The Civil Rights of the Handicapped in Transportation: The Americans With Disabilities Act and Related Legislation

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I. INTRODUCTION

Described as the most sweeping civil rights legislation in a quarter century, the Americans With Disabilities Act of 1990 [ADA] seeks to eliminate bias by private and public enterprises in areas of employment, public accommodations, transportation and telecommunications.[1] The legislation creates federally mandated rights and responsibilities for a class of beneficiaries unparalleled since the 1960s.

Although much of the new legislation is devoted to issues of employment discrimination, its transportation provisions are also quite important. The fundamental thrust of the ADA is to integrate the disabled into the mainstream of the nation. As one Congressman put it, the purpose of the ADA is to "open up mainline transportation systems to people with disabilities. It is designed to make the America of the future accessible to all our citizens."[2]

Another Congressman proclaimed that the ADA "represents a major breakthrough in ensuring that citizens who have been robbed of their mobility by disabilities or accidents can get to work, can pursue their interests, and broaden their lives with the access our nation's public transportation facilities offer."[3] Still another observed:

> All of us recognize the crucial role transportation plays in our lives. It is the veritable lifeline which enables all persons to enjoy the full economic and social benefits which our country offers. To be denied effective transportation is to be denied the full benefits of employment, public and private services, and other basic opportunities.[4]

While many Americans take transportation access for granted, those who have lost it understand the crucial role it plays in everything we do, both professionally and socially.

The transportation provisions of the ADA were among the most hotly contested, primarily because of the cost of compliance.[5] In a nutshell, the

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1. *Will Disabilities Law Produce Litigation*, Nat'l L.J., Aug. 13, 1990, at 3. The bill was signed into law by President George Bush on July 26, 1990. *See generally*, PERRETT, *Americans With Disabilities Act Handbook* (1990) [hereinafter *ADA Handbook*].

2. 136 CONG. REC. H2599, H2608 (daily ed. May 22, 1990) (statement of Rep. Fish.).

3. 136 CONG. REC. H2599, H2634 (daily ed. May 22, 1990) (statement of Rep. Borski).

4. 136 CONG. REC. H2421, H2433 (daily ed. May 17, 1990) (statement of Rep. Luken).

5. Tucker, *The Americans With Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 932 (1989) [hereinafter *Overview*]. For example, Greyhound Corporation argued that compliance with the ADA would cost $40 million a year, "a sum that dwarfs its expected 1989 profit of $8.5 million." Disabled rights advocates, however, have contended that the cost estimates cited by the transportation companies are unrealistic. For example, during congressional hearings on the ADA, Greyhound alleged that it costs $35,000 to purchase one lift for an over-the-road bus, while others indicated that lifts could be purchased for less than $8,000.

ADA requires that all new vehicles purchased by public and private transportation firms be equipped with lifts and other facilities for the handicapped. In three years, telephone companies must provide special equipment enabling the hearing or speech impaired to communicate with people using ordinary telephones.[6] This bit of social engineering is designed to eradicate the problems of discrimination against the handicapped.

The ADA is the most recent in a series of acts intended to eradicate the disadvantages of the handicapped in transportation going back to 1970. With the graying of America, more of its citizens find themselves immobile and requiring federal legislative assistance to move about. This article reviews all the major legislative and regulatory attempts to enhance the mobility of the disabled.

II. THE PROBLEM

People with disabilities are "substantially worse off on almost any indicator of well-being than are the non-disabled."[7] Less than 25% of disabled men and 13% of disabled women hold jobs. Their earnings are but two-thirds of all workers.[8] In 1984, half the disabled people over the age of 16 had household incomes of $15,000 or less, compared with only 25% of non-disabled.[9]

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6. *A Law for Every American*, N.Y. Times, July 27, 1990, § A, at 26, col. 1 [hereinafter *Every American*]. The original Senate bill, passed last September, was vague in its instructions to employers. More precise language has since been added and, partly as a result of adjustments made by the House, employers will have time to get ready. Businesses with more than 25 employees will have 18 months to meet the public accommodations rules and two years to meet the employment revisions. Small businesses would be given more time to comply. The three-year time limit may be extended by the Secretary of Transportation for up to twenty years for "extraordinarily expensive structural changes." See 135 CONG. REC. S10,954, S10,957 (daily ed. Sept. 12, 1989).

7. BURKHAUSER & HAVEMAN, UNITED STATES POLICY TOWARD THE DISABLED AND EMPLOYMENT HANDICAPPED 15 (International Institute of Management/Labor Market Policy Discussion Paper No. 84-4a, 1984), quoted in McCluskey, *Rethinking Equality and Difference*, 97 YALE L.J. 863, 863-64 (1988) [hereinafter *Rethinking Equality*]. People with physical disabilities in the United States face, and continue to struggle against, many social and economic disadvantages. Over the years, laws have explicitly excluded people with disabilities from holding public office, serving on juries, marrying, working in certain occupations, bearing children, attending school, and even from being seen on public streets. Even today, people with disabilities are "substantially worse off in almost any indicator of well-being (including education, employment, and earnings) than are the non-disabled."

8. *Every American*, *supra* note 6, at 26. The Federal Government now spends $57 billion every year on benefits for the disabled. That figure will undoubtedly decline if the disabled have greater access to jobs.

9. *Rethinking Equality*, *supra* note 7, at 864. To alleviate some of the problems confronted by people with disabilities, Congress enacted section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in federally funded programs. Congress modeled section 504 on civil rights legislation that prohibits race and sex discrimination.

Slightly "more than half of the population of the United States expresses slightly positive attitudes toward the disabled. The rest openly admit to negative attitudes. They see the handicapped as different and in some ways inferior to normal people."[10]

However, Professor James Frierson has observed that during the 1990's three trends will converge that should encourage employers to employ disabled employees. First, the number of young entry-level employees is declining to such an extent that many businesses are having difficulty filling positions. Second, the Education for the Handicapped Act of 1975, which required the mainstreaming of disabled students into regular schools, created the first generation of severely disabled individuals with an adequate educational background and training. Third, as the United States evolves toward an informational society, disabled persons' skills in office work, computer operation and other brain-power jobs will increasingly become more valuable.[11]

Professor Frierson has also enumerated several myths which must be dispelled in order to achieve successful compliance with the ADA:[12]

> Myth #1. Disabled employees have higher than average absenteeism. A survey by the U.S. Office of Vocational Rehabilitation shows that 55% of disabled workers have a better than average attendance rate, while only 5% have worse than average absenteeism.
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> Myth #2. Disabled employees have high turnover rates. The study cited above found that 88% of disabled employees have lower than average turnover rates.
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> Myth #3. Job performance and productivity of disabled employees is low. Ninety-one percent of disabled workers have average to higher than average productivity.
>
> Myth #4. Disabled workers create a safety risk. Only 2% of disabled employees have a worse than average safety record, while 57% have higher than average safety records.
>
> Myth #5. Making accommodations for disabled workers is too expensive. Surveys have shown that over 50% of all accommodations are cost free, while another 30% cost under $500.[13] In many cases all that is needed is rearrangement of office furniture, minor adjustments in employee break time,

10. *Id.* at 869. Despite the similarity of section 504 to race and sex discrimination legislation, and despite the similar problems addressed by these laws, courts and lawmakers interpreting section 504 have often departed from the race and sex discrimination model. In contrast to the race and sex discrimination doctrine, disability discrimination law generally assumes that physical difference, not prejudice, is the primary problem.

11. J. Frierson, Major Changes May Be Needed to Conform to the Americans With Disabilities Act, 26-27 (unpublished monograph, 1990) [hereinafter *Major Changes*].

12. Much of this material is taken from two articles: Lester & Caudill, *The Handicapped Worker: Seven Myths*, TRAINING & DEVELOPING JOURNAL, August, 1987, at 50-51 [hereinafter *Seven Myths*]; and Stevens, *Exploding the Myths About Hiring the Handicapped*," PERSONNEL, December 1986, at 57-60 [hereinafter *Exploding Myths*].

13. *Id.* at 57-60.

or the installation of inexpensive equipment such as a $50 telephone amplifier.

Myth #6. Insurance rates will skyrocket if the company hires disabled employees. A U.S. Chamber of Commerce survey of 279 companies found that 90% did not incur added insurance costs by hiring disabled persons. Other surveys have shown that disabled persons create fewer accidents on the job than the average employee, thus lowering workers compensation costs and liability claims. Although many companies—especially small companies—worry about increased health, disability or life insurance claims that may result from hiring disabled employees, their concern is misplaced. Many types of disabilities do not cause continuing health problems. For example, most people in wheelchairs are in a completely stable medical condition that does not require future medical treatment, nor does it increase the chance of contracting illnesses or causing death.

Although it is true that other disabilities will cause future medical bills and may lead to an early total disability or death, i.e., AIDS, uncured cancer, diabetes, etc., the ADA allows employers and insurance companies to continue to use a pre-existing conditions clause whereby coverage of specific medical conditions diagnosed before an individual is first employed may be limited or excluded. The ADA is very clear in stating that nothing in the new law should be interpreted as changing the customary methods of underwriting employer-provided insurance coverage of employees.[14]

The disabled have also been subjected to indignities. For example, "an airline employee who resented having to help a 66-year old double amputee board a plane instead threw him onto a baggage dolly."[15] Seventeen states prohibit people with epilepsy from marrying, and four states authorized the sterilization of people with epilepsy.[16] Until 1973, a Chicago ordinance prohibited people who were "diseased" or "deformed" or an "unsightly or disgusting object" from exposing themselves to public view on the streets or in other public places.[17] Thus, the Elephant Man would be exiled to the back alleys and dark corners of Chicago.

The ADA finds that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness . . . ."[18]

A poll of the disabled reveals that half viewed employment discrimination as the cause of their unemployment, and 28% blame transporta-

14. *Major Changes*, *supra* note 11, at 17-19.

15. Shapiro, *Liberation Day for the Disabled*, U.S. NEWS & WORLD REP., Sept. 18, 1989, at 20, 22 [hereinafter *Liberation Day*].

16. *Rethinking Equality*, *supra* note 7, at 864. As recently as 1980, four states, Delaware, Mississippi, Oklahoma, and South Carolina had statutes authorizing the sterilization of persons with epilepsy.

17. *Id.*

18. Americans with Disabilities Act of 1990, Pub. L. No. 101-596, § 2(a)(7), 104 Stat. 3000 (1990) [hereinafter *A.D.A.*].

tion barriers. Over half of those with severe disabilities identified transportation barriers as limiting their social activity.[19] Transportation access is essential for many of the human activities the non-disabled take for granted: employment, education, shopping, recreation and political participation.[20]

III. HISTORY OF THE LAW OF THE HANDICAPPED IN TRANSPORTATION: THE LONG AND WINDING ROAD

The Urban Mass Transportation Assistance Act of 1970 declared it national policy that elderly and handicapped people have the same right as other people to use mass transportation facilities and services; and that special efforts should be made in the planning and design of mass transit facilities and services to that its availability to the elderly and handicapped services will be assured.[21] Of federal money appropriated for mass transit, 3.5 percent may be designated to benefit access for the elderly and handicapped.[22] The National Mass Transportation Assistance Act of 1974 assured that fares for the elderly and handicapped not exceed half the general rate for peak hours.[23]

But in the ensuing years, handicapped plaintiffs were unsuccessful in arguing that they had a fundamental right to public transportation which requires transit authorities to purchase buses accessible to wheelchairs.[24] In 1976, section 165 was added to the Federal-Aid Highway Act of 1973 authorizing the Secretary of Transportation to require that a mass transit system, aided by grants from highway funds "be planned, designed, constructed, and operated to allow effective utilization by elderly or handicapped persons."[25]

Section 504 of the Rehabilitation act of 1973, commonly known as the civil rights bill of the disabled, provides that

> No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or 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.[26]

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19. 134 CONG. REC. S5106, S5115 (daily ed. April 28, 1988) (statement of Sen. Simon). The 1980 census revealed that 20% of our citizens have a disability. Even the number with severe disabilities constitutes a sizable minority. Six million Americans have mobility problems sufficiently severe to require a mobility aid such as a wheelchair, a walker, crutches, or a prosthesis.

20. *Rethinking Equality*, *supra* note 7, at 864.

21. 49 U.S.C. § 1612(a) (1982).

22. 49 U.S.C. § 1612(b) (1982). DEMPSEY & THOMS, LAW & ECONOMIC POLICY IN REGULATION 327 (1986) [hereinafter *Economic Policy*].

23. *Id.* at 327.

24. *Id.* at 328.

25. 23 U.S.C. § 142 (1982). *Economic Policy*, *supra* note 22, at 329.

26. 29 U.S.C. § 794(a) (1973).

Acting under this bill and section 16 of the Urban Mass Transportation Act, the Urban Mass Transit Administration [UMTA] (a DOT subsidiary) adopted regulations in 1976 which required local transit agencies receiving federal funds to make "special efforts" to accommodate the needs of the disabled, but largely left to the local agencies the responsibility to determine how to implement these requirements.[27] Many devoted resources to purchasing new buses with wheelchair lifts. Others, finding that alternative too costly, provided paratransit or "dial-a-ride" services, whereby a van would be dispatched to pick up the handicapped and take them to their destinations.

In 1978, the U.S. Department of Health Education and Welfare issued guidelines which required that federally funded programs be accessible, as a whole, to the disabled, essentially requiring them to "mainstream" the handicapped.[28] The guidelines specifically required retrofitting of subways and buses to make them fully accessible to the handicapped.[29] But HEW acknowledged that its guidelines did not "preclude in all circumstances the provision of specialized services as a substitute for, or supplement to, totally accessible services."[30]

In response, UMTA promulgated new rules in 1979 which adopted an equal access, embracing the assumption that mass transit should be available both to people with disabilities and those free from them.[31] This required that all new fixed route buses be made accessible to the handicapped (including those confined to wheelchairs), and that rail transit facilities be retrofitted for accessibility.[32] One half of peak-hour buses would have to be accessible within three years (ten years for modification

27. *Rethinking Equality*, *supra* note 7, at 873; 55 Fed. Reg. 40,762 (1990); *Economic Policy*, *supra* note 22, at 329-30. Three examples of satisfactory "special efforts" with respect to people using wheelchairs are: (1) spending a minimum proportion of federal aid on wheelchair accessible service, (2) buying only wheelchair accessible buses until one-half of the vehicles in the system were accessible, or providing a comparable substitute service for wheelchair users, (3) establishing a system of individual subsidies so that every wheelchair user could purchase ten round trips per week from any accessible service at prices equal to "regular fares."

28. 45 C.F.R. §§ 85.57(a), 85.58(a) (1978). *Economic Policy*, *supra* note 22, at 330.

29. 45 C.F.R. §§ 85.57(b), 85.58 (1978).

30. 43 Fed. Reg. 2,134 (1978).

31. *Rethinking Equality*, *supra* note 7, at 873. The DOT made this change in adopting an equal access approach in the new rules in response to rules issued in 1978 by the Department of Health, Education, and Welfare (HEW), which had authority to coordinate other agencies' implementation of section 504. The HEW guidelines required federal funded programs to be accessible, as a whole, to people with disabilities. Following HEW's guidelines, DOT's 1979 rules required all new fixed route buses to be accessible to people with disabilities, including those using wheelchairs. Within three years, or ten years for modifying existing vehicles or facilities or making expensive structural changes, transit systems had to make at least one half of peak-hour bus service accessible.

32. 55 Fed. Reg. 40,778 (1990); *Economic Policy*, *supra* note 22, at 330.

of existing vehicles or facilities requiring extensive structural changes).[33] A waiver provision existed for commuter rail, subway and streetcar systems.[34]

These rules were struck down in 1981 as beyond the scope of DOT's authority because of their requirement of extensive structural changes which imposed undue financial burdens on transit authorities.[35] In response, DOT withdrew the challenged regulations, and substituted interim rules similar to the "special efforts" regulations it had adopted in 1977.[36]

Congress responded by promulgating the Surface Transportation Assistance Act of 1982[37] which required that DOT issue a new rule identifying minimum service criteria for the disabled. The legislation did not, however, require equal access or comparable service for the handicapped.[38]

DOT issued final rules in 1986 which gave local transit agencies the option of (1) requiring installation of wheelchair lifts in buses, (2) establishing a "special service" or paratransit system, or (3) establishing a mixed system of accessible buses and paratransit as an option for mak-

33. *Rethinking Equality*, *supra* note 7, at 873.

34. *Economic Policy*, *supra* note 22, at 330.

35. American Public Transit Ass'n v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981); 55 Fed. Reg. 40,762 (1990); *Economic Policy*, *supra* note 22, at 331. American Public Transit Association v. Lewis held that a section of the rules governing specific requirements for mass transit was beyond the scope of DOT's authority under section 504 because it mandated expensive structural changes. The D.C. Circuit based its decision in this case on Southeastern Community College v. Davis, the U.S. Supreme Court's first decision interpreting section 504's substantive requirements. Davis upheld a nursing program's rejection of an applicant with impaired hearing, holding that section 504 does not require substantial modifications of programs to accommodate people with disabilities. The Court did not define "substantial modification," but held that section 504 does not require a fundamental alternation in the nature of a program, such as eliminating clinical courses for a nursing student.

36. *Rethinking Equality*, *supra* note 7, at 875. Believing that these rules would not result in sufficient access, Congress promulgated a statute requiring DOT promptly to issue final rules that would establish clear minimum standards for accessible transportation service. Before DOT issued these final rules, the U.S. Supreme Court again considered the extent of accommodations required by section 504. In Alexander v. Choate, 469 U.S. 287 (1985), the Court refused to limit section 504 to a simple equal treatment, but left unanswered questions about when section 504 would forbid unequal effects. The Court assumed that section 504 may in some situations require accommodations to eliminate disparate impacts. The Court assumed that section 504 may in some situations require accommodations to eliminate disparate impacts. The Court concluded that policies with harmful effects on people with disabilities may be lawful if "meaningful and equal access" still exists. The Court feared that "because the handicapped typically are not similarly situated to the nonhandicapped," the disperate impact approach in some situations could lead to "a wholly unwieldy administrative and adjudicative burden."

37. 49 U.S.C. §§ 1601, 1612(d). The statute added section 1612(d) to the Urban Mass Transit Act.

38. 55 Fed. Reg. 40,762 (1990). The new section required the Department to issue a new rule containing minimum service criteria for service to disabled passengers.

ing public transportation available to the disabled.[39] The rule also contained six service criteria: (1) non-discriminatory eligibility; (2) maximum response time; (3) no restrictions or priorities based on trip purpose; (4) comparable fares to those for the general public; (5) comparable hours and days of service; and (6) comparable service area.[40]

Service for the handicapped, although it could be segregated, would have to be "comparable." In order to avoid the "undue burdens" problems which had scuttled the 1977 rules, the 1986 rules also allowed a local transit agency to limit its expenditure on transportation for the handicapped to 3% of its annual operating budge, even if it failed to meet the rule's service criteria.[41] Although holding that the DOT could take costs into account in formulating a rule, a federal court deemed this 3% "cost cap" arbitrary and capricious in 1988.[42] Nevertheless, the DOT's decision not to implement mainstreaming, but to allow local transit authorities to use accessible buses, paratransit or mixed systems, was upheld as reasonable.[43] Mainstreaming was not required under the legislation that then existed, for there was no right, legislative or constitutional, of equal access.[44]

With two steps forward and one step back, progress was made, albeit gradually. The percentage of new bus purchases accessible to those in wheelchairs grew to more than 50% annually. By 1990, 35% of the nation's public transit buses were accessible to the disabled.[45]

IV. AIR TRANSPORTATION

A. AIRLINES

Airlines were specifically excluded from the application of the ADA because Congress had already promulgated legislation, the Air Carrier

39. 51 Fed. Reg. 18,994 (1986). 49 C.F.R. § 27.95 (1987). *Rethinking Equality*, *supra* note 7, at 876. The transit agencies shall meet these minimum service requirements as soon as reasonably feasible, as determined by UMTA, but in any case within six years of the initial determination by UMTA concerning the approval of its program. The rules establish minimum service requirements governing fares, area and time of service, restrictions on eligibility and trip purpose, and waiting periods. Under these rules, service for people with disabilities must generally be "comparable" to service for nondisabled people, but can still be somewhat inferior.

40. 49 C.F.R. § 27.95 (1987).

41. *Rethinking Equality*, *supra* note 7, at 877. The DOT claims that this cost limit on required accommodations will prevent undue burdens that are beyond its authority of impose under section 504, particularly in light of APTA, while still requiring improved service for people with disabilities.

42. ADAPT v. Dole, 676 F. Supp. 635 (E.D. Pa. 1988). The decision was affirmed by the Third Circuit in 1989 in ADAPT v. Skinner, 881 F.2d 1184 (3rd Cir. 1989) (en banc).

43. ADAPT, 881 F.2d at 1198.

44. *Id.*

45. 136 CONG. REC. H2421, H2435 (daily ed. May 17, 1990) (statement of Rep. Anderson).

Access Act of 1986 [ACAA],[46] to deal with the problem. The ACAA succinctly provides that "No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation."[47] The principal sponsor of the bill, Senator Robert Dole, said, "there should be no restrictions placed upon air travel by handicapped persons. Any restrictions that the procedures may impose must be only for safety reasons found necessary by the Federal Aviation Administration [FAA]."[48]

Even before enactment of the Air Carrier Access Act, in 1982 the now defunct Civil Aeronautics Board, acting under the authority of section 504 of the Rehabilitation Act of 1973 (discussed above) and sections 404(a) and 404(b) of the Federal Aviation Act of 1958 (which require safe and adequate transportation and prohibited unjust discrimination in transportation, respectively), promulgated regulations attempting to prohibit discrimination in the airlines.[49]

In 1990, the DOT (which took the jurisdictional reins from the CAB upon it demise in 1985), promulgated regulations which required that new aircraft (of thirty seats or more) purchased by domestic airlines be equipped with folding armrests on half the aisles.[50] Widebodied aircraft must have lavatories accessible to the handicapped.[51] Planes with 100 or more seats must have priority space for storing a wheelchair in the cabin.[52] In fact, wheelchairs and other handicap assistance devices (such as canes or crutches) have priority for in-cabin and baggage compartments over other passengers' baggage.[53] Airlines also cannot prohibit the handicapped from bringing their personal ventilators and respirators as well as non-spillable batteries and seeing-eye dogs aboard the aircraft.[54] Planes with sixty or more seats with an accessible lavatory must also have an on-board wheelchair in the cabin.[55] Retrofitting existing aircraft is not required, unless the airline replaces the cabin interior or lavatories.[56]

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46. 49 U.S.C. § 1374(c) (1988).

47. 49 U.S.C. § 1374(c) (1) (1988).

48. 132 CONG. REC. 21, 771 (Aug. 15, 1986).

49. 14 C.F.R. § 382 (1990). A U.S. Supreme Court decision, Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986), held that non-subsidized airlines did not receive Federal financial assistance and were therefore not covered by section 504 of the Rehabilitation Act of 1973. This case served as the catalyst for the Air Carrier Access Act of 1986.

50. 55 Fed. Reg. 8048 (1990) (to be codified at 14 C.F.R. § 382.21(a)(1)).

51. *Id.* at § 382.21(a)(3).

52. *Id.* at § 382.21(a)(2).

53. 55 Fed. Reg. 8050 (1990) (to be codified at 14 C.F.R. § 382.41).

54. *Id.* at §§ 382.39(b), 382.55(a).

55. 55 Fed. Reg. 8048 (1990) (to be codified at 14 C.F.R. § 382.21(a)(4)).

56. *Id.* at § 382.21(b)(1), (c). However, an on-board wheelchair must be available within two years. *Id.* § 382.21(b)(2).

As to the practices of airlines, no airline can refuse transportation to an individual based on his or her handicap unless allowing the person on the plane would be inimical to the safety of the flight.[57] If the carrier excludes a passenger on such grounds, it must provide him with a written explanation.[58] The airline may, however, exclude or require a medical certificate from those with a communicable disease determined by federal authorities to be likely to be spread to other passengers.[59] It may also require a medical certificate from those traveling in stretchers, those needing medical oxygen or those whose condition raises a reasonable doubt whether they can complete the flight safely.[60]

Airlines may not require advance notice that a handicapped person will be traveling, although they may require up to forty-eight hours notice in circumstances where certain preparations need to be made to accommodate the handicapped passenger.[61] Airlines may not charge handicapped people for the amenities required by DOT regulations.[62]

However, the airline may require that an attendant accompany a person traveling in a stretcher or incubator, or who because of a mental disability, is unable to comprehend or respond to safety instructions, or who has a mobility impairment so severe that he is unable to evacuate the aircraft, or who has such severe vision and hearing impairments that he is unable to communicate with airline personnel.[63] But if the handicapped person disagrees with the airline as to the necessity of an attendant, the airline shall not charge for the transportation of the attendant.[64]

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57. 55 Fed. Reg. 8049 (1990) (to be codified at 14 C.F.R. § 382.31). This is consistent with Adamsons v. American Airlines, 58 N.Y.2d 42, 444 N.E.2d 21 (1982), in which the court upheld the airline's refusal to board a passenger paralyzed from the waist down who was crying from the severe pain and was using a catheter and disposal bag. Under 49 U.S.C. § 1511, the airline lawfully excluded the passenger on grounds that such transportation would be inimical to the safety of the flight. An airline specifically may not limit the number of seats dedicated to a handicapped person "solely because the person's handicap results in appearance or involuntary behavior that may offend, annoy, or inconvenience crew members or other passengers." 55 Fed. Reg. 8,049 (1990) (to be codified at 14 C.F.R. § 382.31(b)).

58. *Id.* at § 382.31(e).

59. 55 Fed. Reg. 8052 (1990) (to be codified at 14 C.F.R. § 382.51(b)).

60. *Id.* at § 382.53(b). In the medical certificate, the physician must specify that the passenger is capable of completing a flight safely, "without requiring extraordinary medical assistance during the flight." *Id.*

61. 55 Fed. Reg. 8049 (1990) (to be codified at 14 C.F.R. § 382.33). Among the special services for which advance notification may be required are medical oxygen, an incubator, an electrical hook-up for a respirator, a stretcher, an electrical wheelchair (on a plane seating fewer than 60 passengers), hazardous material packaging for a battery, ten or more handicapped passengers traveling as a group, and an on-board wheelchair on an aircraft that does not have an accessible lavatory. *Id.* at § 382.33(b).

62. 55 Fed. Reg. 8053 (1990) (to be codified at 14 C.F.R. § 382.57).

63. 55 Fed. Reg. 8029 (1990) (to be codified at 14 C.F.R. § 382.35(b)).

64. *Id.* at § 382.35(c).

Airlines which operate aircraft of more than 19 seats are obliged to train their personnel in the requirements of the DOT regulations regarding the handicapped.[65] Airline employees must provide the handicapped with assistance in enplaning and deplaning, and in making flight connections and providing transportation between gates.[66] The airlines must also make special accommodations for passengers with hearing impairments, including providing a telecommunications device for the deaf, without imposing additional charges for the service.[67]

Carriers may place only able bodied persons capable of performing functions necessary for an emergency evacuation in exit rows.[68] Airline employees need not hand carry a handicapped person on a small plane (carrying fewer than 30 passengers) for which a lift or other device is unavailable.[69] However, once in the aircraft, the handicapped passenger is entitled to special assistance, including help in moving between seats in enplaning and deplaning, preparation for eating, use of the on-board wheelchair, moving to the lavatory, and loading and retrieving carry-on items.[70]

The airlines must make a complaints resolution official available at each airport they serve to receive and resolve complaints of violations of the DOT rules.[71] DOT anticipates that the cost to the airline industry of compliance for its regulations, including accessible lavatories, on-board wheelchairs, moveable armrests and training is approximately $400 million, or about ten cents a ticket.[72]

B. AIRPORTS

Discrimination in airports was implicitly addressed by Congress in the Rehabilitation Act of 1973 (discussed above) and the Rehabilitation,

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65. 55 Fed. Reg. 8053 (1990) (to be codified at 14 C.F.R. § 382.61).

66. 55 Fed. Reg. 8050 (1990) (to be codified at 14 C.F.R. § 382.39(a)). Airlines must provide the handicapped with ground wheelchairs at the airport, and may not leave a handicapped passenger in a wheelchair unattended for more than 30 minutes. *Id.* at §§ 382.39(a)(1), (3).

67. 55 Fed. Reg. 8052 (1990) (to be codified at 14 C.F.R. § 382.47(a)). 55 Fed. Reg. 5080 (1990) (to be codified at 14 C.F.R. § 382.39).

68. 14 C.F.R. §§ 121, 135 (1990). This requirement is consistent with Anderson v. USAir, 619 F. Supp. 1191 (D.D.C. 1985), *aff'd on other grounds*, 818 F.2d 49 (D.C. Cir. 1987), which held that an airline could lawfully evict a blind passenger from an exit row.

69. 55 Fed. Reg. 8050 (1990) (to be codified at 14 C.F.R. § 382.39(a)(4)).

70. *Id.* at § 382.39(b). However, the airline is not obliged to assist the handicapped passenger in actual eating, or assist him in the restroom, or provide medical services. *Id.* at § 382.39(c).

71. 55 Fed. Reg. 8053 (1990) (to be codified at 14 C.F.R. § 382.65).

72. 55 Fed. Reg. 8010-11 (1990). In contrast, the industry projected costs of $80 million a year for compliance. *Id.* at 8011. The compliance date was delayed to June 4, 1990. 55 Fed. Reg. 12,336 (1990). DOT refused additional requests for postponement. 55 Fed. Reg. 23,539 (1990).

Comprehensive Services, and Developmental Disabilities Act of 1978, which prohibit discrimination in any program or activity receiving federal financial assistance.[73] In promulgating regulations thereunder, the DOT prohibited discrimination against the handicapped in most airports, except those served by smaller aircraft.[74]

Essentially, the regulations require equality of treatment for qualified handicapped people in terms of employment, access, or utilization of airports.[75] Structural changes in facilities necessary to permit access by the handicapped were required.[76] Specifically, airport terminals "shall permit efficient entrance and movement of handicapped persons while at the same time giving consideration to their convenience, comfort, and safety."[77] Ticketing, baggage check-in and retrieval, boarding, telephones, teletypewriters, vehicular loading and unloading, parking, waiting areas, airport terminal information, and other public services (e.g., drinking fountains and rest rooms) all must be made accessible to the handicapped.[78] Many of these requirements have also been imposed upon airlines which own, lease or operate airport terminal facilities.[79]

V. SURFACE TRANSPORTATION

A. THE DISABLED

The Americans with Disabilities Act of 1990 begins with a Congressional finding that 43 million Americans "have one or more physical or mental disabilities."[80] This is quite a remarkable number of people. Nearly one in five of all Americans, according to Congress, are disabled. The ADA defines a disability as any physical or mental impairment that "substantially limits a major life activity."[81]

While courts interpreting section 504 of the Rehabilitation Act of

73. 29 U.S.C. § 794(a) (1988).

74. Airports subject to the regulations include those served by airlines flying aircraft seating more than 55 people or having a cargo payload of more than 18,000 pounds. But if federal funds are made available for the airport's terminal facilities, they are subject to the rules anyway. 49 C.F.R. § 27.5 (1990).

75. 49 C.F.R. § 27.7 (1990).

76. 49 C.F.R. § 27.65 (1990).

77. 49 C.F.R. § 27.71(a)(2)(i) (1990). The basic terminal design shall permit efficient entrance and movement of handicapped persons while at the same time giving consideration to their convenience, comfort, and safety. It is also essential that the design, especially concerning the location of elevators, escalators, and similar devices, minimize any extra distance that wheel chair users must travel compared to nonhandicapped persons, to reach ticket counters, waiting areas, baggage handling areas, and boarding locations.

78. 49 C.F.R. § 27.71 (1990).

79. 55 Fed. Reg. 8023 (1990) (to be codified at 14 C.F.R. § 382.23).

80. *A.D.A., supra* note 18, at § 2(a).

81. *Will Disabilities Law Produce Litigation*, NAT'L L.J., Aug. 13, 1990, at 3.

1973[82] have construed the term "handicapped" as including transsexuals and compulsive gamblers, the ADA specifically excludes them.[83] In fact the act excludes a number of categories of human condition, including those afflicted with "homosexuality or bisexuality; transvestism, transsexualism, or other sexual disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substantive use disorders resulting from current use of illegal drugs."[84] As to drugs, the ADA allows an employer to prohibit the illegal use of drugs and alcohol in the workplace.[85]

The DOT regulations define a disability as a "permanent or temporary physical or mental impairment that substantially limits one or more major life functions . . . ."[86] A physical or mental impairment is defined to include the following:

> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin or endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction (but not including the current use of illegal drugs) and alcoholism. "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working . . . .[87]

Both the Senate and House of Representatives Committee Reports on the ADA specify that the new legislation covers persons with AIDS or the HIV-Virus.

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82. 29 U.S.C. §§ 790-794c (1982 & Supp. V 1987). *See*, Adelman, *Section 501 of the Rehabilitation Act of 1973: Finally, a Legal Standard*, 1986 ARIZ. ST. L.J. 147 (1986); Richards, *Handicap Discrimination in Employment: The Rehabilitation Act of 1973*, 39 ARK. L. REV. 1 (1985).

83. *See* Lawson, *Aids, Astrology, and Airline: Towards a Casual Interpretation of Section 504*, 17 HOFSTRA L. REV. 237 (1989); Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11 (1985); *Application of Handicap Discrimination Laws to AIDS Patients*, 22 U. SO. FLA. L. REV. 317 (1988). An ongoing illness like tuberculosis is considered a disability, thus subject to protection against discrimination. School Board of Nassau County v. Arline, 480 U.S. 273 (1986). Since AIDS is also an ongoing illness like tuberculosis, then Arline should apply to AIDS patients as well.

84. Tucker, *The Americans With Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 925-26 (1989).

85. W. Kenworthy, Legislative Update (address before the Transportation Law Institute, Washington, D.C., November 5, 1990), at 12 [hereinafter *Legislative Update*].

86. 49 C.F.R. § 37.5 (1990).

87. 49 C.F.R. § 37.5(a) (1990).

The ADA affects transportation firms both as employers (as are all employers) and as providers of transportation services. Transportation firms would be well advised to specify the physical characteristics which require able bodied employees for safety reasons in the job descriptions therefore.[88] But it is the requirements of transportation companies as providers of transport services with which the instant discussion is focused.

The ADA divides transportation firms into two categories: public and private.[89] Let us first examine the ADA's requirements with respect to public transport.

B. Discrimination by Public Entities

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[90] A public entity is defined to include a state or local government or its agencies (meaning essentially public, and mostly urban, bus and rail transit systems) and Amtrak.[91] Both public school transport and aviation are excluded from the definition of public transportation, in the latter case because the Air Carrier Access Act (discussed above) prohibits discrimination in air travel.[92]

The ADA requires that new vehicles (e.g., buses and light and rapid rail cars) purchased and new facilities constructed by these entities which operate fixed route systems must be accessible to the disabled, including those who use wheelchairs.[93] New public buses and rail cars must be fitted with lifts or ramps and fold-up seats or secured spaces in order to accommodate wheelchairs.[94] Public entities must also plan for and implement paratransit service for those unable to use the normal fixed route system.[95]

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88. *See*, U.S. Code Cong. & Admin. News 267, 339 (1990). Initially, the act only applies to firms employing more than 25 employees. That number drops to 15 employees on July 26, 1994.

89. *Legislative Update*, *supra* note 85, at 10.

90. *A.D.A.*, *supra* note 18, at § 202.

91. *Id.* at § 201(1).

92. *Id.* at § 221(2). The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 241)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

93. *A.D.A.*, *supra* note 18, at §§ 222(a), 226, 242; 49 C.F.R. § 37.21(a) (1990).

94. *Overview*, *supra* note 5, at 931.

95. *Legislative Update*, *supra* note 85, at 10.

The 500 existing intercity rail (Amtrak) stations shall be made accessible to the disabled in not less than 20 years.[96] In remodeling existing facilities, those areas renovated must be accessible to the handicapped.[97] Transit authorities have three years in which to insure their key rapid and light rail stations are accessible to the handicapped, unless structural changes are extraordinarily expensive, in which case they may receive extensions up to 20 years.[98] They also have five years to provide at least one commuter, light or rapid rail car per train which is accessible to the disabled, unless it would significantly alter the historical character of the vehicle.[99]

In buying or leasing used vehicles, public entities must also make a good faith effort to find used vehicles accessible to the disabled.[100] Vehicles remanufactured to extend their life for five years or more (or ten years, in the case of rail cars) shall, "to the maximum extent feasible," be made accessible to the disabled.[101] Exceptions are again made for historical vehicles.[102] The House Report states that "remanufactured vehicles need only be modified to make them accessible to the extent that the modifications do not affect the structural integrity of the vehicle in a significant way."[103]

The ADA also requires that public entities providing fixed route systems operate nondiscriminatory paratransit services, comparable in both the level of service and response time, as are provided individuals without disabilities, unless such services would impose an undue financial burden on the public entity.[104]

The rules promulgated by DOT to implement the ADA prohibit discrimination by public and private entities against individuals with disabilities. They forbid denial of the opportunity to use the transportation system if the person is capable of using it. They require that vehicles and equipment be capable of accommodating all users, and that personnel be trained and supervised so that they "treat individuals with disabilities who use the service in a courteous and respectful way."[105]

The new rules also delete the 3% "cost cap," discussed above.[106]

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96. *See, A.D.A., supra* note 18, at § 242(e).
97. *Id.* at § 227(a).
98. *Id.* at §§ 227(b), 242(e).
99. *Id.* at §§ 228(b), 242(a), 242(b).
100. *Id.* at §§ 222(b), 242(c).
101. *Id.* at §§ 222(c) (1), 242(d).
102. *Id.* at § 222(c)(2).
103. 55 Fed. Reg. 40,772 (1990).
104. *A.D.A., supra* note 18, at § 223. *Overview, supra* note 5, at 931.
105. 49 C.F.R. § 37.7 (1990).
106. 55 Fed. Reg. 40,762 (1990). This new final rule deletes the three percent "cost cap," the provision of the rule which the courts invalidated. The effect of this amendment will be to

Compliance with the regulations is a condition of receiving federal financial assistance from DOT.[107] The rules also make clear that any private entity which contracts with public entities for the provision of public transit, "stands in the shoes of the public entity for purposes of determining the application of ADA requirements."[108]

The rules also allow a temporary waiver for the purchase of new lift-equipped buses if they are unavailable, provided several conditions are met.[109] In buying or leasing used vehicles, the ADA requires that transit authorities make a demonstrated good faith effort to find vehicles which are accessible to the handicapped. Under the DOT rules, this requires that the public entity specify accessibility in bid solicitations, conduct a nationwide search, advertise in trade periodicals, and contact trade associations.[110] However, unlike the new vehicle rules, no formal waiver need be requested from DOT.[111]

In remanufacturing used vehicles to extend their life for five years or more, the ADA requires they be made accessible to the handicapped. While they need not be modified in a way which adversely affects their structural integrity, the cost of modification is not a legitimate consideration.[112]

Historical vehicles need not be made accessible if they operate on a

require any UMTA recipient electing to meet its part 27 obligations through a special service system to meet all service criteria.

107. 49 C.F.R. § 27.19 (1990).

108. 55 Fed. Reg. 40,776 (1990).

109. 55 Fed. Reg. 40,770 (1990); 49 C.F.R. §§ 37.21(b)-(g) (1990). The definition of "operates" in the ADA makes it clear that a private entity which contracts with a public entity stands in the shoes of the public entity for purposes of determining the application of ADA requirements.

110. 55 Fed. Reg. 40,771 (1990); 49 C.F.R. § 37.23 (1990). The purpose of the waiver provision in the ADA, as the Department construes it, is to address a situation in which, because of a potentially sudden increase in demand for lifts, lift manufacturers are unable to produce enough units to meet the demand in a timely fashion. This is, as the title of the ADA provision involved suggests, a temporary situation calling for "temporary relief." A waiver should allow a transit provider meeting the statutory standards to being vehicles into service without lifts. But there is not reason related to the purpose of this provision of the ADA why the vehicle should remain inaccessible throughout its life. A lift should be installed as soon as it becomes available.

111. 55 Fed. Reg. 40,711 (1990).

112. 55 Fed. Reg. 40,772 (1990); 49 C.F.R. § 37.25 (1990). The House Committee on Transportation and Public Works reports uses the language: "remanufactured vehicles need only be modified to make them accessible to the extent that the modifications do not effect the structural integrity of the vehicle in a significant way." Based on these statements and on the comments to the NPRM, the final rule provides that it is considered feasible to remanufacture a vehicle to be accessible, unless an engineering analysis indicates that specified accessibility features would have a significant adverse effect on the structural integrity of the vehicle. That it may not be economically advantageous to remanufacture a bus with accessibility modifications does not mean it is unfeasible to do so, in the engineering sense which Congress intended. Accordingly, the rule does not include economic factors among those which may be considered in determining feasibility.

fixed route which is on the National Register of Historic Places, and making the vehicle accessible would significantly alter its historic character.[113] Thus, the San Francisco cable cars and the New Orleans streetcar named Desire need not be modified for wheelchair access, even if they are rehabilitated to extend their life for five years.

The rules governing acquisition of new, used and remanufactured rapid and light rail vehicles parallel those for the purchase of buses and vans, except that the remanufacturing trigger for modification of intercity and commuter rail vehicles is for extension of its life for ten (as opposed to five) years.[114]

Some small cities and rural communities provide demand-responsive systems. In general, such transit authorities must purchase accessible new equipment.[115] But they need not if their systems, when viewed in their entirety, provide equivalent levels of service both to the handicapped and to those without handicaps.[116] Thus, the delays from the moment service is requested to the time it is provided must be equivalent for handicapped and non-handicapped passengers.[117]

C. *Discrimination by Private Entities*

The ADA includes a blanket antidiscrimination provision: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ."[118] A "public accommodation" is defined to include "a terminal, depot, or other station used for specified public transportation . . . ."[119] Included among the prescribed conduct is denial of the opportunity, unequal, different or separate opportunity "to participate in or benefit from the goods, services, facilities, privileges, or accommodation . . . ."[120]

Among the specific prohibitions of the ADA are: "a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofit-

113. 55 Fed. Reg. 40,772 (1990); 49 C.F.R. § 37.25(d) (1990).

114. 55 Fed. Reg. 40,774-75 (1990); 49 C.F.R. §§ 37.51-57, 37.81-89 (1990).

115. *A.D.A., supra* note 18, at § 224.

116. *Id.* at § 224; 55 Fed. Reg. 40,772 (1990); 49 C.F.R. § 37.27 (1990).

117. Fed. Reg. 40,773 (1990); *see*, 49 C.F.R. § 37.7(f) (1990). For example, the time delay between a phone call to access the demand responsive system and pick up the individual is not to be greater because the individual needs a lift or ramp or other accommodation to access the vehicle.

118. *A.D.A., supra* note 18, at § 302(a).

119. *Id.* at § 301(7).

120. *Id.* at § 302(b).

ting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable."[121]

What is readily achievable? The ADA defines it as "easily accomplishable and able to be carried out without much difficulty or expense," taking into account the nature and cost of the change and the overall financial resources of the enterprise. Thus, the legislation requires some retrofitting to be accomplished immediately.[122]

Changes in physical structure, design layout and equipment in existing buildings must be made only if they are reasonable accommodations designed to satisfy the needs of disabled job applicants and employees. However, any sections of the business open to customers or the general public must be made accessible if the cost is minor.

The ADA imposes more stringent accessibility requirements when a "commercial facility" is renovated or newly-built. These rules apply to all businesses, regardless of size. Major renovations of commercial facilities must, to the maximum extent feasible, be made accessible to the disabled.

The most stringent rules dealing with physical accessibility apply to the construction of new commercial facilities whose first occupancy occurs on or after January 26, 1993.[123]

Further, the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people . . . ."[124]

Such enterprise may not purchase a new vehicle (other than an automobile or van seating fewer than eight passengers) which is not readily accessible to individuals with disabilities, unless it is used in a demand responsive system and such system provides service equivalent to that provided the general public.[125] Thus, taxi cabs are exempt.

Similar requirements are imposed for the purchase of new rail cars, and the remanufacture of such cars so as to extend the life thereof for ten or more years.[126] Certain historical or antiquated rail cars more than 30 years in age and whose manufacturer is no longer in the business are exempt.[127]

Private companies operating "fixed route systems" (operating vehicles along a prescribed route according to a fixed schedule), must

121. *Id.* at § 302(b)(2)(A)(iv).
122. *Id.* at § 301(9).
123. *Major Changes*, *supra* note 11, at 15-16.
124. *A.D.A.*, *supra* note 18, at § 304(a).
125. *Id.* at § 304(b)(3).
126. *Id.* at § 304(b) (6)-(7).
127. *Id.* at § 304(c).

purchase or lease new vehicles (seating 16 passengers or more) which are accessible to individuals with disabilities, including those using wheelchairs.[128] If they do purchase a vehicle inaccessible to the handicapped, it shall be considered discrimination for them to fail to operate their systems so that, when viewed in their entirety, the system provides a level of service to individuals with disabilities which is equivalent to the level of service provided to those without disabilities.[129]

However, retail and service businesses which are not in the principal business of transporting people, but do offer transportation, must also comply with several provisions of the ADA. Examples of such organizations are hotels and motels that offer airport pick-up services.

In purchasing new vehicles seating more than 16 people, private entities not primarily engaged in transportation (e.g., airport shuttles operated by hotels, rent-a-car companies, or ski resorts) must acquire vehicles accessible to the handicapped, including those in wheelchairs, unless the system, when viewed in their entirety, provide equivalent service to the handicapped and non-handicapped.[130] Thus, a firm need not equip all of its vehicles with wheelchair lifts if its system will accommodate them adequately as a whole.

Finally, the U.S. Office of Technology Assessment is commissioned by the ADA to undertake a three year study of the most cost-effective means of achieving access in over-the-road buses (Greyhound-type buses with an elevated passenger deck over a baggage compartment), and to recommend legislation.[131] Within a year after the study is completed, DOT shall promulgate regulations identifying how over-the-road buses shall comply with the ADA.[132] Compliance is targeted for seven years for small providers and six years for others.[133] In the interim, DOT may not require retrofitting—structural changes to existing over-the-road buses—in order to obtain access for the disabled.[134] Such regulations also shall not require installation of accessible restrooms in the buses if that would result in a loss of seating capacity.[135]

D. Regulatory Implementation

The ADA requires the Architectural and Transportation Barriers Com-

128. 42 U.S.C. § 12181(4).
129. 42 U.S.C. § 12181(b)(2)(B)(i).
130. *A.D.A., supra* note 18, at §§ 302(b)(2)(B) & (D); 55 Fed. Reg. 40,774 (1990); 49 C.F.R. § 37.29 (1990).
131. *A.D.A., supra* note 18, at § 305.
132. *Id.* at § 306(a)(2)(B).
133. H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 79 (1990).
134. *Id.*
135. *A.D.A., supra* note 18, at § 306(a)(2)(C).

pliance Board to supplement its Minimum Guidelines and Requirements for Accessible Design by April 26, 1991, to insure that public buildings, facilities and vehicles covered by the act are accessible in terms of architecture, design and transportation to the disabled.[136] The DOT must issue regulations to implement the public and private transportation provisions by July 26, 1991 (several of these have been issued, and are discussed above). The Department of Justice must issue its regulations by then as well.[137]

E. Unresolved Issues

Several issues remain unresolved as of the date of this writing. One is, how shall a blind person be accommodated in bus service since he can neither read the destination on the front of the bus, nor see his destination when he arrives at it? The blind could be issued color coded cards to signal the driver of their destination, and the driver could call out each stop as he arrives at it.[138] Another is, how should transit authorities deal with access by non-traditional mobility devices, such as three-wheel scooters, some of which are excessively heavy (600-700 pounds) for some lifts?[139] Still another is whether it is discriminatory to require securement for mobility device users while other users are not secured?[140] The resolution of these issues was left for another day.

F. Remedies

The ADA also provides the remedies available under section 505 of the Rehabilitation Act of 1973 (which incorporates those available under Title VII of the Civil Rights Act, including back pay, damages, attorney's fees and injunctions).[141]

It gives the disabled the remedies and procedures already available under Title VII of the Civil Rights Act of 1964 to those suffering racial discrimination.[142] Title VII outlaws discrimination based upon race, color, religion, sex or national origin. Job applicants or employees can file complaints with the Equal Employment Opportunity Commission (EEOC),

136. *Id.* at § 504. *See also*, 29 U.S.C. § 792 (1986).

137. 55 Fed. Reg. 35,858 (1990).

138. 55 Fed. Reg. 40,767 (1990).

139. 55 Fed. Reg. 40,767-68 (1990). A number of transit authorities either refuse to carry scooters and other non-standard devices or carry scooters and other non-standard devices or carry the devices but require the passenger to transfer out of his or her own device to a vehicle seat. This latter requirement typically is imposed when the transit provider believes it can successfully secure the mobility device but not the passenger while sitting in the device.

140. 55 Fed. Reg. 40,769 (1990).

141. 29 U.S.C. § 794a (1976).

142. 42 U.S.C. §§ 2000a-3(a), 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9 (1964); *Rights Law for Disabled*, N.Y.L.J., July 26, 1990, at 5.

which can investigate and file charges. If the EEOC does not file charges, the individual who complained is permitted to file a lawsuit. Back pay, reinstatement, court-ordered accommodations and attorneys' fees may be granted. Thus, violations of the physical accessibility rules may be handled by EEOC complaint, private lawsuit, or action by the U.S. Attorney General.[143]

One question raised at the time the ADA was passed was whether Title VII would be expanded to include jury trials and punitive damages as proposed under the then-pending civil rights bill before Congress.[144] The issue became moot for the time being, as President Bush vetoed the civil rights legislation.

Injunctive relief is also available.[145] Moreover, the U.S. Attorney General is obligated to investigate alleged violations of the ADA.[146] A court may assess civil penalties up to $50,000 for the first violation, and up to $100,000 for any subsequent violation, plus damages.[147] However, punitive damages are specifically excluded.[148]

VI. CONCLUSION

One criticism of the new legislation was that neither Congress nor the Administration made a responsible effort to determine the public or private costs of compliance.[149] Many businesses lobbied against the ADA, arguing that it would be expensive.

Some maintained that the new legislation would foster another "lawyer cottage industry." One attorney acknowledged the possibility of a "nuclear litigation explosion in the next decade. . . ."[150] Yet another hoped that the ADA would be implemented with a "minimum amount of litigation," but feared that "because it is such a sweeping law . . . there will be a substantial amount."[151] Another predicted that "without a battery of lawyers at their disposal, it will leave small employers playing a

143. *Major Changes*, *supra* note 11, at 16.

144. *Disabilities Law*, *supra* note 1, at 3.

145. *A.D.A.*, *supra* note 18, at § 308(a)(2). In the case of violations of section 302(b)(2)(A)(iv) and section 303(a), injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

146. *Id.* at § 308(b)(1)(A).

147. *Id.* at § 308(b)(2)(B)-(C).

148. *Id.* at § 308(b)(4).

149. *Every American*, *supra* note 6, at 26.

150. *Disabilities Law*, *supra* note 1, at 3.

151. *Id.*

highstakes lawsuit."[152] Among the potential areas for litigation in transportation is accident suits brought, for example, by those injured when bus lifts do not function properly, or when wheelchairs roll off them.[153]

The bus industry also objected to the high cost of compliance imposed by the new legislation. For example, Greyhound argued that compliance would cost it $40 million a year, "a sum that dwarfs its 1989 profit of $8.5 million."[154] Greyhound also alleged that the cost of each lift would be $35,000 per bus; others insisted that lifts could be purchased for less than $8,000.[155]

With its very survival in question, Greyhound, which underwent a $350 million leveraged buy-out in 1986, purchased Trailways for $80 million in 1987, and suffered a strike in 1990, may be ill-equipped to endure even a modest additional financial burden.[156] It is saddled with more than $340 million in long-term debt and has been unable to meet recent interest payments.[157] Greyhound ordinarily serves approximately 9,500 of the 10,000 communities which receive bus service. In contrast, Amtrak serves 498 communities, and all airlines serve 477.[158]

Not only Greyhound, but a number of bus companies are faced with a close-to-being unbearable squeeze on their profits.[159] Even without a wheelchair lift, a new bus costs about $300,000.[160] Handicapped access could increase new equipment costs by more than 10%. As one source noted, "Bus operators are concerned that the costs of compliance will be so high that bus passengers will have to pay higher fares and carrier profit margins will be further eroded."[161]

The ravages of destructive competition unleashed by deregulation have already forced bus companies to discontinue service to more than 4,500 communities, leading to the isolation of large pockets rural

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152. *Id.*

153. *See* 55 Fed. Reg. 40,769 (1990).

154. *Overview*, *supra* note 5, at 932.

155. *Id.* As a result of the current confusion, the ADA provides that the Office of Technology Assessment must undertake a study to determine, inter alia, "the most cost effective methods for making over-the-road buses readily accessible to and usable by individuals with disabilities, particularly individuals in wheelchairs." The study, which is to include any policy options for legislative action," must be completed within three years of the enactment of the Act.

156. *See* Dempsey, Thoms & Clapp, *Canadian Transport Liberalization: Planes, Trains, Trucks and Buses Rolling Across the Great White North*, 19 TRANSP. L.J. 113 (1990) [hereinafter *Planes, Trains*].

157. Phillips, *Intercity Bus Deregulation: Origins and Consequences*, 57 TRANSP. PRAC J. 351, 362 (1990) [hereinafter *Intercity Bus*].

158. Kahn, *Stopping By the Bus Terminal on a Dark and Stormy Night: The U.S. Bus Industry Seven Years After Deregulation*, 18 TRANSP. L.J. 255, 271 n. 48 (1990) [hereinafter *Stormy Night*].

159. *Id.* at 267.

160. *Id.*

161. *Intercity Bus*, *supra* note 157, at 363.

America.[162] In 1977, the last year in which the U.S. Department of Commerce performed a travel survey, 30% of all intercity bus passenger miles were consumed by individuals living in rural areas, compared to trains (20%), and airlines (15%); families earning less than $10,000 a year accounted for 45% of intercity bus miles, compared to trains (25%), automobiles (18%), and airlines (15%); people under the age of 18 or over the age of 64 accounted for half of intercity bus passengers, compared to automobiles (33%), railroads (25%), and airlines (17%).[163]

Access for the poor, the elderly, and the disabled means nothing if the bus no longer stops in your town. Congress needs to come to grips with the failure of deregulation and provide subsidies for small town service and handicapped access, or federalize the system into an "Ambus," like its successful sibling, Amtrak.[164] Amtrak's cost of compliance will be largely paid by the federal government and the "one car per train" rule will significantly temper those costs.

Undoubtedly, users and taxpayers will pay the price of additional access for the disabled. This is particularly troublesome in light of the efforts of recent Administrations to phase out federal operating assistance for public transit driven by unwieldy budget deficits.[165] Subway systems, in particular, are extremely expensive to construct. For example, it would have been cheaper to buy each Metro rider in the Washington, D.C. area two Mercedez Benzes than to have constructed the Metro subway system.

Higher fares will discourage ridership, exacerbating urban highway congestion and automobile pollution. One commentator objected to the cost of urban transit even before promulgation of the ADA, saying:

> In the past Federal regulations have been enacted which would require all mass transit systems to retrofit their facilities and equipment to accommodate the handicapped. The costs of this policy are prohibitive (especially to older systems such as Chicago) and would benefit relatively few members of society. . . .
>
> Many alternatives are available by which mass transit systems could provide the same, if not improved, services to the elderly and handicapped at a significantly lower cost. These include para-transit services, "dial-a-ride" services, and contractual agreements with private taxi companies.[166]

Many public transit systems had adopted dial-a-ride systems for the

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162. P. DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 206 (1990)

163. *Planes, Trains, supra* note 156, at 113.

164. *See generally*, P. DEMPSEY, FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION 54 (1990).

165. *See e.g.*, Hemily & Meyer, *The Future of Urban Public Transportation: The Problems and Opportunities of a Changing Federal Role*, 12 TRANSP. L.J. 287, 292-93 (1982).

166. Lowenstein, *The Need for Limitations on Federal Mass Transit Operating Subsidies: The Chicago Example*, 12 TRANSP. L.J. 265, 283 (1982).

disabled. In theory, such systems are not only cost-efficient, but they provide a superior level of service. If given the choice of standing at a cold, wet bus stop waiting for a crowded, late bus, only to transfer at another cold, wet stop to another crowded, late bus, or instead calling a van to pick you up at your home or apartment and deliver you to your destination, who wouldn't prefer the individualized service, whether one is handicapped or not?

Unfortunately, theory is not reality. In many cities paratransit and dial-a-ride services have a number of significant, and sometimes onerous, restrictions, such as a 24, 48 or 72 hour notification rule; priority given to medical and work trips (in that order); lengthy delays attributable to grouping pick-ups in order to reduce costs; and limitations on availability from 9:00 a.m. to 5:00 p.m. The cost of a truly demand-responsive system would be prohibitive.[167]

The ADA abhors "separate but equal" as almost a badge of slavery, preferring integration into the mainstream and equality for all. Senator Paul Simon summed up the benefits of the legislation by pointing out that, without it, the disabled suffer

> continued unnecessary deprivation, isolation, and deterioration in the lives of millions of Americans. What will be the consequences if we enact this law? Strengthened communities, greater integration, lower medical and institutional costs, and a substantial increase in this country's productivity. Most importantly, we will be ensuring the opportunity for all Americans with disabilities to lead lives of independence, dignity, and full participation as citizens of this nation. . . .
>
> It is unconscionable to imagine an able work force languishing at home because there is no access to public transportation. . . .
>
> Today the technology exists to fashion the existing transit systems with appropriate light and seating to accommodate those who need it. Trains and buses, particularly newly purchased models, are easily equipped. . . . As new buses and trains are purchased they are equipped with lifts. The added costs are relatively small in comparison to the actual gains that are made through employment and more importantly through independence.[168]

The U.S. government presently spends $57 billion each year on benefits for the disabled. That figure may be reduced if significant numbers of disabled Americans acquire access to employment.[169] Transportation is an important means to that end.

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167. Letter from Patricia Yeager to Paul Dempsey (Nov. 12, 1990).

168. 134 CONG. REC. S5106, S5116-17 (daily ed. April 28, 1988) (statement of Sen. Simon).

169. *Every American*, *supra* note 6, at 26.