline, in the log-real wages of men with disabilities, of 5.3% relative to men without disabilities, though it was significant only at the 0.1 level.⁶⁹ Econometric modeling led both DeLeire and Acemoglu and Angrist to specifically attribute these declines to the reasonable accommodation requirement of Title I;⁷⁰ Acemoglu and Angrist thought that the reduction in disabled employment also reflected employers' expectations of increased lawsuit costs.⁷¹

Table 1:
Studies of the Effect of the ADA on Employment Rates and Wages

Study	Data Source	Time Period	Study population	Definition of Disability
DeLeire (2000)	SIPP	1986-1995	Men aged 18-64 with & without disabilities	Work limitation ⁷²
Acemoglu and Angrist (2001)	CPS	1986-1995	Men & women with & without disabilities ages 21-58	Work limitation

& Burkhauser, *supra* note 48, at 5; Jolls & Prescott, *supra* note 7, at 8.

64. Moon & Shin, *supra* note 49, at 269.

65. DeLeire, *supra* note 49, at 701.

66. Acemoglu & Angrist, *supra* note 49, at 916-17.

67. Acemoglu & Angrist, *supra* note 49, at 917; DeLeire, *supra* note 49, at 701; Moon & Shin, *supra* note 49, at 267.

68. Acemoglu & Angrist, *supra* note 49, at 929.

69. Moon & Shin, *supra* note 49, at 267.

70. Acemoglu & Angrist, *supra* note 49, at 950; DeLeire, *supra* note 49, at 711.

71. See Acemoglu & Angrist, *supra* note 49, at 950.

72. Respondents reported having a health problem or disability that prevents or limits work. See DeLiere, *supra* note 49, at 698-99.

Kruse and Schur (2003)	SIPP	1990-1994	Men & women ages 21-58	Composite based on activity limitations, receipt of disability income, and reported ability to work ⁷³
Beegle and Stock (2003)	U.S. Census	1970, 1980, & 1990	Men & women with & without disabilities ages 18-64	Work limitation
Houtenville and Burkhauser (2004)	CPS	1986-1995	Men & women with & without disabilities ages 21-58	Work limitation
Jolls and Prescott (2004)	CPS	1988-1998	Men & women ages 21-58	Work limitation
Moon and Shin (2006)	SIPP	1990-1992	Men ages 20-62 with & without disabilities	Composite based on mobility or activity limitations, disability, and disability benefits ⁷⁴

Using different definitions of disability, and different time periods, leads to different results. Kruse and Schur used fourteen different measures of disability from the SIPP, representing permutations along three dimensions (activity limitations, receipt of disability income, and reported ability to work), to facilitate comparisons between people more and less likely to be covered by the ADA.⁷⁵ They found that the subgroup of people most likely to be covered by Title I saw an improvement in employment rates, while employment rates declined for others.⁷⁶

73. Classification was based on fourteen different SIPP disability measures representing three dimensions: activity limitations, receipt of disability income, and reported ability to work. Kruse & Schur, *supra* note 15, at 41-42.

74. Moon & Shin, *supra* note 49, at 271-72. Classification was based on responses concerning use of a wheelchair or long term use of a cane, crutches, or a walker; activity limitations; reporting one or more disability conditions; and receiving federal benefits based on inability to work. *Id.*

75. Kruse & Schur, *supra* note 15, at 41.

76. *Id.* at 41, 53, 61.

Houtenville and Burkhauser replicated Acemoglu and Angrist's study testing the sensitivity of different definitions of disability, as well as the effects of different periods of time.⁷⁷ They confirmed that the employment rate for people with a work limitation did indeed decline when measured by annual weeks worked during one calendar year.⁷⁸ Using a two-year time period, however, suggested that employment began to decline in the mid 1980s and actually improved sharply in 1992 for some age-sex categories.⁷⁹ They concluded there was "little evidence of a negative effect of the ADA on the population with longer term disabilities and some evidence of a positive effect of the ADA."⁸⁰

All the studies that attempt to test the impact of the ADA by temporal association with national trends in employment and wages suffer from the same flaw; many states had laws against discrimination before the ADA came into effect, so we cannot assume that Title I represented a change in the rules for all employers and employees. Two studies specified state-law variables, making it possible to compare the employment and wages of people with disabilities in states with and without various ADA-like disability protections at the same points in time.⁸¹

Beegle and Stock compared state-level employment conditions for people with disabilities at three points: in 1970, 1980, and 1990.⁸² Since all three time points were before the ADA took effect, the study should be understood as using similar state laws as a proxy for the federal statute. They found that disability discrimination laws were associated with lower relative earnings for people with disabilities and slightly lower relative disabled labor force participation rates.⁸³ However, once they controlled for differential time trends in disabled and non-disabled employment, they found no systematic negative relationship between the laws and relative employment rates of the disabled.⁸⁴ Of course, this also suggests that there was no substantial *positive* impact of state disability discrimination laws.

Jolls and Prescott studied states with three different legal conditions

77. Houtenville & Burkhauser, *supra* note 48, at 5.

78. *Id.*

79. *Id.*

80. *Id.* at 6.

81. Kathleen Beegle & Wendy A. Stock, *The Labor Market Effects of Disability Discrimination Laws*, 38 J. HUM. RESOURCES 806, 807 (2003); Jolls & Prescott, *supra* note 7, at 3-4.

82. Beegle & Stock, *supra* note 81, at 843.

83. *Id.* at 807.

84. *Id.*

between 1990-1993: states with no protections comparable to the ADA, in which the ADA would represent an entirely new influence; “protection without accommodation” states, whose laws prohibited employment discrimination against people with disabilities but did not require reasonable accommodation; and “ADA-like” states whose protections for the employment rights of people with disabilities both prohibited discrimination *and* required reasonable accommodation.⁸⁵ They found that employment rates for people with disabilities began to decline in 1993, relative to pre-ADA levels, in all three categories of states.⁸⁶ The extent to which the ADA was new law made no significant difference, making it difficult as a general matter to attribute the declines to employers’ reactions to new legal requirements.⁸⁷

Jolls and Prescott’s design allowed them to test the effects of specific ADA mandates.⁸⁸ They found that the employment rates of individuals with disabilities fell ten percent in the early days of the ADA in “protection without accommodation” states, compared to states that already had full “ADA-like” statutes, indicating that the reasonable accommodation requirement had an independent negative effect on employment rates.⁸⁹ Yet, they also found little or no change in post-ADA employment rates among people with disabilities in states that had no protection before, indicating that the ADA did not have a significant impact where it brought entirely new mandates.⁹⁰ Considering other important and confounding variables (e.g., the size of the employer covered, the differences between the states in eligibility for disability benefits and the amounts of disability benefits, the states’ economic environments, and the preexisting state-group specific trends in disabled employment), Jolls and Prescott concluded that, apart from the short term effect of the new reasonable accommodation requirement, there was no link between the ADA and the employment declines experienced by people with disabilities starting in 1993 and continuing forward.⁹¹

B. Employer Practices and Attitudes

The ADA requires employers to eliminate discriminatory practices

85. Jolls & Prescott, *supra* note 7, at 3, 9-10.

86. *Id.* at 17-18.

87. *Id.* at 18.

88. *See id.* at 3.

89. *Id.* at 4.

90. *Id.*

91. Jolls & Prescott, *supra* note 7, at 28.

and promote equal opportunity by making reasonable accommodations for workers with disabilities.⁹² We can assess the impact of the ADA on employment by asking what employers have done to comply with the law, and whether there is evidence that the attitudes of employers towards people with disabilities have improved. These data show a high level of awareness of the law and substantial compliance activity.⁹³ They do not shed much light on the sincerity of the effectiveness of employer efforts, and suggest that negative attitudes towards the disabled persists.⁹⁴

At the time of enactment, many employers were uninformed about the ADA and had significant concerns about the costs it was going to impose.⁹⁵ This trend seems to have changed rather quickly. More durable has been the tendency to differentiate among workers with disabilities according to the type of impairment.⁹⁶ Employers feel more positively about people with physical or sensory disabilities than they do about people with psychiatric or cognitive disabilities.⁹⁷ There is less acceptance of people whose disabilities are perceived as having been caused by factors under their control than for “innocent” victims (for example, a person paralyzed in an accident caused by her own drinking, versus a person paralyzed by the actions of a drunken stranger).⁹⁸ Concern about the costs of accommodating a person with disabilities has been a major driver of attitudes, but interacts with attributions and fairness concerns.⁹⁹

Given the poor empirical correlation between attitudes about employing people with disabilities and actual employer behavior,¹⁰⁰ attitude studies may be more suggestive of the complexity of workplace decision-making, and the need for further research than conclusive about

92. 42 U.S.C. § 12112 (2000).

93. See Bruyere et al., *supra* note 18 and accompanying text.

94. See *id.* at 195-96.

95. *Id.* at 195.

96. *Id.* at 195-96; Reed Greenwood & Virginia Anne Johnson, *Employer Perspectives on Workers with Disabilities*, 53 J. REHABILITATION 37, 38-39 (1987).

97. Bruyere et al., *supra* note 18, at 195.

98. *Id.* at 195-96; Tara L. Mitchell & Margaret Bull Kovera, *The Effects of Attribution of Responsibility and Work History on Perceptions of Reasonable Accommodations*, 30 LAW & HUM. BEHAV. 733, 735-40 (2006).

99. See Bruyere et al., *supra* note 18, at 195; Heather Ann Lee, *Non-Disabled Employees' Attitudes Toward the Americans with Disability Act Requirement to Reasonably Accommodate Co-Workers with Disabilities* (1998) (unpublished Ph.D. dissertation, North Carolina State University) (on file with authors); Deborah Olson et al., *Employers' Perceptions of Employees with Mental Retardation*, 16 J. VOCATIONAL REHABILITATION 125, 130 (2001).

100. Bruyere et al., *supra* note 18, at 196.

the employer response to the ADA.¹⁰¹ Organizations have historically made changes in policies, procedures, and organizational structure in response to new national civil rights laws.¹⁰² Organizational compliance actions create the environment in which managers make decisions about hiring, promotion, and accommodation. Perceptions about organizational adherence to the ADA have been found to be a better predictor of how managers translate the ADA into practice than their personal attitudes about people with disabilities.¹⁰³ Larger employers typically respond to antidiscrimination laws by creating policies and internal equal employment opportunity (EEO) offices to help the organization draw the line between legal and illegal behavior, and to minimize and resolve discrimination disputes.¹⁰⁴ In a 1998 survey of human resource managers, 72% reported their company had formal procedures for requesting reasonable accommodations and presenting grievances.¹⁰⁵ Employers too small to support a separate human resources or equal employment opportunity staff may respond to antidiscrimination laws in less formal, but still important, ways.¹⁰⁶

Aside from a number of small surveys, qualitative studies, and dissertations,¹⁰⁷ the best evidence on the organizational response to the ADA comes from a series of large probability surveys of human

101. Legal scholars in discrimination have argued that discrimination is (more) often a result of unintentional errors of judgment than of conscious animus. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1165, 1241-42 (1995) (arguing that discrimination is more often a result of unintentional errors of judgment than of conscious animus). According to this view, the most important “negative” attitudes are not, for example, fear of people with disabilities, but mistaken judgments about their needs, abilities and preferences, and in this context, discrimination law and policy have important educative functions. See *id.* But see Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO STATE L.J. 1023, 1023 (2006) (challenging the empirical foundations and, therefore, the policy prescriptions, of this “implicit prejudice” view).

102. See Edelman, *supra* note 13, at 1531-32.

103. Daksha Thakker & Phyllis Solomon, *Report: Factors Influencing Managers’ Adherence to the Americans with Disabilities Act*, 26 ADMIN & POL’Y MENTAL HEALTH 213, 217-18 (1999).

104. See Edelman, *supra* note 13, at 1549.

105. Susanne M. Bruyere, *Disability Employment Policies and Practices in Private and Federal Sector Organizations*, EMP. & DISABILITY INST. COLLECTION (Emp. & Disability Inst. Sch. of Indus. & Lab. Relations, Cornell Univ., Ithaca, N.Y.), March 2000, at 6, 19.

106. See Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 LAW & SOC’Y REV. 493, 505, 509-10, 512-14 (2006).

107. See, e.g., Sharon L. Harlan & Pamela M. Robert, *The Social Construction of Disability in Organizations: Why Employers Resist Reasonable Accommodation*, 25 WORK & OCCUPATIONS 397 (1998); Rhonda Dee Blackburn, *Relationships Between Employers’ Attitude Toward People with Disabilities, Awareness of ADA, and Willingness to Comply* (2002) (unpublished Ph.D. dissertation, Texas A&M University) (on file with author).

resources managers conducted by Bruyere and colleagues at Cornell University.¹⁰⁸ General awareness of the law was high, with large majorities (80-90%) of both federal and private respondents reporting that they had received training in specific elements of the law, particularly reasonable accommodation and non-discrimination in hiring.¹⁰⁹

Title I puts considerable emphasis on reasonable accommodations as an instrument for workplace inclusion, making the extent to which employers provide accommodations a good measure of compliance. Bruyere's surveys tracked ten types of accommodations, including changes in accessibility, transportation, supervisory methods, and job requirements.¹¹⁰ Overall, the studies found that most employers were making accommodations of all types, but there were important variations.¹¹¹ Federal government employers were substantially more likely to report accommodations of virtually every kind than private employers,¹¹² and large employers reported a greater use of accommodations than smaller ones.¹¹³ The differences between federal and private, and small and large employers were largely accounted for by the number of employers that reported never having been asked for an accommodation, but might also reflect a greater emphasis on compliance within the federal government.¹¹⁴ A lack of requests for accommodations could indicate an unsupportive environment, employees' unfamiliarity with their rights, or the use of informal, undocumented accommodations in smaller workplaces.¹¹⁵ For all employers, physical accessibility, workplace or device re-configuration, and policy change accommodations were more common than changes in training, supervisory methods, or job structure.¹¹⁶

Most federal (95%) and private (82%) employers reported making facilities more accessible.¹¹⁷ There were sharper differences in other areas. Government employers were twice as likely to report providing communication access to people with hearing impairments (91% vs. 43%) or visual impairments (77% vs. 37%) than non-governmental

108. Bruyere et al., *supra* note 18, at 194.

109. Bruyere, *supra* note 105, at 23.

110. Bruyere et al., *supra* note 18, at 199 tbl.2.

111. *Id.*

112. Bruyere, *supra* note 105, at 11 fig.3.

113. Bruyere et al., *supra* note 18, at 199.

114. *See* Bruyere, *supra* note 105, at 12; Bruyere et al., *supra* note 18, at 199.

115. *See* Bruyere et al., *supra* note 18, at 204.

116. *Id.* at 199 tbl.2.

117. Bruyere, *supra* note 105, at 17.

employers.¹¹⁸ Fewer than half of employers, either federal or private provided flexible test taking procedures or a scent-free environment (for people with chemical sensitivities), but most employers who did not provide these accommodations reported that such accommodations were never requested.¹¹⁹ A similar pattern, and explanation, emerged in studies comparing large and small private employers, with smaller employers consistently less likely to report various compliance activities.¹²⁰

The ADA requires a large number of changes in routine procedures that can also be used to mark employer compliance. Bruyere tracked ten indicators in the hiring process, ranging from changing where recruiting was conducted, through overcoming communication barriers with technology or interpreters, to modifying tests and medical exams.¹²¹ As with post-hire reasonable accommodations, employers were much more likely to make what they reported to be “easy” changes, like ensuring physical accessibility of the interview site, than to take on communication barriers.¹²² Again, federal employers were much more likely to report providing these accommodations than private employers, apparently because private employers were less aware of how to overcome communication barriers.¹²³

A survey focusing on the private-sector use of adaptive information technologies found that fewer than half of the respondents reported that their organizations had experience in modifying a computer to make it accessible to an employee with a disability.¹²⁴ Respondents employed by large organizations were more likely than those employed by small organizations to report familiarity with assistive technology and accessible Web designs, and to report that their organizations had made modifications to computers and adaptations to work stations.¹²⁵ In general, however, there was a low level of familiarity with assistive technology.¹²⁶ Almost half (46%) were familiar with screen magnifiers, approximately 33% with speech recognition software, about 25% with

118. *Id.* at 17 fig.10.

119. *Id.*

120. Bruyere et al., *supra* note 18, at 203-04.

121. Bruyere, *supra* note 105, at 11, 13 fig.5.

122. *Id.* at 17 fig.10.

123. *Id.* at 14.

124. See Susanne M. Bruyere, William A. Erickson & Sara VanLooy, *Information Technology and the Workplace: Implications for Persons with Disabilities*, 25 DISABILITY STUD. Q. 1, 10 (2005), available at <http://www.dsqsds.org/>.

125. *Id.* at 9-10.

126. See *id.* at 9.

video captioning, about 20% with Braille readers/displays, about 16% with screen readers, and only 13% with accessible Web design.¹²⁷

These studies leave little doubt that employers are generally aware of the ADA and have taken steps to meet its requirements. They show that employers are making accommodations in hiring processes as well as in the workplace. The studies do not allow confident conclusions about how well these measures are being implemented, or the extent to which people with disabilities have benefited or perceived any benefits. However, Bruyere's respondents report that negative attitudes and lack of information still stand as barriers to the hiring and retention of workers with disabilities, and that smaller employers may need more help to understand and implement the law's requirements.¹²⁸ Not surprisingly, Bruyere recommends more research.¹²⁹

C. Empowerment Effects

The ADA could have a positive impact by empowering workers with more tools for achieving their goals or vindicating their rights. Filing an ADA complaint is one way people could use the law to defend their rights. More than 200,000 individuals filed ADA discrimination claims in the decade after the statute was passed,¹³⁰ but research on how people "use" the law predicts that only a small minority of people with disabilities will invoke the ADA to deal with discrimination.¹³¹ People often use a language of rights to define their social goals and positions,

127. *Id.*

128. Bruyere et al., *supra* note 18, at 200 fig.1, 205. Some scholars believe that contemporary employment discrimination cannot be remedied solely, or even primarily, by punitive enforcement actions, instead they urge instead a cooperative, decentralized, flexible and particularistic model of workplace governance, aimed at enabling employers to deal with discrimination issues in an effective, accountable way. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344-45 (2004); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462-63 (2001). See generally Hans Zacher, *Juridification in the Field of Social Law*, in JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW 389 (Gunther Teubner ed., 1987) (describing the need for personal effort, commitment, and flexibility in interaction to overcome non-economic disadvantages); Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOUR, CORPORATE, ANTITRUST AND SOCIAL AND WELFARE LAW 389 (G. Teubner ed., 1987) (describing the need for "constitutive" approaches to regulation). On this view, further work with employers to develop effective internal compliance mechanisms is crucial to the success of the ADA.

129. Bruyere, *supra* note 105, at 29.

130. Moss et al., *supra* note 37, at 2.

131. Moss et al., *supra* note 20, at 308.

and disadvantaged groups and their advocates often see the defining of rights as a policy solution to social problems. At the same time, research has consistently shown that Americans are loath to sue,¹³² and that civil rights laws are among the least often invoked.¹³³ Research on the ADA suggests that people with disabilities conform to this pattern of law avoidance, not simply because they are unaware of the law or unable to get a lawyer, but because filing a complaint implicates a variety of deep social and psychological issues.¹³⁴

Just as organizations may comply with the law without active enforcement, individuals may “rely” on the law in their own strategies for daily living without formally invoking it.¹³⁵ An important study by Engel and Munger explored this concept in the ADA context.¹³⁶ Detailed life-history interviews with sixty individuals with a variety of disabilities found at least three ways in which the ADA was changing their lives, apart from litigation:

First, rights can change the self-perceptions of individuals with disabilities, enabling them to envision more ambitious career paths by incorporating in their plans the reasonable accommodations and the nondiscriminatory treatment guaranteed by the ADA. . . . Second, ADA rights become active through cultural and discursive shifts even when rights do not directly transform an individual’s self-perceptions. By becoming part of everyday speech, thought, and action, ADA rights affect the way others perceive individuals with disabilities as employees. . . . Third, ADA rights may become active through institutional transformations that are not directed at any particular individual. . . . [R]ights are sometimes implemented unilaterally by . . . employers, rather than through advocacy by the rights-bearers themselves.¹³⁷

132. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 14-15 (1983).

133. DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 3 (2003); see BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 138 (1974).

134. See David M. Engel & Frank W. Munger, *Re-Interpreting the Effect of Rights: Career Narratives and the Americans with Disabilities Act*, 62 OHIO ST. L.J. 285, 330-31 (2001); Moss et al., *supra* note 20, at 308; David M. Studdert, *Charges of Human Immunodeficiency Virus Discrimination in the Workplace: The Americans with Disabilities Act in Action*, 156 AM. J. OF EPIDEMIOLOGY 219, 224-27 (2002).

135. Burris & Moss, *supra* note 15, at 34-36.

136. ENGEL & MUNGER, *supra* note 133.

137. *Id.* at 243-44 (citation omitted).

While difficult to quantify, these “empowerment effects” must be seen as among the most important forms of impact that a civil rights statute can have. The Engel and Munger study, although qualitative, offers intriguing suggestions that the ADA may be working through these mechanisms.¹³⁸ Bruyere’s work, along with some unpublished studies, has found signs that people with disabilities are reluctant to ask for accommodations.¹³⁹ Further research along these lines would be valuable.

III. RETHINKING THE “CAUSE” OF THE EFFECTIVENESS OF TITLE I

Relating changes in the employment situations of people with disabilities to Title I is not a straightforward matter. We can, however, reduce uncertainty, and guide reasonable inferences about cause and effect, by clearly specifying how the ADA has been applied and identifying factors that might confound its intended effects. In this section we will discuss two key factors: judicial interpretation of the statute’s terms, and how the law has been implemented in courts and administrative enforcement agencies. The former has been the subject of much debate. The latter has been given far too little attention.

A. *Title I in the Courts: Narrowing the Protected Class*

Title I did not purport to protect everyone with a disability, but only those who met its definition of a “qualified person with a disability.”¹⁴⁰ Many proponents of the ADA have argued that Congress intended the definition to be liberally applied, as it had been under the Rehabilitation Act, so that even substantial accommodations would be deemed “reasonable” to encourage the inclusion of low-functioning people with disabilities, and so that “impairment” and “major life activity” would be liberally construed to ensure that qualified individuals did not suffer employment discrimination simply because of prejudice, fear, or

138. *See id.* at 244-45.

139. Bruyere et al., *supra* note 18, at 199 tbl.2; David Clayton Baldrige, *The Everyday ADA: The Influence of Requesters’ Assessments on Decisions to Ask for Needed Accommodation* (2001) (unpublished Ph.D. dissertation, University of Connecticut) (on file with authors); John Jay Frank, *The Avoidance of Help-Seeking: A Study of the Experiences of Persons with Severe Visual Impairment with the Americans with Disabilities Act (ADA) Accommodation Request Process for Print Access* (2003) (unpublished Ph.D. dissertation, Syracuse University) (on file with authors).

140. 42 U.S.C. § 12112(a) (2000).

outdated stereotypes.¹⁴¹ Over the last fifteen years, however, the Supreme Court has led the federal courts in interpreting Title I narrowly.¹⁴² In the following subsections, we will summarize the Court's main rulings and review the data on case outcomes.

1. Supreme Court Decisions: Narrowing the Protected Class

Membership in the protected class, a virtual non-issue under other discrimination statutes where a plaintiff's status is obvious (for example, race or gender under Title VII of the Civil Rights Act of 1965,¹⁴³ or age under the Age Discrimination in Employment Act),¹⁴⁴ has been the single most litigated issue in ADA cases. Even under prior law, the status of a plaintiff as "disabled" was required to be determined in an "individualized inquiry," but as the ADA case law developed, the notion that disability determinations must be made on a case-by-case basis took on a decisive importance.¹⁴⁵ Under this approach, a *person* is found to be disabled; conditions are not categorical disabilities.¹⁴⁶ Thus, it is not enough for a plaintiff to show that she has a condition, such as epilepsy or carpal tunnel syndrome, that is commonly considered a disability. Rather, she must prove to the court exactly how this condition constitutes a substantial limitation of a major activity in her own life, and yet does not prevent her from doing the job at issue.¹⁴⁷

Many conditions—such as diabetes, hypertension, and depression—have been found to meet the definition of impairment under the law, but are controllable through medication so that, at least most of the time, their effects on daily life are minimal.¹⁴⁸ In a trio of important

141. See Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 450-53 (1997) (citing H.R. REP. NO. 101-485, at 30 (1990)); Feldblum, *supra* note 45, at 129, 131; cf. Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 445-47, 462-63 (1991).

142. See NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 127.

143. 42 U.S.C. § 2000e-2(a)(1) (2000).

144. 29 U.S.C. § 623(a)(1) (2000).

145. See Feldblum, *supra* note 45, at 140; *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999).

146. See *Albertson's, Inc.*, 527 U.S. at 566-67.

147. See *id.*

148. See *Murphy v. UPS*, 527 U.S. 516, 518, 521 (1999); *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 723-24 (8th Cir. 2002); *Duncan v. Convergys Corp.*, No. 1:03CV35DAK, 2004 WL 2358104, at *3, *5 (D. Utah Oct. 13, 2004) (citing 42 U.S.C. § 12102(2)(2000)).

cases involving nearsightedness,¹⁴⁹ hypertension,¹⁵⁰ and monocular vision,¹⁵¹ the Supreme Court held that mitigating, or corrective, measures should be considered in determining whether an individual has a disability under the ADA.¹⁵² Under this interpretation, an employer may discriminate against someone because he has, for example, diabetes, but as long as the victim is successfully controlling his condition with medication he has no recourse under the ADA.¹⁵³ Of course, if the employee is *not* controlling the condition he not only suffers symptoms but also may find himself excluded from coverage under the ADA because he is too impaired to do the job, even with a reasonable accommodation.

The Court also took a narrow view of the “regarded as” prong of the definition. In older cases under the Rehabilitation Act, the Supreme Court attributed this prong to Congress’ concern with protecting people with disabilities against discrimination stemming not only from simple prejudice, but also from “archaic attitudes and laws” and “the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.”¹⁵⁴ In *Sutton and Murphy*, however, the Court introduced what amounts to a rather difficult “intent” element into the inquiry.¹⁵⁵ The Court required the employee to show not only that the employer regarded the employee as unable to do the job at issue because of disability, but also that the employer had essentially thought out its decision in terms of the primary definition of disability.¹⁵⁶ In *Sutton*, the Court ruled against plaintiffs that were barred from serving as pilots for failing to meet vision requirements that they argued were more stringent than necessary:

Petitioners have failed to allege adequately that their poor eyesight is regarded as an impairment that substantially limits them in the major life activity of working. They allege only that the respondent regards their poor vision as precluding them from holding positions as a “global airline pilot.” . . . Because the position of global airline pilot

149. See *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 475, 482 (1999).

150. See *Murphy*, 527 U.S. at 518, 521.

151. See *Albertson’s, Inc.*, 527 U.S. at 559, 565 (citing *Sutton*, 527 U.S. at 482).

152. See *id.* at 565 (citing *Sutton*, 527 U.S. at 482); *Murphy*, 527 U.S. at 521; *Sutton*, 527 U.S. at 482.

153. See *Sutton*, 527 U.S. at 488.

154. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987) (quoting S. REP. NO. 93-1297, at 50 (1974)).

155. See *Murphy*, 527 U.S. at 521-22; *Sutton*, 527 U.S. at 489.

156. See *Sutton*, 527 U.S. at 489.

is a single job, this allegation does not support the claim that respondent regards petitioners as having a substantially limiting impairment.¹⁵⁷

The mechanic in *Murphy* had been doing his job with excellent performance ratings for years, but was fired because his hypertension barred him from getting a Department of Transportation truck-driver's license that his employer generally required mechanics to possess.¹⁵⁸ *Murphy* showed that he did not actually need to drive in his work, but failed to show the employer "regarded him" as disabled because there was no evidence the employer thought he was too disabled to do any job other than the one that required the license.¹⁵⁹ In both cases, people were fired because of impairments that the employer believed precluded them from the job they had but were not protected by the ADA because they could not prove that the employer thought about their fitness for a wide range of other similar jobs.¹⁶⁰

The Supreme Court's rulings have restricted the definition of a "qualified person with a disability" in other significant ways. In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,¹⁶¹ there was no dispute that the plaintiff had suffered from carpal tunnel syndrome for many years, had to change job assignments several times because of it, and had trouble with basic manual tasks like gardening, dressing herself, and housework.¹⁶² In holding that her impairment did not substantially limit a major life activity, the Court ruled that the word "substantially" excluded "impairments that interfere in only a minor way" with such an activity, and narrowed "major life activity" to mean one that is "of central importance to daily life."¹⁶³ Despite her undisputed impairment, and the demonstrable limitations it created, the plaintiff failed to qualify as disabled because "she could still brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house."¹⁶⁴

For many people with disabilities, medication, devices, adaptability, and sheer grit can mean that they are not in fact

157. *Id.* at 492-93 (citation omitted) (citing 29 C.F.R. § 1630.2(j)(3)(i) (2006)).

158. *Murphy*, 527 U.S. at 519-20 (citing 49 C.F.R. § 391.41(a), (b)(6) (2006)).

159. *Id.* at 524-25.

160. *Id.* at 520, 525; *Sutton*, 527 U.S. at 475-76, 490.

161. 534 U.S. 184 (2002).

162. *Id.* at 187-88, 202.

163. *Id.* at 197 (emphasis added) (citing *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1363 (1976)).

164. *Id.* at 202 (citation omitted).

substantially limited in the activities of daily life. For them, the real barrier to participation in employment may be prejudice or stereotype, meaning that when they suffer discrimination the only “major life activity” their impairment has limited is work itself, and then only because of the attitudes or actions of others. Under prior law, and in the early days of the ADA, “working” seemed to be well accepted as a major life activity, but in *Sutton*, *Murphy*, and *Williams*, the Supreme Court cast serious doubt on this acceptance, suggesting that if the only activity that is impaired is working, the plaintiff will need to show that she is “unable to work in a broad class of jobs.”¹⁶⁵ In the words of the National Council on Disability (NCD),

[t]here are extensive examples of situations in the case law in which plaintiffs have been fired, refused employment, or otherwise disadvantaged in the workplace because of their actual or perceived impairments but have been unable to bring ADA actions because they could not meet what one federal court of appeals called [that] “weighty showing.”¹⁶⁶

2. Lower Court Decisions: Few Plaintiff Victories

The effect of narrowing Supreme Court and courts of appeals rulings can clearly be seen in the outcomes of reported ADA cases. A series of annual studies conducted by the editors of the *Mental and Physical Disability Law Reporter* analyzed Title I final case decisions in federal courts.¹⁶⁷ The studies have highlighted how rarely plaintiffs secure a favorable court judgment or jury verdict in published ADA

165. *Toyota*, 534 U.S. at 200 (citing *Sutton*, 527 U.S. at 492); *Murphy*, 527 U.S. at 523 (citing 29 C.F.R. § 1630.2(j)(3)(i) (2006); *Sutton*, 527 U.S. at 492).

166. NATIONAL COUNCIL ON DISABILITY, *supra* note 2, at 51.

167. Amy L. Allbright, *Special Features: 2000 Employment Decisions Under the ADA Title I—Survey Update*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 508, 508 (2001); Amy L. Allbright, *Special Features: 2001 Employment Decisions Under the ADA Title I—Survey Update* 26 MENTAL & PHYSICAL DISABILITY L. REP. 393, 394 (2002); Amy L. Allbright, *Special Features: 2002 Employment Decisions Under the ADA Title I—Survey Update*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 387, 387 (2003); Amy L. Allbright, *Special Features: 2003 Employment Decisions Under the ADA Title I—Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 319 (2004); Amy L. Allbright, *Special Features: 2004 Employment Decisions Under the ADA Title I—Survey Update*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 513, 513 (2005); John W. Parry, *Highlights & Trends: Employment Decisions Under ADA Title I—Survey Update*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 290, 294 (1999); John W. Parry, *Highlights & Trends: 1999 Employment Decisions Under the ADA Title I—Survey Update*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 348, 348 (2000).

decisions.¹⁶⁸ Taking into account reversals on appeal, the plaintiff success rate in these cases ranged from just under 8% between 1992 and 1997, to as low as 3% in 2002-2004.¹⁶⁹ Professor Colker's study of published appellate decisions found that courts ruled in favor of defendants 94% of the time.¹⁷⁰ Courts of appeals reversed pro-defendant outcomes in trial courts only 21% of the time in Title I cases, compared to rates of 26% to 48% in other types of cases Colker reviewed.¹⁷¹ There was a similar gap in appellate reversals of trial court decisions in favor of plaintiffs: in ADA cases, plaintiff trial court victories were reversed 60% of the time, compared to a range of 33% to 52% in other types of cases.¹⁷² Only prisoners challenging their conditions of confinement were more likely than Title I plaintiffs to have a win reversed (69%).¹⁷³

3. Case Outcomes Through Settlements: Benefits for Many Plaintiffs

While the studies of published Title I decisions demonstrate the impact of the narrow judicial interpretation of the law, reported case decisions are not a reliable indicator of overall outcomes because most lawsuits are settled without a reported decision. Since settlements are voluntary, we presume that most of them entail some sort of payment or other benefit to the plaintiff. Moss and her colleagues collected data from federal court files, on a nationally representative sample of 4114 lawsuits filed between 1993 and March 31, 2001, and linked the cases with administrative data obtained from the EEOC.¹⁷⁴ Of the 3624 federal court cases with identifiable outcomes, 2219 (61%) were classified as settlements.¹⁷⁵ These findings are consistent with an earlier

168. E.g., Amy L. Allbright, *Special Features: 2001 Employment Decisions Under the ADA Title I—Survey Update*, 26 MENTAL & PHYSICAL DISABILITY L. REP. 393, 394 (2002); John W. Parry, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 403-04 (1998).

169. Amy L. Allbright, *Special Features: 2004 Employment Decisions Under the ADA Title I—Survey Update*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 513, 513 (2005).

170. Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 240 (2001).

171. *Id.* at 253.

172. *Id.*

173. *Id.* at 254 tbl.5.

174. Moss et al., *supra* note 20, at 303-04.

175. *Id.* at 305. This included 1397 cases (38.5%) in which the docket explicitly mentioned settlement and 822 (22%) where settlement was inferred from the docket file information as a whole. *Id.* Combining court rulings and settlements, the researchers found that up to 62% (n= 2266) of the sample lawsuits may have brought some benefit to the plaintiffs. *Id.* For more of the details of the analysis, see *id.*

study of ADA cases in one judicial district.¹⁷⁶ The study confirmed that plaintiffs lose most cases that are decided by a judge on motions to dismiss or on motions for summary judgment.¹⁷⁷ Its finding that ADA plaintiffs whose cases go to trial do as well as other civil rights plaintiffs supports the view that the narrow definition of disability is the main doctrinal factor driving the low success rate for plaintiffs.¹⁷⁸

The Moss et al. study also indicated that the vast majority of people who were eligible to file a Title I lawsuit in federal court did not invoke this right.¹⁷⁹ During the period covered by the study, 201,371 Title I charges filed with the EEOC or a state or local Fair Employment Practice Agency (FEPA) were not resolved to the charging parties' satisfaction and were, therefore, eligible to be filed as lawsuits.¹⁸⁰ The researchers estimated that only 27,725 lawsuits were actually filed, meaning that up to 87% of employment claims filed with state and federal agencies were abandoned without a resolution.¹⁸¹ The administrative process does serve a screening function, sparing the courts the labor of dealing with unsupported allegations, but the sheer volume of abandoned cases points to another important set of problems in the implementation of Title I, which we turn to next.

B. *The Title I Enforcement System: Implementation Problems*

Title I is enforced by the same agencies, and under the same procedures, as the nation's other employment discrimination laws.¹⁸² People who believe they have been discriminated against in employment on the basis of a disability may file an administrative charge with the EEOC, or a state or local Fair Employment Practice Agency that contracts with the EEOC, which initiates an administrative dispute resolution process.¹⁸³ If the administrative process fails to produce a satisfactory result, the worker can file an ADA lawsuit in state or federal

176. Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEM. POL. & CIV. R. L. REV. 345, 363 (2000).

177. *See id.*

178. *See id.* at 363-64.

179. *See Moss et al., supra* note 20, at 304-05.

180. *See id.* at 305.

181. *Id.*

182. Rulli, *supra* note 176, at 385.

183. Moss et al., *supra* note 37, at 29 n.147 (citing JOYCE E. TUCKER, REPORT OF THE TASK FORCE ON FAIR EMPLOYMENT PRACTICE AGENCIES (1995)).

court.¹⁸⁴ Chronic under-funding of the EEOC, in the face of ever-growing workloads, has weakened the effectiveness of this enforcement system.¹⁸⁵

1. The Administrative Charge Process

The EEOC has primary enforcement authority for Title I.¹⁸⁶ It contracts with state and local Fair Employment Practice Agencies to help in receiving and investigating employment discrimination charges.¹⁸⁷ In theory, each case is investigated by the agency until it is settled, or a determination is made as to whether the charge is supported by “reasonable cause” to believe that discrimination has occurred.¹⁸⁸ Individuals who want to get to court as quickly as possible can short-circuit the administrative process by asking for a “right to sue” letter.¹⁸⁹ The EEOC can take unresolved cases to court on its own initiative either alone or in collaboration with a complainant’s attorney.¹⁹⁰

In fact, the EEOC has never been able to investigate all, or even most, complaints. It has had a backlog of cases since its earliest days, a backlog that by 1993, one year after Title I took effect, had reached 96,945 cases.¹⁹¹ Shortly after the ADA was enacted, the EEOC tried to deal with its backlog with a new system of intake triage.¹⁹² Based on the complainant’s initial submission, new cases were separated into three categories: clearly meritorious (“A”) cases, clearly unsupported (“C”) cases, or cases whose merits could only be determined after further investigation (“B”).¹⁹³ The agency made substantial progress in reducing case-processing time, decreasing the inventory of charges awaiting resolution, focusing investigative resources onto cases it believed to be strong, increasing its rate of “reasonable cause”

184. *Id.* at 35 (citation omitted).

185. *See id.* at 3.

186. *Id.* at 19.

187. *Id.* at 45.

188. *Id.* at 38.

189. *Id.* at 35.

190. *Id.* at 40.

191. *Id.* at 19; *Burgeoning Workload Calls for New Approaches: Hearing on GAO/T-HEHS-95-170 Before the Comm. On Labor and Human Resources*, 104th Cong. 7 (1995) [hereinafter *Burgeoning Workload*] (statement of Linda G. Mora, Director, Education and Employment Issues, Health, Education, and Human Resources Division).

192. Moss et al., *supra* note 37, at 3; *Burgeoning Workload*, *supra* note 191, at 8.

193. Moss et al., *supra* note 37, at 20-21 (quoting U.S. EQUAL EMPL. OPPORTUNITY COMM’N, NATIONAL ENFORCEMENT PLAN, ¶¶ 22-24 (1996)), <http://www.eeoc.gov/nep.html>); *Burgeoning Workload*, *supra* note 191, at 8.

determinations, and increasing the monetary benefits received by charging parties. By September 2000, 149,123 charges had been filed and resolved with the EEOC under the ADA, with median benefits of \$6000 per closure.¹⁹⁴

The new system is efficient, but has never been validated for accuracy.¹⁹⁵ The C categorization is probably the most reliable because it depends upon objective factors like whether the employer has enough workers to be covered by the ADA.¹⁹⁶ Approximately 25% of cases are classified as C and quickly dismissed.¹⁹⁷ Categorization as an A case requires a greater “feel” for the facts that make for a strong case.¹⁹⁸ About 17% of cases are put in the A group.¹⁹⁹ The problem with the B category is that inclusion in this category rests on the classifier’s inability to assess the case’s merits without further fact-finding; most cases (57%) are rated B.²⁰⁰ Due to insufficient staff resources, most B cases, and even some A cases, are never seriously investigated, so the fate of a complaint hangs on a subjective rating based only on the information the complainant is able to articulate.²⁰¹ Not surprisingly, good outcomes—settlements with benefits and reasonable cause findings—are highly correlated with the original classification decision.²⁰² In spite of a very successful mediation program targeted at B cases,²⁰³ the majority of possibly meritorious ADA claims filed with the EEOC and FEPAs are never investigated or resolved.²⁰⁴

2. Access to Legal Services

People do not need to retain an attorney to file a claim with the

194. See Moss et al., *supra* note 37, at 42 tbl.1.

195. The EEOC has done some evaluation of the “face validity” of the categorization system, by reviewing randomly selected files against two criteria: “(1) appropriate charge categorization and file documentation to support actions and (2) charge resolution.” EEOC, FY 2005 PERFORMANCE & ACCOUNTABILITY REP. 4, available at http://www.eeoc.gov/abouteeoc/plan/par/2005/achieving_results.html#obj1_1 Given that categorization determines investigation, the EEOC’s approach does not test the most important measure: whether a case would still be categorized B or C on a more fully developed factual record.

196. See Moss et al., *supra* note 37, at 22.

197. *Id.* at 32-33.

198. See *id.* at 22.

199. *Id.* at 33.

200. See *id.* at 33, 102.

201. See *id.* at 34.

202. *Id.* at 59.

203. See Kathryn Moss et al., *Mediation of Employment Discrimination Disputes Involving Persons with Psychiatric Disabilities*, 53 PSYCHIATRIC SERVICES 988, 988, 990 (2002).

204. Moss et al., *supra* note 37, at 34, 59, 68.

EEOC or a FEPA, nor does having an attorney during the administrative process raise the chances of resolving the case.²⁰⁵ The overall benefit rate for individuals with attorneys (17.2%) was nearly identical to the overall benefit rate for individuals without attorneys (17.1%).²⁰⁶ Having an attorney does have a significant effect on the size of monetary settlements.²⁰⁷ Median actual monetary benefits for individuals with attorneys were significantly higher (\$19,750) than for individuals without attorneys (\$4482).²⁰⁸ Median projected monetary benefits (mainly “front pay” or wage increases) were \$19,500 for represented parties, compared to \$16,200 for individuals without attorneys.²⁰⁹

An inability to get legal help is probably one of the most important factors in the huge rate of claim abandonment between the administrative and judicial systems. People with attorneys during the EEOC/FEPA stage had significantly higher right-to-sue resolutions (31.4%) than individuals without attorneys (7.4%).²¹⁰ Most (85%) Title I plaintiffs in suits brought in federal court had attorneys, and those with attorneys had much better court results: the proportion of cases that were settled or decided for the plaintiff were approximately three times higher among plaintiffs who were represented by an attorney than among those representing themselves (68% vs. 23%, $p < 0.0001$).²¹¹

3. ADA Complainants with Psychiatric Disabilities

Among the most troubling findings of ADA implementation research has been the difference in experiences and outcomes for people with psychiatric disabilities. People with psychiatric disabilities were less likely than people with other disabilities to have a case classified as “A” by the EEOC, and less likely than others to have a case resolved with benefits, even when controlling for categorization.²¹² They were slightly, but significantly, less likely to be referred by the EEOC to mediation, and employers were significantly less likely to agree to take part in mediation.²¹³

205. *Id.* at 98.

206. *Id.*

207. *Id.* at 100.

208. *Id.*

209. *Id.*

210. *Id.*

211. Moss et al., *supra* note 20, at 307.

212. Michael D. Ullman et al., *The EEOC Charge Priority Policy and Claimants with Psychiatric Disabilities*, 52 PSYCHIATRIC SERVICES 644, 648 (2001).

213. Moss et al., *supra* note 203, at 990.

Once in court, people with psychiatric disabilities were significantly less likely than people with other disabilities to feel that they were “treated with respect,” that the judge was “fair to both sides,” and that they were satisfied, overall, with their experience of filing a lawsuit.²¹⁴ These differences in perception corresponded to the actual differences in outcomes of the lawsuits filed by the two groups of plaintiffs. Plaintiffs with psychiatric disabilities were only half as likely as those with other disabilities to receive a settlement or favorable court decision, even when controlling for important co-factors such as health status, education, and having a lawyer.²¹⁵ These data raise the possibility of “justice disparities” in the ADA enforcement system, which are durable differences in outcomes between cases brought by people with psychiatric disabilities and those brought by people with other disabilities that are not attributable to differences in the legal and factual merits of the cases.²¹⁶

CONCLUSION

The time has come for Congress to revisit the ADA and evaluate how well the law has kept the promises it made in 1990. Title I has not substantially improved employment rates among people with disabilities.²¹⁷ In part, this is because Congress promised more than it could deliver, or was prepared to pay for. Although the preamble spoke of improving economic opportunity for tens of millions of Americans with a wide range of disabilities,²¹⁸ Title I actually extended protection only to those who needed the least help. Substantially increasing employment opportunities for people with more substantial disabilities will require a more comprehensive effort to integrate non-discrimination policies with a wide range of others, including income supplements, health insurance, health care services, and employer tax benefits. Even for those the statute protected, Congress dropped the ball by failing to give the EEOC the funds to handle the new cases Title I brought forth.

The broken promises of the ADA also reflect the federal courts’

214. Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People with Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94, 107 (2006).

215. *Id.* at 108, 110.

216. See generally Baldwin & Marcus, *supra* note 62 (reporting differences in wages and employment for people with psychiatric disabilities versus those without disabilities, and attributing at least some of this to stigma).

217. See *supra* notes 62-67 and accompanying text.

218. See 42 U.S.C. § 12101 (2000).

narrow construction of the definition of disability and other key elements of the law. The protected class under Title I never included people who could not work, even with a reasonable accommodation. The courts, through a narrow construction of the statute, have now excluded a large proportion of people with disabilities who can work, and who suffer discrimination due to a physical or mental impairment, on the ground that they are not disabled enough to be protected by the ADA. Only Congressional action can redress this problem, and any new law on the books, without greater funding and capacity for enforcement, will be another hollow promise.

In the face of these findings, it is useful to heed the reminder that “[l]egal protections from discriminatory practice are probably indispensable, but such guarantees cannot be the only strategy toward ending the discrimination and social exclusion faced by Americans with disabilities.”²¹⁹ The ADA stands as a long-term commitment to integrating people with disabilities into the main stream of American life. The agencies, courts, lawyers, and employers responsible for fulfilling Congress’ promise can do better, and more, but only in the context of a broader social change in attitudes about, and behavior towards, people with disabilities.

219. Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 222 (2000).