

Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?

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TABLE OF CONTENTS

I. INTRODUCTION	1264
II. OVERVIEW OF STATUTORY AND COMMON LAW RIGHTS AND REMEDIES FOR INJURIES TO INDIVIDUALS WITH DISABILITIES RELATING TO THE BUILT ENVIRONMENT	1267
A. <i>Federal Statutory Mandates</i>	1268
1. <i>The Rehabilitation Act of 1973</i>	1269
2. <i>The Americans with Disabilities Act of 1990</i>	1271
3. <i>Who Is Protected Under Federal Statutes (and Many State and Local Laws)?</i>	1272
4. <i>Procedures and Remedies Under Federal Laws</i>	1274
B. <i>State and Local Laws</i>	1276
1. <i>Nondiscrimination Mandates</i>	1276
2. <i>Building Codes and Licensing Permits</i>	1276
C. <i>Common Law Tort Actions</i>	1277
1. <i>Overview</i>	1277
2. <i>Negligence</i>	1279
3. <i>Negligent or Intentional Infliction of Emotional Distress</i>	1283
III. WHAT IS THE IMPACT OF LEGAL PROTECTIONS ON IMPROVING THE BUILT ENVIRONMENT FOR INDIVIDUALS WITH MOBILITY IMPAIRMENTS?.....	1284
A. <i>What Do the Studies Show?</i>	1287

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1. <i>Independent Living Research Utilization Program</i>	1287
2. <i>National Council on Disability</i>	1288
3. <i>Major Legal Scholar Assessments</i>	1291
4. <i>General Conclusions</i>	1295
B. <i>The Role of Technical Assistance in Public Accommodation Improvements</i>	1295
1. <i>Federal Government Agencies</i>	1295
a. <i>Department of Justice</i>	1295
b. <i>Architectural and Transportation Barriers Compliance Board</i>	1296
c. <i>National Institute on Disability and Rehabilitation Research</i>	1296
d. <i>National Center on Accessibility</i>	1297
2. <i>Advocacy Organizations</i>	1297
C. <i>The Role of Litigation and Other Enforcement in Public Accommodation Improvements in the Built Environment</i> ..	1299
1. <i>Tort Theories</i>	1299
a. <i>Section 504 Remedies</i>	1301
b. <i>ADA Remedies</i>	1302
i. <i>Title II</i>	1302
ii. <i>Title III</i>	1303
c. <i>Other Statutory Claims</i>	1304
2. <i>Supreme Court Cases Involving or Affecting Architectural Barrier Issues</i>	1304
3. <i>Types of Claimants</i>	1305
a. <i>Private Individuals Represented by “Solo” Counsel (Those Not Affiliated with Major Disability Advocacy Organizations)</i>	1305
b. <i>Class Actions</i>	1308
c. <i>Advocacy Organizations and Cause Lawyers —the “Private Attorneys General”</i>	1308
d. <i>Department of Justice and Other Agency Enforcement</i>	1310
IV. CONCLUSIONS AND RECOMMENDATIONS	1311

I. INTRODUCTION

Consider the following scenarios and put yourself in the position of the individual who is a wheelchair user or who has a significant mobility impairment or is a friend or family member of that individual.

You want to attend a movie in a stadium seating theater, and the only accessible seats are at the very front, requiring you to view the movie at an extremely uncomfortable and painful angle.

You try to maneuver your wheelchair in a store with narrow aisles and many breakable items on the floor area.

You want to use the dressing room in a department store but it is too small for a wheelchair.

You cannot enter the main entrance of a store within a shopping mall because of the store design, although you can enter through the side.

You attend a convention in Las Vegas and can only go to some of the bars and lounges in the hotel because not all of them are accessible.

You are a student at a public university and need to use the restroom in the student center and find there is not a single accessible restroom in the building.

You face criminal charges in court, but you cannot get to the second floor courtroom, and the solution offered is to carry you up the stairs.

All of these scenarios are similar to or are based on facts of litigated cases. The following provides some perspectives on why I think these scenarios raise important issues and why this Article focuses on those issues.

Shortly after the Americans with Disabilities Act (ADA) of 1990¹ was enacted, my daughters were about eleven and fourteen. When we would eat out, they would notice when entering a restaurant that I would look around to see if it was accessible, not because I have a physical impairment, but because I have been writing about accessibility issues since 1980 and so I notice the physical environment wherever I go. My daughters would sometimes say something like, “Mom, are you going to make a scene?” fearful as children are at that age that their parents will embarrass them in a public place. My response would be, “No, I’m just going to raise awareness.”² And that is one goal of this Article.

Another story highlights why raising awareness and changing the physical environment is important. A year or two after the ADA was enacted, I had to go to a shipping delivery service store to pick up a package. It was a national corporation, but the location was in a small out-of-the-way place in a residential neighborhood. I noticed that there was no curb cut from the parking area to the sidewalk area next to the entrance, although it would not have been a costly or difficult barrier to remove at that particular site. I entered the store. There was only one employee, a woman probably in her thirties who looked very tired and down. I thought to myself, “Is this the day to raise awareness

¹ 42 U.S.C. §§ 12101–12213 (2012).

² As adults, both of my daughters are now extremely aware of accessibility issues and are also engaged in “raising awareness” in many ways. My older daughter, Julia Irzyk, is now my coauthor of our treatise *DISABILITIES AND THE LAW* and my younger daughter, Lisa Goldberg, is the disability services coordinator at Ivy Tech Community College. See LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* v–vi (4th ed. 2014) [hereinafter *DISABILITIES AND THE LAW*].

and is she the right person?”³ I asked her if she could give me the name of the manager or supervisor so I could write a letter encouraging them to remove the curb cut barrier. Her whole being brightened, and she said, “I’m so glad someone cares about this. My son has a disability.” She gave me the contact name. I wrote to the manager, and the barrier was removed—without litigation, without media embarrassment to the company—because that particular company, for whatever reason, had not yet responded to the newly enacted ADA but had realized that it should do so.

By now it is no longer valid for a major company to claim ignorance of the law. It is not 1992 or 1993; it is almost 2015, the twenty-fifth anniversary of the ADA. By now, most programs of public accommodation and public service programs should know better and have addressed barrier issues.

This Article examines the following: Has the physical environment for individuals with mobility impairments improved since 1990? Has it been the result of legislation, regulations, agency guidance, industry action, litigation, or other reasons? What type of litigation has been most effective and why, and what litigation strategies might improve the situation? Does current policy adequately redress and remedy injuries only for specific individuals or does current policy improve the built environment for everyone? Or does it do both? Are there legislative remedies needed to ensure better access? If so, what are the realities of such changes? What else might be done to increase progress on removing architectural barriers?

Before addressing these issues, it should be noted that this Article limits its focus to individuals with mobility impairments (wheelchair users and others with physical mobility limitations). It focuses only on physical spaces and accessible design (and signage) and not on reasonable accommodations and discrimination of other types. The Article discusses all twelve categories⁴ of public accommodations and physical places of state and local government agencies. It only addresses architectural issues related to covered entities, not issues such as websites⁵ or the provision of services and products.⁶

Because the focus of this law review Symposium issue is on the relationship of torts and civil rights, the Article discusses the use of tort theories in enforcing the statutory civil rights created by the ADA, the Rehabilitation Act, and other disability discrimination statutes, and the reasons why tort theories instead of, or in addition to, direct statutory claims are sometimes used and necessary. The Article addresses the limitations of tort theories and discusses what actions might be necessary to carrying out the

³ I have tried to teach both my students and my daughters to pick their battles.

⁴ These categories are lodging (other than apartments), eating establishments, entertainment facilities, public gathering places, stores and sales establishments, service establishments, transportation stations, public display facilities, places of recreation, places of education, social service centers, and exercise facilities. *See* 42 U.S.C. § 12181(7) (2012).

⁵ *See* DISABILITIES AND THE LAW, *supra* note 2, § 9:5.

⁶ *See id.* §§ 5:1–5:10.

goals of ensuring that individuals with disabilities have access to physical places. The Article addresses whether other avenues—legislative, regulatory, agency guidance, or other litigation—are more viable means to improve accessibility. It also considers the role of tort liability within the overall set of activities designed to improve access. In making these assessments it is critical to determine whether individuals or society and groups are most benefitted from the different theories.

II. OVERVIEW OF STATUTORY AND COMMON LAW RIGHTS AND REMEDIES FOR INJURIES TO INDIVIDUALS WITH DISABILITIES RELATING TO THE BUILT ENVIRONMENT

There are a myriad of federal, state, and local statutes, as well as common law protections addressing individuals with disabilities who are adversely affected by the built environment or “place” as a physical location.⁷

As noted previously, the focus of this Article is primarily on individuals with physical impairments, such as wheelchair users or others with mobility impairments. Aspects of physical environment design that affect individuals with sensory impairments are not addressed.

A person with a mobility impairment may be injured by the built environment in a number of ways.⁸ This includes the mental pain and suffering from being excluded because the design does not allow entry or full access to the location.⁹ Other injuries can be physical injuries, the more traditional tort-type injuries, when individuals fall or are otherwise injured because of design problems (such as a ramp that is too steep or the lack of a ramp or elevator).¹⁰ An individual may be adversely affected in the workplace, not because the workplace itself is inaccessible, but because the individual cannot fully participate in social activities (such as having lunch with co-workers) or attending professional development meetings or conferences because those activities take place in inaccessible facilities.¹¹ Such exclusion can have an adverse impact on employment advancement.

The following is a general overview of how such injuries are currently addressed within legal mandates.¹² This section discusses both common law and statutory frameworks. While some have tried to use constitutional theories

⁷The meaning of the term “place” has been litigated in cases involving websites, service providers (such as insurance companies), and other entities. *See generally id.* §§ 6:2–6:6. For purposes of this Article, however, the focus is only on the architecturally built environment. The other issues are important, but the discussion of access in those situations is beyond the scope of this Article.

⁸*See generally id.* § 1:10.

⁹*See id.*

¹⁰*See id.*

¹¹*See DISABILITIES AND THE LAW, supra* note 2, § 1:10.

¹²For a more detailed discussion, including sequential developments, of all laws relating to disability discrimination, see *id.* §§ 1:1–1:43.

(such as the right to travel) to mandate barrier removal, these theories have generally not been accepted.¹³ Therefore, statutory mandates are the primary source of protection.

A. Federal Statutory Mandates

The two most significant of these statutes are the Rehabilitation Act of 1973¹⁴ and the Americans with Disabilities Act (ADA) of 1990.¹⁵ Other federal statutes have varying significance for this Article, but the focus will be on the ADA and the Rehabilitation Act. Other federal statutes of relevance, however, include the Architectural Barriers Act (ABA) of 1968,¹⁶ the Air Carrier Access Act (ACAA) of 1986,¹⁷ the Fair Housing Act Amendments of 1988,¹⁸ the Urban Mass Transportation Act (UMTA) of 1964,¹⁹ the Federal-

¹³ See Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 918 (1966). This article is one of the key foundational pieces regarding disability discrimination law. It was written before any major disability discrimination statute was enacted and demonstrates the need for comprehensive statutory protection. One of the few decisions to address the right to travel as a constitutional issue was *Snowden v. Birmingham-Jefferson County Transit Authority*, 407 F. Supp. 394, 398 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977) (holding that public transportation is not a fundamental right and applying the rational basis test); see also Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501, 1507 (1973).

¹⁴ 29 U.S.C. §§ 701–796l (2012).

¹⁵ 42 U.S.C. §§ 12101–12213 (2012).

¹⁶ 42 U.S.C. §§ 4151–4157 (2012); see also 36 C.F.R. pt. 1191 app. C (2014) (regarding accessible design for agencies covered by the ABA). The ABA applies to buildings for public use that were designed, constructed, or altered for federal government use. See DISABILITIES AND THE LAW, *supra* note 2, § 1:25. This includes federal agency buildings such as post offices, federal housing facilities, federal agency buildings, and a few other facilities. *Id.* The ABA initially lacked an enforcement mechanism, and there are questions about whether current enforcement is effective for carrying out the goals of the statute. *Id.* Because the ABA has not been the basis for much, if any, private remedy enforcement, it is not extensively addressed in this Article.

¹⁷ 49 U.S.C. § 41705 (2012). It is an amendment to the Federal Aviation Act of 1958. While the original codification of the ACAA was repealed by Pub. L. No. 103-272, 108 Stat. 1141 (1994), the repealing legislation added much of the original language of the ACAA to 49 U.S.C. § 41705. For an overview of the ACAA, see DISABILITIES AND THE LAW, *supra* note 2, §§ 8:2–8:3.

¹⁸ 42 U.S.C. §§ 3601–3614a (2012); see also DISABILITIES AND THE LAW, *supra* note 2, §§ 7:6–7:10. The FHA prohibits discrimination in both the sale and rental of housing. In addition, Section 504 of the Rehabilitation Act prohibits discrimination in housing programs that receive federal financial assistance. See *id.* § 6:7. The ADA design requirements do not apply to most housing, although real estate agencies are considered Title III entities. See *id.* § 5:2. Hotels are also covered by the ADA except for portions of hotels that are considered “residence” hotel space. See *id.*

¹⁹ 49 U.S.C. §§ 5301–5330, 5332–5338 (2012); see also DISABILITIES AND THE LAW, *supra* note 2, § 8:5. UMTA was enacted in 1964 and was amended in 1970 to address issues of access for individuals with disabilities. *Id.* It is primarily applicable to mass

Aid Highway Act (FAHA) of 1956,²⁰ the Individuals with Disabilities Education Act (IDEA) of 1975,²¹ and the Voting Accessibility for the Elderly and Handicapped Act (VAEHA).²²

1. *The Rehabilitation Act of 1973*

The Rehabilitation Act of 1973 prohibits discrimination against otherwise qualified individuals with disabilities by programs receiving federal financial assistance.²³ It is an amendment to the much older Vocational Rehabilitation Act.²⁴ While the statute itself does not specifically refer to the design of the environment, model regulations enacted pursuant to Section 504 of the

transit systems, but it also interrelates with Section 504, the ADA, and the Federal Aid Highway Act of 1956 and applies to accessibility for both the vehicles and the stations. *See id.*

²⁰ Pub. L. No. 84-627, 70 Stat. 374 (1956) (codified as amended in scattered sections of 23 U.S.C.). The FAHA applies to highway systems funded through the federal government. *See id.* It was enacted in 1956 and affects facilities such as overpasses, highway rest stops, and other aspects of the physical environment relating to federal highway systems. *See* 23 U.S.C. § 142 (2012).

²¹ 20 U.S.C. §§ 1405, 1406, 1415–1419 (2012). The IDEA was originally enacted as the Education for All Handicapped Children Act (EAHCA) of 1975 and was amended to change the title of the statute in 1990. *See* DISABILITIES AND THE LAW, *supra* note 2, § 1:24. It provides that any state education agency receiving federal funds for special education must comply with a detailed set of procedural and substantive requirements. *See id.* The IDEA ensures that all children with disabilities (defined categorically) receive a free appropriate public education in the least restrictive environment. *Id.* The provision relating to least restrictive environment incorporates a concept that the physical environment for students with mobility impairments should be designed to be inclusive. *See id.* While the IDEA itself does not have provisions relating to school and educational facility design, the principles of Section 504 (for schools receiving federal funding), Title II of the ADA (for state and local publicly funded schools), and Title III of the ADA (for private schools) create mandates relating to the physical environment. The Architectural and Transportation Barriers Compliance Board provides guidelines for buildings to be used by children. *Id.* § 2:54. Because the IDEA does not directly incorporate physical environment issues, it is not the major focus of this Article. It is relevant, however, because not only the school site itself but also the facilities used by the school for graduation, sporting events, and school trips may be required to meet architectural accessibility requirements. *See id.*, § 2:54 n.12 (collecting cases). The requirement that students be placed in the least restrictive environment may also have impact where not all school buildings are accessible. *See id.* § 2:18 (collecting cases).

²² 42 U.S.C. §§ 1973ee–1973ee-6 (2012). VAEHA became effective in 1984 and provides for accessible polling locations for federal elections. *See id.* § 1973ee; *see also* DISABILITIES AND THE LAW, *supra* note 2, § 1:32.

²³ *See* 29 U.S.C. § 794(a) (2012).

²⁴ The history of the Rehabilitation Act of 1973 can be found at S. REP. NO. 93-318, at 4–6 (1973). For an overview of the Rehabilitation Act and its application to architectural barrier issues, *see* DISABILITIES AND THE LAW, *supra* note 2, §§ 6:7–6:11.

Rehabilitation Act provide that individuals should not be excluded from covered programs because facilities are inaccessible or unusable.²⁵

The provisions relevant to architectural barriers clarify that there are different requirements depending on whether a facility is already in existence at the time the statute became effective and if there is a renovation or alteration.²⁶ New construction has specific design standards.²⁷ There is an exemption for accessibility in employment settings for employers with fewer than fifteen employees, but there is not an exemption for small businesses and programs in providing services.

The substantive requirements of the Rehabilitation Act are to be read consistently with the Americans with Disabilities Act for the most part.²⁸ The statutes do, however, have some differences in remedies and enforcement, as will be noted below.

The programs most affected by Section 504 are institutions of higher education and health care institutions. While other programs such as airports, mass transit systems, and criminal justice programs also receive federal financial assistance, the widest impact and the initial judicial interpretation of requirements arose most often in the higher education and health care contexts because these programs receive significant resources from federal agencies.²⁹

The Rehabilitation Act was also the statutory authority for creating the Architectural and Transportation Barriers Compliance Board (ATBCB).³⁰ The ATBCB is an independent agency whose purpose is to ensure access to federally funded facilities.³¹ As the leading source on accessible design, it develops design standards for the built environment, transit vehicles, telecommunications equipment, and electronic and information technology.³² It also provides technical assistance and training on these issues.³³ It is intended to be a coordinating body among the four standard setting agencies (General Services Administration, Department of Defense, Housing and Urban Development, and the Postal Service) and seven additional federal agencies (Education, Health & Human Services, Interior, Justice, Labor, Transportation, and Veterans Administration).³⁴

²⁵ 34 C.F.R. § 104.22(a) (2014). These regulations were updated in 2010. *See* 28 C.F.R. pt. 35 (2014).

²⁶ *See* 34 C.F.R. §§ 104.22–104.23 (2014).

²⁷ *See* DISABILITIES AND THE LAW, *supra* note 2, § 6:8.

²⁸ *See* 42 U.S.C. § 12201(a) (2012).

²⁹ *See* DISABILITIES AND THE LAW, *supra* note 2, §§ 1:17–1:20.

³⁰ *See* 29 U.S.C. § 792 (2012).

³¹ *See id.* § 792(b).

³² *Architectural and Transportation Barriers Compliance Board*, FED. REG., <https://www.federalregister.gov/agencies/architectural-and-transportation-barriers-compliance-board> (last visited Nov. 6, 2014), archived at <http://perma.cc/TK78-XG89>.

³³ *Id.*

³⁴ *Id.*; *see also* 36 C.F.R. § 1190.4 (2004).

2. *The Americans with Disabilities Act of 1990*

The goal of the two major federal disability discrimination laws—Section 504 of the Rehabilitation Act and the Americans with Disabilities Act—is to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals[.]”³⁵ Of primary significance to the built environment is the Americans with Disabilities Act (ADA) of 1990.³⁶ The key provisions relevant to the physical environment are Title II³⁷ (which applies to programs operated by state and local governmental agencies) and Title III³⁸ (which covers twelve categories of privately provided programs).

Title III specifically defines twelve categories of facilities.³⁹ There are some private club exemptions.⁴⁰ Religious entities have some exemptions, except to the extent that these entities rent space to other groups or make facilities available to a private program for other purposes.⁴¹ There has been some discussion of unique facilities and programs and whether they are covered under Title III. The areas of discussion include providers of services (such as insurance) and participation in events such as professional golf tournaments, broadcasting, cruise ships, and websites.⁴²

A number of programs are subject to overlapping statutory requirements including Section 504, the Fair Housing Act, Title II of the ADA, and Title III of the ADA. For example, a student center on a state funded college campus would be subject to both Section 504 and Title II.⁴³ A private vendor with a license to operate within the student center (such as a fast food restaurant or a bookstore) would be subject to Title III. It is not well-clarified how the interrelationship works when a covered entity facilitates participation in a program that does not meet nondiscrimination mandates. For example, a public university alumni organization that arranges an event or a travel experience that might not be accessible may have some responsibility, but how much is not clear. Another example of unclear responsibility would be a

³⁵ 42 U.S.C. § 12101(a)(7) (2012).

³⁶ 42 U.S.C. §§ 12101–12213 (2012). For an overview of the entities primarily covered by the ADA, see *DISABILITIES AND THE LAW*, *supra* note 2, §§ 5:2–5:3.

³⁷ See 42 U.S.C. §§ 12131–12165 (2012); see also *DISABILITIES AND THE LAW*, *supra* note 2, § 5:3.

³⁸ See 42 U.S.C. §§ 12181–12189 (2012); see also *DISABILITIES AND THE LAW*, *supra* note 2, § 5:2.

³⁹ The categories are lodging (other than apartments), eating establishments, entertainment facilities, public gathering places, stores and sales establishments, service establishments (including law offices and health care provider facilities), transportation stations, public display facilities (such as museums), places of recreation (such as parks), places of education, social service centers, and exercise facilities. 42 U.S.C. § 12181(7) (2012).

⁴⁰ 42 U.S.C. § 12187 (2012).

⁴¹ See *id.*; see also 28 C.F.R. § 36.102(e) (2014).

⁴² See *DISABILITIES AND THE LAW*, *supra* note 2, § 5:2 nn.16–26 (collecting cases).

⁴³ See *id.* § 3:1.

membership organization that sponsors a convention, conference, or meeting at an inaccessible venue. Summer abroad programs raise additional issues.⁴⁴

Title I of the ADA applies to employment discrimination and may have an impact for physical design of the workplace.⁴⁵ This is not a primary issue for this Article because employers are not generally required to proactively design workplaces to be accessible, with the exception of obligations to remove barriers or provide accessible parking as a reasonable accommodation, and there is very little judicial or other attention to this issue.⁴⁶ The employment office itself may be subject to Title II or Title III, and factories that provide tours of worksites may be subject to some accessibility requirements for the area used for the tour.⁴⁷

The specific regulatory standards are updated on an ongoing basis. The most recent basic update was in 2010.⁴⁸

3. *Who Is Protected Under Federal Statutes (and Many State and Local Laws)?*

Most of the federal statutes prohibiting discrimination against individuals with disabilities provide protections to individuals who are substantially limited in one or more major life activities, have a record of such an impairment, or are regarded as having such an impairment.⁴⁹ In 1999, the Supreme Court narrowed the definition of “disability” in what is known as the

⁴⁴ *See id.* § 3:20.

⁴⁵ *See id.* § 4:20.

⁴⁶ *See id.*

⁴⁷ *See id.* § 6:13 nn.29–35.

⁴⁸ *See* 34 C.F.R. pt. 104 (2014). For example, in 2010, the Department of Justice issued a set of major regulations amending regulations applicable to Title II and Title III that affected architectural access issues. *See* 75 Fed. Reg. 56163 (Sept. 15, 2010) (codified at 28 C.F.R. pt. 35 (2014)). In addition to amending the basic design standards for buildings, the regulations address service animals as an accommodation, video remote interpreting services as an auxiliary aid, reservation standards for places of lodging and rules relating to other types of lodging, and the use of Segway-type vehicles. The regulations also provide standards for ticketing for seating in assembly areas such as performance and sports venues, swimming pools, and detention and correctional facilities. *See* 28 C.F.R. pt. 35 (2014). The regulations clarify that residential housing offered by Title II entities are covered under the ADA and are subject to design requirements. *Id.* § 35.151(c). They also provide new guidance on housing at places of education. *See id.* § 35.151(f) (for Title II entities); *id.* § 36.406(e) (for Title III entities). For information on the rules, including highlights, information on interpreting the rules, and the rules themselves, see U.S. Dep’t of Justice Civil Rights Div., *Information and Technical Assistance on the Americans with Disabilities Act*, ADA.GOV, <http://www.ada.gov> (last visited Nov. 6, 2014), archived at <http://perma.cc/W75A-6XN2>; *see also* *Architectural and Transportation Barriers Compliance Board*, *supra* note 32.

⁴⁹ *See generally* DISABILITIES AND THE LAW, *supra* note 2, §§ 1:10, 3:2, 4:8–4:9 (discussing definition issues, higher education protections, and employment, respectively).

“*Sutton* trilogy.”⁵⁰ In 2008 Congress amended the ADA to clarify that the definition should be read broadly.⁵¹ The amendments were primarily focused on issues not as relevant to individuals with mobility impairments. Instead the focus was on individuals with health impairments (such as cancer, HIV, epilepsy, diabetes), mental health impairments, and learning disabilities.⁵² Generally speaking, the definition of who is protected is not a major issue in the context of design for accessible facility situations. Surprisingly, however, this issue is occasionally raised.⁵³ Because this is a rare circumstance in the context of architectural barrier cases, this Article will not explore that issue, but it will focus on the substantive requirements of the law.⁵⁴

State and local laws vary widely on the exact definition of disability and a range of other issues. These include what programs are covered, what conduct is prohibited or required, and procedures and remedies.⁵⁵ For purposes of the definition of disability, however, many of them use the federal framework as a

⁵⁰ The Supreme Court addressed three consolidated cases involving employment (all in the transportation industry). See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 556 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 520 (1999). The plaintiffs in the three cases were individuals with 20/400 correctable vision seeking positions as airline pilots (*Sutton*), an individual with correctable monocular vision seeking to be a truck driver (*Kirkingburg*), and an individual with high blood pressure controlled by medication seeking employment as a UPS mechanic (*Murphy*). The Supreme Court adopted what is known as the “mitigating measures” defense in a controversial decision. See *Sutton*, 527 U.S. at 482. The Court held that a determination of whether a disability exists should take into account mitigating measures that might correct or ameliorate the condition. *Id.* In 2002, the Supreme Court further narrowed its *Sutton* decision. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 200–01 (2002) (narrowing the definition of what constitutes a major life activity).

⁵¹ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555 (codified at 42 U.S.C. §§ 12101 (2012)). Provisions of the amendment are now incorporated throughout the revised statutory language.

⁵² See *id.* § 3.

⁵³ In *Covington v. McNeese State University*, the court reversed some of the attorney’s fee awards and held that district court decision on the amounts was not an abuse of discretion, but it did not overrule any of the substantive issues. See 118 So.3d 343, 353 (La. 2013). For the facts in this case that led to the decision, see *Covington v. McNeese State Univ.*, 98 So.3d 414, 418–19 (La. Ct. App. 2012). The initial claim involved the lack of accessible restrooms in the student center. See *id.* Incredibly, one of the defenses raised unsuccessfully by the university was that the student who was a wheelchair user was not disabled under federal law, but the court denied that defense. See §426.

⁵⁴ See DISABILITIES AND THE LAW, *supra* note 2, § 4:9 (discussing application of the definition of a disability in special employment situations); *id.* § 4:9 nn.10 (collecting cases on back problems); *id.* § 4:9 n.37 (collecting cases on orthopedic and mobility impairments).

⁵⁵ See Sande L. Buhai, *In the Meantime: State Protection of Disability Civil Rights*, 37 LOY. L.A. L. REV. 1065 app. (2004) (listing state disability laws).

general definitional model.⁵⁶ This is rarely an issue under state law, so it is not addressed in detail in this Article.⁵⁷

4. *Procedures and Remedies Under Federal Laws*

Later sections of the Article explore the limitations of existing procedures and remedies under federal and state statutory laws applicable to accessible environments. At this point, it should be noted that the key statutes provide a private right of action, although some require pursuing administrative remedies or seeking redress through state human rights agencies before filing a lawsuit.⁵⁸

In addition to having a procedure that makes compliance with statutory mandates effective, the availability of an adequate remedy is key. That is a major focus of this Article. At this point, however, it should be noted that the statutes vary on what remedies—damages, injunctive relief, loss of federal funding, attorney’s fees, etc.—are available. A later exploration of judicial application of these requirements in this Article addresses whether the current remedial scheme is effective.⁵⁹

In carrying out the major federal disability discrimination statutory goals,⁶⁰ the statutes reflect the fact that historically, society has isolated and segregated individuals with disabilities, sometimes intentionally, but often through the discriminatory impact of architectural, transportation, and communication barriers.⁶¹ Key strategies to accomplishing the goals of inclusion include ensuring that the built environment and transportation systems are designed so that those with disabilities can use them to eliminate the segregation that results from unintentional barriers such as steps and other obstacles.

The ADA, Section 504, and other federal statutes also recognize that mandating an accessible environment to avoid discrimination is of little value unless there is a viable remedy. And this remedy has been built into the nondiscrimination statutes—in different ways for different parts.

Section 504 provides that individuals may complain to the federal agency providing the federal funding to the entity claimed to be violating Section 504.⁶² It further allows a private right of action and does not require

⁵⁶ *See id.* at 1089.

⁵⁷ *See* DISABILITIES AND THE LAW, *supra* note 2, § 5:10.

⁵⁸ *See id.* § 6:17. This section discusses when private actions can be brought; *see also* Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 447–48 (2007).

⁵⁹ *See infra* Part III.C.

⁶⁰ 42 U.S.C. § 12101(a)(7) (2012) (assuring “equality of opportunity, full participation, independent living, and economic self-sufficiency”).

⁶¹ *See id.* § 12101(a)(5).

⁶² 29 U.S.C. § 794a (2012); *see generally* DISABILITIES AND THE LAW, *supra* note 2, §§ 3:27, 4:5 nn.35–39, 6:10.

exhausting administrative remedies.⁶³ Under Section 504 an individual may recover damages, attorney's fees, and costs.⁶⁴ Injunctive and declaratory relief are also remedies available in cases brought by individuals.⁶⁵

The remedies available under the ADA differ depending on whether the claim is pursuant to a Title II (state and local governmental agencies) or a Title III (private providers of public accommodations). The U.S. Department of Justice (DOJ) has jurisdiction to bring actions to enforce both Titles II and III.⁶⁶ Individuals may bring individual actions and receive damages, attorney's fees, and costs under Title II.⁶⁷ Title III works differently. Although individuals have a private right of action, they may not receive damages unless the Attorney General requests this remedy on behalf of the individuals.⁶⁸ According to some courts, the availability of damages may depend on whether there is intentional discrimination.⁶⁹ Other Title III remedies available to individuals include injunctive relief, providing services, and modifying policies and practices.⁷⁰ Title III also provides for attorney's fees and costs.⁷¹

One of the greatest impediments to receiving attorney's fees and costs in some disability discrimination cases is the application of what is known as the *Buckhannon* defense. In a housing discrimination case brought under both the Fair Housing Act and the ADA, the Supreme Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources* addressed the availability of attorney's fees when there is a settlement after the defendant changes its conduct.⁷² The Court held that attorney's fees would only be available when the plaintiff received a favorable judgment on the merits or a consent decree approved by the court.⁷³ This has raised considerable questions about the disincentive for private attorneys to take such cases. This is discussed in greater detail in a later section.⁷⁴

In addition to cases brought directly under the federal statutes, the design standards for these statutes have sometimes been used to establish a duty of care in tort litigation.⁷⁵ These cases are discussed in greater detail below.⁷⁶

⁶³ See 34 C.F.R. §§ 100.6–100.10, 101.1–101.131 (2014).

⁶⁴ 29 U.S.C. § 794a.

⁶⁵ *Id.* § 794a(a)(2).

⁶⁶ See 28 C.F.R. §§ 35.190(e), 36.502 (2014).

⁶⁷ 29 U.S.C. § 794a (applying to Title II of the ADA through 42 U.S.C. § 12133 (2012)).

⁶⁸ See 42 U.S.C. § 12188(b) (2012).

⁶⁹ See DISABILITIES AND THE LAW, *supra* note 2, § 6:17 nn.5–6 (collecting cases).

⁷⁰ See *id.* § 6:17 n.5 (collecting cases).

⁷¹ See 42 U.S.C. § 12205 (2012).

⁷² *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001).

⁷³ See *id.* at 604.

⁷⁴ See *infra* Part III.C.3.

⁷⁵ See DISABILITIES AND THE LAW, *supra* note 2, § 6:17 n.10 (collecting cases).

⁷⁶ See *infra* Part III.C.3.

B. State and Local Laws

1. Nondiscrimination Mandates

Many state and local governments have laws that prohibit discrimination on the basis of disability.⁷⁷ Many of these statutes have provisions that apply not only to basic nondiscrimination, but also incorporate concepts of accessible design. In the past, many of these statutes were ineffective because they did not provide adequate enforcement mechanisms, although that has changed in recent years.

The impact of state laws was highlighted in Professor Sande L. Buhai's article quoting Justice Brandeis who stated that a "single courageous State' could serve as a laboratory for experiments that might lead to advances for society as a whole."⁷⁸

2. Building Codes and Licensing Permits

Many building codes require elements relating to design access for individuals with disabilities, but these do not really provide redress for an individual when there are noncompliant features. Generally speaking, while obtaining a building permit under most laws requires some assurance that the building complies with all code requirements, and there are inspection procedures, this process is not really adequate to address individual concerns about lack of access.⁷⁹

State and local agencies issue various kinds of operating permits (restaurants, liquor sales, sale of lottery tickets, etc.). While this process could be a vehicle to ensure access, it is rare that the permitting process is of much value to the individual adversely affected by an inaccessible facility.⁸⁰

⁷⁷ See Buhai, *supra* note 55, at app. (listing state disability laws).

⁷⁸ *Id.* at 1065 (Brandeis, J. dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932)). The article explores that thesis and concludes that "[d]evelopments in the various states . . . will ultimately make federal civil rights protections more effective . . ." *Id.*; see also *id.* at 1083 (again referencing Justice Brandeis on states as laboratories).

⁷⁹ For a general discussion of this issue, see Laura F. Rothstein, *Opening More Doors and Building More Ramps*, HOUS. LAW., Jan.–Feb. 1991, at 41–43; Laura F. Rothstein, *Opening Doors and Building Ramps: Houston and Architectural Barriers*, HOUS. LAW., Mar.–Apr. 1987, at 28–30.

⁸⁰ One of the few cases addressing whether a state or local governmental agency was in violation of Title II for issuing an operating license to a business that did not meet accessibility requirements is *Tyler v. City of Manhattan*, 849 F. Supp. 1429 (D. Kan. 1994). In that case the plaintiff argued unsuccessfully that "the City knowingly issue[d] liquor licenses and building permits for facilities that were not accessible to persons with disabilities." *Id.* at 1441. He claimed that the City did not evaluate licensee applicants for ADA compliance. *Id.* The court did not recognize the application of Title II to "require public entities to impose on private establishments, as a condition of licensure, a

C. Common Law Tort Actions

1. Overview

For individuals seeking redress for injuries resulting from inaccessible design, common law tort actions may provide an individual remedy in some situations. There are a number of barriers to the use of such theories. Because the focus of this Symposium issue is the relationship of tort law to civil rights enforcement, it is important to examine when and how tort law might be relevant.

There are a number of areas in which tort law and disability discrimination law intersect. These include the criminal justice system,⁸¹ special education,⁸²

requirement that they make their facilities physically accessible to persons with disabilities.” *Id.* at 1442. Some states, however, have developed programs that indirectly have the effect of encouraging access by requiring businesses that sell lottery tickets to be accessible. *See* Equal Rights Ctr. v. Dist. of Columbia, 741 F. Supp. 2d 273, 288–89 (D.D.C. 2010) (holding that Title III standards for access do not apply to alleged Title II violations at lottery sale locations and that a district is not required to ensure that all lottery-selling locations are accessible, but triable issues exist on whether program in its entirety is accessible); Paxton v. State Dep’t of Tax & Revenue, 451 S.E.2d 779, 786 (W. Va. 1994) (holding that Lottery Commission has legal duty to issue rules and regulations requiring its licensees to comply with ADA); Winborne v. Va. Lottery, 677 S.E.2d 304, 308 (Va. 2009) (holding that lottery agency and licensed retailers subject to ADA and state requirements in case involving lack of accessible parking, ramps, and paths of travel).

⁸¹ *See, e.g.,* Paulone v. City of Frederick, 718 F. Supp. 2d 626, 639 (D. Md. 2010) (holding that deaf arrestee stated claim for negligent supervision and training against state, but not against sheriff); Ruffin v. Winnebago Cnty. Jail, No. 03–cv–210–DRH, 2010 WL 3359478, at *1 (S.D. Ill. Aug. 25, 2010) (jury finding physical injuries resulted from transportation in inaccessible van in suit by inmate of state corrections facility for failure to provide reasonable accommodations in shower, health care unit, visiting room, exercise yard, transportation, and access to emergency exits); Scozzari v. City of Clare, 723 F. Supp. 2d 945, 949 (E.D. Mich. 2010) (ruling on individual with schizophrenia who claimed wrongful arrest); Ryan v. Vt. State Police, 667 F. Supp. 2d 378, 389–90 (D. Vt. 2009) (holding that communication with deaf arrestee did not violate ADA or Rehabilitation Act and that this court has no jurisdiction over state action for intentional infliction of emotional distress).

⁸² Special education tort issues include improper identification and evaluation, inappropriate placement, failure to adhere to due process procedures, failure to follow substantive requirements of state or federal law, misconduct involving discipline (in-class and removal), and failures involving supervision. *See* Laura F. Rothstein, *Accountability for Professional Misconduct in Providing Education to Handicapped Children*, 14 J.L. & EDUC. 349, 349–50 (1985); *see also, e.g.,* Harris v. Metro. Gov’t of Nashville, No. 3:08–0859, 2010 WL 883811, at *1 (M.D. Tenn. Mar. 11, 2010) (dismissing case because of standing issue and not ruling on substantive claim of failure to provide security on school bus by providing aid to protect against assaults); J.D.P. v. Cherokee Cnty. Sch. Dist., 735 F. Supp. 2d 1348, 1350–51 (N.D. Ga. 2010) (claiming deliberate indifference against several individuals by failing to train school staff by student with autism and other conditions); C.B. v. Sonora Sch. Dist., 691 F. Supp. 2d 1123, 1170 (E.D. Cal. 2009) (granting immunity from action for intentional infliction of emotional distress for school

higher education,⁸³ service animals,⁸⁴ health care providers,⁸⁵ health care treatment,⁸⁶ professional licensing,⁸⁷ transportation,⁸⁸ and even products

district and specialist; accommodation of minor's disabilities at issue); *D.K. ex. rel. G.M. v. Solano Office of Educ.*, 667 F. Supp. 2d 1184, 1197–99 (E.D. Cal. 2009) (holding that district may be jointly liable for any acts of abuse or neglect committed by outside agency or third-party provider); *Funez ex. rel. Funez v. Guzman*, 687 F. Supp. 2d 1214, 1214–15 (D. Or. 2009) (finding student with disability alleging assault when injured by other students did not sufficiently allege that he was in school “custody” to demonstrate a state created danger for due process right against state actor); *Vicky M. v. Ne. Educ. Intermediate Unit*, 689 F. Supp. 2d 721, 741–42 (M.D. Pa. 2009) (denying summary judgment in favor of teacher, school district and education agency for ADA and tort claims against special education teacher for abuse of autistic children through punishment and holding that teacher was not immune from intentional tort claims but supervisory defendants were immune from torts claims); *Edwards v. Sch. Dist. of Baraboo*, 570 F. Supp. 2d 1077, 1085 (W.D. Wis. 2008) (holding that student with fragile bones could not recover from school for injuries when child slipped and fell during recess); *Totty v. Indep. Sch. Dist. No. I-009 of Blaine Cnty., Okla.*, No. CIV–08–572–F, 2008 WL 5070690, at *2 (W.D. Okla. Nov. 24, 2008) (finding negligence claims of failure to protect student from personal injury caused by unusual punishments administered in excessive manner, failure to remedy the assault, and failure to provide a safe and secure environment against school, school district, and other defendants does not fall within statutory exemption from suit under Government Torts Claims Act); *King v. Pioneer Reg'l Educ. Serv. Agency*, 688 S.E.2d 7, 7–8 (Ga. App. 2009) (holding that IDEA does not impose tort liability in case where parents of student who committed suicide at school for children with emotional behavior disorders brought IDEA action).

⁸³ Issues other than architectural design issues include duties relating to individuals with mental health challenges raised by Virginia Tech type situations. *See, e.g., Doe v. Okla. City Univ.*, 406 F. App'x 248, 249 (10th Cir. 2010) (dismissing student's negligence claim based on failure to train university faculty members about obligations to students with disabilities under Title III and holding that negligence claim also failed for lack of damages because plaintiff failed to show discrimination); *Doe v. Bd. of Regents of Univ. of Neb.*, 788 N.W.2d 264 (Neb. 2010) (dismissing intentional tort case based on sovereign immunity, brought by medical student with major depressive disorder who sought damages for fraudulently concealing information about his grades and evaluations).

⁸⁴ The liability concerns about injuries resulting from service animals is reflected in the 2010 regulations on animals. *See* 28 C.F.R. § 35.136 (2011); *see also Roe v. Providence Health Sys.*, 655 F. Supp. 2d 1164, 1167–68 (D. Or. 2009) (balancing use of dog to steady hospital patient with health care concerns for other patients).

⁸⁵ This might arise in medical malpractice cases where it is claimed that a health care provider with HIV transmitted the condition to a patient.

⁸⁶ This might occur where an individual with a disability is negligently treated because the health care provider did not understand the condition.

⁸⁷ The privacy invasions resulting from professional licensing boards that ask questions about mental health history (diagnosis and treatment) have raised the potential for tort theories to be applied relating to claims of invasion of privacy, etc. For a discussion of the harms resulting from such questions, see Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 537–38 (2008); Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues?* 22 AM. U. J. GENDER SOC. POL'Y & L. 519, 635–37 (2014);

liability.⁸⁹ While all of these topics merit attention, this Article is limited to the issue of architectural design and its impact on individuals with mobility impairments and how tort law might be relevant to that.

Before examining the possible theories, it is useful to consider what kinds of injuries might result when an individual with a mobility impairment is adversely affected because the physical design of a facility creates barriers. Except in class action cases, tort cases generally remedy a wrong done to one individual.⁹⁰

The first major type of injury is physical harm when a facility is designed in such a way that it creates a danger to an individual with a mobility impairment and that person is harmed. For example, an individual could be hurt because of a ramp that is too steep. The second type of injury is the emotional damage (pain and suffering, humiliation, etc.) resulting from the inability to even get in the door. Similarly, inaccessible features such as restrooms, aisles, dressing rooms, service counters, and seating areas, may mean that the use of the facility is limited, which may also result in pain and suffering from the inability to participate, as well as humiliation from the stigma of separation. While it is rare that the operator of a program is intentional in having a design that excludes participation, the indirect injury still exists.

2. Negligence

Under traditional tort theory, negligence actions require a duty, a breach of duty, causation, and injury. The first difficulty for an individual seeking redress for a tort injury is establishing what the duty is. Especially if the

Laura Rothstein, *Suffering in Silence: The Tension Between Self-Disclosure and a Law School's Obligation to Report*, 18 AM. U. J. GENDER SOC. POL'Y & L. 121, 129 (2009).

⁸⁸ Issues involve liability for giving drivers licenses to individuals with visual, hearing, or health (epilepsy) impairments that result in injuries. *See Elssaad v. Independence Air, Inc.*, 613 F.3d 119, 122, 124 (3d Cir. 2010) (holding that ACAA and its regulations do not preempt state tort law on standard of care owed by airline for disembarking and exiting aircraft when passenger with disability was injured).

⁸⁹ *See, e.g., Gammill v. Invacare Corp.*, 2 So.3d 557, 558–60 (La. App. 2008) (addressing liability of a wheelchair vendor based on negligence in products liability case).

⁹⁰ Class actions are often difficult to bring in the context of disability discrimination law because of lack of commonality. In the context of architectural barriers, however, when the “class” may be all individuals with mobility impairments or who are wheelchair users, this procedural barrier may be less significant. *See, e.g., Michael Stein & Michael Waterstone, Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 867 (2006) (discussing collective action in ADA workplace cases as consistent with history of class actions in other discrimination actions); DISABILITIES AND THE LAW, *supra* note 2, § 9:12 nn.8–10 (collecting cases on the client with a disability and class actions); *see also infra* Part III.C.3.b.

facility was built before the applicable date for new construction,⁹¹ establishing this element can be challenging, but not impossible. There have been some cases in which courts have considered ADA design standards and other accessibility standards to demonstrate a duty regarding accessible design. In those cases courts have addressed not only whether there is a duty, but also whether there has been a breach of duty.⁹²

One of the challenges in establishing a duty and breach of duty is demonstrating that there is a clear standard for accessibility. As noted previously, while some courts have allowed statutory design standards to be used to demonstrate a duty, this is not a precedent that is necessarily transferable to all cases applying a negligence theory. For example, in the case of ramps and handrails, the design standards for some new construction may require that the ramp be constructed to have a slope at a particular grade with handrails. Existing ramps that do not meet that design standard do not necessarily create a risk to an individual, so a failure to replace the ramp or failure to re-grade it is not necessarily evidence of negligence. Failure to build new facilities in compliance does not necessarily indicate a dangerous design either. While plaintiffs might be permitted to present evidence of a particular

⁹¹ Depending on the statute, there are different obligations regarding existing structures, new construction, and renovations and alterations. *See* 34 C.F.R. §§ 104.22, 104.23 (2014); *DISABILITIES AND THE LAW*, *supra* note 2, §§ 6:9, 6:14–6:16, 7:9 (discussing the obligations required by the Rehabilitation Act, ADA new construction, alterations, and existing facilities, and FHA design standards, respectively).

⁹² *Id.* § 6:17 n.10 (collecting cases). There have been several cases where personal injuries resulted, but the ADA or another statute was the only basis for redressing injuries. *See* *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1071–72 (7th Cir. 2013) (granting standing to a hotel guest for ADA claim regarding spring-hinged door closers on bathroom doors in ADA-compliant room but not allowing standing for claim against all other Courtyard hotels); *Meagley v. City of Little Rock*, 639 F.3d 384, 384–85 (8th Cir. 2011) (holding that zoo patron who could not walk long distances, rented electric scooter from zoo, and was injured crossing a footbridge provided no proof of intentional discrimination to justify compensatory damages under ADA Title II or Rehabilitation Act because plaintiff did not prove discriminatory intent, which includes deliberate indifference); *Owlett v. Doud*, 378 F. App'x 188, 189–91 (3d Cir. 2010) (holding that member of planning commission had warned of floor defects which could affect individuals with visual impairments and that the ADA could allow prospective injunctive relief); *Christian v. United States*, 2013 WL 5913845, at *4 (N.D. W. Va. Nov. 4, 2013); *Estate of Sims v. City of Aberdeen*, No. 1:09CV32–A–D, 2011 WL 132362, at *2 (N.D. Miss. Jan. 14, 2011) (holding that use of cane and handicap parking pass does not demonstrate substantial limitation in major life activity of work); *Blackwell v. Foley*, 724 F. Supp. 2d 1068, 1071–72, 1074–76 (N.D. Cal. 2010) (granting standing to a restaurant patron with a visual impairment who had injured himself on the sidewalk outside, granting injunctive relief for barriers inside restaurant, and resulting—under California law and the ADA—in damage award, attorney's fees, and joint and several liability against landlord and tenant regardless of indemnification agreement); *Barber v. City of Norwich*, No. 3:07–cv–1815 (VLB), 2008 WL 3992711, at *2 (D. Conn. Aug. 25, 2008) (holding that individual who sustained injuries while entering city hall must show discriminatory animus or ill will to override Eleventh Amendment immunity in a Title II action for accessible entrance violation).

design element standard, such evidence would be unlikely to demonstrate negligence per se. So, while the design standards may be relevant, the different application to new and existing facilities and to alterations can make it difficult to prove that a duty has been breached.

In addition to the different design standards applicable to new and existing structures, there are also complexities of overlapping laws and occasional confusion about which law applies when they are inconsistent. There are additional challenges in facilities such as shopping malls and sports and entertainment venues where sales and service providers lease space or have licensing arrangements to operate within another facility that is covered under one of the statutes. It can become difficult to determine which party (if any) is liable and obligated to remove the barriers and which party (if any) is liable for any injury resulting from a failure to do so.

A further difficulty with applying negligence tort theories to ensure accessibility is identifying an injury. Tort damages generally require physical injury (or at least clear mental or emotional distress) resulting from the breach of the duty. In most (although not all) cases when the design has not met clearly defined standards, there is no such injury. When the injury is not a physical injury, but an emotional one—the humiliation or stigma of being segregated or being isolated to only certain parts of the restaurant—it can be extremely difficult to prove and put a dollar figure on the injury, particularly when there is no intentional or egregious conduct on the part of the program.

And in some cases when there is such an injury, procedural issues such as immunity and determining who is liable can impede recovery. For example, some state laws limit liability for certain tort-type injuries when the defendant is a state or local governmental agency.⁹³

An additional difficulty in these cases involves those when a program is exempt from coverage under the ADA. This would be an issue for religious organizations (churches, mosques, synagogues)⁹⁴ and private clubs (which could include fraternities and sororities on campus).⁹⁵ Another problematic area is determining responsibility for design in facilities that are leased.⁹⁶ An

⁹³ *But see* Simpson v. City of Charleston, 22 F. Supp. 2d 550, 551–52 (S.D. W. Va. 1998) (recognizing that obligations under ADA can be used in tort claim involving accident caused by a raised portion of wheelchair ramp and denying dismissal of the case based on governmental immunity).

⁹⁴ *See* 42 U.S.C. § 12187 (2012); 28 C.F.R. § 36.102(e) (2014).

⁹⁵ *See* 42 U.S.C. § 12187; 28 C.F.R. § 36.102(e).

⁹⁶ *See* 28 C.F.R. § 36.201(b) (noting that allocation of responsibility for compliance might be determined by the lease or other contract). This, of course, does not resolve the issue for the individual who is harmed, and in a case of premises liability might extend joint and several liability to both parties. *See e.g.*, Delgado v. Orchard Supply Hardware Corp., 826 F. Supp. 2d 1208, 1215 (E.D. Cal. 2011) (holding that under the ADA, both the landlord and tenant may be liable in case brought by hardware store patron with a mobility impairment claiming numerous accessibility barriers, including the parking lot).

additional wrinkle can occur in situations of parent and subsidiary⁹⁷ or franchise relationships. In the cases of franchise operations, which are common in the fast food and restaurant industries, this can be an important issue. Whether the franchisor mandates certain design features or has a role in architectural issues may be a factor.

It is difficult to evaluate the judicial treatment of the application of the negligence standards themselves because the reported decisions tend only to address preliminary procedural type issues. For example, in *Simpson v. City of Charleston*,⁹⁸ the court addressed claims by an individual who was quadriplegic who fell and was injured when using a motorized wheelchair on what he claimed to be a negligently designed curb cut ramp on a city street. The reported decision only denies the defendant's motion for summary judgment on ADA and torts claims, but does not make a decision on whether there was a violation and what the appropriate remedies should be. It is likely that the case was ultimately settled because no subsequent record of this case is available in federal reporters.

Similarly, the case of *Wagner v. Regent Investments, Inc.*⁹⁹ involved a preliminary decision on the procedural matter. The defendant, in a claim involving injuries to a wheelchair-user and a convenience store, sought removal to federal court because the ADA was being claimed as the standard for negligence.¹⁰⁰ The court denied the removal and remanded the case to state court.¹⁰¹ Again, no further disposition of the case on the substantive issues is reported, so there is no judicial guidance on how the court applied the ADA standards in establishing a duty in a tort negligence case.

In one of the few reported decisions to reach the merits of the case and to apply ADA standards in a tort context, the court in *Theatre Management Group, Inc. v. Dalgliesh*¹⁰² reviewed an appeal of damages for injuries to an individual with leg braces who fell in the sloped aisle of a movie theatre. The court recognized that it was appropriate to consider the design standards in establishing negligence because the ADA incorporates a safety component into its standards. The fall resulted in leg injuries that were slow to heal and "being permanently confined to a wheelchair."¹⁰³ The damages of \$983,177 covered past and future potential medical expenses as well as costs of psychological counseling.¹⁰⁴ This is one of the few decisions to provide some guidance on why and how specific architectural design standards under the

⁹⁷ See 28 C.F.R. § 36.104 (2014) (providing for the factors in determining responsibility for removing barriers and undue burden).

⁹⁸ *Simpson v. City of Charleston*, 22 F. Supp. 2d 550, 551–52 (S.D. W. Va. 1998).

⁹⁹ *Wagner v. Regent Invs., Inc.*, 903 F. Supp. 966, 971 (E.D. Va. 1995).

¹⁰⁰ *Id.* at 968.

¹⁰¹ *Id.* at 971.

¹⁰² *Theatre Mgmt. Grp., Inc. v. Dalgliesh*, 765 A.2d 986, 987 (D.C. 2001).

¹⁰³ *Id.* at 988.

¹⁰⁴ *Id.* at 992.

ADA may be relevant for determining what duty is owed in terms of the design of a facility.

As this handful of cases may indicate, it is simply too early to determine the value to future plaintiffs of having tort negligence theories available as a means of redressing injuries. The decisions generally only deal with preliminary procedural issues, and these cases are probably settled. Only one or two actually flesh out the application of the standards themselves, thus giving little guidance to future prospective plaintiffs about the viability of the theory.

3. Negligent or Intentional Infliction of Emotional Distress

As noted previously, most activities (including how the environment is designed) are not the result of the intent to exclude individuals with disabilities. They are instead, a result of lack of awareness or understanding. In the context of the built environment, this deficiency might have been excusable forty years ago, but as the Rehabilitation Act and the ADA have been applied, and as more regulatory guidance and design standards have been promulgated, most programs cannot easily excuse the failure to provide and ensure access.

Design barriers that do not result in physical injuries can still cause emotional damage because of the stigma and humiliation of not being able to participate in the ordinary activities that most people take for granted. The lack of access can have an impact on work because it is not just the workplace that needs to be accessible, but places where employees go to lunch, attend conferences, and otherwise engage in activities that advance their work status and allow full participation.

There are a number of difficulties, however, in using intentional or negligent infliction of emotional distress that causes mental pain and suffering to remedy design deficits. Like general negligence in design, the specific design standards may be hard to define. For example, a national hotel chain may have a sufficient number of accessible rooms, and public and other spaces may meet access requirements, but there may not be an accessible room available in a specific situation because they have all been reserved. An elevator may not be working properly, raising questions about whether it was repaired with sufficient urgency.¹⁰⁵ Another example is in seating at a movie theater, a sports arena, or another performance venue. While there are design standards requiring the availability of companion seating,¹⁰⁶ there may be circumstances when such seating is not available to everyone seeking it,

¹⁰⁵ See, e.g., *Congdon v. Strine*, 854 F. Supp. 355, 360, 362 (E.D. Pa. 1994) (holding that the FHAA had not been violated due to elevator malfunctions, noting that “[e]ven a perfect landlord cannot maintain a completely problem-free elevator,” and not requiring landlord to install a new elevator or assure that the existing one is problem-free).

¹⁰⁶ See 28 C.F.R. §§ 35.151(g), 36.406(f) (2014) (listing Title II facilities and Title III facilities, respectively).

although the program is in compliance with the regulations. In these cases, while the emotional injury from the humiliation or stigma is still there, the conduct is not in violation of any requirements. As is always the case, proving emotional injury is difficult. Putting a dollar amount on such an injury is even more difficult.

III. WHAT IS THE IMPACT OF LEGAL PROTECTIONS ON IMPROVING THE BUILT ENVIRONMENT FOR INDIVIDUALS WITH MOBILITY IMPAIRMENTS?

Laws with substantive provisions regarding physical design and accessibility do not themselves guarantee an accessible environment. Unless programs and service providers engage in ensuring accessible design, these laws are meaningless. The existence of legal standards and design guidance may prompt programs to comply voluntarily for a range of reasons. While one reason is to avoid litigation, a second compelling reason is because it makes good business sense to do so. And sometimes, it is done because “it’s the right thing to do.”¹⁰⁷ Having guidance about how to provide an accessible built environment is extremely valuable to those operating programs in various facilities.

Unlike some of the other requirements of federal disability nondiscrimination policies, the mandates relating to accessible design have benefits for not just one individual, but for all individuals with mobility impairments who might seek access to the program. Many design elements benefit individuals other than those with disabilities. Some examples include individuals with baby strollers, those using luggage or backpacks on wheels, individuals using delivery and service carts on wheels, individuals with temporary impairments such as a broken leg, and those using grocery or shopping carts.

In addition, as the baby boomer generation ages, individuals who may not meet the definition of having a “substantial” limitation nonetheless may have reduced mobility and are more likely to patronize facilities that are accessible.

¹⁰⁷ See Press Release, Nat’l Rest. Ass’n, National Restaurant Association Offers Toolkit on Americans with Disabilities Act Compliance (Oct. 2, 2012), *available at* <http://www.restaurant.org/Pressroom/Press-Releases/National-Restaurant-Association-Offers-Toolkit-on>, *archived at* <http://perma.cc/4LVX-FF8E> (quoting Jack Crawford, chairman of the National Restaurant Association Board’s Jobs and Careers Committee: “Restaurants invest millions of dollars every year to increase their accessibility to all guests They do so not just because it’s the law, but because it’s the right thing to do.”); *see also* U.S. DEP’T OF JUSTICE, ACCESSIBLE CUSTOMER SERVICE PRACTICES FOR HOTEL AND LODGING GUESTS WITH DISABILITIES (2006), *available at* <http://www.ada.gov/accesscust.pdf> (discussing accessible service in the hotel and lodging industry); Joseph H. Huber, *Will Theaters Receive Two Thumbs Up from Individuals with Disabilities?*, PALAESTRA, Winter 2002, at 54.

This is probably one of the reasons why the concept of “universal design”¹⁰⁸ has been so well received for some types of facilities.

Another reason why improvements may be significant in the area of public accommodations is the extensive guidance available to a range of programs. This guidance comes from the federal government agencies themselves,¹⁰⁹ from organizations working in collaboration with the federal government (such as the National Center on Accessibility),¹¹⁰ from the industries themselves, and from providers of webinars and other training and compliance programs on a range of issues.¹¹¹

The following sections examine what has happened since 1973 when the first major law to have significant impact on the built environment was

¹⁰⁸ The term generally refers to the idea of providing a built environment that is usable to the most people possible, regardless of disability, age, or status in life. *See generally What Is Universal Design?*, UNIVERSALDESIGN.COM, <http://www.universaldesign.com/about-universal-design.html> (last visited Nov. 7, 2014), *archived at* <http://perma.cc/L7VP-GYUW>. Its concepts are often built into “barrier free” design but are broader and extend to not only buildings, but also to products. *Id.*; *see also* NAT’L COUNCIL ON DISABILITY, THE IMPACT OF THE AMERICANS WITH DISABILITIES ACT: ASSESSING THE PROGRESS TOWARD ACHIEVING THE GOALS OF THE ADA (2007), *available at* <http://www.ncd.gov/publications/2007/07262007>. This paper provides a number of specific recommendations related to public accommodations including the following: having Congress legislate that the DOJ should approve state building codes, increase technical assistance, and increase enforcement. *See id.* at 50–54

¹⁰⁹ *See* U.S. Dep’t of Justice Civil Rights Div., *ADA Technical Assistance Materials*, ADA.GOV, <http://www.ada.gov/ta-pubs-pg2.htm> (last visited Nov. 7, 2014), *archived at* <http://perma.cc/SL9R-AUSF> (providing links to several guides). The primary agency responsible for federal compliance with the ADA is the DOJ. *Id.*; *see also* NAT’L COUNCIL ON DISABILITY, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT (2000) [hereinafter NCD 2000 REPORT]. The NCD 2000 REPORT is a 520-page document that includes criticisms of the DOJ for its slow response to enforcing Title III and makes several specific recommendations for improvements within the DOJ. *See id.* at 8–9, 12. The report is an extensive review of the DOJ’s work on ADA compliance at that point, including both Title II and Title III. *See id.* at 8–9.

¹¹⁰ *See About*, NAT’L CTR. ON ACCESSIBILITY, <http://www.ncaonline.org/about/index.shtml> (last visited Nov. 7, 2014), *archived at* <http://perma.cc/N55L-GFTW>. The National Center on Accessibility (NCA) was founded in 1992 to promote access and inclusion for people with disabilities in parks, recreation and tourism. *Id.* It exists as a cooperative agreement between Indiana University and the National Park Service. *Id.* It has been a source of expertise on issues such as swimming pools, golf, hiking trails, picnic elements, campgrounds, and ticket policies for performing arts venues and sports arenas. *Id.*

¹¹¹ For example, the National Restaurant Association offers a toolkit on ADA Compliance. *See* Press Release, Nat’l Rest. Ass’n, *supra* note 107; *see also* GA. STATE FIN. & INV. COMM’N, ACCESSIBILITY IN STATE-OWNED BUILDINGS AND FACILITIES: RETHINKING ACCESSIBILITY AS A CUSTOMER-ORIENTED CULTURE (2009), *available at* http://ada.georgia.gov/sites/ada.georgia.gov/files/imported/vgn/images/portal/cit_1210/43/4/148320033AccessibilityBook5-09.pdf; Richard L. Church & James R. Marston, *Measuring Accessibility for People with a Disability*, 35 GEOGRAPHICAL ANALYSIS 83, 83 (2003).

enacted. Before reviewing these developments, it is useful to outline the various federal agencies that have responsibility for enforcement of disability discrimination policy (not just the ADA, but also other statutes) and to clarify why this report focuses primarily on DOJ activities.

The National Council on Disability (NCD) was created in 1978 and serves in an advisory role to the President, Congress, federal entities, state and tribal communities, local governments, and other entities and organizations.¹¹² NCD plays a leading role in federal disability policy.¹¹³ The NCD's early focus was on the broad array of education issues, but it now attends to issues of housing, transportation, employment, and provision of public services and public accommodations.¹¹⁴ It is intended to be the coordinating agency for the other federal agencies that have major oversight of various disability policy issues.¹¹⁵

Several agencies are involved in enforcing and overseeing federal disability policy.¹¹⁶ In addition to the NCD's role as coordinating agency,

¹¹² See *About Us*, NAT'L COUNCIL ON DISABILITY, <http://www.ncd.gov/about> (last visited Nov. 7, 2014), archived at <http://perma.cc/ED2D-XRMF>. It is an independent agency originally established as an advisory group in the Department of Education. *Id.* It became independent in 1984 at which time it was charged with reviewing *all* federal programs and policies on disability discrimination. *Id.*

¹¹³ *Id.* It was the agency that drafted the first version of the ADA in 1988. *Id.* While this role is comprehensive, which is positive because it makes links among federal agencies, the vast array of disability policy issues can make it challenging to establish focus and set priorities.

¹¹⁴ *Id.*

¹¹⁵ Virtually every federal agency that provides grant funding is technically involved in disability policy by virtue of Section 504 of the Rehabilitation Act, which prohibits disability discrimination in programs that receive federal financial assistance from any agency. See 29 U.S.C. § 794 (2012). There are, however, several major agencies that have a more comprehensive focus on these issues. These agencies include the Department of Education, the Department of Health & Human Services, the Department of Housing and Urban Development, the Department of Transportation (DOT), the Equal Employment Opportunity Commission (EEOC), the Federal Communications Commission (FCC), and the DOJ Civil Rights Division (which has primary responsibility for enforcing Titles II and III of the ADA). With such broad oversight of large and often unwieldy agencies, it is not surprising that coordination among agencies can be difficult, cumbersome, and sometimes nonexistent. Even within agencies themselves there can be disagreement, lack of coordination, and other challenges that make a federal comprehensive policy on disability quite challenging. See Laura F. Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843, 860–61 (2010) (noting the challenges of a lack of coordination on disability policy for higher education within the Department of Education).

¹¹⁶ The four primary agencies that require ADA oversight are the DOJ, EEOC, DOT, and FCC, which “have primary federal enforcement responsibilities as the law applies respectively to private employers, state and local governments, all facilities and programs open to the public, and providers of telecommunications equipment and services.” NCD 2000 REPORT, *supra* note 109, at 3–4.

there are some other federal agencies that provide a range of supporting roles in ensuring implementation of disability policy.¹¹⁷

A. *What Do the Studies Show?*

It is difficult to find any recent comprehensive assessments of improvement to the built environment.¹¹⁸ There are, however, some perspectives worth considering when trying to determine whether the built environment is as accessible as it should be at this point. The commentaries and reviews below are not a comprehensive overview of all studies, but represent some of the key parties who have followed disability policy for a long period of time.

1. *Independent Living Research Utilization Program*

The *Impact of the ADA in American Communities*¹¹⁹ was issued in 2010, on the twentieth anniversary of the ADA, and was written by Lex Frieden,¹²⁰ one of the foremost advocates on accessibility issues. His report notes that “[t]he ADA’s greatest impact has been improvements in access to public accommodations. Nearly 60% of those surveyed agree that access to public accommodations[and] retail and commercial establishments has shown the greatest improvement since passage of the ADA.”¹²¹ There is a caveat in the

¹¹⁷The Architectural and Transportation Barriers Compliance Board is an independent agency with responsibility for accessibility for individuals with disabilities. *Id.* at 44. It was created in 1973 by the Rehabilitation Act. *See* 29 U.S.C. § 792 (2012); *see* DISABILITIES AND THE LAW, *supra* note 2, § 6:4. It is basically the agency that develops the design standards themselves for the General Services Administration, the Department of Defense, Housing and Urban Development, and the Postal Service (which are agencies subject to the Architectural Barriers Act), as well as providing guidance for the Department of Education, Department of Health and Human Services, Department of Interior, Department of Justice, Department of Labor, Department of Transportation, and the Veterans Administration. *See id.* The National Center on Accessibility is another example. *See supra* note 110.

¹¹⁸This may be because many agencies, advocates, and others are in the process of preparing such studies to coincide with the twenty-fifth anniversary of the ADA.

¹¹⁹LEX FRIEDEN, *IMPACT OF THE ADA IN AMERICAN COMMUNITIES* (2010), available at <http://www.dvrgetsjobs.com/Documents/Pubs/ImpactOfTheADA.pdf>.

¹²⁰Lex Frieden is a policy expert on disability issues and disability rights activist who is particularly connected with the advocacy movement for independent living. *See Lex Frieden Employment Awards*, OFFICE OF THE GOVERNOR RICK PERRY, http://www.governor.state.tx.us/disabilities/awards/employment_awards/ (last visited Aug. 12, 2014), archived at <http://perma.cc/PK5Q-CW4W>. He is currently a professor of biomedical informatics and rehabilitation at the University of Texas Health Sciences Center and director of Independent Living Research Utilization Program. *See id.* He is also acknowledged as one of the “architects” of the ADA. *Id.*

¹²¹FRIEDEN, *supra* note 119, at 2. “Other areas of significant agreement regarding improvement are . . . transportation and public awareness.” *Id.* at 3. The report notes, however, a need for improvement in the area of accessible housing. *Id.* at 6.

report that states, “Improvements in access to public accommodations, transportation, and public awareness are consistently acknowledged, but the need for further compliance is evident.”¹²²

2. National Council on Disability

The Independent Living Research Utilization (ILRU) Report referenced in the previous section is consistent with an earlier, but more detailed and comprehensive study that indicates that disability policy implementation needs to be improved, but the area of public accommodations is one of the best areas of disability access. This conclusion is found in the most comprehensive review of federal oversight of accessibility; a 520-page report by the National Council on Disability (NCD) issued on the tenth anniversary of the ADA entitled, *Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act*.¹²³

The Report highlights a number of issues relating to architectural access. It notes that the federal enforcement agencies are responsible for “advanc[ing] the interpretation and implementation of ADA through enforcement actions, policy guidance, and participation in the development of precedent-setting court decisions.”¹²⁴ The Report concludes that the Clinton Administration had “been overly cautious, reactive, and lacking any coherent and unifying national strategy. Enforcement efforts [were] largely shaped by a case-by-case approach based on individual complaints rather than an approach based on compliance monitoring and a cohesive, proactive enforcement strategy.”¹²⁵

Within the Report itself there are a number of specific references to issues relating to architectural barriers.¹²⁶ In the Executive Summary, concerns are raised about the lack of leadership and strategy in litigation by noting that “the federal courts have been dismantling the law’s protections and routinely disregarding the positions of the federal agencies on critical issues such as the

¹²² *Id.* at 8.

¹²³ See NCD 2000 REPORT, *supra* note 109, at x. This was the third in a series of independent analyses by the National Council on Disability about federal enforcement of civil rights laws. *Id.* The first was on air travel, and the second was on special education. While the letter of transmittal promises future reports on the Fair Housing Act and the Rehabilitation Act, these reports were not found on the NCD website.

¹²⁴ *Id.* at 1.

¹²⁵ *Id.* at 2. The Report raised concerns that these deficiencies were “related to the ‘culture’ of particular bureaucracies” but recognized that these shortcomings are tied to:

[C]hronic underfunding and understaffing of the responsible agencies. These factors, combined with undue caution and a lack of coherent strategy, have undermined the federal enforcement of ADA in its first decade. Their net impact has been to allow the destructive effects of discrimination to continue without sufficient challenge in some quarters.

Id. at 2–3.

¹²⁶ The report covers a range of Title II and Title III ADA issues. See *id.* at 8–9.

definition of the protected class, the appropriate analysis for determining the reasonableness of a particular accommodation, and the constitutionality of Title II of ADA.”¹²⁷ The Report, however, notes steady improvement of efficiency and procedural consistency in enforcement but indicates slowness in handling Title III complaints.¹²⁸

Specific recommendations within the Executive Summary relevant to architectural barrier issues state that the “[DOJ] should provide robust and assertive leadership for ADA implementation and to develop a strategic vision and plan for ADA enforcement across the Federal Government.”¹²⁹ Another recommendation urges the DOJ’s use of “regulations, subregulatory guidance, and technical assistance documents to take a leadership role on policy issues in Title II and Title III enforcement”¹³⁰ In addition, “[f]ederal agencies should also increase their use of strategic litigation and class action cases to bring broad sectors of employment, large employers, and *large corporate providers of public accommodations* into ADA compliance.”¹³¹

The body of the Report includes a number of findings and recommendations relevant to architectural barriers.¹³² One finding is that the

¹²⁷ *Id.* at 5. The first issue was addressed by the 2008 ADA Amendments which changed and broadened the definition of coverage. *See* 42 U.S.C. § 12102 (2012). The other two raised as examples remain unresolved. The Report states the following:

In many of the most important policy issues for ADA, . . . the federal agencies have too often waited for the private bar to bring the key litigation. . . . [O]ur investigators observed a lack of coordination on case selection and overall litigation strategy within and among agency field offices engaged in litigation.

NCD 2000 REPORT, *supra* note 109, at 7.

¹²⁸ *Id.* at 8–9. The Report further notes the slowness in certifying state building codes, monitoring transit system accessibility, issuing architectural or transportation regulatory standards, and decision-making about whether to file cases or intervene. *See id.* at 9–10. It further notes the need to evaluate and assess programs by the DOJ to provide technical assistance and training. *See id.* at 11, 376–77.

¹²⁹ *Id.* at 12. This recommends that the DOJ should require annual reporting from other agencies in order to “focus on the big picture.” *Id.* (internal quotation marks omitted).

¹³⁰ *Id.* at 13.

¹³¹ *Id.* at 14 (emphasis added). Additional recommendations include more engagement by federal enforcement agencies in “outreach, training, and collaboration with the disability community.” *Id.* at 15.

¹³² References within the Report to Title II and Title III include Tables on the types of Title II and Title III complaints (matters brought to the DOJ, not complaints in litigation) to date. *Id.* at 64–65. The following types of public accommodations in Title III complaints brought with the highest frequency were service establishments, places of lodging, sales or rental establishments, establishments serving food, and places of exhibition or entertainment. *Id.* at 65. These five types make up almost seventy-five percent of all complaints. *Id.* The next highest was places of education, but it should be noted that there is a substantial amount of private litigation in the education setting, making enforcement less likely in need of DOJ attention. *Id.* at 65. Within these complaints, almost half involved existing facilities, with very few complaints about new construction or alterations. *See id.* at 66. Other areas of significant interest related to architectural barriers were

DOJ was slow to certify state and local building codes, but that has improved.¹³³ The related recommendation is that the Disability Rights Section (DRS) of the DOJ should prioritize areas for review in light of the “frequency, extent, and harmfulness of particular types of noncompliance, along with the degree to which particular types of noncompliance are less likely to be effectively addressed and remedied through individual complaints.”¹³⁴ It notes the topics of the cases in which the DOJ has been involved.¹³⁵

The Report’s section on the DRS staff member perception of the DOJ accomplishments noted the importance of establishing architect liability, especially with regard to accessible stadium design, franchisor liability, prison coverage under Title II, barrier removal in major chains, and access to courts.¹³⁶ The Findings and Recommendations section raises questions about whether focusing on some of the entities (fast food restaurants, hotels and entertainment and recreation entities such as stadiums and racetracks) should be given such a priority.¹³⁷ This section noted again, a lack of a “broad vision for strategic litigation.”¹³⁸

While it is likely that the year 2015 will see many studies evaluating the impact of the ADA at its twenty-fifth anniversary, there is not much recent assessment that provides the extensive and comprehensive overall review that the 2000 NCD Report provides. There are a number of other studies that

stadium-style seating in movie theaters, franchiser liability under Title III (not just franchisees), and ADA coverage (e.g., prisons). *See id.* at 85–86.

¹³³ NCD 2000 REPORT, *supra* note 109, at 83.

¹³⁴ *Id.* In a subsequent section of the Report, it notes the DOJ enforcement philosophy to “educate, negotiate, [and] litigate.” *Id.* The Report addresses the process of setting priorities, whereby the Disability Rights Section of the Civil Rights Division of the DOJ identifies priorities and lists nine. *See id.* at 34–35.

¹³⁵ In the area of architectural barriers, the areas are:

Alterations and barrier removal in existing facilities under Title III (13 cases; 2 cases involved fast food chains, and several involved small or large hotels) . . . [and] [n]ew construction under Title III (9 cases, including against one hotel chain in five districts; also includes 4 stadium line-of-sight cases aimed at owners and architects).

Id. at 90. Four cases involved the availability of damages under Title II. *Id.* at 91. Other types of cases involved state sovereign immunity, employment issues, ADA coverage of prisons, segregated institutional placements, medical and dental services, disability history and licensing exam conditions, coverage of insurance under Title III, NCAA coverage, and 9-1-1 services. *Id.* at 90–91. The Report, in its discussion of settlements, noted a settlement regarding the Empire State Building and its historic landmark status. *Id.* at 92.

¹³⁶ *Id.* at 94. Other areas identified as accomplishments were professional licensing on mental health inquiries, testing, and coverage of individuals with learning disabilities, ADA constitutionality, HIV issues, 9-1-1 services for individuals with hearing impairments, interpreters in courts, and car rentals. *Id.*

¹³⁷ *Id.* at 94–95.

¹³⁸ *Id.* at 95. The Report took note of the avenues through which the DOJ provides technical assistance and outreach and is critical of the DOJ on this issue. The information on that section of the Report is discussed later in this Article. *See infra* Part III.B.

provide some perspectives, but none really update the NCD's comprehensive report.¹³⁹

3. Major Legal Scholar Assessments

There are several legal scholar assessments of the success of the ADA and other statutes in improving the lives of individuals with disabilities. Many of those focus primarily on employment.¹⁴⁰ One of the most useful works is *Law and the Contradictions of the Disability Rights Movement*.¹⁴¹ This is a particularly valuable study because the author is Samuel R. Bagenstos, a

¹³⁹ See, e.g., JAIME FOURNIER, AM. INST. OF ARCHITECTS & RON BLANK & ASSOCS., INTRODUCTION TO BARRIER-FREE DESIGN AND ADA STANDARDS FOR ACCESSIBLE DESIGN (2010) (providing information on continuing education for architects); GA. STATE FIN. & INV. COMM'N, *supra* note 111, at 4 (instructing design professionals on ADA standards); Church & Marston, *supra* note 111, at 83 (discussing the inherent problems associated with measuring accessibility); Kelly E. Larkins et al., *Accessible Transportation and the Built Environment on College Campuses*, 2218 TRANSP. RES. REC. 88, 92–97 (2011) (looking at the accessibility of modern transportation systems); Dorothy E. Nary et al., *Accessibility of Fitness Facilities for Persons with Physical Disabilities Using Wheelchairs*, 6 TOPICS IN SPINAL CORD INJURY REHABILITATION 87, 89–92 (2000) (evaluating the accessibility of fitness facilities in Topeka, Kansas using the Americans with Disabilities Act Accessibility Guidelines); James H. Rimmer et al., *Accessibility of Health Clubs for People with Mobility Disabilities and Visual Impairments*, 95 AM. J. PUB. HEALTH 2022, 2023–24 (2005) (examining the accessibility of health clubs to persons with mobility disabilities and visual impairments); Sarah Sherman & Jean Sherman, *Design Professionals and the Built Environment: Encountering Boundaries 20 Years After the Americans with Disabilities Act*, 27 DISABILITY & SOC. 51, 58–61 (2012) (examining whether interior designers apply ADA design and construction guidelines); Nandana Welage & Karen P. Y. Liu, *Wheelchair Accessibility of Public Buildings: A Review of the Literature*, 6 DISABILITY & REHABILITATION: ASSISTIVE TECH. 1, 8–9 (2011) (examining wheelchair accessibility in public buildings and discussing the role of the professional in the practice area); *The Americans with Disabilities Act*, CTR. FOR AN ACCESSIBLE SOC'Y, <http://www.accessiblesociety.org/topics/ada/> (last visited Sept. 21, 2014), *archived at* <http://perma.cc/7PHN-8UVU>; *Fair Treatment and Access—Wins Under the Americans with Disabilities Act*, CTR. FOR AN ACCESSIBLE SOC'Y (July 2000), <http://www.accessiblesociety.org/topics/ada/adadojstories.htm>, *archived at* <http://perma.cc/EYR6-9FEW> (referencing cases about access to sporting arenas); Judy Woodruff, *20 Years After the ADA, Is Life Better for Those with Disabilities?*, PBS (July 26, 2010, 3:55 PM), <http://www.pbs.org/newshour/rundown/on-anniversary-of-ada-is-life-better-for-those-with-disabilities/>, *archived at* <http://perma.cc/FHW5-9FMT> (providing anecdotes on progress of ADA); Silvia Yee & Marilyn Golden, *Achieving Accessibility: How the Americans with Disabilities Act Is Changing the Face and Mind of a Nation*, DISABILITY RIGHTS EDUC. & DEF. FUND, <http://dredf.org/news/publications/disability-rights-law-and-policy/achieving-accessibility/>, (last visited Aug. 12, 2014), *archived at* <http://perma.cc/VS9M-HKT9>.

¹⁴⁰ See e.g., Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2049–50 (2013) (focusing on how the amended definition of disability has affected outcomes in employment litigation). Other studies on this issue are cited throughout this Article.

¹⁴¹ SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009).

former Deputy Assistant Attorney General of the DOJ Civil Rights Division.¹⁴² This book draws on both his extensive advocacy experience representing individuals and causes related to disability discrimination before he became Deputy Assistant Attorney General as well as his government work. The book is intended to provide “an honest assessment of the ADA’s successes, failures, limitations, and ambiguities.”¹⁴³ The book reflects the challenge of giving a comprehensive overview to all elements of the ADA. Its chapters focus on many issues that the ADA is intended to address such as the definition of disability, the issue of accommodation, safety risks raised by public health professionals, complex bioethical issues relating to life, death, and choice, and the limitations of the anti-discrimination model. These are important and broad issues. The book provides some perspective on architectural barrier or built environment improvements,¹⁴⁴ although it focuses on other issues as well. It recognizes how the built environment creates a social impairment by disabling the individual from accessing a range of places,¹⁴⁵ and discusses the cost, both political and monetary, of eliminating architectural and transportation barriers.¹⁴⁶ Bagenstos also considers how design of the physical environment is an “accommodation,” and the relationship of accommodation to discrimination.¹⁴⁷

In his chapter on the limitations of the anti-discrimination model, Professor Bagenstos addresses specifically the issue of public accommodations and the built environment. In that section his conclusions and comments include the following:

¹⁴² Professor Bagenstos served at the DOJ from 2009 to 2011. He is currently a Professor of Law at the University of Michigan Law School.

¹⁴³ See Arthur W. Blaser, *Taking Disability Law Seriously*, 31 *DISABILITY STUD. Q.* (2011) (book review), available at <http://dsq-sds.org/article/view/1351/1472>.

¹⁴⁴ See BAGENSTOS, *supra* note 141, at 6–7, 19–21, 67–68, 123–24. Of particular relevance to this Article is his representation of plaintiffs in the Supreme Court case involving architectural access to county courthouse buildings. In *Tennessee v. Lane*, the Court held that the Eleventh Amendment does not shield states from disability discrimination cases involving the fundamental right of access to the courts. 541 U.S. 509, 518, 533–34 (2004). The case involved two individuals with mobility impairments who could not gain access to areas of courthouses because of architectural barriers. *Id.* at 513. The Court remanded the issue of what access must be provided. *Id.* at 515.

¹⁴⁵ See BAGENSTOS, *supra* note 141, at 6–7.

¹⁴⁶ See *id.* at 28.

¹⁴⁷ *Id.* at 55. He notes the following:

Requests for modifications to buildings and other physical structures provide the best example [of potentially costly accommodations] here. Physical facilities may be inaccessible to people with disabilities simply because nobody ever considered people with disabilities as possible users of those facilities—and not because it would have been costlier to build accessible structures in the first place. That lack of consideration is the very definition of selective sympathy and indifference.

Id. at 67–68.

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 provide it, the statute requires full accessibility; 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."¹⁴⁸

But, he goes on to explain why this does not necessarily lead to voluntary action by business interests. These reasons include lack of sufficient information about the cost (assuming it is too high), unconscious prejudice and stereotyping, and the fact that making a business accessible does not necessarily result in higher patronage (because of phone or Internet shopping).¹⁴⁹ While barrier removal achieves societal interests, it does not necessarily benefit a particular business.¹⁵⁰

Professor Bagenstos notes:

[The] statute's good effects depend crucially on enforcement. 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 [O]nly an actual threat of enforcement will make them change their ways.¹⁵¹

This discussion continues with the concern about insufficient incentives for enforcement. He cites the NCD 2000 Report discussed above, which recognizes the DOJ's lack of action.¹⁵² He then addresses the need for private enforcement because of inadequate government enforcement.¹⁵³

This discussion then continues the problems surrounding individual enforcement. He notes that most private civil rights cases are "brought by individual lawyers who are trying to make a living."¹⁵⁴ The incentives to recover attorney's fees are "too weak to lead to full enforcement."¹⁵⁵ The problems he cites are the lack of damages in Title III cases as an incentive in a contingent fee case, difficulties with the hourly fee rates, and the inability to recover fees when there are settlements or voluntary compliance.¹⁵⁶ He concludes that these factors are a major reason why, nearly two decades after enactment of the ADA, noncompliance with the statute's public

¹⁴⁸ *Id.* at 123–24.

¹⁴⁹ *Id.* at 124.

¹⁵⁰ *Id.*

¹⁵¹ BAGENSTOS, *supra* note 141, at 124–25.

¹⁵² *See id.* at 125.

¹⁵³ *See id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 125–26.

accommodations title is widespread.¹⁵⁷ He continues by recommending the addition of a damages remedy for Title III.¹⁵⁸

The work of Professor Bagenstos was reviewed by three other legal scholars in two different pieces. These reviewers are themselves all highly regarded experts in the area of disability discrimination law. In their book review entitled *Cause Lawyering for People with Disabilities*, Michael Stein, Michael Waterstone, and David Wilkins suggest hope for the possibility of re-engaging the courts in this issue.¹⁵⁹ The review differentiates between the employment aspect and the other aspects of the ADA, finding more success by “cause lawyers” in the non-employment provisions of the ADA.¹⁶⁰ In a later article by these same scholars, they examine the work of ADA disability cause lawyers.¹⁶¹

In the book review, they find more positive impact arising from the non-employment cases than Professor Bagenstos does.¹⁶² Their conclusions are based on considering the cases brought by cause lawyers seeking systemic justice, not just individual redress.¹⁶³ Examples in the area of architectural barriers include litigation against fast food restaurants¹⁶⁴ and a case seeking accessibility of city sidewalks.¹⁶⁵ These authors seem more optimistic about future improvements based on foreseen improvements in federal enforcement. In particular, the authors believe that the most harmful ADA case law precedents have been in the area of employment law, and they offer recommendations about how the employment case law might be improved.¹⁶⁶ Their later piece, published in 2012, reinforces the recognition that litigation is more likely to change behavior in certain industries and notes, “as other commentators have noted, employment discrimination cases can be a poor vehicle to pursue systemic reform.”¹⁶⁷

Waterstone, Stein, and Wilkins also conclude that “disability cause lawyers have made significant progress in bringing about social integration for Americans with disabilities.”¹⁶⁸ These authors reference the work of the NCD

¹⁵⁷ BAGENSTOS, *supra* note 141, at 127.

¹⁵⁸ *See id.*

¹⁵⁹ *See* Michael Ashley Stein et al., *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1664 (2010) (book review).

¹⁶⁰ *Id.* at 1659.

¹⁶¹ *See* Michael E. Waterstone et al., *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287, 1291 (2012).

¹⁶² *See* Stein et al., *supra* note 159, at 1686.

¹⁶³ *See id.* at 1682.

¹⁶⁴ *Id.* at 1683 (citing *Castaneda v. Burger King Corp.*, 597 F. Supp. 2d 1035, 1038 (N.D. Cal. 2009); *Moeller v. Taco Bell Corp.*, No. C02-05849 MJJ, 2007 WL 2301778, at *1–2 (N.D. Cal. Aug. 8, 2007)).

¹⁶⁵ *Id.* at 1684 (citing *Barden v. City of Sacramento*, 292 F.3d 1073, 1075 (9th Cir. 2002)).

¹⁶⁶ *See id.* at 1699–1702.

¹⁶⁷ Waterstone et al., *supra* note 161, at 1339.

¹⁶⁸ *Id.* at 1348.

(including studies done long before the 2000 Report referenced previously) and find that “NCD studies have consistently found that the employment provisions of the ADA have been poorly implemented, but that the public accommodation provisions have been well-enforced.”¹⁶⁹ They reference the interviews with disability cause lawyers who work on a regular basis focusing on public services and public accommodation cases.¹⁷⁰ They concur with the opinion of those attorneys:

[D]isability cause lawyers have made significant progress towards achieving the social integration envisioned by disability rights advocates . . . and contained in the ADA. This progress has moved social integration close to the point where citizens, disabled or not, are able to equally access opportunities and participate in society.¹⁷¹

4. *General Conclusions*

What is consistent from the sources noted in this section is that the reviews and studies indicate that public accommodations access for individuals with disabilities (at least in some types of facilities) is relatively positive and has improved significantly in recent years. Subsequent sections of this Article draw on some of the recommendations from these studies in what is needed to improve access even further. None of the reviewers thought the built environment was completely as it should be.

B. *The Role of Technical Assistance in Public Accommodation Improvements*

As the following highlights, technical assistance can be as valuable as litigation in making improvements in architectural access.

1. *Federal Government Agencies*

a. *Department of Justice*

The NCD 2000 Report recognized the value and importance of technical assistance in improving regulatory guidance and outreach (including training) and made several specific recommendations about this.¹⁷² It noted several DOJ

¹⁶⁹ *Id.* at 1357.

¹⁷⁰ *See id.*

¹⁷¹ *Id.* at 1358.

¹⁷² NCD 2000 REPORT, *supra* note 109, at 97–107. The Report notes the following avenues of technical assistance by the DOJ: ADA Information Hotline, ADA home page, development and dissemination of technical assistance documents, speaker’s bureau, traveling ADA display, technical assistance grants program, and interagency coordination. *Id.* at 97. It notes that (at that time) the staff carrying out these functions include ten

contractors that also provide information.¹⁷³ Some of the written materials available from the DOJ are technical assistance manuals and Q&A information sheets on various issues.¹⁷⁴

b. Architectural and Transportation Barriers Compliance Board

The Access Board is an independent federal agency created in 1973 for the purpose of ensuring access in programs funded by the federal government.¹⁷⁵ It is the leading source for accessible design information for the built environment and transit vehicles.¹⁷⁶ It also provides technical assistance and training related to accessibility.¹⁷⁷ Since 1994, it has published hundreds of documents, many of them related to the built environment.¹⁷⁸ Its major significant guidance is the ADA Accessibility Guidelines for Buildings and Facilities.¹⁷⁹

c. National Institute on Disability and Rehabilitation Research

The Disability and Business Technical Assistance Center (within the Department of Education) provides information, referral, and technical

specialists for hotline responses, an architect, and four administrative staff members with various areas of responsibility. *Id.*

¹⁷³ Some of the most important providers are Disability and Business Technical Assistance Centers (DBTACs), which are funded by the National Institute for Disability and Rehabilitation Research (NIDRR). *Id.* at 203. These centers are located in ten regions throughout the country. See *Education Resource Organizations Directory*, U.S. DEP'T OF EDUC., http://wdcrobcolp01.ed.gov/Programs/EROD/org_list.cfm?category_cd=DBT (last visited Sept. 23, 2014), archived at <http://perma.cc/NR8K-PGX2?type=source>.

¹⁷⁴ See NCD 2000 REPORT, *supra* note 109, at 98. The Report notes that various national trade associations and others assist in developing and disseminating these materials. *Id.* Some of those listed include:

Hotels and motels, restaurants, grocery stores, small businesses, builders, students and professors of design education programs, members of historic preservation boards and commissions, medical professionals, child care providers, service providers for older people, mayors and town officials, police officers, court personnel, managers and operators of emergency 9-1-1 centers, and others.

Id.

¹⁷⁵ *About the U.S. Access Board*, U.S. ACCESS BD., <http://www.access-board.gov/the-board> (last visited Aug. 24, 2014), archived at <http://perma.cc/FXV4-NYR4>.

¹⁷⁶ *Id.* It is also the leading source on design of telecommunications equipment and electronic and information technology. *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (providing links to these documents). For example, guidance has recently been issued on passenger vessels, rail vehicles, and pedestrian signals. See *generally News*, U.S. ACCESS BD., <http://www.access-board.gov/news> (last visited Sept. 18, 2014), archived at <http://perma.cc/MY8J-QB4A>.

¹⁷⁹ See 36 C.F.R. § 1190 (2004).

assistance, through ten regional centers on an array of disability issues.¹⁸⁰ The purpose is to improve public awareness and understanding through information, guidance, and training.¹⁸¹ It is not surprising that the Department of Education has taken a lead on providing technical assistance inasmuch as it was one of the first major areas to be affected by the Rehabilitation Act and has, in many ways, the longest and most comprehensive experience with disability rights.

d. *National Center on Accessibility*

While the DOJ may be the major federal agency providing technical assistance on issues of accessibility for the built environment, it is not the only agency that does so. One of the major providers of technical assistance is the National Center on Accessibility (NCA).¹⁸² As noted previously, the NCA was established in 1992 as a cooperative agreement between Indiana University and the National Park Service.¹⁸³ It is considered a leading authority on access issues for parks and recreation programs and facilities (including museums, performing arts facilities, and similar programs).¹⁸⁴

2. *Advocacy Organizations*

In the more than four decades since the enactment of the Rehabilitation Act of 1973, the growth of advocacy organizations representing a broad array of interests on behalf of disability rights has been extensive. In the 1960s and early 1970s, there were a few class action advocacy organizations involved in de-institutionalization and special education cases. Today there are dozens, if not hundreds, of national, regional, and local organizations advocating on behalf of disability rights. These organizations engage in a range of activities from advocating for legislative changes, working for funding, acting as parties in lawsuits, and working to improve public awareness. Some of the larger organizations with significant resources also provide technical assistance in a variety of ways. Professors Waterstone, Stein, and Wilkins note the importance of these groups as they examine whether court-centered (or

¹⁸⁰ See *Disability and Business Technical Assistance Centers*, U.S. DEP'T EDUC., <http://www2.ed.gov/programs/dbtac/index.html> (last visited Aug. 24, 2014), archived at <http://perma.cc/JUF9-CTG8>.

¹⁸¹ *Id.*

¹⁸² See NAT'L CTR. ON ACCESSIBILITY, *supra* note 110.

¹⁸³ See *id.*

¹⁸⁴ *Id.* It was the key agency in developing access standard for swimming pools, a facility significant for not just parks, but also for hotels, motels, and others with pools. *Id.* Other programs that have benefitted from NCA expertise and guidance involve golf and ticket policies for performing arts venues and sports arenas. *Id.* NCA is nationally known for providing technical assistance (staff members who are "Accessibility Specialists") as well as training. See *id.* Consultation is also available. *Id.*

litigation-based) advocacy is the best use of resources to accomplish major social change.¹⁸⁵ The role of these organizations in litigation is addressed in a later section.¹⁸⁶ While there are a number of advocacy groups working at the national level, several should be noted in particular because of their impact and the length of time they have been in existence. However, this section does not include detailed mention of several important national groups whose work is specialized on issues less relevant to architectural barrier issues discussed in this Article.¹⁸⁷

The Disability Rights Education & Defense Fund (DREDF) was founded in 1979 and is the “leading national civil rights law and policy center directed by individuals with disabilities and parents who have children with disabilities.”¹⁸⁸ Its mission is “[t]o advance the civil and human rights of people with disabilities through legal advocacy, training, education, and public policy and legislative development.”¹⁸⁹ Training is provided to individuals with disabilities and parents of children with disabilities, while education is provided to lawyers, service providers, government officials, and others.¹⁹⁰ Its publications include many books, guidance manuals, and other publications. As noted previously, DREDF was the drafter of *Promises to Keep*, the 2000 NCD Report through a contract with the National Council on Disability.

The Association on Higher Education and Disabilities (AHEAD) is a professional membership organization that is involved in the development of policy and providing services for individuals with disabilities within the higher education community.¹⁹¹ It was established in 1977 and provides a number of training programs. It is mentioned as a major technical assistance provider because it is one of the longest existing national organizations providing such assistance. Its information includes updates on litigation over a wide range of issues, including architectural barriers in higher education. It does not become directly involved in litigation, but does advocacy work for policy change.

¹⁸⁵ See Waterstone et al., *supra* note 161, at 1336–47.

¹⁸⁶ See *infra* Part III.C.3.c.

¹⁸⁷ See, e.g., NAT’L FED’N OF THE BLIND, <https://nfb.org/> (last visited Aug. 24, 2014), archived at <http://perma.cc/9826-X62Y>; NAT’L ASS’N OF THE DEAF, <http://nad.org/> (last visited Aug. 24, 2014), archived at <http://perma.cc/NZP9-B5ME>.

¹⁸⁸ See *About Us*, DISABILITY RIGHTS EDUC. & DEF. FUND, <http://dredf.org/about-us/> (last visited Oct. 10, 2014), archived at <http://perma.cc/QP7Y-EHRK>.

¹⁸⁹ See *id.*

¹⁹⁰ *Id.* The organization works in collaboration with law schools in the San Francisco Bay Area. *Id.*

¹⁹¹ See *About AHEAD*, ASS’N ON HIGHER EDUC. & DISABILITY, <https://www.ahead.org/about> (last visited Aug. 19, 2014), archived at <http://perma.cc/AZS2-3FMC>.

C. The Role of Litigation and Other Enforcement in Public Accommodation Improvements in the Built Environment

It is generally recognized that litigation is an essential component of effectively accomplishing federal disability policy goals. This section looks at the different theories, types of actions (private and government), and types of private plaintiffs (individuals, classes, advocacy groups) in assessing the degree to which litigation has been effective in improving the built environment. In reviewing the litigation, consideration should be given to whether a particular case is only or primarily seeking to remedy the situation for a particular individual or whether the litigation aims to make improvements for others or society in general.

This section examines cases seeking a remedy for architectural design deficiencies for individuals with mobility impairments. It examines the various theories under which plaintiffs sought relief. It also discusses enforcement efforts by advocacy groups, class actions, and the DOJ. In many situations, plaintiffs bring actions under an array of theories, especially in states like California, where strong state laws are in place.

Other scholars have given substantial attention to the issue of litigation as an enforcement tool for disability rights.¹⁹² This Article does not attempt to replicate that research, but to capture the key points of those works in the broader context of whether the built environment is better for people with mobility impairments because of federal and state law. The following is a brief overview of how the various theories have been used in the context of architectural barrier cases.

1. Tort Theories

As noted previously,¹⁹³ perhaps the greatest likelihood of “success” (or at least having the court consider tort law) involves cases in which a physical injury has occurred. Cases brought making such claims involve harm such as back injuries resulting from a fall due to a floor design defect. Courts in

¹⁹² See, e.g., BAGENSTOS, *supra* note 141, at 125; Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1088 (2007); Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 2 (2006); Buhai, *supra* note 55, at 1065 (focusing on the value of litigation under state laws); Stein et al., *supra* note 159, at 1663; Waterstone et al., *supra* note 161, at 1338; Waterstone, *supra* note 58, at 455–78 (addressing the role of enforcement in employment and physical access cases by both private and public sectors and suggesting a more effective public enforcement scheme); Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1826–32 (2005) (including a discussion of the underenforcement of Titles II and III of the ADA).

¹⁹³ See *supra* Part II.C.

different jurisdictions have varied in whether they have allowed state tort negligence law to be used to redress ADA or Rehabilitation Act claims.¹⁹⁴

However, claims for emotional damages, such as pain and suffering resulting from being excluded, face challenges when seeking redress under tort theories.¹⁹⁵ It may require that the conduct is particularly egregious before such damages would be allowed.¹⁹⁶ In the context of architectural barrier exclusions, the pain and suffering would compensate for the embarrassment and humiliation from being excluded. The stigma resulting from intentional separation at lunch counters, drinking fountains, restrooms, and seats on the bus that occurred in Jim Crow era of race discrimination resulted in a different level of emotional consequence than may occur because of inaccessibility for individuals with mobility impairments. While separation based on architectural barriers may affect an individual's sense of personal dignity, this separation is a result of inaccessible design rather than any negative intent to exclude. This difference in intent might explain why so little attention is paid by scholars or the courts to the issue of damages for emotional distress in the context of disability exclusion resulting from unintentionally inaccessible environmental design.

There are very few cases where the courts have reached a discussion of this issue solely in the context of torts. This is probably because the statutory claims preempt the tort claims in some cases or because there may have been a settlement of the tort claims providing no judicial discussion of damages or injury.

When the injury is of this type, a question arises: if there is a private right of action under all of the major discrimination statutes—including Title III (which relates to private providers of public accommodations)—is a tort

¹⁹⁴ See *supra* note 92 and accompanying text.

¹⁹⁵ Measuring the price of pain and suffering is quite challenging under any circumstances. See generally Romen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 90–97 (2006). As noted in the article, such damages are intended to have a deterrent effect and to spread losses. *Id.* at 88. It is also intended to incorporate a sense of fairness. *Id.*

¹⁹⁶ See, e.g., *Covington v. McNeese State Univ.*, 118 So. 3d 343, 353 (La. 2013). Most of the reported lower court decisions in the case involve the issue of the amount of attorney's fees that could be collected. *Id.* at 346. It is noteworthy, however, that the parties settled the personal injury part of the complaint. *Id.* at 347. The case involved a student who used a wheelchair and needed to use an accessible restroom in the student center on campus. *Id.* at 346. There was no accessible women's restroom, and as a result, the student urinated on herself (suffering humiliation) and was injured while trying to move around the inaccessible restroom. *Covington v. McNeese State Univ.*, 98 So.3d 414, 418 (La. Ct. App. 2012). The appellate court noted the university's "prolonged 'militant' behavior" over several years of litigation. *Id.* at 431. Although the Supreme Court of Louisiana reversed the appellate court's enhancement of attorney's fees and held that the district court's decision on the amount was not an abuse of discretion, it did not overrule any of the substantive issues decided by the appellate court. *Covington*, 118 So. 3d at 353.

theory necessary? The simple answer is that under Title III, although a successful complainant can recover attorney's fees and costs, damages are not allowed.¹⁹⁷ As will be discussed below, the Supreme Court makes it quite difficult to succeed in these cases, which deters private attorneys from representing individual clients in cases involving private entities under Title III of the ADA.

The case of *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Services* involved challenges brought under both the Fair Housing Act and the ADA for failure to address architectural barriers.¹⁹⁸ The Supreme Court's decision addressed the availability of attorney's fees and held that they cannot be recovered under the statutory provisions unless litigation resulted in a "judicially sanctioned change in the parties' legal relationship."¹⁹⁹ Where the defendant has removed the barriers, and there is no likelihood that the injury would recur, because a plaintiff cannot recover damages under Title III of the ADA, the only incentive for an attorney to take such a case would be recovery of attorney's fees. For this reason, it can become necessary for attorneys to include tort theories in order to recover not only damages, but also attorney's fees.

As noted, the difficulties of showing actual injury and resultant damages in tort cases of this type are themselves a barrier to having tort actions as a means of enforcement. Tort cases, however, are still one tool for individuals with disabilities to use in improving architectural access prospectively as well as recovering for their own injuries. The question is whether there might be better alternative theories of litigation through amending the federal statutes.

What is clear in the context of improving systemic change is that tort litigation is not a major means of changing industry behavior in a way that would impact societal interests. The exception might be, however, if a case were to receive national media attention in a way that raised awareness sufficiently to affect how similarly situated potential defendants act.

a. *Section 504 Remedies*

There are a substantial number of cases in which Section 504 of the Rehabilitation Act is used to seek redress for architectural barrier deficiencies.²⁰⁰ As will be noted in the next section, often these are combined

¹⁹⁷ See 42 U.S.C. §§ 2000a-3(a), 12188(a) (2012).

¹⁹⁸ See *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Servs.*, 532 U.S. 598, 601 (2001).

¹⁹⁹ *Id.* at 605. For a discussion of the *Buckhannon* decision and its impact, see BAGENSTOS, *supra* note 141, at 126–27; Waterstone et al., *supra* note 161, at 1352–54. For a discussion of the backlash to private enforcement as played out in the *Buckhannon* decision and in other ways, see Waterstone, *supra* note 58, at 443–47.

²⁰⁰ See, e.g., *Meagley v. City of Little Rock*, 639 F.3d 384, 386–87, 390 (8th Cir. 2011) (holding that zoo patron who could not walk long distances, rented electric scooter from zoo, and was injured crossing a footbridge provided no proof of intentional

with ADA claims. Because most institutions of higher education receive federal financial assistance, these are often the defendants in cases in which the Rehabilitation Act and Title II or Title III of the ADA are used.²⁰¹

From a remedial perspective, the benefit of bringing a Section 504 case is that Section 504 allows for damages as a remedy and the recovery of attorney's fees and costs when the claimant is a prevailing party. The availability of damages is an incentive to bring claims under Section 504, even where the *Buckhannon* defense may make it difficult to recover attorney's fees and costs.

b. ADA Remedies

i. Title II

Title II applies to state and local governmental entities and provides for damages, attorney's fees, and costs. There have been a number of cases brought under Title II theories in the architectural barrier context.²⁰² Like the

discrimination to justify compensatory damages under ADA Title II or Rehabilitation Act because plaintiff did not prove discriminatory intent, which includes deliberate indifference).

²⁰¹ See, e.g., *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 2–6 (1st Cir. 2000) (addressing issues raised by prospective student about public pathway accessibility problems arising during her enrollment experience); *Frank v. Univ. of Toledo*, 621 F. Supp. 2d 475, 478–81, 488 (N.D. Ohio 2007) (finding no immunity from Title II when higher education student who used cane and had nerve problems sought parking accommodations and exam accommodations but holding that student did not make sufficiently specific requests for accommodations before exam and program was not required to be restructured in entirety); *Levy v. Mote*, 104 F. Supp. 2d 538, 540–41 (D. Md. 2000) (holding campus inn lacked accessible parking, path of travel to entrance, and accessible entrance); *Filardi v. Loyola Univ.*, No. 97 C 1814, 1998 WL 111683, at *1 (N.D. Ill. Mar. 12, 1998) (denying dismissal of Title III claim by wheelchair user that university did not remove architectural barriers); see also *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220, 1222 (9th Cir. 1992) (finding no standing existed for student claiming parking permit policy violated § 504 where student had never applied for permit); *Adams v. Montgomery Coll. (Rockville)*, 834 F. Supp. 2d 386, 388, 396 (D. Md. 2011) (allowing claim by student regarding inadequate parking accommodations during period of construction); *Brownscombe v. Dep't of Campus Parking*, 203 F. Supp. 2d 479, 484 (D. Md. 2002) (finding state university's enforcement of parking code against student with a disability did not constitute discrimination when the student failed to show differential treatment to students who were not disabled).

²⁰² See, e.g., *Estate of Sims v. City of Aberdeen*, No. 1:09CV32–A–D, 2011 WL 132362, at *1–2 (N.D. Miss. Jan. 14, 2011) (holding that use of cane and handicap parking pass does not demonstrate substantial limitation in major life activity of work); *Barber v. City of Norwich*, No. 3:07–cv–1815(VLB), 2008 WL 3992711, at *1–2 (D. Conn. Aug. 25, 2008) (holding that individual who sustained injuries while entering city hall must show discriminatory animus or ill will to override Eleventh Amendment immunity in a Title II action for accessible entrance violation); see also *DISABILITIES AND THE LAW*, *supra* note 2, §§ 6:14–6:18.

Rehabilitation Act cases, the *Buckhannon* defense is a smaller hurdle for enforcement efforts because, although there may be a bar to recovering attorney's fees and costs, damages can be recovered.²⁰³

ii. *Title III*

The limitation of the Rehabilitation Act in covering only recipients of federal financial assistance was a significant factor in the need for the ADA. The Rehabilitation Act would have only applied primarily to institutions of higher education, health care providers, and a few other entities receiving federal financial assistance. This left a significant number of entities (most restaurants, movie theaters, shopping malls, sports venues, recreation facilities, and service providers such as real estate agencies and doctor's offices) not covered.

Although Title III provides more comprehensive coverage of programs, available remedies are limited. Claimants might obtain injunctive relief, but they cannot recover damages unless the Attorney General (DOJ) requests them on behalf of the individual. For a variety of reasons, it is quite rare for DOJ to do so. As noted previously, because the recovery of attorney's fees and costs is problematic in many cases after *Buckhannon*, private cases are less likely to be brought by the private bar.²⁰⁴ In spite of the disincentive to do so, there have been a number of Title III cases involving architectural barriers.²⁰⁵

²⁰³ See 29 U.S.C. § 794a (2012).

²⁰⁴ See Waterstone et al., *supra* note 161, at 1352–54 (discussing how this defense is being circumvented).

²⁰⁵ See *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1071–72 (7th Cir. 2013) (granting standing to a hotel guest for ADA claim regarding spring-hinged door closers on bathroom doors in ADA-compliant room but not allowing standing for all other Courtyard hotels); *Berthiaume v. Doremus*, 998 F. Supp. 2d 465, 476 (W.D. Va. 2014) (granting injunction in Title III claim involving removal of minimal barriers at entrance and in restrooms at restaurant); *Houston v. Hess Corp.*, No. 2:13-cv-152-FtM-38DNF, 2014 WL 931055, at *3–4 (M.D. Fla. Mar. 10, 2014) (conflicting evidence about whether barriers to entry, parking, and restroom had been resolved at convenience store); *Rodriguez v. Barrita, Inc.*, No. C 09-04057 RS, 2014 WL 31739, at *16 (N.D. Cal. Jan. 3, 2014) (holding that although barrier removal at restaurant was not readily achievable, alternative method of providing curbside service should have been provided); *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 957 F. Supp. 2d 1272, 1283 (D. Colo. 2013), *aff'd in part, rev'd in part*, 765 F.3d 1205 (10th Cir. 2014) (granting standing to wheelchair users claiming raised porches in retail space violated new construction requirements of ADA); *Norkunas v. HPT Cambridge, LLC*, 969 F. Supp. 2d 184, 189 (D. Mass. 2013) (holding that hotel patron who was a wheelchair user had standing to seek injunction and addressing appropriate attorney's fees rates and expenses); *Blackwell v. Foley*, 724 F. Supp. 2d 1068, 1071, 1071–72, 1074–76 (N.D. Cal. 2010) (granting standing to a restaurant patron with a visual impairment who had injured himself on the sidewalk outside, granting injunctive relief for barriers inside restaurant, and resulting—under California law and the ADA—in damage award, attorney's fees, and joint and several liability against landlord and tenant regardless of indemnification agreement); *Kittok v. Leslie's Poolmart, Inc.*, 687 F. Supp.

c. Other Statutory Claims

The other major statute under which an individual remedy may be needed in a case involving architectural access is the Fair Housing Act. There has not been a great deal of litigation involving accessible housing. Damages are an available remedy under the Fair Housing Act, so although the *Buckhannon* defense limiting attorney's fees may be a deterrent to taking such cases, the damages availability under the FHA may counter that.²⁰⁶

2. Supreme Court Cases Involving or Affecting Architectural Barrier Issues

There are three Supreme Court cases that address issues in the context of claims involving architectural access.²⁰⁷ None of the Supreme Court decisions determined whether there had been a violation or whether a barrier should be removed. All of them raised procedural issues. The procedural issues addressed were whether airlines are subject to Section 504 of the Rehabilitation Act,²⁰⁸ whether Title II of the ADA applies to the judicial system,²⁰⁹ and whether cruise ships are entities covered under Title III of the ADA.²¹⁰

2d 953, 956 (C.D. Cal. 2009) (ruling in favor of store patron under ADA and state statutory and common law negligence theories and finding single handicap-designated parking space was non-accessible); see also *DISABILITIES AND THE LAW*, *supra* note 2, §§ 6:14–6:18.

²⁰⁶ See *DISABILITIES AND THE LAW*, *supra* note 2, §§ 7:10–7:11.

²⁰⁷ See *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 (2005); *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004); *Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 599 (1986).

²⁰⁸ The decision in *Department of Transportation v. Paralyzed Veterans* resulted in a Supreme Court ruling that airlines are not subject to Section 504 of the Rehabilitation Act. 477 U.S. at 612–13. The response to that decision was the Air Carrier Access Act. 49 U.S.C. § 41705 (2012).

²⁰⁹ The decision in *Tennessee v. Lane* addressed whether courthouses are subject to ADA Title II requirements. 541 U.S. at 533–34; see *supra* note 144. This is an issue that would benefit from technical assistance, agency guidance, and financial resources. Many county court systems are financially challenged to find funds to do extensive retrofitting. The Supreme Court's decision in *Pennsylvania Department of Corrections v. Yeskey* did not involve architectural barriers but was relevant to a later decision that did. 524 U.S. 206 (1998). The *Yeskey* Court discussed whether state prisons are covered under Title II of the ADA in a case involving a prisoner who was HIV positive and seeking to participate in a Motivational Boot Camp program. See *id.* at 208–10. This decision arguably preempts potential challenges to the 2010 DOJ regulations under Title II relating to correctional institutions and architectural barrier issues.

²¹⁰ In *Spector v. Norwegian Cruise Line, Ltd.*, the Court addressed the applicability of Title III to cruise ships. 545 U.S. at 125. The Court held that cruise lines that operate with United States connections are subject to Title III. *Id.* at 142. Like the *Tennessee v. Lane* decision, the substantive requirements were left to resolution by lower courts, where

The Supreme Court jurisprudence on disability rights in the architectural barriers context has not been negative. Although arguably the *Paralyzed Veterans* decision narrowed coverage of disability rights, Congress quickly responded (within two years). It took Congress six years after the Supreme Court narrowed the definition of disability under the ADA²¹¹ to amend and clarify the definition. The inability of the current Congress to enact anything on any issue makes it very unlikely that any additional reforms to the ADA will occur any time soon. In none of the cases did the Court reach the issue of the appropriate remedy. So, although the Supreme Court has reviewed disability architectural barrier issues, it has offered no guidance on remedies in such cases.

3. *Types of Claimants*

The previous two sections provided the following: an overview of the remedies available under various theories; a discussion of how remedies might be a factor in whether litigation is an avenue for accomplishing the goal of architectural accessibility generally; and an outline of how the Supreme Court has responded to some cases involving architectural barrier issues. It is important to keep in mind that the goal of remedying a situation for an individual (who has been personally harmed) is not necessarily the same as the goal of ensuring access generally, which is a broader societal goal.

The following section examines briefly whether the types of parties bringing claims may be making a difference (positive or negative) in progress towards ensuring access.

a. *Private Individuals Represented by “Solo” Counsel (Those Not Affiliated with Major Disability Advocacy Organizations)*

Private individuals seeking redress when there have been architectural barrier deficiencies may want recovery for their injuries, as described in earlier sections. Individuals may also be seeking a broader remedy to achieve a societal goal—such as having the barrier removed so that others will not be harmed or creating awareness through publicity about the litigation so that other business entities will be proactive about removing similar barriers. Sometimes, the individuals bringing these claims are represented by a private practitioner with a broad general practice who may or may not have a substantial practice related to these kinds of issues. Other times, the individuals may seek the representation of legal counsel known to have a high

unique aspects of ships, as well as safety issues, could be more appropriately considered.
Id.

²¹¹ See *supra* note 50 (citing the “*Sutton* trilogy” Supreme Court cases).

profile or substantial practice as a cause lawyer.²¹² Cause lawyer representation is discussed more fully in Part III.C.3.c, but it should be noted that while these groups or individual attorneys often use litigation for broad social change, they also sometimes represent individual clients in cases in which individual redress is the primary—or only—goal.²¹³

Individual client representation by private attorneys is certainly important to the individual bringing the case. There is some concern, however, among those looking at larger societal goals about whether some of these cases might actually prove to be counterproductive to the overall goal of accessibility. The controversy arises primarily as a result of two different kinds of litigation strategies: frequent or vexatious litigation and the unwise choices to appeal certain cases to higher courts which risks setting bad precedents on key legal issues.

The first type of situation involves those who seek to accomplish larger societal goals by employing the so-called vexatious or frequent litigant strategy.²¹⁴ The criticism is that some cases are really intended to be harassing and frivolous and only attempt to intimidate defendants into making cash settlements. As a result of some of these types of actions, courts have begun to establish a framework for dismissing cases as frivolous or harassing.²¹⁵ As a result of some private cases, not just those brought by frequent litigators, courts have also begun to establish factors for determining if a potential plaintiff has standing. These factors include the likelihood of using the facility in the future, evidence of whether an individual actually knew of barriers and was deterred from using the facility as a result, proximity between facility and residence, past patronage, definiteness of plans to return, and frequency of travel near that site.²¹⁶ Such cases raise the specter of bad publicity that could result in negative public opinion about disability rights.²¹⁷

²¹²“Cause lawyers” refers to attorneys who work for social justice. They are “attorneys who spend a significant amount of their professional time designing and bringing cases that seek to benefit various categories of people with disabilities and who have formal connections with disability rights organizations.” Stein et al., *supra* note 159, at 1661.

²¹³ See *infra* Part III.C.3.c.

²¹⁴ See DISABILITIES AND THE LAW, *supra* note 2, § 6:17.

²¹⁵ See *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007) (using the following factors to determine that a case was frivolous: (i) numerous claims with false or exaggerated allegations of injuries, (ii) using coercive letters to intimidate into a settlement, and (iii) evidence that few cases had been tried); see also *Molski v. Evergreen Dynasty Corp.*, 521 F.3d 1215, 1220 (9th Cir. 2008) (upholding requirement of pre-filing order for future Title III cases brought by the individual and denying rehearing en banc). Chief Judge Kozinski offered a dissent in that opinion, raising concerns about the impact of the ruling on access to justice. See *id.* at 1221–22 (Kozinski, C.J., dissenting).

²¹⁶ DISABILITIES AND THE LAW, *supra* note 2, § 6:17.

²¹⁷ See, e.g., Mosi Secret, *Disabilities Act Used by Lawyers in Flood of Suits*, N.Y. TIMES, Apr. 17, 2012, at A1 (“The practice has set off a debate about whether the lawsuits are a laudable effort, because they force businesses to make physical improvements to

A second concern with individual case and the solo attorney representation occurs in appellate level situations. This is noted in the Stein, Waterstone, and Wilkins book review of the Bagenstos book.²¹⁸ They respond to Bagenstos's commentary on the contradictions about strategies and approaches within the disability rights movement by highlighting how cases reach the Supreme Court and the fact that there seems to be little coordinated strategy about this. None of the ADA Supreme Court cases initially involved a cause lawyer at the trial level. The authors note:

[This has] left the movement vulnerable to just the kind of exploitation of its internal contradictions that Bagenstos describes. By carefully . . . pushing only those cases that advanced a particular interpretation of the movement's objectives, cause lawyers such as Charles Hamilton Houston and Thurgood Marshall played a key role in making sure that their respective movements presented a unified and cohesive face to courts and the general public. The absence of any similar disciplining force in the ADA arena has left the articulation of the movement's message to the choices of individual litigants and their lawyers—parties that often have little or no interest in presenting anything other than an interpretation of the statute and its reach that serves their own highly particularized interests. The result has been a series of Supreme Court cases attempting to stretch the ADA's coverage to novel, and often highly unusual and unpopular, circumstances. Not surprisingly, these claims rarely succeed.²¹⁹

The authors continue with the suggestion that “committed and informed cause lawyers” might bring more careful deliberation about the means and ends to make progress towards the anti-discrimination agenda.²²⁰ The authors suggest a more thoughtful strategy of presenting the Supreme Court with cases that address key ADA elements.²²¹

In sum, while litigation certainly may provide redress to individuals on a case-by-case basis, these lawsuits do not seem to accomplish the larger goal of changing the behavior of a broader sector of similarly situated parties.

comply with the disabilities act, or simply a form of ambulance-chasing, with no one actually having been injured.”); *see also* Waterstone, *supra* note 58, at 449 (noting the negative portrayal of the ADA by print and other media). It should be noted, however, that the negative portrayal is often in the context of employment cases, and perhaps less so in the context of architectural barrier cases. *See* Laura F. Rothstein, *Don't Roll in My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act*, 19 REV. LITIG. 399, 400–01 (2000) (discussing public reaction to media coverage of high profile sports and entertainment cases involving disability issues).

²¹⁸ *See* Stein et al., *supra* note 159, at 1661–63.

²¹⁹ *Id.* at 1662.

²²⁰ *Id.* at 1663.

²²¹ *Id.* at 1664.

b. *Class Actions*

One vehicle for having greater impact and accomplishing judicial efficiency is the class action.²²² There have been very few of these cases involving architectural barrier issues, although this is probably one of the areas in which would-be class members are most likely similarly situated—e.g., wheelchair users or others with mobility impairments. The common harm to class members, however, may be more challenging to demonstrate, and class actions in Title III cases will not result in damages, so there is less incentive to bring class actions against private providers of public accommodations.

c. *Advocacy Organizations and Cause Lawyers—the “Private Attorneys General”*

One scholar describes the importance of those whose litigation works “to the advantage of the public by eliminating discriminatory behavior.”²²³ This section briefly highlights that kind of advocacy in the context of architectural barrier cases.²²⁴ This section is separate from the private plaintiff and individual attorney section above, because advocates in these cases are generally seeking to “vindicate[] the public interest by deterring unlawful behavior.”²²⁵ “Within the civil rights arena, a private attorney general is a private citizen whose lawsuit, while perhaps benefiting her, also works to the advantage of the public by eliminating discriminatory behavior.”²²⁶ This technique was key to the success of the strategic private litigation in dealing with race discrimination leading up to *Brown v. Board of Education*.²²⁷

²²² See DISABILITIES AND THE LAW, *supra* note 2, § 9:12; see also *Barden v. City of Sacramento*, 292 F.3d 1073, 1074–75 (9th Cir. 2002) (reversing and remanding lower court decision in class action by individuals with mobility impairments challenging design of sidewalks); *Charlebois v. Angels Baseball LP*, No. SACV 10–0853, 2012 WL 2449849, *1 (C.D. Cal. May 30, 2012) (prevailing class action via settlement by wheelchair users); *Moeller v. Taco Bell Corp.*, 816 F. Supp. 2d 831, 836, 868 (N.D. Cal. 2011) (certifying class action, granting partial summary judgment as to liability, and appointing a special master to evaluate accessibility of common design features at chain restaurant); *Californians for Disability Rights, Inc. v. Cal. Dep’t of Transp.*, 249 F.R.D. 334, 336 (N.D. Ill. 2008) (granting wheelchair-using detainees class certification to challenge conditions); *Voices for Independence v. Pa. Dep’t of Transp.*, No. 06–78 Erie, 2007 WL 2905887, *16 (W.D. Pa. Sept. 28, 2007) (denying defendants’ motion for summary judgment in class action challenging curb ramp and sidewalk accessibility); *Stein & Waterstone*, *supra* note 90, at 902–10 (discussing collective action in ADA workplace cases as consistent with history of class actions in other discrimination actions and discussing class actions in the context of public services and public accommodations cases).

²²³ *Waterstone*, *supra* note 58, at 442.

²²⁴ As noted throughout this Article, the success of litigation as an enforcement strategy in employment cases is not the same as in architectural barrier cases.

²²⁵ *Waterstone*, *supra* note 58, at 441.

²²⁶ *Id.* at 442.

²²⁷ *Waterstone et al.*, *supra* note 161, at 1291.

In their article about these cause lawyers, Waterstone, Stein, and Wilkins reference several organizations whose primary mission is litigation on behalf of individuals with disabilities.²²⁸ These authors interviewed individuals engaging in such advocacy and began with the Disability Rights Bar Association (DRBA) and others identified as being advocates by members of this organization.²²⁹ The mission of DRBA is to provide legal representation on behalf of individuals with disabilities.²³⁰

In addition, attorneys at the DOJ Civil Rights Division Disability Rights Section and those within state attorney general offices provide advocacy in the role of cause lawyers. Attorneys at a number of other federal and state agencies have also taken on this role.²³¹

Playing a significant role, especially at early stages of disability discrimination rights are Protection and Advocacy (P&A) organizations.²³² These organizations are authorized to provide representation in legal matters on behalf of individuals with disabilities.²³³ They are not “government” agencies, but they may be funded by a variety of federal, state, and private funding sources.²³⁴ They operate independently, but are networked through the National Disability Rights Network (NDRN).²³⁵

Organizations such as this benefit from having substantial expertise and experience, networks to draw upon, and sometimes connections to law

²²⁸ *Id.* at 1296.

²²⁹ See *About*, DISABILITY RTS. BAR ASS’N, <http://disabilityrights-law.org> (last visited Aug. 18, 2014), archived at <http://perma.cc/3WY2-VLLX>. See Waterstone et al., *supra* note 161, at 1296–97. Sponsors of the DRBA include the Burton Blatt Institute at Syracuse University (<http://bbi.syr.edu>), the National Federation of the Blind (<https://nfb.org>), the Judge David L. Bazelon Center for Mental Health Law (<http://bazelon.org>), Civil Rights Education and Enforcement Center (www.creeclaw.org), Disability Rights Advocates (<http://www.drlegal.org/about>), Disability Rights Legal Center (<http://disabilityrightslegalcenter.org>), and several law firms (Brown Goldstein Levy; Goldstein, Borgen, Dardarian, & Ho; Law Office of Lainey Feingold; and Law Office of David Ferleger). See *Support*, DISABILITY RTS. BAR ASS’N, (last visited Aug. 18, 2014), <http://www.disabilityrights-law.org/?q=support>, archived at <http://perma.cc/3WY2-VLLX>.

²³⁰ See DISABILITY RTS. BAR ASS’N, *supra* note 229.

²³¹ See Waterstone et al., *supra* note 161, at 1324 nn.182–84.

²³² See *About P&A/CAP Network*, NAT’L DISABILITY RTS. NETWORK, <http://www.ndrn.org/about/paacap-network.html> (last visited Aug. 18, 2014), archived at <http://perma.cc/8NMK-JETK>.

²³³ See *id.*

²³⁴ The first P&A program was established in 1975 through the Developmental Disabilities Assistance and Bill of Rights (DD) Act of 1975. *Id.* On a personal note, my first introduction to disability discrimination law was as an affiliated attorney in the Development Disabilities Law Project, a clinical program funded in part through the DD Act, at the University of Pittsburgh Law School (1979–1980) while I was a visiting faculty member at the law school. It was that experience which led to my interest in focusing my civil rights research and teaching disability discrimination law.

²³⁵ See *id.* (providing an overview of the P&A network).

schools²³⁶ or other organizations that can galvanize students and volunteers to play supporting roles. Because of their focus, these organizations are key to representing the interests of individuals with disabilities. Cases brought by members of this group more often achieve broad societal and systemic change than do the individual types of cases discussed in Part III.C.3.a above.

Advocacy organizations that represent special disability groups or subgroups and those that have broader missions than litigation have sometimes been plaintiffs in actions seeking systemic or institutional behavior change. Courts have reached different results on the issue of standing in such cases.²³⁷

d. *Department of Justice and Other Agency Enforcement*

Extensive analysis has been done about the importance of the DOJ and other government agencies in bringing litigation in disability rights cases. Some of that analysis was noted in Part III.B.1 discussing the NCD 2000 Report on DOJ enforcement.²³⁸ Several scholars have engaged in ongoing and cumulative review of this issue.²³⁹ While these assessments provide valuable and excellent insight into the importance of DOJ litigation as an enforcement tool, it is important to note the differences in employment cases and architectural accessibility cases. Most of the studies referenced do clarify the difference between the types of cases, but it is essential to emphasize the difference in any statements regarding the impact of the ADA generally. DOJ litigation may not be as essential to the success of improving the built environment as it is in employment discrimination cases, for the reasons described throughout this Article.

²³⁶ Programs at Loyola Los Angeles Law School and Syracuse University Law School (Burton Blatt Institute) are examples.

²³⁷ See, e.g., *Payne v. Chapel Hill N. Props., LLC*, 947 F. Supp. 2d 567, 570–71 (M.D. N.C. 2013) (granting motion to dismiss because of lack of standing by advocacy group seeking injunctive and declaratory relief against commercial property owner because the group had no personal stake in outcome); *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, No. 09–cv–02757–WYD–KMT, 2011 WL 1930643, at *4 (D. Colo. May 18, 2011) (recognizing that advocacy association may assert claim based on discriminatory policy, design, or decision, not only on a specific barrier and denying motion to dismiss class action request); *Access 4 All, Inc. v. Trump Int’l Hotel & Tower Condo.*, 458 F. Supp. 2d 160, 175 (S.D.N.Y. 2006) (finding association representing individuals with mobility impairments had standing on hotel access issues); *Small v. Gen. Nutrition Cos.*, 388 F. Supp. 2d 83, 85 (E.D.N.Y. 2005) (holding that advocacy organization for disabled individuals lacked standing but that wheelchair user had standing to bring an action in vicinity where he regularly traveled). Other standing cases have involved “testers.” See *DISABILITIES AND THE LAW*, *supra* note 2, § 6:17 n.26. Courts have also addressed the standing of those with associational status. See *id.* § 6:17 n.28.

²³⁸ See *supra* Part III.A.2.

²³⁹ See *supra* note 192.

IV. CONCLUSIONS AND RECOMMENDATIONS

In conclusion, I will try to answer the questions raised in the introduction and provide some recommendations about how to respond to the answers or, perhaps, how to find the answers.

Has the physical environment for individuals with mobility impairments improved since 1990? The studies and reviews (while not all recent) indicate that the built environment has better accessibility than was the case in 1990 when the Americans with Disabilities Act was enacted. It probably had already improved to some degree after the 1973 Rehabilitation Act. The general consensus seems to be that the architectural access issues are probably one of the most positive areas for individuals with disabilities. That does not mean, of course, that the work is done.

Has it been the result of legislation, regulations, agency guidance, industry action, litigation, or other reasons? It is quite difficult to pinpoint what the reasons are for why there has been improvement. It is probably all of the listed factors, but it is also probably relatively better than some disability discrimination progress because the benefits of improving the built environment affect more than those with mobility impairments. In addition, accessible design is a “proactive reasonable accommodation.” Building or altering structures with ramps and elevators and grab bars does not just benefit one individual; it is a larger benefit to others on an ongoing basis.

What type of litigation has been the most effective and why? What litigation strategies might improve the situation? Litigation is almost certainly a key aspect of ensuring compliance with requirements to make the built environment accessible. While the individual solo suits, including those using tort theories, may have some impact, they seem less likely to result in systemic comprehensive change and improvement. As discussed in the Article, there are significant barriers to using tort as a vehicle to remedy an inaccessible built environment situation. The few judicial decisions using this theory provide insufficient precedent to determine whether the results are positive for plaintiffs. In addition, there is some evidence that there may be unintended negative consequences for some of the “frequent litigants” bringing statutory access cases because of negative media coverage as well as nonstrategic litigation which sets precedent that may not be helpful. The litigation that seems to have the greatest impact is that brought by the cause lawyers and the DOJ. These cases almost always have a goal of not just redressing a single wrong, but making societal change that benefits others. For that reason, more resources to bring such cases directed might increase accessibility. It will be useful to see if any twenty-fifth ADA anniversary studies of DOJ and other entities follow up on the 2000 NCD Report in the areas that suggested more strategic litigation and prioritizing what types of cases to bring. It would also be useful to explore the application of state access laws and which state enforcement seems to be most effective in order to generate models for other states to follow.

Are there legislative efforts that would ensure better access? There is some sense that the attorney's fees problems resulting from the *Buckhannon* defense could be resolved through congressional action. Congress could amend the ADA in two ways—allowing damages under Title III (giving incentives to private attorneys even if they do not receive attorney's fees) and amending the attorney's fees provision of the statute to allow such fees in settlement situations if the change was substantially related to the litigation or appeared to be a response to the litigation. There may be unintended consequences of making such amendments, but the most significant barrier to this change is the extreme unlikelihood that Congress would make such a change. Federal legislation is a challenge in any situation (considering how long it took to pass the 2008 amendments returning the definition of disability to the broad interpretation). Today's Congress seems incapable of doing much of anything, even on issues which have bipartisan support. That could change every two years, so it is useful for advocates to have such changes fleshed out if the time is right. For now, however, other avenues for incentivizing constructive litigation should be pursued instead. One of the areas of recommendation in the 2000 NCD Report was increased DOJ funding to allow for more enforcement. Although some funding increase could come from internal allocation by the DOJ and prioritizing disability cases, the better solution would be increased overall funding. As noted, however, Congress is not currently sending signals that this is likely to occur.

What else might be done to increase progress on removing architectural barriers? As noted in the Article, numerous sources have generated a considerable amount of technical assistance to provide a roadmap for operating programs to ensure architectural access to the public. A comprehensive review should be done of not only the content of such information, but also the avenues that are used to reach the beneficiaries. This should be done, perhaps by NCD or by an individual researcher. Individuals with expertise in communications should assess content and delivery to the various stakeholders.

In reviewing the cases cited in the Article, it would be useful to know how much publicity has been given to the litigation, to a settlement, or to a final decision finding liability in important cases. In some arenas, there is a lot of awareness. In higher education, for example, AHEAD provides listserv and web alerts on significant cases of all types (including architectural barrier cases) to higher education administrators, advocates representing individuals with disabilities, and other advocacy organizations. Conferences provide those same parties an opportunity to learn about these issues in greater depth. It would be useful to explore the degree to which this information changes behavior. Does it result in a more proactive approach when new facilities are constructed or old ones are renovated?

While the discussion in this Article does not provide a precise study of what has improved and why, it gives sufficient guidance for all parties to respond. The broad indicators noted above provide cautious optimism that the

built environment will continue to witness improved accessibility for those with mobility impairments, but it is essential to continue to be vigilant to make sure that progress continues. In the meantime, I will (by articles such as this) try to continue to raise awareness.

