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Federal and State Handicapped Discrimination Laws: Toward an Accommodating Legal Framework

By: Michael J. Kaufman*

I. INTRODUCTION

Federal and state legislation protecting handicapped persons from discrimination is recent, relative to other antidiscrimination legislation. Accordingly, the scope of the legislative protection for handicapped persons is often undefined. Courts, local commissions, and litigants frequently are left grasping for some prescriptive norm.¹ The Supreme Court gradually has developed that norm under Section 504 of the Rehabilitation Act of 1973 ("Section 504" or "Rehabilitation Act"), by balancing the goals of the statute against countervailing policy considerations. As judicial experience with handicapped discrimination grows, so too will technological advances that render irrelevant any descriptive differences between the abilities of handicapped and nonhandicapped persons.² Any standard of protection based upon a balance of statutory goals and countervailing policies therefore must be sufficiently flexible to account for these advances. Yet, in order to supply clarity, the standard also must draw upon familiar common law and statutory frameworks successfully used in analogous areas of the law.

This article will illustrate that when interpreting federal and state handicapped discrimination laws, the Supreme Court and lo-

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1. A prescriptive norm is a standard of conduct which does not describe current conditions, but dictates a state of affairs which courts or legislative bodies have deemed ideal and thus worthy of pursuit.

2. The words "description" or "descriptive," as used throughout this article, define the relationship between one's ability and one's determinable physical characteristics in terms of current factual conditions. They exclude any analysis based upon whether one's condition *should* be related to one's ability. A descriptive definition of a handicapped person is one that describes in value-free terms the physical characteristics of that person. A descriptive relationship thus is different from a prescriptive one. Prescription does not describe a current situation; it prescribes a condition which a court or legislative body considers to be ideal. If one's characteristic *should not* be related to one's ability, it is "prescriptively" unrelated to one's ability.

cal adjudicative bodies have developed standards that adapt familiar common law and statutory structures to the unfamiliar area of handicapped discrimination. This article will illuminate this process of interpretation by comparing Section 504 with the Illinois Human Rights Act ("the IHRA" or "the Act"), a model of state statutes protecting handicapped persons.

This article first describes the Illinois Human Rights Commission's ("the Commission") abandonment of a descriptive definition of the term "handicapped individual." The article next traces the Supreme Court's various interpretations of Section 504, which together justify the Commission's embrace of a prescriptive definition of the term handicapped and help define the prescriptive duty that public accommodators under the IHRA owe to individuals with determinable physical characteristics. This article then shows that the Supreme Court's reasoning requires that a greater duty be placed upon public accommodators under the IHRA than is incumbent upon federal grantees. Finally, this article suggests that in light of the prescriptive duties created by Section 504 and the IHRA, the trial of a handicapped discrimination case falls into one of two compatible evidentiary frameworks—a common law or statutory framework.

II. THE ILLINOIS HUMAN RIGHTS ACT'S PRESCRIPTIVE DUTY

The Illinois Human Rights Act³ grants "handicapped" individuals a private right of action against persons who deny to them the "full and equal enjoyment" of places of public accommodation.⁴ The Act also encourages state actors and governmental instrumentalities "rigorously [to] take affirmative action to provide equality of opportunity" for handicapped persons and to "eliminate the effects of past discrimination" against handicapped persons in "the[ir] internal affairs . . . and in their relations with the public."⁵ Although the Act's substantive protections of "handicapped" persons are great, its definition of a handicapped person can be read to exclude each of these protections. Under the Act, a handicapped person, for purposes of discrimination in places of public accommodation, is one whose "determinable physical or mental characteristics" are "unrelated" to his or her ability to "utilize and benefit

3. ILL. REV. STAT. ch. 68, paras. 1-101—9-102 (1985).

4. *Id.* at para. 5-102(A).

5. *Id.* at para. 1-102(D).

from the place of public accommodation.”⁶ This definition appears to eliminate from the Act’s protections virtually all individuals commonly described as handicapped. A “determinable physical or mental characteristic” is always “related” in one form or another to one’s ability to utilize and benefit from a place of public accommodation. If the definition of handicap hinges on a description of this relationship, no one would be deemed handicapped because such a relationship always could be described.

With slight difficulty, for example, a blind man enters a soda shop only to be kicked out by the shopkeeper who says: “We don’t want any blind people in here.” The shopkeeper actually has displayed discriminatory animus. Yet, if the Act’s definition of “handicapped” is meant to describe a current state of affairs, as an evidentiary or factual matter, the blind man would not prevail in a lawsuit against the shopkeeper. His “determinable physical characteristic,” his blindness, is descriptively “related to” his ability to utilize and benefit from a place of public accommodation. Even if the blind man has become more adept than a sighted man at utilizing and benefitting from the soda shop, he could not contend that his blindness is wholly unrelated to his ability to do so. No matter how much discriminatory animus a blind man suffers, the Act would not protect him because he is not “handicapped.”

Confronted with the issue of whether the Act’s definition of “handicapped” rendered its protections for handicapped individuals meaningless, the Commission promulgated regulations and issued decisions that created a duty of accommodation.⁷ In both the employment and public accommodation contexts, the Commission has determined that a handicapped individual is one who, despite any determinable physical characteristic, is able to perform job activities, or use and benefit from a place of public accommodation, with accommodation.⁸

In *May v. Chicago Transit Authority*,⁹ the Commission relied upon the “broad protective philosophy and purpose” of the Act’s predecessor and found “a duty to provide reasonable accommodation to handicapped employees.”¹⁰ In *May*, a former CTA ticket

6. *Id.* at para. 1-103(I)(4) (1985). The Act contains similar definitions of handicapped for purposes of employment and housing discrimination.

7. *Jones v. Chicago Transit Authority*, — Ill. HRC Rep. — (1986); *May v. Chicago Transit Authority*, 5 Ill. HRC Rep. 154 (1982).

8. *Jones v. Chicago Transit Authority*, — Ill. HRC Rep. — (1986); *May v. Chicago Transit Authority*, 5 Ill. HRC Rep. 154 (1982).

9. 5 Ill. HRC Rep. at 154 (1982).

10. *Id.* at 157.

agent claimed that the transit authority discriminated against him because of his handicap by discharging him and failing to place him in an alternate position.¹¹ *May* conceded that he could not perform the job of ticket agent; his determinable physical characteristics were admittedly "related to" his ability to perform that job. The Commission concluded, however, that *May's* characteristics would not, as a matter of law, be "related to" his abilities if he could perform the job with reasonable accommodation.¹² His characteristics, as a descriptive matter, were "related to" his job performance. But as a prescriptive matter, they were not related to that performance.

Although the Commission declared that the issue of reasonable accommodation must be resolved on a "case-by-case basis,"¹³ it allocated the burden of proof in such cases. The complainant's prima facie case must consist of some proof of determinable physical characteristics, proof that those characteristics would be unrelated to job performance if reasonable accommodation were provided, and proof that the employer has failed to provide such accommodation.¹⁴ The burden then shifts to the respondent to prove, as an affirmative defense, that the accommodation is technologically impossible, or at least would create an "undue hardship."¹⁵ While the "technological exclusion" excuses the failure to accommodate in the absence of methods for removing the disability, the "burden exclusion" excuses the failure to accommodate when employers can provide for a handicapped person only by incurring excessive burdens.¹⁶

In *Jones v. Chicago Transit Authority*,¹⁷ the Commission affirmed the Chief Administrative Law Judge's extension of the duty of ac-

11. *Id.* at 155.

12. *Id.* at 158.

13. *Id.*

14. *Id.*

15. *Id.* *May* was originally decided under the Fair Employment Practices Act ("FEPA"), the predecessor to the IHRA. The Commission found that the purposes and duties in the FEPA were present in the IHRA. In addition, the Commission rested its understanding of "undue hardship" and reasonable accommodation upon guidelines promulgated under the FEPA. These guidelines state that an "undue hardship may be established where, for example, business necessity precludes such an accommodation, or where the cost of the accommodation would be economically prohibitive"

16. As a matter of law, the Commission suggests, the relation between characteristic and ability is acceptable if it cannot be removed at all or can be removed only with an undue burden. The Commission determined in *May* that the transit authority had, in fact, provided reasonable accommodation by assigning the complainant to an administrative position. *Id.* at 159.

17. — Ill. HRC Rep. — (1986).

commodation from the employment to the public accommodation section of the Act. In *Jones*, complainants who use wheelchairs as mobility aids filed an action against the transit agency. The complainants alleged that the transit agency's past failure to provide any public bus service for them, and its current failure to provide any mainline bus service for them, constituted discrimination against the handicapped.¹⁸

The respondent moved for summary judgment, arguing that the complainants, despite their wheelchair use, were not "handicapped." The transit agency claimed that complainants' determinable physical characteristics were, in fact, related to their abilities to use and benefit from a public bus; they simply could not board or alight inaccessible buses. Concluding, however, that respondent's argument would "eviscerate" the IHRA, the Chief Administrative Law Judge held that the Act required respondents to provide accommodation.¹⁹

Upon certification of the issue, the Commission affirmed.²⁰ First, the Commission concluded that the IHRA prohibited acts by public accommodators performed with the intent to treat handicapped persons differently from non-handicapped persons.²¹ Second, the Commission declared that in addition to prohibiting such "disparate treatment" or intentional discrimination, the IHRA reaches neutral policies that have a disparate impact upon handicapped persons.²² Accordingly, public accommodators have a duty not only to refrain from intentional discrimination, but also to modify their otherwise neutral practices that disparately impact handicapped persons. The Commission agreed with the Chief Administrative Law Judge that the IHRA would lose its meaning if it did not provide protection from some instances of disparate impact.

The Commission's conclusion that the Act imposes upon public accommodators "some duty of accommodation" also was based upon its finding that cases interpreting Section 504 of the Rehabilitation Act of 1973 required such a duty by analogy. The only issue before the Commission, however, was whether summary judgment was proper. Accordingly, the Commission did not precisely define the scope of the duty of accommodation. The duty can be

18. *Id.* at —.

19. *Id.* at —.

20. *Id.* at —.

21. *Id.* at —.

22. *Id.* at —.

defined, however, through analysis of the Supreme Court's interpretations of Section 504 and allegiance to the prescriptive standards within the IHRA.

III. THE SECTION 504 PRESCRIPTIVE DUTY OF REASONABLE ACCOMMODATION

The Supreme Court has found an "affirmative duty of reasonable accommodation" by balancing Section 504's objectives against the countervailing considerations of manageability, comity, and program integrity.

A. *The Supreme Court's Rejection of Description*

Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap" be, "excluded from participation in, "[d]enied the benefits of," or "subjected to discrimination under any program . . . receiving federal financial assistance" ²³ The Rehabilitation Act defines a "handicapped individual" for purposes of Section 504 as one who has, has a record of having, or is regarded as having, a "physical or mental impairment which substantially limits one or more of such person's major life activities."²⁴ Thus, the definition of a handicapped person within Section 504 includes all individuals who have impairments that limit a major life activity regardless of whether that impairment is related to the person's ability.

The statute, however, does not protect all handicapped persons from discrimination in federally funded programs. Rather, it protects only "otherwise qualified" handicapped persons.²⁵ The Supreme Court has defined an otherwise qualified individual to be "one who is able to meet all of a program's requirements *in spite of* his handicap."²⁶ The Supreme Court's interpretation of otherwise qualified to mean *in spite of* highlights the relationship between one's impairment and one's ability to meet the program's requirements. Under a purely descriptive definition of an otherwise qualified handicapped person, Section 504 would protect only those individuals whose impairments are unrelated to their abilities.

Although it defined otherwise qualified individuals to be those

23. 29 U.S.C. § 794 (1973).

24. *Id.* at § 706(7)(B).

25. *Id.* at § 794.

26. *See* School Board of Nassau County v. Arline, 107 S. Ct. 1123 (1987) (emphasis added); Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

who in spite of their impairments could meet program requirements, the Supreme Court recognized that the legal relation between impairment and ability could not be entirely descriptive. Accordingly, in *Southeastern Community College v. Davis*,²⁷ the Court envisioned situations in which a "refusal to modify" an existing program might be discriminatory²⁸ because it would "deprive *genuinely* qualified handicapped" persons of the opportunity to participate in a federally funded program.²⁹

The Court's shift from otherwise qualified to genuinely qualified is significant. Section 504's protection should not be limited to handicapped individuals who can meet program requirements in spite of their handicaps. Section 504 also protects handicapped individuals who can meet program requirements only if a program is modified. These individuals are genuinely qualified. The word "genuinely" converts the relationship between impairment and ability from a descriptive one to a prescriptive one. Even those individuals whose impairments are, as a descriptive matter, related to their abilities to meet program requirements are, nonetheless, covered by Section 504 because their impairments are unrelated to their abilities as a prescriptive matter. They are genuinely qualified because they can meet a program's requirements if the requirements have been modified. Their handicaps do, but need not, pose a barrier to their participation in a program.

The prescriptive relationship between impairment and ability implicit in *Davis* was made explicit in *Alexander v. Choate*.³⁰ The Supreme Court unanimously held that Tennessee's reduction in its annual Medicaid in-patient hospital coverage did not have an unlawful disparate impact upon handicapped individuals.³¹ The Court assumed, however, that Section 504 reaches some conduct that has a disparate impact upon handicapped individuals.

That assumption represents a further departure from a purely descriptive definition of an otherwise qualified individual. Those individuals who are least qualified for a federally funded program within the meaning of Section 504 are likely to be those upon whom the impact of a program's policy is likely to fall most disparately. To establish a violation of Section 504, handicapped individuals must show that they are otherwise qualified for a

27. 442 U.S. 397 (1979).

28. *Id.* at 413.

29. *Id.* at 412 (emphasis added).

30. 469 U.S. 287 (1985).

31. *Id.* at 289.

program³² and that the grantee's conduct has a disparate impact upon the handicapped.³³ Proof of disparate impact or discrimination, however, is incompatible with proof that an individual can satisfy program requirements in spite of his or her handicap. The evidence that describes the disparate impact of a program at the same time describes a keen relationship between impairment and ability. If a violation of Section 504 could be established only by evidence that shows disparate impact and that does not, at the same time, show a relation between impairment and ability, a violation could rarely be established.

The Supreme Court recognized in *Choate* that if Section 504 was interpreted descriptively, it would be eviscerated. Accordingly, the Court separated the issue of whether a handicapped individual is "otherwise qualified" from the issue of whether discrimination has occurred.³⁴ These issues, the Court reasoned, "would seem to be two sides of a single coin"³⁵ The issue of otherwise qualified, however, is not logically, factually, or descriptively anything like the issue of disparate impact. They are incompatible.

The Court is able to combine these issues only by disregarding the "descriptive" nature of each. By finding that these two incompatible issues are really two ways of looking at the same question, the Court suggests that the purposes of Section 504 are ill-served by elements of recovery that require descriptive analysis. The Court replaced these two descriptive elements, otherwise qualified and disparate impact, with one overriding prescriptive norm. The "ultimate question," according to the Court, "is the extent to which a grantee is required to make reasonable modifications in its programs [to accommodate] the needs of the handicapped."³⁶ This question is a normative or prescriptive one: how much should a grantee be required to do to accommodate the needs of the handicapped, regardless of whether they are otherwise qualified? Or, in terms of the statute, which impairments do, but should not, disqualify a handicapped person from a federal program?

In *School Board of Nassau County v. Arline*,³⁷ the Supreme Court took for granted the proposition that Section 504 reaches claims of disparate impact and interpreted the plain language of

32. See *Choate*, 469 U.S. at 290.

33. *Id.* at 299.

34. *Id.* at 299 n.19.

35. *Id.*

36. *Id.*

37. 107 S. Ct. 1123 (1987).

“otherwise qualified” in a prescriptive manner.³⁸ A handicapped person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified, but one whose risk can be eliminated by the affirmative obligation to make reasonable accommodation is otherwise qualified.³⁹

B. Prescribing the Standard

The adoption of a prescriptive standard immediately raises questions about the nature of that standard. The Supreme Court found a statutory “affirmative duty to make reasonable accommodation”⁴⁰ by balancing “two powerful but countervailing considerations: the need to give effect to the statutory objectives, and the desire to keep Section 504 within manageable bounds.”⁴¹

(1) The Section 504 Statutory Objectives

By enacting Section 504, Congress sought to remedy what it perceived as societal neglect of the handicapped.⁴² That neglect typically was the result of benign indifference rather than invidious discrimination.⁴³ Barriers to access usually are not erected out of discriminatory animus; they are established in disregard for handicapped individuals. By drafting the Rehabilitation Act of 1973, Congress sought to remove barriers to access whether or not they were erected out of animus, and to “ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others.”⁴⁴ Accordingly, the Supreme Court found that the Congressional intent to foster integration of the handicapped into employment,⁴⁵ education,⁴⁶ and public facilities⁴⁷ would “ring hollow” if Section 504 were powerless to reach “harms resulting from action that discriminated by effect as well as by design.”⁴⁸

38. *Id.* at 1131 n.17.

39. *Id.* at 1131 n.19.

40. *Id.*

41. *Alexander v. Choate*, 469 U.S. 287, 299 (1985).

42. *Id.* at 295.

43. *Id.* at 295.

44. *See School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987).

45. “The primary goal of the Act is to increase employment.” *Choate*, 469 U.S. at 307 n.28 (citing *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 633 n.13 (1984)) (“Indeed, enhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress . . . felt it necessary to amend the statute . . .”).

46. *See Choate*, 469 U.S. at 307 n.29.

47. *See id.* at 307 n.30.

48. *See id.* at 297.

The statutory rights granted by Section 504 is defined as "equal" treatment by, and "meaningful access" to, federally funded programs.⁴⁹ The Supreme Court declared that the provision is designed to ensure evenhanded treatment of handicapped individuals.⁵⁰ The right to equal or evenhanded treatment is akin to the right to be free from disparate treatment or intentional discrimination.⁵¹ In addition, the assurance of "meaningful access" guarantees at least some measure of protection from policies that have a disparate impact upon handicapped individuals. Grantees must at least be given the opportunity to compete for program benefits.

The Court suggested, however, that Section 504 affords handicapped individuals no guarantee that they will succeed in their competition with non-handicapped individuals for program benefits.⁵² The Court interprets Section 504's duty of reasonable accommodation as a guarantee of opportunity, not results.

(2) Countervailing Considerations

In developing its ultimate legal standard, the Supreme Court balanced the statutory rights of handicapped individuals against three countervailing considerations. The Court considered the need to keep Section 504 within manageable bounds, and gave deference to the state charged with using federal funds. The court also examined the legitimate interests of federal grantees to preserve the integrity of their programs.⁵³

(a) Manageability

The Supreme Court suggested that if Section 504 were interpreted to prohibit all program policies that adversely impact upon handicapped individuals, the statute would become unmanageable. Such an interpretation would require every recipient of federal funds to evaluate the effect on the handicapped of every proposed action, and would require courts and administrative agencies to investigate countless allegations of conduct that have an adverse impact upon handicapped individuals. The Court emphasized that the application of Section 504 to all disparate impact claims would result in overwhelming administrative and adjudicative burdens.⁵⁴

49. *Id.* at 301.

50. *Id.* at 304.

51. *Id.*

52. The Court finds that the Act does not "guarantee the handicapped equal results" *Id.*

53. *Id.* at 298-99.

54. *Id.* at 298.

(b) *Comity*

In deciding the prescriptive norm for handicapped access to federally funded programs, the Supreme Court also was careful not to allow “major inroads” on a state’s power to administer its programs in accord with its own goals.⁵⁵ Section 504 itself does not “require the [s]tate” to alter its definition of a benefit, unless the benefit is defined to exclude handicapped persons. To conclude that Section 504 requires each state to redefine its program benefits, according to the Court, would be to hold that Rehabilitation Act requires the states to find those illnesses particularly affecting the handicapped more important than other illnesses.⁵⁶ Nothing in the legislative history of Section 504 affords Congress the power to condition federal funding based upon how a state chooses to prioritize the illnesses inflicted upon its citizens. The statutory goal of Section 504, therefore, must be tempered by comity: deference to the state’s policy decisions, particularly in areas in which it has exercised “longstanding discretion.”

The Supreme Court’s comity concern is particularly deep because the duty incumbent upon the states under Section 504 is rooted in a contract with the federal government. In *Pennhurst State School and Hospital v. Halderman*,⁵⁷ the Supreme Court declared that when Congress intends to impose a condition upon the grant of federal funds, “it must do so unambiguously.”⁵⁸ The clear intent of Congress is necessary because federal legislation that places conditions on the use of federal funds has the nature of a “contract.”⁵⁹ The Section 504 contract is based upon a quid pro quo between the federal government and the states: the states bear some of the cost of providing opportunity for the handicapped in consideration for receipt of federal funds.⁶⁰ The states cannot be held to the terms of their contract, however, unless they “knowingly and voluntarily” accept those terms.⁶¹ Absent a clear expression of Congressional intent, the states cannot knowingly and voluntarily accept the conditions attached to the receipt of funds.⁶²

55. In *Choate*, the Court stopped short of imposing upon the State an affirmative action duty partly in deference to the State’s “longstanding discretion” to choose the proper mix of Medicaid coverage for its citizens. The Court’s willingness to defer to the states transcends Medicaid coverage. *Id.* at 303.

56. *Id.* at 303-04.

57. 451 U.S. 1 (1981).

58. *Id.* at 17.

59. *Id.* See also *Arline*, 107 S. Ct. 1123, 1132-33 (Rehnquist, J., dissenting).

60. *Id.*

61. *Id.*

62. *Id.*

The requirement that Congress express its clear intent is particularly strong when the "contract" struck between the state and federal government involves an area in which Congress has traditionally left considerable discretion to the states.⁶³ To the extent that the contractual duties incumbent upon the states under Section 504 are unclear, the Supreme Court has indicated that those duties should be construed narrowly in favor of the states.

(c) *Program Integrity*

The statutory rights of the handicapped must be further balanced under Section 504 against the legitimate interests of federal grantees in preserving the integrity of their programs.⁶⁴ A program's integrity is its "essential nature."⁶⁵ The "essential nature" of a program must be assessed on a program-by-program basis. Hence, the "essential nature" of the nursing program upheld in *Southeastern Community College v. Davis*⁶⁶ was to "train persons who could serve the nursing profession in all customary ways."⁶⁷ In *Alexander v. Choate*,⁶⁸ the "essential nature" of the State of Tennessee's Medicaid program was "a particular package of health care services . . . [that] has the general aim of assuring that individuals will receive necessary medical care"⁶⁹ The "essential nature" of the program at issue in *School Board of Nassau County v. Airline* was the educational welfare of elementary school children in Nassau County, Florida.⁷⁰

Although the definition of a program's "essential nature" turns on the facts of each case, the Supreme Court has established an analytical pattern. First, the "essential nature" of a program cannot be defined with the purpose or effect of disqualifying individuals with handicaps.⁷¹ For example, in *Davis*, Southeastern Community College could not define its nursing program as dedicated to deaf-free nursing care, nor could the College define its program by the goal of producing nurses with supersensitive eardrums. The former goal is an express exclusion of handicapped

63. *Id.*

64. *Alexander v. Choate*, 469 U.S. 287, 300 (1985).

65. *See, e.g.*, *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979).

66. *Id.*

67. *Id.* at 413.

68. 469 U.S. 287 (1985).

69. *Id.* at 299-300.

70. 107 S. Ct. at 1131 n.16.

71. *See, e.g.*, *Choate*, 469 U.S. at 301. "The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled"

individuals, whereas the latter has the direct effect of excluding handicapped individuals.

Second, in each case decided under Section 504, the Supreme Court has suggested that the "essential nature" of a federally funded program, which cannot be sacrificed, is safety to others. In *Davis*, the Supreme Court distilled the College's impenetrable core value to be the assurance that "no graduate will pose a danger to the public"⁷² In *Choate*, the Court described the plaintiff in *Davis* as an individual "who would not be capable of *safely* performing as a registered nurse even with full-time personal supervision."⁷³ Furthermore, the Court in *Choate* emphasized that any modification in Tennessee's Medicaid plan would sacrifice the "best interests" of other individuals whose particular illnesses are as "worthy of cure."⁷⁴ The integrity of Tennessee's program depended upon maintaining the health of others.

Arline also defined the essential nature of the program at issue, elementary school education, to be safety.⁷⁵ The Court declared that an individual "who poses a significant risk of communicating an infectious disease to others in the work-place will not be otherwise qualified for his or her job if reasonable accommodation cannot eliminate that risk."⁷⁶ Section 504 does not require a school board to place a teacher with an active contagious disease in the classroom with elementary school children.⁷⁷ Thus, the Supreme Court declared that the "otherwise qualified" analysis should include a determination of the nature, duration, severity of the health risk and the probability that the disease will cause "harm."⁷⁸ The essential nature of a federally funded program, its integrity, therefore, is the nondiscriminatory pursuit of nondiscriminatory purposes, with minimal risk to public safety.

C. *The Standard*

The Supreme Court's standard for Section 504 compliance is the product of a balance of the statutory goal of equal opportunity and the countervailing considerations of manageability, comity, and program integrity. These competing considerations can be reconciled if grantees are required to make modifications in their pro-

72. 442 U.S. at 413 n.12.

73. 469 U.S. at 300 (emphasis added).

74. *Id.* at 304.

75. 107 S. Ct. 1131 n.16.

76. *Id.*

77. *Id.*

78. *Id.* at 1131.

grams that will allow equal opportunity without sacrificing the integrity of their programs. This requires reasonable, not complete, accommodation. Thus, recipients of federal funds have the "affirmative duty" to accommodate handicapped persons when doing so would not create undue financial and administrative burdens.

The Supreme Court's program-integrity analysis, however, is anterior to its "undue burden" analysis. The Section 504 issue is not whether a handicapped person can be accommodated without an undue administrative and financial burden, but whether a grantee can admit a handicapped person into its program and preserve the integrity of that program without incurring undue administrative and financial burdens. A program's integrity is its safe accomplishment of nondiscriminatory purposes. Thus, if a grantee can admit a handicapped person and maintain the safe accomplishment of legitimate purposes without suffering an undue burden, it must do so. If, however, preservation of the safe accomplishment of its purposes cannot be accomplished technologically or can only be accomplished with an undue financial and administrative burden, then a grantee need not admit a handicapped person.

Understood in light of its origin and purposes, the prescriptive duty of reasonable accommodation can be seen as the application of the "business necessity" defense to charges of handicapped discrimination. Indeed, the Supreme Court's discussion in *Choate* of "integrity" is in the context of its presumption that Section 504 reaches instances of disparate impact.⁷⁹ Since *Griggs v. Duke Power Co.*,⁸⁰ the Supreme Court has characterized the defense to a disparate impact charge as "business necessity." In the classical formulation of the "necessity" defense the defendant must demonstrate that its practice is "sufficiently compelling to override any discriminatory impact," its practice "effectively serves the business purpose," and "there is available no less discriminatory alternative."⁸¹ Hence, the grantee must show that the goals of its policy are compelling, that the "fit" between the goals and the policy is a tight one, and that its goals cannot be accomplished by any other less burdensome means. A discriminatory practice is not justified

79. 469 U.S. 287, 300 (1987).

80. 401 U.S. 424 (1971).

81. *Liberles v. Daniel*, 477 F. Supp. 504, 507 (N.D. Ill. 1979), *aff'd in relevant part*, *Liberles v. County of Cook*, 709 F.2d 1122, 1132 (7th Cir. 1983) (citing *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976)).

by "necessity" unless each of these is shown.⁸²

Although the Supreme Court did not itemize these elements of the business necessity defense in *Davis*,⁸³ *Choate*⁸⁴ or *Arline*,⁸⁵ it implicitly found that the proper inquiry in each case was whether the defendant had met its burden of showing that its practices were necessary. Hence, in *Davis*, Southeastern Community College showed that its purpose "to train persons who could serve the nursing profession" was compelling, that its admission standards fit its goal of producing such nurses and that no less discriminatory alternative existed for meeting its goal because the plaintiff could not even benefit from any "affirmative action."⁸⁶ Similarly, in *Choate*, Tennessee showed that its purpose of "assuring that individuals will receive necessary medical care" was "compelling," that the "fit" between the policy of reducing inpatient coverage and the purpose of providing "necessary" care was tolerable and that, although less discriminatory alternatives existed, none of them could have been pursued without unreasonable "administrative costs."⁸⁷ Finally, in *Arline*, the Supreme Court remanded to the district court the issues of whether any "fit" existed between the discharge of plaintiff for having tuberculosis and the legitimate school policy of removing health risks from the elementary school environment, and, if so, whether any less discriminatory practice could have been pursued without undue hardship.⁸⁸

The balance between the Section 504 statutory objectives and the countervailing management burdens, comity concerns, and program integrity considerations, therefore, requires grantees to afford handicapped persons reasonable accommodation. The "affirmative obligation to make a reasonable accommodation" is normative or prescriptive. It emanates not from any descriptive account of the current relationship between handicap and ability, but from a balance of competing values. The affirmative duty of reasonable accommodation, however, is tantamount to holding grantees liable

82. To prove that its discriminatory policies can be justified by a "business necessity," a grantee has a "heavy" burden. *Hawkins v. Anheuser-Busch*, 697 F.2d 810, 815 (8th Cir. 1983). A discriminatory practice cannot be justified by mere routine business considerations. Nor can it be excused by a rational basis for its existence. *Liberles*, 709 F.2d at 1132; *Hawkins*, 697 F.2d at 815 (citing *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 703 (8th Cir. 1980)) (emphasis in original).

83. 442 U.S. 397 (1979).

84. 469 U.S. 287 (1985).

85. 107 S. Ct. 1123 (1987).

86. 442 U.S. at 409.

87. 469 U.S. at 308.

88. 107 S. Ct. at 1130-31.

for discriminatory practices, unless they can be justified by "program necessity."

IV. THE ANALOGY BETWEEN SECTION 504 AND THE IHRA

The reasons that led the Supreme Court to dispense with descriptive notions of ability and qualifications should ultimately lead courts interpreting the IHRA to dispense with such notions. The IHRA, like Section 504, should be construed in accordance with prescriptive norms. But the prescriptive standard of the IHRA is both more ambitious and less encumbered than that of Section 504. The IHRA establishes equality of result as its goal. The problems of manageability and comity are insignificant, while the desire to maintain program integrity remains a factor to be carefully weighed in the balance.

A. *The Abandonment of Descriptive Analysis*

By finding that the Act's protections for handicapped persons in the field of employment and public accommodations would be eviscerated absent a duty of accommodation, the Commission implicitly recognized that the Act's definition of "handicap" is prescriptive rather than descriptive. In *Jones v. CTA*,⁸⁹ for example, the CTA argued that complainants' physical characteristics, their use of wheelchairs as mobility aids, were related to their abilities to board and alight an inaccessible public bus. There is little doubt that a physical disability is, as a matter of description, related to the ability to use an inaccessible public bus. Accordingly, the administrative law judge and the Commission determined that excusing the CTA's conduct because complainants' physical characteristics were descriptively related to their abilities to use its public buses would render the Act meaningless.

The Commission's decision to develop a prescriptive definition of "handicap" is fully justified by the Supreme Court's analogous interpretation of Section 504. The language of Section 504 seems to protect only those persons with life-activity-limiting impairments who can participate in a federally funded program in spite of their impairments. Similarly, the language of IHRA protects individuals whose determinable physical characteristics are unrelated to their abilities to use and benefit from a place of public accommodation. The IHRA requirement that a characteristic be unrelated to ability is directly analogous to the Section 504 requirement that

89. — Ill. HRC Rep. — (1986).

ability be present in spite of an impairment. If Section 504, however, protected only those individuals who "in spite of" their life-activity limiting impairments could participate in federally funded programs, the Supreme Court recognized, it would "ring hollow."⁹⁰ The Supreme Court thus abandoned a descriptive definition of an "otherwise qualified" handicapped person in favor of the prescriptive "affirmative duty of reasonable accommodation." Likewise, the Commission, faithful to Supreme Court precedent, concluded that if the IHRA protected only those individuals whose determinable physical characteristics were unrelated to their abilities, its substantive protections for handicapped individuals would go unenforced.

Both the Commission and the Supreme Court recognized that if substantive protections for the handicapped are to have any potency, they must encompass individuals who cannot, but should be able to, participate in life's activities. Indeed, the gravamen of an IHRA handicapped discrimination charge is that a condition exists that denies a handicapped person the ability to participate in those activities. The "denial of the ability to participate" is, if not an essential element of the charge, at least the spur to private enforcement of the IHRA. Yet, if the protections of the IHRA did not include individuals whose characteristics are descriptively related to their abilities, they would never be realized. Accordingly, the IHRA requires a prescriptive standard of protection.

B. Prescribing the Standard

The proper prescriptive standard for IHRA protection emanates from a balance of the IHRA's statutory objectives against the countervailing considerations of manageability, comity, and program integrity.

(1) The IHRA's Statutory Objectives

The IHRA is a consolidation of prior Illinois laws prohibiting discrimination.⁹¹ It is designed *inter alia* to provide a mechanism for the implementation and enforcement of the public policy of the State of Illinois. The policies, expressly defined in the IHRA, include securing for all "individuals" within the State, freedom from discrimination because of handicap, and ensuring the realization of "full productive capacities."⁹² The IHRA implements these poli-

90. See *Alexander v. Choate*, 469 U.S. 287, 297 (1985).

91. See Ill. Rev. Stat. ch. 68, para. 1-102 (1985).

92. *Id.* at para. 1-102(A), (B).

cies by creating a private right of action against any person who denies to any handicapped individual the full and equal enjoyment of any public place of accommodation.⁹³

The duty to provide full and equal enjoyment requires more than allowing access, entry, or an opportunity to participate. The IHRA establishes that, although handicapped persons are not "like" non-handicapped persons in all respects, they should realize like enjoyment of public places. Nevertheless, the IHRA does not permit a handicapped individual's enjoyment of a public place to be judged solely in relation to a non-handicapped person's enjoyment. A handicapped person has the statutory right to the "full" enjoyment of a public place absolutely, without reference to the level of enjoyment afforded non-handicapped persons.⁹⁴

This is not the language of mere opportunity, participation, or access; this is the language of result. The Supreme Court in *Roberts, Commissioner Minnesota Department of Human Rights v. United States Jaycees*,⁹⁵ held that the fundamental object of an identical guarantee of "full and equal enjoyment" to handicapped persons in the Minnesota Human Rights Statute,⁹⁶ is to advance the State's compelling interest in receiving the benefits of their wide participation in political, economic and cultural life.⁹⁷ It is the actual participation of all persons in state citizenship that renders the state interest compelling. If the state had expressed its interest in terms of giving a protected class the mere opportunity to compete for social benefits, the interest advanced would have been that of the class. Any benefit to the state would be indirect and speculative. It is, therefore, unlikely that such an interest would have outweighed the first amendment rights at stake. Moreover, if the state's goal were only opportunity rather than result, that goal could have been achieved by less intrusive means. The state's interest in "eradicating" discrimination inherent in the "full and equal enjoyment" language, however, could not be reconciled with any right to association.

The IHRA's goal is expressed also through the language of result. Handicapped persons must be allowed the full and equal enjoyment of public accommodations. The full and equal enjoyment

93. *Id.* at para. 5-102(A).

94. *Id.*

95. 468 U.S. 609 (1984).

96. MINN. STAT. § 363.03 (1982).

97. *Roberts*, 468 U.S. at 625. The State's interest in assuring the involvement of protected classes of individuals in political, economic and cultural life was so compelling that it outweighed any first amendment right to freedom of association enjoyed by the Jaycees.

language of the IHRA suggests a prescriptive norm more ambitious than the equality of opportunity standard of Section 504.⁹⁸ Public accommodators under the IHRA must make those modifications in their accommodations that are necessary to assure that individuals with determinable physical characteristics enjoy fully and equally their public accommodations. The duty commensurate with the prescriptive norm is greater than reasonable accommodation.⁹⁹

(2) Countervailing Considerations

In arriving at its prescriptive standard of reasonable accommodation, the Supreme Court balanced against the Section 504 objectives, the need to keep Section 504 within manageable bounds, deference to the state, and the legitimate interests of federal grantees in preserving the integrity of their programs. Only the last countervailing consideration holds weight in the balance against the IHRA's objectives.

(a) Manageability

The attainment of the IHRA's objectives would not render it unmanageable. In defining Section 504, the Supreme Court noted that although prohibiting all program policies that have a disparate impact upon handicapped persons might be consonant with the statutory objective, such a prohibition would be unmanageable.¹⁰⁰ Such a mandate would require grantees to consider the effect of their programs upon persons with a variety of handicaps and would create an unwieldy "administrative and adjudicative burden."¹⁰¹ Neither manageability factor has significance under the IHRA.

(i) Accommodator's Burden

The Act requires public accommodators to consider the consequences of their policies upon persons with a variety of handi-

98. ILL. REV. STAT. ch. 68, para. 2-102 (1985).

99. The duty incumbent upon governmental instrumentalities that operate public accommodations is still greater. The IHRA requires that such instrumentalities engage in rigorous affirmative action. That norm, when read *in para materia* with the full and equal enjoyment norm, requires nonexempt state actors to make substantial, burdensome modifications in their accommodations not just to afford opportunity, but to assure the result of full and equal enjoyment.

100. *Alexander v. Choate*, 469 U.S. 297, 298-99 (1987).

101. *Id.* at 298.

caps.¹⁰² Unlike Section 504, however, the Act is specifically designed to redress private acts of discrimination by any person against any handicapped "person."¹⁰³ Whereas Section 504 places conditions upon the allocation of funds to a variety of potentially protected individuals, the IHRA gives to each handicapped person a cause of action against any person who discriminates against him or her.¹⁰⁴ The Act includes within its definition of handicapped, persons with a variety of handicaps all of whom have standing to bring a charge of discrimination.¹⁰⁵ If "manageability" were a factor in determining whether "discrimination" had occurred, a public accommodator could presumably defend itself against such charges by asserting that, although it may have discriminated against the complainant before the court, it has a good track record of not discriminating against other handicapped individuals. The issue before the Commission under the IHRA, however, is not whether the accommodator generally admits handicapped individuals, but whether the accommodator discriminated against the complainant.

The Supreme Court has left no doubt that a defendant charged with acts of discrimination against an individual under a statute which is designed to protect individuals, cannot defend the action by claiming that it has a favorable record of treatment of the protected class.¹⁰⁶ The "bottom line" results of an employer's policy—even if they are nondiscriminatory—cannot provide the employer with a defense to individual charges of discrimination.¹⁰⁷ Neither Congress nor the Illinois legislature "intended to give an employer license to discriminate against some employees on the basis of race . . . sex [or handicap] merely because he favorably treats other members of the employees' group."¹⁰⁸ The employer's or public accommodator's treatment of other members of the complainants' group, as the Supreme Court has declared, "can be 'of little comfort to the victims of . . . discrimination.'"¹⁰⁹

102. ILL. REV. STAT. ch. 68, para. 1-103(I) (1985).

103. *Id.* at para. 5-102(A).

104. *Id.*

105. The non-exhaustive list of handicaps includes any determinable characteristic which "may result from disease, injury, congenital condition of birth or functional disorder . . ." *Id.* at para. 1-103(I).

106. *See, e.g., Connecticut v. Teal*, 457 U.S. 440 (1982).

107. *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 701, 708 (1978) (fairness to the class of females as a whole cannot justify unfairness to individual female employees).

108. *Teal*, 457 U.S. at 455.

109. *Id.* at 455 (citing *Teamsters v. United States*, 431 U.S. 324, 342 (1977)).

The Supreme Court's reasoning has been applied to individual cases of handicapped discrimination.¹¹⁰ Hence, in *Maine Human Rights Commission v. South Portland*,¹¹¹ the Maine Supreme Court rejected the transit agency's claims that its failure to accommodate mobility-limited plaintiffs on its mainline bus system could be excused because such accommodation might not serve the needs of other handicapped persons. The court declared:

Even if ramps or lifts are provided on the bus routes, it is certain that not every handicapped person will be able to make use of them. The law, however, protects the rights of the individual. The plaintiffs in this case have demonstrated a violation of their civil rights. They cannot be relegated to a separate system merely because the relief they seek does not solve the multitude of problems experienced by handicapped persons as a class.¹¹²

Under a human rights statute that prohibits individual acts of discrimination, a public accommodator cannot excuse liability by arguing that it is "unmanageable" to accommodate handicapped individuals because so many different kinds of handicaps exist. Though this particular "manageability" concern might arguably have a role when a grantee's performance level in its contract with the federal government is scrutinized under Section 504 on a program-wide basis, it has no role under the IHRA, an antidiscrimination statute, which, like Title VII and the Maine Human Rights Act, protects individuals from individual acts of discrimination.

(ii) Enforcement Burdens

The IHRA's objectives can be pursued without creating an unmanageable administrative or adjudicative burden. This particular "manageability" concern is not present under the IHRA because the Illinois legislature established a Human Rights Department with a specific legislative directive to "enforce" the Act, and a Human Rights Commission with a specific legislative directive to "adjudicate," acts of handicapped discrimination.¹¹³ The Commis-

110. In *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981), the Fifth Circuit held that the Postal Service's reliance upon the fact that it had hired numerous handicapped persons was a defense to charges of handicapped discrimination. In doing so, *Prewitt* cautioned courts to be "careful not to group all handicapped persons into one class, or even into broad subclasses." *Id.* at 307 (citing Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DEPAUL L. REV. 953, 972 n.19 (1978) ("[t]he fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person")). Each case of handicapped discrimination must be judged on its own merits.

111. 508 A.2d 948 (Me. 1986).

112. *Id.* at 956.

113. ILL. REV. STAT. ch. 68, para. 1-101 (1985).

sion's charge is to absorb the administrative and adjudicatory burdens associated with enforcing the Act.¹¹⁴ If such burdens exist, therefore, the Illinois legislature has decided as a matter of policy that those burdens are outweighed by enforcement of the Act's prohibitions.

Moreover, the Commission's effort to find and remedy policies that have a disparate impact upon handicapped persons will not create an administrative or adjudicatory burden. Such a burden might be created when evidence establishing discrimination is virtually impossible to gather, or when the acts constituting discrimination are virtually impossible to define. The Commission's enforcement burdens would accordingly be "manageable" when evidence is tangible and when a bright-line test exists to adjudge discriminatory acts. Those burdens would, of course, be modest if the Act, by virtue of its "related to" language, were read to exclude from its protections all handicapped persons. No claims would be brought. The burdens, however, would be equally modest if the "bright-line" were drawn to include within the Act's protections *all* individuals with determinable physical characteristics who are victimized by policies which have a disparate impact upon them.

Disparate impact analysis, in fact, presents modest adjudicatory burdens. For evidentiary purposes, the ostensibly neutral policy challenged by the complainant is presumed to be in existence. The only issue is quantitative—whether the policy has had a disproportionate impact upon handicapped persons. The defense to a disparate impact charge may require additional evidence, but the burden of assembling such evidence, which is at the disposal of the employer or accommodator, will be borne by the respondent rather than the Commission. Indeed, cases of disparate impact are administratively simple relative to cases of intentional discrimination, which involve difficult qualitative judgments of state of mind. That disparate impact litigation may be less burdensome than disparate treatment litigation suggests that unless the legislature intended the Commission to abandon any effort to enforce the Act's handicapped discrimination prohibitions, the administrative or adjudicatory burdens of enforcement would be insignificant in the context of the IHRA.

(b) *Comity*

Deference to the state and its agencies charged with using fed-

114. See, e.g., *id.* at para. 1-102.

eral funds under Section 504 also is not a "consideration" that countervails the IHRA's protections. The Supreme Court concluded that Congress had displayed no intent in Section 504 to make "major inroads" on the power of the states and their agencies to allocate federal funds, particularly in areas in which the states have exercised "substantial discretion."¹¹⁵ The doctrine of comity has no application in interpreting the IHRA.

First, federal-state relations are irrelevant to the enforcement of a state human rights statute. Second, even when a state instrumentality is charged under a local Human Rights Act with discriminatory practices, deference to the instrumentality cannot be defended when it would be tantamount to deference to unlawful practices. Third, although deference may be appropriate when a state's "mix" of federal funds on a program-wide basis is at issue, it is inappropriate when, as under the IHRA, individual acts of discrimination are cognizable. Fourth, when the State of Illinois and other states which have passed comparable Human Rights statutes have expressed a clear intent to outlaw discrimination by individuals and state agencies against handicapped individuals, any deference owed to those states by the courts should lead to more, not less, judicial scrutiny.

Finally, the contractual nature of the state's obligations under Section 504 and the resulting duties, are nonexistent under the IHRA. The duties created by the IHRA are not contractual. Rather employers and public accommodators have a tort-like duty which runs toward handicapped individuals. Indeed, the Act declares that it is designed to protect "the interest of all people in Illinois in maintaining personal dignity," and sanctions the award of "actual damages" for such "injury," including emotional distress.¹¹⁶ When a statute protects individuals from the personal affront of discrimination and allows them to sue for monetary relief, such a statute creates a tort-like duty, the breach of which gives rise to tort-like liability.¹¹⁷

(c) *Program Integrity*

The ultimate factor that must be considered in arriving at a prescriptive standard for treatment of the handicapped is the risk to the integrity or the "essential nature" of the defendant's program. The determination of the "essential nature" of a place of public

115. *Alexander v. Choate*, 469 U.S. 297, 303 (1987).

116. See ILL. REV. STAT. ch. 68, paras. 1-102(B), 8-108 (1985).

117. See, e.g., *Curtis v. Loether*, 415 U.S. 189 (1974).

accommodation under the IHRA must be guided in part by the Supreme Court's Section 504 analysis.

The IHRA defines a handicapped person as one whose characteristics are unrelated to his or her ability to use and "benefit" from a place of public accommodation. The Supreme Court suggests, however, that the "benefit" offered by the facilities and services of a place of public accommodation cannot be defined to exclude individuals with determinable physical characteristics.¹¹⁸ In *Jones*,¹¹⁹ for example, respondents argued that individuals who use wheelchairs as mobility aids cannot "benefit" from an inaccessible public bus. Yet the Supreme Court has rejected such an argument because it defines the "benefit" of a public bus to be that which individuals in wheelchairs cannot, because of their handicaps, obtain. The benefit of a public bus system cannot be defined as "the transportation of able-bodied persons;" it must be defined as "the transportation of all individuals." Moreover, in finding the "essential nature" of a place of public accommodation, courts interpreting the IHRA have guidance in the Supreme Court's laborious distillation of "safety" as the essence of a federal program. When the "safety" of a place of public accommodation is shown to be truly at risk, then its integrity or its essential nature is threatened.

The "essential nature" of a place of public accommodation, however, is different from that of federally funded programs. An integral part of the essential nature of a public place is its openness to the public. At common law, innkeepers, public utility operators, and public transit operators are held to a higher standard of care precisely because they operate accommodations that hold themselves out to the public.¹²⁰ The operators of public places thus have an affirmative duty to remove any devices which could foreseeably harm the public.¹²¹ The public place achieves its integrity when it permits the public to have safe access. The duty to

118. See *Alexander v. Choate*, 469 U.S. 287, 297 (1985).

119. — Ill. HRC Rep. — (1986).

120. In *Neering v. Ill. Central R.R. Co.*, 383 Ill. 366, 50 N.E.2d 497 (1943), a young woman was assaulted and robbed while she was waiting for her train in the railroad's station building. The court held the railroad to a standard of ordinary care with respect to its station buildings, but to the highest standard of care with respect to the operation of trains and other "immediate incidents of transportation." *Id.* at 374.

121. In *McCoy v. Chicago Transit Authority*, 69 Ill. 2d 280, 371 N.E.2d 625 (1977), the plaintiff, a passenger on a CTA train, was assaulted and battered by three other passengers. The court held that whether the conductor knew the three passengers were "bent on mischief" and whether he could have prevented the injuries inflicted on the plaintiff were questions of fact and that the determination of the trier of fact would not be set aside.

ensure safe access to a place of public accommodation does not threaten its integrity, it maintains its integrity.

C. The Proper IHRA Standard

The proper IHRA standard requires a balance of the statutory goal against significant countervailing considerations. The goal is to provide full and equal enjoyment of places of public accommodation. That goal need not be sacrificed to manageability or comity, but must be balanced against the desire to maintain the integrity of the public place of accommodation. The essential nature of a public place is the safe accommodation of the public. Whereas the prescriptive Section 504 duty must advance the opportunity of participation in federally funded programs without sacrificing manageability, comity, and greater public health risks, the prescriptive duty created by the IHRA must advance the result of full and equal enjoyment without sacrificing the safe accommodation of the public. These considerations are reconciled in the IHRA's affirmative duty to provide to individuals with determinable physical characteristics the full and equal enjoyment of a place of public accommodation, unless doing so would be impossible or would pose a greater risk to public safety.¹²²

V. EVIDENTIARY GUIDELINES

In light of the origin and nature of the duties created by Section 504 and the IHRA, courts can begin to employ a workable evidentiary framework that represents the consolidation of two approaches in the area of handicapped discrimination. The first approach is based upon common law breach of contract or tort claims and the second upon tested anti-discrimination statutes.

122. The proper balance under the IHRA of the statutory norm for employment discrimination and the desire to preserve the integrity of the employment enterprise, therefore, may be somewhat different from the balance between the public accommodation norm and the desire to preserve the integrity of the public place. The employment norm, which guarantees meaningful access to employment opportunities, must be balanced against the necessities of business. That balance requires access to job opportunities unless the employer can show that it cannot achieve the policy goals which adversely affect handicapped persons by any less discriminatory means or could do so, but only by incurring an undue burden. The public accommodation statutory norm, however, which requires the assurance of the full and equal enjoyment of public places of accommodation (not just access) must be balanced against the necessities of operating a public place, one of which is the very assurance that all individuals receive the full and equal enjoyment of that place. That balance requires the public accommodators to provide handicapped individuals the full and equal enjoyment of their accommodations unless they can show that the policy that has an adverse impact upon these individuals is (1) compelling, and (2) can, under no circumstances, be achieved by less discriminatory means.

A. The Common Law Framework

Under the "common law" model, Section 504 is viewed as a contract between the federal government and the states. The Section 504 contract requires the federal government to fund a state's programs in consideration for the state's performance of its contractual duty to provide reasonable accommodation for handicapped persons in those programs. Individuals with life-activity-limiting impairments are the interested third-party beneficiaries to this contract. Accordingly, they have standing to sue for nonperformance. Their cause of action, however, depends upon a contractual duty that runs between the state and the federal government, rather than directly from the state to the individual.

In order to state a cause of action for breach of contract, therefore, the plaintiff must show that a binding contract was entered, that he or she was an intended third-party beneficiary of the contract, that the contract was breached and that damages resulted. There is seldom a doubt that the Section 504 contract exists. Moreover, there is rarely a dispute that an individual with a life-activity-limiting impairment is a beneficiary of the contract, or that damages flowed from any breach. Therefore, the true issue in most cases will be whether the breach occurred. Under this contractual framework, the plaintiff must show that the state breached its affirmative duty to provide reasonable accommodation.

After the prima facie case is made, the defendant is entitled to advance all of the familiar breach of contract defenses. The defense most often invoked will be impossibility or commercial impracticability. Such a defense would require proof that accommodation is impossible, is possible but only with undue financial or administrative burdens, or is possible but only by sacrificing the program's "essential nature."

Under the IHRA, by contrast, courts should employ a common law tort analysis which is comprised of issues of duty, breach, causation and damages. The IHRA establishes a standard of care to which public accommodators must adhere. Like the common law duties placed upon providers of public accommodations, the Act's duties are heightened; the accommodator must provide the full and equal enjoyment of the public place. Breach of that duty is negligence per se. But in suing on a negligence theory, the complainant must demonstrate that he or she is a member of a class that the legislature intended to benefit. Although not all individuals with determinable physical characteristics are "handicapped" according to the Act's language, they are undisputedly part of a class that the

legislature intended to benefit. Hence, individuals with determinable physical characteristics can establish that public accommodators owe them a duty to provide full and equal enjoyment. When full and equal enjoyment has not been provided, the duty has been breached. The breach invariably is the proximate cause of the injury alleged.

The respondent, however, must have the opportunity not only to rebut each element of the prime facie case, but also to advance classic tort defenses. The appropriate tort defense is "necessity." That defense allows a tortfeasor to avoid liability by showing that he or she had no choice but to commit the tort. The doctrine has evolved to recognize, however, that tortious behavior is defensible if it is the product of a choice between the lesser of two evils. Hence, destroying a building to stop the spread of fire through a town is not justified because the actor did not exercise free will; rather it is justified because the destruction of private property is a lesser evil than allowing the destruction of an entire town. The public good outweighed the private harm. The tortious act of destroying a building, however, could not be justified by private good.¹²³

A public accommodator thus cannot successfully claim that the tort of the denial of full and equal enjoyment is necessary simply because the alternative would create private financial and administrative burdens. The public accommodator can, however, show that given the current state of technology, the tort is impossible to avoid. Moreover, the "necessity" defense also allows the public accommodator to show that the tort is justified because to do otherwise would create a greater public evil. Such a greater public evil can be a significant risk to the health of the public or of the victim of the tort.

Under the common law approach, therefore, an IHRA respondent can prevail only by showing that its breach of duty was unavoidable or was necessary to prevent a greater public health risk.

123. PROSSER AND KEETON ON TORTS § 24 (5th ed. 1984). For example, consider Parade Overlook Inc., a hypothetical company that has sold rooftop space for viewing an upcoming Thanksgiving Day Parade. The night before the parade, just in time for the Thanksgiving Day football game, Parade Overlook Inc.'s neighbors erect and refuse to modify a rooftop satellite dish, which obstructs Parade Overlook Inc.'s rooftop view. The Parade Overlook Inc. president is faced with an exigency. If she leaves the satellite dish in place, she will not only lose substantial income and face the administrative burdens of litigation from her customers, but she will lose her entire enterprise. Alternatively, if she destroys the satellite dish she will have committed a tort. Although her plight is sympathetic, she will be held liable for the tort because the tort is a greater evil than the private administrative and financial burdens she will unquestionably suffer.

A Section 504 defendant, however, can prevail by showing that its contractual breach is excused by commercial impracticability or undue administrative and financial burdens.

B. The Disparate Impact Statutory Framework

The disparate impact model is appropriate to handicapped discrimination cases. First, most cases of handicapped discrimination allege disparate impact. Second, the Supreme Court's manageability concern, which led it to suggest that not all disparate impact cases would be successful, does not undermine the disparate impact structure, which should be used in successful cases. Third, to the extent that manageability is a factor, it can be eliminated by burden-shifting within the evidentiary structure.

In order to establish a *prima facie* case, a handicapped person must show a qualifying condition—a life-activity-limiting impairment under Section 504, or a determinable physical characteristic under the IHRA. A handicapped person must also show an adverse effect—denial of program benefits under Section 504 or denial of full and equal enjoyment under the Act. Finally, there must be evidence that the adverse effect is disparate—individuals without qualifying conditions received program benefits or obtained the full and equal enjoyment of a public place.

Once a plaintiff presents a *prima facie* case, the burden shifts to the grantee or the public accommodator to establish the fundamental business necessity defense to a charge of disparate impact. To sustain this defense, a grantee must show that the purpose of its program is legitimate, that its method of achieving that purpose is both legitimate and “fits” the purpose, and that no less discriminatory alternatives exist.

The “affirmative duty of reasonable accommodation” fits neatly into this last prong of the business necessity defense. Defendants are not required to utilize each and every less discriminatory alternative. They can prevail by showing that no less discriminatory alternative exists, or that a less discriminatory alternative exists, but would create a greater public safety risk or an undue administrative and financial burden.

Because the prescriptive duty under the IHRA differs from that under Section 504, so too does the nature of this business necessity defense. The public accommodator can prevail if it first shows that its goals are both legitimate and not designed to exclude handicapped persons. The accommodator, however, must also prove that the methods by which its goals are achieved do not exclude

handicapped persons or perpetuate stereotypical notions about handicapped persons. Finally, the accommodator must demonstrate also that no less discriminatory alternatives exist. As under Section 504, the IHRA does not require accommodators to pursue every imaginable alternative. Rather, the accommodators must show that no less discriminatory alternative exists or that any less discriminatory alternative that does exist would create a greater risk to public safety. The prescriptive standard under the IHRA, however, does not allow the public accommodator to prevail by showing that the safe accommodation of handicapped persons would create private financial or administrative burdens.

C. The Frameworks Tested

The evidentiary frameworks can be demonstrated by way of example. A soda fountain is charged with handicapped discrimination because it has only one door, too narrow to admit complainant, an individual who uses a wheelchair as a mobility aid.

Under the statutory model, complainant establishes a prima facie case of handicapped discrimination by showing that she has a determinable physical characteristic and that the soda fountain has an ostensibly neutral policy which has a disparate impact upon her. There is rarely a dispute about these two elements of the prima facie case. The burden then shifts to the public accommodator to prove that its neutral policy is justified by "necessity." The accommodator must first establish that its reason for the narrow door is compelling—that it is not based upon the desire to exclude people in wheelchairs, but based upon a legitimate business objective. Hence, the accommodator must disprove that the door's structure is designed to attract able-bodied customers. Second, the accommodator must prove that the narrow door does not serve a compelling objective by perpetuating stereotypes. For example, the accommodator must show that the door's structure is not designed to attract and retain customers who do not want to interact with individuals in wheelchairs.

Finally, the accommodator must show the absence of less discriminatory alternatives by producing evidence that the door's structure is either impossible to alter, or is impossible to alter without creating a greater public health risk. The former defense allows the accommodator to prove, for example, that the structure of the soda shop necessitates a narrow door, and, therefore, the accommodator has no choice but to maintain the door. The latter

defense permits the accommodator to introduce evidence showing that any modification of the door's structure would create a risk to public safety.

The substance of a handicapped discrimination case under the statutory model is virtually identical to that under the common law models. Complainant establishes a *prima facie* case by showing that the soda fountain operator, as a public accommodator, owes him a duty of care to provide the full and equal enjoyment of the soda fountain, that the duty has been breached, and that breach has resulted in an injury. The soda fountain operator then, as under the statutory model, has the opportunity to prove that its conduct is justified by "necessity:" the conduct was either the product of the absence of choice or the product of the decision to avoid a greater public evil such as a significant health risk. Under Section 504, of course, a grantee would have the additional defense of showing an undue burden, which is tantamount to both the commercial impracticability defense to a contract claim and the "no less discriminatory alternative which does not create an undue burden" defense to a disparate impact charge.

VI. CONCLUSION

By drawing upon the past and maintaining flexibility for the future, courts, adjudicative bodies, and litigants can lend clarity to the duties that public accommodators owe to handicapped persons. With an eye to the past, they can glean evidentiary standards that fall into a common law and statutory burden-shifting structure. Once the *prima facie* case of refusal to accommodate is established, the burden shifts to the accommodator to prove the affirmative defense of necessity. With an eye toward the future, courts, adjudicative bodies, and litigants can draw upon the Supreme Court's attempt to balance on a continuing basis the goals of the statutory protections for the handicapped with relevant countervailing considerations such as manageability, comity, and the integrity of the program under scrutiny. State law protections for the handicapped, of which the IHRA is an excellent model, need be sacrificed only when accommodation is impossible or would create a significant public health risk.