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## The Professionalization of Urban Accessibility

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# THE PROFESSIONALIZATION OF URBAN ACCESSIBILITY

*Doron Dorfman & Mariela Yabo\**

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### INTRODUCTION

U.S. disability access law has a compliance issue. While disability law “on the books” is composed of civil rights legislation, regulations, and specified codes, in reality, decades after their enactment, many places of public accommodation remain inaccessible and out of reach for individuals with physical disabilities.<sup>1</sup> Disability law scholars have observed that federal level enforcement of accessibility standards is not done at the design stage but only ex post through private litigation.<sup>2</sup> However, scholars have paid much less attention to the ways state and local laws enforce accessibility standards. This Article begins filling this gap in the literature by looking at the enforcement level of disability access in the context of urban built environments.<sup>3</sup>

Specifically, this Article examines the ways large U.S. cities have used their regulatory tools and state laws to move access enforcement

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1. Access to physical and virtual environments extends well beyond accommodations for people with mobility disabilities. Disability studies scholar Tanya Titchkosky famously argued, “Many physical and social environments are set up as if they never imagined the incredible variety of bodies, minds, senses, emotions, and lives that are ‘us.’ Daily life seems instead to function with a mythical, singular conception of the typical human . . . [a] ‘normate man.’” TANYA TITCHKOSKY, *A QUESTION OF ACCESS: DISABILITY, SPACE, MEANING* 26 (2011). Issues of access also move beyond the urban environment into rural communities, where they may be exacerbated by socioeconomic and spatial factors. Although the Authors are fully aware of these important applications of discussing disability access, they chose to focus their discussion on physical accessibility in urban environments, due to limited space and other restrictions.

2. *See infra* Section IV.A.

3. An incredibly important federal statute that covers accessibility in the housing context, which is beyond the scope of this Article, is the Fair Housing Act, amended in 1988 to extend an antidiscrimination mandate in housing to people with disabilities. *See* 42 U.S.C. § 3601.

forward through a process of professionalization.<sup>4</sup> Disability scholars have observed how disability access law increased the need for professional experts on accessibility, who serve as agents of enforcement in the early stages of planning, development, and construction in urban environments.<sup>5</sup> The United States did not standardize the process of producing accessibility experts on the federal level. Instead, it left the approach to states' and local authorities' discretion. Each city decides whether it wants to take an active or passive role in instituting accessibility professionals and enforcement mechanisms.

Many municipalities in large cities have established a special office or commission in charge of enforcing accessibility of the built environment.<sup>6</sup> Not all large cities, however, take the same approach to create expertise for implementing disability access laws, creating what this Article terms a *diffused model of professionalization and enforcement*.<sup>7</sup> While most cities take a similar "hands-on" approach with enforcing disability access laws in their government-owned buildings and facilities, various methods exist for enforcing the law in privately owned places of public accommodations. New York City does not actively enforce accessibility at private projects' approval or design stages but invites developers and architects to consult the City's accessibility professionals on their plans.<sup>8</sup> Big cities in California, like Los Angeles and San Francisco, use a similar approach but also rely on state law to standardize the profession of accessibility experts. A business owner or landlord is incentivized — by receiving some immunity and benefits in private litigation against them — to hire such an expert to assess their site's accessibility.<sup>9</sup> Chicago takes the most active role in employing accessibility professionals to review every application for new buildings or renovation permits and ensures compliance at the design stages.<sup>10</sup> This diffused model has affected the way disability access laws are being

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4. Professionalization is a move toward establishing a profession that is distinguishable from other occupations. Establishing a profession is done through building structure, including creating educational demands, entrance requirements, and ethical codes, as well as by forming attitudes like the sense of calling to the field and the extent to which the person uses colleagues as their major work reference. See Richard H. Hall, *Professionalization and Bureaucratization*, 33 AM. SOCIO. REV. 92, 92 (1968).

5. See *infra* Part III.

6. See *infra* note 184 and accompanying text.

7. See *infra* Section IV.B.

8. See *infra* Section IV.B.i.

9. See *infra* Section IV.B.ii.

10. See David Hanson, *The Chicago Perspective on Design for the Disabled*, 15 TOPICS STROKE REHAB. 75, 75 (2008); see also *infra* Section IV.B.iii.

enforced,<sup>11</sup> as the role of accessibility professionals was not clearly established *ex ante* at the design level of the built environment, but *ex post* through private litigation over buildings already erected. Scholars argued the limited mechanisms for enforcing accessibility established in the ADA — composed of private litigations from which plaintiffs could not get monetary damages — are a reason for still-widespread noncompliance with accessibility standards.<sup>12</sup> In addition, an orchestrated campaign against plaintiffs bringing accessibility suits also contributes to the lack of enforcement.<sup>13</sup> This Article argues that encouraging enforcement of disability access laws in the design and execution stages by certified accessibility professionals, rather than relying on litigation *ex post*, would provide a solution to a model that has proven ineffective in ensuring accessibility.

This Article also looks beyond the United States to Israel, a country that modeled its disability rights laws after those of the United States<sup>14</sup> but with a *centralized model of professionalization and enforcement*, standardized, streamlined, and enforced at the national level.<sup>15</sup>

The two legal systems diverge on issues of federalism, the role of government, and legal culture, yet they converge on their views of the ways disability antidiscrimination law should look. The Israeli system, however, embraces a centralized and proactive approach to the professionalization of accessibility experts and enforcement of accessibility, putting in place national regulatory mechanisms that can only be found sporadically within local governments in the United States. The Israeli ideas about enforcing accessibility are not entirely foreign in the U.S. context; showing how a full embrace of these mechanisms can look is instructive in offering valuable lessons and recommendations on how professionalization could lead to enforcement of accessibility standards.

This Article looks at how the Israeli Commission for Equal Rights for People with Disabilities, a statutory body, has actively enforced disability access laws through various tools indicated in Israeli disability rights legislation, including creating a new licensed profession. The Article then describes how the city of Tel Aviv-Jaffa, one of the most

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11. *See infra* Section IV.

12. *See infra* notes 154–60 and accompanying text.

13. *See infra* notes 171–82 and accompanying text.

14. *See* Neta Ziv, *Disability Law in Israel and the United States — A Comparative Perspective*, 28 ISR. Y.B. HUM. RTS. 171, 171–72 (1998).

15. *See infra* Section V.A.

influential municipalities in Israel, has dealt with accessibility professionalization and enforcement of the law on its premise.<sup>16</sup>

After analyzing the different models and ways to ensure access, the Article moves to a normative level and offers a vision for urban accessibility professionalization.<sup>17</sup> It alludes to the inherent tension within the professionalization process regarding participation by lay, disabled citizens with “access-knowledge” stemming from lived experience<sup>18</sup> as well as the need of standardized training and certification. It also offers ways to create a more effective, standardized, and inclusive avenue to ensure accessibility in urban environments.

This Article proceeds as follows. Section I describes the three-tiered system of U.S. disability access laws, briefly illustrating and contextualizing federal accessibility laws and regulations. Section II describes and contextualizes Israel’s disability access law system. Section III briefly discusses existing approaches and theories on accessibility professionalization. Section IV introduces and discusses the U.S. diffused model of accessibility professionalization and enforcement on the municipal level in select big cities: New York City, Los Angeles, San Francisco, and Chicago. Section V presents the centralized Israeli model of accessibility professionalization and enforcement and discusses its implementation in the city of Tel Aviv-Jaffa. Lastly, the Article turns to our proposed vision for urban accessibility professionalization in Section VI and then concludes.

### I. U.S. DISABILITY ACCESS LAW — AN INTRODUCTION TO A LAYERED SYSTEM

Access is foundational for disability rights, both conceptually and practically.<sup>19</sup> Without the ability to navigate the built environment, people with disabilities cannot enjoy the same services and opportunities nondisabled individuals get, and they cannot exercise their rights as equal citizens.<sup>20</sup> Thus, the accessibility of public space is the cornerstone for the “right to live in the world.”<sup>21</sup>

16. *See infra* Section V.B.

17. *See infra* Part VI.

18. *See* AIMI HAMRAIE, *BUILDING ACCESS: UNIVERSAL DESIGN AND THE POLITICS OF DISABILITY* 10 (2017); *see also infra* Parts III, VI and Section V.B.

19. *See* Sagit Mor, *With Access and Justice for All*, 39 *CARDOZO L. REV.* 611, 621 (2017).

20. *See id.* at 612–13.

21. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 *CALIF. L. REV.* 841, 841 (1966). As tenBroek, legal scholar and key figure in

Traditionally, disability access law has been thought to apply differently in the public sphere than in the private sphere. The main laws and regulations focused more on the public sphere and less on private property, striking a compromise between disability rights advocates' and property owners' interests.<sup>22</sup> This Article focuses on disability access law, specifically the need for accessibility in the public sphere.

U.S. disability access law operates on three levels: federal, state, and municipal. The Americans with Disabilities Act (ADA), the most comprehensive civil rights and antidiscrimination law pertaining to people with disabilities, sets standards and deals explicitly with accessibility in public spaces. It is not, however, a planning and zoning law. That is why the ADA and other federal disability rights laws do not preempt local land use and zoning law created in accordance with state property law.<sup>23</sup> States have the authority to regulate planning and zoning through the Tenth Amendment's police powers, and they delegate this authority to the local government.<sup>24</sup> Therefore, planning and executing inclusive and accessible urban development, in large part,

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disability rights advocacy, wrote, “[n]othing could be more essential to personality, social existence, economic opportunity—in short, to individual well-being and integration into the life of the community — than the physical capacity, the public approval, and the legal right to be abroad in the land.” *Id.*

22. See ROBIN PAUL MALLOY, *LAND USE LAW AND DISABILITY: PLANNING AND ZONING FOR ACCESSIBLE COMMUNITIES* 8–9 (2015) [hereinafter MALLOY, *LAND USE LAW AND DISABILITY*]. Property and real estate law expert Robin Malloy, has criticized the distinction between public and private spheres. He writes, “[t]he lack of strong inclusive design standards for all residential properties perpetuates problems of low accessibility for many residents and weakens the sustainability of our neighborhoods because it hinders the opportunities for social interaction and participation.” *Id.* at 8.

23. See ROBIN PAUL MALLOY, *DISABILITY LAW FOR PROPERTY, LAND USE, AND ZONING LAWYERS* 13 (2020).

24. See Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1170 (2017). State constitutions or enabling acts provide cities with general authority to legislate for the health, safety, and welfare of the local population, although those are usually subject to override by state law. The grant of this authority to legislate and regulate was adopted to allow local governments to engage in the day-to-day regulatory activities without having to seek specific authorization from the state legislature. In recent years, under the Trump Administration, this grant of authority has been undermined by the growth of preemptive state legislation, which aims to remove particular issues from local government control across an entire category of issues (including, municipal minimum wage, LGBTQ anti-discrimination, and sanctuary city laws). Nevertheless, the issue of accessibility has not been identified as one of those preempted issues. See *id.*; MALLOY, *LAND USE LAW AND DISABILITY*, *supra* note 22, at 14.

rests with local and regional authorities.<sup>25</sup> The rationale is connected to the main topic of this Article — expertise. Local governments are in the best position to know the community needs and built environment they are regulating.<sup>26</sup> The need to comply with access legislation increases professionals' roles in implementing accessibility. Local governments are also well situated to creatively develop alternatives that enhance accessibility beyond minimal compliance with federal regulation.<sup>27</sup>

On the federal level, three statutes govern disability access law: the Architectural Barriers Act of 1968 (ABA),<sup>28</sup> Section 504 of the Rehabilitation Act of 1973 (Section 504 or 504),<sup>29</sup> and the ADA of 1990.<sup>30</sup> Other than federal mandates, state and local laws regulating disability access are abundant. The Department of Justice (DOJ) has the authority, under the ADA, to certify local or state codes to ensure they are consistent with the ADA.<sup>31</sup> State and local laws can — and generally do — go beyond the federal mandates to enforce broader standards of access.<sup>32</sup>

Next is a review of federal disability access legislation, which has the most substantial impact on how accessibility is implemented at all levels.

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25. See MALLOY, LAND USE LAW AND DISABILITY, *supra* note 22, at 12. Equality scholars have called for the enforcement of constitutional rights on the national level, noting decentralization often leads to the underenforcement of those rights, specifically affecting subordinated groups. See, e.g., Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1709 (2017). The sub-par state of physical accessibility of the urban environment, see *supra* notes 147–50 and accompanying text, may be attributed, at least to some extent, to the big role that municipalities, instead of the federal government, play in enforcing accessibility. This discussion is beyond the scope of this Article but should be explored in future research.

26. See MALLOY, LAND USE LAW AND DISABILITY, *supra* note 22, at 83–84. The state reviews local legislation through regional and state authorities to ensure consistency in planning between local authorities. See *id.* at 13.

27. See *id.* at 83–84.

28. 42 U.S.C. § 4151.

29. 29 U.S.C. § 794(a).

30. 42 U.S.C. § 12101.

31. See *id.* § 12188(b)(1)(A)(ii); see also *ADA Certification of State and Local Accessibility Requirements*, ADA.GOV, <https://www.ada.gov/reachingout/codecert.html#:~:text=ADA%20Certification%20of%20State%20and%20Local%20Accessibility%20Requirements&text=Title%20III%20of%20the%20ADA,for%20new%20construction%20and%20alterations> [https://perma.cc/7RQS-KQUT] (last visited Sept. 29, 2020).

32. See 42 U.S.C. § 12188(b)(ii); MALLOY, LAND USE LAW AND DISABILITY, *supra* note 22, at 83–84.



### A. The Architectural Barrier Act of 1968

The origins of federal legislation that allow for accessibility for people with disabilities date back to the late 1950s, when Timothy Nugent, a professor of Rehabilitation Education at the University of Illinois, formed and headed a committee that included the Veterans Administration and the American National Standard Institute (ANSI).<sup>33</sup> The rationale behind the committee was to develop the first standards for ensuring accessibility. In 1961, the committee published *ANSI 117.1-1961: American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped*.<sup>34</sup> The principles underlining this revolutionary guideline, which included the knowledge and lived experiences of Nugent's disabled students, served for decades as the basis of local and national codes, including the ABA.<sup>35</sup>

Four years later, in 1965, a Vocational Rehabilitation Amendments provision called for a study to determine what needed to be done to make facilities and buildings available to disabled people in the United States.<sup>36</sup> Subsequently, the National Commission on Architectural Barriers to Rehabilitation of the Handicapped prepared a report titled *Design for All Americans* argued that people with disabilities and elderly people should be afforded spatial access as a right of citizenship.<sup>37</sup> The report inspired a call for enacting a law that requires all public, federal buildings to be physically accessible.<sup>38</sup> Enter the ABA.<sup>39</sup>

One year after Congress enacted the ABA, the General Service Administration issued regulations to implement it.<sup>40</sup> The regulations required the design, construction, and alteration of buildings covered by the Act be undertaken according to the *ANSI 117.1* standards.<sup>41</sup> The Architectural and Transportation Barriers Compliance Board (the access board), created by Congress and codified in Section 502 of the

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33. See STEPHEN L. PERCY, *DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY: THE POLITICS OF IMPLEMENTATION* 49 (1989); see also BESS WILLIAMSON, *ACCESSIBLE AMERICA: A HISTORY OF DISABILITY AND DESIGN* 63–64 (2019); *Tim Nugent a Pioneer in Changing Life for People with Disabilities*, RSCH. NEWS (Nov. 12, 2015, 1:15 PM), <https://news.illinois.edu/view/6367/277535> [<https://perma.cc/U8XE-LUT7>].

34. See WILLIAMSON, *supra* note 33, at 63–64.

35. See *id.* at 64.

36. See PERCY, *supra* note 33, at 49–50.

37. See HAMRAIE, *supra* note 18, at 90–91; PERCY, *supra* note 33, at 49–50.

38. See PERCY, *supra* note 33, at 50.

39. See *id.*

40. See 41 C.F.R. § 102-76.60.

41. See PERCY, *supra* note 33, at 108; see also HAMRAIE, *supra* note 18, at 91, 200.

Rehabilitation Act of 1973, also played a crucial role in refining accessibility policy and coordinating the ABA's implementation.<sup>42</sup> Despite the ABA being a strong statement of congressional intent, the implementation efforts were slow.<sup>43</sup>

The ABA was amended a few times to finally require that all buildings constructed, leased (after construction or alteration in accordance with federal government supervision), or financed by the federal government be accessible to physically disabled individuals. Exceptions were enacted for privately owned structures and facilities on military installations.<sup>44</sup>

### B. Section 504 to the Rehabilitation Act of 1973

Section 504 comprises of a single sentence that appears at the end of the Rehabilitation Act. It reads: "No otherwise qualified handicapped individual in the United States . . . 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."<sup>45</sup> In his famous book on Section 504's enactment, Richard Scotch notes at the time of its enactment, neither Congress members nor those who were concerned with disability issues took any note of the section — that it was essentially "a fluke."<sup>46</sup> As disability studies scholar Lennard Davis vividly described, Section 504 was slipped into the Rehabilitation Act "like a drug into someone's drink."<sup>47</sup> Within a few years, however, this fluke would be considered

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42. See PERCY, *supra* note 33, at 107. The functions of the board were to (1) "ensure compliance with standards;" (2) "investigate and examine alternative approaches to the architectural, transportation, . . . and attitudinal barriers confronting" handicapped individuals, particularly with respect to public buildings and other public facilities; (3) determine measures taken at the federal, state, and local level and by other public or nonprofit agencies to eliminate barriers; (4) promote use of the international accessibility symbol; (5) report to the President and Congress on results of studies and investigations of barrier elimination; and (6) make recommendations to the president and Congress for legislation and administration as deemed necessary to eliminate barriers. See 29 U.S.C. § 792(b).

43. See PERCY, *supra* note 33, at 124.

44. See 42 U.S.C. § 4151.

45. 29 U.S.C. § 794(a).

46. See RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 60–61 (2001).

47. LENNARD DAVIS, ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS 58 (2016).

landmark legislation.<sup>48</sup> Section 504 encompasses a myriad of issues, including employment, health, education, welfare, and social services, all administered through institutions receiving federal funding and beyond the scope of accessibility of public spaces. The strong symbolic statement, however, lacked guidelines for its implementation. With practically no legislative history behind it, there came a need to establish guidelines to lift the mandate off the page and into public space.<sup>49</sup> In the summer of 1975, the Office of Civil Rights (OCR) within the Department of Health, Education, and Welfare (HEW) presented a draft of the 504 regulations.<sup>50</sup> The architectural barriers section, sub-chapter C, proved to be among the Section 504 regulation's most controversial provisions. It aimed to ensure architectural alterations in a wide array of facilities that receive federal funding, ranging from Social Security offices to schools and college campuses. Those alterations came with a hefty price tag.<sup>51</sup> Worries about costs led to delays in the publication and signing of the regulations, which frustrated disability advocates.<sup>52</sup> In 1977, when the then-Secretary of HEW Joseph Califano suggested compromises and waivers in the regulations, the disability community showed its resilience and power.<sup>53</sup> Demonstrations took place across the country, with the largest one in Washington, D.C.<sup>54</sup> In San Francisco, disability advocates occupied the HEW building for 25 days in what was regarded as "perhaps the single most impressive act of civil disobedience in the United States over the last quarter-century."<sup>55</sup> On April 28, 1977, those protests ended in victory and with the signing of the regulations, without the compromises suggested by critics like Califano.<sup>56</sup> Thus, it took nearly

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48. See *id.* at 52; see also WILLIAMSON, *supra* note 33, at 130. Many attribute the first use of civil rights language regarding disabled people to Section 504, but the first explicit articulation of a "right" for people with disabilities came three years prior. See DAVID PETTINICCHIO, *THE POLITICS OF EMPOWERMENT: DISABILITY RIGHTS AND THE CYCLE OF AMERICAN POLICY REFORM* 66 (2019). In 1970, an amendment to the Urban Mass Transportation Act stated "elderly and handicapped persons have the *same right* as other persons to utilize mass transportation and services." *Id.* (emphasis added).

49. See PERCY, *supra* note 33, at 64.

50. See SCOTCH, *supra* note 46, at 86–87.

51. See *id.* at 74–75, 89–91.

52. See *id.* at 95.

53. See WILLIAMSON, *supra* note 33, at 131–32.

54. See *id.* at 132.

55. Susan Schweik, *Lomax's Matrix: Disability, Solidarity, and the Black Power of 504*, *DISABILITY STUD. Q.* 31 (2011); see also RANDY SHAW, *THE ACTIVIST'S HANDBOOK: A PRIMER* 235 (2001); HAMRAIE, *supra* note 18, at 125–27.

56. See SCOTCH, *supra* note 46, at 115, 117; WILLIAMSON, *supra* note 33, at 132.

two years after completing Section 504's original draft to get it signed into law, with the final version looking nearly the same as the original draft.<sup>57</sup>

Sub-chapter C requires an entity that receives federal funding to make "alteration of existing facilities and construction of new facilities in conformance with the requirements [of the regulations]." <sup>58</sup> The facilities need to comply with the Uniform Federal Accessibility Standards (UFAS).<sup>59</sup> "Only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps," are exempt.<sup>60</sup>

### C. Title II and Title III to the ADA

The ADA, enacted in 1990, is an omnibus antidiscrimination statute, modeled after the Civil Rights Act of 1964.<sup>61</sup> At the time of the ADA's enactment, it was considered a revolutionary civil rights law.<sup>62</sup> Similarly, legal scholar Linda Hamilton Krieger referred to the ADA as a "transformative law," one that "challenge[s] preexisting consensus definitions of particular categories or concepts, and . . . attempt[s] to redefine, or 're-institutionalize' them with a different set of . . . meanings, values, and normative principals."<sup>63</sup> Generally speaking,

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57. See SCOTCH, *supra* note 46, at 120.

58. 34 C.F.R. § 104.22(b).

59. See *id.* § 104.23(c).

60. *Id.* § 104.23(c)(2).

61. See Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 *DRAKE L. REV.* 819, 831, 831 n.64 (2015).

62. See Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 *HARV. C.R.-C.L. L. REV.* 413, 415 (1991); see also Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 *WAYNE L. REV.* 1267, 1276–77 (2009).

63. Linda Hamilton Krieger, *Afterward: Socio-Legal Backlash*, 21 *BERKELEY J. EMP. & LAB. L.* 476, 480 (2000); see also LINDA HAMILTON KRIEGER, *Sociolegal Backlash, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 340, 342–43 (Linda Hamilton Krieger ed., 2003). Alex Geisinger and Michael Stein argue the ADA had better success changing attitudes toward public accommodations and access (Title III) than attitudes toward equal participation of disabled workers in the labor market (Title I). They attribute this gap to ingrained public views that people with disabilities lack productivity and the high costs they impose on employers; these were proven incorrect in the literature. See Alex C. Geisinger & Michael Ashley Stein, *Expressive Law and the Americans with Disabilities Act*, 114 *MICH. L. REV.* 1061, 1074–75, 1078 (2016).

Title II of the ADA is similar to Section 504.<sup>64</sup> Title II, nonetheless, extends its scope to prohibit disability discrimination in state and local government entities' programs and activities, without funding playing any part in determining the legal application.<sup>65</sup> The ADA's novelty regarding accessibility and inclusive design was in applying those concepts to places of public accommodations, which commercial entities privately operated, the rules for which are found in Title III of the ADA. Title III prohibits disability discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."<sup>66</sup> It requires "places of public accommodation and commercial facilities to be designed, constructed, and altered in compliance with the accessibility standards established [in regulations]."<sup>67</sup> The ADA's definition of "disability discrimination" includes noncompliance with accessibility standards, meaning "a failure to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable."<sup>68</sup>

Titles II and III are implemented through regulations that ensure nondiscrimination in all services, programs, and activities state and local governments provide to the public<sup>69</sup> and in places of public accommodations and commercial facilities.<sup>70</sup> Similar to the 504 regulations, both Title II and Title III distinguish between existing facilities and new construction built after the ADA was in place,<sup>71</sup> with more stringent accessibility regulations placed on the latter. The DOJ also promulgated standards for accessible design in 1991 (and amended in 2010), which are detailed building codes binding on new construction

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64. See 42 U.S.C. § 12201 ("Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . .").

65. See *id.* §§ 12131–12132.

66. *Id.* § 12182(a).

67. 28 C.F.R. § 36.101 (2010).

68. 42 U.S.C. § 12182(b)(2)(A)(iv).

69. See 28 C.F.R. § 35.106.

70. See *id.* § 36.102.

71. Title II defines "new construction" as any construction commenced after January 26, 1992, and these need to "be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities," with exceptions in place for when accessibility is structurally impracticable. See *id.* §§ 35.151(a)(1)–(2). Title III defines "new construction" as facilities that were first occupied after January 26, 1993, or received a certificate from the local government after January 26, 1992. See *id.* § 36.401(a)(2).

and alteration (i.e., remodeling, renovation, or historic restoration).<sup>72</sup> In addition, the access board enacted the Americans with Disabilities Act Accessibility Guidelines (ADAAG), which are accessibility codes that include

scoping and technical requirements . . . to be applied during the design, construction, and alteration of buildings and facilities covered by titles II and III of the ADA to the extent required by regulations issued by Federal agencies, including the Department of Justice and the Department of Transportation, under the ADA.<sup>73</sup>

Scoping provisions within the ADAAG are directives that specify access requirements and help account for any differences between the ADA, the ABA, and other codes and state regulations. They assist the designer in complying with all of those standards.<sup>74</sup>

## II. DISABILITY ACCESS LAW IN ISRAEL — INTRODUCING A RIGHTS DISCOURSE

### A. Paradigm Shifts in Israeli Disability Access Law

Israeli disability law went through different stages. During the state's first decades, disability policy focused solely on personal rehabilitation or differential welfare plans, such as allowances and benefits, fitting with Israel's welfare state ethos.<sup>75</sup> Based on the discourses of need, charity, or the medical model of disability, medical and welfare professionals principally managed the policy.<sup>76</sup>

72. See *2010 ADA Standards for Accessible Design*, DEP'T JUSTICE (Sept. 15, 2010), <https://www.ada.gov/regs2010/2010ADASTandards/2010ADAstandards.htm> [<https://perma.cc/4RPC-VN7Y>].

73. *Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities*, U.S. Architectural & Transp. Barriers Compliance Bd. 1 (2002), <https://www.access-board.gov/attachments/article/1350/adaag.pdf> [<https://perma.cc/3D98-ZE9F>].

74. See MALLOY, *LAND USE LAW AND DISABILITY*, *supra* note 22, at 115.

75. See Roni Holler, 'Rebuilding a Shattered Life and a Broken Body': *Social Work and Disability Discourses in Israel's First Decades*, 49 *BRITISH J. SOC. WORK* 448, 458–59 (2019); Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 *YALE J.L. & HUMAN.* 63, 85 (2006).

76. See generally Dina Feldman, "Environmental Justice" and Persons with Disabilities in Israel, 27 *DISABILITY STUD. Q.* (2007); Hila Rimon-Greenspan, *Disability Politics in Israel: Civil Society, Advocacy, and Contentious Politics*, 27 *DISABILITY STUD. Q.* (2007).

In tandem with the rise of the U.S. and British disability rights movements,<sup>77</sup> the first paradigm shift for Israeli disability policy started during the 1970s and 1980s.<sup>78</sup> This paradigm shift, which included a change in discourse from a medical view of disability to a social model view,<sup>79</sup> was led mainly by organizations of persons with mobility disabilities and parents of children with disabilities who advocated for greater inclusion and social services.<sup>80</sup>

The advocacy efforts led to the enactment of the first laws focusing on inclusion and accessibility. These included the Special Education Law of 1988,<sup>81</sup> the amendment on the Planning and Building Law (Special Arrangements for Disabled People in Public Buildings) of 1981,<sup>82</sup> as well as smaller regulations, such as one mandating simultaneous sign language during national television broadcasts.<sup>83</sup>

The Planning and Building Law,<sup>84</sup> and its many regulations and amendments, embodies this paradigm shift. In 1972, the Minister of the Interior, who is in charge of this law's implementation, first added a chapter to the Planning and Building Regulations that requires special accommodations for persons with disabilities in public buildings.<sup>85</sup> Numerous enactments and amendments that reflect the complexity of the subject of accessibility quickly followed.<sup>86</sup> Nevertheless, these

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77. See Rabia Belt & Doron Dorfman, *Disability, Law, and the Humanities: The Rise of Disability Legal Studies*, in OXFORD HANDBOOK OF L. & HUMAN. 145, 147–49 (Simon Stern et al. eds., 2019).

78. See Feldman, *supra* note 76; Rimon-Greenspan, *supra* note 76.

79. In the 1970s, the social model of disability, which focuses on society's attitudes toward people with disabilities rather than on purely medical accounts completely inherent to individuals, was developed in England. This model later traveled internationally, including to the United States, and significantly influenced the disability rights movement and the drafting of the ADA. See KATHARINA HEYER, *RIGHTS ENABLED: THE DISABILITY REVOLUTION FROM THE US, TO GERMANY AND JAPAN, TO THE UNITED NATIONS* 19–20 (2015); MICHAEL OLIVER, *THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH* 11 (1990); Bill Hughes & Kevin Paterson, *The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment*, 12 *DISABILITY & SOC'Y* 325, 328–29 (1997); Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 *COLUM. HUM. RTS. L. REV.* 403, 426–28 (2011).

80. See Feldman, *supra* note 76; Rimon-Greenspan, *supra* note 76.

81. See Special Education Law, 5748–1988, SH 1256 114 (Isr.).

82. See The Planning and Building Law, 5741–1981, SH 2497 212 (Isr.), [https://www.nevo.co.il/law\\_html/law01/044\\_001.htm](https://www.nevo.co.il/law_html/law01/044_001.htm) [<https://perma.cc/3UL5-WAS9>].

83. See Sharon Barnatt & Rachel Rotman, *Disability Policies and Protests in Israel*, 27 *DISABILITY STUD. Q.* (2007).

84. See The Planning and Building Law, 5725–1965, SH 5725 307 (Isr.).

85. See Feldman, *supra* note 76.

86. See *id.*

amendments were not done cohesively but reflected more of “patchwork legislation” that lacked enforcement mechanisms or means to increase public awareness.<sup>87</sup> Thus, despite the existence of the Planning and Building Law and other regulations regarding accessibility issues, agencies mostly ignored their requirements for subsequent years.<sup>88</sup> Another criticism was that the Planning and Building Law only relates to specific environments, such as parking lots and public toilets, and excludes accommodations for visual, hearing, and mental impairments. Members drawn from these communities were unrepresented in the process of legislation.<sup>89</sup>

The second paradigm shift began in the 1990s, shifting from welfare legislation to disability rights legislation, which had been neglected and scarce until then. Unlike the struggle for disability rights recognition in the United States, in Israel, lawyers from the civil society collaborating and working closely with the government mainly led this shift.<sup>90</sup> For instance, one main organization advocating for disability human rights was Bizchut, a professional legal advocacy organization established in 1992 that declared itself the Human Rights Center for People with Disabilities.<sup>91</sup> Soon after its establishment, Bizchut filed a Supreme Court petition in *Botzer v. Maccabim-Reut Local Authority*,<sup>92</sup> the first and leading case on accessibility in Israel.<sup>93</sup> This petition, filed on behalf of a 13-year-old, wheelchair-user student, requested that the student’s municipality make its public school buildings accessible.<sup>94</sup> In 1996, the Supreme Court handed down its first decision regarding accessibility in public buildings and accommodations, deriving the student’s right to access all areas in his school from his right to equality and dignity.<sup>95</sup>

87. *See id.*

88. *See Ziv, supra* note 14, at 199. A 2002 official report, for example, showed authorities have not internalized awareness of and commitment to accessibility and the inclusion of people with disabilities in Israeli society, which resulted to very little, if any, of this legislation being implemented in practice. *See Feldman, supra* note 76.

89. *See Feldman, supra* note 76.

90. *See Arie Rimmerman & Stanley S. Herr, The Power of the Powerless: A Study on the Israeli Disability Strike of 1999*, 15 J. DISABILITY POL’Y STUD. 12, 16–17 (2004).

91. *Bizchut* is the Hebrew term for “by right,” as opposed to “by charity.” It was the first disability organization guided by human and civil rights as its underlying principles. Its mandate was cross disability, and its goals were to provide legal advocacy and representation to all persons with disabilities. *See Ziv, supra* note 14, at 172–73.

92. HC 7081/93, *Botzer v. Maccabim-Reut Local Authority*, 50 PD 1 (1996) (Isr.).

93. *See Stanley S. Herr, Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J.L. REFORM 305, 329 (2001).

94. *See id.*

95. *See id.*



The then-Supreme Court President Aharon Barak reasoned, for the first time in the Israeli courts, that the right of persons with disabilities to integrate fully into society should be considered a human rights issue and determined the purpose of the 1981 Planning and Building Regulations was to ensure dignity and equal rights for people with disabilities.<sup>96</sup> Motivated by the *Botzer* decision's success in advancing the rights-based approach, Bizchut decided to submit a comprehensive, new disability rights legislation bill, which became the Equal Rights for People with Disabilities Law (ERPDL).<sup>97</sup>

### B. The Equal Rights for People with Disabilities Law

The ERPDL was primarily influenced by some of the principles embodied in the ADA, such as its cross-disability application, its civil rights and nondiscrimination approach, and its extensive coverage of many areas of life.<sup>98</sup> The statute does, however, go beyond the ADA's prohibition of discrimination by adding various entitlements to receive accommodations, assistance, or services.<sup>99</sup> This expansion aims to achieve substantive equality, and disability legislation influenced participation in Scandinavian countries, mainly Sweden.<sup>100</sup> Such inclusion of multiple "positive rights" elements, extending beyond the ADA's reasonable accommodations standard,<sup>101</sup> is possibly due to the Israeli tradition of government involvement in the social and economic sectors; this stems from the welfare state ideology. Despite erosion to the Israeli welfare state ideology in the last few decades due to changes in social values (from solidarity, communal responsibility, and equality, toward individualism and the free market), the underlying notions of the state's responsibility to its citizens' welfare persist, for "many Israelis still look to the government to provide essential social services."<sup>102</sup>

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96. See *id.*; Feldman, *supra* note 76.

97. See Rimon-Greenspan, *supra* note 76.

98. See Herr, *supra* note 93, at 322; Ziv, *supra* note 14, at 173.

99. The ERPDL's innovation does not fully guarantee an undisputed level of support, but rather aims to provide Israelis with disabilities the leverage to claim, advocate, and anticipate that among available public resources, the government would have to acknowledge their needs and not deny them up front. See Ziv, *supra* note 14, at 197.

100. See Rimon-Greenspan, *supra* note 76; Ziv, *supra* note 14, at 176.

101. For a discussion of the ADA's reasonable accommodations as "positive rights," which are foreign to the U.S. legal tradition, see Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 566–67 (2020).

102. See Ziv, *supra* note 14, at 179–82 (quoting Amos Shapiro, *Why Israel Has No Constitution*, 37 ST. LOUIS L.J. 283, 284 (1993)).

The ERPDL includes additional principles, such as gradual implementation over several years, the right of persons with disabilities to make decisions about their lives, dignity through the supply of universal services provided to the general public and in an appropriate standard, and the establishment of a public enforcement agency — the Commission for Equal Rights for People with Disabilities.<sup>103</sup>

After a long lobbying process, the ERPDL was ratified in February 1998 and set to go into effect on January 1, 1999.<sup>104</sup> The ERPDL includes four notable chapters: Basic Principles, Employment, Public Transportation Services, and the Equal Rights for People with Disabilities Commission, which includes its Advisory Committee.

The Commission for Equal Rights of Persons with Disabilities was established under the Ministry of Justice in 2000.<sup>105</sup> The Commission's main responsibility is to enforce the ERPDL and other Israeli disability laws through professional supervisors, prevent discrimination, promote the integration of people with disabilities, and promote policies relating to the rights of people with disabilities.<sup>106</sup>

The Advisory Committee to the Commission has been functioning since April 2003.<sup>107</sup> The Advisory Committee contains members who are representatives of organizations with a variety of disabilities (physical, sensory, intellectual, mental, and cognitive), representatives of families and organizations involved in promoting the rights of persons with disabilities, and representatives of the public at large.<sup>108</sup> The ERPDL requires a majority of the committee be composed of people with disabilities.<sup>109</sup> The Commission consults with the Advisory Committee in matters related to its functions — these include, among others, promoting the ERPDL's main principles, preventing discrimination against people with disabilities in Israel, and carrying out the regulatory role detailed in the law.<sup>110</sup>

103. *See id.* at 174–75.

104. *See* Herr, *supra* note 93, at 343.

105. *See About, COMM'N FOR EQUAL RTS. PERSONS WITH DISABILITIES*, [https://www.gov.il/en/departments/about/about\\_the\\_commission](https://www.gov.il/en/departments/about/about_the_commission) [<https://perma.cc/5LVT-G62G>] (last visited Sept. 26, 2020).

106. *See id.*

107. *See* Feldman, *supra* note 76; *see also Advisory Committee, COMM'N FOR EQUAL RTS. PERSONS WITH DISABILITIES*, [https://www.gov.il/he/Departments/General/advisory\\_committee](https://www.gov.il/he/Departments/General/advisory_committee) [<https://perma.cc/G4LU-98DS>] (last visited Sept. 26, 2020).

108. *See About, supra* note 105.

109. *See Advisory Committee, supra* note 107.

110. *See* Feldman, *supra* note 76.

### C. The Accessibility Chapter

As accessibility became more known and common in other countries' legislatures, and after prior legal achievements in this field in Israel, Bizchut decided it was the right time to advance comprehensive accessibility legislation. This idea manifested itself in a new chapter on accessibility in an amendment of the ERPDL. In March 2005, the ERPDL Amendment no. 2, commonly known as the Accessibility Chapter, was enacted.<sup>111</sup>

Reminiscent of a combination of Title II and Title III of the ADA, the Accessibility Chapter created an obligation to ensure accessibility in both new and existing public buildings, infrastructure, open spaces, and services provided either by the public or the private sectors.<sup>112</sup>

To transform the formal definition of "accessibility" into actionable practices, the legislature ordered the different government offices, according to their responsibilities over the different kinds of services and spaces, to formulate the provision of multiple detailed accessibility regulations. For example, the Ministry of Education is responsible for formulating different regulations dealing with accessibility in new and existing schools (from preschool to high school) as well as regulations on accessibility in institutions of higher education; the Ministry of Interior implements regulations for public boardwalks and new and existing buildings; and the Ministry of Transport covers regulations for buses, trains, stations, airports, and more.<sup>113</sup> Today there are 25 accessibility regulations enacted, and another nine still being discussed or waiting for

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111. *See id.*; Rimon-Greenspan, *supra* note 76.

112. The Chapter defines "accessibility" as the opportunity to reach a place, move about and orient oneself therein, use and benefit from a service, supply of a product, receive information that is given or produced in a place or service framework or in connection thereto, use of facilities, and participation in programs and activities being held therein, all in an equal, dignified, independent and safe manner. *See* § 19A, Equal Rights for People with Disabilities Law, 5765–2005, SH 1995 288 (Isr.), [https://www.nevo.co.il/law\\_html/law01/p214m2\\_001.htm#Seif29](https://www.nevo.co.il/law_html/law01/p214m2_001.htm#Seif29) [<https://perma.cc/GP59-DNUD>].

113. *See* *About*, MINISTRY OF EDUCATION, [https://www.gov.il/en/departments/ministry\\_of\\_education](https://www.gov.il/en/departments/ministry_of_education) [<https://perma.cc/H8A4-FCH8>] (last visited Sept. 29, 2020); *About*, MINISTRY OF INTERIOR, [https://www.gov.il/en/departments/ministry\\_of\\_interior](https://www.gov.il/en/departments/ministry_of_interior) [<https://perma.cc/PKR5-QVSK>] (last visited Sept. 29, 2020); *About*, MINISTRY OF TRANSPORT & ROAD SAFETY, [https://www.gov.il/en/departments/ministry\\_of\\_transport\\_and\\_road\\_safety](https://www.gov.il/en/departments/ministry_of_transport_and_road_safety) [<https://perma.cc/RM7X-V3VS>] (last visited Sept. 29, 2020).

approval.<sup>114</sup> The legislative process for these accessibility regulations involved (and continues to involve) hundreds of different stakeholders, including representatives from most of the Israeli Ministries, people with disabilities organizations, municipalities, the private sector, professionals, and activists.<sup>115</sup>

In a move that seems contrary to the United States' practices, the Accessibility Chapter and its regulations are to be implemented within specified time spans, shorter for the business sector than for the public.<sup>116</sup> In addition, if private businesses can prove undue burden, they may receive exemptions in some cases. Those exemptions, however, are not available to the public sector.

The ERPDL's Accessibility Chapter includes a number of measures to ensure compliance. It defines the position of an "accessibility coordinator," who must be appointed at any workplace employing more than 25 workers, and whose task is to promote accessibility within the workplace and provide information about accommodations.<sup>117</sup> It also grants the Commission civil and criminal enforcement powers and requires supervision and enforcement of other government Ministries.<sup>118</sup> Finally, the Chapter defines two new licensed expert professionals in the area of accessibility who provide consultations and give approval to different building plans, business licenses, and more.<sup>119</sup>

The following Sections discuss this Article's main issue, the professionalization of accessibility, specifically in urban contexts. First is an introduction to the existing approaches toward professionalization and disability and a discussion of how the legal frameworks presented in the first two sections affected the development of accessibility expertise.

### III. PROFESSIONALIZATION AND URBAN ACCESSIBILITY

Professionalization is a move toward establishing a profession that is distinguishable from other occupations. Establishing a profession is

114. Email from Comm'n for Equal Rights of Persons with Disabilities, to Authors (July 2, 2020) (on file with authors).

115. See Feldman, *supra* note 76.

116. See *id.*

117. A similar requirement exists in the Title II regulations, requiring public entities that employ more than 50 persons to designate one employee to coordinate efforts to accommodate disabled employees and establish a grievance procedure. See 28 C.F.R. § 35.107. In Israel, this duty applies to both public and private employers with over 25 employees. See § 19(42), Equal Rights for People with Disabilities Law, 5765–2005, SH 1995 288 (Isr.).

118. For further discussion see *infra* Section V.A.

119. See Feldman, *supra* note 76; see also *infra* Section V.B.

done by creating structure — including establishing educational demands, entrance requirements, and professional codes of conduct — and forming attitudes like the sense of one’s calling to the profession and the extent to which he or she uses colleagues as a major work reference.<sup>120</sup> Professionals from different fields have played, and continue to play, an important role in the lives of people with disabilities. Often, disability professionals use unique practice and language designed for establishing expertise. Those practices have been criticized for serving as a tool to preserve control and marginalizing people with disabilities.<sup>121</sup> As sociologist Gary Albrecht famously argued, “the disability business” made out of the rehabilitation and health-care industries, exerted a great amount of power on the lives of disabled people in the United States.<sup>122</sup>

In response, as part of their struggle toward rights and equal participation, disability advocates and scholars have been operating under the motto of “nothing about us without us” — meaning, people with disabilities should have the right to be involved in decision-making processes related to their everyday lives.<sup>123</sup> In the 1970s to 1980s, for example, disability advocates criticized the fact that the U.S. social welfare programs relied heavily on the input of “helping professions” who exerted too much control over the ways disabled individuals could manage their day-to-day affairs.<sup>124</sup> In that context, the “nothing about us without us” agenda led the shift to “consumer-controlled” home and community-based services (HCBS) under Medicaid.<sup>125</sup>

Urban planners and other allied professions, such as developers, architects, and designers, have also historically played a central role in the lives of people with disabilities,<sup>126</sup> although they are not as widely discussed in the literature compared to medical professionals.<sup>127</sup> This became increasingly true as the urbanization process accelerated around the world. Urban planning and its allied professions were essentially

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120. See Hall, *supra* note 4, at 92.

121. See TOM SHAKESPEARE, *DISABILITY RIGHTS AND WRONGS* 191–92 (2006).

122. See GARY L. ALBRECHT, *THE DISABILITY BUSINESS: REHABILITATION IN AMERICA* 177–78 (1992).

123. See JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* 14–15, 25–28 (1998).

124. See Samuel R. Bagenstos, *The Future of Disability Law*, 114 *YALE L.J.* 1, 76 (2004).

125. See *id.* at 78–79.

126. See ROB IMRIE & PETER HALL, *INCLUSIVE DESIGN: DESIGNING AND DEVELOPING ACCESSIBLE ENVIRONMENTS* 147–49 (2001).

127. SHAKESPEARE, *supra* note 121, at 191.

created to address various problems in the modern industrial city.<sup>128</sup> They eventually reestablished the modern city as a space that, unfortunately, is often characterized by physical inaccessibility, contributing to the exclusion of disabled individuals from public social spaces.<sup>129</sup>

Today, awareness and knowledge of accessibility have increased significantly, though it still seems to be a low priority for property development, design, and construction professionals.<sup>130</sup> These professionals' attitudes toward and responses to accessibility standards mostly shape actors outside of the needs of disabled end users, including real estate's economics, concerns about compliance with the legal frameworks underpinning professionals' actions, and the technical discourses in construction and real estate.<sup>131</sup>

As social movements in the twentieth century focused on challenging knowledge and the systems in which they were produced, the disability

128. As geography of disability scholar Brendan Gleeson explains, planning had emerged in the nineteenth century to restrain, at least in part, "the radically liberalizing impulse of the market in one critical sphere, the land economy." Brendan Gleeson, *Reflexive Modernization: The Re-Enlightenment of Planning?*, 5 INT'L PLAN. STUD. 117, 126 (2000). He argues the economic logic had suppressed any alternative social rationalities, and planning professionals then promoted major reforms in industrial cities landscapes for issues such as sanitation and housing. *See id.*

129. Brendan Gleeson, *Disability and the Open City*, 38 URB. STUD. 251, 256–57 (2001).

130. *See* IMRIE & HALL, *supra* note 126, at 3. Illustrative examples include the \$41.5 million public Hunters Point Library opened in 2019 in Long Island City, which was "heralded as an architectural triumph." *See* Sharon Otterman, *New Library Is a \$41.5 Million Masterpiece. But about Those Stairs.*, N.Y. TIMES (Nov. 5, 2019), <https://www.nytimes.com/2019/11/05/nyregion/long-island-city-library.html> [<https://perma.cc/D247-DK7B>]. Yet, "several of the terraces at the Hunters Point Library are inaccessible to people who cannot climb to them. . . . The accessibility issues . . . have left officials with the Queens Public Library hurrying to find solutions and the architects exploring ways to retrofit the building." *Id.* A second example is the *Vessel* at Hudson Yards in New York City — a tourist attraction made out of more than 150 interconnected staircases and 80 platforms, with only one elevator — also opened in 2019. *See* Amy Plitt, *Hudson Yards' Vessel Must Add 'One-of-a-Kind Platform Lift' to Improve Accessibility*, CURBED N.Y. (Dec. 13, 2019), <https://ny.curbed.com/2019/12/23/21035379/hudson-yards-new-york-vessel-accessibility-sdny> [<https://perma.cc/GQH8-M8XJ>]. The U.S. Attorney's Office for the Southern District of New York announced it reached an agreement with the developer to "design and install 'a one-of-a-kind platform lift mechanism' that will make it possible for people with disabilities to get to the top levels of Vessel, which are perhaps the most popular sections of the attraction." *Id.* These issues could have been prevented if the compliance was enforced *ex ante* instead of *ex post*.

131. *See* IMRIE & HALL, *supra* note 126, at 8.

rights movement's ideas on physical accessibility evolved as well.<sup>132</sup> Disability scholar Aimi Hamraie shows how the project of designing a more inclusive world has taken shape through a process she refers to as "access-knowledge."<sup>133</sup> An interdisciplinary line of experts first took up the project of making public spaces disability accessible. These were rehabilitation experts, architects, social scientists, policy makers, and others designing *for* people with disabilities.<sup>134</sup> All the while, "disabled users positioned themselves as experts credentialed by their lived experiences to remake the world."<sup>135</sup> Negotiations between the two groups led to accessibility creation strategies.

Disability access law might be the most influential factor of accessibility experts' development. Access statutes, codes, and regulations are becoming more common around the world.<sup>136</sup> They now serve as a major feature of disability rights legislation, providing minimum standards of access to public spaces and services for people with disabilities.<sup>137</sup> Disability scholars Rob Imrie and Peter Hall have observed that compliance with such access legislation increases the need for professional experts on accessibility. This is because the accumulation of regulations and codes on different aspects of accessibility created "a complex and labyrinthine area" of regulation.<sup>138</sup> For example, exemptions such as the ADA's "undue hardship" standard are challenging to assess and need to be interpreted at the implementation phase.<sup>139</sup>

Compliance with the complex and "vague legal mandates" of disability access laws often falls on municipalities and local authorities'

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132. See HAMRAIE, *supra* note 18, at 10. The differentiation between knowledge and information is commonly associated with Michel Foucault. For Foucault, information is readily available for reference and examination, whereas with knowledge one should be critical about the way it was produced and by whom. See MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 23 (1969). For a concrete example on the ways medical knowledge is produced with regards to sex in the context of the intersex movement, see Maayan Sudai, *Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement's Path to De-Medicalization*, 41 HARV. J.L. & GENDER 1, 11 (2018).

133. HAMRAIE, *supra* note 18, at 10.

134. See *id.* at 10–11.

135. *Id.* at 5.

136. See IMRIE & HALL, *supra* note 126, at 48.

137. See *id.*

138. See BRENDAN GLEESON, *GEOGRAPHIES OF DISABILITY* 153 (1998).

139. See IMRIE & HALL, *supra* note 126, at 54–56.

shoulders.<sup>140</sup> In their work on the implementation of disability access laws, Jeb Barnes and Thomas Burke show how reaching out and establishing regular contact with accessibility experts and professionals is key to ensure compliance and to be up-to-date with the best practices in the field.<sup>141</sup> They also demonstrate how litigation has been the driving force to ensure compliance with U.S. access laws. Their study refers to a settlement agreement in an access lawsuit that required hiring an outside accessibility consultant; as a result, “any time a significant issue [arises], it [is] . . . sent to the consultant [(an engineer)] for review.”<sup>142</sup>

Despite the move toward “outsourced accessibility expertise,” compliance is only as good as local authorities’ attitudes toward accessibility. These attitudes are of great significance because they spread to other actors like developers and city officials.<sup>143</sup> In cities where local officials are committed to meeting the rights of people with disabilities, building “developers are unlikely to resist meeting requests for access provisions” in their projects.<sup>144</sup> Local authorities are also responsible for knowing the accessibility requirements for their building and development offices and transferring this knowledge to their employees. It has been found that the difference in the level of compliance to accessibility standards within local building and development offices can be attributed to the municipality’s interpretations of statutory duties and commitment toward accessibility.<sup>145</sup>

The next two Sections demonstrate how both disability access laws and local authorities’ work interact and inform the professionalization of accessibility in the United States and Israel. In these two countries, legislation on accessibility experts and their role in regulation practices varies and offers two completely different approaches to dealing with enforcement of codes and standards: a diffused model in the United States and a centralized model in Israel. This Article presents how these two approaches affect the way local authorities implement disability access law in their respective jurisdictions.

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140. Jeb Barnes & Thomas F. Burke, *Making Way: Legal Mobilization, Organizational Response and Wheelchair Access*, 46 *LAW & SOC’Y REV.* 167, 174 (2012); see also MALLOY, *LAND USE LAW AND DISABILITY*, *supra* note 22, at 84–85.

141. Barnes & Burke, *supra* note 140, at 174.

142. *Id.* at 184–85.

143. See IMRIE & HALL, *supra* note 126, at 84.

144. *Id.*

145. See *id.* at 151.



#### IV. A DIFFUSED MODEL OF ACCESSIBILITY PROFESSIONALIZATION IN LARGE U.S. CITIES

The ADA and other federal disability access laws have been on the books for more than three decades.<sup>146</sup> And yet, the project of urban accessibility is far from complete. Examples of inaccessible spaces, both state- and local government-owned and privately owned public accommodations, abound.<sup>147</sup> They include the lack or inadequate installment of curb cuts<sup>148</sup> and the lack of hotels and restaurants actually accessible to disabled guests<sup>149</sup> because of inaccessible entrances, tables, or restrooms.<sup>150</sup> Many of these examples include situations where, despite some efforts put in place when planning for accessibility, the result is ultimately inaccessible for people with disabilities and reflective of inadequate enforcement of legal standards. In other words, the work to ensure accessibility has not been professionally done to ensure actual access to disabled individuals. This

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146. See *supra* Part I.

147. Ruth Colker, *The Power of Insults*, 100 B.U. L. REV. 1, 36–37 (2020).

148. See Yochai Eisenberg et al., *Are Communities in the United States Planning for Pedestrians with Disabilities? Findings from a Systematic Evaluation of Local Government Barrier Removal Plans*, 102 CITIES 1, 3, 8–9 (2020) (stating that “new construction can be very piecemeal and so one intersection may be accessible but the intersection on the following block is not, leading to pedestrian paths that are discontinuous and thus unusable by people with disabilities. For instance, across the US, it is common to see a curb ramp that is not attached to any sidewalks,” and finding that “[a]mong 23 LPAs [Local Public Agencies] reporting on curb ramps, an average of 65% of the curb ramps assessed had barriers”); see also Winnie Hu, *Disabled New Yorkers Face Trouble with the Curbs*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/2017/10/08/nyregion/new-york-city-sidewalks-disabled-curb-ramps.html> [<https://perma.cc/3TYY-7GZV>].

149. See Vilissa Thompson, *(In)accessible Rooms: The Biggest Lie Told by the Hotel Industry*, RAMP YOUR VOICE! (Jan. 12, 2017), <http://www.rampyourvoice.com/inaccessible-rooms-biggest-lie-told-hotel-industry/> [<https://perma.cc/K7UM-3YJN>].

150. See David Perry, *Restaurants Haven’t Lived up to the Promise of the Americans with Disabilities Act*, EATER (May 31, 2017), <https://www.eater.com/2017/5/31/15701042/american-disabilities-act-restaurants-compliance> [<https://perma.cc/MN34-UARU>]. Only in mid-2020, did a Rhode Island elementary school begin the final stages of installing an elevator to comply with the ADA. See Keldy Ortiz, *Work Resumes on Elevator Installation at West Babylon Elementary School*, NEWSDAY (June 10, 2020), <https://www.newsday.com/long-island/suffolk/elevator-elementary-school-covid-19-americans-with-disabilities-act-1.45559721> [<https://perma.cc/D5VS-PVTE>]. This example bears an uncanny resemblance to the facts underlying the 1996 Israeli *Botzer* case, which was a catalyst for the ERPD’s enactment. The violation in the litigation was resolved two years before the counterpart to the ADA was ever enacted. See *supra* notes 92–97 and accompanying text.

raises the question of why the United States' accessibility project has not reached its full potential (as optimists would say) or is failing (as realists or pessimists would argue). The Article argues that one of the main reasons for the lack of urban accessibility has to do with the flawed model of accessibility professionalization and enforcement that U.S. disability access law enacts, which this Article refers to as a "diffused model."

The process of creating a unique profession of accessibility experts in the United States was not done in a standardized way at the federal level. Instead, it was left to the states' and local authorities' discretion, which led to differing methods of creating such expertise, i.e., a diffused model. This in turn has affected the way disability access laws are being enforced. Accessibility professionals' role was not clearly established or utilized *ex ante* at the built environment's design level, but *ex post* through litigation over buildings already erected. The next Section explains why and how this U.S. diffused model of professionalization and enforcement came about.

#### A. Litigation and Professionalization

During its early days, disability access law encountered backlash, which shaped later accessibility mandates, namely the ADA.<sup>151</sup> The critiques of disability access law have always pointed back to one issue: cost. Critics have weighed the relatively small number of individuals with disabilities against the cost and insolvencies of altering the built environment.<sup>152</sup> As design historian Bess Williamson put it, "Accessible design, once seen as a solution that aligned technological progress with social ideals, now appeared as a form of design excess in which minor material changes could incur massive protests or lawsuits."<sup>153</sup>

Given the controversy around cost,<sup>154</sup> the bipartisan coalition behind the ADA focused on a narrative that included economic incentives

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151. See WILLIAMSON, *supra* note 33, at 129, 142. For the judicial backlash against Section 504 more generally, see DAVIS, *supra* note 47, at 52.

152. See WILLIAMSON, *supra* note 33, at 129.

153. *Id.* at 130.

154. For example, in September 1989, the *New York Times* published an article, "Blank Check for the Disabled?," about the ADA's bill. This story elucidates the common views of people with disabilities as objects of charity and not a minority category deserving of civil rights, and emphasizes the costs of the ADA's implementation:

The sentiment is laudable: to bring the disabled closer to the mainstream of American society. But the legislation is vague; not even its defenders are able

behind accessibility mandates. The idea was to present the disabled individual as a productive worker and consumer,<sup>155</sup> downplaying disability's intersection with race and poverty.<sup>156</sup> The neoliberal narrative of the disabled consumer, one that can be beneficial to bolster the economy, is especially important when discussing Title III of the ADA, which covers private businesses. The interest in ensuring business owners would not lose money for failure to accommodate disabled patrons at their sites was incorporated into the ADA's remedial scheme's design. While the original ADA bill permitted plaintiffs to file civil actions for injunctive relief and monetary damages,<sup>157</sup> the final statute only allowed for injunctive relief under Title III.<sup>158</sup> In the name of a "fragile compromise," as disability law scholar Ruth Colker coined it, the remedies under Title III were limited in exchange for an expansive list of commercial entities covered as places of public accommodations.<sup>159</sup> Therefore, some argue this remedy scheme does not create enough incentive for potential plaintiffs to bring suits, which is one explanation of why there is still widespread noncompliance with Title III.<sup>160</sup>

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to calculate its benefits and costs. Those costs could be monumental. . . . The bus companies are angry. Most businessmen are simply fretful and confused. . . . No one wishes to stint on helping the disabled. It requires little legislative skill, however, to write blank checks for worthy causes with other people's money.

See *Blank Check for the Disabled?*, N.Y. TIMES (Sept. 6, 1989), <https://www.nytimes.com/1989/09/06/opinion/blank-check-for-the-disabled.html> [<https://perma.cc/QBM9-757Z>].

155. See DAVIS, *supra* note 47, at 58–59; HAMRAIE, *supra* note 18, at 90; *Blank Check for the Disabled?*, *supra* note 154; see also SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 29 (2009); THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 96–97 (2004); HEYER, *supra* note 79, 33–34; PETTINICCHIO, *supra* note 48, at 22.

156. See WILLIAMSON, *supra* note 33, at 143.

157. See Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 383 (2000) [hereinafter Colker, *A Fragile Compromise*].

158. See 42 U.S.C. § 12188(a)(1); 28 C.F.R. § 36.501(a) ("Any person who is being subjected to discrimination on the basis of disability in violation of the Act or this part or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303 of the Act or subpart D of this part may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.").

159. See Colker, *A Fragile Compromise*, *supra* note 157, at 385.

160. The incentives for private enforcement of Title III through litigation are weak because plaintiffs have no prospect of monetary recovery, from which to carve a contingent fee for their attorneys, not to mention the time invested and the emotional costs of filing and going forward with such a lawsuit. See Samuel R. Bagenstos, *The*

Traditionally, and as a consequence of political compromises due to backlash, litigation and not design has mainly driven disability access in the United States.<sup>161</sup> In other words, the enforcement of disability access law is mostly done *ex post*, after constructing the space or the building and not *ex ante*, while plans for the building are approved. Although the ADA gives governmental bodies the authority to enforce Title II and Title III, *de facto*, the absolute majority of *ex post* enforcement of disability access laws is done through private litigation.<sup>162</sup> In addition, federal legislation and most state legislation does not include official titles, requirements, or licenses for potential

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*Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 11–13 (2006) [hereinafter Bagenstos, *The Perversity of Limited Civil Rights Remedies*]; Leslie Lee, *Giving Disabled Testers Access to Federal Courts: Why Standing Doctrine Is Not the Right Solution to Abusive ADA Litigation*, 19 VA. J. SOC. POL’Y & L. 319, 347 (2011).

161. See MALLOY, LAND USE LAW AND DISABILITY, *supra* note 22, at 7.

162. Under Title III, the DOJ must investigate claims and periodically review compliance of covered entities. See 42 U.S.C. § 12188(b)(1)(A)(i). Title III also authorizes the U.S. Attorney General to sue for violations that constitute either a pattern or practice of discrimination or which raise an issue of general public importance. See 42 U.S.C. § 12188(b)(2)(B). Under Title II, an individual may file a complaint with the DOJ or other appropriate agency, which then must investigate the complaint and attempt to reach an informal resolution. If informal resolution fails and the applicable agency finds noncompliance, it refers the complaint to the DOJ, which attempts to negotiate compliance and potentially files suit. See Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1865–66 (2005). Nevertheless, as disability law scholar Samuel Bagenstos notes,

the U.S. Department of Justice has devoted “only a small cadre of lawyers” to disability rights enforcement, and those lawyers must shoulder responsibility for enforcing the ADA against state and local governments as well as against private businesses. . . . Because the government does not fully enforce the ADA, private enforcement is essential.

Bagenstos, *The Perversity of Limited Civil Rights Remedies*, *supra* note 160, at 9; see also Casey L. Raymond, *A Growing Threat to the ADA: An Empirical Study of Mass Filings, Popular Backlash, and Potential Solutions under Title II and III*, 18 TEX. J. ON C.L. & C.R. 235, 257–58 (2013). Disability law scholar Arlene Kanter also expressed frustration with the passive role federal, state, and local authorities take in enforcing accessibility and the reliance on private enforcement by “private attorney generals.” She stated:

[U]nder Title II or III, even a state or local government, is not required to ensure that the accommodations or modifications are available for the next person who may need them, even the next person who may need the identical accommodation or modification. That next person would have to prove the appropriateness of such accommodation and modification in his or her case [through litigation], as would the next person after that, and so on.

Kanter, *supra* note 61, at 853.

accessibility experts who would advise architects and developers on access matters at its design or implementation phase (i.e., ex ante enforcement).<sup>163</sup> State laws do not provide an answer to these issues either. Local government is the arena where most of accessibility's regulation is being made.<sup>164</sup> Municipalities use professionals to provide some oversight of the building process. Even then, however, it is a dispersed and "diffused model" of enforcement. This is part of a hands-off approach for rights enforcement that shrinks the federal government's role and fits neatly within a conservative and neoliberal political agenda.<sup>165</sup>

The ADA prescribes enforcement through a "private attorney general model,"<sup>166</sup> which requires people to use private attorneys to bring a suit, rather than governmental agencies on behalf of people with disabilities, to secure their civil rights.<sup>167</sup> These private lawyers are allowed to obtain attorney's fees if they win the case, creating a fee-shifting exception to the U.S. rule that all sides bear their own legal expenses.<sup>168</sup> The private attorney general model fits within the U.S. framework of disability law, which is most often dependent on private enforcement by laypersons and members of society.<sup>169</sup> Under this model, accessibility professionals play a significant role in litigation: each party brings their own expert witness who files a report to show compliance (or lack

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163. This lack of regulation of experts resembles the legal regime of service animal regulation under the ADA. An example is there is no regulation of standards for service dogs' training to ensure the uniformity of service animal quality. The dog does not need to be professionally trained nor is there a preferred means of training. See Doron Dorfman, *Suspicious Species*, U. ILL. L. REV. (forthcoming 2021) (manuscript at 8).

164. See MALLOY, *LAND USE LAW AND DISABILITY*, *supra* note 22, at 83–84.

165. See Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 442 (2007) [hereinafter Waterstone, *A New Vision*]; see also Colker, *The Power of Insult*, *supra* note 147, at 43.

166. Waterstone, *A New Vision*, *supra* note 165, at 447–48.

167. See Bagenstos, *The Perversity of Limited Civil Rights Remedies*, *supra* note 160, at 10. The Attorney General also has the authority to file a suit against entities for noncompliance with Title III or to join a civil suit filed by a private person, see 28 C.F.R. §§ 36.501–36.505, but it has been argued that the government cannot be counted on to fill the enforcement gap because of a lack of resources. See Bagenstos, *The Perversity of Limited Civil Rights Remedies*, *supra* note 160, at 9.

168. See 28 C.F.R. § 36.505; see also Colker, *The Power of Insults*, *supra* note 147, at 41–42; William B. Rubenstein, *On What a "Private Attorney General" Is — and Why It Matters*, 57 VAND. L. REV. 2129, 2142–56 (2004).

169. See Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051, 1053–54 (2019); see also BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT*, *supra* note 155, at 20; SARAH MARUSEK, *POLITICS OF PARKING: RIGHTS, IDENTITY, AND PROPERTY* 139 (2012); Dorfman, *[Un]Usual Suspects*, *supra* note 101, at 563.

thereof) with codes and disability access laws and convince the court that their side got it right.<sup>170</sup> Since there is no regulation of access professionals, the discussion is left for the adversarial system to resolve.

The private attorney general model has been under attack since its inception.<sup>171</sup> Claims about misuse of law and abusive practices by people with disabilities and their lawyers, who allegedly created a “cottage industry” around the practice of going from business to business looking for noncompliance, were soon to follow.<sup>172</sup> A memorable case is that of Clint Eastwood, the owner of the Mission Ranch Inn in Carmel, California.<sup>173</sup> A disabled patron sued the hotel for noncompliance with the ADA’s standards.<sup>174</sup> Eastwood went on a crusade against Title III, using his celebrity status, wealth, and media relations,<sup>175</sup> and ended up winning the case, declaring it “a victory for the little guy.”<sup>176</sup> The jury was not convinced the plaintiff had actually planned on staying at the resort’s facilities, and found the patron lacked standing.<sup>177</sup> The jurors, however, did find the hotel was inaccessible and that it should build a ramp to the registration office, create a second disabled-access guest room, and put in signs about access accommodations — all improvements Eastwood said were already in the works regardless of the lawsuit.<sup>178</sup>

170. See, e.g., Colker, *The Power of Insults*, *supra* note 147, at 54–55.

171. See Waterstone, *A New Vision*, *supra* note 165, 448–49.

172. See Bagenstos, *The Perversity of Limited Civil Rights Remedies*, *supra* note 160, at 4–5, 26; see also Carri Becker, *Private Enforcement of the American with Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 HASTINGS WOMEN’S L.J. 93, 97 (2006); Lee, *supra* note 160, at 322; Katherine Pankow, *Advocates for the Disabled, or Extortionist Vampires? Chapter 383 Attempt to Prevent Plaintiffs’ Attorneys from Bleeding Small Businesses Dry*, 44 MCGEORGE L. REV. 559, 559–60 (2013); Raymond, *supra* note 162, at 244–45; Linda H. Wade & Timothy J. Inacio, *A Man in a Wheelchair and His Lawyer Go into a Bar: Serial ADA Litigation Is No Joke*, 25 Trial Advoc. Q. 31, 33 (2006).

173. See *Brunnen v. Misson Ranch*, No. 97-CV-20668, 2000 WL 33915634, at \*1 (N.D. Cal. Dec. 19, 2000).

174. See *id.*; DAVIS, *supra* note 47, at 236–37.

175. MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE AND THE CASE AGAINST DISABILITY RIGHTS 1–3 (2003).

176. Maria Alicia Gaura & Alan Gathright, *Eastwood Wins Suit over ADA/But Jury Says Resort Needs Improvements*, SFGATE (Sept. 30, 2000), <https://www.sfgate.com/bayarea/article/Eastwood-Wins-Suit-Over-ADA-But-jury-says-2736250.php> [<https://perma.cc/5EUL-SBYW>]; see also JOHNSON, *supra* note 175, at 242 (The “little guys” are the “businessmen and businesswomen who own small businesses who are trying to get by and . . . get worked over by [plaintiffs in ADA suits]”).

177. See JOHNSON, *supra* note 175, at 242–43; see also Gaura & Gathright, *supra* note 176.

178. See Gaura & Gathright, *supra* note 176.

A similar narrative about accessibility remains in public discourse today. A media campaign, joined by the defense bar, against the wave of drive-by disability lawsuits,<sup>179</sup> pitting people with disabilities and their attorneys against business owners,<sup>180</sup> was launched by strong business lobbies.<sup>181</sup> Consequently, this had a chilling effect on lawyers, who are reluctant to take on these cases because they do not want to be stigmatized as “bounty hunters” and “drive-by litigators”;<sup>182</sup> this keeps the goal of building an accessible world on unstable ground. Encouraging enforcement of access laws in the design and execution stages by certified professionals, rather than relying on litigation *ex post*, would provide a solution to a model that has proven itself to be ineffective in ensuring accessibility.

The next Part of this Article reviews how accessibility is enforced at the municipal level and shows the range to which big cities involve accessibility professionals to regulate disability access.

### B. Accessibility Professionalization at the Local Government Level

Municipalities’ attitudes toward accessibility and disability rights play an important role in ensuring the built environment is physically accessible. Local governments have required knowledge about their communities, the different actors that are a part of the design and construction, and, perhaps most importantly, the environments they are regulating. Municipalities can come up with creative ideas to regulate accessibility, even beyond compliance with codes and standards.<sup>183</sup> Often, it is up to local governments to fill the gap in accessibility enforcement created by disability access laws on the federal and, often, the state levels.

The good news is that many large cities in the United States have embraced this task, though in differing degrees, creating a “diffused model” of accessibility professionalization and enforcement. Many large cities have established a specific office or commission in charge of

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179. See Garth Stapley, *Wave of Disability Lawsuits Threatens Small Businesses in Stainslaus County*, *MODESTO BEE* (June 21, 2014, 8:18 PM), <https://www.modbee.com/news/business/article3166747.html> [<https://perma.cc/S2KV-T3CX>].

180. Namely small businesses that could not afford the cost of the lawsuit or the price of renovations needed to make their business accessible. See Becker, *supra* note 172, at 110–12.

181. See Colker, *The Power of Insults*, *supra* note 147, at 46–48.

182. See *id.* at 46–47.

183. See MALLOY, *LAND USE LAW AND DISABILITY*, *supra* note 22, at 83–84.

promoting and enforcing disability rights generally (such as in employment, housing, education, transportation, or health-care contexts).<sup>184</sup> Ensuring the accessibility of the built environment is an important part of the work of these offices. This Section analyzes the diffused model of professionalization and enforcement at the municipal levels of New York City, Chicago, San Francisco, and Los Angeles.

*i. New York City's Mayor's Office for People with Disabilities*

New York City's Mayor's Office for People with Disabilities (MOPD) was established in 1973.<sup>185</sup> It is certainly one of the strongest, most established offices of its kind in the country.<sup>186</sup> In terms of enforcing accessibility, there is a distinction between projects related to the City (covered under Section 504 and Title II) and places of public accommodations covered under Title II, state, and local laws. Officers — disability service facilitators (DSF) whom the NYC MOPD has trained on accessibility and disability issues<sup>187</sup> — review plans for New York City's construction projects. DSFs are employed by different municipality departments, like the School Construction Authority or the Department of Parks and Recreation, to coordinate the City's efforts to comply with and carry out accessibility standards under federal, state, and local laws and regulations.<sup>188</sup>

When it comes to places of public accommodations, NYC MOPD encourages a standard of accessibility beyond mere compliance with federal and state codes.<sup>189</sup> When it comes to enforcement, however, its

184. "Empowered Cities," a recently created network, focuses on developing solutions for various disability issues, like financial wellness, employment, and accessible building at the municipal level. The network includes the municipal disability offices of New York City, Boston, Chicago, Los Angeles, and San Francisco. See *Empowered Cities*, NAT'L DISABILITY INST., <https://www.nationaldisabilityinstitute.org/capacity-building/empowered-cities/> [<https://perma.cc/883V-7DTT>] (last visited Aug. 14, 2020).

185. See *About*, NYC MAYOR'S OFF. FOR PEOPLE WITH DISABILITIES, <https://www1.nyc.gov/site/mopd/about/about.page> [<https://perma.cc/TY48-JZJ7>] (last visited Aug. 24, 2020).

186. NYC MOPD leads the "Empowered Cities" initiative. See *Empowered Cities*, *supra* note 184.

187. See *Disability Services Facilitators (DSF)*, NYC MAYOR'S OFF. FOR PEOPLE WITH DISABILITIES, <https://www1.nyc.gov/site/mopd/initiatives/disability-service-facilitators-dsf.page#:~:text=The%20DSF%20Program,accessibility%20for%20persons%20with%20disabilities> [<https://perma.cc/4LLE-WZTD>] (last visited Sept. 3, 2020).

188. See *id.*

189. Such an approach is embodied in the accessibility guides NYC MOPD has promulgated, which go beyond mere compliance. See *AccessibleNYC*, NYC MAYOR'S



model very much relies on the federal government's private attorney general model. New York City's Department of Buildings,<sup>190</sup> which writes the local accessibility codes, reviews building plans for compliance with general building codes like those for plumbing, fire safety, electricity, etc. The Department of Buildings also reviews building accessibility plans; however, unlike other building codes, there is no statutory requirement to check for compliance with federal, state, or local statutory accessibility standards. Therefore, while the department does its best to review accessibility plans, it is not comprehensive and does not guarantee compliance with national access standards.

Instead, the City offers developers and architects of record the chance to go to NYC MOPD voluntarily and get feedback from ADA accessibility consultants, with whom the City independently contracts, on their projects' accessibility.<sup>191</sup> Since there is no explicit requirement to do so, not all developers and architects reach out to NYC MOPD.<sup>192</sup> There is a long-term risk of noncompliance with federal, state, and local accessibility standards after a building's construction that may need to be privately litigated later and may take years to resolve. In the meantime, a renovated or recently built building can remain inaccessible, preventing people with disabilities from using it.

*ii. Los Angeles's Department of Disability and San Francisco's Mayor's Office on Disability*

Los Angeles's Department of Disability<sup>193</sup> and San Francisco's Mayor's Office on Disability<sup>194</sup> — both of which actively ensure

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OFF. FOR PEOPLE WITH DISABILITIES,  
<https://www1.nyc.gov/site/mopd/initiatives/accessiblenyc.page>  
 [https://perma.cc/96LR-Z45R] (last visited Sept. 3, 2020).

190. See *About, NYC BUILDINGS*,  
<https://www1.nyc.gov/site/buildings/about/about.page> [https://perma.cc/GP7H-BZTT]  
 (last visited Sept. 3, 2020).

191. See Interview with Victor Calise, Comm'r of the N.Y.C. Mayor's Off. for People with Disabilities (June 16, 2020) (on file with authors). A project's architect of record bears the liability for any non-compliance with any federal, state, or local statutory standards.

192. See *id.*

193. On the website for Los Angeles's Department of Disability there is a reference to a California Commission on Disability Access document which embraces the private attorney general approach, stating,

[i]t is the sole responsibility of the business owner and/or the landlord to make sure that the facility is in compliance with the most restrictive requirements of both the California accessibility requirements AND the federal requirements

accessibility only for city projects under Title II — have a similar private attorney general-based litigation approach for enforcing accessibility of the built environment.<sup>195</sup> Both of these municipalities lack an active, hands-on program for enforcing accessibility of places of public accommodations under Title III. In California, however, what is missing on the municipal level is supplemented at the state level.

California has a state law, Senate Bill 1608, that regulates accessibility professionals and established the voluntarily Certified Access Specialists (CASp) program.<sup>196</sup> A CASp is a person the Division of State Architects in California has trained and certified to assess

under the ADA. Remember that the accessibility requirements in the California Building Code (CBC) are reviewed by the building department only when a project is submitted for permit . . . . Under the CBC, however, if you change the use of a room or space without submitting for a permit, the accessibility requirements of the CBC still apply.

*Accessibility Compliance for Businesses — “Myths and Misconceptions,”* CAL. COMM’N ON DISABILITY ACCESS 1 (Jan. 2017), [https://ens.lacity.org/dod/events/dodevents3150110628\\_03302017.pdf](https://ens.lacity.org/dod/events/dodevents3150110628_03302017.pdf) [<https://perma.cc/QY7R-VR2X>] (emphasis added).

194. San Francisco’s Mayor’s Office on Disability offers review of plans and field inspection for “all City-owned or City funded construction projects,” covered under Title II. *Project Review Process for Plan Check and Inspection*, CITY & CNTY. S.F., MAYOR’S OFF. ON DISABILITY, <https://sfgov.org/mod/project-review-process-plan-check-and-inspection> [<https://perma.cc/Y6KG-4DX4>] (last visited Sept. 3, 2020). However, the website has no information about any efforts taken to ensure compliance with the accessibility standards for places of public accommodations under Title III. The responsibility and liability on that end rests on the business owners and follows the private attorney general model. *See Resources for Small Businesses*, CITY & CNTY. S.F., MAYOR’S OFF. ON DISABILITY, <https://sfgov.org/mod/resources-small-businesses> [<https://perma.cc/HJ5J-EK4W>] (last visited Sept. 25, 2020).

195. California law, however, gives private plaintiffs financial incentive in the form of damages to bring accessibility lawsuits; as mentioned, damages are not available under the federal ADA. The Unruh Civil Rights Act (Unruh Act) is a broader and more generous counterpart to the ADA and declares all violations under the ADA as violations of the Unruh Act. *See* CAL. CIV. CODE § 51(f) (West 2016). It awards a floor of \$4,000 in damages, in addition to attorney’s fees, to the plaintiffs. *See id.* § 52(a). Those damages can be awarded even if the business’s violation was unintentional. *See* *Munson v. Del Taco, Inc.*, 208 P.3d 623, 634 (Cal. 2009) (holding that the plaintiff does not need to prove intentional discrimination to recover damages); *see also* Pankow, *supra* note 172, at 562. In addition, the state of California also established the California Commission on Disability Access, which aims to “promote disability access in California through dialogue and collaboration with stakeholders including, but not limited to, the disability and business communities as well as all levels of government.” *About*, CAL. COMM’N ON DISABILITY ACCESS, <https://www.dgs.ca.gov/CCDA/About> [<https://perma.cc/Q28M-2TLP>] (last visited Sept. 3, 2020).

196. *See* S.B. 1608, 2008 Leg., Reg. Sess. (Cal. 2008).

accessibility.<sup>197</sup> A business owner or landlord of a place of public accommodation under Title III can voluntarily hire a CASp to assess their site's accessibility. After the CASp determines that the site is accessible, the owner or landlord is regarded as a "qualified defendant."<sup>198</sup> If an accessibility lawsuit is brought against a qualified defendant, he or she may request the court order a 90-day stay of the proceedings and schedule an early evaluation conference of the claims.<sup>199</sup> The qualified defendant can then file the CASp inspection report with the court so that it can be discussed at the yearly evaluation conference.<sup>200</sup> This unusual submission of evidence at a very early stage of the proceedings gives the qualified defendant a strong defense in most circumstances and allows him or her to dismiss the case. Therefore, owners and landlords have an incentive to hire CASps so they can avoid access litigation. From a public good perspective, it also incentivizes designers and architects to build a more accessible environment at the design stage rather than ex post, following litigation.

*iii. Chicago's Mayor's Office for People with Disabilities*

Chicago has an advanced model of dealing with the private attorney general litigation model when it comes to accessibility. It is the city with the most hands-on approach for the enforcement of accessibility standards at the design stages. The Chicago MOPD established a plan review process for all construction, covered either by Title II or Title III, that ensures accessibility when the renovation or construction plans are initially submitted. In other words, since 1996, the Accessibility Compliance Unit within the Chicago MOPD has reviewed every plan for compliance with accessibility standards — similar to the review done in the New York City Department of Buildings for compliance with plumbing, electricity, or structural codes.<sup>201</sup> The City will only issue a building permit if the building complies with federal, state, and local access codes.<sup>202</sup> Potential plaintiffs can hold the City liable for an access claim if it issued a permit to a noncompliant site.<sup>203</sup> The Chicago MOPD

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197. *See id.*

198. *See id.* § 55.52(a)(8).

199. *See id.* § 55.54(d)(1).

200. *See id.* § 55.54(b)(1).

201. *See Accessibility Compliance*, CHI. MAYOR'S OFF. FOR PEOPLE WITH DISABILITIES, <https://www.chicago.gov/city/en/depts/mopd/provdrs/comply.html> [<https://perma.cc/TP9G-GNGP>] (last visited Sept. 3, 2020).

202. *See Hanson, supra* note 10, at 75.

203. *See id.*

also offers architects and developers a pre-permit plan review to assist with accessibility requirements in the early stages of plan development.<sup>204</sup> Of course, when a site is converted or modified without submitting a plan to the City, such conversion or modification can result in access barriers the City does not regulate. In those cases, litigation will be the answer for enforcing compliance with the access codes.

One can now see how the U.S. model of accessibility professionalization and enforcement of accessibility codes on the municipal level is a “diffused model.” Given the private attorney general model dictated by the ADA enforcement system, each municipality finds its own way to enforce accessibility requirements depending on the state law and on the values and priorities it sets.

## V. ACCESSIBILITY PROFESSIONALIZATION AND REGULATION AT THE LOCAL LEVEL IN ISRAEL

### A. A Centralized Model and the Creation of a New Licensed Profession

Israel has a centralized governmental system, in which the state’s ministry of interior supervises all municipalities.<sup>205</sup> Compared to the U.S. federal system, the extent of autonomy of Israeli local governments is much more restricted, as the national government must approve all local legislative, planning, and financing decisions.<sup>206</sup> This also means the municipality must comply with regulations the government drafts.<sup>207</sup>

Unlike the ADA, the ERPDL’s Accessibility Chapter includes measures to regulate its implementation. One of the main innovations of the Chapter, added to the ERPDL seven years after its original

204. See *Appointment to Meet with MOPD Preliminary Plan Review*, CHI. MAYOR’S OFF. FOR PEOPLE WITH DISABILITIES, [https://www.chicago.gov/city/en/depts/mopd/provdrs/comply/svcs/pre-permit\\_plan\\_review.html](https://www.chicago.gov/city/en/depts/mopd/provdrs/comply/svcs/pre-permit_plan_review.html) [<https://perma.cc/TYD3-NBAA>] (last visited Sept. 3, 2020).

205. See DON PERETZ & GIDEON DORON, *THE GOVERNMENT AND POLITICS OF ISRAEL* 232 (3d ed. 2018).

206. See Daniel B. Rodriguez & Nadav Shoked, *Comparative Local Government Law in Motion: How Different Local Government Law Regimes Affect Global Cities’ Bike Share Plans*, 42 *FORDHAM URB. L.J.* 123, 147 (2014).

207. See PERETZ & DORON, *supra* note 205, at 232. Yet renowned scholar Yishai Blank showed, in action, the Israeli government is selective in employing some of its mandatory powers of supervision in its big cities. See Yishai Blank, *The Location of the Local: Local Government Law, Decentralization and Territorial Inequality in Israel*, 34 *HEBREW U. L. REV.* 197, 200 (2004) (Isr.).

enactment<sup>208</sup> is the development of new licensed professions in the field of accessibility.<sup>209</sup>

The first type of Israeli accessibility professionals — such as architects, engineers, and urban planners — are professionals in the area of access to building access, open spaces, and infrastructure.<sup>210</sup> The second type of accessibility professionals — composed of people working in health, welfare, education, and technology professions — are those in the area of service access and telecommunication.<sup>211</sup>

After going through specific academic training delivered by selected universities in the state, Licensed Accessibility Experts (LAEs) are recognized by the registrars in Israel's Ministry of Labor, Social Affairs and Social Services.<sup>212</sup> LAEs' duties include providing guidance and consultation to projects and organizations on access issues and making sure developers and architects comply with the access codes. In addition, LAEs in the area of buildings, open spaces, and infrastructure have the legal authority to provide or deny official certifications of compliance to access requirements. These certificates are important because the municipal committees that approve, among other things, building plans, business licenses, and exemption requests consider them indicators of accessibility compliance. These LAE certificates are mandatory for approval of any new construction and, in some cases, for approval of a building's renovation.<sup>213</sup>

This new profession is growing rapidly as more Israeli organizations and developers employ or contact LAEs for practical guidance and legal assistance.<sup>214</sup> The National Commission for Equal Rights for People with Disabilities at the Ministry of Justice, the statutory body responsible for implementing the ERPDL, led the process of establishing and integrating LAEs into the market. As the former national accessibility commissioner explained, the number of LAEs grew rapidly

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208. See *supra* notes 111–19 and accompanying text.

209. § 1900, Equal Rights for People with Disabilities Law, 5759–1998, SH 2388 (Isr.).

210. *Id.* § 1900(a).

211. *Id.* § 19001.

212. See *id.* § 19001; see also Feldman, *supra* note 76.

213. See Dan Oren & Neta Dagan, *The Legislative Revolution in Accessibility*, in THE ACCESSIBILITY OF THE ISRAELI SOCIETY FOR PERSONS WITH DISABILITIES ON THE THRESHOLD OF THE 21ST CENTURY 135, 158–59 (Dina Feldman et al. eds., 2007) (Isr.).

214. See Feldman, *supra* note 76.

as the different regulations started to come into effect and requirements increased.<sup>215</sup>

Municipalities in Israel bear most of the responsibility for implementing accessibility regulations. They are responsible for making sure the cities' existing and new constructions and public spaces comply.<sup>216</sup> In addition, cities are responsible for approving new private buildings and have the authority to license private businesses.<sup>217</sup> The ERPDL also requires them to submit a premeditated plan detailing the accommodations that will be implemented gradually within a predefined period.<sup>218</sup>

Unlike in the United States, most of the ERPDL's regulation and enforcement, in general, and the Accessibility Chapter, in particular, are done through a centralized model. This means that the accessibility regulation is standardized and streamlined on the national level.<sup>219</sup> The ERPDL gives the Commission two types of tools: preventive mechanisms and enforcement authority. Preventive mechanisms impose on large organizations, such as local governments, duties to report on their progress implementing access codes to the Commission.<sup>220</sup> The enforcement authority gives the Commission the power to take civil and criminal actions against public or private organizations for noncompliance with accessibility codes.<sup>221</sup> Local governments are expected to work side by side with LAEs to comply with the legal requirements, and the Commission can give offices within the municipalities "accessibility orders" for noncompliance.<sup>222</sup> Given the Israeli government's more hands-on approach to enforcing accessibility, private attorney general lawsuits exist but are not as common as in the United States. Individuals may also submit complaints to the Commission about a lack of accessibility in any area under a municipality's responsibility and have the Commission enforce the

215. Interview with Shmuel Haimovitz, Former Nat'l Accessibility Comm'r, Comm'n for Equal Rights for People with Disabilities (June 2016) (on file with authors).

216. See Yael Danieli Lahav, *Accessible Cities for People with Disabilities: From Vision to Practice*, in *THE ACCESSIBILITY OF THE ISRAELI SOCIETY FOR PERSONS WITH DISABILITIES ON THE THRESHOLD OF THE 21ST CENTURY* 711, 713 (Dina Feldman et al. eds., 2007) (Isr.).

217. See *id.* at 714.

218. See Oren & Dagan, *supra* note 213, at 158.

219. See *supra* notes 118–19 and accompanying text.

220. See Oren & Dagan, *supra* note 213, at 158.

221. See *id.* at 158–61.

222. See § 19QQ, Equal Rights for People with Disabilities Law, 5758–1998, SH 2388 (Isr.).

access law requirements on the matter of the complaint.<sup>223</sup> The next Section is a case study of the city of Tel Aviv-Jaffa and how it enforces compliance with accessibility codes and works with accessibility professionals.

### B. Regulation and Professionalization of Accessibility in Tel Aviv-Jaffa

Tel Aviv-Jaffa is recognized as one of Israel's most influential municipalities, both in resources and political influence.<sup>224</sup> It was one of the first local authorities in the state to address the subject of accessibility from a strategic perspective, in 1984,<sup>225</sup> and it established an Accessibility Team in 1999.<sup>226</sup> Following the ERPDL's Accessibility Chapter's enactment, the Commission's accessibility regulations, and enforcement efforts, Tel Aviv-Jaffa started a process of institutionalization and professionalization that changed its accessibility discourse and practices. This process emphasizes a legal and instrumental perspective, based almost exclusively on the new disability rights legislation, which differs from the social welfare perspective emphasized before the ERPDL.<sup>227</sup>

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223. See Lahav, *supra* note 216, at 713.

224. See Nurit Alfasi & Tovi Fenster, *A Tale of Two Cities: Jerusalem and Tel Aviv in an Age of Globalization*, 22 CITIES 351, 352, 354 (2005).

225. See Lahav, *supra* note 216, at 712.

226. See Danny Prigat, *Urban Accessibility Systems for People with Disabilities — Models from Israel and the World*, 1 INYAN SHEL GISHA 52, 56 (2004) (Isr.). For the Tel Aviv-Jaffa Accessibility Unit's official website, see *Accessibility for People with Disabilities*, TEL AVIV-JAFFA, <https://www.tel-aviv.gov.il/Residents/HealthAndSocial/Pages/Disabilities.aspx> [<https://perma.cc/TG4G-TECK>] (last visited Sept. 3, 2020) (Isr.).

227. The information on Tel Aviv-Jaffa is based on interviews conducted between 2014 and 2016 with officers from the Tel Aviv-Jaffa Municipality, the Commission, and other organizations representing people with disabilities, and on relevant official documentation including accessibility master plans, accessibility surveys, and more (on file with authors). See Mariela Yabo, *From Social Services to Urban Planning: Accessibility for People with Disabilities — The Case of Municipal Professionalization* (2019) [hereinafter Yabo, *From Social Services*], [https://www.academia.edu/40008339/From\\_Social\\_Services\\_to\\_Urban\\_Planning\\_Accessibility\\_for\\_People\\_with\\_Disabilities\\_The\\_Case\\_of\\_Municipal\\_Professionalization?fbclid=IwAR07MR87qI529Bx-Gm\\_3Y-t6f270Hd9kC1PUoeWkeze0FxTsYjGyQdZzrU](https://www.academia.edu/40008339/From_Social_Services_to_Urban_Planning_Accessibility_for_People_with_Disabilities_The_Case_of_Municipal_Professionalization?fbclid=IwAR07MR87qI529Bx-Gm_3Y-t6f270Hd9kC1PUoeWkeze0FxTsYjGyQdZzrU) [<https://perma.cc/79N8-LNBB>]; Mariela Yabo, *From Welfare to Urban Planning: Pioneering, Professionalization and Institutionalization of Accessibility for People with Disabilities in the Municipality of Tel Aviv-Jaffa* (2017) (M.A. thesis, Tel Aviv University) [hereinafter Yabo, *From Welfare*], [https://www.nli.org.il/he/dissertations/NNL\\_ALEPH004713446/NLI](https://www.nli.org.il/he/dissertations/NNL_ALEPH004713446/NLI) [<https://perma.cc/SS5L-4VJT>] (Isr.).

In 2011, following the newly enacted requirements from local governments in the Chapter, the municipality formulated a multiyear accessibility plan to be implemented in all of the City's public spaces, including public buildings, open spaces, and urban infrastructures (such as boardwalks). In 2015, as work on implementing the plan began, the municipality decided to transfer the authority on access issues from a team a Social Services Unit social worker had coordinated to the newly established Accessibility Unit.<sup>228</sup> This new Accessibility Unit is under the direct authority of the Deputy Director of the Planning Department. Today, the Accessibility Unit focuses mainly on coordinating the progress of the plan within the different municipal operational units — such as the Boardwalks Department, Department of Education, Sport and Culture — charged with implementing the plan in their respective areas and on promoting the standardization of accessibility practices.<sup>229</sup> Similar to some of the MOPDs in the United States, the Accessibility Unit formulates city standards on accessibility that sometimes go beyond compliance with the national codes.<sup>230</sup>

The Accessibility Unit works in various ways to secure compliance with the disability access legislation in the City. It works closely with a senior accessibility advisor, who is an LAE on buildings, open spaces, and infrastructure, and in some cases, with additional external LAEs with specific expertise in different areas. When necessary, operational units implementing the multiyear plan in their area can consult regularly with the accessibility advisor or with any other LAE that the municipality contracts with.

When it comes to privately led projects, which require the municipality's approval, the developer is obligated to include an LAE's certification in their request.<sup>231</sup> The appropriate municipal department later examines the certification as part of the larger plan approval or business licensing process. In addition to these two routinized processes in the municipality, private parties may also reach out to the

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228. See Interview with the Manager and Coordinator, Accessibility Unit, Tel Aviv-Jaffa Mun. (Mar. 2016) (on file with authors).

229. See *id.*

230. For example, by including access instructions in the municipality's accessibility plan, which were not officially enacted yet, on how to regulate subjects like boardwalks, or by implementing more accommodations than required, like ensuring access to the stage at schools auditoriums instead of only to the seating area as detailed in the 2011 multiyear accessibility plan. See Yabo, *From Welfare, supra* note 227, at 63.

231. See Oren & Dagan, *supra* note 213, at 158.



Accessibility Unit anytime they need consultation on a subject of accessibility in their project.

It is evident that Israeli disability access laws — the Accessibility Chapter, in particular — tremendously influence the Accessibility Unit's work. The large number of new access codes and regulations has led to professionalization in the municipality and has given LAEs the highest authority to decide access matters in the city. This process has facilitated the comprehensive and efficient implementation of disability access law in all aspects. Together with Commission enforcement on the government level, noncompliance with disability access law is minimized.

It is important to note, however, the municipality's efforts have also led to the estrangement of citizens with disabilities from decision-making processes.<sup>232</sup> As explained above, until the ERPDL's Accessibility Chapter's passage, the regulation of accessibility in Israel had been insufficient and unclear. When a team of municipality officials started promoting accessibility in 1999, citizens with disabilities were considered the "experts."<sup>233</sup> The team organized ways that allowed these citizens to be very much involved in the municipality's work on accessibility. This included regular meetings with officials, focus groups, surveys, and other practices that helped the municipality better understand the subject matter.<sup>234</sup> With the Accessibility Chapter's enactment and the new ways in which local governments became responsible for its implementation, the municipality of Tel Aviv-Jaffa went through a process of professionalization in this field, transferring the authority on accessibility issues from social service workers to LAEs. Given the technical and operational nature of the LAEs' profession, it has become more challenging for citizens with disabilities to participate in the decision-making processes on accessibility.

In the last Section, this Article reviews the lessons a comparative analysis of different local level approaches to the implementation of disability access law teaches and makes recommendations for the future of accessibility professionalization and enforcement in the United States.

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232. See Yabo, *From Social Services*, *supra* note 227, at 14–16; Yabo, *From Welfare*, *supra* note 227, at 71–76.

233. See Interview with Former Coordinator, Accessibility Team, Tel Aviv-Jaffa Mun. (Sept. 2014) (on file with authors).

234. See Yabo, *From Social Services*, *supra* note 227, at 18; Yabo, *From Welfare*, *supra* note 227, at 72.

## VI. A VISION FOR URBAN ACCESSIBILITY PROFESSIONALIZATION

What is clear from the comparative account put forth in this Article is that culture and public attitude directly influence disability law and policy, specifically regarding the government's role in ensuring equity. Even though both jurisdictions started out sharing a similar view on disability antidiscrimination law, as the ERPDL was modeled after the ADA, they diverged on the implementation and enforcement of access.

Israel takes a hands-on approach to regulate accessibility of the built environment, embodied in its centralized model of professionalization and enforcement.<sup>235</sup> It does so through its newly established network that contains licensed professionals who serve as on-the-ground gatekeepers as well as through a centralized, governmental enforcement mechanism. The United States takes a more hands-off approach, relying on a private attorney general model to enforce compliance with access codes and regulations. When U.S. state law does not provide guidance on enforcement, local governments take the lead on enforcing accessibility standards through a "diffused model"; each city decides whether it wants to take an active or a passive role in instituting accessibility professionals and mechanisms of enforcement. While Chicago takes an active role in enforcing accessibility in the private sector, New York City relies primarily on private litigation as a driving force, yet it offers guidance to private developers and architects upon request. While big California cities, like Los Angeles and San Francisco, take a similar approach to New York City with regard to enforcing accessibility, state law plays a large role in creating accessibility professionals who ensure compliance.<sup>236</sup>

Three decades after the ADA's and other federal laws' enactment, the enforcement of accessibility standards in the United States is still lacking. Enforcement and professionalization of U.S. access laws could be improved, as could "internal" motivations to improve access and go beyond compliance. Because change on the federal level is often hard to implement and accessibility professionals play a significant role, state and local reforms will have to be the answer to ensure compliance with codes, equal access, and civic engagement of people with disabilities in the United States.<sup>237</sup> Creating an accessibility profession at the local level could be part of "legislative design choice" mechanisms intended to

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235. See *supra* Section V.A.

236. See *supra* Section IV.B.

237. This can be done without the risk of preemption. See MALLOY, *LAND USE LAW AND DISABILITY*, *supra* note 22, at 13–14 and accompanying text.

implement national goals and values while harnessing local expertise and nurturing local democracy and decision-making processes.<sup>238</sup>

What could the vision be for ensuring urban accessibility on the local level? First, the Article argues municipalities should take an active role in ensuring accessibility at the design stage when approving plans. This active role can be taken in different ways. One approach could be how Chicago conditions the approval of plans and permits based on a review by its MOPD.<sup>239</sup> Another method could be the one Tel Aviv-Jaffa has taken, which relies on a detailed certificate by a licensed accessibility professional required for application submission.<sup>240</sup> Regardless of the specifics, by taking an active role, municipalities ensure that access is dealt with *ex ante*, at the design stage, instead of *ex post*, through litigation. Most litigation revolves around a disagreement on whether a site is or is not compliant, with each professional taking a stance. Enforcement when approving plans would help save litigation costs and ensure a more effective process for achieving accessibility. In addition, municipalities should encourage designers and architects to go beyond mere compliance with the codes, whether through publishing recommendations like New York City's MOPD or offering consultation prior to submitting the plans, as done in New York City and Chicago.

Second, standardized training and certification of accessibility experts, at least on a state, if not on a national level, is important to ensure that built environments are actually accessible. This is similar to California's and Israel's current practices. The creation of a national standard of training may be a possible solution. Regulation of the general training framework for accessibility professionals will be considered a "decision channeling rule" through which the federal government ensures uniformity, structure, and required steps, while still leaving most of the decision-making process to the local authorities.<sup>241</sup> Such training would ensure an adequate level of expertise and allow for a quality consultation at the design stage that would yield more accessible environments. To achieve this, the training of urban planners, engineers, and architects on accessibility should be a matter of civil rights, not merely one of technical details. Reducing accessibility into narrow technical applications ignores disabled people's daily

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238. Michael Pollack, *Land Use Federalism's False Choice*, 68 ALA. L. REV. 708, 719 (2017). This is while classic federalism argues against national solutions that do not take local knowledge and ideas about local democracy into consideration. *See id.* at 711.

239. *See supra* notes 201–04 and accompanying text.

240. *See supra* Section V.B.

241. *See* Pollack, *supra* note 238, at 729–30.

experience of injustice in the public realm.<sup>242</sup> Municipalities should more fully consider the holistic needs that disabled end users have when navigating urban spaces. Such thinking would facilitate the need to plan for access in one facility or building and the necessity of understanding the connectedness of infrastructure to the area around it and to centers of community life.<sup>243</sup>

The last issue that is important to address is the inherent tension between professionalization and participation of lay disabled individuals in the process of accessible design. One needs to acknowledge that design and building professions, like all trades, are hierarchical, and users' knowledge is rarely deployed in work done by professionals.<sup>244</sup> The process of moving away from advice given directly by citizens to experts has happened in Tel Aviv-Jaffa, despite disability studies scholars conceptualizing the need for individuals with disabilities themselves to share their access-knowledge, based on their lived experience.<sup>245</sup> A substantial collaborative process between professionals and lay disabled citizens can be done through multiple avenues, including focus groups, representation in local government committees, and consultation in all design and development stages.<sup>246</sup> Those approaches would allow for creating "social architecture" that is attentive to end users' needs.<sup>247</sup> Such labor on the part of end users with disabilities, however, should not come free. Their expertise should be

242. See Nili R. Broyer, *Through the Restroom Mirror: Accessibility and Visibility in Public Space*, 35 *DISABILITY & SOC'Y* 1483, 1501 (2020).

243. See MALLOY, *LAND USE LAW AND DISABILITY*, *supra* note 22, at 15.

244. See IMRIE & HALL, *supra* note 126, at 149–50.

245. See HAMRAIE, *supra* note 18, at 6, 10. Disabled individuals conceptualize Universal Design, an ideology that the design process should create environments accessible for many people, disabled or non-disabled, going further than only designing accessible accommodations. *See id.* at 5–6. Incorporating disabled end users' voices is an inherent characteristic of Universal Design implementation that the Authors believe accessibility professionals should adopt. *See id.*

246. Such participatory process, referred to as "deliberative development," has been deemed to improve projects. *See* VICTOR SANTIAGO PINEDA, *BUILDING THE INCLUSIVE CITY: GOVERNANCE, ACCESS, AND THE URBAN TRANSFORMATION OF DUBAI* 36–37 (2020).

247. IMRIE & HALL, *supra* note 126, at 4–5. For an introduction to the concept of "crip design," see Broyer, *supra* note 242, at 1501 ("As one optional direction to radicalize accessibility, I offer 'crip design' . . . . As a version of critical design, crip design enables and/or imposes on its users non-normative practices while affirming disability and contaminating normalcy. On the one hand, crip design is intended to validate disability and to support recognition of differences. On the other hand, this alternative design is meant to challenge power relations, disrupt performativity, and destabilize the hegemonic notion of 'the human'. Its purpose is to undermine the notion of sameness and to directly interfere with the taken for granted state of normalcy.").

valued not only on principle but also as time and knowledge that requires compensation.

#### CONCLUSION

Professionalization has many benefits in the disability access context. It is a critical way to ensure much-needed compliance with U.S. disability access laws, which are still insufficient decades after they were enacted. Despite the urgent need for truly accessible built environments, the process of creating or standardizing new professions in the field of disability access should be done carefully.

This Article analyzes the way that urban accessibility is implemented at the local level. In the United States, this has been done in varying degrees — as a result of U.S. federal law's reliance on private litigation to enforce accessibility standards — but insufficient incentives for plaintiffs have led to underenforcement. On the state and local levels, a diffused model of dealing with urban accessibility has emerged, where different cities take different approaches to professionalization and enforcement. In Israel, where the government has historically been more involved in the provision of social services and has collaborated with civil society, there is a centralized model for ensuring compliance with accessibility codes.

This Article borrows from each model to offer a new vision to implement and enforce urban accessibility in an effective, standardized, and participatory manner. This Article proposes that this way of creating access is the key to ensuring spatial and civic equality for people with disabilities.