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# ARCHITECTURAL BARRIERS: A PERSPECTIVE ON PROGRESS

CHARLES D. GOLDMAN\*

## I. INTRODUCTION

Putting pen to paper—for an architect it begins the design process and the process of translating images of the mind into the reality of buildings. To a lawyer, the putting of pen to paper is associated with preparing memoranda, pleadings, and most dramatically, with public figures signing bills into law, new governmental mandates that will be translated into realities.

Over the past twenty-five years, laws have been enacted mandating that buildings be designed and constructed to be accessible to persons with handicaps. The implementation of these laws with barrier free design standards, which also developed in this period, has led to significant process in the involvement of disabled persons in the fabric of American society. Accessible design is currently in an age of implementation. It is apparently on a projected course where "handicapped design" will ultimately be so fully integrated into the creative process that it will be part of "universal design" in which architects and designers maximize the number of users and their experiences in a facility.

According to I. M. Pei, master architect, remarkable progress has been spurred by legislation, building codes, and the involvement of handicapped individuals.<sup>1</sup> Government agencies, as well as private groups, have evolved to ensure and facilitate the change. These organizations have been complemented by the extraordinary dedication and efforts of concerned individuals: (1) The United States Senators who jackhammer curbs to make room for a curb ramp;<sup>2</sup> (2) the world premier violinist who reads blueprints and inspects new con-

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1. Telephone interview with I. M. Pei, noted architect (July 16, 1982).
2. Interview with the Honorable Robert Stafford, U.S. Senator (July 16, 1982).

cert halls;<sup>3</sup> (3) the disabled students whose sheer presence compels changes, revalidates the legislative commitment to education for persons with handicaps, and makes universities aware of federal mandates; and (4) the professionals, able-bodied, and disabled, who actively participate in the design process.

It is important to view architectural barrier statutes in proper perspective. Although there has been significant litigation and arduous debate over the implementation of mandates not to discriminate against qualified persons with handicaps, such as section 504 of the Rehabilitation Act,<sup>4</sup> with regard to the implementation of laws requiring buildings to be accessible, emphasis over the past decade has focused on the achievement of meaningful voluntary compliance.

Architectural barriers are discriminatory in that they deny qualified persons their most basic of rights: access to and participation in society. Accessibility permeates all other aspects of disabled persons' civil rights.<sup>5</sup> Without access, rights to equal employment opportunity,<sup>6</sup> rights to be "abroad in the land,"<sup>7</sup> and the full panoply of protections and duties can be rendered meaningless. To a disabled person, a six-inch curb may loom as large as the Berlin Wall.<sup>8</sup>

This article addresses several of the critical legal aspects of architectural barrier laws and mandates for accessibility. Part I will focus on the development of the basic design standard and the cornerstone federal legislation. Enforcement of that legislation in the courts and by federal agencies is discussed in Part II. In Part III, state laws for building accessibility, including those of Massachusetts, are reviewed as a prelude to providing practitioners with a methodology of approaching particular problems. The final segment elaborates on the growing involvement of disabled persons in the design process, the latest in accessibility specifications, and peers into the future of building practices. Also considered is the key legislation likely to highlight the first session of the 98th Congress.

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3. Telephone interview with Itzhak Perlman, noted violinist (Aug. 2, 1982).

4. 29 U.S.C.A. § 794 (West Supp. 1976-1981).

5. WHITE HOUSE CONFERENCE ON HANDICAPPED INDIVIDUALS, 1 AWARENESS PAPERS, CIVIL RIGHTS 403 (1977).

6. UNITED STATES GENERAL ACCOUNTING OFFICE, FURTHER ACTION NEEDED TO MAKE ALL PUBLIC BUILDINGS ACCESSIBLE TO THE PHYSICALLY HANDICAPPED, (1975) [hereinafter cited as GAO-I].

7. tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841 (1966).

8. Goldman, *For Able-Bodied People Only*, 3 DISTRICT LAWYER 18, 18-20 (1978).

## II. HISTORICAL OVERVIEW: THE BASIC STANDARD AND LEGISLATION

Today, architects are more conscious of laws requiring accessibility and must contemplate creating facilities that are functional and safe for handicapped and nonhandicapped persons. To appreciate fully the significance of the progress, it is important to trace the evolution of the mandates against architectural barriers. That history contains the roots of the current activities and seeds of the future trends.

In 1957, Hugh Deffner of Oklahoma City was named Handicapped American of the Year by the President's Committee on Employment of the Handicapped for his efforts against unwarranted architectural barriers that prevented him from moving freely in his community. To receive his award, Mr. Deffner had to be carried by two Marines up the steps of a federal building.<sup>9</sup>

The result of the incident was a strong effort, led by the President's Committee on Employment of the Handicapped and the National Easter Seals Society, as well as other governmental and consumer groups, to work with the American Standard Association, today known as the American National Standards Institute (ANSI) to develop specifications that would make buildings accessible to handicapped persons. This first ANSI specification, issued in 1961 and reaffirmed in 1971, is only six pages long<sup>10</sup> and has been used extensively by federal, state, and local governments in laws adopted in the 1960's and 1970's. It contains the detailed "how to" and "requirements" for construction of bathrooms, ramps, switches, walks, and other elements of a facility.<sup>11</sup>

The federal legislation that has formed the backdrop for state initiatives developed in several phases. Congress studied the problem of accessibility, rejected voluntary compliance as ineffective, and created strong mandates and enforcement mechanisms. In 1965, Congress established the National Commission on Architectural

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9. NATIONAL COMMISSION ON ARCHITECTURAL BARRIERS TO REHABILITATION OF THE HANDICAPPED, DESIGN FOR ALL AMERICANS, H. R. DOC. NO. 324, 90th Cong., 2d Sess. 5 (1968) [hereinafter cited as NATIONAL COMMISSION ON ARCHITECTURAL BARRIERS].

10. AMERICAN NATIONAL STANDARDS INSTITUTE, INC., SPECIFICATIONS FOR MAKING BUILDINGS AND FACILITIES ACCESSIBLE TO, AND USABLE BY, THE PHYSICALLY HANDICAPPED (1971) [hereinafter cited as ANSI A117.1].

11. *Id.* See also *infra* note 163.

Barriers to the Rehabilitation of the Handicapped.<sup>12</sup> The Commission's responsibility was to determine how and to what extent architectural barriers impeded access to or use of all facilities or buildings by handicapped persons. Further, the Commission was to make proposals to Congress that would achieve the goal of ready access and full use of buildings.<sup>13</sup> The distinguished Commission was a panel in the mode of study groups of that era<sup>14</sup> and chaired by former American Institute of Architects President Leon Chatelain, Jr.<sup>15</sup> In its 1968 final report, "Design for All Americans," the Commission found that the experience of the federal government, in attempting to make its own buildings and those it helped finance through construction grants more accessible, had shown that change could not be achieved by voluntary action alone.<sup>16</sup> The Commission noted that while federal officials had been alerted to the problems of accessibility and had received copies of the 1961 ANSI specification, problems still persisted in both new and old buildings.<sup>17</sup> The Commission made a series of legislative recommendations to require accessibility in the design, construction, and alteration of federal and federally funded buildings that were either open to the public or in which disabled persons could be employed.<sup>18</sup> The Commission also recommended that states be urged to strengthen their laws by making them more specific, by utilizing standards based on ANSI, and by providing for stricter enforcement procedures.<sup>19</sup>

In 1968, Congress translated into law the recommendations relating to the federal sector by adopting the Architectural Barriers Act.<sup>20</sup> That law required accessibility in standards basically as recommended by the Commission<sup>21</sup> and authorized the issuance of accessibility standards.<sup>22</sup> Congress recognized that there was a policy regarding the planning and construction of federal buildings to make them accessible to handicapped persons. That policy, however,

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12. Vocational Rehabilitation Act Amendments of 1965, Pub. L. No. 89-333, § 15, 79 Stat. 1282, 1289, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 1304, 1312-13.

13. S. REP. NO. 806, 89th Cong., 1st Sess. 19, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 4180, 4187.

14. NATIONAL COMMISSION ON ARCHITECTURAL BARRIERS, *supra* note 9, at 3.

15. *Id.*

16. *Id.* at 11-12.

17. *Id.*

18. *Id.* at 13.

19. *Id.* at 14.

20. Pub. L. No. 90-480, 82 Stat. 718 (1968) (current version at 42 U.S.C. §§ 4151-4157 (1976)) (set forth in the Appendix to this article).

21. H.R. REP. NO. 1532, 90th Cong., 2d Sess. 1-4 (1968).

22. 42 U.S.C. §§ 4152-4154a (1976).

could be changed. Moreover, there was no policy requiring that buildings open to the public and constructed with federal grants and loans be accessible.<sup>23</sup>

Congress sought to insure that all public buildings designed, constructed, or altered in the future by or on behalf of the federal government, or with loans or grants from the federal government, be accessible to and usable by physically handicapped persons. It intended that the term "buildings" be given the broadest possible interpretation and, thus, the term included any structure used by the public, "whether it be a small rest station at a public park or a multi-million dollar [f]ederal office building."<sup>24</sup> Congress sought to prevent the perpetuation of barriers that "literally locked out millions of . . . citizens"<sup>25</sup> and, in doing so, set the example for states and private industry by fostering accessibility.<sup>26</sup>

Under the Architectural Barriers Act, four agencies, each in consultation with the Department of Health, Education, and Welfare,<sup>27</sup> issue accessibility standards applicable to buildings depending on the nature of the facility.<sup>28</sup> The Department of Defense standard applies to its facilities<sup>29</sup> and the United States Postal Service standard applies to its facilities.<sup>30</sup> The Department of Housing and Urban Development standard applies to residential structures regardless of which agency is providing funds.<sup>31</sup> The other structures, including federal buildings, schools receiving federal financial assistance, transit facilities, and hospitals, must be accessible in ac-

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23. S. REP. NO. 538, 90th Cong., 1st Sess. 2 *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 3214-23.

24. *Id.* at 3, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 3216-17. *See also* H.R. REP. NO. 1532, 90th Cong., 2d Sess. 4 (1968). Buildings subject to the Act are, in general, those structures open to the public or where disabled persons may be employed. The statute excludes privately owned residential structures and structures primarily intended for able-bodied military personnel. 42 U.S.C. § 4151 (1976).

25. S. REP. NO. 538, 90th Cong., 1st Sess. 3, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 3216. *See also* H.R. REP. NO. 1532, 90th Cong., 2d Sess. 2 (1968).

26. S. REP. NO. 538, 90th Cong., 1st Sess. 3, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 3216.

27. When the Department of Health, Education, and Welfare was redesignated the Department of Health and Human Services and the Department of Education established, the consultative function devolved to the Secretary of Health and Human Services. 20 U.S.C. § 3508 (Supp. V 1981).

28. 42 U.S.C. §§ 4152-4154a (1976). As originally enacted, the Architectural Barriers Act did not authorize the United States Postal Service to issue standards. *Supra* note 20. *See infra* text accompanying notes 34-42.

29. *Id.* § 4154.

30. *Id.* § 4154a.

31. *Id.* § 4153.

cordance with the standard of the General Services Administration.<sup>32</sup> While there were some minor variations because of the peculiarities of residential and military facilities, the cornerstone of each of the federal standards was the 1961 ANSI standard.<sup>33</sup> Waivers and modifications of the standards were also authorized on a case-by-case basis when the head of the agency setting the standard found it clearly necessary.<sup>34</sup> No enforcement entity, however, was created and only reporting and investigating were authorized.<sup>35</sup>

In 1976, amendments to the Architectural Barriers Act,<sup>36</sup> prompted by a General Accounting Office report stating that more needed to be done to make public buildings accessible,<sup>37</sup> expanded the coverage of the law to include buildings leased by the federal government<sup>38</sup> and required the issuance of the accessibility stan-

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32. *Id.* § 4152.

33. See 41 C.F.R. § 101-19.603 (1981); 24 C.F.R. § 40.4 (1982). See also DEPARTMENT OF DEFENSE, CONSTRUCTION CRITERIA MANUAL 4270.1-M. (1967).

34. 42 U.S.C. § 4156 (1) (1976). In fiscal years 1980 and 1981 the General Services Administration granted five waivers and modifications. The Departments of Housing and Urban Development and the United States Postal Service did not issue a waiver or modification in either year. No other agency's activity was reported to the Congress pursuant to that 1976 amendment to the Architectural Barriers Act. *Id.* In hearings on H.R. 15,134, the bill that became Pub. L. No. 94-541, the 1976 amendments to the Architectural Barriers Act, one agency official admitted that the waiver process was "difficult" but then admitted that "when it gets too difficult, what one usually does is ignore it and, of course, we do not like to do that." *Public Buildings Cooperative Use, Hearings on H. R. 15134 Before the Subcomm. on Public Buildings and Grounds of the House Comm. on Public Works and Transportation*, 94th Cong., 2d Sess. 91 (1976) [hereinafter cited as *1976 House Hearings*] (statement by Dr. Ernest A. Connally, Associate Director for Professional Services, National Park Service, Department of the Interior).

35. 42 U.S.C. § 4156(2) (1976).

36. Pub. L. No. 90-480, § 1(2), 82 Stat. 718, 719 (1968); Pub. L. No. 94-541, § 102(a), 90 Stat. 2505 (1976).

37. GAO-I, *supra* note 6. GAO-I led to hearings on the statute: *The Effectiveness of the Architectural Barriers Act of 1968 (Public Law 90-480), Hearings Before the Subcomm. on Investigation and Review of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. (1975). These hearings were the forerunner of the 1976 Hearings.

38. The definition of "building" in the original Architectural Barriers Act included buildings leased "in whole or in part by the United States after the date of enactment of this Act after construction or alteration in accordance with plans and specifications of the United States." Pub. L. No. 90-480, § 1(2), 82 Stat. 718, 719 (1968) (current version at 42 U.S.C. § 4151(a) (1976)). The amendments deleted the language after the word "States." The amendment applies to leases entered into on or after January 1, 1977, including any renewal of a lease entered into before such a date where renewal is on or after such date. 42 U.S.C. § 4151 (1976). Residential structures leased by the Government for subsidized housing programs are subject to the statute. See also H.R. REP. NO. 1584, 94th Cong., 2d Sess. part I at 3; part II at 9, 12, 13, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5560, 5571-75.

dards.<sup>39</sup> The General Accounting Office had surveyed federal and federally funded buildings for accessibility and had examined the efforts of federal agencies in implementing the statute.<sup>40</sup> The 1976 amendments also gave the United States Postal Service standard setting and waiver modification authority over their buildings<sup>41</sup> and facilities, which were now subject to the accessibility requirements of the statute.<sup>42</sup>

### III. COMPLIANCE AND ENFORCEMENT

#### A. *Judicial*

The Architectural Barriers Act has had little judicial interpretation. The Act's mandate now is enforced by the Architectural Transportation Barriers Compliance Board (ATBCB).<sup>43</sup> While the decisions are relatively few, the cases do provide insight as to how the remedial statute may be applied.

In *Washington Urban League, Inc. v. Washington Metropolitan Area Transit Authority, Inc.*,<sup>44</sup> Judge Jones held that for a building to be in compliance with the Architectural Barriers Act, the facilities for the handicapped had to be operational and not merely in the process of installation.<sup>45</sup> In this case, the court issued a second injunction and continued an injunction already in effect to compel the installation of elevators in the new Washington, D.C. subway system.<sup>46</sup> A group of businesses had sought to have the injunction vacated with respect to a subway station then kept closed because its elevator was not completed. The court felt such an action would have left the statute bereft of its purpose.<sup>47</sup>

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39. Public Buildings Cooperative Use Act of 1976, Pub. L. No. 94-541, § 102(a), 90 Stat. 2505 (current version at 40 U.S.C. § 601(a) (1976)). The Architectural Barriers Act as originally adopted provided that the head of the enumerated agencies, each in consultation with the Secretary of Health, Education, and Welfare, is authorized to issue the standard. The 1976 amendments deleted "is authorized to" and inserted "shall." *Id.* The intent was to make the provisions congressional mandates, rather than delegations of authority. The objective was to address the discretionary element of implementing agency action. GAO - I, *supra* note 6, at 35.

40. GAO - I, *supra* note 6, at 4.

41. 42 U.S.C. § 4154(a) (1976).

42. 39 U.S.C. § 410(b)(8) (1976).

43. *See supra* text accompanying notes 61-70.

44. No. 776-72, (D.D.C. Oct. 23, 1973) (order of final judgment).

45. *Id.*

46. *Id.*

47. *Washington Urban League, Inc. v. Washington Metropolitan Area Transit Auth., Inc.*, No. 776-72, slip op. at 3 (D.D.C. Aug. 31, 1976) (memorandum and order denying plaintiff's motion to modify the injunction).



Another major case was just decided. In *Rose v. United States Postal Service*,<sup>48</sup> the question before the court was whether the Architectural Barriers Act requires access in leased postal service buildings before they may be used or only when the building is designed, constructed, or altered.<sup>49</sup> This case will have a nationwide impact as the postal service has two-thousand leasing transactions each month.<sup>50</sup> When the Architectural Barriers Act was amended, the definition of "building" was revised to include all leased buildings.<sup>51</sup> Congress, however, did not amend the statutory directive that all buildings designed, constructed, or altered comply with the applicable standard. The postal service contended that access in leased buildings is not required until that building is altered, redesigned, or rebuilt and relied on the lack of congressional change to the access mandate.<sup>52</sup> The court agreed, disregarding the contrary legislative history.<sup>53</sup> An appeal is expected.

Two other cases are noteworthy. In *Eastern Paralyzed Veterans Association, Inc. v. Metropolitan Transportation Authority*,<sup>54</sup> a preliminary injunction was issued to enjoin the substantial renovation of several New York City subway stations because elevators were not being provided for mobility-impaired individuals.<sup>55</sup> While the decision is based on the New York Public Building Law,<sup>56</sup> the court

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48. No. 82-1974 (C.D. Cal. Mar. 30, 1983).

49. *Id.* at 15.

50. *Id.*

51. 42 U.S.C. § 4151 (1976).

52. Remarks by Roger Craig before the United States Architectural Transportation Barriers Compliance Board (Oct. 31, 1980) (approved minutes at 10-12).

53. The author wishes to clearly distinguish his position from that of the United States Architectural Transportation Barriers Compliance Board (ATBCB). The ATBCB is officially neutral on the issue. It recognizes that the issue concerning the applicability of the Architectural Barriers Act to certain leased buildings is a legal one on which the Board expresses no position. Minimum Guidelines and Requirements for Accessible Design, 47 Fed. Reg. 33,870 (1982) (to be codified at 36 C.F.R. § 1190.34). The author's position is to the contrary of the United States Postal Service. Remarks by Charles Goldman before the United States Architectural Transportation Barriers Compliance Board (Oct. 31, 1980) (approved minutes at 12-13). The 1976 amendments to the Architectural Barriers Act were an outgrowth from the General Accounting Office efforts that found that the original law had resulted in few leased buildings being accessible. GAO - I, *supra* note 6, at 35. Congressional hearings showed a clear intention to make the private sector aware that access was required when leasing to the federal government. 1976 *House Hearings*, *supra* note 34, at 24, 30. The U.S. Postal Service argument, an apparent semantic syllogism, disregards the congressional mandate and renders the 1976 amendment a nullity, contrary to basic principles of statutory interpretation. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 46.05-.06 (4th ed. 1973).

54. No. 18,136 - 79 (N.Y. Sup. Ct. Dec. 22, 1982).

55. *Id.* slip op. at 15-16.

56. N.Y. PUB. BLDGS. LAW §§ 50-52 (McKinney Supp. 1982).

closely examined the terms implementing the Architectural Barriers Act as "particularly relevant"<sup>57</sup> in giving meaning to the state law because the federal law is cited in the legislative memorandum to the state law.<sup>58</sup> In *Michigan Paralyzed Veterans v. Coleman*,<sup>59</sup> the court held that buses clearly were not "facilities" within the meaning of the Architectural Barriers Act.<sup>60</sup>

B. *Administrative: The Architectural Transportation Barriers Compliance Board (ATBCB)*

The limited amount of judicial litigation involving the Architectural Barriers Act illustrates the proposition that it has been implemented administratively. That implementation, however, was spurred significantly by adoption of the Rehabilitation Act of 1973.<sup>61</sup> The Rehabilitation Act was a quantum leap forward because it provided a means of redressing violations of federal architectural barrier mandates.<sup>62</sup>

In section 502 of the Act, the ATBCB (the Board) was established to ensure compliance with Architectural Barriers Act standards.<sup>63</sup> The Board has the authority to hold administrative hearings and issue compliance orders that include specific corrective actions as well as the withholding or suspension of federal funds.<sup>64</sup> The Board is a unique, special interest regulatory body. It focuses only on disability rights, especially the nuts, bolts, bricks, and mortars in preventing and overcoming architectural barriers.

The Board is now comprised of eleven persons appointed by the

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57. *Eastern Paralyzed Veterans Ass'n v. Metropolitan Transp. Auth.*, No. 18,136-79, slip op. at 10 (N.Y. Sup. Ct. Dec. 22, 1982).

58. *Id.* slip op. at 7-8.

59. 451 F. Supp. 7 (E.D. Mich. 1977).

60. *Id.* at 9-10 n.1. See also S. REP. NO. 658, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 2477, 2478. Cf. *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1286 (7th Cir. 1977).

61. Pub. L. No. 93-112, §§ 502, 504, 87 Stat. 355, 391-94 (current version at 29 U.S.C.A. §§ 792, 794 (West Supp. 1976-1981)).

62. *Id.*

63. *Id.* § 792(b)(1).

64. *Id.* § 792(d). As originally enacted this provision authorized the ATBCB to issue orders it deemed necessary to comply with the provisions of the Architectural Barriers Act as amended. Act of March 5, 1970, Pub. L. No. 91-205, 84 Stat. 49. The Rehabilitation Act Amendments of 1974 added the provision allowing a compliance order to include the withholding or suspension of federal funds with respect to any building found not to be in compliance. Pub. L. No. 93-516, § 111(o)(2), 88 Stat. 1611, 1621 (1974). Thus, the ATBCB was given complete authority to redress problems of inaccessibility. S. REP. NO. 1139, 93d Cong., 2d Sess. 28 (1974); S. REP. NO. 1297, 93d Cong., 2d Sess. 4, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6373, 6376.

President, as well as the heads or designees of eleven federal agencies.<sup>65</sup> The agencies—the Departments of Health and Human Resources, Education, Labor, Defense, Transportation, Interior, Housing and Urban Development, Justice, General Services Administration, Veterans Administration, and United States Postal Service—play key roles in the federal government's design, construction, lease, and use of buildings and facilities occupied by itself and recipients of federal financial assistance. In creating the Board, which was originally composed of members from federal agencies,<sup>66</sup> Congress found that compliance with the Architectural Transportation Barriers Act had been "spotty" and that a "new entity was needed."<sup>67</sup> In 1978, as well as adding to the Board eleven public members, at least five of whom must be disabled,<sup>68</sup> Congress simultaneously declared that the decision of the administrative law judge was to be the final decision for purposes of judicial review.<sup>69</sup> The ATBCB members' role as policymaker<sup>70</sup> rather than adjudicator is consistent with the less than full-time basis of members' service, as well as the size of the ATBCB and its emphasis on amicable compliance.

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65. 29 U.S.C.A. § 792(a) (West Supp. 1976-81). Designees must be Executive Level IV minimum.

66. The original agencies with members on the ATBCB were the Departments of Health, Education and Welfare, Transportation, Housing and Urban Development, Labor, Interior, General Services Administration, Veterans Administration, and United States Postal Service. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 502(a), 87 Stat. 355, 391, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 409, 451. The Department of Defense was added by the 1974 Amendments to the Rehabilitation Act. Amendments of 1974, Pub. L. No. 93-516, § 111(n)(1), 88 Stat. 1617, 1621, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 1862, 1867. The Department of Justice was added by The Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 118(a)(1), 92 Stat. 2955, 2979. (1978) [hereinafter cited as RCSDDA]. When it was established, the Department of Education succeeded to the Department of Health, Education, and Welfare's position. The Department of Health and Human Services was subsequently added to the ATBCB. Education Amendments of 1980, Pub. L. No. 96-374, § 1321(a)(1), (2), 94 Stat. 1367, 1499.

67. S. REP. NO. 318, 93d Cong., 1st Sess. 46-47, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2122-23.

68. RCSDDA, *supra* note 66, Pub. L. No. 95-602, § 118(a)(1), 92 Stat. 2955, 2979 (1978). This is a result of an apparent typographical error in the enrolled bill. The Conference Report expressly states the requirement is for eleven public members at least eight of whom are disabled. H.R. REP. NO. 1780, 95th Cong., 2d Sess. 88, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7312, 7399.

69. RCSDDA, *supra* note 66, Pub. L. No. 95-602, § 118(c), 92 Stat. 2955, 2980-81 (1978).

70. 45 Fed. Reg. 78,473 (1980); *cf.* Shirey v. Devine, 670 F.2d 1188, 1194 (D.C. Cir. 1980). (ATBCB created to promote elimination of architectural and transportation barriers in federal, state and local facilities).

The Board is a unique government body where both disabled persons and federal officials are members of the regulating body. This provides the federal members with a perspective on the impact of their programs and gives the disabled community a clearer insight into the workings of the federal government. For the past several years, the Board has been active in the development of minimum guidelines and requirements related to the accessibility standards mandated by the 1978 amendments.<sup>71</sup> Those requirements<sup>72</sup> have been the focal point of dialogue between concerned disabled persons and federal officials. The collegial policymaking nature of the Board, however, does not preclude enforcement activity. Since adopting its enforcement rules in December 1976,<sup>73</sup> the Board has received an average of 125 complaints per year.<sup>74</sup> The rules provide for an administrative process consistent with the Administrative Procedure Act.<sup>75</sup>

The Board's administrative process, revised in 1980 to incorporate technical changes from the 1978 amendments,<sup>76</sup> stresses voluntary compliance.<sup>77</sup> In fact, the Board's Executive Director has initiated only nine administrative proceedings since the rules were adopted. The existence of the Board, however, has served to create a climate in which federal agencies know that voluntary compliance is beneficial.<sup>78</sup> The Executive Director's authority to initiate an administrative proceeding is similar to that of the General Counsel of the National Labor Relations Board.<sup>79</sup> Both are high-level, statutory officials. The ATBCB seeks to attain compliance within its regulatory

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71. 29 U.S.C.A. § 792(b)(7) (West Supp. 1976-81).

72. RCSDDA, *supra* note 66, Pub. L. No. 95-602, § 118(b)(3), 92 Stat. 2955, 2980 (1978).

73. 36 C.F.R. § 1150 (1981). The rules were adopted at a special ATBCB meeting held December 7, 1976 and were published shortly thereafter as final rules. 41 Fed. Reg. 55,442 (1976) (to be codified at 36 C.F.R. § 1150). Proposed rules had been published for comment earlier that year. 41 Fed. Reg. 23,598 (1976) (to be codified at 36 C.F.R. § 1150).

74. As of September 30, 1982, the ATBCB had processed 816 since beginning operations in March 1975. Approximately a full one-third (at the minimum) of the ATBCB complaints relate to facilities not covered by the Architectural Barriers Act. UNITED STATES ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD, ANNUAL REPORT 4-8 (1982).

75. 29 U.S.C.A. § 792(d)(1) (West Supp. 1976-81) provides that the ATBCB hearings must comply with Administrative Procedure Act, §§ 5, 7, 5 U.S.C. §§ 551, 557 (1976).

76. 45 Fed. Reg. 78,472 (1980).

77. 36 C.F.R. § 1150.41 (1982).

78. 45 Fed. Reg. 78,473 (1980).

79. *Cf.* 29 U.S.C.A. § 792(e)(2) (West Supp. 1976-81); 29 U.S.C. § 153(d) (1976).

time objectives. If voluntary compliance is not achieved, then the ATBCB Executive Director has authority to issue a citation commencing the administrative proceedings or to make a determination not to proceed. The latter course of action indicates that no enforcement action will be taken.<sup>80</sup> Thus, closure and exhaustion of the administrative process are ensured.<sup>81</sup>

The Board's enforcement actions have been largely successful. In *In re Union Station*,<sup>82</sup> the Board ordered the Departments of Interior and Transportation to reinstall an elevator between the upper and lower track levels.<sup>83</sup> The original elevator had been removed as part of the major renovations at the transit facility.<sup>84</sup> This was found to be a violation of the standards issued under the Architectural Barriers Act as well as section 504 of the Rehabilitation Act.<sup>85</sup> In *In re Southeastern Program Service Center*,<sup>86</sup> the administrative law judge ordered specific corrective actions be taken by the Social Security Administration and General Services Administration concerning bathrooms and elevator panels to assure that those elements of the structure conformed to the ANSI standard and were usable by persons with disabilities.<sup>87</sup> These initial cases, commenced shortly after the administrative hearing process was adopted,<sup>88</sup> were a message to federal agencies that noncompliance would not be tolerated. In fact, *Union Station* was the first administrative proceeding completed under any provision of title V of the Rehabilitation Act.<sup>89</sup>

The Board's Executive Director settled several cases after the administrative proceedings had been initiated. *In re Pedestrian Overpass*<sup>90</sup> led to Federal Highway Administration and Department of Transportation reexamination of pedestrian overpasses throughout the country for handicapped access.<sup>91</sup> In a case involving dormitories at Oral Roberts University, modifications were made to correct deficiencies in the Department of Housing and Urban Devel-

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80. 36 C.F.R. § 1150.41(f), (g), (h), (i) (1982).

81. 45 Fed. Reg. 78,473 (1980).

82. No. 3-77-1 (ATBCB June 19, 1978) (Pfeiffer, A.L.J.).

83. *Id.*, slip op. at 11.

84. *Id.*, slip op. at 2.

85. *Id.*, slip op. at 9.

86. No. 6-77-2 (ATBCB Jan. 31, 1979) (McCarthy, A.L.J.).

87. *Id.*, slip op. at 16-17.

88. *See supra* note 75.

89. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 502(d), 87 Stat. 355, 392-93 (codified as amended at 29 U.S.C. § 792(d) (Supp. V 1981)).

90. No. 12-77-3 (ATBCB March 25, 1979) (agreement to order by A.L.J.).

91. *Id.*, slip op. at 2-4.

opment-funded structures.<sup>92</sup>

One major thrust of the Board's enforcement effort has been to address problems in newly constructed and highly visible public buildings. *In re Hubert H. Humphrey Building*<sup>93</sup> involved the new headquarters of the Department of Health, Education, and Welfare. Formal proceedings were instituted and resulted in corrective actions with respect to the employees' credit union, gymnasium, and audiovisual studio.<sup>94</sup> The Board negotiated amicably for corrective actions with respect to a panoply of other problems, including inaccessible bathrooms, entrances, cafeteria, and lack of tactile signage for visually impaired persons.<sup>95</sup>

In *101 Marietta Tower*,<sup>96</sup> proceedings related to newly leased federal structures in Atlanta, Georgia, led to installation of passenger elevators to service lobbies and basements.<sup>97</sup> The General Services Administration sought to have disabled persons utilize the freight elevator, which was also used to haul garbage to traverse the distance.<sup>98</sup> The judge apparently rejected this approach as contrary to the fundamentally humane, integrationist thrust of the Architectural Barriers Act.<sup>99</sup> *In re Eight Subway Stations*<sup>100</sup> is another case that was settled after formal proceedings were instituted.<sup>101</sup> The resolution led to the installment of additional elevators capable of transporting passengers from the street to station platforms with intermittent stops at exchange points on mezzanines.<sup>102</sup> The Chicago, Washington, and Atlanta cases served as powerful notice to federal agencies and recipients of assistance that no building or facility was above the law. Accessibility would be sought wherever the law applied.

Most recently, the ATBCB enforcement effort has led the Administrative Office of the United States Courts to develop new design practices that will lead to access to all areas of courtrooms. Two

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92. *In re Wesley Leuhning and Susie Vinson Residences*, No. 12-77-4, slip op. at 2 (ATBCB Aug. 25, 1980) (order vacating pending proceedings).

93. No. 4-79-5 (ATBCB Dec. 10, 1979) (Young, A.L.J.).

94. *Id.*, slip op. at 3-5.

95. *Id.*

96. No. 2-80-6 (ATBCB June 11, 1980) (Young, A.L.J.).

97. *Id.*, slip op. at 4.

98. *Id.*, slip op. at 2.

99. See II UNITED STATES GOVERNMENT PRINTING OFFICE, PUBLIC PAPERS OF THE PRESIDENTS, LYNDON B. JOHNSON 881 (1970).

100. No. 4-80-7 (ATBCB July 22, 1981) (Maxwell, A.L.J.).

101. *Id.*, slip op. at 1.

102. *Id.*, slip op. at 1-2.

cases, one relating to the federal courthouse in *In re Richard Russell Federal Building*,<sup>103</sup> and the other, *In re Two New Courthouse Projects*,<sup>104</sup> resulted in findings that the problems in the courtrooms were not covered by ANSI standards because the inaccessible items were chattels.<sup>105</sup> However, now mandatory design practices will lead to accessible jury boxes, judges' benches, court reporter areas, and witness areas.<sup>106</sup>

### C. *The Corollary Mandate: Section 504*

Section 504 of the Rehabilitation Act, the other major factor in the quest for equal access, prohibits federal grantees from discriminating against qualified handicapped persons.<sup>107</sup> Under section 504, all federally assisted programs must be accessible.<sup>108</sup> This means that all new buildings and those receiving federal assistance, must be barrier free and readily accessible to and usable by persons with handicaps. Additionally, under section 504, recipients may be required to renovate portions of older buildings.<sup>109</sup> Alteration of older structures, however, is not always required. For example, in an older multi-story building it is not necessary to install an elevator if the entire program is available on the first floor.<sup>110</sup>

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103. No. 6-80-8 (ATBCB Dec. 18, 1981) (Megan, A.L.J.).

104. No. 11-81-9 (ATBCB March 24, 1982) (Spruill, A.L.J.). These projects were located in Springfield, Massachusetts and in San Jose, California.

105. *In re Richard B. Russell Fed. Bldg.*, No. 6-80-8, slip op. at 18 (ATBCB Dec. 18, 1981); *In re Two New Courthouse Projects*, No. 11-81-9, slip op. at 5-7 (ATBCB March 24, 1982).

106. See UNITED STATES GENERAL SERVICES ADMINISTRATION, UNITED STATES COURTS DESIGN GUIDE (1979).

107. Section 504 provides in pertinent part that: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C.A. § 794 (West Supp. 1976-81).

108. "Program accessibility" is a concept that initially surfaced in the original Department of Health, Education, and Welfare (HEW) rules under section 504. HEW had the lead responsibility pursuant to Exec. Order No. 11,914, 3 C.F.R. 117 (1977). HEW issued rules applicable to its grantees. 42 Fed. Reg. 22,676 (1977). It also issued a rule to coordinate development of regulations by the other federal agencies. 43 Fed. Reg. 2,132 (1978) (to be codified at 45 C.F.R. §§ 85.1-85.99). "Program accessibility" was required. 45 C.F.R. §§ 84.21-84.23 (1982). The HEW responsibilities were subsequently transferred to the Department of Justice by Exec. Order No. 12,250, 3 C.F.R. 298 (1981); 28 C.F.R. §§ 41.1-41.99 (1982).

109. 28 C.F.R. §§ 41.56-41.58 (1982). See also 45 C.F.R. § 84.23 (1982). See Appendix A providing an analysis of the regulation, especially the discussion of Subpart C, Program Accessibility. 45 C.F.R. Part 84 Appendix A (1982).

110. *Id.*

Failure to comply with section 504 of the Rehabilitation Act or the Architectural Barriers Act may result in a loss of federal funds to a recipient. Primary responsibility for enforcing the application of section 504 to grantees rests with the federal agency providing the funds. The United States Department of Justice, as the lead federal agency, provides coordination and support services to the funding agency.<sup>111</sup>

In the near future, it is anticipated that regulations will be proposed by those agencies that have not implemented section 504. The proposals will also affect which older buildings need to be modified, as well as identify the technical standard to be followed by the agencies' grantees.

In 1978, amendments to the Rehabilitation Act extended the statute to the federal government.<sup>112</sup> However, no regulations have as yet been issued to implement the statute.

#### IV. STATE EFFORTS

As Congress intended,<sup>113</sup> efforts at the federal level have formed the background for states to adopt access mandates. A review of an American Bar Association publication reveals a proliferation of state codes enacted during the 1970's to eliminate barriers in facilities.<sup>114</sup>

In Massachusetts, the Architectural Barriers Board (ABB) was created by statute in 1967.<sup>115</sup> The scope of its authority has expanded as the definition of "public building" was broadened to encompass educational buildings and private buildings open to and used by the public, as well as buildings of the commonwealth and its political subdivisions.<sup>116</sup> A comparable amendment was adopted by Ohio in 1981, similarly enlarging the mandate for access in that state.<sup>117</sup>

ABB, like the federal ATBCB, is comprised of designated state officials and public members. There are seven members, including five from the public, three of whom are to be selected from nominees

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111. Exec. Order No. 12,250, 28 C.F.R. §§ 41.1-41.99 (1982).

112. RCSDDA, *supra* note 66, Pub. L. No. 95-602, §§ 119, 122(d)(2), 92 Stat. 2955, 2982, 2987, extended the nondiscrimination mandate, *see supra* note 108, to any "activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C.A. § 794 (West Supp. 1976-81).

113. S. REP. NO. 538, 90th Cong., 1st Sess. 2 (1967).

114. AMERICAN BAR ASSOCIATION, *ELIMINATING ENVIRONMENTAL BARRIERS* (1979).

115. MASS. ANN. LAWS ch. 22, § 13A (Michie/Law Co-op. 1980 & Supp. 1982).

116. *Id.*

117. OHIO REV. CODE ANN. § 3781.111 (Page 1980 & Supp. 1982).



submitted by advocacy groups on behalf of the physically handicapped.<sup>118</sup>

ABB rules pertaining to accessibility are enforced jointly by ABB and local building officials, although only ABB can grant a variance.<sup>119</sup> New York takes a similar local official approach to enforcement.<sup>120</sup> This practice has been criticized because it entrusts enforcement to those possessing limited or no experience in the fields of architectural barriers and persons with handicaps.<sup>121</sup>

In Ohio, like Massachusetts, barrier free plans for accessible design are reviewed by state building officials.<sup>122</sup> In Texas, the practice is similar. In fact, the certificate of occupancy can be and has been withheld from noncomplying buildings.<sup>123</sup> The California Board of Architects has advised all licensed architects that punitive actions will be taken through the state's disciplinary program against those who fail to incorporate handicapped access.<sup>124</sup> In short, the consequences of failing to comply with the state access law can be very serious.

## V. PROBLEMS AHEAD: A PRACTICAL APPROACH

There are many unresolved questions concerning state and federal architectural barriers statutes. One of the foremost to be resolved is the relationship of the architectural barrier statutes to other nondiscrimination mandates. In Massachusetts, the state constitution prohibits discrimination against qualified handicapped individuals solely by reason of their handicap.<sup>125</sup> Several states'

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118. MASS. ANN. LAWS ch. 22, § 13A (Michie/Law Co-op. 1980 & Supp. 1982); cf. 29 U.S.C.A. § 792(a) (West Supp. 1976-1981). In Massachusetts the members appointed from the public outnumber their official staff colleagues. The United States ATBCB has equal numbers (11) of agency and public members. 29 U.S.C.A. § 792(a)(1) (West Supp. 1976-1981).

119. MASS. ANN. LAWS ch. 22, § 13A (Michie/Law Coop 1980 & Supp. 1982). See also MASS. ADMIN. CODE tit. 521, § 3.00 (1978).

120. N.Y. PUB. BLDGS. LAW § 52 (McKinney Supp. 1982).

121. See R. BURGDORF, *THE LEGAL RIGHTS OF HANDICAPPED PERSONS* 465 (1980). See also Comment, *Access to Buildings and Equal Employment Opportunity for the Disabled: Survey of State Statutes*, 50 TEMP. L.Q. 1067, 1078 (1977); AWARENESS PAPERS, *supra* note 5, at 403.

122. OHIO REV. CODE ANN. § 3781.111 (Page 1980 & Supp. 1981).

123. TEX. REV. CIV. STAT. ANN. art. 601b (Vernon Supp. 1982). A significant departure from other states is to give the University of Texas Board of Regents responsibility for the administration and enforcement of the law with respect to buildings and facilities under its jurisdiction. *Id.* 705(f).

124. Memoranda from Dan Wooldridge, President, Board of Architectural Examiners, to licensed architects. (March 5, 1980-July 27, 1982).

125. MASS. CONST. art. CXIV, § 260.

nondiscrimination statutes were originally adopted to redress racial discrimination. In the 1970's and 1980's, the scope of these statutes was amended to combat gender and handicapped condition based discrimination.<sup>126</sup> The relationship of the anti-architectural barrier laws and "white cane" statutes<sup>127</sup> has never been defined.

The federal government has never published any lucid statement that comprehensively addresses the interrelationship of the Architectural Barriers Act,<sup>128</sup> section 504 of the Rehabilitation Act as applied to recipients of federal aid or the federal government,<sup>129</sup> title IX of the Education Law,<sup>130</sup> the Age Discrimination Act,<sup>131</sup> and other civil rights laws. This is a fundamental need that must be addressed.

The public accommodation laws are most intriguing. The implication of these statutes is that, after a reasonable time, there is a duty to make changes in the physical environment to accommodate handicapped persons in the public who may seek to avail themselves of the premises. If the owners fail to remodel, and retain a brick and mortar status quo, the effect of such unequal treatment is exclusion of qualified disabled persons solely on the basis of their disability. The issue at this point becomes whether state or federal officials should periodically license activity in such facilities without giving thought to the potential continuation of discriminatory effects.

Legal practitioners with clients in the building industry should look carefully at state laws to ascertain key elements such as: (1) The scope of application—what buildings and projects, including renovations, must be accessible? Are leased buildings to be accessible? Check the definition of building or public building carefully; (2) The standard for accessibility—is it published?; (3) The entity

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126. In Massachusetts, for example, the original non-discrimination prohibition of the public accommodations law, MASS. ANN. LAWS ch. 272, §92A (Michie/Law Coop. Supp. 1982), was extended in 1971 to prohibit discrimination on the basis of sex, with certain exceptions. Act of June 21, 1971, ch. 418, 1971 Mass. Acts 244. In 1979, an amendment extended the protection to discrimination because of physical or mental disability. Act of Oct. 4, 1979, ch. 595, 1979 Mass. Acts 637. In New York, "sex" was inserted as a basis of prohibited practices under N.Y. EXEC. LAW §296 (McKinney 1982) by a 1970 amendment. Act of May 13, 1970, ch. 807, 1970 N.Y. Laws 1680. In 1974, "disability" was inserted. Act of June 15, 1974, ch. 988, 1974 N.Y. Laws 1575.

127. See MASS. ANN. LAWS ch. 272, §§ 92A, 98A (Michie/Law Coop. Supp. 1982).

128. 42 U.S.C. § 4151-4157 (1976 & Supp. IV 1980).

129. 29 U.S.C. § 794 (Supp. V 1981).

130. 20 U.S.C. § 1681-1686 (1976 & Supp. V 1981).

131. 42 U.S.C. § 6101-6107 (1976 & Supp. IV 1980). See also 29 U.S.C. §§ 791, 793 (1976 & Supp. V 1981) relating respectively to affirmative action in employment by the federal government and its contractors.

with the authority to approve the accessible design or construction—what constitutes the approval process?; (4) The enforcement mechanism—is it judicially or administratively processed initially? Which agency can grant a variance?; (5) The responsibilities of building or funding entities—what authority does each entity have to provide a binding interpretation?; (6) The existence of nondiscrimination mandates—how do those statutes affect public accommodation statutes?; and (7) Positive incentives for access—are there other benefits, such as in the tax code, that might encourage a client to comply with access mandates?

It is prudent to put all inquiries of this nature in writing. Questions should be framed precisely in order to obtain definite answers. Attorneys should obtain copies of current standards being used by the state and federal government. It is also wise to seek interpretations from the funding or building agency. When interacting with a funding source, an attorney should exercise care to be sure that letters of interpretation are signed by the contracting officer or grant official with the actual authority to bind his organization. Where there exists a separate administrative enforcement body, it may be of greater value to direct inquiries to that agency rather than the funding source. Additionally, one should obtain a joint response or meeting with the funding and enforcement agency where possible. If potentially conflicting state statutes or conflicting interpretations by state agencies exist, it may be prudent to seek a ruling from the state attorney general on the issue in question.

## VI. BARRIER-FREE DESIGN: NOW AND THE FUTURE

Design to accommodate persons with disabilities was and has continued to be primarily conceptualized for the ambulatory-impaired person, particularly one in a wheelchair. An emerging theme is that of universal design. There is a recognition that design which is functional for persons with handicaps is also utilitarian for the elderly, the very young, and the temporarily disabled.<sup>132</sup> Curb cuts and ramps serve baby strollers as well as wheelchairs and serve as channels for pedestrians. The Handicapped Affairs Office of San Antonio has found that fifty-six percent of the community benefits

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132. Morgan, *Beyond Disability: A Broader Definition of Architectural Barriers*, 65 AM. INST. ARCHITECTURE J. 49 (1976); Osman, *Barrier-Free Architecture: 'Yesterday's Special Design Becomes Tomorrow's Standard'*, 64 AM. INST. ARCHITECTURE J. 40, 41 (1975); Simon, *Policy Forum: Defending the Handicapped*, 13 NAT'L J. 468, 468 (1981).

from barrier free design.<sup>133</sup>

There has been progress. The anti-architectural barrier laws have set the backdrop for the beginning of a significant change in attitudes toward the disabled. Disabled persons are gradually becoming recognized as persons—albeit with physical limitations—capable of participating in physical spatial arrangements. There is a growing awareness that disability does *not* denote inability, that disabled persons are users rather than abusers, and that the individual with a disability pays taxes as does any other citizen. Elimination of architectural barriers has also broken down the invisible attitudinal barriers. Persons with disabilities were traditionally viewed as stigmatized and unacceptable.<sup>134</sup> That attitude appears to be giving way to a realization that such stereotyping is inappropriate.<sup>135</sup>

Persons with disabilities are increasingly participating in the design process, bringing unprecedented firsthand knowledge. World class violinist, Itzhak Perlman, ambulatorily impaired by polio, believes that persons with disabilities cannot rely exclusively on the laws. He has learned to read blueprints and tries to review plans whenever he learns that a new concert hall is being planned or built.<sup>136</sup> Ron Mace, an architect in a wheelchair, is a member of the North Carolina Building Code Council.<sup>137</sup> Steve Spinetto, an amputee, is a designer in the Boston area and serves on the Massachusetts Architectural Barriers Board.<sup>138</sup> Perlman, Mace, and Spinetto are part of the newer breed of disabled consumers who use their professional positions and skills to provide technical assistance in the prevention and elimination of architectural barriers. Groups such as Barrier Free Environments, Inc., in Raleigh, North Carolina, and MAINSTREAM, in Washington, D.C., provide technical expertise on accessibility issues at all government levels. These groups attest to the benefit of having disability experienced groups participate in the design process.

Examples  
related to  
America  
(single  
people &  
groups)

133. SAN ANTONIO DEP'T OF PLANNING/HANDICAPPED ACCESS OFFICE, COMMUNITY BENEFITS REPORT (1982).

134. E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963); Hull, *Foreward—The Specter of Equality: Reflections on the Civil Rights of Physically Handicapped Persons*, 50 TEMP. L.Q. 944 (1977); Karst, *Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ACCESS TO THE BUILT ENVIRONMENT: A REVIEW OF THE LITERATURE 7-8 (1979).

135. Altman, *Studies of Attitudes Toward the Handicapped: The Need For A New Direction*, 28 SOC. PROBS. 321 (1981).

136. Telephone interview with Itzhak Perlman, noted violinist (Aug. 2, 1982).

137. Telephone interview with Ronald Mace, noted architect (July 12, 1982).

138. Telephone interview with Steven Spinetto, noted designer (Aug. 2, 1982).

Another significant catalyst of the intellectual development of disabled persons and elimination of architectural barriers has been the 1975 adoption and implementation of the Education for All Handicapped Children Act.<sup>139</sup> Senator Robert Stafford is chairman of the Senate Environment and Public Works Committee and a long time member of the Senate Subcommittee on the Handicapped. In the mid 1970's, Senator Stafford along with Senator Jennings Randolph, ranking minority member of the Public Works Committee and Subcommittee on the Handicapped, jackhammered out a curb near the Dirksen Senate Office Building so that a curb ramp could replace it.<sup>140</sup> This action dramatically demonstrated the congressional commitment to accessibility. Senator Stafford has shaped national policies in educating persons with disabilities and removing barriers. The educational and barrier removal efforts have complemented each other. Federal initiatives in requiring full educational opportunity for handicapped children have helped to remove architectural barriers in public buildings, especially schools.<sup>141</sup> It is a process that is likely to continue despite the uncertain economy, for as Senator Stafford has said: "Special education is expensive. But it is more expensive in terms of dollars—not to mention the human values involved—to ignore the special needs of more than seven million of our young citizens."<sup>142</sup>

Qualified disabled persons are enrolling in higher education programs and accommodations are being made. Harvard Law School installed several lifts to begin to meet the needs of its first quadriplegic students. Additional adaptations, such as toilet rooms, were made and more, including installation of an elevator to a moot court room, are planned.<sup>143</sup>

Congressman Paul Simon, chairman of the House of Representatives Post Secondary Education Subcommittee, has observed the change in attitudes in the higher education community. Representative Simon notes that there is a "recognition of the reality of the need for accessibility."<sup>144</sup> He believes that to adapt to this change of attitude, architects need to become creatively realistic in devising access

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139. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C.A. §§ 1401-1461 (West Supp. 1982).

140. Interview with the Honorable Robert Stafford, U.S. Senator (July 16, 1982).

141. *Id.*

142. *Id.*

143. Telephone interview with Dean Mary Upton, Harvard University (July 26, 1982).

144. Interview with the Honorable Paul Simon, U.S. Congressman (July 15, 1982).

changes.<sup>145</sup> In one instance, Stanford University believed it would take eleven million dollars to make itself accessible.<sup>146</sup> After work was completed three years later, the cost of the project was only 900,000 dollars.<sup>147</sup>

A similar experience occurred in connection with a corporate headquarters. A barrier free design architect found that only 8,000 dollars worth of changes were necessary, in stark contrast to the 160,000 dollars that inexperienced in-house personnel had estimated.<sup>148</sup> A recent Department of Labor study of federal contractors found that to most firms actively providing accommodations for handicapped workers, accommodation is "no big deal," rarely entailing much cost.<sup>149</sup>

These incidents highlight the need for a greater understanding with respect to what is actually required and the danger of attributing to accessibility modifications what may be unnecessary or unrelated costs. The cost of accessibility is not an issue in new construction. Studies by the National League of Cities and the United States General Accounting Office have led to an acceptance of the proposition that accessibility features cost less than one percent, often less than one-half of one percent of the cost of new construction.<sup>150</sup> Alteration projects can be more expensive, depending on the exact nature of the work involved. The cost question epitomizes the interaction of accessibility with other design considerations. The phasing-in of accessibility has been found to ease the cost burden.<sup>151</sup>

Itzhak Perlman, a most creative musician, believes that with rich imagination, aesthetics and accessibility can be blended.<sup>152</sup> Accessibility is compatible with other design considerations. The Marriott Corporation includes accessibility as part of its Hotel Design Guide.<sup>153</sup> The new Marriott Crystal Gateway Hotel in Arlington,

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145. *Id.*

146. Simon, *Policy Forum: Defending the Handicapped*, 13 NAT'L J. 468 (1981).

147. *Id.*

148. COCHRAN ASSOCIATES, *THE COST OF ACCESSIBILITY* 3 (1976).

149. UNITED STATES DEPARTMENT OF LABOR, *A STUDY OF ACCOMMODATIONS PROVIDED TO HANDICAPPED EMPLOYEES BY FEDERAL CONTRACTORS* ii (1982).

150. GAO-I, *supra* note 6, at 87-92.

151. Zucker, *Hospital's barrier-free design compliance costs can run from \$250,000 to several million dollars*, HEALTH CARE PRODUCT NEWS 67, 69 (1982). The rules implementing § 504 provided a three-year period in which to achieve program accessibility. 45 C.F.R. § 84.22 (1982). See also 28 C.F.R. § 41.57 (1982).

152. Telephone interview with Itzhak Perlman, noted violinist (Aug. 2, 1982).

153. MARRIOTT CORPORATION, *HOTEL DESIGN GUIDE* (1982).



Virginia, has a grade level entrance, ramps in restaurants, accessible rooms, and other features that are aesthetically pleasing and fully compatible with other uses. Bellmen carrying luggage and waitresses serving from tea carts gladly use the ramps. The new hotel is connected by a series of ramps to the new Washington, D.C., subway system, the most accessible of all such systems.<sup>154</sup> The new Baltimore Symphony Concert Hall will be fully accessible.<sup>155</sup>

Although accessibility easily can be provided in new structures, more careful planning is needed when addressing older sites. In older cities, inconsistent planning has often resulted in curb ramps on one side of a street and curbs on the other. Progress, however, is being made, even on historic sites. Ramp and elevator access is now available to the Lincoln Memorial and other major monuments in Washington, D.C. The Plymouth Plantation in Massachusetts recently widened the entrances to its huts. Neither the aesthetic quality nor historic character of any of these facilities has been compromised.

Consumers and their organizations are moving to protect their hard-fought gains, fearful that the economy will be used as an excuse by those unfamiliar with or opposed to accessibility.<sup>156</sup> This movement has put a premium on the issuance of a clear, uniform standard for accessibility that can be easily understood and implemented. As understanding increases, the costs of implementation decrease because errors are avoided with the use of standard design practice. To Congressman Paul Simon, the tenor of the times means there is need for "common sense and flexibility by all concerned" so that the spirit of the laws can be met.<sup>157</sup> Architect Ron Mace has a similar perspective, recognizing the need for a clear uniform standard that can be supported and then implemented.<sup>158</sup> A clear uniform standard will be assimilated into accepted architectural practice. Accessibility specifications that are part of a universal design standard will be implemented readily because the design features will be available on a mass produced, rather than special effects, basis.

The time for a clear, uniform standard has never been more opportune. ANSI A117.1 was revised in 1980, expanded from 6 to

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154. *Id.*

155. Telephone interview with Itzhak Perlman, noted violinist (Aug. 2, 1982).

156. Roberts, *Harder Times Make Social Spenders Hard Minded*, N. Y. Times, Aug. 3, 1980, § B, at 3, col. 1.; Starr, *Wheels of Misfortune*, HARPER'S, 11, 14-15 (Jan. 1982); *Building Access: Cost No Barrier*, REGULATION 5, 6-8 (Sept./Oct. 1982).

157. Interview with the Honorable Paul Simon, U.S. Congressman (July 15, 1982).

158. Telephone interview with Ronald Mace, noted architect (July 17, 1982).

57 pages.<sup>159</sup> It is much more detailed and more complete than previous editions. Yet, the revised ANSI has no legal effect in the federal government because no federal agency has adopted it. After extensive and, at times acrimonious debate,<sup>160</sup> the ATBCB unanimously adopted and, in August, 1982, issued 30 pages of revised minimum guidelines and requirements for accessible design.<sup>161</sup> While largely consistent with ANSI, the ATBCB rule departs in certain areas, specifically windows and carpets, areas in which the ATBCB found that the experience and research did not support a federal rule.<sup>162</sup> There is an absolute need for ANSI and the Board to reconcile their differences. It is critical that the federal government send an unequivocal signal to states, consumers, and the design profession on the true uniform standard. A true uniform standard will catalyze more consistent design practice and, in turn, greater voluntary compliance.<sup>163</sup>

The immediate practical points reiterated here are that the ANSI and ATBCB revisions are significant because state codes may make reference to the ANSI standard or ATBCB minimum guidelines.<sup>164</sup> Practitioners are advised to check carefully their state and local codes and specifications in particular projects to determine the impact in their jurisdiction of these latest revisions.

I.M. Pei notes the need to go beyond mere access: "Spatial relationships need to be experienced. Persons with disabilities must be able to enjoy the psychological aspects of a structure, not only the individual points or planes within it."<sup>165</sup> This is a concept that will

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159. AMERICAN NATIONAL STANDARDS INSTITUTE, INC., AMERICAN NATIONAL STANDARD SPECIFICATIONS FOR MAKING BUILDINGS AND FACILITIES ACCESSIBLE TO AND USABLE BY PHYSICALLY HANDICAPPED PEOPLE (1980).

160. Debates before the United States Architectural and Transportation Barriers Compliance Board (July 10, 1981; Sept. 22, 1981; Dec. 1, 1981; May 4, 1982) (approved minutes).

161. 47 Fed. Reg. 33,862 (1982) (to be codified at 36 C.F.R. pt. 1190).

162. 36 C.F.R. §§ 1190.1-1190.240 (1982). The rules were first published on January 16, 1981. 46 Fed. Reg. 4,270 (1981). The rule had been spurred by a follow-up report of the General Accounting Office to GAO-I. The follow-up report, in progress from 1979 to 1980, was issued on June 6, 1980. GENERAL ACCOUNTING OFFICE, MAKING PUBLIC BUILDINGS ACCESSIBLE TO THE HANDICAPPED: MORE CAN BE DONE, (1980). Regrettably, neither ANSI nor ATBCB published detailed accessibility cost information that could quiet the critics. See *supra* note 156.

163. A uniform accessibility standard was recently published by the General Services Administration, Department of Defense, Department of HUD, and the United States Postal Service. 48 Fed. Reg. 19,610-19,691 (Apr. 28, 1983).

164. See Comment, *Access to Buildings and Equal Employment Opportunity for the Disabled: Survey of State Statutes*, 50 TEMP. L.Q. 1067, 1074-76 (1977). Massachusetts does not. See MASS. ADMIN. CODE tit. 521, § 2.00 (1982).

165. Telephone interview with I. M. Pei, noted architect (July 16, 1982). See also Vogel, *Adapting a House for Itzhak Perlman*, N. Y. Times, Feb. 25, 1982, at C1, col. 5.



develop over the next few years. It is also a thread that will make the concept of barrier free design interact with the new technology and safety codes with respect to such items as vertical access devices.

As more persons with different disabilities enter the mainstream, technology will be challenged to meet their needs. The focus will be on a greater number of people experiencing a building and a recognition of the practicality of universal design, which benefits all citizens for the same cost. The future of barrier free design is perhaps signalled by events at opposite ends of the country. In Los Angeles, California, the Century Freeway Replenishment Housing Program will provide new and replacement housing in connection with urban renewal necessitated by a new highway project.<sup>166</sup> The units have been designed to be adaptable for persons with handicaps. This means that doors are wider, entrances are grade level or ramped, and bathroom walls are being reinforced so that grab bars can be added. In townhouses, the stairs are wide enough to accommodate lifts for disabled persons. Using a specification prepared by Peoples Housing, Inc.,<sup>167</sup> the State of California, with input from its Department of Rehabilitation, is seeking to implement universal design. The designs will be functional for the able-bodied and disabled. The grade level entrance that serves the mobility impaired also serves the baby carriage brigade. The design features add nominal cost to the structure, which has a longer useful life for its occupant.

Lamentably, the older people get, the less able-bodied they become. The adaptability features enable people to make accommodations as disabilities occur. The features are aesthetically pleasing and make the house more marketable as it is suitable for the total range of buyers, not only those who are able-bodied.

In Washington, D.C., Senator Stafford, along with Senator Moynihan, for the past two years has led the way in shepherding legislation through the United States Senate. This legislation would have revised the Public Buildings Act, which regulates the manner in which Federal buildings are built, constructed, altered, and leased. The bill would statutorily meld the accessibility mandate into the design process and would require federal contracts to include provi-

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166. Agreement between Century Freeway Housing Replenishment Program and ATBCB (March 26, 1982).

167. PEOPLES HOUSING INC., HOUSING ADAPTABILITY GUIDELINES (1980). For a report of a more celebrated adaptation see Vogel, *Adapting a House For Itzhak Perlman*, N. Y. Times, Feb. 25, 1982, at C3, col. 5.

sions for accessibility.<sup>168</sup> This approach would bring the Federal government closer to the states' practice. It has been reintroduced and passage in the Senate is likely by the 98th Congress. Its future in the House is uncertain. To Senator Stafford, the message in the bill is clear: "The federal government should not, ever again, permit a building built at taxpayers expense that is not accessible to all the people . . . ."<sup>169</sup>

In North Carolina, according to Ron Mace, there is a tax incentive for building accessible housing units.<sup>170</sup> That is noteworthy because it is one of the few positive incentives being utilized in this area. Oregon and Florida also had tax incentives.<sup>171</sup> By contrast, the 25,000 dollars per year federal barrier removal tax deduction, adopted in 1976 and extended in 1979, expired at the end of 1982 but has been reintroduced in the 98th Congress.<sup>172</sup>

## VII. CONCLUSION

In just twenty-five years, much has been accomplished. Yet more must and will be done. As long as there is a strong commitment to accessibility and the mandate of the law, especially at the federal level to spur states, progress will continue, particularly as disabled persons become more active participants in our society. Twenty-five years from now, the term "barrier free design" hopefully will be equated with design.

In the interim, however, problems will remain. Generations of buildings were created before anti-barriers laws were adopted. A significant number of older buildings and leased buildings remain substantially inaccessible and architects are only beginning to become experienced with barrier free design codes. Lawyers with clients in the building or design process must carefully address

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168. S. 2080, 96th Cong., 2d Sess. (1980); S. 533, 97th Cong., 2d Sess., § 307 (1982); S. REP. NO. 48, 97th Cong., 1st Sess. 32-34 (1981).

169. 127 CONG. REC. S14867 (daily ed. Feb. 24, 1981) (statement of Senator Stafford); 129 CONG. REC. S1057 (daily ed. Feb. 3, 1983).

170. Telephone interview with Ronald Mace, noted architect (July 12, 1982). See N.C. GEN. STAT. § 105-130.22 (Supp. 1981). North Carolina also provides a tax deduction for barrier removal. *Id.* § 105-130.5(a)(8).

171. Comment, *Access to Buildings and Equal Employment Opportunity for the Disabled: Survey of State Statutes*, 50 TEMP. L.Q. 1067, 1072-73 (1977).

172. I.R.C. § 190 (1976); H.R. 267, 98th Cong., 1st Sess. (1983) and H.R. 669, 98th Cong., 1st Sess. (1983) would make the deduction permanent; H.R. 267, 98th Cong., 1st Sess. (1983) would raise the deduction to \$100,000. 129 CONG. REC. H86, 96 (daily ed. Jan. 6, 1983). See also S. 111 which would make the deduction \$50,000/year permanently. 129 CONG. REC. S92 (daily ed. Jan. 26, 1983).

accessibility issues. State and federal architectural barriers statutes create significant obligations for the building community and rights for disabled persons.

William Cochran, a Washington, D.C. architect with extensive experience in barrier free design, is encouraged that he now gets inquiries from other architects regarding the implementation of accessibility requirements. He foresees the days of greater accessibility as older buildings are gradually redone. To him, this is analogous to automobiles and the fuel crisis. Just as cars are now referred to as "economical" or "fuel efficient," so too buildings will be described as "designed" for people, able-bodied and disabled.<sup>173</sup>

A critic recently wrote: "Each and every building is a product of numerous forces—economic, social, cultural, political, functional, and aesthetic—and must be evaluated in terms of how well it has responded to all of these forces."<sup>174</sup>

There is little doubt that handicapped persons and barrier free design are forces which are now and should continue to be significant factors in the totality of building design. As the building design process evolves towards greater accessibility, legal issues will inevitably arise.

This article has been a primer on the major aspects of mandates that buildings and facilities be accessible to handicapped persons. Federal and state laws have been highlighted. A framework for resolving problems has been set forth. As the building professionals address disabled persons' needs and disabled persons attain greater access by virtue of barrier free design, there will be greater access to the legal process to ensure the continued cycle of progressive mainstreaming.

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173. Interview with William Cochran, noted architect (July 13, 1982).

174. Goldberger, *Architect vs. Developer: A Curious Dynamic*, N. Y. Times, July 18, 1982, at B25, col. 1.

## APPENDIX A.

**§ 4151. Definitions**

As used in this chapter, the term "building" means any building or facility (other than (A) a privately owned residential structure not leased by the Government for subsidized housing programs and (B) any building or facility on a military installation designed and constructed primarily for use by able bodied military personnel) the intended use for which either will require that such building or facility be accessible to the public, or may result in the employment or residence therein or physically handicapped persons, which building or facility is—

- (1) to be constructed or altered by or on behalf of the United States;
- (2) to be leased in whole or in part by the United States after August 12, 1968;
- (3) to be financed in whole or in part by a grant or a loan made by the United States after August 12, 1968, if such building or facility is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan; or
- (4) to be constructed under authority of the National Capital Transportation Act of 1960, the National Capital Transportation Act of 1965, or title III of the Washington Metropolitan Area Transit Regulation Compact.

42 U.S.C. § 4151 (1976).

**§ 4152. Standards for design, construction, and alteration of buildings; Administrator of General Services**

The Administrator of General Services, in consultation with the Secretary of Health, Education, and Welfare, shall prescribe standards for the design, construction, and alteration of buildings (other than residential structures subject to this chapter and buildings, structures, and facilities of the Department of Defense and of the United States Postal Service subject to this chapter) to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings.

*Id.* § 4152.

**§ 4153. Standards for design, construction, and alteration of buildings; Secretary of Housing and Urban Development**

The Secretary of Housing and Urban Development, in consultation with the Secretary of Health, Education, and Welfare, shall prescribe standards for the design, construction, and altera-

tion of buildings which are residential structures subject to this chapter to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings

*Id.* § 4153.

**§ 4154. Standards for design, construction, and alteration of buildings; Secretary of Defense**

The Secretary of Defense, in consultation with the Secretary of Health, Education, and Welfare, shall prescribe standards for the design, construction, and alteration of buildings, structures, and facilities of the Department of Defense subject to this chapter to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings.

*Id.* § 4154.

**§ 4154a. Standards for design, construction and alteration of buildings; United States Postal Service**

The United States Postal Service, in consultation with the Secretary of Health, Education, and Welfare, shall prescribe such standards for the design, construction, and alteration of its buildings to insure whenever possible that physically handicapped persons will have ready access to, and use of, such buildings.

*Id.* § 4154a.

**§ 4155. Effective date of standards**

Every building designed, constructed, or altered after the effective date of a standard issued under this chapter which is applicable to such building, shall be designed, constructed, or altered in accordance with such standard.

*Id.* 4155.

**§ 4156. Waiver and modification of standards**

The Administrator of General Services, with respect to standards issued under section 4152 of this title, and the Secretary of Housing and Urban Development, with respect to standards issued under section 4153 of this title, and the Secretary of Defense with respect to standards issued under section 4154 of this title, and the United States Postal Service with respect to standards issued under section 4154a of this title—

(1) is authorized to modify or waive any such standard, on a case-by-case basis, upon application made by the head of the department, agency, or instrumentality of the United States concerned, and upon a determination by the Administrator or

Secretary, as the case by be, that such modification or waiver is clearly necessary, and

(2) shall establish a system of continuing surveys and investigations to insure compliance with such standards.

*Id.* § 4156.

**§ 4157. Reports to Congress and congressional committees**

(1) The Administrator of General Services shall report to Congress during the first week of January of each year on his activities and those of other departments, agencies, and instrumentalities of the Federal Government under this chapter during the preceding fiscal year including, but not limited to standards issued, revised, amended, or repealed under this chapter and all case-by-case modifications, and waivers of such standards during such year.

(b) The Architectural and Transportation Barriers Compliance Board established by section 792 of title 29 shall report to the Public Works and Transportation Committee of the House of Representatives and the Committee on Environment and Public Works of the Senate during the first week of January of each year on its activities and actions to insure compliance with the standards prescribed under this chapter.

*Id.* § 4157.