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The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation

Samuel R Bagenstos

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THE PERVERSITY OF LIMITED CIVIL RIGHTS REMEDIES: THE CASE OF "ABUSIVE" ADA LITIGATION

Samuel R. Bagenstos*

In the past two decades, business groups and their political allies have often criticized broad civil rights remedies—particularly the availability of money damages—as encouraging abusive and extortionate litigation practices. In its decision in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, *the U.S. Supreme Court seemed to heed those arguments when it rejected the catalyst theory for recovery of statutory attorneys' fees. As many commentators have pointed out, these limits on remedies are likely to undermine the enforcement of civil rights laws. That criticism is correct as far as it goes, but it ignores an important part of the story. Limitations on civil rights remedies do not simply reduce the number of cases that get brought. They also change the character of the cases that get brought. In particular, limitations on remedies may themselves create an incentive for conduct that appears to defendants as abusive. Civil rights advocates may even confront a vicious cycle: Concern with abusive litigation motivates the adoption of limitations on remedies; those limitations lead plaintiffs' lawyers to engage in litigation conduct that appears even more abusive; the newly energized perception of abuse motivates adoption of even more limitations; and so on. This Article illustrates these points by examining an important ongoing issue: the controversy over serial Americans with Disabilities Act (ADA) public accommodations litigation. The ADA's public accommodations title is massively underenforced, and the limitations on remedies for violations of that title are the most likely culprit. But the litigation conduct that courts, members of the U.S. Congress, and business groups have labeled abusive also grows out of the statute's remedial limitations.*

I. WHY LIMITATIONS ON REMEDIES PRODUCE SERIAL ADA LITIGATION 7
A. Why Businesses Do Not Comply Voluntarily 7
B. The Importance of, but Weak Incentives for, Private Enforcement 9
C. Why Serial ADA Suits Occur 13

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II. THE MISGUIDED CASE AGAINST SERIAL ADA LITIGATION.....16
A. The Notice Argument.....16
B. The Burdensome Litigation Argument.....21
C. The Outside Agitator Argument.....26
III. AMBIVALENCE ABOUT CIVIL RIGHTS LITIGATION.....31
CONCLUSION.....37

In the past two decades, business groups and their political allies have often criticized broad civil rights remedies—particularly the availability of money damages—as encouraging abusive and extortionate litigation practices.[1] They have thus fought to limit the remedies available for violations of civil rights laws—with limited success in the enactment of the Civil Rights Act of 1991,[2] and with greater success in the enactment of the public accommodations title of the Americans with Disabilities Act of 1990 (ADA).[3] In its decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,[4] the U.S. Supreme Court seemed to heed those arguments when it rejected the "catalyst theory" for

1. *See, e.g.*, H.R. REP. NO. 102-40 pt. 1, at 124 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 653 (minority views in opposition to the Civil Rights Act of 1991, arguing that the addition of a damages remedy for employment discrimination would create "a litigation generating machine which will only benefit lawyers of both the defense and plaintiff bars"); H.R. REP. NO. 102-40, pt. 2, at 52, 73 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 737, 759 (dissenting views of Rep. Henry J. Hyde et al., opposing the Civil Rights Act of 1991, and arguing that a damages remedy for employment discrimination "will lead to a dramatic increase in title VII litigation" and "benefit no one but lawyers") (citation omitted); Miriam Horn, *Sex and the CEO*, U.S. NEWS & WORLD REP., July 6, 1998, at 32 ("Most employment lawyers believe that the number of spurious sexual-harassment claims has increased since the Civil Rights Act of 1991 allowed for jury trials and compensatory damages, and 'ambulance chasing' jumped in."); Allen R. Myerson, *As Federal Bias Cases Drop, Workers Take Up the Fight*, N.Y. TIMES, Jan. 12, 1997, at A1 ("[C]orporate lawyers and business groups, while granting that some bias persists, say the 1991 law has spawned many frivolous suits and inflated awards.").

2. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 2, 42 U.S.C.); *see* 42 U.S.C. § 1981a(b)(3) (2000) (allowing recovery of damages in employment discrimination cases, but capping them at an amount between $50,000 and $300,000, depending on the size of the employer); Statement of President George Bush Upon Signing S. 1745, Pub. L. No. 102-166, 1991 U.S.C.C.A.N. 768, 769 (noting that the Civil Rights Act of 1991, as enacted, "adopts a compromise under which 'caps' have been placed on the amount that juries may award").

3. Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 29, 42, 47 U.S.C.); *see* 42 U.S.C. § 12188(a)(1) (incorporating by reference the remedial provisions governing Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a), which authorizes private plaintiffs to seek injunctive relief but not damages); RUTH COLKER, THE DISABILITY PENDULUM 172–74 (2005) (discussing the "fragile compromise" under which supporters of the ADA agreed to accept a statute that did not authorize the recovery of damages for violations of the public accommodations title).

4. 532 U.S. 598 (2001).

recovery of statutory attorneys' fees.[5] In concluding that plaintiffs' attorneys should not be able to recover fees in cases where defendants voluntarily abandon challenged practices, the *Buckhannon* Court was motivated at least in part by a concern that broader fee recovery would create a tool for "extortio[n]" by lawyers filing nuisance suits.[6]

As many commentators have pointed out, these limits on remedies are likely to undermine the enforcement of civil rights laws. Much criticism of *Buckhannon*, in particular, has homed in on the decision's likely enforcement-suppressing effect.[7] That criticism is correct as far as it goes, but it ignores an important part of the story. Limitations on civil rights remedies—like the bar to damages recovery in the ADA's public accommodations title and the rejection of the catalyst theory in the *Buckhannon* decision—do not simply reduce the *number* of cases that are brought. They also change the *character* of the cases that are brought. In particular, limitations on remedies may themselves create an incentive for conduct that appears to defendants as abusive. This may even create a vicious cycle for civil rights advocates: Concern with abusive litigation motivates the adoption of limitations on remedies; those limitations lead plaintiffs' lawyers to engage in litigation conduct that appears even more abusive; the newly energized perception of abuse motivates adoption of even more limitations; and so on.

In this Article, I illustrate these points by examining an important ongoing issue: the controversy over serial ADA public accommodations litigation. More than fifteen years after the enactment of the ADA, violations of the statute's public accommodations title remain, by all accounts, widespread. In an effort to open all areas of social, economic, and civic life to people with disabilities,[8] that title requires retail stores and service providers to make their premises accessible to individuals with disabilities. Newly constructed or renovated facilities must be fully accessible,[9] and facilities that predate the statute's enactment must be made

5. *Id.* at 602–10. The "catalyst theory," which was the law in all but one circuit before *Buckhannon*, permitted a plaintiff to recover attorneys' fees when she "achieve[d] the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601.

6. *Id.* at 618 (Scalia, J., concurring).

7. *See* Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 547 (2003); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 207–08; Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 388–90 (2002); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 243–45 (2003).

8. *See* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 419 (2000).

9. *See* 42 U.S.C. § 12183(a) (2000).

accessible where doing so is "readily achievable."[10] But testimony from advocates across the country affirms that many if not most businesses remain inaccessible, even in circumstances where it would be easy to remove barriers.[11] Studies also reveal that the ADA has not significantly increased (and in some respects may have decreased) the percentage of people with disabilities who are participating in public, civic, and economic activities.[12] And a strong consensus is emerging among experts that the ADA's public accommodations title is underenforced.[13]

For many federal judges, however, widespread violations of a fifteen-year-old law appear to be of less significance than the motives of the relatively few individuals who are seeking to enforce that law. A handful of plaintiffs and lawyers have each brought dozens, hundreds, or even thousands of suits challenging inaccessible stores and restaurants.[14]

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10. *Id.* § 12182(b)(2)(A)(iv); *see also id.* § 12181(9) (defining "readily achievable" as meaning "easily accomplishable and able to be carried out without much difficulty or expense").

11. *See, e.g.*, *ADA Notification Act: Hearing Before the Subcomm. on the Constitution of the H. Comm on the Judiciary*, 106th Cong. 49 (2000) [hereinafter *Hearing*] (statement of Rick A. Shotz, ADA Consulting Associates, Ft. Lauderdale, Fla.) ("[P]robably less than one building in 10 that is a public accommodation is compliant with the ADA."); Lindsay Bernstein, Op-Ed., *Marshall Street Discriminates Against Physical Disabilities*, DAILY ORANGE (Syracuse, N.Y.), Nov. 14, 2005, *available at* http://www.dailyorange.com/news/2005/11/14; Jen McCaffery, *Downtown Barriers*, ROANOKE TIMES, Nov. 13, 2005, at A1, http://www.roanoke.com/news/roanoke/wb/xp-40435; *Most Cedar City Businesses Violate Disability Act*, KSL.COM, Nov. 13, 2005, http://www.ksl.com/?sid=128321&nid=148; The Gimp Parade, http://thegimpparade.blogspot.com/2005/03/jared-molski-and-me.html (Mar. 11, 2005, 15:47 EST).

12. *See* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1832–34 (2005). For a discussion of the ambiguous effects of the ADA in the employment sector, which is not my focus in this Article, see Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527 (2004).

13. *See* COLKER, *supra* note 3, at 188; Waterstone, *supra* note 12, at 1853–59.

14. *See, e.g.*, Molski v. Mandarin Touch Rest., 359 F. Supp. 2d 924, 926 (C.D. Cal. 2005) (stating that one of two individual plaintiffs had "filed more than 400 federal lawsuits" under the ADA since 1998, the other had filed 36 such lawsuits, and plaintiff's law firm had "filed at least 223" such lawsuits); Brother v. Tiger Partner, LLC, 331 F. Supp. 2d 1368, 1369 (M.D. Fla. 2004) (stating that plaintiff, almost always represented by the same lawyer, had filed "at least fifty-four" ADA public accommodations suits); Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1281 n.10 (M.D. Fla. 2004) (stating that in the previous three years "579 [public accommodations] cases have been filed by only five organizations (and a few of their associated members)," that the individual plaintiff had filed eleven such cases during the same period, and that the plaintiff's lawyer had been counsel in seventy-five such cases during that period); Matt Krasnowski, *Flood of ADA Lawsuits Irks Small Businesses*, SAN DIEGO UNION-TRIB., Sept. 12, 2004, at A-4 (stating that Jarek Molski had been the plaintiff in "close to 500" ADA public accommodations suits since 2001 and that George Louie had been the plaintiff in "about 1,000 lawsuits since 1998"); Walter Olson, *The ADA Shakedown Racket*, CITY J., Winter 2004, at 80, 82, 83 (stating that one law firm had "filed more than 100 ADA suits" in the Philadelphia area on behalf of two individual plaintiffs in less than a year, that another attorney had "filed more than 500 lawsuits against shops

Although the ADA does not authorize an award of damages to private plaintiffs for inaccessible public accommodations,[15] these lawsuits (which may result in the imposition of injunctive relief as well as an award of attorneys' fees to prevailing plaintiffs) have understandably been upsetting to many of those named as defendants.

There is good reason to believe that in a large majority of the cases brought by serial ADA plaintiffs, the defendants were in fact violating the statute.[16] But in a large and growing number of cases brought by those plaintiffs, judges have shown little concern for whether the defendants were violating the law. Rather, they have dismissed suits or refused to award attorneys' fees based on what they believe to be the abusive litigation practices of the plaintiffs and their counsel—in particular, the practice of bringing suits against large numbers of businesses, often without providing notice to the defendants before heading for court. Judges have thus picked up on (and given further life to) a set of arguments leveled against "abusive" ADA litigation in the popular discourse. And it is not just judges: A proposal to impose an advance notification requirement on private suits to enforce the ADA's public accommodations title has been introduced in four consecutive Congresses.[17] Congressional hearings on the bill have showcased the support of "Dirty Harry" himself, Clint Eastwood, who has railed against abusive lawyers.[18] And business groups in California recently sought to put a referendum on the ballot that would impose similar requirements on accessibility suits under state law, though they have withdrawn the initiative for now.[19]

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and restaurants in Hawaii on behalf of his octogenarian mother-in-law," and that yet another attorney had "filed more than 200 cases" in California); Kathryn Wexler, *Big Winners in Disabled Crusade? Lawyers*, ST. PETERSBURG TIMES, Mar. 24, 2002, at 1A (stating that one group of plaintiff's lawyers "had filed at least 740" ADA public accommodations cases in the Southern District of Florida since 1998); Posting of Walter Olson to Overlawyered, Chicago's ADA Filing Mill, http://www.overlawyered.com/2004/03/chicagos_ada_filing_mill.html (Mar. 9, 2004, 00:51 EST) (stating that "a lawyer/complainant team has tagged some 175 businesses, mostly in the Lincoln Park area, with charges of lack of disabled accessibility").

15. *See* 42 U.S.C. § 12188(a)(1) (2000). State law in some states, notably California, does authorize the recovery of damages for inaccessibility in public accommodations. *See* CAL. CIV. CODE §§ 52(a), 54.3 (West Supp. 2006); *see also* COLKER, *supra* note 3, at 195–96 (discussing states that provide "some form of compensatory relief").

16. *See infra* text accompanying notes 88–89.

17. *See* H.R. 2804, 109th Cong. (2005); H.R. 728, 108th Cong. (2003); H.R. 914, 107th Cong. (2001); H.R. 3590, 106th Cong. (2000); S. 3122, 106th Cong. (2000). Some judges have expressed support for such legislative action. *See, e.g.*, *Brother*, 331 F. Supp. 2d at 1375 ("[T]he system for adjudicating disputes under the ADA cries out for a legislative solution.").

18. *See Hearing*, *supra* note 11, at 11–12 (statement of Clint Eastwood).

19. *See* Disability Law, http://disabilitylaw.blogspot.com/2006/01/ragged-edge-on-california-opportunity.html (Jan. 10, 2006, 11:24 EST).

In this Article, I argue that the controversy over "abusive" ADA litigation perfectly illustrates the paradoxical effects of limiting civil rights remedies. The ADA's public accommodations title is massively underenforced, and the limitations on remedies for violations of that title are the most likely culprit. But as I hope to show, the litigation conduct that courts, members of the U.S. Congress, and business groups have labeled "abusive" grows out of the statute's remedial limitations. Although some serial ADA plaintiffs and lawyers have engaged in unethical practices—which should be punished through normal disciplinary proceedings—judges are wrong to accord (negative) legal significance to the fact that a plaintiff or a lawyer has brought a large number of cases. Serial litigation is a natural result of the limitations on remedies under the statute's public accommodations title. Further, members of Congress are wrong to think—and business groups are wrong to assert—that the primary effect of an advance notification requirement would be to enhance voluntary compliance with the ADA. The failure to provide notice, too, is a natural result of the limitations on remedies under the statute. If plaintiffs' attorneys provided presuit notice, businesses could easily render cases nonjusticiable—and deprive the attorneys of a fee recovery—simply by making their premises accessible before or during the pendency of litigation.

This Article has three parts. In Part I, I explain why the limits on remedies for violation of the ADA's public accommodations title—including the unavailability of damages and *Buckhannon*'s rejection of the catalyst theory—are likely to engender serial litigation. In Part II, I argue that, when the incentive effects of the ADA's limited remedies are taken into account, the current attack on serial ADA litigation is misplaced. Finally, in Part III, I argue that the criticism of serial ADA litigation stems from an ambivalence toward the notion that lawyers should make a living bringing civil rights cases. Civil rights litigation generally—and disability rights litigation particularly—is thought of as an essentially charitable enterprise, which the profit motive perverts. That view, which is remarkably persistent, fails to appreciate the need to enlist the private, profit-making bar if civil rights statutes are to be fully enforced.

I. WHY LIMITATIONS ON REMEDIES PRODUCE SERIAL ADA LITIGATION

In this part, I discuss the incentives that operate on plaintiffs, defendants, and plaintiffs' counsel in ADA public accommodations litigation. Consideration of these incentives shows that serial litigation without presuit notice is a natural response to the limits Congress and the Supreme Court have imposed on the remedies available under the statute. If the ADA's public accommodations title is to be enforced to any significant extent under currrent law, serial litigation is probably essential. In Subpart A, I argue that businesses will not comply with the ADA's accessibility requirements unless they face a realistic threat that those requirements will be enforced. In Subpart B, I argue that enforcement by private lawyers is essential to creating such a threat, but that the incentives for private enforcement are weak. Finally, in Subpart C, I argue that, given the existing incentives, accessibility suits are likely to be brought by serial plaintiffs without presuit notice—even if all a plaintiff's counsel wants to do is remove barriers to access and get paid for her successful efforts in achieving that goal.

A. Why Businesses Do Not Comply Voluntarily

Supporters of the ADA frequently contend that the statute's requirement of accessible public accommodations serves the interests of business by opening up a new market.[20] It is undeniable that accessibility does increase a business's pool of potential customers. And the ADA's requirements in this context are not particularly costly: In new construction, where it is relatively cheap to do so, the statute requires full accessibility;[21] in existing buildings, where accessibility may be onerous to achieve, the statute requires the removal of barriers only where removal does not entail "much difficulty or expense."[22] One might therefore ask why it was necessary to legislate accessibility: Won't businesses rationally want to remove barriers to access?

For a variety of reasons, however, operators of public accommodations may not voluntarily make their facilities accessible. Even if accessibility is

20. *See, e.g.*, COLKER, *supra* note 3, at 184 ("A restaurant that can serve customers who use wheelchairs will also add to its patronage not only from individuals with disabilities but also from the friends and families of those individuals.").

21. *See* 42 U.S.C. § 12183(a) (2000).

22. *Id.* §§ 12181(9), 12182(b)(2)(A)(iv).

completely rational from the perspective of a business, the owner may lack sufficient information: She may erroneously assume that barrier removal is more expensive than it is, or she may underestimate the amount of new patronage that would result from making her business accessible.[23] The owner's assessment of the costs and benefits of accessibility may be skewed by prejudice against or stereotyping of people with disabilities, even if the prejudice or stereotyping is unconscious.[24]

Barrier removal might not even be rational from the perspective of a particular business. The costs of making a business accessible, while small, might not be matched by increased patronage from individuals with disabilities. One might expect that a business that is the first mover in making its premises accessible could reap significant advantages by cornering the market on customers with disabilities. But those advantages might not be readily realized in practice. Given the availability of phone or internet shopping and the possibility of asking or paying someone else to go to the store, an individual with a disability may not find it worth her while to expend the time and effort to go shopping in person if only one or a few stores are accessible. There may thus be a substantial network effect to retail accessibility.[25] If so, one business can reap the benefits of accessible facilities only if many other businesses make their facilities accessible as well. Without some assurance that other businesses will remove barriers, an individual business may lack the incentive to do so itself.[26] And even if most businesses become accessible, not every business will realize a net benefit as a result; for some (perhaps many) businesses, the cost of barrier removal will outweigh the benefit of increased patronage.[27] Requiring

23. For a discussion of the lack of information about the costs and benefits of accommodation, see Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 124–27 (2003).

24. *See* Bagenstos, *supra* note 8, at 423–24, 438–42. On unconscious stereotyping generally, see Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5–8 (2006).

25. For a general discussion of network effects, though one not addressed to this context, see Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 488–500 (1998).

26. The problem may be one that cannot be solved even by making the premises of every store accessible; without accessible transportation, individuals with disabilities may simply be unable to get to those stores. *Cf.* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 26 & n.100, 37 (2004) (discussing lack of accessible transportation as a barrier to employment for individuals with disabilities, one the ADA's requirement of workplace accommodation does not solve).

27. *Cf.* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS 491 (1992) (arguing, in the employment context, that different firms will have different costs of accommodating different disabilities).

widespread accessibility serves an important societal interest in eliminating the stigma against and second-class citizenship of people with disabilities, but it may not be bottom-line rational for any particular business.[28]

The ADA's mandate of accessible public accommodations thus helps respond to problems of bounded rationality and prejudice, collective action and coordination problems, and socially harmful "rational discrimination." But the statute's good effects depend crucially on enforcement.[29] If a business owner erroneously believes that barrier removal is expensive, she will not discover her error unless she is actually threatened with an enforcement action or the risk and consequences of enforcement are so great as to give her a reason to fear being targeted with litigation. If business owners want to be sure that others will remove barriers before they do so, they will have no incentive to act unless they know that a significant number of those who refuse will face enforcement actions. And if businesses rationally serve their bottom lines in refusing to make their premises accessible, only an actual threat of enforcement will make them change their ways.

B. The Importance of, but Weak Incentives for, Private Enforcement

The discussion in the previous subpart should demonstrate that widespread compliance with the ADA's accessibility requirements is unlikely in the absence of a realistic threat of vigorous enforcement of those requirements. But enforcement is essentially a public good: Once a business becomes accessible to individuals with a particular disability, all individuals with similar disabilities in the relevant area will benefit. Because an individual who succeeds in forcing a business to remove barriers cannot appropriate all of the benefits of that action, the mere creation of a right of accessibility affords insufficient incentives to achieve full enforcement. And government cannot be counted on to fill the gap, for its "[e]nforcement resources are limited and may be subject to pressures not

28. For a defense of imposing costs that are "irrational" from the perspective of particular businesses in order to achieve disability equality, see Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837 (2003).

29. *Cf.* Frances Kahn Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 LAW & CONTEMP. PROBS. 187, 202 (1984) (arguing that, despite the law's "educative function," and the fact that "some compliance results from the mere fact that the state has authoritatively spoken," a "substantial portion of compliant behavior is a response to an assertion of right by beneficiaries of the law").

directed toward maximizing economic and social welfare."[30] Indeed, the U.S. Department of Justice has devoted "only a small cadre of lawyers" to disability rights enforcement, and those lawyers must shoulder responsibility for enforcing the ADA against state and local governments as well as against private businesses.[31] A report of the National Council on Disability found that the Department's Disability Rights Section "is understaffed in many areas of its responsibility, with significant operational consequences."[32] These consequences include "decisions . . . not to open for investigation a large proportion of [public accommodations] complaints received."[33] As a result, the Department has brought relatively few enforcement actions against places of public accommodation.[34]

Because the government does not fully enforce the ADA, private enforcement is essential. But in the private bar "most civil rights litigation is not brought by institutional litigators or by large firms engaging in pro bono activity" but by individual lawyers who are trying to make a living.[35] Accordingly, enforcement largely depends on lawyers who need to earn income on their cases to keep their practices viable. As in other areas of public interest litigation, Congress sought to provide an incentive for enforcement of the ADA's public accommodations provisions by giving prevailing plaintiffs the right to recover attorneys' fees.[36] But the incentives

30. Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 236 (1984); *see also* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1438 (1998) (discussing limitations of government enforcement of civil rights statutes); *cf.* Zemans, *supra* note 29, at 201 (stating that "reliance on government action too has additional effects, not the least of which is the political screening of cases that voids the distinctiveness of litigation as a means of citizen access to government decisionmaking").

31. Adam A. Milani, *Wheelchair Users Who Lack "Standing": Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69, 112 (2004).

32. NAT'L COUNCIL ON DISABILITY, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 38 (2000). If anything, the problem has only gotten worse in the last six years. *See, e.g.*, William R. Yeomans, *An Uncivil Division*, LEGAL AFF., Sept./Oct. 2005, *available at* http://www.legalaffairs.org/issues/September-October-2005/argument_yeomans_sepoct05.msp.

33. NAT'L COUNCIL ON DISABILITY, *supra* note 32, at 38.

34. *See* COLKER, *supra* note 3, at 192 (finding that the Department of Justice reached 107 public accommodations settlements in ten years—"less than one settlement a month by an agency charged with national enforcement").

35. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 768 (1988).

36. 42 U.S.C. § 12205 (2000); *see also* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (stating that the U.S. Congress adopted the fee-shifting rule for litigation enforcing Title II of the Civil Rights Act of 1964, the public accommodations title on which Title III of the ADA was based, "to encourage individuals injured by racial discrimination to seek judicial relief

to bring ADA accessibility cases are still likely to be too weak to lead to full enforcement.

The statutory provisions limiting private plaintiffs to injunctive relief have two significant consequences that dampen private attorneys' incentive to bring ADA accessibility suits. First, because ADA public accommodations plaintiffs have no prospect of a monetary recovery out of which to carve a contingent fee, statutory attorneys' fees are likely to be the exclusive source of compensation for their lawyers. Practitioners who rely on contingent fees frequently earn effective hourly rates that are slightly higher than the hourly rates similarly credentialed practitioners charge their paying clients.[37] But under the Supreme Court's interpretation of the fee-shifting statutes, practitioners who rely on statutory attorneys' fees will always earn lower effective hourly rates than similarly credentialed practitioners with fee-paying clients. The Court has held that statutory attorneys' fees must be calculated by determining the number of hours plaintiff's counsel reasonably expended and multiplying that number by a "reasonable hourly rate" for counsel's services.[38] That hourly rate—known in attorneys' fees jurisprudence as the "lodestar"[39]—is set according to the "prevailing market rates" that lawyers of similar skill and experience charge to fee-paying clients.[40] The Court specifically rejected a rule that would enhance the lodestar "to compensate for risk of loss and of consequent nonpayment."[41] As a result, plaintiffs' lawyers in statutory fee cases, who get paid only for hours expended in cases they win, are paid for those hours at the same hourly rate as lawyers with fee-paying clients, who get paid for all of the hours they work, win or lose. That difference in compensation tends to deter lawyers from taking cases like those under the ADA's public

under Title II"); Percival & Miller, *supra* note 30, at 241 ("Congress generally authorizes fee shifting where private actions serve to effectuate important public policy objectives and where private plaintiffs cannot ordinarily be expected to bring such actions on their own. Fee shifting is designed to remove some of the disincentives facing public interest litigants, thus increasing access to the courts for groups who otherwise might be unrepresented or underrepresented.").

37. *See* Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 772 (2002); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 302 (1998).

38. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

39. City of Burlington v. Dague, 505 U.S. 557, 562 (1992).

40. Blum v. Stenson, 465 U.S. 886, 894 (1984); *see also* Blanchard v. Bergeron, 489 U.S. 87, 94 (1989) (lodestar is determined by "prevailing billing rates").

41. *Dague*, 505 U.S. at 562.

accommodations title, in which compensation comes only from statutory fees.[42]

Second, after *Buckhannon*, plaintiffs' counsel can recover fees only when the litigation results in a "judicially sanctioned change in the legal relationship of the parties"—not an out-of-court settlement or voluntary compliance.[43] If a business owner can moot an ADA accessibility suit by removing the challenged barriers before the court issues a judgment, the plaintiff's counsel will recover no fee.[44] It is true, as the Court emphasized, that "'voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"[45] But plaintiffs in ADA accessibility cases will often be unable to avail themselves of this principle. Where defendants respond to a plaintiff's complaint by constructing a ramp or removing some other structural barrier in a durable way, they will often be able to convince judges that there is no chance that the challenged behavior will recur.[46] That is true even when the lawsuit was the clear motivation for the decision to remove the barriers.[47]

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42. *See* Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorney's Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. REV. 1943, 1967–71 (1998); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 676; Charles Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 REV. LITIG. 301, 332 (1993); *cf.* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 133 (2004) (describing cases that "promis[e] both high damages and the potential for attorney's fees" as "the bread-and-butter of public interest firm practice"); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 933 (2006) (discussing incentives for civil rights plaintiffs' lawyers to take contingent-fee damages cases); Selmi, *supra* note 30, at 1452–54 (discussing the importance of the prospect of a damages recovery in encouraging plaintiffs' lawyers to take civil rights cases because statutory fee shifting provides an "insufficient" incentive).

43. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 605 (2001).

44. *See* Chemerinsky, *supra* note 7, at 547 ("[A] defendant can preclude a deserving plaintiff from recovering attorneys fees simply by changing policies before a verdict.").

45. *Buckhannon*, 532 U.S. at 609 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)).

46. *See* Doran v. N. State Grocery, Inc., 39 Cal. Rptr. 3d 922, 923 (Cal. Ct. App. 2006) ("During the course of the federal litigation, North State removed the architectural barriers to accessibility that Doran claimed were illegal. Therefore, the federal cause of action became moot, as the only remedy under Title III of the ADA—an injunction—was no longer necessary."); Iverson v. Sports Depot, Inc., No. Civ. A. 00-10794-RWZ, 2002 WL 745824 (D. Mass. Feb. 20, 2002); Disability Law, http://disabilitylaw.blogspot.com/2005/01/more-molski.html (Jan. 5, 2005, 09:14 EST) (discussing Molski v. Peach Canyon Cellars, No. 2:03-CV-06266-TJH-PLA (C.D. Cal. Dec. 22, 2004)).

47. *See Buckhannon*, 532 U.S. at 600.

The *Buckhannon* Court suggested that its rule would offer defendants an incentive to voluntary compliance because "the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct."[48] That analysis may be correct in the cases that are brought, but it ignores the effect of the Court's ruling on the decisions of plaintiffs' lawyers. If a defendant's voluntary compliance can moot a purely injunctive lawsuit and deprive the plaintiff of the right to recover attorneys' fees, plaintiffs' counsel who depend on statutory fees are likely to take far fewer purely injunctive cases in the first place[49]—which means far fewer ADA public accommodations cases.[50] To the extent that businesses remove barriers to access only in response to litigation—and the absence of a damages remedy gives businesses little reason *not* to take this "wait and see" approach[51]—the *Buckhannon* decision will cause a net decrease in voluntary compliance with the ADA.[52]

C. Why Serial ADA Suits Occur

The foregoing discussion should suggest a big part of the reason why, more than fifteen years after enactment of the ADA, noncompliance with the statute's public accommodations title is widespread: There is not a sufficient incentive for private attorneys to bring ADA public accommodation suits. All other things being equal, an attorney will choose to work for a fee-paying client, or to bring damages actions in which a contingent fee can be recovered, rather than bring the purely injunctive cases that the ADA's public accommodations title authorizes. ADA public accommodations litigation simply pays a lower effective hourly rate than do those alternatives because a plaintiff's counsel will be unable to recover attorneys' fees if she loses *or* if she succeeds too easily. And the government cannot and will not fill the enforcement gap.

Consideration of the litigation incentives in this context also helps to explain why so many of the accessibility lawsuits that are brought are initiated by the same counsel. Those lawyers who bring ADA public accommodations cases in the face of the disincentives created by the fee-

48. *Id.* at 608.

49. *See* Karlan, *supra* note 7, at 207–08 (noting this "skewing effect on case selection").

50. *See* COLKER, *supra* note 3, at 171 (*Buckhannon* "has made it even more difficult for [ADA Title III] plaintiffs to find attorneys who will take their cases.").

51. *See id.* at 199.

52. *Cf.* Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069 (1993) (arguing, based on a formal economic model, that a "proplaintiff" fee-shifting rule enhances incentives for both compliance and settlement).

shifting rules are likely to fall into one or more of three categories: lawyers with atypically low litigation costs; lawyers with atypically good ability to determine which cases are likely to succeed (and thus generate a fee award); and lawyers with ideological motives. Serial litigants are likely to populate each of these three categories. The ADA's rules governing physical accessibility are highly complex, detailed, and contextual.[53] Lawyers are thus likely to experience a high fixed cost in familiarizing themselves with and internalizing those rules. But once an attorney has handled a number of accessibility cases, the additional cost of learning the rules governing a new case drops. Here as elsewhere, specialization is likely to lead to significant economies of scale.[54] And specialization will also enable the attorney to recover higher fees—both by justifying a higher lodestar rate,[55] and by making possible more effective screening of cases (and hence greater certainty of fee recovery). Attorneys who handle serial ADA litigation are thus likely to be among the few lawyers for whom public accommodations cases are cheap enough and lucrative enough to be economically worthwhile. And lawyers and plaintiffs who are ideologically motivated are not likely to stop with making only one business accessible when so many others are violating the law.

Litigation incentives also explain why lawyers often refuse to provide presuit notice to ADA public accommodations defendants. In these cases, *Buckhannon* pits plaintiffs' lawyers in a race against time—at least if they want to get paid for their efforts.[56] If the defendant fixes the problem before

53. For example, the Department of Justice's technical assistance manual contains many pages elaborating on the requirement of "readily achievable" barrier removal in existing facilities. *See* OFFICE ON THE AMERICANS WITH DISABILITIES ACT, U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: TITLE III TECHNICAL ASSISTANCE MANUAL §§ III-4.4000 to -4.5200 (1992). The manual states that the determination whether an action is "readily achievable" is "necessarily a case-by-case judgment" that requires consideration of a number of factors; it contains a nonexclusive list of "21 examples of modifications that may be readily achievable." *Id.* § III-4.4200. The barrier removal rule incorporates, to the extent "readily achievable," the Americans with Disabilities Act Accessibility Guidelines. *See id.* § III-4.4300. Newly built facilities must fully comply with the ADA Accessibility Guidelines, which set forth highly detailed requirements. *See, e.g.*, *infra* notes 93–98 and accompanying text.

54. *See* Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 199 (2001) (discussing plaintiffs' attorneys' economies of scale from specialization).

55. *See* Blum v. Stenson, 465 U.S. 886, 898 (1984) (stating that the reasonable hourly rate takes account of "the special skill and experience of counsel").

56. Even ideological lawyers, of course, need to earn a living, and independently funded public interest organizations are unlikely to take the mundane accessibility cases that are crucial to day-to-day enforcement. *See* Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws*, *in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 141, 163 (Richard B. Freeman et al. eds., 2005).

the case reaches a judgment, the case may become moot, and the plaintiff's counsel will not get paid.[57] Presuit notification would only give the defendant a head start in attempting to deprive the plaintiff's counsel of attorneys' fees. Indeed, notice may enable a business to make its premises accessible before a complaint is even filed. If the business does so, it will have an even easier time getting the complaint dismissed on justiciability grounds. Where the plaintiff had standing at the initiation of the action, and the defendant alleges that events *subsequent* to the filing of the complaint have made the case moot, the defendant must bear the usually "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again"[58]—though, as I have suggested, it is one ADA accessibility defendants can often carry. But where the violation has been extinguished before the complaint is filed, there is no standing to sue under the ADA's public accommodations title in the first place. To establish standing to seek injunctive relief, the plaintiff must show a "continuing violation or the imminence of a future violation" as of the time of the complaint.[59]

Presuit notice would thus give defendants an opportunity to squelch accessibility cases before they are brought. The defendants' actions might improve access in the short run by making facilities accessible in instances where lawsuits had been threatened. But they would impede access in the long run by further diminishing the incentives for plaintiffs' lawyers to enforce the ADA's accessibility requirements.

Serial litigation, without presuit notice, is thus a direct response to the remedial limitations imposed by Congress and the Supreme Court on ADA public accommodations cases. Serial litigation will occur even when the plaintiff is challenging conduct that actually violates the ADA and even when the plaintiff's lawyer wants nothing more than to eliminate the violation and to get paid for her successful efforts. As I argue in the next

57. In at least one case, a district court assisted a defendant in avoiding attorneys' fees by issuing a stay of the action to give the defendant a chance to make its premises accessible. The court specifically stated that it did not wish to give plaintiff's counsel an opportunity to earn fees. *See* Ass'n for Disabled Ams., Inc. v. Integra Resort Mgmt., Inc., 385 F. Supp. 2d 1272, 1285 (M.D. Fla. 2005) (discussing Macort v. Checker Drive-In Rest., Inc., No. 8:03-CV-1328-T-30EAJ, 2005 WL 332422 (M.D. Fla. Jan. 28, 2005)).

58. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189, 191 (2000) (internal quotation marks and brackets omitted); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109 (1998).

59. *Steel Co.*, 523 U.S. at 108; *see also Laidlaw*, 528 U.S. at 191 ("Standing admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum.").

part, once one takes account of the litigation incentives that operate in this context, the case against serial ADA litigation appears overblown.

II. THE MISGUIDED CASE AGAINST SERIAL ADA LITIGATION

Critics have attacked serial ADA litigation as burdening the courts with unnecessary suits that line the pockets of plaintiffs' attorneys without actually improving access. But once the litigation incentives discussed in the previous part are brought into view, serial litigation looks a lot less nefarious. Suits by private counsel are necessary to achieve compliance with the statute's accessibility requirements, and under the current remedial scheme serial litigation may be the only cost-effective way for private counsel to bring suit. In this part, I show that the major criticisms of serial ADA litigation are misguided; the incentives created by the statute's remedial scheme, and not anything untoward, are responsible for most of the litigation conduct that critics find abusive. Subpart A discusses the criticism I term the notice argument: the claim that serial litigants unfairly spring ADA accessibility suits on business owners without warning. Subpart B discusses what I term the burdensome litigation argument: that serial litigants waste resources (of businesses and courts) by simply bringing too many cases. Subpart C discusses what I term the outside agitator argument: that serial litigants are not connected to the communities in which they bring suits, and that they challenge architectural barriers about which local disabled people have not complained. Each of these criticisms, I contend, is overstated and fails to take account of the incentives created by the remedial limitations in the ADA public accommodations title.

A. The Notice Argument

Perhaps the most prominent argument against serial ADA litigation focuses not on the decision to bring large numbers of suits per se but on the refusal of many lawyers who bring such suits to give defendants prior notice and an opportunity to make their premises accessible without litigation.[60]

60. *See, e.g.*, Doran v. Del Taco, Inc., 373 F. Supp. 2d 1028, 1030 (C.D. Cal. 2005) (stating that "unscrupulous law firm[s]" file ADA lawsuits without "simply informing a business of the violations and attempting to remedy the matter through 'conciliation and voluntary compliance'") (citation omitted); Footman v. Cheung, 341 F. Supp. 2d 1218, 1229 (M.D. Fla. 2004) (quoting defense attorney describing practice of serial ADA litigants: "[T]hey don't, before they file these cases, go to the defendant . . . and say, 'hey, will you fix this'") (ellipses in original); *Hearing*, *supra* note 11, at 3 (opening statement of Rep. Charles T. Canady, Chairman, Subcomm. on the Constitution, H. Comm. on the Judiciary); Olson, *supra* note 14, at 85 ("Louie brusquely

A number of judges have argued that this failure to provide notice is unethical and counterproductive. Rather than "rush[ing] to file suit," one federal district judge asserted in a typical formulation, "conciliation and voluntary compliance" would "[o]f course" be "a more rational solution" to inaccessibility.[61] Questioning "whether attorney's fees should be awarded where no effort is made pre-suit to obtain voluntary compliance," the same judge argued that litigation without prior notice "carries only negative economic value—it has accomplished nothing but expense and waste of precious judicial resources."[62] At least two other federal judges have picked up on the point and denied attorneys' fees to plaintiffs who filed public accommodations lawsuits without providing adequate presuit notice—even though it was the filing of the lawsuits that spurred the defendant businesses to make their premises accessible.[63] "[L]egitimate ADA advocates," one of these judges suggested, will want simply to "get the problem fixed without having to file a needless, frequently extortionate, lawsuit," and a "wise business will comply with a fair warning of ADA problems."[64]

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dismisses the notion of notifying firms before filing suit. They've had more than a decade to learn the rules, haven't they? he asks rhetorically.").

61. Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1281 (M.D. Fla. 2004).

62. *Id.* at 1282 n.14.

63. *See* Macort v. Checker Drive-In Rests., Inc., No. 8:03-CV-1328-T-30EAJ, 2005 WL 332422, at *1 (M.D. Fla. Jan. 28, 2005) ("This Court is not inclined to award attorney's fees for prosecuting a lawsuit when a pre-suit letter to the Defendant would have achieved the same result."); *Doran*, 373 F. Supp. 2d at 1033 (imposing the "require[ment], as a prerequisite to recovering attorneys' fees," of "a pre-litigation unambiguous warning notice to the defendant and a reasonable opportunity to cure the violation," because without such a notice it is impossible for the court to know "whether a lawsuit was really necessary"). *But see* Martinez v. Thrifty Payless, Inc., No. 2:02-CV-0745-MCE-JFM, 2006 WL 279309 (E.D. Cal. Feb. 6, 2006) (rejecting holding in *Doran* and awarding attorneys' fees to prevailing ADA public accommodations plaintiff even without presuit notice). The plantiff in *Macort* was represented by Gene Zweben, who has been plaintiffs' counsel in, by his own account, hundreds of ADA public accommodation suits. Zweben has said that he sometimes, but far from always, provides notice in advance of filing suit. *See, e.g.*, Dan Wilson, *Area Woman Sues for Access*, POST-CRESCENT (Appleton, Wis.), Jan. 26, 2005, at 1A. In the *Doran* case, the plaintiff did actually provide prior written notice, but the district judge found the notice to be insufficient. *See Doran*, 373 F. Supp. 2d at 1034 (concluding that an unsigned letter, stating "that the sender 'could not find handicapped parking' and 'had serious problems trying to use your restroom,'" was not sufficient because it did not "specify and detail the nature of the claimed ADA violation, and warn of the need for a lawsuit if the defect is not fixed within a reasonable time").

64. *Doran*, 373 F. Supp. 2d at 1033–34. For a similar statement in the press, see Joy Lanzendorfer, *Enforced Compliance: George Louie Wants California Safe for the Disabled, and He Wants it Now*, NORTH BAY BOHEMIAN (Santa Rosa, Cal.), Dec. 26, 2002–Jan. 1, 2003, *available at* http://www.metroactive.com/papers/sonoma/12.26.02/louie-0252.html ("If he truly wants to help the disabled, some say, why not issue businesses a warning and give them time to comply before going straight to the checkbook?").

The "ADA Notification Act," which has been introduced in four successive Congresses, would go even further to mandate notice in ADA public accommodations suits. The proposed legislation would bar a state or federal court from exercising jurisdiction over an ADA public accommodations suit unless the plaintiff provides the defendant written notice of "the specific facts that constitute the alleged violation" by registered mail, and ninety days elapses without the defendant correcting the violation.[65] Echoing the comments of the federal judges who have denied attorneys' fees, the ADA Notification Act's proponents emphasize that notice would often make a lawsuit unnecessary by alerting businesses of the need to make changes.[66]

Proponents of the notice argument fail to appreciate one salient fact discussed in the previous part: The failure of many attorneys to provide presuit notice in accessibility cases is a direct result of the remedial limitations of the ADA's public accommodations title. If the plaintiff provides notice, the defendant will often be able to fix the problem in time to render any lawsuit nonjusticiable. Suing without notice will thus be the only way plaintiff's counsel can recover her fees.

To the extent that they attribute the lack of notice to the desire for attorneys' fees, then, critics of serial ADA litigation are correct. They go astray, however, in assuming that there is something wrong with plaintiffs' counsel wanting to recover their fees. It is simply inaccurate to say that "legitimate ADA advocates"[67] should want to get accessibility problems fixed without worrying about whether they will be paid. The ADA has been on the books for over fifteen years. If a business continually violated that law until the moment a plaintiff's lawyer came into the picture, the lawyer plainly deserves credit for making the business accessible. And the defendant business is poorly positioned to complain about the lack of notice. The ADA has been widely publicized. Though the statute's accessibility requirements are complex, the federal government offers businesses a number of free technical assistance resources to help them

65. *See, e.g.*, H.R. 2804, 109th Cong. § 2 (2005).

66. *See, e.g.*, *Hearing*, *supra* note 11, at 5 (statement of Rep. Mark Foley) ("A simple notice telling them they were out of compliance and vulnerable to a lawsuit would have probably done the trick."). Adam Milani, who opposed the ADA Notification Act as unnecessary because he believed (contrary to current precedent, *see* Botosan v. Paul McNally Realty, 216 F.3d 827 (9th Cir. 2000)) that the ADA already incorporated a thirty-day notice requirement, agreed that a notice requirement would promote voluntary compliance. *See* Adam A. Milani, *Go Ahead. Make My 90 Days: Should Plaintiffs Be Required to Provide Notice to Defendants Before Filing Suit Under Title III of the Americans with Disabilities Act?*, 2001 WIS. L. REV. 107, 155–59.

67. *Doran*, 373 F. Supp. 2d at 1033.

comply. And, as in other technical regulatory areas (workplace safety and environmental law come readily to mind), businesses can always hire their own lawyers or consultants to assess their current compliance with the law and to make plans to come into compliance. As between a lawyer whose efforts were necessary to make a facility accessible and a business that has not yet taken the steps to comply with the ADA more than fifteen years after its enactment, fairness dictates that it is the defendant business, and not the plaintiff's lawyer, who should bear the costs of enforcement.

In any event, the widely accepted theory of public interest fee-shifting rules is not based on the desert of individual attorneys. It is a theory of systemic incentives: Without the prospect of recovering fees, too few attorneys will be willing to take public interest cases, and the law will be underenforced.[68] As the discussion in Part I suggests, the point holds especially true for statutes that, like the ADA's public accommodations title, authorize only injunctive relief. In seeking fees for achieving access, a plaintiff's attorney is simply carrying out the congressional policy that encourages enforcement of the ADA. Although it sounds nice to say that attorneys' fees should not be awarded "when a pre-suit letter to the Defendant would have achieved the same result,"[69] individuals with disabilities will not be able to find lawyers even to send such a letter unless they can offer the prospect of fees.[70] And the widespread violations of the ADA are evidence that many businesses will not comply with the statute without such a threat of enforcement.

One might respond that the Supreme Court's fee-shifting jurisprudence establishes that civil rights lawyers ought to be concerned about achieving compliance with the law and not about recovering their fees.[71] In *Evans v. Jeff D.*,[72] for example, the Court held that plaintiffs can waive their right to attorneys' fees in a settlement, and that defendants can refuse to enter into a settlement unless the plaintiff agrees to such a waiver.[73] The Court unaccountably concluded that counsel for an indigent

68. *See* City of Riverside v. Rivera, 477 U.S. 561, 576–78 (1986) (plurality opinion); Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 309–12 (1990); Percival & Miller, *supra* note 30, at 241.

69. Macort v. Checker Drive-In Rests., Inc., No. 8:03-CV-1328-T-30EAJ, 2005 WL 332422, at *1 (M.D. Fla. Jan. 28, 2005).

70. Individuals with disabilities could send such a letter themselves. Unless a lawyer sends the letter, however, businesses have no reason to believe that they are faced with a realistic threat of litigation—including the necessary use of expert witnesses—if they fail to comply.

71. *See* Brand, *supra* note 68, at 358–61.

72. 475 U.S. 717 (1986).

73. *See id.* at 737–38. For criticism of that decision, see Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII*

plaintiff in a civil rights case faces no "ethical dilemma" when the defendant offers the plaintiff a settlement that is "more favorable than the probable outcome of [a] trial" on the condition that the plaintiff waive any fee award, because the lawyer's "ethical duty [is] to serve his clients loyally and competently," rather than to recover fees.[74]

But although *Jeff D.* limited plaintiffs' *right* to recover attorneys' fees—and did so based on an unrealistic assumption that civil rights lawyers will not be concerned if they do not get paid—the Court did not deny plaintiffs' counsel the ability to structure litigation to make sure that they will as a practical matter recover fees. In his *Jeff D.* dissent, Justice Brennan argued quite plausibly that the Court's decision would deter competent counsel from accepting civil rights cases because they would fear that defendants would offer lucrative settlements to their clients but condition those settlements on the waiver of attorneys' fees.[75] But attorneys have largely avoided such coercive settlements by simply making clear at the outset of the lawyer-client relationship that their agreement to represent the plaintiff is conditioned on the plaintiff's agreement not to accept a settlement that waives the right to recover attorneys' fees.[76] Just as nothing in *Jeff D.* prohibits that strategy, nothing in *Buckhannon* should be understood to prohibit the structuring of litigation in such a way as to minimize the risk that the defendant can opportunistically comply and thereby deprive plaintiffs' counsel of any fees for the efforts that were the essential spur to compliance. Indeed, the *Buckhannon* opinion itself was premised on the notion that such opportunistic compliance will not typically operate to deprive plaintiffs' lawyers of their fees.[77]

Although the filing of suits without notice is not *prohibited* by *Buckhannon*, it is certainly *motivated* by that decision (or, more precisely, by the interaction between that decision and the ADA's lack of a damages remedy in public accommodations cases). If the ADA were amended to authorize the award of attorneys' fees on the catalyst theory, plaintiffs'

Cases, 33 B.C. L. REV. 211, 286–88 (1992); Brand, *supra* note 68, at 360; Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 819 (1989); Luban, *supra* note 7, at 241–42; Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656, 709 (1991).

74. *Jeff D.*, 475 U.S. at 727–28.

75. *See id.* at 754–58 (Brennan, J., dissenting).

76. *See* Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 214–15 (1997); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1177 (1990).

77. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 608 (2001) (expressing "skeptic[ism]" of the assertion that defendants will be able to deprive plaintiffs' counsel of fees by opportunistic concessions).

attorneys would be far more likely to give notice before filing suit. Under such an altered regime, defendants could not deprive plaintiffs' lawyers of fees simply by capitulating quickly when suit is threatened; a presuit capitulation would eliminate any ongoing violation, but it would not prevent the plaintiff from "prevailing" for the purpose of fee shifting. An amendment to permit the recovery of damages for inaccessible public accommodations would have a similar effect: The defendant's voluntary compliance might render a claim for prospective relief nonjusticiable, but a live claim for damages would remain.[78]

If the remedies for the ADA's public accommodations title were expanded, plaintiffs' lawyers would lose the incentive to file suits without notice, and a notice requirement would not significantly limit effective enforcement of the statute.[79] It is only under the current, limited remedies that the lack of presuit notice is both widespread and probably essential to enforcement. Accordingly, courts should not seek to impose on the statute a requirement of notice, nor should Congress adopt the ADA Notification Act. Either of those steps would make the problem of widespread noncompliance with the ADA's accessibility requirements even worse. If members of Congress truly want the benefits of presuit notice—and not merely as a cover for allowing evasion of the law—any notice requirement should be coupled with an endorsement of the catalyst theory for fee recovery or the authorization of statutory damages for plaintiffs who have confronted inaccessible public accommodations.

B. The Burdensome Litigation Argument

A second argument against serial ADA litigation focuses on the large numbers of accessibility suits plaintiffs have brought and on the burden those suits place on the courts. Not surprisingly, businesses that are sued by serial litigants complain that "firms filing lawsuits to force compliance have

78. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983). If the damages were set high enough, perhaps at the $50,000 to $100,000 level that the attorney general can recover in government-initiated ADA litigation, *see* 42 U.S.C. § 12188(b)(2)(C) (2000), they could even attract contingent-fee attorneys.

79. Indeed, under a statute that recognized the catalyst theory, a notice requirement would probably ensure that plaintiffs recover attorneys' fees for their success in provoking businesses to make their premises accessible before litigation is filed. *Cf.* N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 65 (1980) (holding that the fee-shifting provision of Title VII authorizes the award of attorneys' fees for state and local administrative proceedings that the statute requires plaintiffs to exhaust before filing suit in federal court).

tied up federal court dockets."[80] But it is not just defendants; federal judges have made the same charge. In a newspaper article published in September 2004, Judge Dickran Tevrizian of the United States District Court for the Central District of California was described as "troubled by the flood of litigation: 'There are roughly 40 ADA lawsuits on his docket,' he said. 'Multiply that by all the federal judges in the country. It's causing a lot of court congestion.'"[81] And in decisions dismissing on other grounds ADA accessibility suits brought by serial plaintiffs, courts have gone out of their way to decry the burden imposed by the large numbers of lawsuits filed by such litigants.[82] Complaints about a "blizzard of lawsuits"[83] filed in an "alarming" volume[84] that "clutter up our courts and make it tough on everyone"[85] also received attention at the hearings on the proposed ADA Notification Act.

But whether a class of litigation unduly burdens the courts necessarily depends on a normative assessment of the importance of that class.[86] In the case of ADA accessibility litigation, the discussion in Part I should suggest a few reasons why so many lawsuits are filed: (1) Violations of the statute are widespread; (2) even fifteen years after the enactment of the ADA, businesses wait until lawsuits are filed or threatened before they comply; and (3) the combination of the *Buckhannon* rule and justiciability doctrine encourages plaintiffs' counsel to sue immediately rather than first threaten

80. John Lee, *Local Firms Look to Comply*, POST-CRESCENT (Appleton, Wis.), Feb. 11, 2005, at 1A.

81. Krasnowski, *supra* note 14, at A-4.

82. This has been especially true in the Middle District of Florida, which has seen a particularly large number of suits by serial litigants. *See, e.g.*, Brother v. Tiger Partner, LLC, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004) (after dismissing complaint for lack of standing, decrying "shotgun litigation" in the Middle District of Florida, "where the same plaintiffs file hundreds of lawsuits"); Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1280–82 (M.D. Fla. 2004) (ruling for the defendant on the merits, but beginning by criticizing the "explosion of private ADA-related litigation," the "current ADA lawsuit binge," and the birth of a "[c]ottage [i]ndustry" in ADA accessibility litigation); *see also* Footman v. Cheung, 341 F. Supp. 2d 1218, 1229–30 (M.D. Fla. 2004) (after ordering sanction under 28 U.S.C. § 1927 and FED. R. CIV. P. 11, decrying the court's "voluminous docket of ADA premises cases" and quoting defense counsel's statement that serial ADA litigation "burdens the courts unnecessarily").

83. *Hearing*, *supra* note 11, at 5 (statement of Rep. Mark Foley).

84. *Id.* at 46 (statement of Christopher G. Bell, Attorney, Minneapolis, Minn.).

85. *Id.* at 12 (statement of Clint Eastwood); *see also id.* at 38 (statement of Joe Fields, Jr., Attorney, West Palm Beach, Fla.) ("You are going to have the Federal courts clogged with these cases.").

86. As Deborah Rhode emphasizes, "[L]itigation rates are no measure of abusive litigation." Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 457 (2004). She notes that "[a]lthough business leaders are the sharpest critics of litigiousness, disputes between businesses are the largest and fastest growing category of civil cases." *Id.*

to sue.[87] Under these circumstances, the large number of ADA accessibility suits is probably the only way to check the widespread violations of the statute.

Strikingly, the opponents of serial ADA litigation have essentially acknowledged that the bulk of the lawsuits about which they complain have targeted business conduct that in fact violated the law. In the hearings on the proposed ADA Notification Act, Representative Mark Foley, the bill's primary sponsor, explained that state bar discipline could not be relied upon to regulate serial ADA litigation because "it is hard to prove the lawsuits are frivolous if violations do exist."[88] Joseph Fields, an attorney who represents businesses that have been sued by serial ADA litigants, similarly explained that his clients need legislative protection because they have no adequate defense: When his clients are sued, Fields has "to tell them, no, you are not in compliance."[89] As one federal judge recently noted, engaging in only a bit of hyperbole, "[I]t would be difficult to find any restaurant, specialty store, service station, or other public accommodation between Chico and Sacramento which does not have some barrier to disabled access under the Americans with Disabilities Act Accessibility Guidelines."[90]

The impatient tone of judges who have criticized the large number of ADA accessibility suits is therefore unwarranted. In some ways, however, it is not surprising. As Judith Resnik has shown, many federal judges believe that they should hear only "'important' matters."[91] Federal judges have frequently lobbied Congress to keep less "important" causes of action out of their jurisdiction. And even when they have failed as lobbyists, federal

87. Moreover, the statute applies to thousands of businesses, and it presents legal issues that are too individualized to make defendant class actions feasible.

88. *Hearing*, *supra* note 11, at 6 (statement of Rep. Mark Foley).

89. *Id.* at 38 (statement of Joe Fields, Jr., Attorney, West Palm Beach, Fla.); *see also* Lanzendorfer, *supra* note 64 ("And while some businesses may be trying to avoid the high cost of trial, the main reason for the settlements is that [the] accusations are true. Many of the businesses are out of compliance, often lacking wheelchair ramps, proper paths of travel, or signage."); Wexler, *supra* note 14, at 1A (discussing hotel owner's complaint about an ADA lawsuit that he felt forced to settle and noting that "clearly" he "would lose" if he sought to defend the suit on the merits, for he "had not put handicapped signs in the parking lot or created a wheelchair-friendly room" at the hotel).

90. White v. GMRI, Inc., No. CIV S-04-0620 WBS KJM, 2006 WL 947768, at *2 (E.D. Cal. Apr. 12, 2006).

91. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 968–69 (2000) [hereinafter Resnik, *Trial as Error*]; *cf.* Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1696 (1991) (arguing that many federal judges do not consider "gender-related injuries" to be sufficiently "important" in this way).

judges have achieved similar results as adjudicators by reading narrowly or even invalidating statutes that seem to require federal courts to decide "unimportant" cases.[92]

It is easy to see why ADA accessibility cases might seem unimportant. The issues involved are, to be frank, mind-numbingly boring; the ADA Accessibility Guidelines regulate design elements down to the minutest detail. The guidelines govern such matters as protruding objects;[93] carpet pile;[94] the design of accessible parking spaces;[95] the slope, rise, and other aspects of the design of ramps;[96] the width, clearance, and other aspects of

92. *See* Resnik, *Trial as Error*, *supra* note 91, at 993–94, 1003–05.

93. *See* ADA Accessibility Guidelines, 28 C.F.R. pt. 36, app. A, § 4.4.1 (2006):

> Objects projecting from walls (for example, telephones) with their leading edges between 27 in and 80 in (685 mm and 2030 mm) above the finished floor shall protrude no more than 4 in (100 mm) into walks, halls, corridors, passageways, or aisles (see Fig. 8(a)). Objects mounted with their leading edges at or below 27 in (685 mm) above the finished floor may protrude any amount (see Fig. 8(a) and (b)). Free-standing objects mounted on posts or pylons may overhang 12 in (305 mm) maximum from 27 in to 80 in (685 mm to 2030 mm) above the ground or finished floor (see Fig. 8(c) and (d)). Protruding objects shall not reduce the clear width of an accessible route or maneuvering space (see Fig. 8(e)).

94. *See id.* § 4.5.3:

> If carpet or carpet tile is used on a ground or floor surface, then it shall be securely attached; have a firm cushion, pad, or backing, or no cushion or pad; and have a level loop, textured loop, level cut pile, or level cut/uncut pile texture. The maximum pile thickness shall be 1/2 in (13 mm) (see Fig. 8(f)). Exposed edges of carpet shall be fastened to floor surfaces and have trim along the entire length of the exposed edge. Carpet edge trim shall comply with 4.5.2.

95. *See id.* § 4.6.

96. *See, e.g.*, *id.* § 4.8.2:

> The least possible slope shall be used for any ramp. The maximum slope of a ramp in new construction shall be 1:12. The maximum rise for any run shall be 30 in (760 mm) (see Fig. 16). Curb ramps and ramps to be constructed on existing sites or in existing buildings or facilities may have slopes and rises as allowed in 4.1.6 (3)(a) if space limitations prohibit the use of a 1:12 slope or less.

> *See also id.* § 4.8.5:

> If a ramp run has a rise greater than 6 in (150 mm) or a horizontal projection greater than 72 in (1830 mm), then it shall have handrails on both sides. Handrails are not required on curb ramps or adjacent to seating in assembly areas. Handrails shall comply with 4.26 and shall have the following features:

> (1) Handrails shall be provided along both sides of ramp segments. The inside handrail on switchback or dogleg ramps shall always be continuous.

> (2) If handrails are not continuous, they shall extend at least 12 in (305 mm) beyond the top and bottom of the ramp segment and shall be parallel with the floor or ground surface (see Fig. 17).

> (3) The clear space between the handrail and the wall shall be 1-1/2 in (38 mm).

> (4) Gripping surfaces shall be continuous.

> (5) Top of handrail gripping surfaces shall be mounted between 34 in and 38 in (865 mm and 965 mm) above ramp surfaces.

the design of doorways;[97] the height of toilet seats;[98] and many others. These matters are of surpassing importance to individuals with disabilities—stores and restaurants whose design features do not comply with these standards exclude people from central activities of life in the community—but they are likely to strike many federal judges as both arcane and trivial. Combine that with what seem like the small stakes in most accessibility cases (one individual with a disability wants one small business to make a set of relatively cheap changes in its facilities), and federal judges will readily see these cases not as implicating civil rights but instead as posing issues best fit for state and local building inspectors.

That attitude is wrongheaded, however. Although the ADA's requirements are highly technical, they are essential to serve a core function of all civil rights laws: ensuring that the arenas of civic life are open to everyone.[99] A single step in front of a store may not immediately call to mind images of Lester Maddox standing in the door of his restaurant to keep blacks out. But in a crucial respect they are the same, for a step can exclude a person who uses a wheelchair just as surely as a no-blacks-allowed rule can exclude a class of people. Technical as they are, the ADA Accessibility Guidelines are simply designed to remove the manmade barriers that exclude people with disabilities from participating in major parts of our nation's economic and community life. Congress therefore properly framed them as civil rights protections.[100] Although it is common for judges to treat disability rights as fundamentally different from other civil rights,[101] they are wrong to do so.

In any event, it is not for judges to decide whether the technical matters necessary to vindicate disability rights are sufficiently like other civil rights laws to be worth their time. Congress passed the ADA as a "clear and comprehensive national mandate for the elimination of

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(6) Ends of handrails shall be either rounded or returned smoothly to floor, wall, or post.

(7) Handrails shall not rotate within their fittings.

97. *See id.* § 4.13.

98. *See id.* § 4.16.3 ("The height of water closets shall be 17 in to 19 in (430 mm to 485 mm), measured to the top of the toilet seat.").

99. *See* Bagenstos, *supra* note 8, at 435.

100. For a general argument that the ADA's accommodation requirement is fundamentally continuous with more traditional antidiscrimination requirements, see Bagenstos, *supra* note 28, at 859.

101. *See, e.g.*, Samuel R. Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 945–48 (2004) (arguing that the U.S. Supreme Court has done so).

discrimination against individuals with disabilities."[102] There is simply no doubt that Congress had the constitutional power to enact the statute's requirements of accessible public accommodations.[103] Accordingly, there is no doubt that cases arising under those requirements properly invoke the jurisdiction of the federal courts.[104] If there are "too many" ADA accessibility cases, that is because the statute's purely injunctive remedies give businesses an incentive to wait until suit is threatened before they comply, and the *Buckhannon* rule gives plaintiffs' attorneys an incentive to sue rather than simply threaten to sue. The large number of ADA accessibility cases in the federal courts ultimately reflects the large number of statutory violations and the limited remedies available.

C. The Outside Agitator Argument

A third frequent argument against serial ADA litigation asserts that the plaintiffs in such cases are not connected to the communities in which they bring suits, and that they challenge barriers about which local residents with disabilities have never complained. In media coverage of serial ADA litigation, this argument has taken on some of the overtones of Southern criticism of "outside agitators" during the African American civil rights movement.[105] Thus, one editorial that criticized serial litigator Jarek Molski for "traveling throughout Southern California, finding violations of requirements in the Americans With Disabilities Act" asserted that in "many" of Molski's cases "other disabled folks found no fault and used the facilities with ease."[106] And Walter Olson, in his attack on what he called the "ADA Shakedown Racket," prominently featured the claim of recently sued businesses that no person with a disability had "ever complained before about their facilities."[107]

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102. 42 U.S.C. § 12101(b)(1) (2000).

103. *See* Pinnock v. Int'l House of Pancakes Franchisee, 844 F. Supp. 574, 578–79 (S.D. Cal. 1993). The constitutionality of the ADA's public accommodations title follows clearly from the Supreme Court's decisions upholding the public accommodations title of the Civil Rights Act of 1964. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

104. *Cf.* Samuel R. Bagenstos, *Judging the Schiavo Case*, 22 CONST. COMMENT. 457, 472–73 (2005) (arguing that federal courts may not refuse to apply a law that is constitutional simply because they find it to be an inappropriate use of federal jurisdiction).

105. *Cf.* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 168–69 (3d rev. ed. 1974).

106. Editorial, *Ending Scam on ADA Suits*, SANTA MARIA TIMES (Cal.), Dec. 14, 2004, *available at* http://www.santamariatimes.com/articles/2004/12/14/sections/opinion/121404b.txt.

107. Olson, *supra* note 14, at 80.

So too in the ADA Notification Act hearings, where Clint Eastwood set the tone by calling serial ADA plaintiffs' lawyers "self-appointed vigilantes."[108] One witness, criticizing a series of suits against inaccessible businesses in Palm Beach, Florida, emphasized that "[t]he lawsuits were not filed by a Palm Beach County resident who would likely be seeking the services of these businesses, but by a Broward County resident."[109] Another witness criticized an attorney for "develop[ing] a cottage industry based upon a single client who went door-to-door in Hawaii suing public accommodations" and subsequently "moved to the San Francisco area [where he] is doing the same thing."[110]

The outside agitator argument has not been confined to the media or the political arena. Courts have frequently invoked the argument in the course of dismissing ADA public accommodations suits for lack of standing.[111] Under the Supreme Court's case law, a plaintiff lacks standing to seek an injunction unless she can show a "real and immediate threat" of future injury at the hands of the defendant.[112] "[P]ast exposure to illegal conduct" will create standing to pursue a claim for damages, but it "does not in itself show a present case or controversy regarding injunctive relief."[113] In a large number of cases brought by serial ADA litigants, courts have relied on the distance between the plaintiff's home and the defendant's business as grounds for concluding that there is no "real and immediate threat" that the plaintiff will visit the defendant's business again.[114]

Ruth Colker and Adam Milani have both argued that lower-court decisions denying standing in ADA public accommodations cases misapply

108. *Hearing*, *supra* note 11, at 11 (statement of Clint Eastwood).

109. *Id.* at 57 (statement of Tammy K. Fields, Assistant County Attorney, Palm Beach County, Fla.).

110. *Id.* at 46 (prepared statement of Christopher G. Bell, Attorney, Minneapolis, Minn.).

111. For discussions of the significant barrier that the standing doctrine, as interpreted by the lower courts, has posed to successful ADA public accommodations suits, see COLKER, *supra* note 3, at 184–87; Milani, *supra* note 31, at 84–85.

112. City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (internal quotation marks omitted).

113. *Id.* (internal quotation marks omitted); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (reaffirming this aspect of *Lyons*).

114. *See, e.g.*, Molski v. Kahn Winery, 405 F. Supp. 2d 1160, 1164 (C.D. Cal. 2005) (dismissing for lack of standing and finding that the 104-mile distance between the plaintiff's residence and the location of the defendant winery "weighs against finding a reasonable likelihood of future harm"); Brother v. Tiger Partner, LLC, 331 F. Supp. 2d 1368, 1373 (M.D. Fla. 2004) (finding no standing where plaintiff who lived in Miami sued hotel in Orlando, more than 280 miles away); Rosenkrantz v. Markopoulos, 254 F. Supp. 2d 1250, 1251 & n.2, 1253 (M.D. Fla. 2003) (finding no standing where plaintiff who lived in Miami sued hotel in Clearwater Beach, "hundreds of miles" away from his home).

the Supreme Court's justiciability precedents.[115] Congress passed a law that demands that every place of public accommodation in America comply with the requirements of "readily accessible" facilities or "readily achievable" barrier removal.[116] It is certainly plausible to argue that an individual with a disability experiences current "injury in fact" whenever a place of public accommodation is inaccessible, whether or not that individual intends to patronize the business again. The statute guarantees people with disabilities the right to choose stores and restaurants from the same array of options as people without disabilities, and one business's violation deprives a person with a disability of that opportunity to choose, even if at the end of the day she would not have decided to patronize that store.

The argument for Article III standing in such circumstances would start with the proposition that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."[117] As Justice Kennedy explained in his concurring opinion in *Lujan v. Defenders of Wildlife*, that principle gives Congress "the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[118] Here, the statutory right is a right to choose from the same (or close to the same) array of goods and services providers as can anyone else—the right not to have some choices foreclosed because of disability. The denial of that statutory right is an injury.[119] And it is not an injury to every person in the world; it is an injury to the narrowly drawn class of individuals with disabilities, as defined by the ADA.[120] In the ADA's public accommodations title, then, Congress has clearly "identif[ied] the injury it

115. *See* COLKER, *supra* note 3, at 184–87; Milani, *supra* note 31, at 117–19.

116. 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12183(a)(1) (2000).

117. Warth v. Seldin, 422 U.S. 490, 514 (1975).

118. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

119. *Cf.* Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.").

120. *See* 42 U.S.C. § 12102(2); *see also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002) (stating that the ADA's disability definition "need[s] to be interpreted strictly to create a demanding standard for qualifying as disabled").

seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit."[121]

That argument is likely to be an uphill one under current doctrine. But if standing doctrine in fact requires the individual plaintiff to demonstrate a current, concrete plan to return to the particular business sued, the law will be wildly underenforced, particularly in businesses patronized mostly by travelers. To the extent that the Supreme Court's standing doctrine does require a current plan, as important language in *Lujan* suggests,[122] the harmful consequences of that rule add weight to the standard critiques of the Court's cases.[123] Under such a rule, "an alleged wrongdoer [could] evade the court's jurisdiction so long as he does not injure the same person twice."[124]

Even if Supreme Court doctrine requires a plaintiff suing an inaccessible business to face a "real and immediate threat" of returning to that business, a number of courts have gone well beyond that principle in dismissing ADA cases brought by serial litigants. In one case, for example, a serial litigant visited an inaccessible hotel, filed suit, and then subsequently made a reservation to return.[125] The district court concluded that the reservation could not give the plaintiff standing because "standing is determined as of the date suit is filed."[126]

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121. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

122. *See id.* at 564 ("[T]he affiants' profession of an 'inten[t]' to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").

123. *See, e.g.*, Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 30 (1984) (arguing that *Lyons* "may jeopardize the protective powers of Congress"); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 209 (1992) (criticizing *Lujan* for suggesting improper limits on Congress's power to authorize citizen suits); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988) ("If a duty is statutory, Congress should have essentially unlimited power to define the class of persons entitled to enforce that duty, for congressional power to create the duty should include the power to define those who have standing to enforce it.").

124. Indep. Living Res. v. Or. Arena Corp., 982 F. Supp. 698, 762 (D. Or. 1997).

125. Brother v. Tiger Partner, LLC, 331 F. Supp. 2d 1368, 1373 (M.D. Fla. 2004).

126. *Id.* (internal quotation marks omitted); *see also* Access 4 All, Inc. v. Wintergreen Commercial P'ship, Ltd., No. CIV.A.3:05-CV-1307-G, 2005 WL 2989307, at *4 (N.D. Tex. Nov. 7, 2005) (ruling that hotel reservation made after the complaint was filed did not create standing); Wilson v. Costco Wholesale Corp., 426 F. Supp. 2d 1115, 1121 n.2 (S.D. Cal. 2006) (plaintiff's two visits to defendant's store after filing the complaint did not create standing); D'lil v. Best Western Encina Lodge & Suites, 415 F. Supp. 2d 1048, 1054–55 (C.D. Cal. 2006) (ruling that intention, as of the time of trial, to return to defendant's hotel could not establish standing because the relevant question was intention at the time the complaint was filed).

That conclusion in itself made little sense: There would be nothing to prevent a plaintiff from filing a new lawsuit if events subsequent to the filing of her original suit gave her standing. To require the dismissal of a pending suit and the filing of a new suit in such circumstances is wasteful and formalistic (and would only make the plaintiff look like even more of a serial litigant). Even more troubling, however, was the court's reliance on the fact that the plaintiff had been "involved in a multitude of lawsuits against the hotel industry."[127] The court noted that the plaintiff "has professed an intent to return to all fifty-four of the properties he has sued" and found that expression of intent "simply implausible."[128] But there is no reason, simply because a person with a disability can stay at only one hotel at a time, that she should not be able to demand that *all* hotels in a city are accessible. If fifty hotels in a city had a "whites only" policy, would an African American be required to sue only one such hotel, leaving it to a separate plaintiff to sue each of the others? If not, there is no reason why public accommodations suits under the ADA should be any different.

Worse, some courts (particularly in the Middle District of Florida) have considered it a factor weighing against the plaintiff's standing that, though the defendant's business is not accessible, other similar businesses in the area *are* accessible.[129] These rulings directly contradict the statute's purposes. Congress specifically highlighted the "isolat[ion] and segregat[ion of] individuals with disabilities" as a principal target of the ADA.[130] The statute's public accommodations title further emphasizes the antisegregation purpose by prohibiting businesses from providing "different or separate"

127. *Brother*, 331 F. Supp. 2d at 1374; *see also Wilson*, 426 F. Supp. 2d at 1122.

128. *Brother*, 331 F. Supp. 2d at 1375.

129. *See, e.g.*, Ass'n for Disabled Ams., Inc. v. Integra Resort Mgmt., Inc., 385 F. Supp. 2d 1272, 1280 (M.D. Fla. 2005) (discussing an earlier case brought by a serial ADA litigant and finding it significant that the plaintiff "could not explain why he would choose to stay at the [defendant's inaccessible] hotel, when other nearby hotels admittedly met his needs"); *see also* Access 4 All v. Oak Spring, Inc., No. 504CV75OCGRJ, 2005 WL 1212663, at *5 (M.D. Fla. May 20, 2005) (dismissing a serial litigant's claims against an Ocala, Florida, hotel for lack of standing, and stating that even if the plaintiff desired to return to the Ocala area to visit the Silver Springs theme park (as the plaintiff suggested he would), there would be no reason why he would go back to the same hotel instead of one of a "large number of hotels closer to the theme park"); *Brother*, 331 F. Supp. 2d at 1373 (arguing that, although the plaintiff "travels to the greater Orlando area (Disney World in particular) . . . about twice a year," he lacked standing because "there are countless other hotels located closer to Disney World than the Best Western Deltona Inn"); Rosenkrantz v. Markopoulos, 254 F. Supp. 2d 1250, 1253 (M.D. Fla. 2003) (arguing that, even if the plaintiff will return to the Tampa Bay area to visit his sister-in-law, "[t]here are countless hotels closer to Plaintiff's sister-in-law's house than Defendants' establishment").

130. 42 U.S.C. § 12101(a)(2) (2000); *see also* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 600 (1999) (discussing congressional findings identifying segregation as a form of discrimination).

accommodations to individuals with disabilities except where "necessary" to provide accommodations that are "as effective as [those] provided to others."[131] To say that an individual with a disability is less likely to have standing to challenge inaccessible facilities at one hotel because *other* hotels are accessible is to disregard the essential principle that *all* places of public accommodation must comply with the statute.

The discussions in the cases I have highlighted in this subpart are understandable if they are based on a view that "outside agitators," who do not have any "real" problems but just come into a community where everyone is happy and stir up trouble, should not be allowed to invoke the ADA. But they ignore the significant difficulties people with disabilities have in enforcing the statute, and the significant obstacles in the way of the filing of *any* civil rights action.[132] Under the ADA's current remedial regime, the disincentives to filing public accommodations lawsuits are so great that public accommodations suits are likely to be brought by a small number of individuals who litigate in a large number of communities. That is the natural result of the ADA's limited remedies, and courts fail to take account of that fact when they treat out-of-town ADA plaintiffs as outside agitators.

III. AMBIVALENCE ABOUT CIVIL RIGHTS LITIGATION

As the discussion in the previous parts should demonstrate, serial litigation, without presuit notice, is a predictable result of the limited remedies available for violations of the ADA's public accommodations title. Ironically, the remedial limitations that were imposed to prevent litigation abuse have encouraged the very practices that courts and businesses find especially abusive. The limited remedies have led to massive underenforcement of the ADA's public accommodations title, and they have left serial litigation as one of the only ways to achieve anything approaching meaningful compliance with the statute.

Why, then, have courts and commentators been so critical of serial ADA litigation? In this part, I suggest that the criticism reflects a deep ambivalence toward the role of attorneys in civil rights litigation. The fee-shifting statutes reflect a judgment that civil rights laws will be

131. 42 U.S.C. § 12182(b)(1)(A)(iii).

132. *See, e.g.*, Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 668 (citing research detailing the "significant barriers [that] confront plaintiffs" in efforts to bring civil rights cases).

underenforced unless private lawyers are given financial incentives to bring cases under those laws. But judges and members of Congress are uncomfortable with civil rights law being practiced for profit. When the desire of civil rights lawyers to get paid is too obvious, courts recoil.

This discomfort has been particularly apparent in serial ADA cases, in which judges have criticized lawyers for being driven by the desire to recover fees. In one case that dismissed a serial plaintiff's claim on standing grounds, a federal judge complained that the entitlement to attorneys' fees "encourages massive litigation" that "undermines both the spirit and purpose of the ADA."[133] Another ruling that rejected on the merits a claim brought by a serial litigant began the substantive part of its opinion with a section that decried "[t]he current ADA lawsuit binge" as being "essentially driven by economics—that is, the economics of attorney's fees."[134] In hearings on the ADA Notification Act, Clint Eastwood testified that serial plaintiffs' lawyers "come along and they end up driving off in a big Mercedes, and the disabled person ends up riding off in a wheelchair, and that is because they have collected all the money."[135] "[Y]ou can't believe in America," he said, "that these lawyers that cloak themselves under the guise that they are doing a favor for the disabled when they really are doing a disservice."[136]

Eastwood's words perfectly encapsulate the belief that attorneys who bring civil rights cases should think of their work as charity. As Jeffrey Brand has shown, that notion of civil rights law as charity has often reared its head when courts have interpreted statutory fee-shifting provisions.[137]

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133. *Brother*, 331 F. Supp. 2d at 1375.

134. Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1282 (M.D. Fla. 2004).

135. *Hearing, supra* note 11, at 12 (statement of Clint Eastwood); *see also id.* at 20 (statement of Terri L. Davis, Rancho Santa Fe, Cal.) (stating that "the lawyers were the big winners"). In one instance, the attribution of greed to serial plaintiffs' lawyers comes across as particularly ironic. In the ADA Notification Act hearings, no member of Congress was more vehement in charging those lawyers with greed than Representative Randy "Duke" Cunningham of California. *See id.* at 13–14 (attacking "slick, mean-spirited liberal trial lawyer[s]" who bring serial ADA suits). Five years later, Cunningham resigned from Congress "after pleading guilty to taking more than $2 million in bribes." *Congressman Resigns After Bribery Plea*, CNN.com, Nov. 28, 2005, http://www.cnn.com/2005/POLITICS/11/28/cunningham. Freud would be proud.

136. *Hearing, supra* note 11, at 11 (statement of Clint Eastwood).

137. *See* Brand, *supra* note 68, at 373; *see also* Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2106 (2004) ("The prevailing conception of 'public interest' lawyering defines it, in large part, in terms of the lawyer's financial self-sacrifice."). More generally, John C. Coffee has noted the "smugly moralistic" attitude courts often take toward entrepreneurial attorneys, a phenomenon to which the assumption that civil rights cases should be charity is surely related. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 897 (1987); *see also* Anita Bernstein, *The Enterprise of Liability*, 39 VAL. U. L. REV. 27, 33 (2004) ("[D]espite the esteem for

But that fact merely demonstrates the ambivalence judges have toward civil rights litigation. The widely acknowledged purpose of fee-shifting statutes is to encourage skilled private attorneys to take public interest cases by guaranteeing them competitive compensation.[138] To read fee-shifting statutes in a way that fails to provide that incentive betrays an underlying unease with the entire practice. That plaintiffs' lawyers want to be paid the "reasonable" attorneys' fees authorized by statute should provide no basis for objecting to their litigation practices.

In the disability context, the notion that civil rights cases are essentially charity work is particularly pernicious. A central goal of the American disability rights movement has been to challenge the widely held view that people with disabilities are unfortunates who deserve the pity and charity of the nondisabled public.[139] Instead of telethons that ask people to give money to seek cures for disabling medical conditions, disability rights activists have urged that the proper response to disability is civil rights legislation to open up all areas of civic and economic life to people with disabilities.[140] The ADA, of course, is the vindication of that aim of the disability rights movement. Clint Eastwood's suggestion that lawyers who bring ADA cases should think of their work as "doing a favor for the disabled" thus reflects the very attitudes against which disability rights activists mobilized in their successful campaign to enact the ADA.[141] And Eastwood's statement that ADA plaintiffs' lawyers "come along and they end up driving off in a big Mercedes, and the disabled person ends up riding off in a wheelchair,"[142] suggests even more strongly a belief that only a cure, and not the enforcement of civil rights legislation, will serve the interests of people with disabilities. Again, that is just the kind of attitude that the disability rights movement has long mobilized against.

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enterprise that prevails in the capitalist United States, American scholarship and public discourse seldom omit a dash of hostility when they refer to the entrepreneurial tendencies of the plaintiffs' bar. Writers sound a little like Castro railing against the paladares as they attack plaintiffs' lawyers for their hustle, initiative, and bringing to a market that which a market wants."). That moralistic attitude has fueled such legislation as the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (to be codified in scattered sections of 28 U.S.C.), which limits plaintiffs' class action litigation.

138. *See supra* note 68 and accompanying text.

139. *See generally* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993).

140. *See* Bagenstos, *supra* note 8, at 430.

141. For a good discussion of Clint Eastwood's testimony, see MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 146–65 (2003).

142. *Hearing*, *supra* note 11, at 12 (statement of Clint Eastwood).

To be sure, whenever plaintiffs' attorneys rely on recovery of their fees from the opposing party, the risk of a conflict of interest is present. Lawyers may enter into sweetheart settlements that line the pockets of plaintiffs' counsel without achieving results for the plaintiffs themselves.[143] In the ADA accessibility context, judges and others have accused plaintiffs' counsel of making such sweetheart deals, but they have offered little evidence to support those accusations. "There have been cases in this District," one judge wrote, "where the same defendant property is sued a second, and even a third, time for the same violations of ADA."[144] In those cases, he alleged, "after Plaintiff's counsel was paid a substantial fee the case languished with no effort to enforce the injunction or remove the barriers," and the defendant ultimately "saved the cost of renovation to bring the property in compliance with the ADA."[145] But he did not identify any particular instances in which that conduct had occurred; his "[t]here have been cases" statement stood on its own.

The argument that serial plaintiffs' lawyers seek money at the expense of access was also a major theme of the ADA Notification Act hearings. Representative Charles Canady opened the hearings by stating that "[t]he lure of large attorney's fees is so great that attorneys may even settle cases for attractive sums for themselves by agreeing to terms by which a property would not even be fully accessible under the requirements of the ADA."[146] Representative Mark Foley, the primary sponsor of the bill, similarly charged that "the ADA is being used by some attorneys to shake down

143. *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 226 (1983) ("[T]he ability of private law enforcement to create a credible penalty structure is undercut if the private watchdog can be bought off by tossing him the juicy bone of a higher-than-ordinary fee award in return for his acceptance of an inadequate settlement."). This is the kind of concern that motivated the requirement, in Rule 23 of the Federal Rules of Civil Procedure, for court approval of the dismissal or settlement of class actions. *See, e.g.*, Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1079–82 (1984); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 45 (1991); Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 76–77. Although ADA accessibility suits are not typically brought as class actions, they are, just like public accommodations suits under the Civil Rights Act of 1964, "private in form only." Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401 (1968). They seek injunctive relief that often requires durable structural changes, which changes will benefit an entire class of individuals with disabilities. The standard concerns about sweetheart settlements of class action litigation are thus relevant here.

144. Disability Advocates & Counseling Group, Inc. v. Betancourt, 379 F. Supp. 2d 1343, 1349 (S.D. Fla. 2005).

145. *Id.*

146. *Hearing*, *supra* note 11, at 1 (opening statement of Rep. Charles T. Canady, Chairman, Subcomm. on the Constitution, H. Comm. on the Judiciary).

thousands of businesses from Florida to California, and they are doing so at the [expense] of people with disabilities."[147] Again, however, neither Canady nor Foley offered specific examples of instances in which plaintiffs' lawyers had entered into settlements that paid attorneys' fees without achieving access to the defendants' businesses.

To the extent that sweetheart settlements are a problem, however, a broad-gauged attack on serial ADA litigation is unwarranted. Rather, sweetheart settlements could easily be avoided simply by requiring the publication in a web-searchable database of any agreement that disposes of actual or threatened ADA public accommodations claims.[148] Under such a regime, a defendant who entered into a settlement would have every incentive to make its premises accessible, even if the plaintiff's attorney had no interest in following up: The mere filing of the settlement would alert *other* potential plaintiffs, who would not be bound by its preclusive effect, that the defendant's premises were in violation of the law. A business entering into such a settlement would therefore know that it would be an easy target for a second round of litigation—and an obligation to pay attorneys' fees to a second plaintiff's lawyer—if it did not move quickly to come into compliance.

Nor is a broad-gauged attack on serial ADA litigation a justifiable response to the ethical violations some serial plaintiffs' lawyers have committed. In one noted series of cases, a federal judge found that the lawyer of one serial plaintiff, Jarek Molski, gave legal advice to unrepresented defendants—including advising defendants *not* to retain a lawyer and not to make changes to improve the accessibility of their premises while litigation was pending.[149] Such clear ethical violations can be easily discovered and punished without limiting serial litigation generally. Molski also uniformly alleged that he suffered physical injury at each of the hundreds of inaccessible businesses he sued, even in cases where the claim of injury contradicted one of his other allegations.[150] For

147. *Id.* at 5 (statement of Rep. Mark Foley); *see also id.* at 5–6 ("[H]aving a bunch of rogue attorneys using the law to reap attorney's fees does no one but the lawyers any service.").

148. This proposal would parallel the "sunshine in litigation" movement that has led to requirements of open access to settlements in a number of states. *See* Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 830–31 (2004). *See generally* Kotkin, *supra* note 42, at 971–78 (discussing possible ways of making civil rights settlements less "invisible").

149. *See* Molski v. Mandarin Touch Rest., 359 F. Supp. 2d 924, 929–30 (C.D. Cal. 2005) [hereinafter *Mandarin Touch I*]; Molski v. Mandarin Touch Rest., 385 F. Supp. 2d 1042, 1047 (C.D. Cal. 2005); Molski v. Kahn Winery, 381 F. Supp. 2d 1209, 1211 (C.D. Cal. 2005).

150. *See Mandarin Touch I*, 359 F. Supp. 2d at 930–31.

example, his complaints alleged that he suffered physical injury in two cases in which he did not even attempt to enter a business because its entrance was inaccessible and in a case in which he simply sat in his car and "wait[ed] for a handicapped [parking] space to become available."[151] Such contradictions should be evident to anyone who reads a complaint even remotely carefully; again, they do not justify any restriction on serial ADA litigation per se. And where a plaintiff "repeated[ly] refile[s] the same case, [with] the same parties, the same issues and against the same property without disclosure of an adverse ruling in the same previously filed case for the purpose of being assigned to a judge more favorable to Plaintiffs' position," as one district judge has accused some lawyers of doing in the ADA context,[152] surely the defendant (who was, after all, the defendant in the previous suit) can be counted on to point out that fact to the court.

But the attack on serial ADA litigation has not in any event been limited to cases in which plaintiffs' lawyers violate ethical strictures or seek attorneys' fees at the expense of access for their clients. The attack has focused on the motivation of plaintiffs' lawyers to earn attorneys' fees, period. And again, the limitations that Congress and the Supreme Court have placed on the ADA's remedies have ironically contributed to the backlash. All private attorneys seek to earn a living, but attorneys who bring ADA public accommodations cases have to be particularly obvious about it. The limitations on remedies force these attorneys to engage in serial litigation, often without presuit notice, to get paid. Those practices, which are unusual for attorneys, make the profit motive of the lawyers who bring ADA public accommodations cases particularly apparent. And that obvious profit motive further delegitimizes ADA litigation and is used to justify further restrictions on the litigation.

The problem is generalizable: Civil rights laws depend on the private bar for their enforcement. Government enforcers have limited resources in the best of times, and recent years have made painfully apparent just how much the vigor of government enforcement can vary with the political winds. Public interest groups, moreover, have far too limited resources to fill in the gap—and far too little inclination to bring the mundane day-to-day cases that raise no new legal questions but are essential to assuring that

151 *Id.* at 931.

152. Disability Advocates & Counseling Group, Inc. v. Betancourt, 379 F. Supp. 2d 1343, 1366 (S.D. Fla. 2005).

the law is enforced.[153] But the private bar cannot be induced to bring these cases without a promise of a profit, and judges and political actors react harshly to profit-motivated civil rights litigation.[154] The controversy over serial ADA litigation thus highlights a general problem in making the promises of civil rights law a reality.

CONCLUSION

This Article has illustrated an ironic effect of limitations on civil rights remedies: Even when they are designed as a response to abusive litigation conduct, such limitations may have the effect of encouraging conduct that seems even more abusive. The new, seemingly abusive conduct then may be pointed to as justifying additional limitations.

As I have tried to show, this precise cycle is currently playing itself out in the context of ADA accessibility litigation. The unavailability of damages under the statute's public accommodations title and *Buckhannon*'s rejection of the catalyst theory for attorneys' fee recovery have combined to encourage serial litigation without presuit notice. Judges and legislators have responded by seeking to limit the statute's remedies even further. But additional limitations will only exacerbate the problem of underenforcement of the ADA's public accommodations title. A better response to serial ADA litigation would be to reinstate the catalyst theory, and perhaps authorize a damages remedy for violation of the statute. Those additional remedies would, perhaps ironically, eliminate some of the incentives that lead to serial litigation. If those remedies were added to the statute, the frequently proposed presuit notice requirement might well make sense. Without those additional remedies, though, a notice requirement would only make the ADA less effective.

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153. *Cf.* Jolls, *supra* note 56, at 158 (stating that "national issue organizations . . . tend to focus on high-profile, publicly charged issues," and that they "tend to work on a few important or influential cases rather than a large number of more day-to-day claims").

154. *Cf.* Coffee, *supra* note 143, at 228 (stating that courts, reacting to blatantly entrepreneurial litigation practices by plaintiffs' attorneys in class and derivative actions, "have begun to narrow and limit substantive statutory rights, seemingly because of their distaste for the process by which such rights are enforced"). There is a broader question beneath the surface here, about whether *litigation* is the proper way to enforce disability rights laws or civil rights laws generally. *Cf.* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1136–39 (2006) (arguing that the Court's fee-shifting decisions reflect a more general "hostility to litigation"). I tend to believe that it is, and I find it important that "[v]irtually all modern civil rights statutes rely heavily on private attorneys general." Karlan, *supra* note 7, at 186. But a full answer would take me far beyond this project.

The controversy over serial ADA litigation highlights the continuing ambivalence about civil rights law as a profit-making enterprise. But the legal system must get past that ambivalence if civil rights laws are to be enforced. The private, profit-making bar has proven essential to civil rights enforcement.