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The Antodiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973

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THE ANTIDISCRIMINATION MODEL RECONSIDERED: ENSURING EQUAL OPPORTUNITY WITHOUT RESPECT TO HANDICAP UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

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INTRODUCTION

Prejudice against handicapped persons[1] has deep roots and a long history. Disability was early associated with God's displeasure or the influence of Satan.[2] By the seventeenth century steps were being taken in Europe to educate the deaf and the blind. In the United States more sensitive treatment of the handicapped was longer in coming.[3] Federal efforts to assist disabled persons with vocational rehabilitation and other services began after World War I when a flood of injured veterans returned home.[4] Not until the end of the civil rights era, in 1973, did Congress take steps to eradicate the longstanding prejudice against the handicapped by passing section 504 of the Rehabilitation Act:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[5]

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1 Some commentators have distinguished between the term "disability," used to refer to a medical condition or disorder, and the term "handicap," used to refer to a person's status as a result of a disability. *See, e.g.,* Weiss, *Equal Employment and the Disabled: A Proposal,* 10 COLUM. J.L. & SOC. PROBS. 457, 461 n.23 (1974). As discussed *infra* in notes 12-16 and accompanying text, the Rehabilitation Act includes its own definition of the phrase "handicapped individual." This article uses the terms "disabled" and "handicapped" interchangeably in referring to persons within the scope of that definition.

2 The Old Testament states that one who transgresses against God's commandments will be inflicted with "blindness, the boils of Egypt with ulcers and scurvy, and the itch which cannot be healed." *Deuteronomy* 28:20; *see also Deuteronomy* 28:18, :22, :35. Similarly, in the New Testament, after healing a disabled man, Jesus reportedly stated, "Behold, thou art made whole. Sin no more lest a worse thing come unto thee." *John* 5:13. At the time of Martin Luther, the birth of a handicapped child was accepted as proof that the parents were involved in witchcraft, impious practices, or simply had wicked thoughts. D. THOMAS, THE EXPERIENCE OF HANDICAP 22 (1982). In the Malleus Maleficarum of 1487 deformed children were regarded as the fruit of sexual intercourse between a woman and the devil. *Id.* The tendency to associate handicapped persons with evil did not end in the middle ages. *See* Garret, *Historical Background,* in VOCATIONAL REHABILITATION OF THE DISABLED: AN OVERVIEW 37 (D. Malikin & H. Rusalem eds. 1969).

3 The first hospital for the mentally ill in the United States was opened in 1773. C. OBERMANN, A HISTORY OF VOCATIONAL REHABILITATION IN AMERICA 78 (1965). A school for the deaf was opened in 1817, and a school for crippled children in 1893. *Id.* at 80. Experimental schools for the mentally retarded were begun during the latter part of the nineteenth century. *Id.* at 81-82.

4 The Smith-Fess Act, ch. 219, 41 Stat. 735, was enacted in 1920 to provide federal grants in aid to state agencies that afforded training, counseling, and placement services to physically handicapped persons. *See* S. REP. NO. 318, 93 Cong., 1st Sess. 9, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2082. In 1943, Congress broadened this program both to provide services to eliminate or reduce individuals' disabilities, and to provide services for mentally ill and mentally retarded individuals. The vocational rehabilitation program has been further expanded on several occasions in the ensuing years. *Id.* at 9-11. *See also* C. OBERMANN, *supra* note 3, at 135-323.

5 Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as

The measure's apparently simple mandate raised numerous questions. In a 1978 case involving access to public transportation facilities one jurist asked:

> How plain is the language of . . . § 504 of the Rehabilitation Act? What must be done to provide handicapped persons with the same right to utilize mass transportation facilities as other persons? Does each bus have to have special capacity? Must each seat on each bus be removable? Must the bus routes be changed to provide stops at all hospitals, therapy centers and nursing homes? Is it required that buses be able to accommodate bedridden persons? Is it discriminatory to answer any of these questions in the negative? Will the operation of hydraulic lifts on buses involve stigmatizing effects on the persons who use them? If so, is that a discrimination solely by reason of handicap within the meaning of § 504?[6]

Ten years have passed since the enactment of section 504. Courts and commentators[7] have grappled with the difficulties of applying the

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amended at 29 U.S.C. § 794 (Supp. V 1981)). In addition to § 504, title V of the Rehabilitation Act of 1973 included several other important civil rights provisions. Section 501, 29 U.S.C. § 791, required federal agencies to take affirmative action to employ handicapped individuals. Section 502, 29 U.S.C. § 792, established the Architectural and Transportation Barriers Compliance Board to address problems relating to "architectural, transportation, and attitudinal barriers." Section 503 required federal contractors undertaking contracts in excess of $2,500 to take affirmative action to employ qualified handicapped individuals.

As originally enacted, the text of § 504 was closely modeled after other federal civil rights provisions prohibiting discrimination on the basis of race, color, national origin, and sex. *See* Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 373 (codified at 20 U.S.C. § 168(a) (1982)) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .") (title IX); Civil Rights Act of 1964, § 601, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1976)) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.") (title VI). Section 504 was subsequently amended so that it currently reads, in pertinent part, as follows:

> No otherwise qualified handicapped individual in the United States, as defined in *Section 7(7),* 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 *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978* . . . .

Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (changing cross reference to § 7(7)) (emphasis added); Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2982 (bringing activities of federal agencies within statute and authorizing agencies to promulgate regulations) (emphasis added).

6 Atlantis Community, Inc. v. Adams, 453 F. Supp. 825, 831 (D. Colo. 1978).

7 Commentators have generally focused their attention on the application of § 504 in specific substantive contexts. This scattered authority is discussed in the footnotes that follow. Only a few scholars have attempted a crosscutting analysis exploring the strengths and weak-

statute's antidiscrimination mandate[8] in a wide variety of contexts. The time has come to determine whether section 504 has proved a viable means for assuring handicapped persons equal opportunity, or whether early skepticism was justified.

This article concludes that section 504 is a useful tool for advancing Congress's equal opportunity objective, but a tool whose strengths and weaknesses are not fully understood. A major reason for this limited understanding is that courts have treated the antidiscrimination mandate embodied in section 504 and other civil rights statutes as unitary, rather than multifaceted in character. Recognizing that the mandate is multifaceted provides a stronger analytical framework for resolving the many difficult cases arising under section 504, and assists in identifying certain inherent limitations in the antidiscrimination model. Although this article focuses on developing this thesis in the context of section 504, a multifaceted antidiscrimination model could have fruitful application in many other areas where antidiscrimination statutes have been adopted.

The article employs a three-part classification scheme based on the language of section 504 itself. Denials of equal opportunity on the basis of handicap are characterized as falling within three general categories: (1) *exclusion* (the adoption and application of particular selection and retention criteria so as to render a handicapped individual ineligible to participate in a federally assisted program);[9] (2) *denial of benefits* (the de facto exclusion that occurs when all program benefits are denied, even though an individual satisfies governing eligibility criteria) and (3) *discrimination* (the failure to accord qualified participants equal treatment or an equal opportunity to benefit from a federally assisted program).[10] The article will demonstrate that the courts' analyses and dispositions of cases has varied depending on whether the challenged conduct falls within one or another of these classes. The article argues that subtle differences in the courts' approaches have frequently been warranted,

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nesses of § 504 as a means of eliminating discrimination on the basis of handicap. *See, e.g.*, Note, *Mending the Rehabilitation Act of 1973,* 1982 U. ILL. L.F. 701; Comment, *Accommodating the Handicapped: The Meaning of Discrimination under Section 504 of the Rehabilitation Act,* 55 N.Y.U. L. REV. 881 (1980). A recent publication of the United States Civil Rights Commission has made an outstanding contribution to this effort. *See* U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983).

8 The phrase "antidiscrimination mandate" will be used in this article to refer to the statute's prohibition against three more specific types of conduct: exclusion, denial of benefits, and discrimination. These narrower terms are defined *infra* at text accompanying notes 9-10 and are discussed in greater detail in Part II.B.1 and in Parts IV, V, and VI.

9 As discussed in Part II.B.2 and Part IV, exclusionary conduct may be divided into several subcategories: exclusionary criteria, exclusionary refusals to accommodate, and exclusionary judgments. *See infra* notes 114-19, 128 and accompanying text.

10 As discussed in Part II.B.1 and in Part VI, discriminatory conduct also takes at least two distinct forms: failure to provide equal treatment; and provision of equal treatment while denying equal opportunity to benefit. *See infra* text accompanying note 112.

because the nature of a defendant's conduct has an important bearing upon sound resolution of issues such as the allocation of the burden of proof, and the legitimacy of the justifications offered to support the legality of particular practices.

The article will also demonstrate that adoption of a multifaceted analysis facilitates evaluation of the success of section 504 as a means of assuring equal opportunity. The evidence of the last decade reveals that section 504 is most effective in eliminating exclusionary practices and outright denials of benefits—the grossest methods of denying equal opportunity. It has been less effective in eliminating certain forms of discrimination, particularly where participation is permitted but unequal "benevolent" treatment is afforded; or where, despite equal treatment, unequal opportunity to benefit is received. In sum, the article will show that the antidiscrimination model of section 504 is a powerful tool that has been used to make substantial progress toward the goal of assuring equal opportunity for handicapped persons. At the same time, it is a limited tool, inherently incapable of eliminating every vestige of inequality.

Part I of the article begins with an overview of section 504, examining several threshold issues and reviewing administrative regulations and pertinent constitutional doctrine. Part II discusses the extent to which traditional antidiscrimination principles, developed in the context of racial discrimination, must be reshaped in order to construct an effective scheme for analyzing problems involving denial of equal opportunity on the basis of handicap and proposes such a scheme of analysis. Part III compares the proposed scheme with the Supreme Court's decision in *Southeastern Community College v. Davis*.[11] This was the Court's initial encounter with section 504 and has made an indelible mark on subsequent case law. Finally, Parts IV, V, and VI consider in detail the three broad classes of conduct forbidden by section 504's antidiscrimination mandate—exclusion, denial of benefits, and discrimination. Each of these Parts is divided into sections discussing subsidiary types of prohibited conduct. In each case, the discussion is organized in terms of plaintiffs' and defendants' cases, so as to facilitate discussion of both procedural and substantive issues.

I
SECTION 504: AN OVERVIEW

In the ten years since Congress enacted section 504, three major issues have occupied Congress and the courts: (1) the breadth of statutory coverage (i.e., the class of persons protected by the statute, and the class of activities subject to statutory requirements); (2) the means avail-

11 442 U.S. 397 (1979).

able for implementing the statutory mandate; and (3) the nature of the substantive obligations imposed. Sections A and B discuss questions of coverage and implementation, respectively. Section C begins to explore the substantive obligations imposed by section 504, the subject of the remainder of this article.

A. Coverage

1. *Protected Class*

Section 504 protects qualified "handicapped individual[s]."[12] Rather than leaving that phrase for interpretation by the courts,[13] Congress included a definition of "handicapped individual" elsewhere in the Rehabilitation Act. In the 1973 Act, Congress adopted a definition of "handicapped individual" that encompassed only individuals who had the potential to benefit from employment.[14] In 1974, Congress amended this provision to incorporate a special definition of "handicapped individual" for purposes of title V of the Act. Persons protected included those who have "a physical or mental impairment which substantially limits one or more of [their] major life activities," have "a record of such impairment," or are "regarded as having such an impairment."[15] Congress adopted a final clarifying amendment in 1978 to address questions concerning the coverage of alcoholics and drug

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12 The phrase "handicapped individual[s]" describes those persons who may invoke the protection of § 504. The words "otherwise qualified," which immediately precede this phrase in the statutory text, have been interpreted to limit the right of some handicapped individuals to participate in certain federally assisted programs. That phrase does not, however, restrict the class of persons eligible for protection under the Act. For discussion of judicial interpretation of the "otherwise qualified" provision, see *infra* notes 167-69.

13 This issue has been resolved as a matter of common law under many state statutes protecting handicapped individuals against employment discrimination. *See, e.g.,* Lyons v. Heritage House Restaurants, 89 Ill. 2d 163, 171, 432 N.E.2d 270, 274 (1982) (cancer of uterus is not handicap for purposes of Illinois statute); Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 528, 259 S.E.2d 248, 253 (1979) (for purposes of North Carolina statute, glaucoma is handicap only where visual impairment results); Providence Journal Co. v. Mason, 116 R.I. 614, 624, 359 A.2d 682, 687 (1976) (temporary injury resulting from whiplash is not handicap for purposes of Rhode Island statute).

14 The 1973 Act provided:

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.

Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (current version codified at 29 U.S.C. § 706(7) (Supp. V 1981) (quoted *infra* note 16).

15 Rehabilitation Act Amendments of 1974, Pub. L. No. 98-516, § 111(a), 88 Stat. 1617, 1619. Agency regulations elaborate upon this expanded statutory text:

> (i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any

abusers.[16] Since that time, there has been little controversy concerning the class of persons protected by section 504.

2. *Covered Activities*

Section 504's antidiscrimination mandate extends to "any program or activity receiving Federal financial assistance" and to "any program or activity conducted by any Executive agency or by the United States Postal Service." At least two distinct questions are posed by the first of these formulations: (1) Who qualifies as a "recipient" of federal "financial assistance"? and (2) What is a "program or activity" receiving such assistance?

Section 504 clearly applies to activities that receive direct transfers of federal funds as part of traditional grant programs.[17] More difficult

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mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
(iii) "Has a record of sueh an impairment" means has a history of, or has been misclassified as having, a mental or physieal impairment that substantially limits one or more major life activities.
(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting sueh a limitation; (B) has a physical or mental impairment that subtantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

34 C.F.R. § 104.3(j)(2) (1982) (Department of Education regulations); 45 C.F.R. § 84.3(j)(2) (1982) (Department of Health and Human Services regulations).

16 Rehabilitation, Comprehensive Serviees, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 122(a)(6), 92 Stat. 2955, 2984-85. The amendments redesignated § 7(6) as § 7(7), and gave the definition its current form:

> (B) Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having sueh an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706(7) (Supp. V 1981).

17 Agency regulations define the terms "recipient" and "Federal financial assistance" as follows:

> (f) "Recipient" means any State or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another reeipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.
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> . . . .

questions have arisen in situations in which the relationship between the federal government and the entity in question is of a different character. Courts have held that when the entity is the provider of goods or services under a federal procurement contract,[18] or when the entity is merely the holder of a federal broadcast license,[19] section 504 does not apply. Questions have also arisen regarding coverage of entities that do not benefit directly from federal aid. The courts have concluded that state educational agencies that serve as conduits for funds actually used by local school districts are "recipients."[20] The courts are divided, however, as to whether the entities that are indirect beneficiaries of federal assistance—for example, colleges whose only source of federal support is tuition payments from students receiving federal grants or loans—are "recipients" covered by section 504.[21]

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

34 C.F.R. § 104.3 (1982) (Department of Education regulations); 45 C.F.R. § 84.3 (1982) (Department of Health and Human Services regulations).

18 *See* Randolph v. Alabama Inst. for Deaf and Blind, 27 Fair Empl. Prac. Cas. (BNA) 1718, 1721-22 (N.D. Ala. 1982) (neither federal procurement contracts nor reimbursement for services performed by employee for other entities are "assistance"); Cook v. Budget Rent-a-Car Corp., 502 F. Supp. 494 (S.D.N.Y. 1980); Rogers v. Frito-Lay, Inc., 433 F. Supp. 200, 204 (N.D. Tex. 1977), *aff'd on other grounds,* 611 F.2d 1074 (5th Cir.), *cert. denied,* 449 U.S. 889 (1980). Section 503 specifically addresses the obligations of federal contractors to avoid employment discrimination on the basis of handicap. *See supra* note 5.

19 *See* Gottfried v. FCC, 655 F.2d 297, 307, 312-14 (D.C. Cir. 1981) (public television station receiving subsidy and grants is "recipient"; however, commercial broadcasters are not directly covered by § 504, despite related obligations under Communications Act), *rev'd on other grounds sub nom.* Community Television v. Gottfried, 103 S. Ct. 885 (1983) (FCC has no duty to enforce § 504 against licensee public television station in context of agency's review of licensee's programming decisions).

20 *See* Association for Retarded Citizens v. Frazier, 517 F. Supp. 105, 119-20 (D. Colo. 1981); New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391, 397 (D.N.M. 1980), *rev'd on other grounds,* 678 F.2d 847 (10th Cir. 1982).

21 *Compare* Nodelman v. Aero Mexico, 528 F. Supp. 475, 489 (C.D. Cal. 1981) (airline may be indirect beneficiary of federal funding used to develop airport facilities and therefore is "recipient") (dicta) *with* Disabled in Action v. Mayor of Baltimore, 685 F.2d 881, 884-85 (4th Cir. 1982) (baseball club that rents stadium constructed by city with federal grant is not "recipient") *and* Angel v. Pan Am. World Airways, Inc., 519 F. Supp. 1173, 1178 (D.D.C. 1981) (airline is not recipient when merely indirect beneficiary of federal funding for airport facilities).

The Supreme Court will soon resolve the long-standing debate regarding the responsibilities, under the federal civil rights laws, of institutions of higher education whose only source

The precise activities of "recipient" entities that are covered by section 504 have also been a matter of some controversy. Section 504 is a "program-specific" statute—that is, its antidiscrimination mandate only applies to programs and activities that receive federal assistance, not necessarily to all of a recipient's activities or actions.[22] The critical question is the meaning of the phrase "program or activity." The courts, for example, have adopted a broad reading of "program" in section 504 cases concerning interscholastic athletics, in the belief that an entity should not use federal funds to free its resources for use in discriminatory activities.[23] A narrower reading has prevailed in cases challenging a re-

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of federal financial assistance is tuition payments received from students who are themselves recipients of federal grants and loans. The Third and Fourth Circuits have held that such institutions are recipients. *See* Haffer v. Temple Univ., 688 F.2d 14, 16 (3d Cir. 1982) (award of federal BEOG grants to students constitutes assistance to university for purposes of title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, prohibiting sex discrimination in federally assisted education programs); Grove City College v. Bell, 687 F.2d 684, 688-89 (3d Cir. 1982), *cert. granted,* 103 S. Ct. 1181 (1983) (same); Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974) (veterans' benefits are assistance to university for purposes of title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibiting racial discrimination in federally assisted programs), *aff'd mem.,* 529 F.2d 514 (4th Cir. 1975). At least two district courts have taken the contrary view. *See* University of Richmond v. Bell, 543 F. Supp. 321, 329 (E.D. Va. 1982) (award of federally funded financial aid to students does not render university's athletic program recipient of financial assistance for purpose of title IX where student funds are used to purchase educational services); Bennett v. West Tex. State Univ., 525 F. Supp. 77, 80-81 (N.D. Tex. 1981) (award of financial aid to students does not render university recipient of financial assistance for purposes of title IX). For a general discussion of this issue, see Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof",* 78 MICH. L. REV. 608, 609-17 (1980).

22 See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 536-37 (1982), which held that title IX's prohibition on sex discrimination in federally assisted education programs is program-specific and that fund termination is an appropriate remedy only for a program in which discrimination has occurred. It is possible, however, that discrimination in some particular program may taint the whole of an entity's activities. *See* Board of Public Instruction v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969).

23 *See* Wright v. Columbia Univ., 520 F. Supp. 789, 791-92 (E.D. Pa. 1981) (activities of football team were part of covered program because team was component entity of university and university medical personnel were involved in decision to exclude plaintiff); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 951 (D.N.J. 1980) (interscholastic athletic program is covered activity where school system receives federal funds); *see also* Sanders by Sanders v. Marquette Public Schools, 561 F. Supp. 1361, 1370 (W.D. Mich. 1983) (in case involving adequacy of educational placement, threshold requirement of federal assistance to recipient program would be satisfied if educational system as whole received federal funding). *But cf.* Ferris v. University of Tex., 558 F. Supp. 536, 539-43 (W.D. Tex. 1983) (although university received various forms of federal financial assistance, university shuttle bus service did not constitute program because it received no earmarked funds).

The courts' resolution of this question for purposes of title IX has been more sharply divided. *Compare* Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982) (intercollegiate athletic program falls within scope of title IX even assuming that it received no earmarked federal financial assistance) *and* Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982) (same) *with* University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (Department of Education has no authority under title IX to investigate athletic program which did not receive direct

cipient's employment practices.[24]

B. Implementation

As enacted in 1973, the Rehabilitation Act did not provide for administrative implementation of section 504's antidiscrimination guarantee.[25] As a result, federal agencies were uncertain whether they possessed the authority to adopt implementing regulations or to take

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federal assistance) *and* Bennett v. West Tex. State Univ., 525 F. Supp. 77 (N.D. Tex. 1981) (athletic program governed by title IX only if it receives direct federal assistance).

For a discussion of the meaning of "program" for purposes of title VI and title IX, see Rivera & Frank, Othen v. Ann Arbor School Board, *A Weakening of Title IX Protection Against Sex Discrimination,* 26 ST. LOUIS U.L.J. 857 (1982); Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools,* 53 TEX. L. REV. 103, 107-13 (1974); Note, *Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of "Program,"* 52 IND. L.J. 651 (1977); Note, *supra* note 21, at 617-25.

24 *See* Brown v. Sibley, 650 F.2d 760, 768-69 (5th Cir. 1981) (requiring showing that alleged discrimination by Mississippi Industries for the Blind occurred in component program that received or directly benefited from federal financial assistance, where entity did not receive pervasive federal funding); Simpson v. Reynolds Metal Co., 629 F.2d 1226, 1231-37 (7th Cir. 1980) (in action against private entity, plaintiff must show nexus between discrimination and federal financial assistance; no nexus demonstrated where plaintiff did not participate in federally assisted on-the-job training program involving veterans); Randolph v. Alabama Inst. for Deaf and Blind, 27 Fair Empl. Prac. Cas. (BNA) 1718, 1720 (N.D. Ala. 1982) (funds received by supervisory state agency for the deaf and blind is not assistance to individual workshop program under its jurisdiction); *see also infra* note 38 (discussing availability of a private cause of action under § 504 for employment discrimination); *cf.* Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 675 (8th Cir.), *cert. denied,* 449 U.S. 892 (1980) (job applicant who sought employment with sewer district had no cause of action under § 504 where federal grant received for purpose of sewer plant construction was for plant other than one in which applicant sought work).

A tendency to interpret "program" narrowly is also apparent in cases involving alleged employment discrimination by educational institutions that receive substantial federal financial assistance. *See* Doyle v. University of Ala., 680 F.2d 1323 (11th Cir. 1982) (plaintiff required to show that university program in which she was employed benefited directly from federal financial assistance); Pittsburgh Fed'n of Teachers, Local 400 v. Langer, 546 F. Supp. 434, 437 (W.D. Pa. 1982) (although private cause of action may be stated for employment discrimination under § 504, blind high school mathematics teacher required to show that she was employed in specific program receiving federal financial assistance or that, as matter of fact, entire operation of school system constituted single program); Meyerson v. Arizona, 507 F. Supp. 859, 862-63 (D. Ariz. 1981), *aff'd,* 709 F.2d 1235 (9th Cir. 1983) (alleged discrimination in university psychology department not actionable absent evidence of nexus between discrimination and federally financed program).

25 The 1973 version of § 504 was silent as to the existence of regulatory authority. The absence of such authority sharply contrasts with provisions in title VI and title IX authorizing the promulgation of legislative rules, to become effective upon presidential approval. *See* Education Amendments of 1972, § 902, 20 U.S.C. § 1682 (1982) (governing provision of federal financial assistance to education programs that discriminate on basis of sex); Civil Rights Act of 1964, § 602, 42 U.S.C. § 2000d-1 (1976) (governing provision of federal financial assistance to racially discriminatory programs). The omission is all the more noticeable in light of language, elsewhere in the Rehabilitation Act, requiring promulgation of regulations to implement § 503's prohibition of employment discrimination against handicapped persons by any party to an employment contract in excess of $2,500. *See* Rehabilitation Act of 1973, § 503, 29 U.S.C. § 793 (1976). Section 504 also failed to include any provision for termination of federal funds, as was the case under these sections of title VI and title IX just cited.

other steps leading to enforcement.[26] The absence of agency action contributed to the growing number of lawsuits by private parties seeking to enjoin prohibited exclusions, denials of benefits, and discrimination. A major issue during the first five years following section 504's enactment was whether a private cause of action could be inferred from the statute.

More recently, plaintiffs wishing to enforce section 504 through private litigation have been on a stronger footing.[27] Congress amended the Rehabilitation Act in 1978, adding two critical provisions bearing on this question.[28] First, a new section 505(a)(2) provides that "[t]he reme-

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26 Congress attempted to remedy this shortcoming through subsequent amendments to the Rehabilitation Act, but it did so in an ambiguous manner. The legislative history of the 1974 amendments included several statements indicating an intent to authorize administrative regulations, yet Congress included no authorizing language in the statutory text. *See* H.R. REP. NO. 1457, 93d Cong., 2d Sess. 27 (1974) (§ 504 "does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but is clearly mandatory in form, and such regulations and enforcement are intended"); S. REP. NO. 1139, 93d Cong., 2d Sess. 24, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6391 (same).

The Department of Health, Education, and Welfare subsequently issued implementing regulations. *See* 42 Fed. Reg. 22,676 (1977). The agency acted only after being directed to coordinate implementation of § 504 by all federal agencies, *see* Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976), and after a court order to promulgate regulations, *see* Cherry v. Matthews, 419 F. Supp. 922 (D.D.C. 1976). *See generally* Note, *Ending Discrimination Against the Handicapped or Creating New Problems? The HEW Rules and Regulations Implementing Section 504 of the Rehabilitation Act of 1973,* 6 FORDHAM URB. L.J. 399 (1978); Note, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulations,* 16 HARV. J. ON LEGIS. 59 (1979).

Congress again amended title V of the Act in 1978, incorporating the enforcement mechanisms available under title VI. *See* S. REP. NO. 890, 95th Cong., 2d Sess. 19 (1978) ("It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies and rights under section 504 conform with those promulgated under Title VI. Thus this amendment codifies existing practice as a specific statutory requirement."); *infra* text accompanying note 29. The 1978 legislation, however, remained ambiguous. It revised § 504 to authorize federal agencies to promulgate regulations necessary to implement an extension of the scope of § 504 to programs operated by federal agencies. It failed, however, to authorize explicitly the promulgation of regulations to govern the broader range of federally assisted programs covered by § 504. *See supra* note 5. For a discussion of the weight accorded agency regulations under § 504, see *infra* note 53.

27 *See generally* Note, *Legislation by Implication: The Exercise of Legislative Authority Under the 1978 Amendments to Section 504 of the Rehabilitation Act of 1973,* 68 KY. L.J. 141 (1979-80) (suggesting that more precise statutory language would combat problems posed by § 504); Comment, *Implied Rights of Action Under the Rehabilitation Act of 1973,* 68 GEO. L.J. 1229 (1980) (contending that case law and social policy support implied private rights of action for enforcement and damages); Comment, *Rehabilitation Act of 1973: Is There an Implied Right of Action Under Section 504?,* 49 TENN. L. REV. 577 (1982) (arguing that Supreme Court should find implied private right of action under § 504).

28 By enacting clarifying amendments to the 1973 version of the Rehabilitation Act, Congress expressed its view of the proper interpretation of § 504. *Compare* NLRB v. Bell Aerospace Co., Div. of Textron, 416 U.S. 267, 275 (1974) (subsequent legislation declaring intent of earlier statute entitled to significant weight in determining appropriate construction) *with* Southeastern Community College v. Davis, 442 U.S. 397, 411 n.11 (1979) (statements by members of Congress or its committees cannot substitute for clear expression of legislative intent at time legislation is enacted).

dies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or provider of such assistance under section 504."[29] Congress presumably was aware that at the time of this amendment[30] the federal courts had recognized a private right of action as a means of enforcing title VI's ban on racial discrimination in federally assisted programs.[31] Since the passage of the amendment, seven members of an otherwise divided Supreme Court have agreed that a private right of action may be inferred under title VI.[32] Second, section 505(b) was added, authorizing a court "in any action or proceeding to enforce or charge a violation of a provision of this subchapter, . . . [to] allow a prevailing party, other than the United States, a reasonable attorney's fee as part of [its] costs."[33] The Supreme Court has stated in related contexts that authorization of attorney's fees "explicitly presumes the availability of private suits to enforce [the civil rights law]."[34] The legislative history accompanying both these changes

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29 Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, § 120, 29 U.S.C. § 794a(a)(2) (Supp. V 1981).

30 *See* Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979) (Court, in determining existence of private cause of action, must take into account contemporary legal context for congressional action, including important precedents from federal courts).

Some might argue that Congress should have been more explicit in specifying the existence of a private right of action under § 504 in light of contemporaneous Supreme Court cases that treated the issue as unresolved. This argument invites at least three responses. First, Congress *was* explicit, stating that "any person aggrieved" was entitled to pursue the aggregate "rights" and "remedies" available under title VI. *See supra* text accompanying note 29. Second, Congress may have thought it highly unlikely that established precedent recognizing the existence of a private cause of action would be reversed. Finally, Congress may have believed that its handling of this issue in committee reports, *see infra* note 35, provided an adequate basis for interpreting the statutory language.

31 *See, e.g.,* Bossier Parrish School Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir.), *cert. denied,* 388 U.S. 911 (1967) (holding that private cause of action exists under title VI); *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 418-21 (1978) (Stevens, Stewart, Rehnquist, JJ., & Burger, C.J., expressing view that private cause of action exists under title VI); *id.* at 284, 328 (Powell, Brennan, Marshall, & Blackmun, JJ., assuming existence of private cause of action); Lau v. Nichols, 414 U.S. 563 (1974) (assuming existence of private right of action).

32 *See* Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. 3221 (1983) (discussed *infra* at notes 89, 99-103 and accompanying text). Justice White announced the opinion of the Court, which held that title VI allows private actions only for prospective relief, and accordingly affirmed a denial of back pay by the lower court. 103 S. Ct. at 3227-29. Justice Rehnquist concurred with this portion of Justice White's opinion. Justice Powell, with the Chief Justice concurring, found no private cause of action under title VI. *Id.* at 3235-36 (opinion of Powell, J.). Justice O'Connor agreed that a private cause of action exists, but argued that proof of discriminatory intent was a necessary element of the judgment, and therefore voted to affirm. *Id.* at 3237-38 (O'Connor, J., concurring). The four other Justices dissented, all agreeing that a private action exists under title VI, and rejected Justice White's limitation on that action. *Id.* at 3239 (Marshall, J., dissenting); *id.* at 3249 (Stevens, J., dissenting).

33 Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, § 120, 29 U.S.C. § 794a(b) (Supp. V 1981).

34 Cannon v. University of Chicago, 441 U.S. 677, 699 (1979) (availability of award of attorney's fees in actions under title VI cited in support of holding that private cause of action exists to enforce title IX).

supports the view that a private right of action exists under section 504.[35] Most federal circuit court decisions also adopt this position.[36]

The Supreme Court will soon have a third opportunity to address this question,[37] when it seeks to resolve the emerging split in the circuits concerning the availability of a private right of action to redress employment discrimination on the basis of handicap.[38] Other related issues

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35 The legislative history of the 1978 amendments specifically contemplates that a private cause of action should be available to enforce § 504. *See* H.R. REP. NO. 1149, 95th Cong., 2d Sess. 21, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7312, 7332 ("[D]isabled individuals are one of the very few minority groups in this country who have not been authorized by the Congress to seek attorneys' fees. The amendment proposes to correct this omission and thereby assist handicapped individuals in securing the legal protection guaranteed them under Title V of the [Rehabilitation Act]."); S. REP. NO. 890, 95th Cong., 2d Sess. 19 (1978):

> The committee believes that the rights extended to handicapped individuals under title V—that is, Federal Government employment, physical accessibility in public buildings, employment under Federal contracts, and nondiscrimination under Federal grants—are, and will remain, in need of constant vigilance by handicapped individuals to assure compliance, and the availability of attorney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under sections 501 and 504.

The statements in the 1978 legislative history are consistent with the views expressed in the Senate report accompanying the 1974 amendments to title V. *See* S. REP. NO. 1297, 93d Cong., 2d Sess. 39-40, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6390-91:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of [title VI and title IX] . . . . The language of section 504, in following the above-cited Acts, . . . envisions the implementation of a compliance program which is similar to those Acts. . . . This approach . . . would . . . permit a judicial remedy through a private action.

36 Ten of the 12 federal courts of appeals have inferred a private cause of action to enforce § 504. *See* Jones v. Metropolitan Atlanta Rapid Transit Auth., 681 F.2d 1376, 1377 n.1 (11th Cir. 1982); Miener v. Missouri, 673 F.2d 969, 973-75 (8th Cir.), *cert. denied,* 103 S. Ct. 215 (1982); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1376-80 (10th Cir. 1981); Simon v. St. Louis County, 656 F.2d 316, 319-20 (8th Cir. 1981), *cert. denied,* 455 U.S. 976 (1982); Local Div. 1285 Amalgamated Transit Union v. Jackson Transit Auth., 650 F.2d 1379, 1384-85 (6th Cir. 1981); Kling v. County of Los Angeles, 633 F.2d 876, 878 (9th Cir. 1980); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 675 (8th Cir. 1980); Camenisch v. University of Tex., 616 F.2d 127, 131 (5th Cir. 1980), *vacated on other grounds,* 451 U.S. 390 (1981); NAACP v. Medical Center, Inc., 599 F.2d 1247, 1258-59 (3d Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158, 1159 (4th Cir. 1978), *rev'd on other grounds,* 442 U.S. 397 (1979); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284-87 (7th Cir. 1977).

37 The Court has avoided deciding whether a private cause of action exists in two previous cases. *See* Camenisch v. University of Tex., 451 U.S. 390 (1981) (remanding in part and vacating as moot); Southeastern Community College v. Davis, 442 U.S. 397, 404-05 n.5 (1979); *see also* Campbell v. Kruse, 434 U.S. 808 (1977) (remanding for decision whether § 504 barred system of partial tuition grants to handicapped children).

38 The Courts of Appeals for the Second, Fourth, Eighth, and Ninth Circuits have held that § 504 does not provide a private cause of action for employment discrimination in federally assisted programs except where the primary objective of the financial assistance is provision of employment. *See* Scanlon v. Atascadero State Hosp., 677 F.2d 1271 (9th Cir. 1982); United States v. Cabrini Medical Center, 639 F.2d 908, 909-11 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 674-75 (8th Cir. 1980); Trageser v. Libbie Rehabilitation Center Inc., 590 F.2d 87, 88-89 (4th Cir. 1978), *cert. denied,* 442 U.S. 947 (1979); *see also* Simon v. St. Louis County, 656 F.2d 316, 319 (8th Cir. 1981) (affirming district

likely to be considered by the Court in the next few years include whether plaintiffs must exhaust administrative remedies before seeking judicial resolution of section 504 claims,[39] and whether section 504 al-

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court ruling that purpose of federal funding of police department was employment). These courts reasoned that § 505(a)(2)'s incorporation by reference of title VI remedies and procedures necessarily incorporated § 604 of the 1964 Civil Rights Act, 42 U.S.C. § 2000d-3 (1976), limiting actions to remedy employment discrimination under title VI, in the light of the detailed legislative scheme governing employment discrimination that is found in title VII of the Civil Rights Act. That reasoning has been sharply criticized in view of Congress's expressed intent, through the 1978 amendments to title V of the Rehabilitation Act, to expand, not limit, available remedies. *See, e.g.,* Comment, *Employment Discrimination Against the Handicapped: Can* Trageser *Repeal the Private Right of Action?,* 54 N.Y.U. L. REV. 1173 (1979).

Responding to this criticism and to the Supreme Court's recognition that private actions for employment discrimination on the basis of sex may be brought under the analogous provisions of title IX, *see* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982), the Third and Eleventh Circuits recently upheld private actions alleging employment discrimination on the basis of handicap under § 504. *See* LeStrange v. Consolidated Rail Corp., 687 F.2d 767, 770 (3d Cir. 1982), *cert. granted,* 103 S. Ct. 1181 (1983); Jones v. Metropolitan Atlanta Rapid Transit Auth., 681 F.2d 1376, 1378-80 (11th Cir. 1982); *see also* Scanlon v. Atascadero State Hosp., 677 F.2d at 1277 (Ferguson, J., dissenting) (arguing that legislative history of amendments suggests that Congress intended to expand remedies available under the Act); Longoria v. Harris, 554 F. Supp. 102, 106 (S.D. Tex. 1982) (rejecting strict reading of Act). At least one court left open the possibility that employment discrimination that injures not only the plaintiff employee, but also other persons who are intended beneficiaries of a federally assisted program, may give grounds for a claim under § 504, even where no program designed primarily to provide employment is involved. *See* Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1235 n.16 (7th Cir. 1980). *But see* Sabol v. Board of Educ., 510 F. Supp. 892 (D.N.J. 1981) (no private right of action in absence of broad policies of discriminatory hiring).

39 Two related issues concern the necessity for exhaustion of administrative remedies. The first is whether a plaintiff must exhaust federal agency complaint procedures before litigation may proceed. Courts have concluded that this sort of exhaustion is not required, at least since the Supreme Court held in Cannon v. University of Chicago, 441 U.S. 677, 706 n.41 (1979), that exhaustion of administrative remedies is not required under title IX. *See* Miener v. Missouri, 673 F.2d 969, 978-79 (8th Cir.), *cert. denied,* 103 S. Ct. 215 (1982); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1381 (10th Cir. 1981); Kling v. County of Los Angeles, 633 F.2d 876, 879 (9th Cir. 1980); Camenisch v. University of Tex., 616 F.2d 127, 133-36 (5th Cir. 1980); *see also* Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1286 n.29, 1287 (7th Cir. 1977) (exhaustion not required where not shown that administrative remedy available); Whitaker v. Board of Higher Educ., 461 F. Supp. 99 (E.D.N.Y. 1978) (exhaustion not required). The preceding cases rejected the view of the earlier decisions cited below that exhaustion is required, or that the primary jurisdiction doctrine applies. *See* Stubbs v. Kline, 463 F. Supp. 110, 117 (W.D. Pa. 1978); Doe v. New York Univ., 442 F. Supp. 522 (S.D.N.Y. 1978), *aff'd in part, rev'd in part on other grounds,* 666 F.2d 761 (2d Cir. 1981); Crawford v. University of N.C., 440 F. Supp. 1047, 1059 (M.D.N.C. 1977); NAACP v. Wilmington Medical Center, 426 F. Supp. 919 (D. Del. 1977).

Second, a growing number of courts have required exhaustion of state procedural remedies available under the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 (1976), in cases involving alleged discrimination in elementary and secondary education. *See* Riley v. Ambach, 668 F.2d 635 (2d Cir. 1981); Scruggs v. Campbell, 630 F.2d 237 (4th Cir. 1980); Davis v. Maine Endwell Cent. School Dist., 542 F. Supp. 1257 (N.D.N.Y. 1982); Mitchell v. Walter, 538 F. Supp. 1111, 1117 (S.D. Ohio 1982); Akers v. Bolton, 531 F. Supp. 300, 316 (D. Kan. 1981). *But see* Vander Malle v. Ambach, 673 F.2d 49 (2d Cir. 1982) (exhaustion not required if it would deny plaintiff interim relief sought); Jose P. v. Ambach, 669 F.2d 865, 869-70 (2d Cir. 1982) (exhaustion not required if adequate and speedy state remedies not available). *See generally* Hyatt, *Litigating the Rights of Handicapped Children to an Appro-*

lows damages or other forms of compensatory relief.[40]

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priate Education, 29 U.C.L.A. L. REV. 1, 35-42 (1981) (discussing procedural and remedial questions raised by § 504 and § 1983).

40 In recent years, several courts have held that damages are available under § 504 on the ground that such a remedy is necessary to afford plaintiffs complete relief. *See* Miener v. Missouri, 673 F.2d 969, 977-79 (8th Cir.), *cert. denied,* 103 S. Ct. 215 (1982); Christopher N. v. McDaniel, 569 F. Supp. 291, 297 (N.D. Ga. 1983); Gelman v. Department of Educ., 544 F. Supp. 651, 653-54 (D. Colo. 1982); Hutchings v. Erie City & County Library, 516 F. Supp. 1265, 1267-69 (W.D. Pa. 1981); Patton v. Dumpson, 498 F. Supp. 933, 937-39 (S.D.N.Y. 1980); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 949 (D.N.J. 1980); *see also* Gregg B. v. Board of Educ., 535 F. Supp. 1333, 1339-40 (E.D.N.Y. 1982) (tuition reimbursement available under § 504). Some courts have taken the position that even if damages are generally available under § 504, the eleventh amendment may bar damage claims against state officials where recovery would be paid out of state coffers. *See* Miener v. Missouri, 673 F.2d at 979-82; Sanders by Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361, 1372-73 (W.D. Mich. 1983); Parks v. Pavkovic, 536 F. Supp. 296, 311 n.27 (N.D. Ill. 1982); M.R. v. Milwaukee Pub. Schools, 495 F. Supp. 864, 867 (E.D. Wis. 1980); Stubbs v. Kline, 463 F. Supp. 110, 115-16 (W.D. Pa. 1978).

At the other extreme, some courts have held that damages are simply unavailable under § 504. *See* Longora v. Harris, 554 F. Supp. 102, 106-07 (S.D. Tex. 1982); Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460, 469-73 (S.D. Tex. 1982); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104, 1112 (N.D. Cal. 1979). For a more extensive discussion of the damage issue, see Hyatt, *supra* note 39, at 51-55, 59-61; Comment, *Compensating the Handicapped: An Approach to Determining the Appropriateness of Damages for Violations of Section 504,* 1981 B.Y.U. L. REV. 133.

Much of this earlier precedent may have limited future application, however, in light of the Supreme Court's recent decision in Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. 3221 (1983); *see supra* note 32. There, five members of the Court concluded that compensatory relief was unavailable under title VI, at least where intentional racial discrimination had not been shown. *Id.* at 3229-32 (White & Rehnquist, JJ., plurality opinion); *id.* at 3236-37 (Powell, Rehnquist, JJ., & Burger, C.J., concurring); *id.* at 3237-39 (O'Connor, J., concurring). Six members of the Court stated, on the other hand, that compensatory relief could be awarded in the event that racial animus could be demonstrated. *Id.* at 3229-30 (White & Rehnquist, JJ., plurality opinion); *id.* at 3244-46 (Marshall, J., dissenting); *id.* at 3250-52 (Stevens, Brennan & Blackmun, JJ., dissenting).

Unfortunately, the effect of *Guardians Association* upon the developing law under § 504 is not clear. Because § 505(a)(2) of the Rehabilitation Act expressly provides that the remedies available under title VI are also available in actions under § 504, it appears that, at minimum, a court may award compensatory relief as a remedy for intentional discriminatory conduct that violates § 504. Perhaps damages should be more widely available. As discussed below, both intentional and nonintentional discrimination arguably fall within the scope of § 504, notwithstanding the Supreme Court's more limited construction of title VI. *See infra* notes 84-109 and accompanying text. Even if that were not the case, a broader range of conduct may properly be characterized as "intentional" for purposes of § 504 than might be the case under title VI. *See infra* notes 104-07 and accompanying text. The courts are likely to turn to these areas of inquiry in an attempt to delineate the extent of compensatory relief available under § 504. *See, e.g.,* Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348, 1357 (5th Cir. 1983) (no private right of action for damages available under § 504 absent intentional discrimination); Wilder v. City of New York, 568 F. Supp. 1132, 1136 (E.D.N.Y. 1983) (discussing *Guardians Association* and concluding that damages are available under § 504). The Supreme Court may also provide additional guidance on this question in its forthcoming decision concerning the availability of private causes of action for employment discrimination under § 504. *See* LeStrange v. Consolidated Rail Corp., 687 F.2d 767 (3d Cir. 1982), *cert. granted,* 103 S. Ct. 1181 (1983).

C. Section 504's Substantive Mandate: An Introduction

In the last five years, a growing body of case law has developed addressing the substantive obligations imposed by section 504. Before turning to the case law, it is instructive to review the administrative efforts to implement section 504, and to consider the constitutional underpinnings that shape section 504 jurisprudence.

1. *Administrative Interpretation*

The United States Department of Health, Education, and Welfare (HEW), a principal source of federal financial assistance, adopted regulations implementing section 504 in 1977.[41] Those regulations, now enforced by the Department of Education and the Department of Health and Human Services, continue to provide one of the most comprehensive systematic interpretations of section 504, and, therefore, warrant close examination.[42]

The regulations can be divided into two segments. The first segment adopts a broad definition of "discrimination."[43] "Discrimination"

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41 *See supra* note 26.

42 In 1979, Congress divided the Department of Health, Education and Welfare (HEW) into two new agencies, the Department of Education and the Department of Health and Human Services. *See* Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979). Each of those agencies has republished regulations implementing § 504. *See* 34 C.F.R. § 104 (1983) (Department of Education regulations); 45 C.F.R. § 84 (1982) (Department of Health and Human Services regulations). Other federal agencies have also published regulations implementing § 504; most have modeled their regulations after the original HEW implementing regulations. *See, e.g.,* 5 C.F.R. § 900.701 (1983) (Office of Personnel Management); 10 C.F.R. § 4.101 (1983) (Nuclear Regulatory Commission); 10 C.F.R. § 1040.61 (1983) (Department of Energy); 13 C.F.R. § 113.1 (1983) (Small Business Administration). Very recently, several agencies have proposed new regulations desigued to comply with their obligation, under 1978 Rehabilitation Act amendments, to conduct their own activities in accordance with the requirements of § 504. *See* 49 Fed. Reg. 1449-62 (Jan. 11, 1984); *see also supra* notes 4, 26 (discussing regulatory authority under 1978 amendments). These proposed regulations modify the framework provided by the earlier HEW regulations to the extent that they incorporate recent judicial interpretations of § 504, such as that of the Supreme Court in *Southeastern Community College v. Davis,* discussed *infra* part III. *See, e.g.,* 49 Fed. Reg. 1460 (Jan. 11, 1984) (defining "qualified handicapped individual" as one who meets essential eligibility requirements, and who can achieve purpose of program or activity, without modification of program or activity that would result in fundamental alteration in its nature); *id.* at 1461 (requiring affected agencies to render programs conducted in existing facilities accessible unless doing so would result in fundamental alteration in nature of program or activity, or would result in undue financial or administrative burdens).

In addition to adopting implementing regulations to govern its financial assistance programs, in 1978 HEW published a second set of regulations, 45 C.F.R. § 85 (1982), as guidelines to assist individual agencies in implementing § 504. *See supra* note 26. In 1980, the Department of Justiee assumed responsiblity for coordinating executive branch compliance. *See* 28 C.F.R. § 41 (1982) (guidelines published by Department of Justice pursuant to Exec. Order No. 12,250, 3 C.F.R. 298 (1981)). Although it has aired a preliminary draft of proposed changes in the coordinating regulations, the Department of Justice has not yet formally implemented major changes in the coordinating regulations. In the future the Department of Justice will play a leading role in the interpretation of § 504.

43 The regulations provide as follows:

encompasses actions that deny a qualified handicapped person the opportunity to participate or receive equal treatment in a federally assisted program. Actions that provide handicapped persons with services that are not as effective as those afforded others also constitute discrimination. Prohibiting this latter type of conduct is more controversial. Requiring equally effective programs may necessitate adjustments to regular programs or the provision of different programs. For example, this may entail developing unique special education services, rather than including handicapped children in regular school classrooms.[44]

The second segment of the regulations includes specific directives concerning actions recipients must take to avoid "discrimination" in five distinct factual contexts: employment; program accessibility; preschool,

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(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients [sic] program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

45 C.F.R. § 84.4(b)(1) (1982). The regulation goes on to provide, however, that

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and non-handicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

45 C.F.R. § 84.4(b)(2) (1982).

44 Interpretive commentary justifies this requirement as follows:

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau v. Nichols,* 414 U.S. 563 (1974).

34 C.F.R. § 104, app. A, n.6 (1982); *see also* 45 C.F.R. § 84, app. A, n.6 (1982).

elementary, and secondary education; post-secondary education; and health, welfare, and social services. First, recipients may not inquire about a person's handicaps prior to employment. Inquiries must be limited to an applicant's abilities to perform job-related functions.[45] In addition, employers must make "reasonable accommodation" to the needs of handicapped employees.[46] Second, new buildings must be readily accessible; building alterations must be accessible "to the maximum extent feasible"; and existing facilities must be operated so that a program or activity therein, "when viewed in its entirety," is readily accessible.[47] Third, public elementary and secondary education programs must provide free education suited to a child's needs, in an appropriate setting, using appropriate evaluation and placement techniques, and providing

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45 *See* 34 C.F.R. § 104.14 (1982); 45 C.F.R. § 84.14 (1982). The regulations prohibit a recipient from classifying or segregating employment applicants in any way that adversely affects their opportunities or status because of handicap. 34 C.F.R. § 104.11(a)(3) (1982); 45 C.F.R. § 84.11(a)(3) (1982). They also ban use of employment tests or other selection criteria that screen out or tend to screen out handicapped persons unless the recipient establishes the job-relatedness of the criteria and the agency is unable to show the availability of alternative tests or criteria. 34 C.F.R. § 104.13(a) (1982); 45 C.F.R. § 84.13(a) (1982).

46 *See* 34 C.F.R. § 104.12(a) (1982); 45 C.F.R. § 84.12(a) (1982) ("A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."). Reasonable accommodation may include: making facilities accessible and usable; job restructuring; modifying work schedules; acquiring or modifying equipment; or providing readers or interpreters. 34 C.F.R. 104.12(b) (1982); 45 C.F.R. § 84.12(b) (1982). In determining whether accommodation would result in undue hardship, one must consider, inter alia: (1) the overall size of a recipient's program (number of employees, number and type of facilities, size of budget); (2) the type of operation (including composition and structure of work force); and (3) the nature and cost of accommodation. 34 C.F.R. § 104.12(c) (1982); 45 C.F.R. § 84.12(c) (1982); *see also* 34 C.F.R. § 104, app. A, nn.15-19 (1982); 45 C.F.R. § 84, app. A, nn.15-19 (1982).

47 *Compare* 34 C.F.R. § 104.23 (1982) (new construction and alterations) *and* 45 C.F.R. § 84.23 (1982) (same) *with* 34 C.F.R. § 104.22 (1982) (existing facilities) *and* 45 C.F.R. § 84.22 (1982) (same). *See also* 43 Fed. Reg. 36,034-36,035 (1978) (Policy Interpretation No. 3 relating to program accessibility requirement).

The regulations require new buildings to be fully accessible from the outset to minimize cost. Recipients must take the opportunity to increase accessibility to structures whenever alterations are being made. The regulations permit the greatest flexibility with respect to providing access to existing facilities. In such cases, the recipient's program, rather than individual facilities used in conneetion with that program, must be accessible. For example, a university need not make all its existing classroom buildings accessible if some of them are already accessible and it can reschedule or relocate enough classes to offer all required courses and a rcasonable selection of electives in accessible facilities. A university may not exclude a handicapped student from a specifically requested course because of inaccessibility although every section of that course need not be accessible. *See* 34 C.F.R. § 104, app. A, nn.20-21 (1982); 45 C.F.R. § 84, app. A, nn.20-21 (1982). Some agencies have adopted special regulations dealing with the unique problems of program accessibility in historic properties. *See, e.g.,* 10 C.F.R. § 1040.74 (1983) (Department of Energy regulations).

Other federal legislation also bears on accessibility. *See* Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157 (1976 & Supp. V 1981) (buildings and facilities designed, constructed, altered, or leased with federal funds after September 1969 must be accessible).

certain procedural safeguards.[48] Fourth, recipients must operate post-secondary education programs, including vocational programs, with nondiscriminatory admissions, financial aid, and student employment policies.[49] Recipients may have to adjust academic requirements and provide auxiliary aids to students, just as reasonable accommodations are required in the employment context.[50] Fifth, recipients must administer programs providing health, welfare, and social services in a nondiscriminatory fashion using auxiliary aids such as brailled and taped materials and interpreters.[51] In particular, hospitals providing emergency health services must establish a procedure for effective communi-

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48 *See* 34 C.F.R. § 104.31-.39 (1982); 45 C.F.R. § 84.31-.39 (1982). HEW designed these regulations to conform with landmark decisions assuring handicapped children the right to a public education. *See, e.g.,* Lebanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973); Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971); 34 C.F.R. § 104, app. A, subpart D (1982); 45 C.F.R. § 84, app. A, subpart D (1982). HEW also sought to ensure that its interpretation of § 504 was in conformity with the requirements of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400-1461 (1982) [hereinafter cited as EHA].

For purposes of § 504, the regulations define an "appropriate education" as one consisting of "regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to [specified] procedures." 34 C.F.R. § 104.33(b)(1) (1982); 45 C.F.R. § 84.33(b)(1) (1982). Compliance with procedures adopted pursuant to the EHA, including development of an individualized education program (setting forth a child's level of performance, goals, and services to be provided), and provision of required notice and the opportunity for an administrative hearing to contest placement decisions, will satisfy the requirements of § 504. *See* 34 C.F.R. § 104.33(b)(2), .36 (1982); 45 C.F.R. § 84.33(b)(2), .36 (1982).

The Department of Education issued draft regulations changing the interpretation of the EHA, *see* 47 Fed. Reg. 33,836 (1982), but later partially withdrew them, *see* 47 Fed. Reg. 49,871 (1982). The § 504 regulations may also be revised to reflect these changes.

49 34 C.F.R. § 104.42, .47 (1982); 45 C.F.R. § 84.42, .47 (1982). Recipients must treat students on a nondiscriminatory basis when providing health insurance, transportation, housing, physical education, counseling, and placement. 34 C.F.R. § 104.43, .45, .47 (1982); 45 C.F.R. § 84.43, .45, .47 (1982).

50 *See* 34 C.F.R. § 104.44 (1982); 45 C.F.R. § 84.44 (1982). Modification of academic requirements may include changing the length of time permitted for the completion of degree requirements, the specific courses required for the completion of degree requirements, or the manner in which specific courses are conducted. However, the regulations do not regard as discriminatory academic requirements that are essential to a student's program of instruction or a directly related licensing requirement. 34 C.F.R. § 104.44(a) & app. A, n.31 (1982); 45 C.F.R. § 84.44(a) & app. A, n.31 (1982). Auxiliary aids include assistance in such forms as taped tests or interpreters for hearing-impaired students, readers to assist visually-impaired students, and classroom equipment adapted for use by students with manual impairments. Recipients must supply auxiliary aids where necessary to ensure a handicapped student the full benefits of the program. 34 C.F.R. § 104.44(d) (1982); 45 C.F.R. § 84.44(d) (1982). Schools need not pay for auxiliary aids themselves if state agencies or private organizations provide them. *See* 34 C.F.R. § 104, app. A, n.31 (1982); 45 C.F.R. § 84, app. A, n.31 (1982).

51 34 C.F.R. § 104.52 (1982); 45 C.F.R. § 84.52 (1982). In addition, recipients who operate or supervise programs for institutionalized persons must ensure that qualified handicapped persons in such programs receive a free appropriate public education. 34 C.F.R. § 104.54 (1982); 45 C.F.R. § 84.54 (1982).

cation with persons having impaired hearing.[52]

The regulations thus articulate a comprehensive definition of "discrimination," and provide some rudimentary guidance with regard to selected, practical problems.[53] However, they do not probe the fundamental theoretical problems associated with the application of section 504's substantive mandate to provide equal opportunity to handicapped persons. A consideration of several key constitutional provisions relied upon by Congress or the courts in their development and interpretation of section 504 is a useful starting point in approaching these fundamental problems.

2. *Constitutional Underpinnings*

a. *Spending Power.* Congress has broad authority under article I of the Constitution to collect taxes—and by implication to expend federal resources—to provide for the general welfare.[54] In the exercise of that authority, Congress has frequently conditioned receipt of federal funds upon compliance with federal policies.[55] Although framed in particularly broad terms, section 504 represents just such a condition. Section 504 applies to recipients of federal funds. It was originally adopted as

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52 34 C.F.R. § 104.52(c) (1982); 45 C.F.R. § 84.52(c) (1982).

53 In many cases, regulations provide an important source of persuasive authority for resolving difficult questions of statutory interpretation. *See, e.g.,* Udall v. Tallman, 380 U.S. 1, 16 (1965). Because federal agencies were initially reluctant to adopt regulations implementing § 504, however, courts have accorded their administrative interpretation less deference. *See* Southeastern Community College v. Davis, 442 U.S. 397, 412 n.11 (1979). This rationale may not apply, however, to administrative interpretations developed after the agencies' authority became clear.

In some circumstances, the courts have rejected particularly burdensome agency regulations as unauthorized by § 504. *See* Joyner v. Dumpson, 712 F.2d 770, 775 (2d Cir. 1983) (§ 504 regulations adopting adverse impact test reach beyond scope of statute and thus do not provide grounds for striking down state law requiring transfer of child custody as prerequisite to receipt of certain residential care services); American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272, 1278 (D.C. Cir. 1981) (regulations regarding accessibility of public transit systems were overly burdensome and thus unauthorized). Nevertheless, in the greater number of cases, the courts have enforced regulatory obligations that lay close to the statute's core. *See* New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 852-54 (10th Cir. 1982) (distinguishing *Southeastern Community College v. Davis);* Association for Retarded Citizens v. Frazier, 517 F. Supp. 105, 120-22 (D. Colo. 1981) (same); *see also* Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1281-84 (7th Cir. 1977); Doe v. Syracuse School Dist., 508 F. Supp. 333, 337 n.4 (N.D.N.Y. 1981).

54 "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1.

55 *See, e.g.,* King v. Smith, 392 U.S. 309, 333 (1968); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947). *See generally* Wing & Silton, *Constitutional Authority for Extending Federal Control Over the Delivery of Health Care,* 57 N.C.L. REV. 1423 (1979); Note, *Federal Grants and the Tenth Amendment: "Things As They Are" and Fiscal Federalism,* 50 FORDHAM L. REV. 130 (1981); Comment, *The Federal Constitutional Spending Power: A Search for Limits,* 70 NW. U.L. REV. 293 (1975).

part of legislation primarily designed as a vehicle for providing federal aid.[56] Moreover, it was modeled after title VI of the Civil Rights Act of 1964,[57] a provision resting, in part, on congressional spending power.[58]

Although congressional spending power is broad, it is not unlimited. Accusations have been raised that Congress has used its spending power to coerce state compliance by imposing conditions that are insufficiently related to the particular program. Although such attacks have generally been unsuccessful,[59] two recent Supreme Court cases have suggested a new theory for curbing congressional impingement upon state prerogatives.[60] In *Pennhurst State School and Hospital v. Halderman,*[61] the Court announced an "unambiguous statement" rule. The Court held

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56 In addition to the various civil rights measures included in title V, the Rehabilitation Act of 1973 contained numerous provisions relating to federal financial assistance for rehabilitation programs. Title I of the Act, 29 U.S.C. §§ 720-750 (1976), authorized federal grants to state vocational rehabilitation agencies. Title II, 29 U.S.C. §§ 760-764 (1976), established a research and training program designed to assist rehabilitation personnel. Title III, 29 U.S.C. §§ 770-776 (1976), provided for assistance to support the construction of rehabilitational facilities. The lengthy congressional debate and the two presidential vetoes of earlier versions of the Rehabilitation Act of 1973 focused primarily on the effect of the legislation's various spending provisions, rather than on its title V civil rights measures. *See* S. REP. NO. 318, 93d Cong., 1st Sess. 12-16, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2086-90.

57 *See supra* notes 5, 35.

58 *See* 110 CONG. REG. 6546 (1964) (statement of Sen. Humphrey) ("[Title VI] is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed.' *Oklahoma v. Civil Service Comm'n,* 330 U.S. 127, 143 (1947). No recipient is required to accept Federal aid. If he does so voluntarily, he must take it on the conditions on which it is offered."); *see also* Lau v. Nichols, 414 U.S. 563, 568-69 (1974) (requiring school system to take affirmative steps to ensure that non-English speaking children benefited from educational programs as mandated by agency regulation under title VI); United States v. Marion County School Dist., 625 F.2d 607, 609 (5th Cir. 1980) (upholding authority of United States to sue to enforce federally funded schools' compliance with title VI's prohibition against racial discrimination in light of congressional authority to fix conditions upon money disbursed to governmental entities), *cert. denied,* 451 U.S. 910 (1981).

59 *See* Wing & Silton, *supra* note 55, at 1442-51. Conditions have rarely been invalidated as coercive, *see, e.g.,* North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532, 535 (E.D.N.C. 1977) (threatened loss of $50 million in federal health assistance not "coercive"), *aff'd mem.,* 435 U.S. 962 (1978). Because termination of federal funds under § 504 can only be accomplished on a "program-specific" basis, *cf.* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535-40 (1982) (discussing the "program specific" nature of title IX of the Education Amendments of 1972), any potentially coercive effect of its antidiscrimination provisions is limited. Congress may legitimately adopt a policy of nondiscrimination to ensure that federal funds are equitably administered. *See* Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 606 (D.S.C. 1974) (title VI of the Civil Rights Act of 1964), *aff'd mem.,* 529 F.2d 514 (4th Cir. 1975); Comment, *supra* note 55, at 308-09.

60 A similar concern has influenced the Court's analysis of tenth amendment challenges to commerce clause legislation. *See* National League of Cities v. Usery, 426 U.S. 833 (1976). That tenth amendment-commerce clause line of reasoning has been sharply narrowed. EEOC v. Wyoming, 103 S. Ct. 1054, 1060-64 (1983).

Even prior to this contraction in tenth amendment analysis, the lower courts had refused to use *National League of Cities* to curb federal spending power. The courts reasoned that the tenth amendment is not implicated when federal aid is subject to conditions and states are free to accept or reject that aid. *See, e.g.,* Oklahoma v. Schweiker, 655 F.2d 401, 412 (D.C.

that the Developmentally Disabled Assistance and Bill of Rights Act does not create a privately enforceable right of action requiring states to provide mentally retarded persons with habilitative services in the least restrictive environment.[62] The Court reasoned that Congress must unambiguously state whether or not it has imposed a particular condition on the state's receipt of federal funds to allow a private right of action.[63] In *Hendrick Hudson District Board of Education v. Rowley,*[64] the Court cited its *Pennhurst* discussion in interpreting the Education for All Handicapped Children Act. The Court concluded that because Congress had not spoken "unambiguously, as required in the valid exercise of its spending power," it would narrowly construe the statutory requirement that states provide handicapped students with a "free appropriate

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Cir. 1981); Florida Dep't of Health & Rehabilitation Servs. v. Califano, 449 F. Supp. 274, 284-85 (N.D. Fla.), *aff'd,* 585 F.2d 150 (5th Cir. 1978), *cert. denied,* 441 U.S. 931 (1979).

If Congress was entitled to rely on § 5 of the fourteenth amendment in enacting § 504, *see infra* notes 70-76, any possible tenth amendment challenge would be unavailing. *See* Usery v. Charlestown County School Dist., 558 F.2d 1169 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 154-56 (3d Cir. 1976), *cert. denied,* 430 U.S. 946 (1977).

61 451 U.S. 1 (1981), *rev'g,* 612 F.2d 84 (3d Cir. 1979) (en banc), *aff'g,* 446 F. Supp. 1295 (E.D. Pa. 1977). In *Pennhurst,* plaintiffs challenged allegedly inhumane conditions at a facility for the care and treatment of mentally retarded persons. The challenge relied upon constitutional guarantees, state law, § 504 of the Rehabilitation Act of 1973, and § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6010 (1976 & Supp. V 1981). The district court held that retarded residents had a right to minimally adequate habilitation (i.e., education and training) in the least restrictive environment. Concluding that habilitation could not be provided in a large institution such as Pennhurst, the court ordered Pennsylvania to provide suitable community living arrangements, and to gradually close the institution. *Pennhurst,* 446 F. Supp. at 1326-28. The Third Circuit modified the district court's remedial order, relying narrowly on the Developmentally Disabled Assistance and Bill of Rights Act and on state law. *Pennhurst,* 612 F.2d at 1116.

After the Supreme Court reversed and remanded, *Pennhurst,* 451 U.S. at 64, the court of appeals held that state law provided adequate independent support for its previous order. Halderman v. Pennhurst State School & Hosp., 673 F.2d 647 (3d Cir. 1982) (en banc). The Supreme Court recently reversed, in a five-to-four decision. *See* Halderman v. Pennhurst State School & Hosp., 52 U.S.L.W. 4155 (Jan. 23, 1984). The Court held that the eleventh amendment prohibited the lower federal courts from ordering state officials to operate the Pennhurst institution in conformance with state law.

62 451 U.S. at 18.

63 [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17 (footnote and citations omitted). Regarding the significance of the first *Pennhurst* decision, *see generally* Baker, *Making the Most of* Pennhurst's *"Clear Statement" Rule,* 31 CATH. U.L. REV. 439 (1982).

64 458 U.S. 176 (1982).

public education," to qualify for special federal financial assistance.[65]

The scope of the unambiguous statement rule and its application to section 504 remains uncertain.[66] *Pennhurst* requires a clear statement that statutory standards of conduct were intended to impose conditions upon the receipt of federal aid. Section 504 is not ambiguous in this regard.[67] It was modeled on title VI and title IX, which specify that federal funds are to be terminated if states do not comply with antidiscrimination mandates concerning race and sex—certainly a plain statement that compliance is a condition of receiving financial assistance.[68] *Rowley* may simply have restated the *Pennhurst* rule. Both cases, however, hint at a broader formulation of that doctrine. Insofar as the Court's reasoning is based on an analogy to contract law, that analogy is readily extended. It is a short step from requiring that the conditional character of a statutory provision be clearly stated, to construing a condition of federal funding narrowly so as to conform to a recipient's alleged understanding of federal expectations at the time it agreed to accept federal aid. If the Court takes this course, section 504 may be attacked as inherently ambiguous, as some early observers believed.[69] Such a claim ignores the important fact that Congress modeled section 504 on the well-established antidiscrimination principles embodied in title VI and the fourteenth amendment. At the very least, they provide a benchmark that limits the potential ambiguity of section 504 and strengthens the argument that it is a necessary and proper exercise of

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65 The Court first concluded that the legislative history of the Education for All Handicapped Children Act indicated that Congress had intended to impose a limited substantive duty. It then observed:

> Moreover, even were we to agree that [statements in the legislative history] evince a congressional intent to maximize each child's potential, we could not hold that Congress had successfully imposed that burden upon the States. . . .
>
> As already demonstrated, the Act and its history impose no requirements on the States like those imposed by the District Court and the Court of Appeals. *A fortiori* Congress has not done so unambiguously, as required in the valid exercise of its spending power.

458 U.S. at 204 n.26. This discussion of an alternative rationale might be considered dictum. The Court ultimately held that the Act required the states, as a condition of continued receipt of federal funding, to provide personalized instruction and sufficient support services to permit the handicapped child to benefit from the instruction. *Id.* at 203.

66 *See, e.g.,* Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460, 470 n.8 (S.D. Tex. 1982) (speculating whether *Pennhurst*'s unambiguous statement rule limits availability of damage remedy under § 504 and Education for All Handicapped Children Act, because damages had not been expressly authorized).

67 *See* Miener v. Missouri, 673 F.2d 969, 974 n.4 (8th Cir. 1982), *cert. denied,* 103 S. Ct. 215 (1982); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1380 (10th Cir. 1981); *cf.* Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1576-77 (11th Cir. 1983) (*Pennhurst* is no bar to claim under Education for All Handicapped Children Act); Lieberman v. University of Chicago, 660 F.2d 1185, 1189-91 (7th Cir. 1981) (Swygert, J., dissenting) (title IX of Education Amendments of 1972), *cert. denied,* 456 U.S. 937 (1982).

68 *See supra* notes 5, 25.

69 *See supra* note 6 and accompanying text.

congressional spending power. Alternatively, when section 504 restricts the activities of state and local recipients of federal funds, the fourteenth amendment may provide independent support for Congress's enactment of this provision.

b. *Fourteenth Amendment.* There is substantial evidence that Congress regarded section 504 as an application of equal protection principles.[70] Sponsors of proposals to amend the Civil Rights Act of 1964 to prohibit discrimination on the basis of handicap spoke repeatedly of the need to ensure equality of opportunity and characterized the proposals as civil rights measures.[71] Committee reports discussing section 504

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70 The Supreme Court has given conflicting signals concerning the specificity with which Congress must articulate its reliance on the fourteenth amendment when enacting legislation. In *Pennhurst,* the Court, because of its concern for state prerogatives, was reluctant to "quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment," particularly where Congress had not "expressly articulated its intent to legislate pursuant to § 5" of that amendment. 451 U.S. at 16. Justice Rehnquist went on to explain that "[t]he case for inferring intent is at its weakest where . . . the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Id.* at 16-17 (emphasis in original). In *EEOC v. Wyoming,* Justice Brennan, writing for four members of the Court, characterized the *Pennhurst* rule as one of statutory construction:

> It is in the nature of our review of congressional legislation defended on the basis of Congress's powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection" . . . for "[t]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

103 S. Ct. at 1064 n.18 (quoting Woods v. Miller, 333 U.S. 138, 144 (1948)) (citation omitted). This view appears to command a majority of the court. *See also* Fullilove v. Klutznick, 448 U.S. 448, 479 (1980) (Burger, C.J.); *cf.* Parks v. Pavkovic, 536 F. Supp. 296, 308 n.21 (N.D. Ill. 1982) (Congress adequately expressed its intent to use Education for All Handicapped Children Act as vehicle to enforce fourteenth amendment by stating that Act was designed to enforce court decisions recognizing right to appropriate public education.).

71 *See* H.R. 14,033, 92d Cong., 2d Sess., 118 CONG. REC. 9712 (1972) (introduced by Rep. Vanik "to amend the Civil Rights Act of 1964 in order to make discrimination because of physical or mental handicap in employment an unlawful employment practice, unless there is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"); S. 3458, 92d Cong., 2d Sess., 118 CONG. REC. 11,788 (1972) (similar amendment introduced by Senators Humphrey and Percy); H.R. 12,154, 92d Cong., 1st Sess., 117 CONG. REC. 45,945 (1971) (bill introduced by Rep. Vanik to amend Civil Rights Act of 1964 to prohibit discrimination on basis of physical or mental handicap in federally assisted programs); S. 3044, 92d Cong., 2d Sess., 118 CONG. REC. 525 (1972) (similar amendment introduced by Senators Humphrey and Percy).

Representative Vanik, discussing the first of his proposed amendments referred to the failure of mental institutions to provide necessary treatment, the exclusion of handicapped children from schools, and the refusal of private and government employers to hire handicapped persons. 117 CONG. REG. 45,974 (1971). He then discussed the district court decision in Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), saying that this decision carried a "vital message" for those who wished to protect the "civil rights" of the handicapped, and demonstrated that exclusion from educational services is "not only . . . a discriminatory practice, but it is a violation of due process rights." 117

were quite abbreviated, speaking simply of a "nondiscrimination" requirement.[72] In an effort to expand upon this description, reports and floor colloquy accompanying the 1974 amendments to the Rehabilitation Act expressly embraced the analogy to title VI of the Civil Rights Act.[73] The text of the 1978 amendments made explicit cross-references to title VI.[74] The Supreme Court has recognized that title VI embodies the fourteenth amendment's prohibition on racial discrimination, and has concluded that conduct permitted under that amendment was not barred by title VI.[75] Arguably, therefore, section 504 also constitutes legislation based on Congress's power to enforce the fourteenth amendment.[76]

CONG. REC. 45,975 (1971). He concluded that his legislation would ensure equal educational and employment opportunities. *Id.* Although the Vanik bill did not leave committee, its sponsor noted that its language and intent had been incorporated into §§ 503 and 504 of the 1973 Rehabilitation Act. 119 CONG. REC. 7114 (1973).

Senator Humphrey spoke of injustices to handicapped persons seeking educational opportunities, opportunities to travel alone, insurance protection, and fair wages for their work. 118 CONG. REC. 525 (1972). Humphrey insisted that the "civil rights" of handicapped persons be affirmed, and stressed that it was the "constitutional right" of handicapped persons to be helped to help themselves. *Id.* As the debate on the Rehabilitation Act drew to a close, Senator Humphrey was gratified that the Act prohibited discrimination on the basis of handicap in federally assisted programs, as his original bill had sought to do. 118 CONG. REC. 32,310 (1972); *see also* 119 CONG. REC. 6145 (1973).

Although Vanik and Humphrey expressed their views early in Congress's deliberation on handicap discrimination, these views should be considered part of § 504's legislative history. *See* United States v. Enmons, 410 U.S. 396, 404 n.14 (1973) (sponsor's two year old interpretation of operative language subsequently used by Congress is part of legislative history).

72 *See* H.R. REP. NO. 244, 93d Cong., 1st Sess. 35 (1973); S. REP. NO. 318, 93d Cong., 1st Sess. 50, 70 (1973); H.R. REP. NO. 42, 93d Cong., 1st Sess. 41-42 (1973); S. REP. NO. 48, 93d Cong., 1st Sess. 80 (1973); H.R. REP. NO. 1581, 92d Cong., 2d Sess. 78 (1972) (conference report adopting provisions of Senate bill including § 504); S. REP. NO. 1135, 92d Cong., 2d Sess. 49, 77 (1972).

73 S. REP. NO. 1297, 93d Cong., 2d Sess. 39 (1974) (language in § 504 "patterned after" and "almost identical to" antidiscrimination language of title VI and title IX); S. REP. NO. 1139, 93d Cong., 2d Sess. 24 (1974) (same); H.R. REP. NO. 1457, 93d Cong., 2d Sess. 27 (1974) (Conference Report) (same); 120 CONG. REC. 30,551 (1974) (statement of Sen. Stafford) (same).

74 *See supra* note 29 and accompanying text; *see also* S. REP. NO. 890, 95th Cong., 2d Sess. 19 (1978) (remedies, procedures, and rights set forth in title VI to apply).

75 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284-87 (1978); *id.* at 328 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part); *see also* Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. 3221, 3225-26 (1983) (White & Rehnquist, JJ., plurality opinion); *id.* at 3235 (Powell & Rehnquist, JJ., & Burger, C.J., concurring); *id.* at 3252-53 (Stevens, Brennan & Blackmun, JJ., dissenting).

76 A second issue must also be considered: Did Congress have authority under § 5 of the fourteenth amendment to accord greater protection of handicapped persons than that accorded by courts interpreting the equal protection clause? Although the Supreme Court has acknowledged congressional power under § 5 to expand fourteenth amendment guarantees, the Court's most recent discussions of the issue have created uncertainty. *Compare* Katzenbach v. Morgan, 384 U.S. 641 (1966) (Congress may prohibit states from requiring literacy in English in order to vote in state elections) *with* Oregon v. Mitchell, 400 U.S. 112 (1970) (§ 5 of fourteenth amendment does not give Congress power to lower voting age in state elections from 21 to 18). *But cf.* City of Rome v. United States, 446 U.S. 156, 173-78 (1980) (Congress

If the analogy to equal protection and antidiscrimination law is warranted, the critical question becomes to what extent that analogy is controlling.[77] Handicapped persons have not been afforded the same level of protection as have members of minority racial groups or women. The Supreme Court has regarded classification based on race as inherently suspect, triggering strict scrutiny and requiring that the classification be necessary to the accomplishment of a compelling state purpose.[78] Only a few types of classifications require such close scrutiny. These suspect classes have experienced a history of purposefully unequal treatment, leaving them politically powerless and subjecting them to stereotypes that do not correspond to class members' true abilities.[79] The Supreme Court has been reluctant to extend suspect class status. Gender classifications have not been treated as suspect, but as quasi-suspect, triggering an intermediate level of scrutiny that requires a substantial relationship to an important state purpose.[80] In light of the history of unequal treatment of the handicapped, and their political powerlessness, it has been suggested that handicap status be treated as

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did not exceed its authority under § 2 of fifteenth amendment in enacting Voting Rights Act of 1965, prohibiting discriminatory voting practices).

Challenges to the Age Discrimination in Employment Act have questioned congressional powers under § 5 of the fourteenth amendment. *Compare* EEOC v. County of Calumet, 686 F.2d 1249, 1251-53 (7th Cir. 1982) (Congress possessed requisite power under § 5 of fourteenth amendment) *and* EEOC v. Elrod, 674 F.2d 601, 603-09 (7th Cir. 1982) (same) *with* EEOC v. Wyoming, 514 F. Supp. 595, 598-600 (D. Wyo. 1981) (Congress did not act with sufficient specificity to invoke § 5 of fourteenth amendment), *rev'd on other grounds,* 103 S. Ct. 1054 (1983).

Few cases have addressed whether § 504 rests upon Congress's fourteenth amendment power, perhaps because Congress's spending power provides an alternative source of authority. The most likely context for resolution of this issue is in cases seeking an award of damages or other compensatory relief against state agencies that assert eleventh amendment defenses. *See* Miener v. Missouri, 673 F.2d 969, 974 n.4 (8th Cir.), *cert. denied,* 103 S. Ct. 215 (1982) (noting issue without deciding it); Department of Educ. v. Katherine D., 531 F. Supp. 517, 530 (D. Hawaii 1982) (legislative history of § 504 "leaves no doubt" that it was enacted pursuant to Congress's power under fourteenth amendment), *aff'd in part and rev'd in part,* No. 82-4096, slip op. (9th Cir. Nov. 7, 1983); *cf.* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (eleventh amendment prohibition on suits against states superseded by 1972 Title VII amendments, enacted pursuant to § 5 of fourteenth amendment). On the availability of damages under § 504, *see generally supra* note 40.

77 Although recognizing that civil rights statutes have similarities, the courts have cautioned that differences are equally important. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 529-31 (1982) (discussing relationship between title IX and title VI); Wright v. Columbia Univ., 520 F. Supp. 789, 792 (E.D. Pa. 1981) (admitting some relationship between title VI, title IX, and § 504, but eautioning against "forcing the kinship to an unwarranted degree of consanguinity"). Commentators have recognized that differences in underlying policy considerations affect the interpretations of federal civil rights statutes. *See* Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975,* 89 YALE L.J. 27, 28-39 (1979) (comparing age discrimination and racial discrimination).

78 *See, e.g.,* McLaughlin v. Florida, 379 U.S. 184, 191-94 (1964).

79 *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

80 *See, e.g.,* Craig v. Boren, 429 U.S. 190, 197 (1976).

either a suspect or a quasi-suspect class.[81] The courts have been reluctant to adopt this view, however, for two reasons: first, substantial state expenditures for institutions for the handicapped may indicate a favorable attitude toward disabled persons; and second, a factual basis may exist for those stereotypes where a handicap does indeed correspond with impaired ability to perform certain functions.[82] The lowest level of equal protection scrutiny has therefore been applied to the handicapped. Legislative line-drawing that adversely affects handicapped persons may be justified by simply demonstrating the existence of a rational basis for the problematic classification.

Even if only limited equal protection scrutiny is required, it does not necessarily follow that such limited review is appropriate for section 504 analysis. Section 504 reflects a congressional judgment equating a denial of equal opportunity based on handicap with a denial based on race. A more thorough review, such as the one adopted under title VI, or under title VII of the 1964 Civil Rights Act dealing with employment discrimination,[83] is therefore arguably more appropriate. Although the broader body of antidiscrimination law provides useful guidelines for defining the contours of section 504, it only provides a starting point. The following section considers the need to reshape established antidiscrimination analysis to guarantee equal opportunity for handicapped persons, and proposes an analytic framework for interpreting section 504.

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81 *See, e.g.,* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause,* 15 SANTA CLARA L. REV. 855 (1975); Burt, *Beyond the Right to Habilitation,* in THE MENTALLY RETARDED CITIZEN AND THE LAW 417, 425-32 (M. Kindred ed. 1976).

82 *See, e.g.,* Brown v. Sibley, 650 F.2d 760, 766 (5th Cir. 1981); Doe v. Colautti, 592 F.2d 704, 710-12 (3d Cir. 1979); Anderson v. Banks, 520 F. Supp. 472, 512 (S.D. Ga. 1981); Dopico v. Goldschmidt, 518 F. Supp. 1161, 1178 (S.D.N.Y. 1981), *rev'd on other grounds,* 687 F.2d 644 (2d Cir. 1982); Doe v. Koger, 480 F. Supp. 225, 230 (N.D. Ind. 1979); Upshur v. Love, 474 F. Supp. 332, 337 (N.D. Cal. 1979); Counts v. Postal Serv., 17 Fair Empl. Prac. Cas. (BNA) 1161, 1164 (N.D. Fla. 1978). *But see* Sterling v. Harris, 478 F. Supp. 1046, 1050-53 (N.D. Ill. 1979) (mental health classifications deserve quasi-suspect status), *rev'd on other grounds sub nom.* Schweiker v. Wilson, 450 U.S. 221 (1981); Frederick L. v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976) (applying middle tier scrutiny where education is quasi-fundamental interest); Fialkowski v. Shapp, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975) (dictum).

83 Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (1976 & Supp. V 1981)) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin). Athough title VII is not identical in form to § 504, courts have cited it as precedent in interpreting § 504 and other antidiscrimination statutes. *See, e.g.,* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1331 (3d Cir. 1980) (interpreting § 504, title VI, and Age Discrimination Act of 1975, 42 U.S.C. § 6102 (1976 & Supp. V 1981), as prohibiting actions that have discriminatory effect, in light of precedent under title VII); New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 649 (2d Cir. 1979) (recognizing that "[s]ection 504 is intended to be part of the general corpus of discrimination law," which includes title VII).

II
RESHAPING ANTIDISCRIMINATION ANALYSIS: PROBLEMS AND PROPOSALS

Denial of equal opportunity on the basis of handicap can be distinguished from denial of equal opportunity on the basis of race, in at least four respects. First, denial of equal opportunity on the basis of handicap is generally not motivated by malevolence or ill will, as is often the case with racial discrimination. Instead, such denial more commonly results from a failure to consider how particular policies or practices may affect handicapped persons, from feelings of awkwardness or fear in dealing with handicapped persons, or from benevolent efforts to protect or assist the less fortunate. Second, many handicapped persons experience some impairment in their abilities as a result of their disabling conditions, which may preclude or limit their capacity to participate in federally assisted programs. Decisions by recipients to deny handicapped persons opportunities to participate often have a legitimate factual basis, rather than being rooted in stereotype. Third, although future facilities and newly initiated practices may readily be designed with handicapped persons in mind, existing facilities and well-established practices frequently impede their participation. Recipients may need to take affirmative steps to accommodate the special needs of handicapped persons, if meaningful participation is to be ensured. Fourth, largely because of this need for accommodation, particularly heavy costs may be associated with recipients' efforts to assure equal opportunity for handicapped persons. The development of an analytical model appropriate to section 504 must carefully consider each of these four points of comparison.

A. The Role of Intent

Racial discrimination provides important but unique precedent concerning the role of intent in antidiscrimination analysis. As practiced immediately after the Civil War, racial discrimination was often characterized by overt denials of equal opportunity, which were the product of acknowledged racial animus.[84] Not surprisingly, a number of the federal civil rights statutes of the period specifically address purposeful discriminatory conduct of this type.[85] The post-Civil War historical context has also influenced the Supreme Court in its interpretation of the Constitution's equal protection guarantee. The

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84 *See* General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 386-88 (1982).

85 *See id.* (42 U.S.C. § 1981 prohibits intentional racial discrimination, because principal purpose of legislation was to eradicate Black Codes designed to resurrect slavery and because legislation was enacted contemporaneously with fourteenth amendment); Griffin v. Breckenridge, 403 U.S. 88 (1971) (42 U.S.C. § 1985(3) prohibits intentional private conspiracies to deny equal protection of the laws).

Court will apply strict scrutiny to facially neutral classifications that have a disparate impact on members of minority racial groups provided that such classifications are the product of discriminatory intent. In the absence of discriminatory intent, however, the Court will apply only minimal review under the rational basis test.[86]

In the last few decades, attention has turned to the problem of covert racial discrimination. Although agreeing on the need for additional measures to address the problem of intentional, de jure discrimination, Congress has been sharply divided over whether legislation should address de facto discrimination that denies equal opportunity on the basis of race.[87] The Supreme Court has responded creatively in the face of unclear legislative guidance. First, the Court has adopted a two-pronged system of analysis. In interpreting title VII of the 1964 Civil Rights Act, it has recognized that plaintiffs may establish racially based employment discrimination either by a disparate treatment theory, requiring a demonstration of intent, or by a disparate impact theory, requiring a showing of a substantially disproportionate effect.[88] In contrast, in

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86 *See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (zoning board decision that perpetuated segregated housing patterns upheld against fourteenth amendment challenge in absence of proof of discriminatory intent); Washington v. Davis, 426 U.S. 229 (1976) (employment test having disproportionately adverse effects upon minority candidates upheld in face of fifth amendment challenge in absence of demonstrated intent to discriminate); *see also* Jefferson v. Hackney, 406 U.S. 535, 547-49 (1972) (applying rational basis standard and upholding state's allegedly discriminatory method of computing AFDC benefits against fourteenth amendment challenge); *cf.* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (upholding Massachusetts veterans' preference statute, challenged on equal protection grounds as discriminating on basis of sex in absence of proof of discriminatory purpose).

Commentators have sharply criticized the Court's approach in *Washington v. Davis*. *See* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977). The incorporation of an intent requirement reversed an earlier trend in which the Supreme Court had hesitated to give intent a centrol role in equal protection analysis. *See* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1971); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

87 *See, e.g.*, 42 U.S.C. § 2000d-6(b) (1976) (Stennis amendment to title VI of 1964 Civil Rights Act requiring that HEW apply nationally uniform policy with respect to de jure and de facto racial segregation). For a discussion of the sharply divided congressional debate on this measure, see Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L.J. 1, 34-35 (1981).

88 The Supreme Court has defined "disparate treatment" discrimination as follows:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Disparate impact discrimination is that which "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than

Guardians Association v. Civil Service Commission,[89] the Court held that title VI, of its own force, prohibited only intentional racial discrimination.[90] At the same time, however, the Court acknowledged that federal agencies implementing title VI could impose more expansive requirements by adopting regulations that prohibit actions having racially discriminatory effects.[91] Second, in cases requiring a demonstration of discriminatory intent, the Court has gone beyond the traditional understanding of racial animus. For purposes of equal protection analysis, the Court has defined discriminatory intent, in part, as a function of discriminatory

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another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory." *Id.* at 336 n.15.

89 103 S. Ct. 3221 (1983).

90 *Id.* at 3235 (Powell, Rehnquist, JJ., & Burger, C.J., concurring); *id.* at 3237-39 (O'Connor, J., concurring); *id.* at 3249-55 (Stevens, Brennan, & Blackmun, JJ., dissenting); *see also* Jefferson v. Hackney, 406 U.S. 535, 549 n.19 (1972) (no violation of title VI was shown when method of calculating AFDC benefits was not intentionally racially discriminatory, and when disproportionately adverse effect upon members of minority groups was justified in light of rational relationship between procedure and purpose of welfare program).

The *Guardians Association* decision ended protracted litigation by black and hispanic police officers challenging written examinations used between 1968 and 1970, for entry level appointments to the New York City police department. The plaintiff officers attained relatively low scores on the examinations, resulting in their receiving later appointments and earlier layoffs than many white applicants because appointments were made in order of test scores and layoffs followed a "last hired, first fired policy." Plaintiffs' initial effort rested on the 1972 amendments to title VII of the 1964 Civil Rights Act, which applied title VII to municipalities. It was ineffective because the challenged conduct took place before the statute's effective date. The plaintiffs subsequently sought compensatory relief, including back pay and constructive seniority, under title VI. Although plaintiffs successfully asserted that proof of discriminatory intent was not required to establish that a program receiving federal assistance engaged in racial discrimination in violation of title VI, they were unsuccessful in their efforts to procure compensatory relief. *See supra* note 40.

91 103 S. Ct. 3226-27 (White & Rehnquist, JJ., plurality opinion); *id.* at 3239-49 (Marshall, J., dissenting); *id.* at 3249-55 (Stevens, Brennan, & Blackmun, JJ., dissenting).

The Court's conclusion was consistent with its earlier decision in Lau v. Nichols, 414 U.S. 563 (1974). In *Lau,* plaintiffs challenged the failure of the San Francisco school system to provide English language instruction or other appropriate assistance to students who spoke only Chinese. The Court held that the school system's failure to provide special assistance to students with limited proficiency in English violated HEW regulations implementing title VI. The regulations prohibited the use of methods "which ha[d] the effect of subjecting individuals to discrimination." *Id.* at 568. Accordingly, the school system had acted in a way prohibited by federal law, "even though no purposeful design [was] present." *Id. Guardians Association* resolved doubts concerning the continued viability of *Lau,* which *Regents of the University of California v. Bakke* had raised. *See* 438 U.S. at 352 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part) (expressing doubt concerning premise underlying *Lau* that actions having discriminatory effect are proscribed by title VI). *Bakke* upheld the University of California at Davis's consideration of race as a factor weighing in favor of the admission of minority medical school applicants.

For a pre-*Guardians Association* discussion of the role of intent as an element of a cause of action under title VI, see generally Abernathy, *supra* note 87; Salomone, *Title VI and the Intent/Impact Debate: A Critical Look at "Coextensiveness",* 10 HASTINGS CONST. L.Q. 15 (1982); Note, *Intent or Impact: Proving Discrimination under Title VI of the Civil Rights Act of 1964,* 80 MICH. L. REV. 1095 (1982).

effect.[92] Similarly, for purposes of title VII, the Court has adopted a system of inferences that recognize that the mere denial of equal opportunity may constitute actionable discrimination, at least where alternative explanations such as lack of adequate qualifications are not established.[93]

There are three reasons why the complex scheme that governs the role of intent in racial discrimination cases should not apply where equality of opportunity is denied on the basis of handicap. First, although both black persons and handicapped persons have been the victims of discrimination, the history of discrimination affecting each of these groups has been quite different. Although historically there has been a distinction between de jure and de facto racial discrimination, no

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92 *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 279 n.25 (1979) (inevitable or foreseeable disparate impact may create inference of discriminatory intent, but will not necessarily constitute proof of such intent if challenged classification results from legitimate, facially neutral policy); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (determining existence of discriminatory intent requires "sensitive inquiry" into circumstantial and direct evidence, including impact of action, its historical background, and legislative or administrative history).

93 The Supreme Court has divided the process of proving a disparate treatment case under title VII into three steps. A prima facie case of disparate treatment discrimination can be established by a plaintiff who shows: (1) that he belongs to a category of persons protected by title VII; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications he was rejected; and (4) that after his rejection the position remained open and the employer continued to seek applicants from persons with the plaintiff's qualifications. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The rationale for these requirements has been described as follows:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (citation omitted); *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981). Defendant may then rebut plaintiff's prima facie case by articulating a legitimate nondiscriminatory reason for rejecting plaintiff. *Furnco,* 438 U.S. at 578. Finally, plaintiff may still prevail if he can demonstrate that the asserted nondiscriminatory reason was merely a pretext for discrimination. *Id.*

Although plaintiff need not demonstrate intent in disparate impact cases, the Court has established a somewhat similar three-part framework of analysis:

> To establish a prima facie case of [disparate impact] discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.

Connecticut v. Teal, 457 U.S. 440, 446-47 (1982) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)) (footnote and citation omitted).

similar distinction exists with respect to the denial of equal opportunity to the handicapped. For example, the barriers imposed by the inadvertent adoption of inaccessible architectural design have been as much the target of federal legislation as overt exclusions of handicapped students from educational opportunities.[94]

One must interpret section 504 in light of this different historical and factual context. Viewing this provision in isolation, the statute can be interpreted as addressing denials of equal opportunity in terms of their effect upon handicapped persons rather than in terms of any particular discriminatory intent.[95] The statute's grammatical structure supports this interpretation because it shifts the emphasis from the perpetrator to his victim. By its use of the passive voice, section 504 indicates that it is the victim's injury, the discriminatory *effect,* rather than

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94 *Compare* Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157 (1976) (buildings and facilities designed, constructed, altered, or leased with federal funds after September 1969 to be accessible) *with* Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1411-1420 (1976 & Supp. V 1981) (recipients of special federal funds must provide handicapped children with free appropriate public education).

95 Only a few cases have directly considered the issue whether a plaintiff must show discriminatory intent in establishing a cause of action under § 504. *See, e.g.,* Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983) (plaintiffs had demonstrated prima faeie violation of § 504 in light of disparate impact upon handicapped persons resulting from reduction in number of hospital days per ycar covered by Tennessee Medicaid program); New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 854 (10th Cir. 1982) (applying effect standard to require provision of special education to handicapped children); Pushkin v. Board of Regents of the Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981) (rejecting arguments that § 504 incorporates intent requirement and that necessary showing of intent could be refuted by demonstration that defendant aeted in good faith, because "[d]iscrimination on the basis of handieap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons"); NAACP v. Medical Center, Inc., 657 F.2d 1322, 1331 (3d Cir. 1981) (applying discriminatory effect standard, but finding no violation of § 504 by virtue of decision to relocate hospital facility from inner city to suburban setting); Sanders by Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361, 1372 (W.D. Mich. 1983) (rejeeting discriminatory intent test in case involving adequacy of child's educational placement); Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (rejecting use of IQ test as means of identifying mildly retarded children for placement in special education classes, because test had adverse impact on these children and was insufficiently validated for challenged use). *But see* Joyner by Lowry v. Dumpson, 712 F.2d 770, 775-76 & n.7 (2d Cir. 1983) (rejecting use of "adverse impact" theory as grounds for challenging New York state statute requiring parents who wished to obtain state-subsidized residential care for their children to transfer temporary custody of their children to state; but reserving question whether that test might be used in context of employment discrimination); Guerriero v. Schultz, 557 F. Supp. 511, 513 (D.D.C. 1983) (federal employee must carry burden of proof to establish discriminatory motive in connection with discharge alleged to violate § 501 of Rehabilitation Act, in light of incorporation of title VII procedural requirements, pursuant to § 505(a)(1), in employment discrimination action against federal employer). The dcarth of case law on this point may reflect the fact that defendants often readily acknowledge that they believe an individual's handicap gives grounds for exclusion or other discriminatory conduct, thus clearly evideneing intcnt; or the fact that agency regulations adopt an effect-based standard that to date has gone largely unchallenged. *See supra* note 43.

the perpetrator's state of mind, that is of concern.[96] Two of the three verbs chosen to describe that injury are also words of effect—"exclu[sion]," and "deni[al] of benefits."[97] The word "discriminat[ion]" is perhaps more ambiguous in this respect. However, section 504's limited legislative history suggests that any ambiguity should be resolved by rejecting an intent requirement: the congressional sponsors clearly understood that traditional discriminatory intent does not usually lie at the heart of denials of equal opportunity on the basis of handicap.[98]

The Supreme Court's decision in *Guardians Association* does not require a contrary result. Like title VI, section 504 may be interpreted with reference to constitutional principles. That is not to say, however, that Congress could not choose (either pursuant to its authority over federal spending or pursuant to its power under section 5 of the fourteenth amendment) to prohibit denials of equal opportunity on the basis of handicap, regardless of whether any discriminatory intent is shown. Because the statutory language and the legislative history of section 504 indicate that Congress sought to address impediments to equal opportunity that do not easily fall into the intent-effect scheme, courts should be reluctant to distort that scheme in order to preserve an inexact analogy. However, even if one assumes that the analogy to title VI is controlling, *Guardians Association* itself provides grounds for applying an effects-based standard, rather than an intent-based standard, under section 504. Five

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96 *Cf.* Board of Educ. v. Harris, 444 U.S. 130, 142 (1979) (language of § 706(d)(1)(C) of Emergency School Assistance Act, declaring applicant for federal funds to be ineligible whenever "any procedure . . . results in the separation of minority group from nonminority group children for a substantial portion of the school day," is "effect," not "intent," language).

97 29 U.S.C. § 794 (Supp. V 1981). *See* Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. at 3242 (Marshall, J., dissenting) (citing statutes, including § 504, that "[do not] define discrimination to require proof of intent"); *cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. at 416 (Stevens, Rehnquist, Stewart, JJ., & Burger C.J., dissenting) (title VI bars all exclusions, including exclusion that would not otherwise run afoul of the fourteenth amendment). Note, *Age Discrimination and the Disparate Impact Doctrine,* 34 STAN. L. REV. 837, 842-48 (1982) (discussing language of Age Discrimination in Employment Act).

98 Instead, the legislative history indicates that Congress was fully aware that denials of equal opportunity on the basis of handicap were generally not the product of discriminatory animus. *See* S. REP. NO. 1297, 93d Cong., 2d Sess. 50 (1974) (noting, in discussion of White House Conference on Handicapped Individuals, that public is "unfamiliar with and insensitive to difficulties" confronting handicapped persons, and observing that individuals with handicaps are often "excluded from schools and educational programs, barred from employment or . . . underemployed because of archaic attitudes and laws, denied access to transportation, buildings, and housing because of architectural barriers and lack of planning, and . . . discriminated against by public laws which frequently exclude individuals with handicaps or fail to establish appropriate enforcement mechanisms"); 124 CONG. REC. 30,578 (1978) (statement of Sen. Cranston) (barriers facing handicapped individuals are both attitudinal and physical); 118 CONG. REC. 525 (1972) (statement of Sen. Humphrey) (discussing explanations for exclusion of handicapped children from educational opportunities, including problems of transportation and architectural barriers); 117 CONG. REC. 45,974 (1971) (statement of Sen. Vanik) ("In the past, the reason for excluding [handicapped] children from their right to an education has never been very clear. At times, handicapped children were seen as a physical threat or as uneducable.").

members of the *Guardians* Court held that a recipient violated federal law when it failed to comply with regulations interpreting title VI to prohibit conduct with a disparate impact on blacks. Justices White and Marshall spoke in broad terms, citing longstanding agency interpretations of the statute as a sufficient basis for applying an effects-based standard.[99] Agency regulations under section 504 have long prohibited conduct having a discriminatory effect on handicapped persons and should satisfy this test.[100] Justices Stevens, Brennan, and Blackmun adopted a slightly different approach, focusing on Congress's express authorization of agency rulemaking as a means of implementing the title VI antidiscrimination provisions.[101] Although section 504 does not contain a similar rulemaking provision,[102] section 505(a)(2)'s incorporation of "procedures" available under title VI should satisfy the Stevens-Brennan-Blackmun test. Indeed, the absence from section 504 of a limit on agency authority to develop implementing regulations that define discrimination in terms of effect rather than intent may provide additional evidence that Congress viewed the intent-effect dichotomy as irrelevant where discrimination on the basis of handicap was concerned.[103]

Second, it is unclear how an intent requirement would be interpreted if one were included. In some instances intent might be readily shown. For example, a program operator's open reliance on an individual's blindness in determining that he is ineligible to participate in a federally assisted program would satisfy an intent requirement. To the extent that the line between considering an individual's handicap and considering his neutrally defined abilities is inherently blurred, however, there is some ambiguity inherent even in this seemingly simple case. Although use of written standardized tests as a screening device for employment does not constitute intentional discrimination where race or sex is concerned,[104] use of such tests, without the aid of a reader, to

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99 103 S. Ct. at 3222 (White & Rehnquist, JJ., plurality opinion); *id.* at 3229-39 (Marshall, J., dissenting).

100 *See supra* note 43.

101 103 S. Ct. at 3253-55.

102 *See supra* note 26.

103 Title VI and title IX, governing race and sex discrimination, include provisions authorizing presidentially approved, binding administrative regulations. *See supra* note 26. Professor Abernathy has argued that title VI's rulemaking provision was designed to permit the development of rules that would add more precise contours to the statutory prohibition on racial discrimination, leaving room for adoption of carefully tailored effect-based standards but only under circumstances where political accountability was guaranteed. *See* Abernathy, *supra* note 87, at 28-32. The absence of a similar provision in the Rehabilitation Act may reflect a congressional judgment that federal agencies were not to promulgate regulations expressly prohibiting conduct that would have a disproportionately severe effect on handicapped persons. A contrary conclusion, that Congress felt no need to place a presidential check on agency rulemaking authority under § 504 because there was no artifical dichotomy between discriminatory intent and discriminatory effect present in the legislators's minds, is, however, equally plausible.

104 *See* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (pre-employment tests); *see*

disqualify a blind person seems intentionally calculated to prevent his participation.[105]

In other instances, denial of equal opportunity may stem from a program operator's thoughtlessness—the use of stairs, the inadvertent choice of hazardous or narrow doors, or the installation of poorly designed toilet facilities. Such conduct is a far cry from traditional intentional discrimination; the purpose of excluding handicapped participants from program benefits very likely did not even enter the operator's mind. Continuing refusal to make necessary accommodations in the face of participant complaints might, however, present a different case. In the absence of adequate justification, a decision to forgo installation of an inexpensive ramp can only be explained as a purposeful exclusion of mobility-impaired participants. Although such denials may be benevolently intended, they nevertheless limit the situations in which handicapped individuals can function independently and enjoy the dignity of risk.[106] In such cases it is tempting to regard an operator's good faith as negating any discriminatory intent, notwithstanding the injury such paternalistic practices cause.[107] In sum, inquiring into intent is likely to cloud analysis, rather than to clarify which types of conduct should or should not be prohibited on policy grounds.

Finally, there is an adequate substitute for an intent standard: a carefully developed inquiry into the issue of causation. The Supreme Court has already moved in this direction in title VII disparate treatment cases. In these cases, the Court has permitted plaintiffs to make the requisite prima facie showing on the issue of racially discriminatory intent by introducing evidence that refutes the existence of probable alternative reasons for the challenged denial of opportunity.[108] The application of this model to several other types of cases is discussed below.[109] By applying a causation test, the negative implications of an intent-based standard can be avoided.

B. The Problem of Inability

Ability is commonly used as an appropriate, neutral basis for limiting participation in various sorts of programs or activities. Selection cri-

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also Griggs v. Duke Power Co., 401 U.S. 424 (1971) (pre-employment test or diploma requirement).

105 *Cf.* Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983) (use of written test to disqualify person with dyslexia violates § 504; discussed *infra* at note 277 and accompanying text).

106 *See* cases discussed *infra* notes 228-40, 247-50 and accompanying text.

107 This view was rejected in Pushkin v. Board of Regents of the Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981). *But see* Vanko v. Finley, 440 F. Supp. 656, 666 (N.D. Ohio 1977) (finding no violation of § 504 in face of good faith progress in planning and implementing transit programs for mobility handicapped).

108 *See supra* note 93.

109 *See infra* notes 195-209, 261-65, 286-90, 324-25 and accompanying text.

teria are generally developed as a means of screening applicants to determine whether they possess the requisite abilities. Retention criteria are used to determine if termination of participation is required. Although it has been generally accepted that an individual's ability to meet such criteria is unrelated to race,[110] the same is not the case with respect to handicap. Handicap, by definition, may affect ability. This basic difference between race and handicap can best be accounted for by reshaping the analysis in two respects: first, by modifying the broad framework within which such analysis takes place; and second, by fine-tuning the analysis when a handicapped person's ability to participate in programs or activities is called into question.

1. *Revised Framework*

A framework of analysis is needed that allows for consideration of a handicapped person's limitations but that directs that consideration toward questions of eligibility, where they may have some relevance. Careful limitation of the circumstances in which ability may be considered is critical if lack of ability is not to be used as an excuse for withholding benefits from handicapped individuals who are fully qualified program participants.

A three part classification scheme will serve this purpose. Such a system tracks the language of section 504 itself, although courts and commentators have yet to recognize that system's utility. First, a denial of equal opportunity may take the form of exclusion, which involves a determination that a handicapped individual is unqualified and therefore ineligible to participate in an activity or program. This category includes all those instances in which an individual's ability to satisfy applicable selection or retention criteria, or the legitimacy of those criteria, is at issue. For example, exclusion may occur when visual ability is a requirement for employment as a teacher even though vision may not be necessary for successful performance. The importance of exclusion cases is apparent from a number of perspectives. Exclusion represents a particularly egregious injury to the handicapped person: not only is he denied all opportunity to enjoy the benefits of the program, but he is stigmatized as unqualified in the process. From the standpoint of society, exclusion is a foremost target of any effective antidiscrimination

110 Thus, it is noteworthy that federal employment discrimination statutes permit employers to consider such characteristics as religion, sex, national origin, and age in making employment decisions, provided that those characteristics are "bona fide occupational qualification[s] reasonably necessary to the normal operation of [a] particular business. . . ." *See* Age Discrimination in Employment Act of 1967, § 4(f)(1), 29 U.S.C. § 623(f)(1) (1976) (age); Civil Rights Act of 1964, § 703(e)(1), 42 U.S.C. § 2000e-2(e) (1976) (religion, sex, or national origin). Significantly, race is missing from the list of characteristics that qualify for this very limited exception. *See also* Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982) ("Classifications treated as suspect [such as race] tend to be irrelevant to any proper legislative goal.").

scheme because it often evidences blatant prejudice. Exclusion is also of critical importance to the operator of a particular program. It is through the adoption and application of selection and retention criteria that an operator defines the character of his program; successful challenges to those criteria erode the operator's autonomy and possibly threaten the effectiveness and viability of the program.

Second, an outright denial of benefits[111] may occur even though a handicapped person satisfies all applicable selection and retention criteria. For example, an individual may be prevented from attending school or using the only available public transportation because he is unable to negotiate steps without ramps. This second category of cases, although in some respects similar to exclusion cases, is distinguishable. The handicapped person is denied all opportunity for participation in the program, even though he is not directly stigmatized as "unqualified." The resulting de facto exclusion reveals an obvious and fundamental unwillingness to ensure universal access to programs or activities—a likely initial target for an antidiscrimination scheme. The operator of the inaccessible program, unlike the operator in an exclusion case, has little to support its continuing refusal to grant access. Institutional prerogatives of the sort involved in establishing legitimate selection or retention criteria are not at issue because all legitimate selection criteria have been satisfied. The most that can be said is that the operator is unwilling to reallocate resources used to benefit current participants to the extent necessary to ensure at least minimal access for the handicapped applicant.

Third, a denial of equal opportunity may take the form of discrimination. Discrimination cases have generally involved either unequal treatment of handicapped and nonhandicapped program participants, or uniform treatment that has a disparate impact on handicapped participants resulting in an unequal opportunity to benefit. Unequal treatment cases and unequal opportunity to benefit cases implicate individual, societal, and institutional concerns rather differently. In unequal treatment cases—for example, when a handicapped individual is paid less than his fellow employees or is required to attend a separate school—a fully qualified handicapped individual is singled out to receive a different level of opportunity than that accorded his fellow participants. He may be frustrated and stigmatized as a result, or he may derive benefits from a special program tailored to his needs. From the

111 Because the statutory ban on "discrimination" ensures that equal opportunity will be afforded handicapped individuals, the requirement that benefits not be denied must be read narrowly to prohibit outright foreclosure of all opportunity. If instead, it is interpreted as requiring a handicapped individual to be provided whatever benefits are necessary to ensure his full participation, then the statute's nondiscrimination provision—which protects against *unequal* treatment and arguably against *unequal* opportunities to benefit—would be rendered mere surplusage. Such an interpretation should be rejected.

viewpoint of society, many instances of unequal treatment may be as troublesome as outright exclusions to the extent that they involve blatant violations of the antidiscrimination principle: acknowledgment of an individual's ability to participate, but refusal to allow him to do so on an equal footing. In other instances, however, unequal treatment may actually be encouraged as a means of assuring more cost-effective delivery of services.[112] The institutional concerns of the program operator may thus have either minimal or considerable legitimacy. Unequal treatment that is injurious to a handicapped participant cannot be justified by a need to maintain the program's integrity. Neither can it be routinely upheld as an appropriate decision concerning the distribution of scarce resources; in many such cases, resources are diverted from the participant simply because he is handicapped. In other instances, however, unequal treatment may represent a well-justified effort to ensure that the underlying objective of an antidiscrimination scheme—the assurance of an equal opportunity to benefit—is achieved.

Cases that pose the ultimate question—whether a program provides equal opportunity to benefit—are among the most difficult. By definition, the handicapped individual is not stigmatized by exclusion or unequal treatment, and is provided at least some opportunity to benefit.[113] His argument is that the opportunity he is afforded falls short of that provided to his nonhandicapped or otherwise-handicapped peers. For example, the availability of a particular level of insurance coverage may be inadequate to meet the handicapped person's needs even though it generally provides satisfactory coverage for nonhandicapped persons. The operator of a program or activity may find such challenges particularly frustrating. He may have difficulty defining and measuring opportunity, let alone determining when an "equal" opportunity has been afforded. In most instances he will be obligated to reallocate limited resources to provide opportunities to a wide range of participants. For this reason it is not surprising that society's response to situations in which there is equal treatment but an unequal opportunity to benefit is often ambivalent.

2. *Fine Tuned Analysis*

Adopting such a classification scheme can advance analysis by isolating cases in which a handicapped individual's abilities may legitimately be considered in determining whether he is entitled to participate in particular programs or activities. Care is also needed in distinguishing between those instances in which impaired ability provides a legitimate ground for exclusion and those in which it does not.

112 "Cost effectiveness" means selecting the less costly of two equally beneficial systems of service delivery.

113 *See supra* note 111.

Problems can arise in several contexts. First, a handicapped individual may admit that he is unable to satisfy eligibility criteria, but then challenge those criteria as unnecessary and illegitimate (exclusionary criteria). Second, he may assert that although the criteria are generally legitimate, they would be unnecessary in his case if his needs were reasonably accommodated (exclusionary refusals to accommodate). Third, he may argue that the program operator erroneously assumed that he was unable to satisfy legitimate criteria (exclusionary judgment). The first and last of these theories are briefiy described below; the second is more fully discussed in the following section.

The problem of exclusionary criteria is not limited to handicapped persons. Title VII provides useful precedent. In disparate impact cases[114] the Supreme Court has recognized that facially neutral selection criteria that deny equal opportunities to minority racial groups may be challenged as discriminatory. The legitimacy of such criteria depends upon their capacity to select employees with the skills necessary for successful job performance.[115]

Adapting this model to the present context requires a modification. Statistical evidence of substantial racially disparate impact is generally required under title VII for a plaintiff to establish a prima facie case and thereby force a defendant employer to produce evidence justifying a facially legitimate criterion.[116] Such statistical evidence is usually unavailable where handicapped individuals are concerned.[117] Accord-

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114 For a discussion of the distinction between disparate impact cases and disparate treatment cases under title VII, see *supra* note 88. This article deliberately refrains from applying title VII terminology in the context of § 504 for several reasons. First, as previously discussed, an exclusion/denial-of-benefits/discrimination scheme of analysis is more serviceable than a scheme that focuses only on disparity. Second, the intent-effect dichotomy that is incorporated into the title VII terminology should have no bearing where denial of equal opportunity on the basis of handicap is concerned. Third, the words "criteria" and "judgment" more clearly capture an important distinction between decisions establishing criteria as a matter of policy, and decisions involving the application of criteria in any individual case. This distinction may help to explain the different standards of review courts apply in the various types of title VII cases.

115 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Griggs,* black plaintiffs challenged their employer's use of a diploma requirement and aptitude tests as methods for screening prospective or incumbent employees who wished to transfer to higher paying positions. These methods disqualified a disproportionate number of blacks and perpetuated an existing pattern of segregation. The Supreme Court held that the employer could not adopt such requirements if they operated as "built-in headwinds" for minority groups. In the words of the Court: "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. *See also* Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (aptitude tests).

116 *See, e.g.,* Connecticut v. Teal, 457 U.S. 440 (1982) (plaintiff, who relied upon statistical evidence to demonstrate disparate impact of screening examination, stated claim under title VII despite absence of racially disproportionate hiring practices at "bottom line"). *See generally* 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION §§ 72-74 (1983).

117 *See, e.g.,* 34 C.F.R. § 104.13(a), § 104 app. A n.17 (1982) (explaining regulatory re-

ingly, other evidence must be used to demonstrate that the challenged criteria exclude a handicapped applicant for reasons related to his disability.

Special care in applying the modified model is required. Selection criteria are generally justified as a means of screening out applicants incapable of effective participation; safety concerns are often cited as a persuasive basis for such standards. Unfortunately, it is easy to draw unsupported conclusions concerning the ability of a handicapped individual to function safely in circumstances in which his impairment is irrelevant.[118] Even when the public safety is not involved, society's interest in safety generally may appear so strong that decisionmakers freely substitute their own conclusions for those of a handicapped person who chooses to assume the risk to his safety. This intervention ignores the handicapped individual's freedom of choice and interest in self-determination. For these reasons, exclusionary criteria justified by safety considerations may prove particularly problematic where handicapped persons are concerned.

The problem of exclusionary judgments, which wrongly result in denial of benefits to the handicapped, also has parallels in the title VII area. Many title VII disparate treatment cases involve exclusionary judgments, although the title VII terminology obscures that central issue. A judgment to exclude will in most instances be impermissible under title VII, if race is even considered, because race is by definition irrelevant to ability. Therefore, a prima facie case can be made by eliminating the legitimate bases for exclusion and creating the inference that race was indeed a factor.[119]

A more finely tuned inquiry is necessary to develop an antidiscrimination scheme directed toward exclusionary judgments based on handicap. Assuming that an individual's handicap may be considered in determining his eligibility, a two-stage inquiry is required. First, it is necessary to determine whether a particular handicap is relevant. The individual may be perceived as having a handicapping condition when,

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quirement that employers refrain from using tests that screen out or tend to screen out handicapped persons unless no better tests are available); 45 C.F.R. § 84.13(a), § 84 app. A n.17 (same); Gittler, *Fair Employment and the Handicapped: A Legal Perspective,* 27 DE PAUL L. REV. 953, 971-73 (1978); Lang, *Protecting the Handicapped From Employment Discrimination: The Job-Relatedness and Bona Fide Occupational Qualification Doctrines,* 27 DE PAUL L. REV. 989, 1007-10 (1978). For a discussion of problems related to ability testing of handicapped people, see generally, Panel on Testing of Handicapped People, Nat'l Research Council, Ability Testing of Handicapped People: Dilemma for Government, Science, and the Public (1982) (copy on file with author).

118 *See, e.g.,* Eisenberg, *Disability as Stigma,* in DISABLED PERSONS AS SECOND-CLASS CITIZENS 6-7 (M. Eisenberg, C. Griggins & R. Duval eds. 1982) (citing study findings that, for some individuals, the "perceived failure [of blind persons] to see may be generalized into a gestalt of disability so that the individual shouts at the blind as if they were deaf or attempts to lift them as if they were crippled").

119 *See supra* note 93.

in fact, he does not. He may be affected by such a condition, but not in a way pertinent to the given program. Second, it is necessary to ascertain whether the handicap impairs his ability to satisfy eligibility criteria. That question may become problematic if the individual is impaired, but only to a limited degree that may or may not affect his participation, or, if the individual suffers from a latent handicap, that may lead to a deterioration of his abilities in the future. In light of the difficult factual issues, the allocation of the burden of proof may be critical in determining whether a handicapped individual is justifiably excluded from participation.

In sum, the problem of inability creates difficulties that must be addressed in adapting the antidiscrimination model to assure equal opportunity without regard to handicap. Resolution of these difficulties requires a recognition first, that inability is primarily relevant in cases of exclusion, and, second, that a different analysis may be required in assessing the legitimacy of exclusionary criteria and exclusionary judgments.

C. The Need for Accommodation

Accommodation refers to the adaptation or modification of a program's design or operation to facilitate participation by handicapped persons. Accommodation may be simple and inexpensive, such as installing a ramp or restructuring an academic or work schedule; or it may be more complex and costly, such as renovating subway systems by installing elevators or revising certain work assignments. Although accommodation is not necessary to ensure participation by handicapped persons in every case, it may be required where existing brick and mortar facilities have been designed, or established policies and practices implemented, without regard to their effect on disabled individuals.

Although the need for accommodation may seem unique to the handicapped, the issue has arisen in at least one other context—that of religion. Accommodation was initially recognized as a constitutional right when individuals affected by certain facially neutral state policies demonstrated that those policies adversely affected their religious freedom, and that such policies could be modified without impairing any compelling state interest. For example, in *Sherbert v. Verner,*[120] the Supreme Court required South Carolina to modify its unemployment compensation laws to avoid penalizing persons unwilling to work on Saturdays because of their religious beliefs. Similarly, title VII requires that employers reasonably accommodate their employees' religious beliefs to avoid discrimination on the basis of religion.[121] The Supreme

120 374 U.S. 398 (1963).

121 *See* Civil Rights Act of 1964, § 701(j), 42 U.S.C. § 2000e(j) (1976) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an

Court interpreted this requirement in *Trans World Airlines v. Hardison,*[122] where an employee alleged that TWA had unreasonably failed to accommodate his need to observe a Saturday sabbath. The airline had refused, in accordance with a collective bargaining agreement, to assign other employees to cover his shift, and had declined to encourage voluntary coverage by offering premium overtime pay to substitutes. The Court did not require TWA to make accommodations because the collective bargaining agreement served the legitimate purpose of distributing burdens and privileges in a neutral fashion acceptable to both workers and management,[123] and because the airline reasonably chose not to finance additional time off for employees on the basis of their religious beliefs.[124]

Accommodation has arisen in other contexts, although the term "accommodation" has not been applied. The Supreme Court has recognized an obligation to accommodate in the context of national origin discrimination. In *Lau v. Nichols,*[125] the Court held that the San Francisco public school system was required under title VI of the 1964 Civil Rights Act to ensure that non-English speaking students were provided an opportunity to benefit from federally assisted programs. Similarly, the Ninth Circuit has recognized that a cause of action may lie under title IX to prohibit sex discrimination in federally assisted education programs. That court required a community college to facilitate development of child-care centers for lower income female students who might otherwise be unable to attend college.[126] Under title VII, courts have also required employers to modify sanitary and residential facilities to accommodate both male and female employees.[127]

This precedent is important for two reasons. First, it establishes that an obligation to accommodate is implied under constitutional and statutory provisions that prohibit the denial of rights or opportunities. Because either a decisionmaker's action or inaction may lead to denial of rights or opportunities, both types of conduct are forbidden if not adequately justified. In the former case, the appropriate remedy is to require that the offending action be curtailed; in the latter, an obligation to accommodate should arise.

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employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

122 432 U.S. 63 (1977).

123 *Id.* at 77-78.

124 *Id.* at 84-85.

125 414 U.S. 563 (1974).

126 De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978), *cert. denied,* 441 U.S. 965 (1979).

127 *See, e.g., Sex Not Bona Fide Occupational Qualification in Maritime Industry,* [1973] EEOC DEC. (CCH) ¶ 6081 (Dec. 16, 1969); *Refusal to Hire Female Purser Constitutes Sex Discrimination,* [1973] EEOC DEC. (CCH) ¶ 6010 (May 21, 1969); *see also* McLean v. Alaska, 583 P.2d 867 (Alaska 1978).

Second, existing precedent demonstrates that the scope of the obligation to accommodate is not easily defined. Courts require careful examination of a defendant's justification for refusing to accommodate. Adequate justification under antidiscrimination statutes such as section 504 would show that plaintiff's injury did not result "solely" from discrimination, but rather was an unfortunate by-product of legitimate action. Absent such justification, it can be assumed that defendant's refusal to accommodate *was* "solely" the result of an unwillingness to facilitate plaintiff's participation—precisely the sort of conduct section 504 and similar statutes were intended to condemn.

Evaluating the adequacy of proffered justifications in any individual case is a difficult task. The scheme of classification outlined above, however, can substantially facilitate that evaluation process. As a first step, in some circumstances, a refusal to accommodate may be presumed to be unjustified. Such a presumption may operate in two classes of cases: those in which fully qualified participants are denied all benefits of a program (the situation in *Lau*); and those in which fully qualified participants are treated less favorably than their peers (the situation in the title VII sex discrimination cases). A presumption that a refusal to accommodate is unjustified in such cases is warranted. Experience has shown that providing at least some benefit, or equal treatment, is a readily available alternative. Thus, refusal to accommodate is often based upon an unwillingness to facilitate participation by members of traditionally disadvantaged classes.[128]

There are other circumstances, however, in which such a presumption would not be appropriate. Included in this category are exclusionary refusals to accommodate. A program operator may be asked to alter its selection or retention criteria, or to modify its program so that a handicapped individual can satisfy applicable criteria (the situation in *Hardison*). The operator will usually try to justify its refusal to accommodate by demonstrating the necessity for particular criteria and for its existing mode of operations. Such a justification is neither presumptively reasonable or unreasonable; it can only be assessed by reference to the facts and circumstances of each case.

In some cases, a contrary presumption may operate. In this category, a refusal to accommodate may be presumed to be adequately justified, and thus, reasonable. Cases involving unequal opportunity to benefit (including the title IX case described above) are commonly of this type. Plaintiffs in such cases may have considerable difficulty demonstrating that they have been denied an equal opportunity to bene-

128 *See also* United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring) (arguing that decisions requiring religious accommodation are best explained as providing protection against unequal treatment, and suggesting that accommodation may not be required to afford special treatment to members of certain favored sects).

fit.[129] Assuming that this threshold is overcome, however, a refusal to accommodate may be presumed to be well-founded in light of the equal treatment afforded plaintiffs and the complexity of resource allocation decisions.

In sum, an analytic scheme designed to ensure equal opportunity for the handicapped need not be drastically reshaped to address the problem of accommodation. Other antidiscrimination schemes impose an obligation to accommodate the needs of members of the protected class. Although defining the precise contours of such an obligation is difficult, a carefully structured inquiry regarding the possible justifications for a refusal to accommodate can help clarify when accommodation of the handicapped is required.

D. The Problem of Cost

The costs of complying with an antidiscrimination mandate designed to protect the handicapped are often cited as distinguishing this type of civil rights provision from more traditional measures. Estimates of the compliance costs associated with section 504 vary. Early projections ranged from 2.5 billion dollars for elementary and secondary education facilities,[130] to 3.3 billion dollars for implementation of all types of necessary modifications.[131] Other observers stated that no rea-

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129 *See infra* notes 389-404 and accompanying text.

130 *See Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor,* 95th Cong., 1st Sess. 13 (1977) (statement of Rep. Jeffords) (estimates based on proration of estimate by states of Alabama and California) [hereinafter cited as *1977 Implementation Hearings*].

131 41 Fed. Reg. 20,365 (1976) (cost-benefit analysis accompanying proposed HEW regulations implementing § 504). The following table, keyed to department regulations described *supra* at notes 45-52, summarized estimated costs and benefits associated with the implementation of the proposed regulations:

SUMMARY OF ESTIMATED ANNUAL PECUNIARY COSTS AND BENEFITS FOR ALL SUB-PARTS[d]
(Billions of dollars)

Sub-parts	(1) Costs[a]	(2) Benefits	(3) (1)-(2)
Employment practices	.05	.5	−.45
Program accessibility	.05	[b]	+.05
Elementary and secondary	2.3[c]	1.5	+.8
Higher Education	N.E.	.1	−.1
Health & Social Services	N.E.	N.E.	N.E.
Total	2.4	2.1	+.3

[a] For the parts other than program accessibility only non-accessibility costs are included.

[b] Benefits from program accessibility are included in the amounts for the other sub-parts.

[c] This is the average *net* increase (4.8 − .8) + (1.3 − .8)/2, where .8 is the reduction in cost due to shifts to less restrictive settings.

[d] This is before allowance for the effect of existing laws. . . .

N.E. = Not estimated, assumed to be negligible.

Id.

sonable estimate could be made with available data.[132] Despite ten years of experience with the statute, there continues to be disagreement over compliance costs. For example, cost estimates for modification of a university campus range from 0.4 million to 2.2 million dollars.[133]

Although the evidence suggests that compliance with section 504's antidiscrimination mandate may entail substantial costs, great care is needed in assessing the significance of such data. Costs may be high when modifications must be made to existing facilities; they are likely to be substantially less when new facilities are designed with accessibility in mind.[134] Accommodations needed to facilitate employment, on the other hand, may, in many cases, be relatively inexpensive.[135] High cost estimates may reflect poor technical advice or failure to consult architects familiar with access problems who can often sharply reduce accommodation expenses.[136] Cost estimates may also reflect existing technology; if incentives are provided to develop inexpensive means of assuring access, technical advances may sharply reduce costs.[137] Finally,

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132 *1977 Implementation Hearings, supra* note 130, at 213 (statement by John W. Adams, Director, Federal-State Relations, Council of Chief State School Officers); *id.* at 360 (statement by David S. Tatel, Director, Office for Civil Rights, Department of Health, Education and Welfare).

133 *Compare* Kaufman, *Colleges Spend Millions to Modify Buildings for Disabled Students,* Wall St. J., Jan. 29, 1981, at 1, col. 1 (quoting estimates of $2.2 million for physical modifications to University of Texas campus at Austin, and $2 million for modifications at Harvard University) *with Implementation of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments, 1979: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources,* 96th Cong., 1st Sess. 65 (1979) (study submitted by Mainstream, Inc.) ($0.4 million estimate for necessary accommodations in large urban midwestern university; estimate prepared in consultation with architectural firm specializing in solving access problems) [hereinafter cited as *1979 Implementation Hearings*]. In view of the wide divergence in these estimates, it is questionable whether cost differentials can be wholly attributed to differences in the architecture of individual campuses.

134 *See 1977 Implementation Hearings, supra* note 130, at 33 (statement by Thomas P. Carroll, Executive Director, National Center for Law and the Handicapped) (cost of elimination of architectural barriers at design stage is between 0.1% and 0.5%).

135 *Equal Employment Opportunity for the Handicapped Act of 1979: Hearings on S. 446 Before the Senate Comm. on Labor and Human Resources,* 96th Cong., 1st Sess. 103 (1979) (statement by Weldon Rougeau, Director, Office of Federal Contract Compliance Programs, United States Department of Labor) (preliminary survey of department's 10 regional offices had not found any great cost associated with making accommodations in employment; such costs included $50 for visual magnifier needed by visually-impaired employee and $14.95 for telephone equipment needed by hearing-impaired employee) [hereinafter cited as *1979 Equal Employment Opportunity Hearings*]; *see also 1979 Implementation Hearings, supra* note 133, at 98 (report of Ph.D.S. Project, Lawrence Hall of Science, University of California, Berkeley) (once original costs of physical modifications are paid, ongoing costs of services for disabled students at Berkeley campus equaled less than 0.05% of yearly operating budget).

136 *See 1979 Equal Employment Opportunity Hearings, supra* note 135, at 207 (statement by Leslie Milk, Executive Director, Mainstream, Inc.) (describing situation in which costs to render 27 story building barrier-free originally were estimated by engineers without special training at $160,000; costs of rendering building legally accessible were subsequently estimated at $7,800 by firm specializing in access problems).

137 *See, e.g.,* Note, *Television and the Hearing Impaired,* 34 FED. COM. L.J. 93, 149-60 (1982) (describing development of closed captioning system significantly improving accessibility of

consideration of costs of accommodation, as an isolated matter, ignores the bigger picture. The benefits resulting from accommodation must also be evaluated to arrive at a true picture of net cost.[138] At the same time, the cost of benefits forgone to meet compliance expenses may color subjective assessments of such a net cost figure.[139]

Assuming that some significant costs do stem from implementation of an antidiscrimination requirement designed to protect handicapped persons, the issue becomes whether and how cost should be included in the statutory scheme. Cost has generally had a very limited role in antidiscrimination analysis. Some courts have rejected a broad cost defense where constitutional rights are concerned, reasoning that economic considerations pale when invaluable civil rights are violated.[140] The Supreme Court has found cost an insufficient basis to deny equal protection where strict scrutiny applies.[141] Absent strict scrutiny, the Court has found cost justifications unpersuasive when the classification gives members of a quasi-suspect class no opportunity to benefit from a particular program,[142] or denies access to a quasi-fundamental right.[143]

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television programming for hearing-impaired viewers). At times, however, costs of marketing may keep new technological advances out of reach of handicapped consumers. *See* Ris, *Electronic Age Brings New Aids for the Disabled, But Economics Put Them Out of Reach of Many,* Wall St. J., Aug. 26, 1980, at 52, col. 1.

138 *See, e.g., 1979 Implementation Hearings, supra* note 133, at 98-99 (report of Ph.D.S. Project, Lawrence Hall of Science, University of California, Berkeley) (cost-benefit analysis of education of disabled students indicated that individual rate of return on investments in higher education equaled 15.7% per year for nondisabled students and 14% to 17% per year for disabled students; rate of return for society was estimated at 14.3% for nondisabled students and 31% to 40% for disabled students).

139 *See* Kaufman, *supra* note 133, at 1, col. 1 (statement by representative of University of Texas at Austin expressing concern that expenditure of funds on improving campus accessibility meant less money for library books).

140 Cases involving unconstitutional prison systems provide an example. *See, e.g.,* Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 201 (8th Cir. 1974) ("Lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration."), *aff'd sub nom.* Hutto v. Finney, 437 U.S. 678 (1978); Wyatt v. Aderholt, 503 F.2d 1305, 1315 (5th Cir. 1974) ("[T]he State may not fail to provide [required] treatment for budgetary reasons alone."); Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974) ("Shortage of funds is not a justification for continuing to deny citizens their constitutional rights.").

141 *See, e.g.,* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (rejecting concern for fiscal savings as basis for imposing one-year residency requirement as condition to receiving nonemergency hospital treatment when that requirement infringed upon constitutionally protected right to travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (rejecting residency requirement designed to ensure fiscal savings by discouraging welfare recipients from entering state). For a discussion of the role of cost in constitutional analysis, see Frug, *The Judicial Power of the Purse,* 126 U. PA. L. REV. 715 (1978).

142 *See, e.g.,* Frontiero v. Richardson, 411 U.S. 677, 688-91 (1973) (rejecting requirement that female member of uniformed services must prove husband's dependency for him to qualify for government benefits, whereas male member need not prove wife's dependency, when that requirement had been partially justified by government's need to limit costs). Professor Frug suggests, however, that the Court's reasoning in *Frontiero* and subsequent cases reveals a willingness to entertain a cost-based defense in equal protection cases involving quasi-suspect classes, provided that the defense is adequately supported in fact, and the issue presented is one of allocation of funds rather than outright denial of benefits. *See* Frug, *supra* note 141, at 781-84.

Cost has, however, had a greater bearing where minimal scrutiny applies.[144]

In interpreting antidiscrimination statutes designed to provide increased protection to members of traditionally disadvantaged classes, the courts have limited costs as a ground for denying equal opportunity. The Supreme Court recently refused to recognize, in a title VII sex discrimination case, a cost-justification defense that would have permitted employers to require female employees to contribute more for pension benefits than their male colleagues.[145] Although the courts have recognized a cost-related defense under title VII's provisions relating to religious discrimination, that defense has proved to be a narrow one. The Supreme Court sanctioned such a defense in *Trans World Airlines v. Hardison.*[146] The Court reasoned that if an accommodation imposed more than de minimis financial burdens, it could result in "undue hardship" on an employer, justifying the employer's refusal to make the accommodation.[147] The breadth of this holding was initially unclear because strong alternative rationales contributed to the result.[148] Subsequent lower court decisions have recognized that a cost-related defense may be raised in religious discrimination cases only if actual, not hypothetical,

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districts funds for education of children of aliens who are not legally admitted into United States). In *Plyler,* the Court specifically rejected as unsupported two types of cost defenses. The first was based on the state's alleged incapacity to bear the costs of educating such children. *Id.* at 229 n.25. The second was based on the state's judgment that the costs of educating excluded children substantially outweighed the benefits likely to accrue to the state in view of the improbability that undocumented children would remain in this country. *Id.* at 230.

144 Minimal scrutiny is generally applied when challenges to decisions concerning the allocation of resources have been raised under the equal protection clause. *See* Weinberger v. Salfi, 422 U.S. 749, 767-85 (1975) (upholding duration-of-relationship test for determining eligibility for Social Seeurity survivor's benefits); Dandridge v. Williams, 397 U.S. 471, 478-80 (1970) (upholding congressional judgment allowing states latitude in allocation of welfare funds). *See generally* Frug, *supra* note 141, at 777-78.

145 City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 717 (1978) ("[N]either Congress nor the courts have recognized [a cost-justification] defense under Title VII.") (footnote omitted).

146 432 U.S. 63 (1977).

147 The Court explained its position as follows:

> To require TWA to bear more than a *de minimis* cost in order to give [its employee] Saturdays off is an undue hardship. . . . [T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.

Id. at 84 (footnote omitted). Although the Court viewed cost as having some weight, its principal concern was to avoid any requirement of employer preference based on the employee's religion.

148 *See supra* text accompanying note 122.

accommodation costs are involved.[149] Courts have allowed a defense based on costs in two types of situations: when an employer is unable to bear the costs in question,[150] and when those costs substantially exceed the benefits accrued.[151] The courts, however, have unhesitatingly required employers to make less costly changes in the work environment. For example, an employer must shift work assignments if they create conflicts with an employee's religious beliefs.[152] In addition, under the Age Discrimination in Employment Act, most courts have rejected the assertion that cost is a "reasonable factor other than age" that may serve as a permissible ground for denying employment opportunities to protected individuals.[153] These courts have reasoned that to permit such a

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149 *See* Brown v. General Motors Corp., 601 F.2d 956, 958-59 (8th Cir. 1979) (employer violated title VII by discharging employee who refused for religious reasons to work Fridays after sunset, where there were extra personnel available to cover his absences and where hiring a new employee to serve that purpose was not required).

150 *See* Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441, 443 (8th Cir. 1979) (employer, suffering from "serious financial difficulty," was not required to hire substitute employees or to press other employees into service in order to accommodate Sabbath observance by plaintiff employee).

151 *See* Brener v. Diagnostic Center Hosp., 671 F.2d 141, 146-47 (5th Cir. 1982) (rejecting hiring of another employee or substituting supervisor as unreasonable accommodation to employee's absence that imposed undue burden); Howard v. Haverty Furniture Cos., 615 F.2d 203, 206 (5th Cir. 1980) (substitution by supervisor in employee's absence imposed undue burden); Guthrie v. Burger, 24 Fair Empl. Prac. Cas. (BNA) 992 (D.D.C. 1980) (rejecting proposal that supervisor be hired to accommodate employee's revised work schedule).

152 *See* McGinnis v. United States Postal Serv., 512 F. Supp. 517, 523-24 (N.D. Cal. 1980) (requiring employer to shift employee duties so that individual employee would not be forced to perform work that violated religious convictions); Haring v. Blumenthal, 471 F. Supp. 1172, 1184-85 (D.D.C. 1979) (same) (dicta), *cert. denied,* 452 U.S. 939 (1981).

153 *See* Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 755 (7th Cir. 1983) (rejecting cost justification for mandatory retirement requirement); Smallwood v. United Air Lines, 661 F.2d 303, 307 (4th Cir. 1981) (rejecting cost justification for maximum age-of-hire requirement applied to airline pilots), *cert. denied,* 456 U.S. 1007 (1982); Leftwich v. Harris-Stowe State College, 540 F. Supp. 37, 41-42 (E.D. Mo. 1982) ("[e]conomie savings is not a valid business excuse" for adopting hiring plan that reserved certain number of faculty positions for nontenured faculty members, resulting in plaintiff's termination), *aff'd in part, rev'd in part,* 702 F.2d 686 (8th Cir. 1983); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978) (high salary and pension costs, and limited years of work remaining not legitimate grounds for discharging employee when economic savings and expectation of longer future service associated with younger employee are directly related to employee's age), *aff'd in part, rev'd in part, and remanded without published opinion,* 608 F.2d 1369 (2d Cir. 1979); LaChapelle v. Owens-Illinois, Inc., 14 Fair Empl. Prac. Cas. (BNA) 737, 739-40 (N.D. Ga. 1976) (consent judgment) (termination based on cost of continued employment not permitted under ADEA). *But see* Reed v. Shell Oil Co., 14 Fair Empl. Prac. Cas. (BNA) 875 (S.D. Ohio 1977) (employer may evaluate performance and discharge least productive employee, regardless of age), *vacated and remanded without published opinion,* 582 F.2d 1280 (6th Cir. 1978); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1318-19 (E.D. Mich. 1976) (high cost of retention may be considered in deciding whether to discharge individual employee although business judgments based on generalized assumptions regarding age-related costs are not permitted); Donnelly v. Exxon Research & Eng'g Co., 12 Fair Empl. Prac. Cas. (BNA) 417 (D.N.J. 1974) (employer may consider cost relative to production in making decisions to terminate), *aff'd without published opinion,* 521 F.2d 1398 (3d Cir. 1975). *See generally* Note, *The Cost Defense Under the Age Discrimination in Employment Act,* 1982 DUKE L.J. 580 (pro-

cost-based defense, where the costs are directly related to an employee's age, would undercut the very purpose of the Act.[154]

In light of present concerns regarding the high costs of accommodating the handicapped, Congress's brief consideration of the cost issue in the original debate of section 504 is surprising. Discussion of the cost of accommodating handicapped federal employees during the debate on the 1978 amendments to title V of the Rehabilitation Act sheds little light on the question.[155] The terse language of section 504 itself must therefore provide the principal guidance on this issue. Congress carefully tailored the language of section 504 to permit exclusion of handicapped persons who are not "otherwise qualified" to participate in a federally assisted program. Thus, although Congress deliberately allowed exclusion based on handicap-related inability, it included no similar express exception to permit exclusion based on handicap-related costs. The absence of such a clause is not surprising; an open-ended cost defense exempting recipients from section 504's requirements, whenever inclusion of handicapped individuals resulted in some expense, would emasculate the provision. Congress apparently believed that by limiting section 504 to recipients of federal assistance it was simply requiring that federal funds be allocated in a nondiscriminatory way, rather than requiring that covered parties expend new private funds for this purpose, as might be the case if section 504 were extended to all private employers.[156]

Congress did, however, leave room for cost to play a narrower, more carefully confined role in the statutory scheme. Section 504 prohibits denials of equal opportunity "solely because of [an individual's] handicap." An argument might be advanced based on this language that cost provides a separate and distinct basis for refusing to take the steps necessary to permit handicapped individuals to participate in a federally assisted program; accordingly, a denial of equal opportunity based on costs is not "solely because of" handicap. As thus stated, however, the argument proves too much. The costs at issue are necessarily

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posing that Congress intended output, rather than cost alone, to serve as criterion for cost-related defense under ADEA).

154 *See* Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 755 (7th Cir. 1983) ("[I]t is well established that economic factors cannot be the basis for a [bona fide occupational qualification], since precisely those considerations were among the targets of the ADEA.").

155 For the most extensive congressional discussion of the availability of a cost-related defense under § 504, see 124 CONG. REC. 30,576-80 (1978) (debate on 1978 amendments to § 501 of Rehabilitation Act, which allowed courts fashioning remedy for employment discrimination by federal agency to take into account reasonableness of cost of workplace accomodations).

156 Congress has considered extending the protections of title VII of the Civil Rights Act of 1964, prohibiting employment discrimination in private employment, to handicapped persons. *See, e.g.*, S. 446, 96th Cong., 1st Sess., 125 CONG. REC. 3053 (1979). Congress may not have taken this step, however, because it did not want to impose additional costs on private employers.

related to the handicapped individual's seeking access to the program or activity. A decision not to incur such costs may stem precisely from the fact that such costs are associated with granting access to that individual. Accordingly, more than cost must be demonstrated to establish the requisite separate and distinct basis for refusal. Factors in addition to simple cost, however, may provide the requisite foundation for such a "cost-plus" defense, much as they have in religious discrimination cases. A "cost-plus" defense may be raised based upon such factors as: incapacity to bear the costs of accommodation; inadequacy of benefits received in light of costs incurred; and comparatively low cost-effectiveness of a proposed means of accommodation.

Incorporating such a carefully restricted cost-based defense into the classification scheme described above adequately addresses the problem of high compliance costs, which may be associated with a statutory guarantee of equal opportunity without respect to handicap.

E. Proposed Analytical Framework

In interpreting section 504's antidiscrimination mandate, it is critical to take account of the issues and problems just discussed. The following three-step framework offers a means by which courts can bring these issues to bear in resolving section 504 cases.

First, the nature of the handicapped plaintiff's injury must be assessed. Injuries cognizable under section 504 may result either from a defendant's action or inaction (i.e., from a refusal to accommodate). As previously discussed, such injuries may take several forms: exclusion (including exclusionary criteria, exclusionary refusals to accommodate, and exclusionary judgments); denial of benefits; and discrimination (including unequal treatment and unequal opportunities to benefit). Initial classification of plaintiff's injury as falling into one of these classes facilitates resolution of the issues raised at steps two and three below.

Second, the causal nexus between the alleged injury and plaintiff's handicap must be considered. The evidence required to demonstrate that plaintiff's injury is attributable to his handicap varies depending upon the type of injury. Such a straightforward inquiry into the question of causation avoids the need to draw artificial distinctions between discriminatory intent and discriminatory effect.

Third, any alternative justifications for the challenged conduct must be addressed. Even if plaintiff has been injured in a way that is linked to his handicap, defendant may nevertheless prevail if he can demonstrate that legitimate alternative grounds for the challenged conduct exist—i.e., that the conduct was not "solely because of [plaintiff's] handicap." The defendant may offer a variety of justifications, ranging from safety or efficiency, to considerations of cost. As in step two, an assessment of the various justifications offered should not take place in

the abstract and should be sensitive to the relationship between the type of injury alleged and the justification posed.

This approach has the advantage of identifying substantive elements that may be readily integrated into the procedural context of plaintiffs' and defendants' cases. Even more importantly, as the remainder of this article will demonstrate, the proposed framework of analysis provides a helpful vehicle for interpreting and evaluating the cases decided under section 504 during the last decade.

III

THE SUPREME COURT SPEAKS: *SOUTHEASTERN COMMUNITY COLLEGE V. DAVIS*

The Supreme Court's decision in *Southeastern Community College v. Davis*[157] has proved to be the most influential judicial interpretation of section 504 since the statute's inception. It is therefore useful to examine that decision with special care, to establish the precise contours of the Court's holding and to compare its reasoning with the analytical approach proposed by this article.

A. The Supreme Court's Decision

The *Davis* case arose out of Frances Davis's efforts to gain admission to a state community college vocational training program leading to state certification as a registered nurse.[158] Ms. Davis suffered from a congenital hearing impairment in both ears.[159] The community college learned of Ms. Davis's disability and ordered that a medical evaluation of her condition be performed.[160] Although a hearing aid provided

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157 442 U.S. 397 (1979). Many commentators have considered *Davis*. *See, e.g.,* Charmatz & Penn, *Postsecondary and Vocational Education Programs and the "Otherwise Qualified" Provision of Section 504 of the Rehabilitation Act of 1973,* 12 U. MICH. J.L. REF. 67 (1978); Cook & Laski, *Beyond* Davis: *Equality of Opportunity for Higher Education for Disabled Stndents Under the Rehabilitation Act of 1973,* 15 HARV. C.R.-C.L. L. REV. 415 (1980); Note, *A Campus Handicap? Disabled Students and the Right to Higher Education*—Southeastern Community College v. Davis, 9 N.Y.U. REV. L. & SOC. CHANGE 163 (1980); Comment, *Discrimination on the Basis of Handicap: The Status of Section 504 of the Rehabilitation Act of 1973,* 65 IOWA L. REV. 446 (1980).

158 Ms. Davis was licensed as a practical nurse, but had not worked in that capacity. 442 U.S. at 401 n.1. She had completed preliminary academic coursework during the 1973-74 school year and was one of more than 100 applicants for admission to the approximately 45 positions in Southeastern's Associate Degree Nursing Program for fall 1974. Davis v. Southeastern Community College, 424 F. Supp. 1341, 1342-43 (E.D.N.C. 1976), *rev'd,* 574 F.2d 1158 (4th Cir. 1978), *rev'd,* 442 U.S. 397 (1979). Southeastern is a public educational institution operated by the state of North Carolina. *Id.* at 1342. The college is a recipient of federal financial assistance. 442 U.S. at 400.

159 Davis v. Southeastern Community College, 424 F. Supp. 1341, 1343 (E.D.N.C. 1976), *rev'd,* 574 F.2d 1158 (4th Cir. 1978), *rev'd,* 442 U.S. 397 (1979).

160 A faculty member detected Ms. Davis's hearing problem in a preadmission interview and advised her to consult an audiologist. 442 U.S. at 400. After an examination at Duke University Medical Center, she was diagnosed as having " 'bilateral, sensori-neural hearing loss' " and a change in her hearing aid was recommended. The change was expected to allow

some assistance, she was able to understand normal speech only by reading lips. Citing concerns for patient safety, both during training and in subsequent practice, as well as doubts regarding the likelihood that Ms. Davis would be licensed as a registered nurse by state authorities, the faculty rejected Ms. Davis's application.[161]

Ms. Davis filed suit in federal district court, alleging that the college's decision excluded her from a federally assisted program in violation of section 504.[162] Following her successful appeal to the United States Court of Appeals for the Fourth Circuit,[163] the case reached the

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her to detect sounds " 'almost as well as a person would who has normal hearing.' " 442 U.S. at 401 (quoting Appendix to Record at 127a-128a, *Davis,* 424 F. Supp. 1341 (E.D.N.C. 1976)). In spite of this improvement, however, she would still need to rely on her excellent lip reading skills in order to understand normal speech. *Id.* at 400.

161 *Id.* at 402. The college initially rejected Ms. Davis after consulting Mary McRee, Executive Director of the North Carolina Board of Nursing. 442 U.S. at 401. Ms. McRee advised that Ms. Davis's disability made it impossible for her to function safely as a registered nurse or as a student in the clinical portion of the school's training program. *Id.* at 401. Ms. McRee also stated that modifying the program to ensure Ms. Davis's safe participation would deny her the learning experiences necessary to meet the objectives of the training program. *Id.* at 401-02. Southeastern's president cited several reasons for Ms. Davis's original rejection, including her expected inability to function safely in the clinical-educational setting or in practice and the school's anticipated inability to certify Ms. Davis to the state board for licensing. Appendix to Record at 66a-67a, *Davis,* 424 F. Supp. 1341 (E.D.N.C. 1976).

After reconsideration at Ms. Davis's request, the faculty again rejected her application. 442 U.S. at 402. There was evidence that Ms. Davis might function adequately as a nurse in certain contexts such as long-term care, or in a doctor's office or an industrial setting. Appendix to Record at 141a, *Davis,* 424 F. Supp. 1341 (E.D.N.C. 1976). The faculty were concerned, however, that Ms. Davis might not be able to function safely in life and death situations where lip reading was impossible (for example in an operating room where face masks are used). *See, e.g., id.* at 71a, 76a, 89a, 96a. Faculty members were also concerned whether Ms. Davis could he certified to the state as capable of providing safe nursing care, a prerequisite to licensing. *Id.* at 47a. It is unclear whether the faculty actually considered modifying the nursing program to provide particularly close supervision; however, faculty members apparently believed that such modifications would drain faculty resources, *id.* at 77a, or would be impermissible in light of licensing requirements, *id.* at 53a.

162 *See* Davis v. Southeastern Community College, 424 F. Supp. 1341, 1342 (E.D.N.C. 1976). Ms. Davis asserted both § 504 and constitutional claims. The district court viewed her constitutional attack as resting primarily on due process grounds. It concluded that the state could reasonably deny her admission to the nursing program in light of the limited places available in the program, her projected inability to be licensed, *id.* at 1344-45, and the danger that might result if she attempted the clinical portion of the training program, *id.* at 1345. The district court also concluded that Ms. Davis was not an "otherwise qualified handicapped individual" for purposes of § 504, interpreting that phrase to bar discrimination only against handicapped persons who could "function sufficiently in the position sought in spite of the handicap." *Id.* Because plaintiff's handicap presented a potential danger to future patients, her § 504 challenge failed. *Id.* at 1344-45.

163 On appeal, the Fourth Circuit reversed. Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978). The court rested its decision on statutory grounds. It concluded that § 504 did provide a private cause of action for injunctive relief and that a plaintiff could pursue such an action before exhausting administrative remedies. *Id.* at 1159-60. The court remanded with directions that the district court reconsider its interpretation of the phrase "otherwise qualified handicapped individual" in light of newly promulgated HEW regulations. In the view of the appeals court, these regulations permit consideration of only "academic and technical" standards; the court hinted that handicap did not qualify as either.

Supreme Court.[164] There, she advanced two major substantive arguments. First, she claimed that the district court's endorsement of the college's selection criterion limited participation by the hearing impaired and conflicted with the purposes of section 504. In her view, the college could adopt only qualifications unrelated to handicap as eligibility criteria.[165] Second, she asserted that even if the college could use such criteria, it had an obligation to accommodate her needs by allowing her to pursue a less clinically oriented program or by providing her with additional clinical supervision.[166] The Supreme Court unanimously rejected both these contentions.

In addressing the first of these issues, the Court focused on the statute's prohibition against exclusion of an "otherwise qualified handicapped individual . . . solely by reason of his handicap." The Court found the "plain meaning" of this language controlling. The phrase "solely by reason of his handicap" indicated "only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context."[167] The phrase "otherwise qualified handicapped individual" did not "prevent an institution from taking into account any limitation resulting from [a] handicap, however, disabling," but instead referred to persons "who [are] able to meet all of a program's requirements in spite of [their] handicap[s]."[168] The Court also cited HEW regulations in support of this view.[169]

Id. at 1160-61. The court of appeals also stated that the district court should consider whether regulations requiring institutions of higher education to modify academic requirements and to supply auxiliary aids, *see supra* note 50 and accompanying text, obligated the college to provide additional supervision to plaintiff in connection with the clinical portion of its nursing program, *id.* at 1162. In dicta, the court suggested that plaintiff should not be foreclosed from functioning as a nurse in an area where she could function safely. *Id.* at 1161 n.6.

164 The Supreme Court's decision on the merits avoided resolution of a major underlying procedural issue: whether a private right of action is implied under § 504. 442 U.S. at 404 n.5. For a discussion of this issue, see *supra* notes 27-28 and accompanying text.

165 Respondent's Brief at 15-16, 18, Southeastern Community College v. Davis, 442 U.S. 397 (1979).

166 442 U.S. at 407-08.

167 *Id.* at 405-06.

168 *Id.* at 406.

169 The Court focused on the HEW regulation defining "qualified handicapped individual." *See* 45 C.F.R. § 84.3(k)(3) (1982) ("With respect to postsecondary and vocational education services, [a qualified handicapped person is one] who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity."). The Court suggested, by implication, that "technical standards" could include physical qualifications, including those relating to handicap. 442 U.S. at 406. The Court also noted HEW's regulatory commentary, which rejected a literal interpretation of the statutory language.

> [R]ead literally, "otherwise" qualificd handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress.

Id. at 407 n.7 (quoting 45 C.F.R. § 84, app. A, n.5 (1978)).

Turning to the second argument, the Court held that section 504 did not impose a broad affirmative duty to accommodate. The Court framed the issue in a particularly careful fashion, asking whether the "physical qualifications Southeastern demanded of [Ms. Davis] might not be necessary for participation in its nursing program."[170] The Court then noted that it was undisputed that an ability to understand speech was necessary to ensure patient safety during the clinical portion of the college's program, and that such ability was also "indispensable for many of the functions that a registered nurse performs."[171] The Court went on to review several alternative sources for a broadly based obligation to accommodate. It rejected HEW regulations as grounds for such an accommodation obligation. In the Court's view, Ms. Davis was "unlikely [to] benefit from any affirmative action that the regulation reasonably could be interpreted as requiring."[172] More extensive modifications would require "fundamental" changes in the "nature of [the] program" and so alter her basic course of study as to prevent her from "receiv[ing] even a rough equivalent of the training a nursing program normally gives."[173] Turning to the language of the Rehabilitation Act itself, the Court observed that the Act demonstrated congressional recoguition of the distinction between "evenhanded treatment of qualified handicapped individuals" and more extensive "affirmative action" obligations.[174] Section 504 imposed no broad gauged affirmative action obligation on recipients of federal funds because no affirmative action requirement was included in its language.

The Court, however, acknowledged that a narrower obligation to accommodate could exist by virtue of section 504's more limited prohibitory language: "[S]ituations may arise where a refusal to modify an existing program might become unreasonable and discriminatory."[175] As possible examples of statutory violations of this type, the Court cited instances in which accommodation would impose no "undue financial and administrative burdens" and in which accommodation would become more feasible in light of technological advances.[176] On the facts before it, however, the Court concluded that there had been no violation of this rather limited obligation. The college's program prepared graduates to perform the normal roles of a registered nurse and reflected a

170 442 U.S. at 407.

171 *Id.*

172 *Id.* at 409.

173 *Id.* at 410.

174 *Id.* at 410-11. The Court contrasted the language of § 504 with references to affirmative action in § 501(b) (requiring federal government to develop "affirmative action program plan[s] for the hiring, placement, and advancement of handicapped individuals"), and in § 501(c) (merely "encourag[ing]" state agencies to adopt policies and procedures providing for affirmative action).

175 *Id.* at 412-13.

176 *Id.* at 412.

legitimate concern for public safety.[177] Moreover, the program's design was a common one, followed by many similar institutions, and did not reflect an animus against handicapped individuals.[178] In summary, the Court restated its rather narrow holding: Congress did not intend section 504 "to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program"; because nothing short of a substantial change in its program would render Southeastern's qualifications unreasonable, its refusal to accommodate did not violate section 504.[179]

B. An Assessment

Although the Court's reasoning in *Davis* is not altogether persuasive, it correctly resolved the key theoretical issues and reached a result arguably compelled by the facts.

In addressing the first issue, the Court concluded that section 504 expressly permits consideration of a person's handicap in developing ability-based selection criteria. Justice Powell's underlying rationale, however, is far from compelling. The statutory prohibition against exclusion of "otherwise qualified handicapped individual[s]" is syntactically ambiguous. It could mean "qualified other than with regard to handicap," implicitly prohibiting consideration of a person's handicap, as Ms. Davis suggested.[180] It could mean "qualified notwithstanding" an individual's handicap, as the college maintained.[181] It is, therefore, questionable whether the phrase has a single "plain meaning"[182] as Justice Powell assumed. His conclusion is nevertheless justified. Congress felt no need to include similar phrases in other antidiscrimination statutes, yet the courts have permitted consideration of participants' general qualifications in reaching eligibility decisions. Accordingly, the "otherwise qualified" language must be desigued to permit recipients to take individuals' disabilities into account in reaching eligibility decisions. Such consideration is potentially fraught with risk because the stereotypes that led to enactment of section 504 may influence judgments concerning the abilities of handicapped individuals. Notwithstanding that fact, Congress apparently believed that considering how a handicap influences an individual's abilities was necessary and inevitable.[183] In the final analysis, given the uncertainty in the statutory language, the Court merely recoguized the policy decision that Congress had already made.

The Court's resolution of the second question—whether Southeast-

177 *Id.* at 413-14 & n.12.
178 *Id.* at 413.
179 *Id.* at 414.
180 *See also* 574 F.2d at 1160.
181 *See also* 424 F. Supp. at 1345.
182 442 U.S. at 406.
183 *See supra* text accompanying note 110.

ern was obliged to accommodate Ms. Davis's participation in its nurses training program—was also problematic. The Court initially framed the issue in terms of necessity, asking whether the physical qualifications demanded by the college might be unnecessary in light of its obligation to accommodate. The Court seems to have gone out of its way to embrace the type of analysis generally applied in title VII disparate impact cases, which requires that selection criteria that exclude members of a protected class be justified by a showing of necessity.[184]

Ultimately, the Court did recognize the existence of a limited obligation to accommodate under section 504, but unpersuasively rejected a more broad-based duty to accommodate. The Court misinterpreted HEW regulations that were intended to limit the availability of personal aids, not the academic supervision requested by the plaintiff in *Davis*.[185] The Court also hinted at an "ability to benefit" standard that may prove a trap for courts inclined toward paternalistic judgments concerning the handicapped.[186] It also failed to recognize that "affirmative action" is a term of art, referring to special steps that may be required to recruit victims of previous discrimination as participants in programs offering employment and educational opportunities.[187] Because section 504 was intended to apply in a broader range of circumstances, it is not surprising that no such reference was included. The Court was on much sounder ground, however, in recognizing that an unjustified refusal to accommodate can run afoul of section 504's prohibition on exclusions solely on the basis of handicap.[188]

Unfortunately, the Court failed to articulate a reliable test for dis-

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184 *See supra* note 115.

185 *See* 34 C.F.R. § 104.44(d) (1982); 45 C.F.R. § 84.44(d) (1982) (each requiring provision of auxiliary aids). As the Court noted, the regulation does not require "devices or services of a personal nature." When read in context, however, this language relates to such services as those provided by personal care attendants, not close academic supervision, as the Court suggested. 442 U.S. at 409.

186 *See, e.g.,* Edge v. Pierce, 540 F. Supp. 1300, 1305 (D.N.J. 1982) (denying preliminary injunction because of low probability of prevailing on § 504 claim where defendants refused to accept mentally handicapped residents into federally subsidized housing projects solely because projects were not equipped to improve individuals' ability to live independently). For further discussion, see *infra* text accompanying notes 248-50.

187 *See* Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982); *see also* Note, Southeastern Community College v. Davis, *Section 504 and Handicapped Rights,* 16 CAL. W.L. REV. 523, 544 (1980).

One can make a strong competing argument. In earlier legislation, Congress took pains to *limit* the obligation imposed on colleges and universities by another antidiscrimination statute. *See* Edueation Amendments of 1972, § 904, 20 U.S.C. § 1684 (1982) ("No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment."). A broad obligation to provide needed accommodations might be inferred beeause § 504 contains no such limiting language.

188 *See supra* notes 120-29 and accompanying text.

tinguishing between situations that require accommodation and those that do not. The Court limited its discussion to situations involving "modifications" of "existing" programs and found no need for "extensive" or "substantial" accommodations under these circumstances. It recognized, however, that accommodation may be required when no "undue" burden is involved. Although the Court has thus established certain boundaries for determining whether accommodation is appropriate, its standards remain unclear.[189]

The Court's application of these standards to the *Davis* case offers some illumination. Two factors were of critical importance: the prerogatives of an institution of higher education to set academic standards without being second-guessed by the courts or legislature;[190] and, the fact that the standards in question rested upon considerations of public safety. It is difficult to imagine a more unsympathetic case for requiring accommodation than that presented in *Davis.* Public health professionals had set existing standards to limit risks to third parties in critical care situations with a slim margin for error and a high potential for liability. Although the Court mentioned the financial and administrative burdens that may arise in accommodation cases, it is clear that the factors just cited, not cost, were the principal bases for its decision.[191]

In sum, the Supreme Court's decision in *Davis* is important for several reasons. The case provides a useful example of the exclusionary refusal to accommodate theory. It suggests that exclusion, within the meaning of section 504, can result when the operator of a federally assisted program refuses to modify the program's design or operation for a particular handicapped applicant. The decision presumes that plaintiff may satisfy his initial evidentiary burden by establishing that he has been excluded and that his exclusion resulted from the application of criteria expressly limiting the participation of handicapped applicants. *Davis* indicates that the key question in exclusionary refusal to accommodate cases will be the adequacy of the operator's justification for his decision not to accommodate. Finally, *Davis* demonstrates that such a refusal may be justified when the peculiar prerogatives of institutions of higher education are backed by professional judgments concerning significant health risks to innocent third parties. Although providing sig-

189 442 U.S. at 412-13. Unfortunately, at least one lower court has interpreted *Davis* as creating a dichotomy between situations in which plaintiffs seek modifications of existing programs (required under § 504), and those in which they demand creation of a new service (not required). Turillo v. Tyson, 535 F. Supp. 577, 587 (D.R.I. 1982). Nothing in the *Davis* opinion appears to support this distinction.

190 *See, e.g.,* Board of Curators v. Horowitz, 435 U.S. 78, 92 (1978) (declining to impose hearing requirement, and cautioning against probing judicial review, in case involving student challenge to decision of medical school dismissing her for inadequate clinical performance).

191 442 U.S. at 413.

nificant guidance regarding this particular theory, *Davis* did not attempt to develop a more general framework for analysis of the broad spectrum of cases that are likely to arise under section 504. Accordingly, it cannot be presumed that the *Davis* analysis applies in other situations or controls in other exclusionary refusal to accommodate cases that involve significantly different justifications. Having placed *Davis* in perspective, the article will proceed to develop a broader framework.

IV
EXCLUSION

As previously noted, a handicapped individual barred from participating in a federally assisted program because of his alleged inability to satisfy particular selection and retention criteria may advance several arguments in endeavoring to state a claim under section 504.[192] This Part examines possible challenges to exclusionary criteria, exclusionary refusals to accommodate, and exclusionary judgments.

A. Exclusionary Criteria

Adoption of eligibility criteria that categorically exclude certain handicapped persons is not itself illegal. When these criteria result in selections based on abilities directly related to successful participation in the program, their exclusionary effect is merely incidental to their legitimate purpose; such criteria do not exclude handicapped persons "solely by reason of [their] handicap[s]." When no such direct relationship exists, however, the criteria do exclude handicapped persons simply because they are handicapped in violation of section 504.

1. *Plaintiff's Case*

Assuming that a plaintiff can meet applicable threshold requirements,[193] developing a prima facie case[194] in an exclusionary criterion case should not be difficult. First, plaintiff must demonstrate his exclusion from the program. Plaintiff can establish this by showing he has been rejected on the ground that he is unable to satisfy a governing criterion that either excludes persons with identified handicaps or disqualifies persons who lack specific neutrally defined abilities. Second,

192 *See supra* Part II.B.2.

193 These requirements include proof that plaintiff is a "handicapped individual" within the meaning of § 504, and that he has sought admission to a "program or activity" that receives "federal financial assistance." For a discussion of these issues see *supra* notes 12-24 and accompanying text. Plaintiff must satisfy these threshold requirements, regardless of the theory he pursues.

194 "Prima facie case" describes the evidence plaintiff must present to withstand defendant's motion to dismiss prior to defendant's giving of evidence. *See* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice,* 34 VAND. L. REV. 1205, 1213-14 (1981).

plaintiff must address the more difficult issue of causation. At a minimum, he must satisfy all applicable criteria other than the one attacked as exclusionary[195] and show that the challenged criterion indeed excluded him because of his handicap. When the criterion, on its face, disqualifies persons who suffer from his particular disability, there is little question that the disability caused his exclusion.[196] In the event that the criterion is deemed facially neutral, plaintiff may be able to establish the necessary causal relationship by introducing direct evidence that his disability precludes him from satisfying the requirements, or by demonstrating that the requirements tend to disqualify people with his disability.[197]

These elements of plaintiff's prima facie case parallel those required to establish a prima facie case of disparate impact employment discrimination under title VII of the 1964 Civil Rights Act.[198] Section 504 differs from title VII, however, in that it only prohibits exclusion of "otherwise qualified" handicapped individuals when the exclusion is "solely" because of handicap. The Supreme Court's decision in *Davis* has made clear that this language authorizes defendants to take handicap-related inabilities into account when establishing eligibility criteria.[199] The language of section 504 may also place an evidentiary

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195 *See* Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981). In *Prewitt,* the Court initially determined that handicapped federal employees or applicants for federal employment may maintain a private right of action under either § 504 (prohibiting exclusion, denial of benefits, or discrimination in any "activity conducted by any Executive agency or by the United States Postal Service"), *id.* at 302 n.15, or under §§ 501(b) and 505(a)(1) (requiring federal agencies to develop affirmative action programs for employment of handicapped individuals, and making available "remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 . . . to any complaint under section [501]"), *id.* at 304 n.17. The court then concluded that to establish a prima facie case of disparate impact discrimination the plaintiff must show "that the challenged standard disparately disadvantages the protected group of which he is a member, and that he is qualified for the position under all but the challenged criteria." *Id.* at 306. Although the direct incorporation of title VII rights and procedures into § 505 affected the court's analysis of this issue, no reason exists for plaintiff's prima facie case to differ in situations involving only § 504.

196 Categorical exclusion of persons with a particular type of disability is especially problematic because it fails to account for variations in the level of impairment suffered by different persons. Categorical exclusionary criteria have been successfully challenged as unreasonable under several antidiscrimination schemes. *See, e.g.,* Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977), *cert. denied,* 450 U.S. 923 (1981) (school system may not adopt irrebuttable presumption that visually-impaired teacher is incompetent to teach sighted students); Neeld v. American Hockey League, 16 Fair Empl. Prac. Cas. (BNA) 494, 496 (W.D.N.Y. 1977) (preliminary injunction would issue where plaintiff represented that his visual handicap did not substantially detract from his ability to play hockey).

197 *See, e.g.,* Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983) (requirement that applicant pass written aptitude test excluded individual with dyslexia, a reading disability, because of his handicap); Bentivegna v. Department of Labor, 694 F.2d 619 (9th Cir. 1982) (policy against hiring individual with uncontrolled level of blood sugar excluded applicant with diabetes mellitus because of his handicap); *see also supra* note 117.

198 *See supra* note 93.

199 *See supra* note 169 and accompanying text.

burden upon plaintiff to demonstrate that he is fully capable of participating in a particular program or activity, notwithstanding his inability to satisfy eligibility criteria that screen out candidates suffering from his handicap. Accordingly, plaintiff might be expected, as part of his prima facie case, to present evidence suggesting that the challenged eligibility criteria are not directly related to successful performance in the program.

The courts have yet to carefully analyze the evidentiary showing required of plaintiffs in exclusionary criteria cases under section 504. In most instances, plaintiffs have introduced evidence challenging the legitimacy of eligibility criteria, in order to rebut defendant's evidence justifying the use of the questioned standard. Such evidence has included proof that the criteria were not applied uniformly,[200] that the criteria for comparable programs were less rigorous,[201] and that persons who do not satisfy the challenged criteria performed successfully in similar programs.[202] Alternatively, a plaintiff may demonstrate the insufficiency of the evidence relied on by defendant to justify the criteria in question,[203] or demonstrate his ability to perform successfully in the recipient's program without accommodation, despite his inability to satisfy the challenged criteria. When such evidence has been introduced, it has been unnecessary to determine if it was required to establish a prima facie case. Nevertheless, in at least one Rehabilitation Act decision involving federal employment discrimination, the court indicated that to establish a prima facie case plaintiff's evidence must cast doubt on the legitimacy of the challenged criteria.[204]

Requiring plaintiff, rather than defendant, to address the issue of legitimacy as part of his prima facie case assumes that plaintiff, rather than defendant, should bear the burden of persuasion[205] on this ques-

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200 *See* Simon v. St. Louis County, 656 F.2d 316, 320-21 & nn.8, 9 (8th Cir. 1981) (discussed *infra* text accompanying notes 242-46), *cert. denied,* 455 U.S. 976 (1982).

201 *Id.* at 320-21 & n.7.

202 For example, the American Association for the Advancement of Science and the Foundation for Science, in their amicus curiae brief before the Supreme Court in *Davis,* cited evidence that a number of handicapped doctors and nurses worked successfully in their professions.

203 *See, e.g.,* Bentivegna v. Department of Labor, 694 F.2d 619 (9th Cir. 1982) (discussed *infra* notes 230-34 and accompanying text).

204 *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 310 (5th Cir. 1981) ("To sustain this prima facie case [under §§ 501, 504, and 505 of the Rehabilitation Act], there should also be a facial showing or at least plausible reasons to believe that the handicap can be accommodated or that the physical criteria are not 'job related.' ").

205 The terms "burden of producing evidence" and "burden of persuasion" generally identify certain specific aspects of the burden of proof. The difference between the burden of producing evidence and the burden of persuasion has been described as follows:

> The burden of producing evidence, or—as it is sometimes called—the burden of going forward with the evidence, is the obligation imposed upon a party during trial to present evidence on the element at issue. The evidence presented must be of sufficient substance to permit the factfinder to act upon

tion. This premise is a questionable one. In cases under title VII, courts require defendants to bear the burden of persuasion regarding the legitimacy of facially or effectively discriminatory criteria.[206] This result is consistent with the notion that necessity serves as an affirmative justification for the continued use of criteria that have a demonstrably discriminatory effect; and with the traditional maxim that the party with the greatest access to pertinent evidence should bear the risk of nonpersuasion.[207] A substantial number of courts have determined that the title VII rule should be applied to section 504.[208] Congress intended section 504 to put handicapped persons on a par with members of disadvantaged groups previously protected by federal civil rights legisla-

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> it. This burden aids the court in determining whether, if the trial were halted at the conclusion of the party's presentation, the court would immediately decide the case itself or instead send it to the jury. . . .
>
> The burden of persuasion refers to the risk of uncertainty about an element's resolution. When the parties are in dispute over a material element of a case, the party having the burden of persuasion on that element will lose if the factfinder's mind is in equipoise after he has considered all the relevant evidence.

Belton, *supra* note 194, at 1216.

206 *See* Williams v. Colorado Springs School Dist., 641 F.2d 835, 842 (10th Cir. 1981) (defendant who relies on business necessity defense bears burden of persuasion in attempting to justify use of facially neutral criterion which results in disparate impact on protected class); Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971) (defendant who relies on bona fide occupational qualification defense to justify use of facially exclusionary criterion bears burden of proof); *cf.* Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 591 (5th Cir. 1978) (defendant bears burden of persuasion in establishing that age is bona fide occupational qualification under Age Discrimination in Employment Act).

207 *See* Campbell v. United States, 365 U.S. 85, 96 (1961); 9 J. WIGMORE, EVIDENCE § 2486, at 290-91 (Chadbourn rev. ed. 1981).

208 *See* Treadwell v. Alexander, 707 F.2d 473, 475 (11th Cir. 1983) ("Once a plaintiff shows an employer denied him employment because of physical condition, the burden of persuasion shifts to the federal employer to show that the criteria used are job related and that plaintiff could not safely and efficiently perform the essentials of the job."); Bentivegna v. Department of Labor, 694 F.2d 619, 622 (5th Cir. 1981) (defendant bears burden of persuasion when attempting to establish defense based on job-relatedness under § 504); Prewitt v. United States Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981) (defendant bears burden of persuasion when attempting to establish defense based on job-relatedness under §§ 501, 504, and 505); *see also* E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1103 (D. Hawaii 1980) (defendant bears burden of persuasion when attempting to establish defense based on job-relatedness under § 503). This rule allocates the risk of nonpersuasion consistently with governing administrative regulations. *See* 29 C.F.R. § 32.14(b) (1982) (Department of Labor regulations); 34 C.F.R. § 104, app. A, n.17 (1982) (Department of Education regulations); 45 C.F.R. § 84, app. A, n.17 (1982) (Department of Health and Human Services regulations). Seemingly analogous authority under title VI is distinguishable. The Third Circuit, in NAACP v. Medical Center, Inc., 657 F.2d 1322, 1333-34 (3d Cir. 1981) (en banc), a title VI disparate impact case in which inner city residents challenged the decision of defendant medical center to relocate its facility in the suburbs, held that defendant's burden was one of production. The *Medical Center* case did not involve a challenge to exclusionary criteria of the sort here discussed; instead, plaintiffs proceeded under an unequal opportunity to benefit theory, raising sharply different considerations regarding the allocation of the burden of proof and other issues. *See infra* notes 379-404 and accompanying text.

tion.[209] Allocating a substantially heavier evidentiary burden to section 504 plaintiffs than to plaintiffs under other civil rights statutes contravenes that intent. Absent persuasive reasons for incorporating an additional element as part of plaintiff's prima facie case, plaintiff should simply be required to introduce enough evidence to rebut the legitimacy of defendant's eligibility criteria.

2. *Defendant's Case*

Once plaintiff has established a prima facie case, defendant can either attempt to rebut plaintiff's evidence on the issues of exclusion and causation, or seek to justify the use of the criteria challenged as exclusionary. Two defenses have frequently been raised in efforts to justify exclusionary criteria. First, a defendant may argue that the criteria select for abilities that are reasonably necessary for safe performance by program participants. Second, a defendant may contend that the criteria select for abilities reasonably necessary to effective participation, without respect to safety. A third potential defense is that cost may justify exclusionary criteria.

a. *Safety Defenses.* A defendant who seeks to support challenged criteria on safety grounds can advance two lines of argument. On the one hand, he may assert that the criteria protect third parties from safety risks stemming from the handicapped plaintiff's participation ("public safety" defense). On the other hand, defendant may assert that the criteria protect the handicapped plaintiff from personal injury ("personal safety" defense). The analysis may differ depending on which line of argument defendant pursues.

(i) *Public Safety Defense.* Significant competing interests have influenced the courts' treatment of the public safety defense. Easily fabricated safety concerns may mask underlying stereotypical doubts concerning the capability of handicapped persons.[210] Yet, the safety of unprotected third parties is a matter of significant public concern, and the courts have hesitated to substitute their judgment for that of defendants who may be in a better position to gauge the extent and nature of the safety risk.[211] In light of these competing concerns, it would not be surprising to see divergent lines of case law develop under section 504, much as has occurred in decisions involving the public safety defense under the Age Discrimination in Employment Act.[212] To date, how-

209 *See supra* note 73 and accompanying text.

210 *See* McGarity & Schroeder, *Risk-Oriented Employment Screening,* 59 TEX. L. REV. 999, 1008-09 (1981).

211 *See also* Burstein & Foster, *Handicap Discrimination: The Available Defenses,* 7 EMPL. REL. L.J. 67, 679-80 (1982). *See generally* McGarity & Schroeder, *supra* note 210, at 1038-49.

212 In litigation under the Age Discrimination in Employment Act, the greater number of courts have applied a relatively stringent two-part test in assessing purported bona fide occupational qualification defenses based on public safety considerations. As articulated in

ever, important decisions of the Second and Third Circuits have taken somewhat similar, dispassionate approaches to this problem.

The Second Circuit articulated a relatively stringent standard, rejecting the defense unless there is a "significant risk" to public safety. Employing that standard in *New York State Association for Retarded Children v. Carey,*[213] the court overturned a decision by school administrators to exclude from regular classrooms mentally retarded children who carried hepatitis B. The court found that the defendants had not made the "substantial showing" necessary to support a public safety defense because they had presented no "definite proof" that the disease could be transferred other than through the blood and had made no effort to screen for potential carriers among nonretarded children.[214]

The Third Circuit, in *Strathie v. Department of Transportation,*[215] engaged in a similar analysis of the public safety defense. In *Strathie,* Pennsylvania denied plaintiff a school bus driver's license because he used a hearing aid.[216] In support of his claim that the state's policy violated section 504, the plaintiff cited several unrefuted studies that demonstrated that drivers with impaired hearing have substantially better driving records than drivers with unimpaired hearing.[217] The state, in

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Aritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977), the test requires a court to inquire (1) whether the challenged criterion is "reasonably necessary to the essence of [the defendant's] business," and (2) whether the defendant "has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved or that it is impossible or impractical to deal with persons over the age limit on an individualized basis." *See, e.g.,* Equal Empl. Opp. Comm'n v. City of St. Paul, 671 F.2d 1162, 1166-67 (8th Cir. 1982) (applying two-part test to mandatory retirement program); Smallwood v. United Air Lines, Inc., 661 F.2d 303, 307-09 (4th Cir. 1981), *cert. denied,* 456 U.S. 1007 (1982); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235-37 (5th Cir. 1976); *see also* Tuohy v. Ford Motor Co., 675 F.2d 842, 843, 845-46 (6th Cir. 1982) (requiring some showing of necessity and rejecting mere reasonableness or good faith standard); Equal Empl. Opp. Comm'n v. County of Santa Barbara, 666 F.2d 373, 377 (9th Cir. 1982) (where safety is essence of particular business, employers may have less difficulty establishing public safety defense; however, defense may not be based on unsubstantiated assumptions regarding ability).

On the other hand, some courts have applied a much laxer standard. *See, e.g.,* Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981) (according employer great deference in determining manner in which it may operate most safely, and accepting legitimacy of standard that "might result" in death of one less person), *cert. denied,* 456 U.S. 915 (1982); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974) (defendant need only show that elimination of hiring standard "might jeopardize" life of one more person), *cert. denied,* 419 U.S. 1122 (1975).

For an excellent discussion of these competing lines of authority, see 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 100.13-.14A (1983).

213 612 F.2d 644 (2d Cir. 1979). School authorities had recently been under court order to allow the children in question to attend public school classes. This order stemmed from an earlier case challenging conditions at the Willowbrook Developmental Center, a state facility for the mentally retarded where the children had previously resided. *See id.* at 646.

214 *Id.* at 650-51.

215 706 F.2d 956 (3d Cir. 1983).

216 547 F. Supp. 1367, 1371-72 (E.D. Pa. 1982), *vacated,* 706 F.2d 956 (3d Cir. 1983).

217 The cited studies showed an accident rate for persons with normal hearing between

turn, cited several unsubstantiated concerns in support of its policy: fears that hearing aids might be rendered inoperable as a result of dislodgement, mechanical failure, or user tampering; and doubts whether a hearing aid user would be able to localize sounds to control the children on the bus.[218]

The district court applied an extremely lax standard of review in accepting the state's argument. The court held that the licensing requirements were legitimate if, "[g]iven the limitations, uncertainties, and deficiencies of hearing aids, plaintiff and the class he represents may not be able to perform adequately."[219] On appeal, the Third Circuit scrutinized the Department's licensing requirements more closely.[220] In the appellate court's view, the critical question was whether "there is a factual basis in the record reasonably demonstrating that accommodating [the plaintiff] would require either a modification of the essential nature of the program, or impose an undue burden on the recipient of federal funds."[221] The court found that although the Department asserted that its purpose was "to ensure the highest level of safety . . . [by] eliminat[ing] as many potential safety risks as it can," the Department's own policies of allowing users of other support devices, such as eyeglasses, to receive licenses, belied this claim.[222] Instead, the court concluded that "the essential nature of the program is to prevent any and all appreciable risks that a school bus driver will be unable to provide for the control over and safety of his passengers."[223] Finding evidence on the record to refute each of several alleged risks associated with licensing of users of hearing aids, the court remanded for further consideration consistent with its newly articulated standard.[224]

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three and four times higher than that for persons with hearing impairments, and a rate of traffic violations for persons with normal hearing more than double that for hearing impaired persons. *Id.* at 1375.

218 *Id.* at 1372-73, 1375.

219 *Id.* at 1382. *But cf.* Coleman v. Casey County Bd. of Educ., 510 F. Supp. 301 (W.D. Ky. 1980). In *Coleman,* the court found defendant's refusal to reemploy a school bus driver following a leg amputation violated § 504, where that refusal was based on a state requirement that school bus drivers possess "natural body parts." Plaintiff demonstrated that he was "a highly competent bus driver who [was] not hindered at all by his prosthesis," and had arranged for mechanical modification of whatever school bus he would drive. *Id.* at 303. The court had no occasion to articulate a general standard to govern the availability of a public safety defense because plaintiff's evidence was "uncontroverted."

220 716 F.2d 227 (3d Cir. 1983). The court noted that "[p]rogram administrators surely are entitled to some measure of judicial deference . . . by reason of their experience with and knowledge of the program in question," but indicated that "broad judicial deference resembling that associated with the 'rational basis' test would substantially undermine Congress' intent in enacting section 504 that stereotypes or generalizations not deny handicapped individuals equal access to federally-funded programs." *Id.* at 231.

221 *Id.*

222 *Id.* at 232.

223 *Id.*

224 *Id.* at 232-33.

Together, *New York Association for Retarded Children* and *Strathie* indicate that courts will consider at least three factors in evaluating the legitimacy of eligibility criteria justified by concern for public safety. First, the court will review the quality of the recipient's decisionmaking process. Defendants must identify a factual basis in support of the criteria challenged as exclusionary.[225] This requirement affords some measure of protection against the most blatantly undesirable forms of exclusionary conduct: reliance upon stereotype or conjecture as a basis for disqualifying handicapped individuals without respect to their actual abilities. It also allows reviewing courts some useful insulation. Under this standard, they may find a particular criterion in violation of section 504 without engaging in intrusive review of a recipient's substantive policy judgments. Whether this threshold requirement will prove as useful a screening device in future cases in which defendants present a minimal factual showing in support of challenged criteria remains to be seen. Under such circumstances, a court may interpret the "factual basis" requirement flexibly in light of the evidence available and the risk involved. Where a particularly high risk is presented, a court may accept more equivocal evidence as proof that exclusion is necessary.[226]

Second, *Strathie* indicates that a challenged criterion may not stand if it is not sufficiently related to the "essential nature" of the recipient's program. One possible interpretation of this requirement is that criteria rooted in the public safety may only be applied in situations in which an interest in the public safety lies at the heart of the program under consideration. The licensing program at issue in *Strathie,* or other programs involving operation of systems of common carriage, would plainly satisfy such a narrow reading. A court, however, might deem concern for public safety essential to a wide variety of programs in light of the underlying public interest involved.

Finally, the court will evaluate the extent of the risk to public safety that the challenged criterion seeks to avoid. Here, some potentially significant differences between the approach adopted by the two courts of appeals begin to emerge. *Strathie*'s holding in this regard is relatively narrow. In reaching its decision, the Third Circuit needed to go no farther than determining that the Department of Transportation was attempting to apply inconsistent criteria regarding the acceptable level of

225 *Cf.* Zorick v. Tynes, 372 So. 2d 133, 141-42 (Fla. App. 1979) (under state law, school employer may refuse employment to blind person on basis of his disability only if it is shown, by "the employer's particularized knowledge of the work of the similarly handicapped" or "by testing, interview, or trial employment of a particular applicant," that applicant's blindness "prevents the satisfactory performance of the work involved").

226 Courts have applied a variable standard for the level of proof in certain cases under title VII, *see* Spurlock v. United Airlines, Inc., 475 F.2d 216, 219 (10th Cir. 1972), and under the Age Discrimination in Employment Act, *see* Tuohy v. Ford Motor Co., 675 F.2d 842, 845 (6th Cir. 1982).

risk to various classes of potential licensees. Because eyeglass wearers who posed no appreciable risk were not excluded, the Department was estopped from excluding hearing aid users who posed no greater risk. Under this line of analysis, therefore, the Third Circuit was not required to determine whether the Department could have adopted a criterion rejecting all licensees who posed any identifiable risk.

New York Association for Retarded Children goes further in addressing this question. The Second Circuit stated that a school could not exclude handicapped children unless they posed a "significant risk" to others. This formulation suggests that the social cost of participation must exceed some baseline level of risk before it is sufficient to justify an individual's exclusion. Critics may contend that the Second Circuit's standard is unduly stringent and intrudes upon recipient prerogatives, especially in programs where safety is the paramount concern. These contentions fail to consider that "risk" is best defined as magnitude of danger times probability of occurrence, not probability of occurrence alone.[227] Where safety truly lies at the core of a recipient's program, it is usually because the magnitude of potential danger is great; in such instances, a defendant need only show a low probability of occurrence to satisfy the Second Circuit standard. In other situations, although safety may be an appropriate consideration, it usually is a more peripheral concern because the magnitude of danger is relatively low. In such cases, demonstration of a higher probability of occurrence would be required to establish that the risk of participation is so unreasonable as to warrant exclusion. To avoid uncertainty a court could substitute an "unreasonable risk" standard to reach a similar result and yet avoid possible confusion associated with the phrase "significant risk."

(ii) *Personal Safety Defense.* A defense predicated upon a recipient's desire to protect a handicapped individual from risk to himself must rest upon at least as significant a showing as that required when the recipient asserts an interest in protecting public safety. Accordingly, the Second Circuit has applied a "substantial justification" standard that

227 The Second Circuit in Doe v. New York Univ., 666 F.2d 761, 777-78 (2d Cir. 1981) (discussed *infra* notes 302-06 and accompanying text), seemed to use the phrase "significant risk" to refer merely to the probability that a dangerous condition may recur. However, courts in some analogous cases have focused upon both the level of danger and the probability of its occurrence. *See* Usery v. Tamiami Trail Tours, 531 F.2d 224, 235-36 (5th Cir. 1976). The need for close examination of both these points is demonstrated by the continuing evolution of the applicable standard under Wisconsin's fair employment laws. *Compare* Bucyrus-Erie Co. v. Department of Indus., Labor & Human Relations, 90 Wis. 2d 408, 424, 280 N.W.2d 142, 150 (1979) (employer must establish to "reasonable probability" that employment in position in question would be "hazardous to the health or safety of the complainant or to other employees or frequenters of the place of employment") *with* Boynton Cab Co. v. Department of Indus., Labor, & Human Relations, 96 Wis. 2d 396, 414-15, 291 N.W.2d 850, 859 (1980) (common carrier need not demonstrate that exclusion of one-armed cab driver was based on "reasonable probability" of safety hazard, but may instead rely upon lesser "reasonableness" standard).

parallels its "significant risk" test employed in cases involving the public safety defense. The problem with this standard is its potential to permit unnecessary exclusions. The Second Circuit applied the standard in allowing the exclusion of a student with vision in one eye from an intramural sports program where he would risk a complete loss of vision.[228] Another court applied the "substantial justification" standard in a case that barred a high school student with impaired mobility from a school trip to Spain where she might have been exposed to the pressure of crowds, or fallen behind her peers in the course of walking tours.[229]

More recently, the Ninth Circuit, in *Bentivegna v. United States Department of Labor,*[230] adopted a seemingly more stringent test in evaluating an asserted personal safety defense. Plaintiff, a diabetic, launched an administrative challenge against the City of Los Angeles's use of a selection criterion that denied employment to persons seeking work as building repairers if they could not maintain their blood sugar levels. In upholding the Department of Labor's disposition in favor of plaintiff, the court stated that "[i]f a job qualification is to be permitted to exclude handicapped individuals, it must be directly connected with, and must substantially promote, 'business necessity and safe performance.' "[231] It noted, in addition, that "courts must be wary that business necessity is not confused with mere expediency."[232] The court questioned the City's asserted justification that its standard avoided risk of future injury to plaintiff, stating that "[a]ny qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at greater risk from work-related injuries."[233] The court then concluded that the City's standard could not withstand such scrutiny.

The Ninth Circuit's willingness to engage in more probing review of criteria justified by reference to a handicapped individual's personal safety seems amply justified. Even assuming that an employer or other recipient has some parens patriae-like interest in protecting a handicapped individual from exposing himself to identified risks, the court correctly insisted on assurance that such risks exist, and that they are substantial. Criteria such as those advocated by the defendant in *Bentivegna* can too easily bar handicapped individuals from participation.

The court did not, however, reach the more troubling question of whether a personal safety defense is ever acceptable where a handi-

228 Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977).

229 Wolff v. South Colonie Cent. School Dist., 534 F. Supp. 758 (N.D.N.Y. 1982).

230 694 F.2d 619 (9th Cir. 1982).

231 *Id.* at 622 (quoting 29 C.F.R. § 32.14 (1982).

232 *Id.* at 621-22.

233 *Id.* at 622.

capped plaintiff assumes the risk of participation and waives any claim based on injuries that might result.[234] In the context of sex discrimination, the Supreme Court has recognized that paternalistic judgments intended to prevent women from taking "unwise" risks that affect only themselves may not be used to justify their exclusion.[235] This conclusion merely extends the established limits on the parens patriae power, which prohibit the state from overriding the informed judgment of certain individuals, except in the most compelling circumstances.[236]

Courts have grasped this lesson more slowly where handicapped persons are concerned.[237] In a growing number of cases, however, they have begun to recognize that fully competent handicapped individuals may waive any assertion of improper action and assume the risk attendant to participation in activities such as scholastic sports,[238] or life in an apartment, rather than in a state institution.[239] Whether the handicapped may also waive any claim of financial liability in a potentially more coercive context, such as that of employment, is discussed

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234 *Id.* at 623 n.3.

235 *See* Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) (stating that "the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself"); *id.* at 335 n.21 (cases cited therein); Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women,* 129 U. PA. L. REV. 798, 823-25 (1981).

236 On occasion, courts have deemed apparently compelling circumstances insufficient. *See, e.g.,* Winters v. Miller, 446 F.2d 65, 71 (2d Cir.) (state may not compel medical treatment under claimed parens patriae relationship without judicial determination of incompetence), *cert. denied,* 404 U.S. 985 (1971); Zant v. Prevatte, 248 Ga. 832, 834, 286 S.E. 2d 715, 717 (1982) (hunger-striking prisoner's right to privacy prevails over state's interest in preserving his life where he is not mentally incompetent and has no dependents). *But see, e.g.,* State *ex rel.* White v. Narick, 292 S.E.2d 54, 57-58 (W. Va. 1982) (rejecting *Zant* reasoning and allowing forced feeding of hunger-striking prisoner).

237 *See, e.g.,* Bey v. Bolger, 540 F. Supp. 910, 926 (E.D. Pa. 1982) (in action under §§ 501 and 505 of Rehabilitation Act, court rejected plaintiff's argument that he should have been appointed to light duty status as postal employee, despite risk that duty might have worsened his hypertension); Maine Human Rights Comm'n v. Canadian Pac. Ltd., 31 Fair Empl. Prac. Cas. (BNA) 1028, 1035 (Me. 1983) (statutory safety defense requires "reasonable probability" that employee's handicap renders him unable to perform duties without endangering his own health or safety); Lewis v. Remmele Eng'g, Inc., 29 Fair Empl. Prac. Cas. (BNA) 576, 578 (Minn. 1981) ("reasonably probable risk of serious harm" to health or safety of disabled person is defense to claim of discrimination on basis of handicap).

238 *See* Grube v. Bethlehem Arca School Dist., 1982-83 EDUC. HANDICAPPED L. REP. (CRR) 554:280 (E.D. Pa. 1982) (school district may not exclude student with one kidney from high school football team when student had demonstrated necessary athletic prowess, medical evidence showed very little risk to remaining kidney, and student and parents waived all claim of financial liability against school district); Wright v. Columbia Univ., 520 F. Supp. 789, 795 (E.D. Pa. 1981) (temporary restraining order issued allowing college student with vision in only one eye to decide for himself whether to participate in college football). *See generally* Hermann, *Sports and the Handicapped: Section 504 of the Rehabilitation Act of 1973 and Curricular, Intramural, Club and Intercollegiate Athletic Programs in Postsecondary Educational Institutions,* 5 J.C. & U.L. 143 (1979).

239 *See* Lynch v. Maher, 507 F. Supp. 1268, 1280-81 (D. Conn. 1981) (granting preliminary injunction requiring state to provide extended home care needed for quadraplegic plaintiff to live independently).

below.[240]

b. *Non-Safety-Related Ability Defenses.* Two distinct ability defenses have likewise been raised in support of exclusionary selection criteria: one relates to the ability of the plaintiff to perform effectively as a participant in the program, the other to the ability of the plaintiff to derive benefit from the program.

(i) *Ability to Perform.* Courts should apply at least as stringent a standard in reviewing an ability-to-perform defense as they have in evaluating public and personal safety defenses. At minimum, a "substantial" justification, or a showing that the challenged criterion is "directly connected with," and "substantially promotes business necessity" must therefore be expected in support of such a defense. Arguably, courts should be willing to apply even more stringent standards where the interests of innocent third parties are no longer part of the calculus and only those of the recipient and the participant remain.[241]

Few cases, other than the analogous safety defense cases, have directly considered the appropriate standard for an ability-to-perform defense. *Simon v. St. Louis County*[242] sheds some light on the issue. There, plaintiff, who had served as a county police officer until a gun shot wound left him a paraplegic, was denied reappointment to the force, after a period of rehabilitation, because he could not meet the department's requirements that all employees possess the ability to effect a forcible arrest, render emergency aid, and fill any position in the department. The district court held that Simon had not stated a section 504 claim because he was not a "qualified" handicapped individual. The Eighth Circuit reversed and remanded. Because Simon had introduced evidence that the department's criteria were not applied uniformly and that other departments had no such requirements, the appellate court concluded that the district court should consider further whether the criteria were "reasonable, legitimate, and necessary."[243]

Simon offers only limited guidance on the requirements of a successful ability-to-perform defense.[244] It seems certain that courts will sustain

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240 *See infra* notes 251-59 and accompanying text.

241 *See, e.g.,* McGarity & Schroeder, *supra* note 210, at 1032-66 (arguing that courts have generally been more stringent in their scrutiny of screening criteria designed to promote efficient performance as compared to those desigued to promote employee or third party safety).

242 656 F.2d 316 (8th Cir. 1981), *cert. denied,* 455 U.S. 976 (1982); *see also* Guerriero v. Schultz, 557 F. Supp. 511, 514 (D.D.C. 1983) (in action under § 501, plaintiff, allegedly alcoholic with personality disorder, was not "otherwise qualified" for employment in foreign service, because his need for extended therapy precluded his assignment abroad, which was essential condition of employment in that capacity).

243 656 F.2d at 320-21.

244 For example, *Simon* did not involve the common and exceptionally troublesome problem of a recurrent or progressively deteriorative handicap that may cause an individual to become incapacitated in the future, even though it does not currently impair his ability. In a recent case under § 504, the Ninth Circuit generally rejected potential long-term health

criteria related to the necessary functions of the job. The police department's failure to apply its standards uniformly apparently undercut any claim that the requirements were relevant to every job in the department. *Simon*'s "necessity" standard, however, may include more. Under title VII, courts have viewed defenses based on necessity as permitting only those criteria that select for abilities related to the essential functions of the employer's business.[245] A similar approach might be expected to develop under section 504.[246] Once a defendant surmounts

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problems as a basis for refusing a diabetic candidate employment as a building repairer. *See* Bentivegna v. Department of Labor, 694 F.2d 619, 623 (9th Cir. 1982):

> [A]llowing remote concerns to legitimize discrimination against the handicapped would vitiate the effectiveness of section 504 of the Act. Potentially troublesome health problems will affect a large proportion of the handicapped population. Consistent attendance and an expectation of continuity will be important to any employer. Such considerations cannot provide the basis for discriminatory job qualifications unless they can be connected directly to "business necessity or safe performance of the job."

A Wisconsin state court has also rejected potential inability as a ground for disqualification where the controlling state statute defined "handicapped person" in the present tense. *See* Chrysler Outboard Corp. v. Department of Indus., Labor, & Human Relations, 14 Fair Empl. Prac. Cas. (BNA) 344, 345 (Wis. Cir. Ct. 1976) (employer's refusal to hire qualified individual with leukemia because of risk of high absenteeism and high insurance rates violated state fair employment act).

Other state courts have allowed employers to consider potential incapacity in reaching hiring decisions. *See, e.g.,* Panettieri v. C.V. Hill Refrigeration, 159 N.J. Super. 472, 492, 388 A.2d 630, 640 (App. Div. 1978) ("materially enhanced risk" of future injury or death is a consideration in determining whether handicap "reasonably precludes performance of the particular employment"); Westinghouse Elec. Corp. v. State Div. of Human Rights, 63 A.D.2d 170, 172-73, 406 N.Y.S.2d 912, 914 (App. Div. 1978) (employer could decline to hire summer job applicant who suffered from dermatitis where medical evidence demonstrated that exposure to chemicals present in workplace would aggravate condition and render applicant unable to perform required duties), *aff'd,* 49 N.Y.2d 234, 401 N.E.2d 196, 425 N.Y.S.2d 74 (1980). *See generally* H.R. TURNBULL, THE LAW AND THE MENTALLY HANDICAPPED IN NORTH CAROLINA 11-8, -9 (2d ed. 1979).

Courts can best resolve the problem of potential incapacity by adopting a line of analysis analogous to that applied in cases raising a public safety defense. Thus, where a recipient adopts a criterion that screens out candidates for participation based upon a probability of future nonperformance, the court should carefully consider whether there is a factual basis to believe that the exclusionary criterion in question is necessary to avoid an unreasonable risk of ineffective performance. Among the factors relevant to the unreasonableness of the risk are the nature of the program in question, the magnitude of the difficulty in job performance created by the potential inability, the probability that the applicant will become disabled, and the sufficiency of the evidence demonstrating these facts. *See supra* notes 220-27 and accompanying text.

245 *See, e.g.,* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971) (feminine gender not bona fide occupational qualification for position as airline steward because cosmetic effect contributed by female sex "was tangential to the essence of the business involved").

246 *See* Treadwell v. Alexander, 707 F.2d 473, 477 (11th Cir. 1983) (holding, under §§ 501 and 504 of Rehabilitation Act, that plaintiff with heart condition may be required to have capacity to perform essential functions of employment, even though employee may only be required to perform such functions occasionally); *cf.* Prewitt v. United States Postal Serv., 662 F.2d 292, 310 (5th Cir. 1981) ("The ultimate test is whether, with or without reasonable accommodation, a handicapped individual who meets all employment criteria except for the

the twin hurdles of relevance and connection to essential functions, however, he may use selection criteria to set whatever level of ability or performance he chooses.

(ii) *Ability to Benefit.* The Supreme Court's discussion in *Davis* of plaintiff's ability to benefit from Southeastern Community College's nursing program prompted some defendants to justify exclusionary criteria by showing the inability of the handicapped plaintiff to benefit from the program. Because an acceptance of this defense would emasculate the purpose of section 504 even more surely than acceptance of a loosely defined personal safety defense, most courts have rejected these contentions and distinguished *Davis.*[247]

At least one court has, however, taken the *Davis* "ability to benefit" language more seriously and assumed that a defendant may design eligibility criteria to exclude handicapped individuals who lack such capacity. Thus, in *Edge v. Pierce,*[248] a New Jersey district court rejected plaintiffs' assertion that excluding persons who are, or are perceived to be, chronically mentally ill from certain federally subsidized housing opportunities violated section 504.[249] In denying the requested preliminary injunction, the court embraced defendant's argument that plaintiffs could not benefit from the desired housing facilities, because the housing projects were allegedly not organized and equipped in a fashion that would improve their ability to live independently.[250]

The *Edge* court's decision is seriously flawed. Defendants might have, but did not, assert an ability-to-perform defense by arguing that they had desigued the eligibility criteria to ensure that tenants could properly maintain the housing units in question. They might also have justified the criteria as designed to promote public and personal safety by ensuring that all tenants possessed the necessary self-care skills to live in the housing units without injury to themselves or their neighbors. By adopting defendants' ability-to-benefit standard the court sanctioned an approach with numerous flaws: it was exceedingly vague; it could readily be applied in a subjective rather than objective fashion; and it was apparently not uniformly applied to all tenants. Moreover, now that courts are beginning to recoguize that handicapped individuals are generally capable of assuming any safety risk associated with participation in a federally assisted program, there can be little question that the *Edge*

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challenged discriminatory criterion 'can perform the essential functions of the position in question without endangering the health and safety of the individual or others.' ") (quoting 29 C.F.R. § 1613.702(f) (1981)).

247 *See, e.g.,* Camenisch v. University of Tex., 616 F.2d 127, 132-33 (5th Cir. 1980) (concluding that *Davis* decision was clearly not intended to bar relief under this statute for all handicapped persons in future), *vacated and remanded on other grounds,* 451 U.S. 390 (1981).

248 540 F. Supp. 1300 (D.N.J. 1982).

249 *Id.* at 1305.

250 *Id.*

plaintiffs could waive their right to complain in the event that the desired program benefit proved minimal.

c. *Cost.* In an era of limited economic resources, cost is a matter of abiding concern to program decisionmakers. It can become an issue in the development of eligibility criteria affecting handicapped individuals, just as it may in situations where accommodation is required to facilitate their participation.[251] Program operators, especially employers, fear that the participation of handicapped individuals could lead to a greater rate of injury or to comparatively more severe injuries, resulting in substantially greater liability.[252] Such liability might arise for several reasons. An employer may have special obligations under federal protective legislation to furnish employees a safe place of work; failure to perform that duty may lead to liability in the event of worker injury or death.[253] Under state worker compensation laws that adopt an insurance-based scheme to govern employer liability, employers may be required to bear the incrementally higher costs associated with a successive injury to an individual who is already significantly impaired.[254] Although a handicapped employee might be willing to waive any claim for excessive liability, it is doubtful that such a waiver would

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251 *See infra* notes 279-84 and accompanying text.

252 For example, the loss of a single eye might mean a compensation liability of $5,000 for a man with two good eyes, but $26,000 for a man with only one. 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 59.31(a), at 10-392 (1982). Substantial incremental costs attendant to employment of handicapped individuals can trigger strong employer reactions. Professor Larson reports that within one month following a decision of the Oklahoma Supreme Court requiring employers to bear the full cost of successive work-related disabilities, "betwcen seven thousand and eight thousand one-eyed, one-legged, one-armed, and one-handed men were displaced" from existing employment within that state. *Id.*

253 *See* Rissetto & Schoomaker, *The Federal Employers' Liability Act and the Rehabilitation Act: New Traps on an Old Road,* 17 FORUM 828 (1982). Rissetto and Schoomaker describe concerns of railroad employers covered by the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60 (1976). Such employers are obliged to provide a safe place of work; in the event of even minimal negligence, the railroad may face substantial liability for worker injuries. The authors cite numerous examples when employers have been liable under the FELA, including: the assignment of an employee suffering from cardiovascular disease to a stressful job as a train dispatcher; the failure to identify an employee as a diabetic before assigning him to a position requiring certain difficult physical labor; and the failure to identify a worker as suffering from tuberculosis before assigning him to a position in which he transmitted that disease to a fellow worker. Employers also fear that the Rehabilitation Act requirement to hire handicapped individuals may increase the litigation instituted by employees who suffer on-the-job injuries. Rissetto & Schoomaker, *supra,* at 839.

254 Workers compensation statutes and interpretative court decisions have generally addressed the problem of successive disabilities in two ways. In some "apportionment" states, employers have been held liable only for whatever job-related disability would have resulted in the absence of the prior disability. Most states adopt a strategy of nonapportionment. In these states, an employer is liable for the combination of the prior disability and the subsequent injury. In order to remove the obvious disincentive for employment of disabled individuals that arises under this scheme, these states establish special "second injury funds," which, in specified cases, pay the difference between the liabilty resulting from the combined injuries and the liability that would accrue if the subsequent injury were the employee's sole disability. *See generally* 1 A. LARSON, *supra* note 252.

be effective in the relatively coercive setting of an employment relationship.[255] This fear of increased liability, as much as concern for participants' own safety, may provide the stimulus for adoption of many exclusionary criteria.

Notwithstanding such concerns, there is little basis for accepting any cost-related defense of exclusionary criteria. The lack of case law directly addressing this issue under the Rehabilitation Act[256] is attributable to defendants' ability to rely on the more sympathetically received personal safety defense. The most nearly analogous precedents under federal employment discrimination laws reject assertions by defendants that costs directly related to hiring members of the protected class can serve to justify exclusionary practices. Thus, under the Age Discrimination in Employment Act, courts have generally not allowed employers to refuse to hire or retain older, more highly paid employees because of attendant wage and benefit costs.[257] Similarly, under title VII an employer may not rely upon state protective legislation, which requires employers to pay premium overtime wages to female employees, to justify discriminatory hiring practices.[258] As long as known and determined incremental costs provide no basis for such a defense, the mere risk of additional expense should be insufficient for this purpose. Defendants could purchase insurance that would cover risks of liability associated with participation of a wide range of individuals in any particular program or activity. Thus quantified, the incremental liability attendant to participation by handicapped persons is likely to be small—so small as to render inapplicable possible cost-plus defenses based on capacity to bear costs, cost-effectiveness, or costs substantially in excess of benefits received—defenses that may have a bearing in certain other types of cases.[259]

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255 *See* S. WILLISTON, CONTRACTS § 1751A (1972) (employment contracts absolving employer against future liability void as against public policy); Andrade, *The Toxic Workplace: Title VII Protection for the Potentially Pregnant Person,* 4 HARV. WOMEN'S L.J. 71, 99-100 (1981); Rissetto & Schoomaker, *supra* note 253, at 841.

256 The court in E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980), a case arising under § 503 of the Rehabilitation Act, noted that the defendant employer had cited high workers compensation insurance costs as grounds for refusing to hire a prospective employee with a history of back trouble for a position involving heavy labor. The court did not reach the merits of this issue, however. *Id.* at 1103-04.

257 *See* cases cited *supra* note 153; *see also* City of Appleton v. Labor and Indus. Review Comm'n, 20 Empl. Prac. Dec. (CCH) ¶ 30,138, at 11,746 (Wis. Cir. Ct. 1979) (city may not refuse to hire applicant with back problem that could increase risk of payment of disability benefits); Yuckman, *Employment Discrimination and the Visually Impaired,* 39 WASH. & LEE L. REV. 69, 89-90 (1982).

258 *See* Arkansas v. Fairfield Communities Land Co., 260 Ark. 277, 279-80, 538 S.W.2d 698, 699-700 (1976).

259 *See infra* notes 279-84, 335-42, 356-78 and accompanying text.

B. Exclusionary Refusal to Accommodate

The exclusionary criteria theory and the exclusionary refusal to accommodate theory are closely related. Under the former, plaintiff argues that particular eligibility criteria are generally unnecessary and therefore illegitimate. Under the latter, plaintiff contends that the criteria are unnecessary and therefore illegitimate, in his particular case, because defendant could have accommodated plaintiff's special needs.

1. *Plaintiff's Case*

Plaintiff's prima facie case under the exclusionary refusal to accommodate theory closely resembles his case under the exclusionary criteria theory. He must establish that defendant excluded him from the program on the ground that he did not meet the eligibility criteria.[260] By also showing that he requested that the program operator accommodate his needs, and that his request was refused, he maintains that he was doubly excluded. Plaintiff must also establish that his exclusion was related to his handicap by showing that he satisfied all criteria other than a particular disqualifying standard, and that he failed to satisfy that standard because of his handicap.[261] By showing that defendant's refusal to accommodate leaves the underlying exclusion in effect, plaintiff effectively establishes that his exclusion was because of his handicap.

As with the exclusionary criteria theory,[262] one might contend that section 504's reference to "otherwise qualified" handicapped individuals requires the plaintiff to establish his capability to participate in a particular program notwithstanding his handicap. Such an added burden might require him to demonstrate the availability of means by which defendant could have accommodated his needs, rendering his exclusion unnecessary. The resolution of this issue turns upon the allocation of the burden of proof concerning the availability of possible means of accommodation. The most directly analogous precedent, that involving accommodation to avoid religious discrimination under title VII, places the burden of persuasion squarely on defendant.[263] This precedent may have limited bearing, however, because express statutory language seems to control, which is not the case under section 504. Nevertheless, agency regulations and some courts have allocated the burden of persuasion to Rehabilitation Act defendants,[264] perhaps on the unstated

260 *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 308 (5th Cir. 1981) (assuming, without discussion, that plaintiff's prima facie case for purposes of exclusionary criteria theory suffices as prima facie case for purposes of exclusionary refusal to accommodate theory).

261 *Id.* at 306.

262 *See supra* notes 198-209 and accompanying text.

263 *See* Redmond v. GAF Corp., 574 F.2d 897, 901 (7th Cir. 1978) (quoting 42 U.S.C. § 2000e(j), which requires employer to demonstrate "that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship").

264 *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 308 (5th Cir. 1981); Crane v.

premise that a defendant must establish the legitimacy of governing criteria and justify their use by demonstrating the unavailability of reasonable means of accommodation. Although two courts have indicated that plaintiff must demonstrate the existence of available alternatives as part of his prima facie case,[265] the better view holds that defendant must carry the burden of persuasion on this issue.

2. *Defendant's Case*

Defendants have attempted to justify exclusionary refusals to accommodate on two grounds. First, defendants have contended that they have institutional prerogatives to establish eligibility criteria deemed necessary for effective program operation, and that the chosen criteria are immune from challenge where adopted in good faith. Second, they have contended that a refusal to accommodate was warranted because accommodation involved unreasonable costs.

a. *Abilities Needed for Effective Participation: The Limitations of Institutional Prerogatives.* (i) *Academic Institutions.* The Supreme Court in *Davis* stated that "[s]ection 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[266] This statement must, however, be read with the facts of *Davis* in mind. *Davis* involved the prerogative of an institution of higher learning to set admissions standards designed to protect the public safety, a situation in which the courts have accorded particular deference to institutional decisionmakers.[267] Following *Davis,* it remained unclear whether the courts would defer to eligibility criteria adopted by academicians when no substantial public safety concerns were raised. Two examples indicate that the problem is not as simple as *Davis* appears to suggest.

In cases involving challenges to requirements that tie high school graduation to passage of minimum competency tests, the courts have honored the institutional prerogatives recognized in *Davis,* even when

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Lewis, 551 F. Supp. 27, 31 (D.D.C. 1982); Bey v. Bolger, 540 F. Supp. 910, 925 (E.D. Pa. 1982); 29 C.F.R. § 1613.704 (1982) (EEOC regulations). *See generally* Note, *Accommodating the Handicapped: Rehabilitating Section 504 After* Southeastern, 80 COLUM. L. REV. 171, 187-90 (1980).

265 *See* Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983) ("Although the plaintiff [in an action under §§ 501 and 504] initially has the burden of coming forward with evidence to make at least a facial showing that his handicap can be accommodated, the federal employer has the ultimate burden of persuasion in showing an inability to accommodate."); Prewitt v. United States Postal Serv., 662 F.2d 292, 310 (5th Cir. 1981) (quoted *supra* note 204); *cf.* Sanders by Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361, 1371 (W.D. Mich. 1983) (plaintiff has burden, as part of prima facie case, to show that provision of needed education services would not impose undue burden on defendant school system).

266 Southeastern Community College v. Davis, 442 U.S. 397, 413 (1979) (footnote omitted).

267 *See supra* notes 210-27 and accompanying text.

no interest in the public safety was at stake. In *Anderson v. Banks,*[268] a Georgia federal district court rejected a challenge brought by mentally retarded students and upheld the use of a minimum competency test designed to ascertain whether test-takers possessed basic skills deemed necessary to receive an academic diploma.[269] Plaintiffs argued that successful performance on the examination required skills to which they had not been exposed in their special classes, and that defendant could not apply the test to them without violating section 504. The court, reasoning that "[t]he definition of 'diploma' is what is challenged rather than a barrier to a program,"[270] relied on *Davis* to conclude that plaintiffs could not challenge academic standards in this fashion. Although plaintiffs litigated the case under an exclusionary criterion theory, an alternative approach might have been to rely on an exclusionary refusal to accommodate theory, alleging that the school system had unreasonably refused to adopt satisfactory completion of the special education curriculum as an alternative diploma criterion. Indeed, the court's remarks respond more to the latter theory than to the former.

Cases involving exclusion of handicapped children because of disciplinary problems suggest, however, that certain circumstances require a more subtle analysis of academic prerogatives. Traditionally, courts have accorded school systems significant freedom to set standards of good conduct as a prerequisite to continued student participation in academic programs. It would, therefore, not be surprising for courts to permit ready suspension or expulsion of handicapped students whose conduct does not conform to required behavioral norms, much as they have permitted school authorities to deny retarded students diplomas if they have not met academic standards. Such has not been the case. Instead, courts have followed a very different line of analysis, severely limiting the prerogatives of school systems to discipline handicapped children even where constitutionally required due process has been afforded. In *S-1 v. Turlington,*[271] the Fifth Circuit held that section 504 precluded school authorities from expelling several mentally retarded high school students unless school authorities could show that the misconduct leading to the disciplinary action was unrelated to the chil-

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268 520 F. Supp. 472 (S.D. Ga. 1981).

269 Other cases have reached similar results in challenges to the use of minimum competency tests. *See* Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179 (7th Cir. 1983) (use of minimum competency test does not violate § 504 or EHA; however, § 504 precludes use of test format or environment that would not disclose degree of learning that handicapped student actually possesses, and procedural due process requires more than one and one-half years' notice of minimum competency test requirement); Board of Educ. v. Ambach, 107 Misc. 2d 830, 436 N.Y.S.2d 564 (1981) (use of minimum competency tests permissible under § 504 and EHA), *aff'd,* 90 A.D.2d 227, 458 N.Y.S.2d 680 (1982).

270 520 F. Supp. at 511.

271 635 F.2d 342 (5th Cir.), *cert. denied,* 454 U.S. 1030 (1981).

dren's handicaps.[272] Because of the practical difficulty of proving that a child's misconduct is unrelated to his handicap, this requirement substantially limits the prerogatives of school officials to apply disciplinary sanctions to handicapped students.[273]

The reasoning of courts in resolving challenges to disciplinary sanctions under section 504 has been less than clear. Application of the exclusionary refusal-to-accommodate theory would reconcile the seeming dichotomy between the handling of academic and disciplinary standards. Both section 504 and the Education for All Handicapped Children Act[274] require covered school systems to provide individual handicapped children with an appropriate education and to make available a full range of alternative educational placements to ensure attainment of that goal. In most instances, disciplinary problems involving handicapped children stem from the children's placement in an inappropriate educational setting.[275] Thus, school officials could remedy most disciplinary problems by changing a child's placement. When they reject alternative placement and expel the child, it can be inferred that they have unreasonably refused to accommodate the child's needs and have excluded him solely on the basis of his handicap. The defendant must then demonstrate that its conduct was not unreasonable in that the problem could not be cured by alternative placement—i.e. that it was not related to the child's handicap—just as the courts have required.[276]

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272 635 F.2d at 350. A number of other courts have reached similar results, approaching the disciplinary issue in light of § 504, the Education for All Handicapped Children Act, or both. *See* Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982); Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328 (W.D.N.Y. 1979); *see also* 47 Fed. Reg. 33,836, 33,854 (1982) (to be codified at 34 C.F.R. § 300.114 (recently proposed federal regulation addressing issue of discipline procedures under Education for All Handicapped Children Act)).

See generally Schoof, *The Application of P.L. 94-142 to the Suspension and Expulsion of Handicapped Children,* 24 ARIZ. L. REV. 685 (1982); Note, *Disciplining Handicapped Students: Suspension and Expulsion under the Education for All Handicapped Children Act of 1975 and Section 504 of the Rehabilitation Act of 1973,* 33 SYRACUSE L. REV. 657 (1982); Comment, *Disciplinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed by the Education for All Handicapped Children Act of 1975,* 51 FORDHAM L. REV. 168 (1982); Comment, *The Rights of Handicapped Students in Disciplinary Proceedings by Public School Authorities,* 53 U. COLO. L. REV. 367 (1981).

273 *See* Lichtenstein, *Suspension, Expulsion, and the Special Education Student,* 61 PHI DELTA KAPPAN 459, 459 (1980) (describing judicial decisions involving discipline of handicapped students as "supplant[ing] the disciplinary procedures of local school districts").

274 For a brief description of the requirements imposed by the Education for All Handicapped Children Act, see *supra* note 48; *infra* note 332.

275 *See* 34 C.F.R. § 104, app. A, n.24 (1982) ("[W]here a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required. . . .").

276 A third example also suggests that courts may not defer to school authorities if eligibility criteria are unrelated to academic performance. In Doe v. Marshall, 459 F. Supp. 1190 (S.D. Tex. 1978), *vacated as moot,* 622 F.2d 118 (5th Cir. 1980), *cert. denied,* 451 U.S. 993 (1981),

(ii) *Other Institutions.* Where academic institutions have not been involved, the courts have seen no special need for deference and have been less willing to hold an institution's exclusionary refusal to accommodate immune from challenge in the face of reasonable alternatives. In *Stutts v. Freeman,*[277] plaintiff challenged his exclusion from an apprenticeship program for heavy equipment operators, where the exclusion was based on his poor performance on a written aptitude test. Plaintiff alleged that he suffered from dyslexia, a reading disability that interfered with his performance on the examination. Defendant, the Tennessee Valley Authority, asserted that it had made good faith but unsuccessful efforts to obtain alternative test scores for plaintiff and to have a nonwritten test administered. The Eleventh Circuit held that defendant's use of the written test violated section 504, where the agency had in fact failed to administer an alternative oral examination or otherwise adjust its entry requirements to accommodate plaintiff's dyslexia. Similarly, in *Majors v. Housing Authority,*[278] the Fifth Circuit held that defendant housing authority's refusal to waive its rule against admitting tenants who had pets violated section 504 where a mentally disturbed plaintiff alleged that she would be unable to live in the defendant's facility without her dog as a companion, and where a waiver of the no pet rule would constitute a reasonable accommodation.

b. *Cost-Plus Defenses.* Defendants have also contended that section 504 does not require any accommodation that necessitates substantial, and therefore unreasonable, expenditures. As previously discussed, the role of cost factors in section 504 analysis remains unresolved.[279] Not surprisingly, despite the Supreme Court's dicta in *Davis,* the lower courts have not adopted a broad-based cost defense to justify exclusionary refusals to accommodate. They have, however, addressed two types of cost-plus justifications relied on by defendants: incapacity to bear the costs of accommodation and inadequacy of benefits received in light of costs incurred.

Government regulations and case law pertaining to handicap-re-

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a high school football player, who had a history of emotional disturbance, changed school districts in order to live in a less stressful home setting. He challenged the new school system's refusal to permit him to participate in intermural football, a decision that had been based on conference rules. The court ordered the school system to allow plaintiff to play, finding that the school system had a duty, under § 504, to consider the handicapped student's alleged need to play football as a form of therapy. Although the district court's decision predated the Supreme Court's decision in *Davis,* it may still be appropriate to distinguish between a school district's prerogatives to set academic standards and its establishment of standards in other areas.

277 694 F.2d 666 (11th Cir. 1983).

278 652 F.2d 454 (5th Cir. 1981). Regarding legal strategies for assuring adequate housing for the disabled, see generally Andersen, *Private Housing for the Disabled: A Suggested Agenda,* 56 NOTRE DAME LAW. 247 (1980).

279 *See supra* Part II.D.

lated employment-discrimination by federal agencies recognize incapacity to bear the costs of accommodation as a defense. Regulations under section 504 adopted by the United States Department of Labor, the Education Department, and other agencies, specify several factors to be considered in determining whether an employer has demonstrated "undue hardship" sufficient to excuse a refusal to make reasonable accommodation. These factors include the size of the recipient's program; the type of operation, that is, the composition and structure of the recipent's workforce; and the nature and cost of the needed accommodation.[280] Thus, the ability of the recipient to bear the cost of the accommodation, rather than the absolute cost of the accommodation, controls the decision.

In *Bey v. Bolger,*[281] a Pennsylvania federal district court also addressed a defense based on incapacity to bear costs. Plaintiff, who suffered from hypertension, sought reinstatement with the United States Postal Service following a period of enlistment in the Navy. He alleged that the Service's refusal to accommodate by appointing him to a position with "light duty status" violated section 501 of the Rehabilitation Act. The court found that section 501 did not oblige the Service to make such an appointment where federal budget constraints dictated that it could only make a limited number of light duty status assignments, and where it had entered into a collective bargaining agreement requiring the Service to allocate those assignments to employees who had attained a specified level of seniority or who had suffered an on-the-job injury.[282] Thus, the Service's defense in *Bey* was a cost-plus defense,

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280 34 C.F.R. § 104.12(c) (1981).

281 540 F. Supp. 910 (E.D. Pa. 1982); *see also* Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983) (in case involving §§ 501 and 504 of Rehabilitation Act, federal agency adequately demonstrated "undue hardship" when, in order to accommodate employment of applicant with heart condition as park technician, agency's other two to four employees would be required to absorb duties relating to patrol of 150,000 acre park area). *But see* Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983) (employer required to bear cost of providing blind workers with readers, electronic devices, or other assistance needed to provide reasonable accommodation to their needs, at least where cost of such assistance represented "minute fraction" of employer's administrative budget). *Id.* at 382.

282 *Bey,* 540 F. Supp. at 927. Although the theory adopted by the court in *Bey* is sound, the application of that theory to the facts of *Bey* is questionable. It is unclear whether a court should regard the constraints imposed by a collective bargaining agreement as limiting an employer's obligation to accommodate. Agency regulations reject this view. *See* 34 C.F.R. § 104.11(c) (1981) (Department of Education); 45 C.F.R. § 84.11(c) (1982) (Department of Health and Human Services). Title V of the Rehabilitation Act contains no provision preserving the effect of collective bargaining agreements, distinguishing *Bey* from the situation in *Hardison,* discussed *supra* notes 122-24 and accompanying text. Even if the court may consider constraints imposed by collective bargaining agreements, the hardship imposed upon the employer in *Bey* was nonetheless minimal. The employer was neither obliged, as in *Hardison,* to allocate benefits in a fashion that might have impinged upon the fundamental freedom of other employees, nor faced with the prospect of increased costs because of a multitude of employees attempting to change their status to qualify for a special benefit.

turning upon its ability *to bear* the requested costs of accommodation, not upon the costs of accommodation alone.

In at least one case, a defendant has raised as a defense the inadequacy of benefits received in light of costs incurred. In *Upshur v. Love,* plaintiff, a blind teacher, alleged that he had been refused an appointment as a school administrator because of his handicap.[283] Although the court found that the defendant based the exclusion on plaintiff's lack of skills unrelated to his handicap, it went on to observe in dicta that the court would not require the school district to accommodate by hiring an aide who would assist plaintiff in undertaking virtually all those functions the school would be paying an administrator to perform.[284] In effect, the court acknowledged that it would not require accommodation where it would be so costly as to exceed the benefits to be gained by plaintiff's employment. The situation is an extreme one, however. Had defendant been able to show only that the costs of accommodation were great in comparison to benefits, and not that such costs completely outweighed expected benefits, a court would be less likely to conclude that an exclusionary refusal to accommodate was not rooted in plaintiff's handicap.

C. Exclusionary Judgments

A plaintiff proceeding under an exclusionary judgment theory concedes that applicable eligibility criteria are legitimate and assumes that accommodation is unnecessary. Instead, he alleges that he satisfies all governing criteria, but that defendant has misapplied those criteria to exclude him because he is handicapped. Because "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context,"[285] a judgment to exclude plaintiff on this basis violates section 504.

1. *Plaintiff's Case*

As with each of the other theories discussed in this Part, a plaintiff attempting to establish a violation of section 504 under the exclusionary judgment theory must demonstrate, first, that he was excluded from a federally assisted program or activity, and, second, that his exclusion was because of his handicap.[286] Plaintiff can readily establish the first of these points by showing that he applied to participate in a given program and was rejected for failing to satisfy applicable eligibility requirements. The second point, proof of causation, may be slightly more

283 474 F. Supp. 332 (N.D. Cal. 1979).

284 *Id.* at 342 (dicta).

285 Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979).

286 Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981).

complex. Plaintiff may show either that he is fully qualified to participate, apart from his handicap, giving rise to a judicially created presumption that, "but for" his handicap, he would not have been excluded,[287] or that defendant relied on plaintiff's handicap in reaching its decision to exclude.[288] Although either of these two methods shows that plaintiff was excluded for reasons related to his handicap, a question may arise whether plaintiff must demonstrate, as part of his prima facie case, that he is "otherwise qualified" (i.e., that he is qualified notwithstanding his handicap) in order to establish that the mere fact of his handicap, and not handicap-related inability, was the basis for his exclusion. At least one court has required such an additional showing.[289] The greater weight of authority has rejected this view, concluding that any obligation on the part of plaintiff to address the issue of handicap-related inability arises only when defendant has demonstrated the relevance of plaintiff's handicap to his ability to satisfy governing eligibility criteria.[290]

2. *Defendant's Case*

There are two principal lines of argument available to defendant in responding to plaintiff's prima facie case. First, defendant may urge that its exclusion of plaintiff was wholly unrelated to his handicap, directly rebutting plaintiff's evidence on the issue of causation.[291] Defendant

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287 *Doe,* 666 F.2d at 776; *Pushkin,* 658 F.2d at 1387.

288 666 F.2d at 776.

289 *See* Mantolete v. Bolger, 96 F.R.D. 179, 182-83 (D. Ariz. 1982) (in federal employment discrimination case, "before the burden shifts to defendant to justify its refusal to hire, plaintiff must first show a prima facie case of discrimination which includes demonstrating that she is 'qualified handicapped' and can perform the essential functions of the condition without endangering her safety or that of others").

290 *See infra* notes 298-306 and accompanying text.

291 *See, e.g.,* Guerriero v. Schultz, 557 F. Supp. 511, 514 (D.D.C. 1983) (foreign service officer failed to establish that discharge was because of status as schizophrenic or alcoholic rather than past misconduct, where agency showed that it had not relied on handicap as basis for discharge). A defendant who adopts this first line of argument must bear only a limited burden of producing evidence, not the burden of persuading the trier of fact that plaintiff's exclusion was unrelated to his handicap. *See* Doe v. New York Univ., 666 F.2d 761, 776 (2d Cir. 1981) (dicta); *cf.* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981) (in title VII disparate treatment case, defendant's burden on issue of causation is one of production, not persuasion). The introduction of defendant's evidence undercuts the judicially created presumption of causation, relied upon by plaintiff in establishing his prima facie case; once the presumption is destroyed, it drops from the case, leaving plaintiff's original burden of persuasion on the issue of causation unchanged. 450 U.S. at 255-56.

But see Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981) (dicta) (defendant's burden in § 504 case brought under exclusionary judgment theory is one of going forward and proving that plaintiff is not able to meet program requirements in spite of his handicap, or that his rejection from program was for reasons other than his handicap). It may be appropriate to characterize defendant's burden as one of persuasion when defendant seeks to justify its exclusion of plaintiff as necessary in light of plaintiff's handicap-related inabilities, or on other grounds once the court has determined that the exclusion was related to plaintiff's handicap. *See infra* notes 311-22 and accompanying text. The court's statement

may accomplish this by demonstrating that plaintiff does not satisfy those eligibility criteria unrelated to his handicap,[292] or by introducing additional evidence showing that it had nondiscriminatory grounds for excluding plaintiff, thereby rebutting the presumption of causation discussed above.[293] Although a defendant who has admitted reliance upon plaintiff's handicap in reaching its decision to exclude is not foreclosed from making this argument, in most instances the defendant will face an uphill battle in bringing the argument to a successful close.[294]

Defendant may, in the alternative, concede that its exclusion of plaintiff was related to plaintiff's handicap, but contend that the exclusion was permissible in light of plaintiff's alleged handicap-related inabilities. The Supreme Court's decision in *Davis* provides a sound theoretical base for the proposition that handicap-related inability can constitute a permissible ground for exclusion.[295] Defendant's success will depend on whether there is an adequate factual basis to conclude that a particular handicap-related inability prevents plaintiff from satisfying applicable eligibility criteria, and whether, if the evidence is in equipoise, defendant, rather than plaintiff, bears the burden of persuasion. The evidence concerning the extent to which plaintiff's handicapping condition impairs his abilities is often in conflict, and stereotypes concerning the abilities of handicapped persons often influence the trier of fact.[296] Accordingly, resolution of the question whether defendant

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in *Pushkin* appears, however, to extend beyond these circumstances to characterize defendant's burden as one of persuasion even in those instances in which defendant merely attempts to rebut plaintiff's initial showing of causation. At least in the latter situation, courts should regard the Supreme Court's reasoning in *Burdine,* adopted by the Second Circuit in *Doe,* as controlling.

292 *See, e.g.,* Upshur v. Love, 474 F. Supp. 332, 342 (N.D. Cal. 1979) (blind teacher who lacked necessary administrative skills legitimately denied appointment as school administrator).

293 *See supra* text accompanying note 287. In order to be persuasive, however, defendant must generally have been aware of these shortcomings at the time of plaintiff's initial exclusion. *See, e.g.,* Mantolete v. Bolger, 96 F.R.D. 179, 182 (D. Ariz. 1982) (in employment discrimination case under § 504 of the Rehabilitation Act, defendant, which attempts to articulate a "legitimate nondiscriminatory reason" for refusing to hire plaintiff, may not rely on facts not known to it at time of its refusal to hire in order to rebut plaintiff's claim that exclusion was beeause of handicap); Joyner v. Dumpson, 533 F. Supp. 233, 239 (S.D.N.Y. 1982) (court will not supply rationales not identified by defendant in defense of its decision to exclude plaintiffs from residential placement in violation of § 504), *rev'd on other grounds,* 712 F.2d 770 (2d Cir. 1983).

294 *See, e.g.,* Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1382-83 (10th Cir. 1981).

295 *See supra* notes 167-69 and accompanying text.

296 The court rather than a jury will often serve as the trier of fact. Because damages or other compensatory relief is available only in certain actions under § 504, *see supra* note 40, plaintiffs in most cases will seek equitable relief, which falls within the province of the court, rather than a jury. The courts that have considered the issue have stated that plaintiff does not have a right to a jury trial in § 504 actions. *See* Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1407 n.3 (5th Cir. 1983) (dicta) (discussing, without

bears the burden of persuasion is of critical importance in many section 504 cases brought under the exclusionary judgment theory.[297] The courts remain sharply divided on this issue.

The Tenth Circuit, in *Pushkin v. Regents of the University of Colorado,*[298] placed the burden of persuasion on the issue of handicap-related inability on the defendant. The case involved the efforts of a medical doctor, disabled by multiple sclerosis, to gain admission to the university's psychiatric residency program. The university denied plaintiff's application because of low interview scores. The scores reflected judgments by program faculty that patients would react adversely to plaintiff's disability and that plaintiff, because of his condition, would find the program unduly stressful. Plaintiff admitted that his disease impaired his abilities to write and to walk, but maintained that successful prior service as a psychiatric resident amply demonstrated his ability to participate in the Colorado program.

The court of appeals concluded that the university had violated section 504. In light of the conflicting evidence, the nature of defendant's evidentiary burden on the issue of handicap-related inability played a critical role in the court's decision. The court characterized defendant's burden as one "of going forward and proving that plaintiff was not an otherwise qualified handicapped person,"[299] leaving to plaintiff the more limited burden of "going forward with rebuttal evidence showing that the defendants' reasons for rejecting the plaintiff are based on misconceptions or unfounded factual conclusions."[300] Because the trial court had not clearly erred in its determination that the university had relied upon plaintiff's handicap as grounds for his rejection, and that plaintiff's handicap did not limit his ability to perform successfully

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deciding, question); Giles v. EEOC, 520 F. Supp. 1198, 1200 n.1 (E.D. Mo. 1981) (jury trial not available).

297 In some instances, plaintiff may be able to show quite clearly that his handicap does not affect his ability to satisfy applicable eligibility criteria. For example, plaintiff may be able to show that he has fully controlled the symptoms associated with his handicapping condition. *See, e.g.,* Doe v. Syracuse School Dist., 508 F. Supp. 333 (N.D.N.Y. 1981) (plaintiff with history of mental illness improperly denied employment with school system); Duran v. City of Tampa, 430 F. Supp. 75 (M.D. Fla. 1977) (plaintiff likely to succeed on merits of claim that city violated § 504 by refusing plaintiff employment as police officer based on plaintiff's childhood history of epilepsy; however, no irreparable injury was shown to justify award of preliminary injunction). Plaintiff may also be able to show that his condition does not impair his ability to satisfy program requirements. *See, e.g.,* Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1389-90 (10th Cir. 1981) (plaintiff's multiple sclerosis did not impair his ability to function in psychiatric residency program); Kling v. County of Los Angeles, 633 F.2d 876, 879-80 (9th Cir. 1980) (preliminary injunction granted in light of evidence that plaintiff with Crohn's disease would not experience undue number of absences so as to impair her ability to participate in nursing program).

298 658 F.2d 1372 (10th Cir. 1981).

299 *Id.* at 1387.

300 *Id.*

as a psychiatric resident, the court of appeals affirmed.[301]

The Second Circuit, in *Doe v. New York University,*[302] rejected the approach taken in *Pushkin,* concluding that defendant bore only a limited burden of producing evidence on the issue of handicap-related inability, and that plaintiff should bear the ultimate burden of persuasion. The case involved the efforts of a woman with a history of mental illness to gain readmission to New York University's medical school. The medical school had accepted plaintiff based on her representation that she suffered from no serious emotional problems. In fact, in the years immediately preceding her original application, she had experienced difficulties in dealing with stress and had attempted suicide. Shortly after plaintiff commenced her medical studies, she was forced to disclose her prior medical history, again experienced severe emotional difficulties, and began a pattern of self-abuse. The school forced her to withdraw from the program, leaving open the possibility that she might be allowed to reenroll following a leave of absence. A year and a half later, after a period of intensive therapy, plaintiff sought readmission. The medical school reviewed the divergent opinions of several psychiatrists concerning her condition and refused plaintiff's request. Plaintiff, meanwhile, had successfully completed a masters degree in public health and had received awards for her effective performance in several high-pressure government positions.

The Second Circuit held that the university had acted within its rights in denying plaintiff's application for readmission, and reversed the trial court's award of a preliminary injunction in her favor. In the court's view, the critical issue was "not whether [Doe's] handicap was considered" by the university in reaching its decision to exclude, but whether "under all of the circumstances [the handicap] provide[d] a reasonable basis for finding the plaintiff not to be . . . as well qualified as other applicants."[303] Although plaintiff's prima facie case created an inference that defendant had impermissibly taken her handicap into account as a basis for its decision to exclude, defendant rebutted that inference "by going forward with evidence that the handicap [was] relevant to qualifications for the position sought," leaving to plaintiff "the ultimate burden of showing by a preponderance of the evidence that in spite of the handicap [she was] qualified . . . [or] at least as well qualified as other applicants who were accepted."[304] The court concluded that there was "a significant risk that Doe [would] have a recurrence of her mental disorder, with resulting danger to herself and to others with

301 *Id.* at 1389-90.

302 666 F.2d at 761.

303 *Id.* at 776.

304 *Id.* at 776-77 (footnote omitted).

whom she would be associated as a medical student."[305] Two other factors also influenced the court to decide in favor of defendant: the deference the court believed it should afford a university's decisions concerning admissions standards; and the large number of qualified applicants competing for the very limited number of positions available in the medical school program.[306]

The competing approaches adopted by the Tenth and Second Circuits[307] warrant careful examination. Both courts began their analysis of the allocation of the burden of proof by considering title VII disparate treatment cases. Under that precedent, plaintiff generally establishes a prima facie case by demonstrating that he satisfies all applicable eligibility criteria, thereby triggering a judicially created presumption that he was denied a desired employment opportunity because of his

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305 *Id.* at 777.

306 *Id.* at 775-76.

307 In addition to the Tenth and Second Circuits, three other federal courts of appeals have touched upon the nature of the plaintiff's prima facie case and the allocation of the burden of proof under the exclusionary judgment theory. The Eleventh Circuit, in Treadwell v. Alexander, 707 F.2d 473, 475 (11th Cir. 1983), an employment discrimination case brought under §§ 501 and 504, embraced the general rule that defendants must bear the burden of persuasion to show that criteria are job related and that plaintiff could not safely and efficiently perform the essential functions of the job. Without further elaboration, the court, like the Tenth Circuit, then applied this rule to both plaintiff's exclusionary criteria and exclusionary judgment challenges. The court concluded that the defendant adequately justified its determination that an applicant with a history of heart trouble could not properly perform as a park technician. *Id.* at 478.

The Fifth Circuit appears to have adopted a position similar to that of the Second Circuit. In Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402 (5th Cir. 1983), plaintiff alleged that she had been discharged from her position as a psychiatric worker with a state mental health program because she suffered from ongoing psychiatric problems. Although Ms. Doe performed her work in an exemplary fashion, she had required several periods of hospitalization, had repeatedly threatened to commit suicide, and had made little progress in psychotherapy. Her supervisors concluded that her condition was deteriorating and that she could no longer serve effectively as a therapist because her possible suicide might adversely affect her patients. They discharged Ms. Doe, conceding that her illness served as the basis for their action. Ms. Doe sued under § 504 and successfully persuaded a trial jury that she had been wrongfully dismissed. The trial court, however, set aside the verdict as unsupported by the evidence, and she appealed. The Fifth Circuit affirmed, addressing the issue of the burden of proof only in a footnote:

> Ms. Doe was required to prove her handicap for jurisdictional purposes, but simultaneously required to prove that she was not so handicapped as to be unqualified to perform her job. Of course, the initial jurisdictional burden is met by presentation of a "colorable claim." For a discussion of the appropriate presentation of proof in section 504 cases, see *Pushkin v. Regents of University of Colorado* . . . .

704 F.2d at 1408 n.6 (citation omitted). Later in the opinion, the court also relied upon Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981), as supporting its resolution of the case. 704 F.2d at 1410-12. Although the court appears to have placed the burden of persuasion upon plaintiff to demonstrate her ability to perform as required, its limited discussion of this question, and its citation of both *Pushkin* and *Doe v. New York University,* leaves the matter in doubt.

The Ninth Circuit has noted but reserved the question of plaintiff's burden in cases brought under an exclusionary judgment theory. Cook v. Department of Labor, 688 F.2d 669, 671 (9th Cir. 1982).

race or other protected characteristic.[308] Defendant may rebut this presumption by going forward with evidence that it had a "legitimate, nondiscriminatory reason" for the denial. Plaintiff, in turn, can attack defendant's response as a mere pretext for discrimination.[309] In the event the evidence is equally divided, however, the burden of persuasion on the issues of discrimination and causation remains with plaintiff.[310]

The two courts reshaped this underlying precedent in different ways for application in the context of section 504. The Tenth Circuit sought to determine whether defendant had considered plaintiff's handicap in determining whether plaintiff satisfied applicable eligibility criteria. The court then required defendant to justify its exclusionary action.[311] This requirement of justification, rather than refutation, placed the burden of persuasion on defendant. In the court's view, reaching an exclusionary judgment is directly analogous to adopting an exclusionary criterion. Defendant has established as its de facto eligibility criterion a level of ability exceeding that demonstrated by plaintiff. Where that criterion excludes plaintiff because of his handicap, defendant must carry the burden of justifying the criterion. Accordingly, defendant must persuade the trier of fact that plaintiff's level of ability is inadequate and that a higher standard of performance is required to meet defendant's needs.

The Second Circuit, on the other hand, viewed the issue as one of causation, not of justification. It required plaintiff to demonstrate that defendant had considered his handicap in reaching the exclusionary judgment. Plaintiff might accomplish this by employing the same presumption adopted under title VII or by relying on defendant's acknowledgment that plaintiff's handicap had played a role in its decision.[312] At that point, defendant need only show that plaintiff's handicap was relevant to the governing eligibility criteria, in effect suggesting that plaintiff's inability, not the mere fact of his handicap, provided a legitimate, nondiscriminatory reason for its decision. Plaintiff may demonstrate that defendant's rationale is a mere pretext by establishing that he is fully qualified to participate, notwithstanding his handicap. If the evidence is evenly divided on the issue of ability, however, plaintiff loses.

Several factors must be considered in determining which of these competing positions represents the better view. The language of section 504—"no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded"—departs from the established

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308 *See* Doe v. New York Univ., 666 F.2d at 776; Pushkin v. Regents of the Univ. of Colo., 658 F.2d at 1384-86. For a discussion of the elements of plaintiff's prima facie case under the disparate treatment theory, see *supra* note 93.

309 *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981).

310 *Id.* at 256.

311 658 F.2d at 1385-86.

312 *See supra* note 291.

practice under federal employment discrimination statutes of recognizing inabilities related to gender, national origin, religion, and age as affirmative defenses to be pleaded and proved by the defendant.[313] The statute instead describes plaintiff as a "qualified" individual, arguably suggesting that he must demonstrate that he possesses requisite abilities, just as he must establish the existence of "handicap," to fall within the provision's protective ambit. Under this view plaintiff should bear the burden of persuading the trier of fact that he does not suffer from disqualifying, handicap-related inabilities. On the other hand, one may argue that the statutory language is not that clear. Congress apparently intended to incorporate an inability defense of the sort recognized under federal employment discrimination statutes, and adopted an adjectival construction as a shorthand method to accomplish that goal.[314] It is unclear whether Congress intended this choice of syntax to disturb the traditional rule that defendant should bear the burden of persuasion in establishing an exception to the overriding principle of nonexclusion.[315]

The Federal Rules of Evidence may shed light on the issue. In instances involving presumptions, rule 301 allocates the burden of persuasion to the party who is initially assigned the burden of proof on an issue.[316] One could argue that plaintiff's prima facie case under the exclusionary judgment theory creates a presumption or inference that defendant's conduct was impermissible. Although defendant may therefore be obliged to produce evidence showing that his conduct is permissible to rebut plaintiff's prima facie case, the burden of persuading the trier of fact that defendant's conduct was in fact impermissible

313 Title VII and the Age Discrimination Act, in contrast, address the questions of abilities related to religion, sex, national origin, and age in a separate statutory section, which specifies that such characteristics may be treated as bona fide occupational qualifications in certain narrow circumstances "[n]otwithstanding any other provision" of those statutes. *See* Age Discrimination in Employment Act of 1967, § 4(f)(1), 29 U.S.C. § 623(f)(1) (1976) (creating exception "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business"); Title VII of the Civil Rights Act of 1964, § 703(e), 42 U.S.C. § 2000e-2(e) (1976) (creating exception "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

314 There are ample syntactieal reasons for Congress's choice. Because the disabilities associated with handicap result in very individualized levels of impairment, a defense permitting distinctions based on "handieap" generally might be overbroad. Framing the defense in terms of ability ("except that lack of ability may be a bona fide qualification") seems to create a tautology. The defense, in any event, would have to apply outside the context of "occupational" qualifications.

315 *See* cases cited *supra* notes 206, 208.

316 Federal Rule of Evidence 301 provides that

> [i]n all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

should remain with plaintiff throughout. This argument, however, appears flawed in at least two respects. First, it assumes, rather than decides, the central issue. By framing the inquiry in terms of an inference or presumption of impermissible behavior, it ignores the underlying question of whether courts should view handicap-related inability as an affirmative defense. Second, it is based on the premise that rule 301 applies to all types of inferences and presumptions. The language of the rule limits its application to "civil actions . . . not otherwise provided for by Act of Congress." It is at least arguable, therefore, that a judicial finding aimed at divining congressional intent embodied in a federal statute designed to allocate the burden of proof simply falls outside the scope of the rule.[317]

In light of the ambiguity in the statutory language and the questionable relevance of the Federal Rules of Evidence, policy considerations should control. The principal purpose of section 504 is to eliminate denials of equal opportunity based on stereotyped judgments concerning a handicapped individual's inabilities. Allocating the burden of proof on the issue of handicap-related inability to defendant significantly advances this purpose, because it provides an important incentive for defendants to inquire carefully and objectively into plaintiff's true abilities. Congress has expressly recognized the need for such an allocation of the burden of persuasion under other statutes that permit discrimination when justified by inabilities associated with sex, religion, national origin, and age.[318] In the absence of a clearly contrary directive, that approach should be incorporated here as well.

Courts must also consider the need for logical consistency with the rest of the section 504 statutory scheme. Commentators have criticized the lack of uniformity in the prevailing system for allocating the burden of proof in disparate treatment and disparate impact cases under title VII.[319] Adoption of competing approaches to this question under section 504 would probably be even more fraught with peril; it may often

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317 *See* United States v. City of Chicago, 411 F. Supp. 218, 231-33 (N.D. Ill. 1976) (in disparate impact case under title VII, defendant bears burden of persuasion in establishing judge-made business necessity defense where that defense had been adopted pursuant to act of Congress, thus falling outside rule 301), *aff'd in part, rev'd in part on other grounds,* 549 F.2d 415 (7th Cir. 1977); S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 69-70 (3d ed. 1982); Belton, *supra* note 194, at 1266-71; Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases,* 32 STAN. L. REV. 1129, 1157-61 (1980).

318 *See supra* note 313.

319 *See* Belton, *supra* note 194, at 1207 (asserting that courts' failure to formulate coherent framework for allocating burdens of proof hinders enforcement of antidiscrimination laws); Mendez, *supra* note 317 (discussing federal courts' inconsistent development of rules governing allocation of burden of proof in disparate treatment cases). *See also* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1335-36 (3d Cir. 1981) (allocating to defendant burden of production in title VI unequal opportunity to benefit cases to achieve procedural uniformity rather than undesirable disparity such as exists between title VII disparate impact and disparate treatment cases).

be unclear whether a defendant has adopted an exclusionary criterion (for example, informally concluding that persons suffering from a particular disability generally cannot perform as required) or reached an exclusionary judgment (for example, determining that a given individual suffering from that disability does not satisfy more neutrally defined, generally applicable eligibility criteria). There is little basis for distinguishing between these two situations for purposes of allocating the burden of proof. If, as discussed above, a defendant bears the burden of persuasion in establishing the necessity for an exclusionary, ability-based, eligibility criterion,[320] defendant should likewise bear such a burden in justifying its exclusion of a handicapped individual on grounds of handicap-related inability in an exclusionary judgment case.

There are countervailing considerations. Where the lives of critically ill patients are at stake, public policy may dictate exclusion if there is any doubt concerning an individual's ability to serve such patients. To use the allocation of the burden of proof as a means of addressing this concern, however, would be a mistake. There are more suitable methods of analysis to protect valid exclusions. As previously discussed,[321] program operators may establish eligibility criteria that reflect their legitimate needs to ensure the public safety. A nursing or medical school is entitled to ensure that persons who serve as hospital staff present no significant safety risk to patients. A medical school might legitimately contend that no individual who may foreseeably cause significant injury to patients should be permitted on its staff. If it can then demonstrate, for example, that an individual with a history of mental disability may foreseeably cause significant injury, it will have carried the requisite burden of persuasion. Other situations will require a less stringent threshold of eligibility, and a defendant presenting such limited evidence will probably fail to persuade the trier of fact of a similar plaintiff's ineligibility.[322]

Based on the forgoing considerations, the sounder approach to allocating the burden of proof in exclusionary judgment cases would be the following. Plaintiff must bear the burden of persuading the trier of fact that defendant excluded him from a federally assisted program, and that his exclusion was related to his handicap. Defendant may attempt to rebut plaintiff's prima facie case by showing that it excluded plaintiff for reasons unrelated to his handicap. In that case, defendant's burden is merely one of producing evidence; the burden of persuasion on the issue of causation remains with plaintiff. When defendant admits, however, that it has relied upon plaintiff's handicap as a basis for exclusion,

320 *See supra* note 208.

321 *See supra* Part IV.A.2.a.

322 *See, e.g.,* Doe v. Syracuse School Dist., 508 F. Supp. 333 (N.D.N.Y. 1981) (plaintiff with history of mental illness improperly denied employment with school district).

or asserts that the exclusion was justified because of certain alleged handicap-related inabilities, defendant should bear the burden of persuasion on the issue of inability.

D. Summary

Plaintiffs who have been foreclosed from participation in a federally assisted program or activity as a result of a recipient's application of certain selection or retention criteria may allege a violation of section 504 using one or more of three possible theories. They may assert: (1) that the criteria used are themselves unnecessarily exclusionary; (2) that applying one or more criteria to exclude them from participation was unnecessary and unreasonable in light of various accommodation measures that the recipient might have adopted; or (3) that recipient improperly applied governing criteria to exclude them based on unfounded judgments concerning their abilities.

The responses available to a defendant whose actions have been challenged as a violation of section 504 will vary depending on the theory plaintiff employs. Thus, although defendant may be able to justify its use of exclusionary criteria as essential to ensuring that program participants are able to perform safely and efficiently, an attempt to defend such criteria on cost-related grounds will probably fail. In contrast, sharply circumscribed defenses, based on necessary institutional prerogatives and cost-related concerns, may justify exclusionary refusals to accommodate. Finally, although inability to satisfy applicable eligibility criteria may serve as a defense in actions based upon an exclusionary judgment theory, it is unclear whether defendants' evidentiary burden in such cases is more limited than the heavy burden of asserting inability as a grounds for using criteria that are themselves challenged as exclusionary.

V
Denial of Benefits

A handicapped individual who has been denied all benefits of participation in a particular program suffers an injury that closely resembles the outright foreclosure of participation associated with the exclusion cases just considered. Despite this strong similarity, exclusion cases and denial of benefits cases differ in at least one critical respect. In exclusion cases, a handicapped plaintiff has been foreclosed from participation because he is unable to satisfy eligibility criteria developed to ensure effective program operation. In denial of benefits cases, the plaintiff satisfies all acknowledged eligibility criteria, but is nonetheless foreclosed from participation. Courts in denial of benefits cases have therefore been able to avoid the difficult factual and policy questions posed by evaluation of eligibility criteria allegedly required to ensure

effective program operation and the assessement of a specific handicapped individual's ability to perform effectively in the context of a particular program. Instead, the courts must assess more marginal justifications for the conduct in question—justifications based upon alleged institutional prerogatives and program costs.

A. Plaintiff's Case

In order to establish a prima facie case in a denial of benefits case, a handicapped plaintiff must address two issues. First, he must demonstrate that defendant has denied him all meaningful benefits associated with participation in a federally assisted program. Generally, plaintiff can establish this point by introducing evidence that he requested particular program services or benefits, that his request was rejected, and that as a result he was foreclosed from receiving a desired opportunity.[323] Second, he must show that defendant denied the benefits in question because of his handicap. Plaintiff can accomplish this by demonstrating that he satisfies all pertinent eligibility criteria, creating an inference that the denial related to his handicap.[324] In most cases, he can also point to direct evidence that establishes a causal nexus between his handicap and the denial. For example, a handicapped person wishing to attend school may show that he and other similarly disabled persons cannot safely attend the school unless certain auxiliary services are provided.[325]

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323 *See, e.g.,* Association for Retarded Citizens v. Frazier, 517 F. Supp. 105, 118-19 (D. Colo. 1981) (denial of free appropriate education to handicapped children in state training home arguably violated § 504; plaintiffs need not demonstrate that nonhandicapped children, in fact, receive an adequate education because court will presume that normal school-aged children receive adequate educational services); Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976) (refusal to provide clean intermittent catheterization needed to enable child with spina bifida to participate in mainstream elementary school classroom violates § 504).

324 *See, e.g.,* Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980), *aff'd following remand,* 703 F.2d 823 (5th Cir. 1983) (clean intermittent catheterization must be provided to child with spina bifida where, without that service, child will be unable to participate in preschool program); Ferris v. University of Tex., 558 F. Supp. 536, 539 (W.D. Tex. 1983) (mobility-impaired students who satisfied all academic requirements for college study and who would have been able to use shuttle bus service had physical barriers been removed to permit their participation were "otherwise qualified" individuals within meaning of § 504; however, bus service was not "program" that received "federal financial assistance" for purposes of § 504).

325 *See, e.g.,* Sanders by Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361, 1371-72 (W.D. Mich. 1983) (learning-disabled child who received minimal benefit from regular education program was denied benefits "because of" her handicap where, "but for" her disabilities, education she received would have been appropriate); *see also* Ferris v. University of Tex., 558 F. Supp. 536, 539 (W.D. Tex. 1983) (causal nexus demonstrated where mobility-impaired plaintiffs would have been able to use shuttle bus service had physical barriers been removed).

B. Defendant's Case

Once plaintiff has established a prima facie case, defendant must seek to justify the challenged denial.[326] If defendant had concluded that plaintiff's handicap impaired his ability to satisfy legitimate eligibility criteria, it would have formally excluded plaintiff as unqualified to participate in its program, and the case would have proceeded on one or more of the available exclusion theories. That defendant did not adopt an exclusionary approach presupposes that plaintiff's handicap is not directly and substantially related to plaintiff's ability to participate successfully in defendant's program. Accordingly, in denial of benefits cases defendants have had to rely on defenses based on institutional prerogtives and cost-plus defenses in an attempt to demonstrate that it denied plaintiff benefits for reasons other than his handicap.

1. *Institutional Prerogatives*

The courts have accorded academic decisionmakers considerable deference in developing academic selection criteria that are closely related to the purposes of the educational enterprise.[327] In contrast, courts have readily rejected claims of institutional prerogatives when raised in defense of an outright denial of educational benefits provided by elementary and secondary schools.

In a number of cases,[328] parents of children afflicted with spina bifida have successfully challenged the refusal of school authorities to ensure that school personnel provide their children with clean intermittent catheterization[329] during school hours. The parents argued that

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326 The courts have not yet discussed the nature of defendant's evidentiary burden in denial of benefits cases. In cases where plaintiff has been able to demonstrate the existence of the requisite causal nexus between the denial of benefits and his handicap without reference to a judicially created presumption of causation, defendant's burden should be one of persuasion. Such allocation of the burden of proof is appropriate where defendant makes an affirmative defense that his actions were fully justified. *See supra* note 208 and accompanying text.

327 *See supra* notes 266-70 and accompanying text.

328 *See* Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980), *aff'd following remand,* 703 F.2d 823 (5th Cir. 1983), *cert. granted sub nom.* Irving Indep. School Dist. v. Tatro, 104 S. Ct. 523 (1983); Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976); *see also* 56 Fed. Reg. 4912 (1981) (United States Department of Education interpretative ruling requiring local educational agencies to provide catheterization where that service constitutes needed relative service).

329 The court of appeals, in *Tatro v. Texas,* described clean intermittent catheterization (CIC) as follows:

> CIC is a very simple procedure which can be performed within five minutes. The catheter is washed with soap and water; the urethral area is wiped clean; the catheter is introduced approximately one and one-half inches into the urethra and the bladder contents drained; the catheter is withdrawn; and the amount of urine collected is measured and noted. The procedure can be taught to anyone after a training session of approximately thirty minutes, and it need not be performed by a doctor or nurse. Currently, [plaintiffs' child] is catheterized at home by her parents, teenage sibling, and babysitter. However, when [the child] is eight or nine years-old, she will be able to perform CIC upon herself.

their children were fully qualified, in academic terms, to receive instruction in a regular school classroom. They further emphasized that the refusal by defendant school authorities to provide the needed service denied their children the opportunity to learn in the appropriate, least restrictive setting, and instead relegated them to educationally unsatisfactory placements. In response, defendants contended that section 504 imposed no obligation to provide "health services" such as clean intermittent catheterization. The courts in rejecting defendants' contentions have reasoned that schools may be required to expand their traditional functions to provide minor health services where necessary to permit a handicapped child to receive educational benefits.[330]

Several factors undoubtedly contributed to the outcome in these cases. First, the benefit denied—the opportunity to receive a basic education in an integrated setting—has long been recognized by the courts as especially important.[331] Second, in recent years federal and state law has expanded the narrow mission of schools by requiring not only the provision of traditional instruction, but also related services.[332] Finally,

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625 F.2d at 559 n.3.

330 *See also* Department of Educ. v. Katherine D., 531 F. Supp. 517 (D. Hawaii 1982), *aff'd in part and rev'd in part,* No. 82-4096, slip op. (9th Cir. Nov. 7, 1983). In *Katherine D.,* a child with tracheomalacia alleged that she could only attend classes in a regular school classroom if school personnel were trained and willing to assist by administering medication, reinserting her tracheotomy tube should it become dislodged, and suctioning excess mucus from her lungs if necessary. School authorities attempted to justify their refusal to provide these services by citing contract grievances filed by teachers who were unwilling to perform such functions and expressing concern about the possible lack of competence and unavailability of school personnel to carry out these responsibilities. The court found these arguments to be unpersuasive and ordered that the school system provide the services or pay for plaintiff's education in a comparable private school setting where the necessary services would be available.

On appeal, the Ninth Circuit reversed on the theory that the claim under § 504 had been superseded by the comprehensive remedy provided by the EHA. Department of Educ. v. Katherine D., No. 82-4096, slip op. (9th Cir. Nov. 7, 1983). Other courts have taken a contrary position. *See, e.g.,* Georgia Ass'n for Retarded Citizens v. McDaniel, 716 F.2d 1565, 1578-80 (11th Cir. 1983). The Supreme Court is likely to address this quesiton in the course of its forthcoming decision in Irving Indep. School Dist. v. Tatro, 104 S. Ct. 523 (1983).

331 *See, e.g.,* Plyler v. Doe, 457 U.S. 202 (1982).

332 *See* Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401(17)-(18), 1412(1) (1982) (requiring that recipients of particular federal funds assure handicapped children "free appropriate public education," which consists of "special education and related services"; "related services" is, in turn, defined to include,

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychologieal services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diaguostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education . . . .)

Id. at § 1401(17). Similar provisions are included in many state statutes. *See, e.g.,* N.C. GEN. STAT. §§ 115C-108 to -111 (Supp. 1981). For a general discussion of the Education for All Handicapped Children Act, see Board of Educ. v. Rowley, 458 U.S. 176 (1982); Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-*

the injury to the schools' prerogatives resulting from the required remedies was in many respects more symbolic than real: assisting with catheterization required little time and minimal training.[333]

These relatively narrow decisions provide some broader lessons. Schools and other institutions will have considerable difficulty in justifying denial of benefits to a handicapped individual based on minimal health problems unrelated to the individual's capacity to participate in a particular program. Absent a substantial showing of other compelling institutional concerns closely linked to the institution's core mission or purpose,[334] defendants will very likely be unsuccessful in justifying an outright denial of benefits as consistent with section 504.

2. *Cost-Plus Defenses*

Defendants have been no more successful in denial of benefits cases when they have relied on a cost-plus defense. The cases fall into two categories: those involving incapacity to bear the costs of according at least some benefits of participation to plaintiffs, and those involving implicit or express claims that the costs of permitting participation substantially outweigh the benefits.

a. *Incapacity.* Where the costs of permitting participation have been extremely high because necessary technology is unavailable, the courts have generally assumed that defendants have no obligation to develop that technology and have found that denying plaintiffs the opportunity to participate in federally assisted programs under these circumstances does not violate section 504. Courts applied this reasoning in several early cases in which mobility-impaired wheelchair users challenged the refusal of public transportation authorities to purchase lift-equipped buses that would have permitted plaintiffs to use the public transit system.[335] They held that, because the United States Department of Transportation had found that such buses were not readily

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142, 15 CONN. L. REV. 477 (1981); Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975,* 92 HARV. L. REV. 1103 (1979).

333 Both courts also alluded to the fact that minimal costs were involved but expressed differing views on the role of cost generally. *Compare* Tatro v. Texas, 625 F.2d at 564-65 n.19 (catheterization, on evidence at hand, did not appear to present undue financial or administrative burden; however, § 504 might not require costly kidney dialysis should child require that service during school day) *with* Hairston v. Drosick, 423 F. Supp. at 184 ("School officials must make every effort to include [handicapped] children within the regular public classroom situation, even at great expense to the school system.").

334 *See* Hairston v. Drosick, 423 F. Supp. at 184 (school may not exclude handicapped child from regular classroom "without bona fide educational reason" and "compelling educational justification").

335 Atlantis Community, Inc. v. Adams, 453 F. Supp. 825 (D. Colo. 1978); Snowden v. Birmingham-Jefferson County Transit Auth., 407 F. Supp. 394 (N.D. Ala. 1975), *aff'd mem.,* 551 F.2d 862 (5th Cir. 1977).

available, defendants had no obligation to acquire vehicles with the desired equipment.

The defense recognized in these transportation cases appears to be a narrow one. In several other situations, where defendant could provide access only at substantial cost, courts have required compliance with section 504. For example, courts have disregarded defendants' cost concerns in requiring that defendants provide hearing-impaired plaintiffs with sign language interpreters in college lectures.[336] Similarly, the Court of Appeals for the Tenth Circuit rejected cost as a defense in a case in which state and local education agencies had denied a large class of handicapped children all meaningful education.[337] The court found defendants' cost-based arguments unpersuasive, concluding that, to the extent that cost is to be considered as a possible justification for a denial of benefits, the appropriate test is whether required program modifications would "jeopardize the overall viability of the State's educational system,"[338] a difficult standard to meet.

b. *Disproportionate Cost in Light of Benefit.* Contentions that the cost of providing access significantly outweighs the benefits that would be afforded have also been unsuccessful. In the early case of *Mills v. Board of Education,*[339] a decision that was one of the moving forces behind the enactment of section 504 and the Education for All Handicapped Children Act, the court stated the analysis clearly:

> [T]he District of Columbia's interest in educating the excluded [handicapped] children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a

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336 *See* Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977). The leading case in this area, Cameniseh v. University of Tex., 616 F.2d 127 (5th Cir. 1980), *vacated,* 451 U.S. 390 (1981) (remanded to decide question of who must pay for interpreter), failed to address directly the cost issue.

337 New Mexico Ass'n for Retarded Citzens v. New Mexico, 678 F.2d 847 (10th Cir. 1982) (broad ranging failure to provide adequate services to handicapped children violates § 504).

338 678 F.2d at 855. *But see* Sanders by Sanders v. Marquette Pub. Schools, 561 F. Supp. 1361, 1371 (W.D. Mich. 1983) (in action asserting that inappropriate educational placement had virtually denied learning disabled child any meaningful education, plaintiff was required to show that providing necessary services would not constitute undue burden for defendant school system; court further stated that it would presume that no undue burden would result in light of defendants' practice of providing special education services to other students, but left open possibility that school system might rebut that presumption by showing "that funding was simply unavailable, or that the program requested by plaintiff could not have been provided without great expense and detriment to the system"). Other courts have articulated somewhat less precise cost-related incapacity standards. *See supra* note 333.

339 348 F. Supp. 866 (D.D.C. 1972) (failure of District of Columbia to provide educational serviees to mentally retarded, emotionally disturbed, physically handieapped, hyperactive, and other children with behavioral problems violated fifth amendment guarantee of due process of law and related right to equal protection).

> manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.[340]

It is apparent that some benefits, such as education, are so highly esteemed that a defendant will have difficulty in demonstrating that its costs of affording handicapped individuals the opportunity to participate outweighs the benefits to be gained from that participation. This is particularly true because if defendant has denied a large class of individuals an opportunity to participate the benefits to be gained by an individual plaintiff must be multiplied by the large number of other individuals in the affected class.[341] Defendants also will be hard put to establish that a court should consider their raw costs of providing program access, no matter how great. As the court in *Mills* emphasized, the issue in denial of benefits cases is really one of resource allocation. Section 504 requires defendants who have denied access to handicapped individuals over an extended period of time to readjust their skewed distribution of resources by taking steps to modify their ongoing programs. Refusing to do so provides further evidence of their violation of the statute's mandate; it can hardly provide grounds for a legitimate defense.

Even outside of the education context, it is therefore not surprising that courts have rejected defenses premised on the costs of compliance outweighing the benefits to be gained. Cases involving access to public transportation systems illustrate this fact most clearly. Once lift-equipped buses became available, courts found that federally assisted transit authorities that failed to take steps to render their bus systems accessible were in violation of section 504.[342] More recently, despite the demise of federal regulations that required costly renovations to public transportation systems, the Second Circuit has reaffirmed that federally assisted transit authorities must make some special efforts to assure access.[343]

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340 *Id.* at 876.

341 *See* New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 854 (10th Cir. 1982); *cf.* Lau v. Nichols, 414 U.S. 563, 572 (1973) (Blackmun, J., & Burger, C.J., concurring) (failure of San Francisco school authorities to provide special instruction to substantial number of children with English language deficiencies was inconsistent with agency regulations and accordingly violated § 504).

342 *See* United Handicappcd Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977); Bartels v. Biernat, 427 F. Supp. 226 (E.D. Wis. 1977).

343 *See* Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982). For a summary of newly proposed regulations governing federal assistance to public transit authorities, see *infra* note 375.

C. Summary

Denial of benefits cases present the greatest obstacles for defendants. In these cases defendants lack the shield of expertise in setting and applying eligibility criteria suitable to their individual programs, a consideration that courts have deferred to in some exclusion cases. In addition, they lack a colorable claim that their selection of one of several reasonable approaches to providing benefits involves protected policy judgments upon which the courts should not intrude; denial of all benefits is too clearly unreasonable. Accordingly, courts have responded most favorably to plaintiffs' claims brought under a denial of benefits theory.

VI
DISCRIMINATION

The prohibitions against exclusion and denial of benefits are designed to protect handicapped individuals against the most invidious denials of equal opportunity—those in which a member of the protected class is totally foreclosed from participation in a federally assisted program. Section 504's prohibition against discrimination goes further, guaranteeing not only some opportunity, but an equal opportunity. This Part examines two distinct types of discrimination: unequal treatment; and unequal opportunity to benefit.

A. Unequal Treatment

1. *Plaintiff's Case*

Once again, plaintiff has a straightforward prima facie case. First, plaintiff must demonstrate that he has been the victim of discrimination by establishing that he has been treated differently from nonhandicapped persons. He may also show that other similarly situated handicapped individuals have been treated differently. For example, plaintiff may show that handicapped workers receive less pay or fewer promotions for the same work, or that mobility-impaired users of public transportation must rely upon a different or less available form of bus service. Second, he must demonstrate a direct relationship between the unequal treatment and his handicap. He may create an inference of differential treatment by showing that he satisfies all applicable eligibility criteria, an inference similar to that recognized by courts in disparate treatment cases under title VII. Plaintiff may also rely on direct evidence of causation, such as admissions by program operators that they adopted a separate form of transit service for handicapped users.

2. *Defendant's Case*

Defendants' success in justifying[344] allegedly unequal treatment may well depend upon whether that treatment is designed to meet handicapped individuals' special needs.

a. *Unequal Treatment in the Absence of Efforts to Address Special Needs.* In many cases, defendants should expect to face an uphill battle in justifying unequal treatment that is unrelated to efforts to address handicapped participants' special needs. At least where the unequal treatment in question is clear and predictable,[345] the institutional prerogatives defense is likely to be unavailable. The recipient's legitimate interest in establishing eligibility criteria needed to foster safe and effective participation in federally assisted programs has already been addressed as a result of plaintiff's qualification for participation under those criteria. Moreover, the recipient makes no claim that the unequal treatment in question reflects its expert judgment regarding the method best suited to accommodating plaintiffs' special needs in order better to foster effective participation in its program. Defendant will also have little success in relying upon cost-based defenses in such situations, for, as in denial of benefits cases, the question is primarily one of allocation of available resources in an evenhanded fashion. Accordingly, the recipient's capacity to continue program operations should not be affected. Since the recipient has already determined that the benefits of providing at least some participants with the level of opportunity in question outweigh the costs, an argument that the costs of equal treatment substantially exceed benefits received is also likely to be unavailing.

Not surprisingly, therefore, there have been few litigated cases of this type. A single example demonstrates what is likely to be a general reluctance on the part of the courts to regard recipient practices of this sort as justified. In *Yaris v. Special School District,*[346] plaintiffs challenged Missouri's policy of allocating state funds to assist local school districts

344 The courts have not considered directly the nature of defendant's evidentiary burden in § 504 unequal treatment cases. As previously discussed, however, if plaintiff has demonstrated by direct evidence the relation of his exclusion to his handicap, defendant will in all probability justify the challenged action on independent grounds rather than rebut plaintiff's claim of handicap-related discrimination. In the absence of direct evidence on the issue of causation, defendant may attempt to rebut the presumption that the unequal treatment is related to plaintiff's handicap. *See supra* note 291.

345 These premises do not hold in some unequal treatment cases. For example, a court's analysis may follow the unequal opportunity to benefit cases when the unequal treatment of the handicapped population is difficult to demonstrate, and when it is questionable whether defendant could have appreciated and avoided the unequal treatment at the time of the decision. *See infra* text accompanying notes 379-408; *cf.* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1324, 1333 (3d Cir. 1981) (relocation of hospital center to suburban cite away from locus of minority population did not violate title VI; § 504 claim failed in absence of adequate evidence demonstrating discriminatory effects on members of handicapped population).

346 558. F. Supp. 545 (E.D. Mo. 1983).

in providing both regular school year programming and optional summer school programming for nonhandicapped children, but only regular school year programming for severely handicapped children. The federal district court had little difficulty in determining that this practice violated section 504. It stated simply that "[w]hatever benefits nonhandicapped children realize when they attend summer school in Missouri are not available to the severely handicapped. By maintaining this policy the State of Missouri has violated the Rehabilitation Act on its face."[347]

b. *Unequal Treatment Related to Defendant's Efforts to Meet Special Needs.* In many instances, recipients have attempted to justify unequal treatment as necessary to meet the special needs of handicapped participants. In such cases, they have had to address two distinct questions: Whether they may properly employ an inherently unequal, separate mode of providing benefits; and whether, even where a defendant can justify a different mode of delivering benefits, equal services must be provided?

(i) *Challenges to the Mode of Providing Program Benefits.* Handicapped plaintiffs have argued that alternative modes of benefit delivery discriminate in a particularly invidious way prohibited by section 504. For example, institutionalizing mentally retarded persons rather than providing for needed services in community-based residential centers has been attacked as contributing to deterioration in the learning capacity of such persons.[348] The use of paratransit vehicles, instead of lift-equipped buses, to provide public transportation for the handicapped has also been challenged as inherently unequal. Plaintiffs claim that such a system reinforces the stigma of differentness already affecting handicapped riders.[349]

Defendants have justified alternative modes of benefit delivery on two grounds. First, they have claimed that their choice of an alternative

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347 *Id.* at 561.

348 Advocates of deinstitutionalization argue that public policy should strive for normalization of life for the mentally retarded. *See* W. WOLFENSBERGER, THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES 28 (1972). Once this principle is accepted, the conclusion that the mentally retarded should not be served in large state institutions readily follows:

> Institutions, by their very structure—a closed and segregated society founded on obsolete custodial models—can rarely normalize and habilitate the mentally retarded citizen . . . . [There] the two institutional characteristics most antithetical to the application of the normalization principle remain intact: segregation from the community and the total sheltering of retarded citizens in all spheres of their lives.

Mason & Menolascino, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface,* 10 CREIGHTON L. REV. 124, 156-57 (1976); *see also* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. at 1319 ("isolation and confinement are counter-productive in the habilitation of the retarded"), *aff'd in part and rev'd in part,* 612 F.2d 84 (3d Cir. 1979), *rev'd,* 451 U.S. 1 (1981), *on remand,* 673 F.2d 647 (3d Cir. 1982), *rev'd,* 52 U.S.L.W. 4155 (Jan. 23, 1984).

349 *See* Breslin, *Backlash Against the Disabled,* 4 MENTAL DISABILITY L. REP. 345, 348 (1980).

mode represents a reasonable policy choice that the courts should respect—the institutional prerogatives defense in a somewhat different guise. The majority of courts in both deinstitutionalization[350] and transportation[351] cases have accepted that position. Where the experts disagree concerning the merits of alternative delivery systems, the judiciary has been reluctant to intrude upon judgments that are fundamentally legislative or executive in character.[352] Such judicial deference is particularly appropriate when Congress has not established precise policies intended to preempt the substantive options available under state law.[353]

Deference to this sort of policy judgment has its perils. Adoption of an alternative mode of benefit delivery can easily be affected by impermissible stereotypes or unacceptable desires to keep handicapped persons isolated from the rest of society in contravention of Congress's express intent. Where the ill effects of such an alternative mode of delivery are undisputed, courts may therefore engage in more probing review. In *Shirey v. Devine,*[354] the District of Columbia Circuit held that a federal agency's decision to continue treating a handicapped plaintiff as a special employee violated section 501. Although the agency's decision exempted the handicapped employee from certain competitive requirements, it rendered him more vulnerable to layoffs. Because plaintiff had already satisfied all applicable requirements for regular competitive

350 *See* Garrity v. Gallen, 522 F. Supp. 171, 213 (D.N.H. 1981) (§ 504 does not require creation of community-based programs so as to permit deinstitutionalization of all residents of state institution for the mentally retarded); Kentucky Ass'n for Retarded Citizens v. Conn, 510 F. Supp. 1233, 1243-44 (W.D. Ky. 1980) (same), *aff'd,* 674 F.2d 582 (6th Cir.), *cert. denied,* 103 S. Ct. 457 (1982).

351 *See* Vanko v. Finley, 440 F. Supp. 656, 660-62 (N.D. Ohio 1977) (paratransit system satisfies requirements of Urban Mass Transit Act and § 504; transit authority is not required to make all fixed-route buses accessible to mobility-impaired users); *see also* Dopico v. Goldschmidt, 687 F.2d 644, 651-52 (2d Cir. 1982) (although "massive restructuring" of transportation systems is not necessary, some affirmative efforts to provide adequate public transportation are required); Lloyd v. Illinois Regional Transp. Auth., 548 F. Supp. 557, 584-85 (N.D. Ill. 1982) (although § 504 does not require that all rapid transit facilities be accessible, transit authority may be required to make special efforts to provide transportation services to handicapped).

352 *See* Vanko v. Finley, 440 F. Supp. 656, 669 & n.15 (N.D. Ohio 1977) (adoption of paratransit service providing low-cost transportation did not violate § 504 when transit authority complied with regulations under § 16 of Urban Mass Transit Act; when more than one valid approach exists, "selection process is, of necessity, one for branches of government other than the judiciary"); *see also* Atlantis Community v. Adams, 453 F. Supp. 825, 830-31 (D. Colo. 1978) (refusing to enjoin purchase of buses without lift equipment even in absence of paratransit system where "[t]he prescription of particular conduct among a wide range of possibilities is not an appropriate judicial function").

353 *See* Halderman v. Pennhurst State School & Hosp., 612 F.2d 84, 120-21 (3d Cir. 1979) (Seitz, J., dissenting) ("legislative mandate for deinstitutionalization" should not be read into § 504), *rev'd,* 451 U.S. 1 (1981), *on remand,* 673 F.2d 641 (3d Cir. 1982), *rev'd,* 52 U.S.L.W. 4155 (Jan. 23, 1984).

354 670 F.2d 1188 (D.C. Cir. 1982).

service appointment, the court concluded that the agency's action constituted impermissible discrimination. Although the court's decision rested in part upon section 501's affirmative action requirement,[355] section 504 would probably require a similar result.

Recipients have also asserted a cost defense to justify an alternative mode of benefit delivery. In *American Public Transit Association (APTA) v. Lewis,*[356] recipients raised this argument in challenging United States Department of Transportation regulations designed to implement section 504 and other statutes governing federally assisted mass transit programs.[357] With certain exceptions, the regulations required that new buses be equipped with wheelchair lifts, and that subways and other rail systems be retrofitted with elevators and "gap-closing" equipment that would enable wheelchair users to board trains. Recipients attacked the regulations as excessively costly. The court agreed, stating that the regulations required "extensive modifications of existing systems" and imposed "extremely heavy financial burdens" on local transit authorities.[358] The court declared the regulations invalid because of inadequate statutory authorization.

The court's analysis, unfortunately, lacks precision. Although cost

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355 *Id.* at 1200-02. Section 501 requires all departments and agencies of the Executive branch to prepare "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals. . . ." 29 U.S.C. § 791(b) (1976).

356 655 F.2d 1272 (D.C. Cir. 1981). For a discussion of the *APTA* case, see Comment, *Application of the Undue Burden Test to Mass Transportation: Parallel or Pitfall,* 34 HASTINGS L.J. 491 (1982); Recent Developments, *Administrative Law: Department of Transportation Regulations Mandating That Mass Transit Systems Be Accessible to the Handicapped Are Beyond the Scope of Section 504 of the Rehabilitation Act,* 27 VILL. L. REV. 374 (1982).

357 In 1979, the Department of Transportation, pursuant to §§ 504 and 16(a) of the Urban Mass Transit Act, amended its regulations governing mass transit systems. 49 C.F.R. §§ 27.1-.129 (1980). Under these regulations, new fixed-route buses were required to be accessible to wheelchair users, 49 C.F.R. § 27.85(b) (1980), with the result that at least one-half of peak-hour bus service was to be accessible. *Id.* at § 27.85(a)(1)(ii). Although compliance with this requirement was expected within three years, a 10 year extension could be granted to permit completion of extraordinarily expensive structural changes or replacement of buses. *Id.* at § 27.85(a)(2). The regulations imposed similar requirements for rapid and commuter rail systems, albeit only one vehicle per train was required to be wheelchair accessible, only key stations were required to be accessible, and an extension might be granted for up to 30 years. *Id.* at § 27.87. Rapid and commuter rail systems could obtain waivers if alternative service was as good or better than what would have been required without a waiver. *Id.* at § 27.99.

The *APTA* case involved a challenge to these 1979 Department of Transportation regulations. Following the D.C. Circuit's decision in *APTA,* the Department of Transportation issued new regulations, very similar to those they had adopted in 1976, which required transit authorities to make "special efforts" to extend services to the handicapped population. *See* 46 Fed. Reg. 37,488 (1981), 49 C.F.R. § 27.77 (1982). The Department once again entered the regulatory arena in 1983 with a new notice of proposed rulemaking, which attempts to provide more detailed guidance to public transit authorities in the wake of the *APTA* ruling. *See infra* note 375.

358 655 F.2d at 1278.

appeared to be its paramount concern,[359] the court did not clarify the type of cost defense it meant to recognize. Its mention of extraordinary costs suggests concerns similar to those encompassed by the cost-related incapacity defense or the cost-greatly-in-excess-of-benefit defense. Such defenses have generally been unsuccessful where reallocation alone will provide an adequate opportunity for the handicapped to participate.[360] Ultimately, the court may have allowed this defense because public transit operations are at best economically marginal. Nevertheless, a more suitable remedy would have been to limit the application of the regulations in individual instances, rather than to strike them down altogether, especially without a specific finding as to the costs involved.[361]

Alternatively, the court may have intended to recognize a third type of cost-plus defense based on cost-efficiency.[362] APTA might have asserted such a defense using the following line of reasoning. First, it could have assumed that section 504 requires public transit authorities to provide some minimal level of transportation services to the handicapped. It then would demonstrate that there were less costly methods of delivering the required services than those mandated by the challenged regulations. Finally, it would argue that transit authorities could properly choose the most cost-efficient method for providing the required minimum benefit. If the method adopted satisfied the statutory requirement, the authorities' decision to eschew additional benefits in favor of cost savings would not constitute "discrimination." Because recipients legitimately can pursue efficiency despite adverse effects on

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359 The court did not venture its own opinion concerning the costs of implementing the 1979 Department of Transportation (DOT) regulations. Instead, the court cited competing estimates of the cost of implementing the full DOT program over a 30 year period assuming federal subsidies were continued (DOT estimate, $460 million; APTA estimate, $4.5 billion; Congressional Budget Office (CBO) estimate, $7.1 billion) and of the cost of the bus program alone (DOT estimate $2 billion over cost of previously required Transbus; CBO estimate, $4.9 billion total cost). 655 F.2d at 1278 n.12. For an explanation of the CBO estimates see CONGRESSIONAL BUDGET OFFICE, URBAN TRANSPORTATION FOR HANDICAPPED PERSONS: ALTERNATIVE FEDERAL APPROACHES (1979).

The availability of supplemental federal funding has an important bearing upon the cost-burden actually experienced by a local transit authority. Congress has recently curtailed federal funds. *See* Department of Transportation and Related Agencies Appropriations Act of 1981, Pub. L. No. 96-400, 94 Stat. 1681, 1689 (appropriating funds for urban discretionary grants under Urban Mass Transportation Act, but specifying that "none of these funds shall be available to retrofit any existing fixed-rail transit system to comply with regulations issued pursuant to section 504").

360 *See supra* notes 335-43 and accompanying text.

361 *Cf.* Dopico v. Goldsehmidt, 687 F.2d 644, 650-53 (2d Cir. 1982) (dismissal of handicapped plaintiff's claim that transit authority failed to provide sufficiently accessible transit system was unwarranted beeause relief could be granted without "massive" expenditures).

362 Vanko v. Finley, 440 F. Supp. 656 (N.D. Ohio 1977), involved such a defense. There the court refused to find defendant transit authority's use of a separate paratransit system in violation of § 16(a) of the Urban Mass Transit Act, because adequate transportation services could be provided to handicapped persons using such a system at a fraction of the cost required to render the transit system's fixed route services fully accessible. *Id.* at 661.

handicapped individuals, their decision would not be based solely on handicap.[363]

Although a cost-efficiency defense appears sound in principle, the court in *APTA,* unfortunately, did not structure its analysis carefully or make its premises explicit. First, the court did not directly address the threshold question of whether it would be inherently unequal to provide transportation for the mobility-impaired outside the regular system of public transportation, thereby violating section 504. The court's unexplained assumption that use of alternative modes is permissible is in accord with the decisions of other courts that have considered the question.[364] A fuller discussion of this conclusion would have helped determine the scope of *APTA* as a source of section 504 precedent outside the transportation context. Second, the court failed to provide clear guidance concerning the extent to which its reasoning might bear on further decisions relating to the provision of public transit services. If a cost-efficiency defense is premised on an alternative mode of delivery providing benefits equal to those required by section 504, it is not clear that the courts should recognize a similar defense where public transit authorities have failed to provide such benefits. Although the *APTA* court appropriately focused on the regulations before it, its rather abbreviated decision may have the unfortunate effect of lulling transit authorities into an attitude of complacency regarding compliance with section 504. There are indications that such a conclusion would be premature.

(ii) *Challenges to the Level and Extent of Program Benefits.* In *Rhode Island Handicapped Action Committee (RIHAC) v. Rhode Island Public Transit Authority,*[365] the court addressed the issue left unresolved by *APTA.* Plaintiffs there asserted that the paratransit service offered by defendant transportation authority failed to satisfy the requirements of section 504. Specifically, plaintiffs cited inequities evidenced by the requirement that reservations be made one week in advance by users of the paratransit system as compared to the shorter waiting periods associated with regular fixed route service, and by the limitation on paratransit service to priority needs.[366] Sustaining plaintiffs' demands, the district court required that defendant purchase lift-equipped buses to provide more nearly equivalent service. In reaching that conclusion, the district court rejected defendant's cost-substantially-in-excess-of-benefit defense, find-

363 *See supra* notes 242-46 and accompanying text.

364 *See supra* note 351.

365 549 F. Supp. 592 (D.R.I. 1982), *rev'd,* 718 F.2d 490 (1st Cir. 1983).

366 549 F. Supp. at 597. Service was limited to travel to medical appointments, activities for the handicapped, and other special purposes. Although a similar system of service designed to satisfy priority needs was in effect in Vanko v. Finley, 440 F. Supp. at 667-68, such limitations on service were apparently necessitated by constraints attendant to the transition from a nonaccessible fixed-route system to a full-blown paratransit system. Accordingly, the *Vanko* court did not discuss the issue of unequal levels of program benefits.

ing that the five percent price increase attributable to lift equipment for each bus was outweighed by the anticipated increase in ridership and the resulting opportunities for greater independence for handicapped individuals.[367] Although defendant did not expressly assert a cost-efficiency defense, the district court's disposition seemed to presume that no such defense would be available where the combined paratransit and fixed route bus system was deemed inadequate.

On appeal, the First Circuit reversed and vacated the district court's holding on the issue of equivalent service.[368] The appellate court stated that, as interpreted in *Davis,* section 504 imposed no broad duty upon recipients to undertake affirmative action.[369] It reasoned that the statute's "otherwise qualified" language permitted the assertion of a cost-based defense.[370] It concluded that federal agencies, not the courts, were in the best position to provide clear, uniform guidance concerning the availability of such a defense, and that the district court had acted improperly in requiring more of the transit authority than did governing regulations.[371]

The decisions in *RIHAC* have some precedential value for analyzing unequal treatment cases involving challenges to the level and extent of program benefits. First, although neither the district court nor the appellate court discussed the institutional prerogatives defense, it is unlikely that such a defense would have succeeded. Unlike judgments regarding the mode of benefit delivery,[372] judgments concerning the quantity of available benefits are not based on unreviewable policy decisions.

Second, both the district court and the appellate court recognized the theoretical availability of a cost-substantially-in-excess-of-benefits defense, although they disagreed concerning how that defense should be applied, given the facts at hand. The district court attempted its own

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367 549 F. Supp. at 613-14.

368 718 F.2d 490 (1st Cir. 1983).

369 *Id.* at 496.

370 The court stated:

> [W]heelchair users cannot board and ride buses unless the buses are specially outfitted with lifts and wheelchair bays; thus, in this limited but important sense the plaintiff class is not "qualified" to use buses of the ordinary sort. And the cost of transforming ordinary buses into lift-equipped ones for which plaintiffs are "qualified" is, as the district court conceded, "not insubstantial."

Id. This passage is ambiguous. The court's language may have been intended to suggest that plaintiffs who fail to satisfy existing eligibility requirements are not "otherwise qualified" handicapped individuals and may not challenge the legitimacy of those requirements. This proposition is discussed and refuted in Part IV.A above. The court may, instead, have intended to suggest that cost-based defenses are at times available under § 504. While this conclusion is sound, the court's reliance upon the "otherwise qualified" clause in support of the proposition is questionable. *See supra* notes 145-46 and accompanying text.

371 *Id.* at 496-99.

372 *See supra* note 352.

balance of costs and benefits. The court of appeals indicated that it might well have agreed on the merits with the balance struck by the district court,[373] but believed that greater deference to agency regulations was required unless the administrative determination were illegal, arbitrary, or capricious.[374] Ironically, in light of the First Circuit's disposition, it made no reference to proposed federal regulations issued three weeks prior to its decision, which elaborated upon the obligations of public transit authorities that rely upon mixed-paratransit, fixed-route service to meet the needs of mobility-impaired users. These regulations state that transit authorities must certify that their systems do provide equivalent service of the sort requested by the *RIHAC* plaintiffs; however, transit authorities would be permitted to reach compliance with this requirement over a number of years, taking into account the amount of federal assistance provided and the size of their operating budgets.[375] These regulations are likely to prove dispositive of the dispute in *RIHAC*. The lower court's initial close scrutiny of the cost-sub-

373 718 F.2d at 497 ("If the only question was whether the able district judge had, in this instance, struck a sensible balance in respect to Rhode Island's transportation needs for its handicapped, we might affirm.").

374 *Id.* at 499.

375 *See* 48 Fed. Reg. 40,684 (1983) (notice of proposed rulemaking, amending 49 C.F.R. § 27.77). DOT was required to publish regulations establishing "minimum criteria for the provision of transportation services to handicapped and elderly individuals by recipients of Federal financial assistance" under the Urban Mass Transportation Act of 1964 (UMTA) or § 165(b) of the Federal-Aid Highway Act of 1973.

The newly proposed regulations require such recipients to certify their compliance with several substantive requirements. 49 C.F.R. § 27.77(a) (1982). Small cities and rural areas that receive assistance under § 18 of UMTA must continue to comply with less burdensome requirements imposed by current regulations. Recipients of funds under §§ 3, 5, 9, and 9A of that Act must comply with one of the following three requirements: (1) they must make 50% of both their peak and nonpeak fixed-route bus service accessible to wheelchair users and semiambulatory persons; (2) they must establish an adequate paratransit or special services system; or (3) they must develop a mixed system providing fixed-route as well as paratransit or special services. *Id.* at § 27.77(b). The latter two options require compliance with the following six service criteria: (1) service must be available to handicapped persons throughout the same general area as that covered by the recipient's service to the general public; (2) special services must be available on the same days and during the same hours as services to the general public; (3) fares for handicapped persons using the special services must be comparable to those charged for regular service; (4) no special restrictions or priorities may limit use of the special service system if such limits do not apply to regular service; (5) any waiting periods imposed for response to requests for special services must be reasonable; and (6) no waiting lists limiting the availability of services to a certain number of users may exist. *Id.* § 27.77(c).

The burden of compliance with these substantive requirements is limited by cost considerations. The Department of Transportation has requested comment on two sets of cost limitations. The first option limits a recipient's obligation in a given fiscal year to 7.1% of the annual average amount of federal financial assistance received for mass transportation purposes over the three most recent fiscal years. *Id.* § 27.77(d). The second option requires the recipient to expend no more than 3.0% of its average operating budget over the three most recent fiscal years. *Id.* For purposes of calculating these cost limitations, the recipient could take into account incremental costs of acquiring and operating accessible rolling stock and operating costs associated with a special service system. *Id.* § 27.77(e).

stantially-in-excess-of-benefit defense may, nevertheless, be an indication that courts are skeptical of such defenses in unequal treatment cases of this sort, much as they have been in denial of benefits cases involving an absolute, rather than incremental, denial of opportunity. Careful judicial review of such defenses may accordingly be expected in the absence of controlling regulations.

Regrettably, neither the district court nor the appellate court clearly addressed the cost-efficiency defense, perhaps because this defense should be unavailable in cases like *RIHAC*.[376] The cost-efficiency defense assumes the availability of equally extensive benefits under either of two alternative means of delivering benefits. The assumption is unwarranted where the benefits provided are demonstrably unequal. Moreover, in the absence of evidence to the contrary, it may be presumed that any inequality in services is solely attributable to handicap. A defendant choosing an inadequate alternative over a readily available adequate alternative has failed to justify its practices on neutral grounds unrelated to plaintiff's handicap. Accordingly, defendant's conduct remains unexcused and plaintiff's prima facie showing of illegal discrimination remains undisturbed.

Defendant might make the cost-efficiency argument from an alternative perspective. It could contend that a decision to offer limited paratransit service enables a transit authority to offer better and more extensive services than possible if the same resources had been allocated to the acquisition of lift-equipped buses. If the resources allocated for operation of a paratransit system represent a share of the transit authority's total budget at least equal to the proportion of the mobility-handicapped users in the population, there would be no violation because: (1) no discrimination in the allocation of funds has occurred; and (2) allocation of benefits has followed a neutral principle of benefit-maximization.

This argument fails for two reasons. First, discrimination against handicapped users exists where they alone must bear their own costs of benefit delivery and where no neutral principle dictates the adoption of such cost allocation rather than pooling of costs.[377] Second, it remains undisputed that the level and extent of benefits differs between handicapped and nonhandicapped users. Although defendant has justified its provision of the greater of two possible levels of benefits available for the same expenditure, this argument does not address the foreclosure of a third alternative—providing handicapped users a level of benefits equal

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376 *See supra* notes 335-43 and accompanying text.

377 *Cf.* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 710 (1978) (requirement that female employees make significantly larger contributions to pension fund than male employees violates title VII, despite fact that women as group live longer than men, where insurance risks are generally grouped without regard to specific level of risk that characterizes many subgroups of insureds).

to that provided nonhandicapped users.[378]

In sum, courts have often permitted defendants in unequal treatment cases to select alternative modes of benefit delivery to meet the special needs of handicapped participants. Plaintiffs may prove more successful in establishing violations of section 504's nondiscrimination mandate by demonstrating concrete inequalities in treatment that work to their detriment. They are likely to face a much more difficult task in cases where defendant has afforded handicapped and nonhandicapped participants equal treatment but where handicapped participants have allegedly received unequal opportunities to benefit from federally assisted programs.

B. Equal Treatment, Unequal Opportunity to Benefit

Section 504's nondiscrimination provision, along with the provisions addressing exclusion and denial of benefits, embodies the equal opportunity guarantee that lies at the heart of the statutory scheme. This provision protects against unequal treatment, because equal treatment is the minimum required to assure equal opportunity. Whether the ban on discrimination protects against unequal opportunity that may be hidden by facially equal treatment is a more difficult question. If, however, the nondiscrimination provision does not reach this far, it

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378 The *RIHAC* decision may be compared with Doe v. Devine, 545 F. Supp. 576 (D.D.C. 1982), *aff'd,* 703 F.2d 1319 (D.C. Cir. 1983). In *Doe,* plaintiffs challenged a decision by the federal Office of Personnel Management (OPM) to limit mental health coverage under a federal insurance plan. The reduction permitted less coverage for mental illness than for physical illness. The reasons cited for the decision included: (1) the fact that the "vast majority" of persons using mental health benefits would still be protected; (2) the higher cost of mental health benefits resulted in a subsidy by physical health benefit users to mental health benefits users; and (3) the selection by federal employees of other insurance plans because of the high cost of this plan. The court found no § 504 violation, reasoning that (1) all available benefits could be enjoyed by both physically and mentally ill persons; (2) there would be no denial of benefits to mentally ill persons; and (3) there would be roughly equivalent resource expenditures for physically and mentally ill persons.

Although the court's conclusion was probably correct, its reasoning does not conform to the unequal treatment analysis proposed by this article. The analysis suggested here would first acknowledge that mentally and physically ill persons were treated differently under the revised plan. Defendant could then justify this different treatment in several ways. First, defendant could raise an institutional prerogatives defense, arguing that it had to decide how to allocate disability coverage because coverage of all disabilities was impossible. A court may defer to this kind of rational program design decision more readily than to decisions involving competing claims by handicapped and nonhandicapped persons. *See also* Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979) (state's limitation on medicaid benefits available through private hospital did not violate § 504); 45 C.F.R. § 84, app. A n.37 (1982) (all hospitals and clinies need not treat drug addiction and alcoholism, but a hospital may not exclude alcoholies or drug addicts from available programs). Second, an incapacity-related-to-cost defense may be available because the loss in employee enrollment was apparently correlated with the inclusion of high cost mental health benefits used by few enrollees. Third, a cost-efficiency defense may be available, where the agency chose the one plan providing the best overall coverage per dollar for the greatest number of permanently or temporarily disabled employees.

guarantees only the trappings of equality and ignores the ultimate objective of section 504.

Beginning with this premise, plaintiffs relying on an unequal opportunity to benefit theory proceed as follows. First, they attempt to demonstrate inequality between the opportunities afforded handicapped participants and those afforded other participants. The comparison may focus on unequal opportunities to benefit or upon related burdens. Second, plaintiffs argue that if they satisfy all applicable eligibility requirements and if a recipient's decision results in demonstrated inequality of opportunity, then a prima facie case of discrimination is established and the burden should shift to defendant to justify its actions.

This proposed analysis raises three questions. First, can plaintiff compare the opportunities available to handicapped and nonhandicapped participants to demonstrate inequality? Second, assuming plaintiff can clear this first hurdle, does section 504's nondiscrimination guarantee protect against inequalities in opportunity where there is no inequality in treatment? Finally, assuming plaintiff can clear the first two hurdles, under what circumstances is a decision that results in unequal opportunities justified, notwithstanding its adverse effect on handicapped plaintiffs? The courts have only begun to grapple with these difficult questions. Two examples—one from the context of education, the other from the context of health care—amply illustrate their efforts.

In several cases, plaintiffs have relied upon section 504 and the Education for All Handicapped Children Act to challenge the refusals of school districts to provide supplemental summer instruction to handicapped children.[379] Districts have traditionally limited basic instruction provided to handicapped and nonhandicapped children alike by adopting a 180-day school year. Parents of severely handicapped children have claimed that this limitation results in substantial regression of their children's skills over the summer months.[380] They have argued under section 504 that, although handicapped and nonhandicapped children have been afforded equal treatment, the 180-day school year disadvantages certain handicapped children by denying them an equal opportunity to receive educational benefit. They have demonstrated that such children often suffer severe educational losses not experienced by their

379 The leading case on this question is the court of appeals' decision in Battle v. Pennsylvania, 629 F.2d 269 (3d Cir.), *on remand,* 513 F. Supp. 425 (E.D. Pa. 1980), *cert. denied,* 452 U.S. 968 (1981). The *Battle* court held that the states may not adopt an explicit policy to prohibit extended school year services under the All Handicapped Children Act; however, the court left the decision of which students should receive such education to the states. *See also* Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983); Yaris v. Special School Dist., 558 F. Supp. 545 (E.D. Mo. 1983); Georgia Ass'n for Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981) *aff'd,* 716 F.2d 1565 (11th Cir. 1983).

380 Regression refers to the actual loss of skills previously mastered.

nonhandicapped peers.[381]

Georgia Association for Retarded Citizens v. McDaniel[382] is the leading section 504 case analyzing the obligations of school districts to provide an extended school year to handicapped children. In this class action, plaintiffs challenged the refusal of local school boards to provide schooling in excess of 180 days—a practice that apparently resulted from Georgia's refusal to contribute to the costs of such instruction.[383] The plaintiffs alleged that individual profoundly retarded children suffered severe regression in self-help skills that continuous instruction would have prevented.[384]

The federal district court agreed that the challenged practices violated section 504. It rejected defendants' assertion that section 504 assured only equality of access and found that the statute imposed certain affirmative obligations to provide handicapped children with an opportunity to receive equal benefits. In the court's words,

> [i]f a child needed a special service to gain equal benefit from his education, the denial of that service would constitute discrimination in violation of Section 504. Individual attention to the needs of each handicapped child is the only way to determine whether such special or additional services are needed.[385]

Although the 180-day limit on educational services failed to withstand plaintiffs' challenge, the court refused to determine whether individual children were entitled to extended services, requiring, instead, that the school districts first consider the children's individual needs.[386] On appeal, the Eleventh Circuit affirmed.[387]

It is unclear how much precedential weight should be given the court's apparent acceptance of the unequal opportunity to benefit theory. The court did not confront the problem of evaluating evidence concerning the educational opportunities available to handicapped children vis-a-vis nonhandicapped children in the Georgia schools, nor did

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381 Parents have sought extended school year programs for multiply handicapped children who are severely and profoundly impaired by mental retardation. Such children learn more slowly than others, have problems generalizing skills, and lose skills when not practiced. Parents have also sought summer instruction for severely emotionally disturbed children who, because of autism or schizophrenia, have extreme difficulty in learning and problems in generalizing skills. *See, e.g.,* Armstrong v. Kline, 476 F. Supp. 583, 588, 590 (E.D. Pa. 1979). Although all children suffer some educational loss over the summer, the loss suffered by these children is particularly severe. *Id.* at 596-97.

382 511 F. Supp. 1263 (N.D. Ga. 1981), *aff'd,* 716 F.2d 1565 (11th Cir. 1983).

383 *Id.* at 1270-71.

384 *Id.* at 1272-73.

385 *Id.* at 1280.

386 *Id.* at 1281-82. As the court noted, "the determination of whether any mentally retarded child needs more than 180 days of schooling is a burden that the defendants (not the plaintiffs) must carry in the first instance, i.e., in the [individualized education program] process." *Id.* at 1282.

387 716 F.2d 1565 (11th Cir. 1983).

it grapple with the theoretical issues raised by plaintiffs' theory. More recent cases involving individual children's claims for an extended school year have also avoided these problems, basing their decisions on the Education for All Handicapped Children Act.[388]

Cases involving the adequacy of health care coverage have forced the courts to address these issues more directly.[389] In *Jennings v. Alexander*,[390] Medicaid recipients challenged the decision of Tennessee state officials to reduce the duration of coverage for inpatient hospital care from twenty to fourteen days per year. They argued that this reduction in coverage resulted in a disproportionate reduction in benefits to handicapped individuals. In support of this contention, they demonstrated that during the prior fiscal year the rate of inpatient hospital use by handicapped recipients was substantially higher than the rate for nonhandicapped recipients, and that a substantially greater proportion of handicapped users still needed hospitalization at the end of the period.[391] State defendants argued that resource constraints compelled the change in policy.[392]

The competing lines of analysis adopted by the district court and the Sixth Circuit in *Jennings* illustrate the problems implicit in the unequal opportunity to benefit theory. The district court rejected plaintiffs' unequal opportunity to benefit claim for several reasons. First, it found plaintiffs' statistical evidence inadequate. The court refused to treat the data presented as representative, asserting that patterns of use could vary from year to year.[393] It also questioned whether the evidence showed that individuals' handicaps accounted for the statistically higher use rate for handicapped users, and whether all classes of handicaps could be combined for statistical purposes. Second, the court concluded that although section 504's antidiscrimination provisions guaranteed equal access, they did not assure an equality of product or result.[394] Although section 504 ensured that handicapped individuals would be provided an equal opportunity for hospital care, it did not guarantee that

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388 *See, e.g.*, Rettig v. Kent City School Dist., 539 F. Supp. 768, 778-79 (N.D. Ohio 1981), *aff'd on other grounds*, 720 F.2d 463 (6th Cir. 1983) (denying extended school year where it was not absolutely necessary to prevent substantial regression); Bales v. Clarke, 523 F. Supp. 1366, 1370 (E.D. Va. 1981) (denying extended school year where regression not "extraordinary nor irretrievable"); Anderson v. Thompson, 495 F. Supp. 1256, 1266 (E.D. Wis. 1980) (denying extended school year where student had not, in past, suffered "irreparable loss" without it), *aff'd*, 658 F.2d 1205 (7th Cir. 1981).

389 *See also supra* note 378.

390 715 F.2d 1036 (6th Cir. 1983), *rev'g and remanding*, 518 F. Supp. 877 (M.D. Tenn. 1981).

391 518 F. Supp. at 880-81.

392 The state submitted evidence showing that to maintain the Medicaid program as it was prior to the proposed changes would require 42 million additional dollars, beyond the cost of operating the redesigned program. 715 F.2d at 1044.

393 518 F. Supp. at 881-82.

394 *Id.* at 882-85.

they would be well at the end of the hospitalization.[395] The court concluded that any injury to handicapped recipients was not "solely by reason of" their handicaps. Having reached this conclusion, the court found it unnecessary to examine the adequacy of defendants' justifications.[396]

In a divided opinion the Sixth Circuit reversed. First, the court concluded that the trial court had committed clear error in finding that plaintiffs' evidence had failed to demonstrate that the proposed Medicaid policy change would have a disparate impact upon handicapped users.[397] Second, the court rejected the lower court's view that the type of disparate impact demonstrated did not constitute the type of discriminatory effect actionable under section 504. Instead, the court concluded that even a program equally accessible to both handicapped and nonhandicapped users may provide more limited opportunities to handicapped persons; a plaintiff who demonstrates this establishes a prima facie case of violation.[398] Finally, the court indicated that defendants would be required to rebut the inference of discrimination created by plaintiffs' prima facie case by explaining the state's choice of the challenged Medicaid policy.[399] In a preliminary analysis of defendants' cost justification, the court accepted the state's contention that it was unable to maintain its Medicaid program at the prior level.[400] Nevertheless, the court remanded for consideration of the state's rejection of an alternative approach, which plaintiffs claimed would have a less disparate impact.[401]

Judge Merritt dissented, questioning the adoption of a disparate impact test. He argued that the district court's analysis should be followed and a bright line equality of access standard adopted. In his view, such a standard would forestall inevitable section 504 challenges to state budgetary decisions.[402]

Although both the district court and the court of appeals in *Jennings* grappled with the three critical questions raised by the unequal oppor-

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395 *Id.* at 885.

396 The district court also relied upon the express provisions of federal statutes governing the Medicaid program to support its conclusion. 518 F. Supp. at 884-85 (discussing 42 U.S.C. § 1396d(a), which provides that states are to pay "part or all" of the cost of required care and services).

397 715 F.2d at 1039-42.

398 *Id.* at 1042-43. In reaching this conclusion, the court of appeals relied heavily on the Third Circuit decision in NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981) (applying discriminatory impact test in case alleging that decision to move hospital facility to suburban location from inner city, where it had been readily accessible to heavily concentrated minority population, violated title VI of the 1964 Civil Rights Act).

399 715 F.2d at 1043-45.

400 *Id.*

401 The challenged program limited the number of hospital visits per year rather than the number of days per visit. *Id.* at 1044-45.

402 *Id.* at 1047-50.

tunity to benefit theory, neither was able to resolve these issues in a satisfactory way. First, the court of appeals correctly found that the statistical evidence demonstrated that handicapped users had been afforded a lesser opportunity to benefit than nonhandicapped users.[403] This initial evidentiary hurdle, however, cannot be readily surmounted in other contexts where plaintiffs rely on an unequal opportunity to benefit theory. For example, in most education cases, it will be extremely difficult to make any meaningful comparison between the opportunities afforded handicapped children and those afforded other children where all children receive roughly equivalent treatment.[404] Comparing individualized services presents similar difficulties.

Second, neither court probed the theoretical underpinnings of the unequal opportunity to benefit theory. The court of appeals was correct in concluding that section 504 prohibits conduct with a discriminatory effect, as well as conduct with a discriminatory intent.[405] The appellate court, however, did not appreciate that more subtle distinctions may be necessary in analyzing various types of discriminatory effects. Although the district court was incorrect in concluding that only denials of access are actionable under section 504, it correctly concluded that the unequal opportunity to benefit theory may be fundamentally flawed. Textual analysis of section 504 provides some support for the view that the ban on discrimination is designed only to reach unequal treatment. The

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403 The district court's approach can be criticized on three grounds. First, plaintiffs demonstrated that a sizeable difference existed between the proportion of nonhandicapped persons fully served at the end of 14 days of hospital inpatient coverage (92.2%) and the proportion of handicapped persons fully served at the end of that period (72.6%). 518 F. Supp. at 880-81. The ratio of handicapped to nonhandicapped persons fully served was thus approximately 4:5, the rate constituting evidence of adverse impact under EEOC title VII guidelines. *See* 29 C.F.R. § 1607.4(D) (1982). Second, the court may have been correct in believing that statistical evidence concerning the participation of handicapped persons may not demonstrate that there had not been discrimination against a particular subclass of handicapped persons (for example, the fact that a defendant permits mobility-impaired persons to participate would not demonstrate that defendant had not discriminated against visually-impaired persons). The court's criticism of plaintiffs' evidence in *Jennings* was less well founded because evidence that handicapped persons generally receive less than equivalent opportunities suggests that at least some subclass of such persons are subject to discrimination. Finally, there is no reason to believe that the data presented in *Jennings* was unrepresentative. It is therefore unclear why that data did not provide adequate prima facie evidence of discrimination.

404 In Board of Educ. v. Rowley, 458 U.S. 176 (1982), the Supreme Court rejected the view that "free appropriate public education," for purposes of the Education for All Handicapped Children Act, could be measured through a comparison of the edueation afforded handicapped and nonhandieapped children. *Id.* at 198-200. The lower courts have also tended to rest decisions concerning the appropriateness of handicapped children's placement and the adequacy of educational services upon the provisions of the Education for All Handicapped Children Act, rather than undertaking the comparative analysis that seems to be called for under § 504. *See, e.g.,* Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982), *cert. denied,* 103 S. Ct. 1252 (1983).

405 *See supra* Part II.A.

second of the section's three prohibitions directs only that benefits not be denied. One may infer that Congress addressed the adequacy of benefits exclusively under this statutory prong, understanding that it would be possible to ensure the provision of some meaningful benefits but that it would be infeasible to create a right to receive benefits that could be evaluated only through an unwieldy process of comparison.

Finally, the court of appeals was correct in requiring an examination of defendants' justification, but provided insufficient guidance concerning analysis of cost-based justifications under the unequal opportunity to benefit theory. A two-stage inquiry is required in such situations. First, a defendant may argue that it is incapable of mustering sufficient resources to ensure all participants an equal opportunity to benefit. The Sixth Circuit, in *Jennings,* accepted this contention, citing as its basis a state constitutional restriction that prohibited deficit spending. This response is inadequate because the provision in question may limit state borrowing without limiting the state's authority to raise taxes to increase available public funds. The court accordingly sidestepped the difficulties that would arise if a court attempted to review more closely the financial incapacity of governmental defendants in unequal opportunity to benefit cases challenging the adequacy of public services.[406]

Assuming that a court must accept as given a governmental defendant's claim of incapacity to raise additional funds, the court must still address a second question: whether the defendant has adequately justified its decision to allocate available funds in such a way as to deny certain handicapped individuals an equal opportunity to benefit. Although there are few legitimate reasons for totally denying benefits to handicapped individuals or for treating them unequally, many reasons can contribute to adopting facially neutral policies designed to allocate scarce resources among competing claimants. The courts are well aware that legislative bodies are the appropriate forum for making this type of policy decision.[407] They may hesitate to conclude that Congress intended to dictate to the states an approach that more fully insulates one group of citizens from revenue shortfalls than others, instead of an approach that accords equal treatment to all.[408] Finally, the courts may realize that intensive scrutiny of resource allocation decisions is likely to be futile. Knowing that it is difficult to equate the opportunities afforded handicapped and nonhandicapped participants, even in hindsight, the courts may appreciate the problems recipients face in avoiding

406 *Cf., e.g.,* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981), discussed *supra* at notes 61-63.

407 *See supra* note 144.

408 *Cf.* Trans World Airlines v. Hardison, 432 U.S. 63 (1977) (discussed *supra* text accompanying notes 122-24) (title VII prohibition on religious discrimination does not require employer to allocate time off in fashion that favors employees having certain religious beliefs).

inequities when making resource allocation decisions. For these reasons, if other courts follow the Sixth Circuit and examine defendants' cost-based justifications, their scrutiny is likely to be extremely limited.

Unequal opportunity to benefit cases such as *Jennings* push the antidiscrimination principle to its practical and theoretical limits. Although plaintiffs proceeding under such a theory may succeed in making a prima facie case, they will probably fail to extend the reach of section 504 so far.

C. Summary

One commentator has recently suggested that the idea of equality is an empty one that is counterproductive where individuals' interests can be more effectively protected if defined in terms of rights or liberties.[409] It is possible to formulate section 504's core guarantee as a "right" to opportunity. This would, however, tell only half the story, because the right is not unqualified—the opportunity afforded need only be equal to that afforded others. Equality serves as a critical limiting principle in this context. As a first approximation of that limit, provision of no opportunity falls short of providing equal opportunity; accordingly, excluding a handicapped individual from participation or denying him all benefits may violate his protected right. As a second approximation, unequal treatment in many instances falls short of equal opportunity; in those instances, it too may violate a protected right. Unequal opportunity to benefit cases require more than approximation, however; they require a precise and difficult determination of whether the opportunity sought falls inside or outside the boundary line set by the equality principle. Although these cases are therefore the most difficult of those presented under section 504, it is by no means clear that the difficulty stems from the use of an "empty" equality principle as a limit on the right afforded. Instead, the real problem may be the lack of an adequate definition for the underlying "right to opportunity."

CONCLUSION

After ten years of administrative, legislative, and judicial effort, the meaning of section 504 of the Rehabilitation Act of 1973 is less uncertain than early observers feared. A strong, although unacknowledged, framework of analysis can be crafted to interpret the growing body of case law, and to assess the strengths and weaknesses of the antidiscrimination model itself. Thus, several distinct types of cases and alter-

409 *See* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153 (1982). *But see* Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982); Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); D'Amato, *Is Equality A Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983).

native theories of litigation can be identified: those involving exclusion (litigated under exclusionary criteria, exclusionary refusal to accommodate, and exclusionary judgment theories); those involving denials of benefits; and those involving discrimination (litigated under unequal treatment and unequal opportunity to benefit theories). Using this classification scheme, it is possible to delineate the nature and extent of plaintiffs' and defendants' evidentiary burdens, and the varying types of justifications that may be asserted by federal recipients as defenses in any given case.

Far from being a problematic latecomer to the family of federal civil rights statutes, section 504 thus provides a useful model through which scholars, litigants, and courts may come to appreciate the knotty analytical problems that continue to arise under the general body of statutory and constitutional antidiscrimination law.