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Paralyzing Discord: Workplace Safety, Paternalism, and the Accommodation of Biological Variance in the Americans with Disabilities Act

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Paralyzing Discord: Workplace Safety, Paternalism, and the Accommodation of Biological Variance in the Americans with Disabilities Act*

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INTRODUCTION

Seldom, if ever, have the power and the purposes of legislation been rendered so impotent .... All that is left today are a few scattered remnants of a once grandiose scheme to nationalize the fundamental rights of the individual.[1]

Few areas of the law can inspire the fury of popular debate, the breadth of scholarly criticism, the intensity of research, or the multitude of legislative enactments and judicial interpretations to parallel the controversy surrounding the precise meaning of equality and civil rights in the American workplace. The struggle for civil rights, still firmly etched in America's collective consciousness, officially admitted a new member with the passage of the Americans

1. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1323, 1343 (1952).

with Disabilities Act[2] (ADA) in 1990. Its mandate has proven anything but clear. Since its enactment, the contours of the ADA have been subject to continual examination, and the Supreme Court has heard an unusually heavy load of disability rights cases.[3] Recent commentators have characterized many interpretations of the ADA as a "backlash" against the statute.[4] This backlash is attributed to a myriad of different causes, ranging from judicial intolerance of the Act's objectives to media portrayals that misunderstand the underpinnings and scope of the Act.[5] One commenting Justice attributes the endless judicial examination of the ADA to uncertainties and ambiguities inherent in the statute.[6] Regardless of its cause, however, one thing is certain: the ADA is producing considerable confusion.

In 2002, the confusion generated by the ADA was more evident than ever before. Justice O'Connor suggested that the Court's 2002 term will likely be remembered as the "Disabilities Act Term"[7] for the high number of cases dealing with this "landmark civil rights" enactment. The "Disabilities Act Term" included four cases: (1) *US Airways, Incorporated v. Barnett*[8] (2) *Toyota Motor Manufacturing,*

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2. 42 U.S.C. §§ 12101-12213 (2000).

3. Supreme Court Justice Sandra Day O'Connor attributes this to gaps in the law: "It's an example of what happens when . . . the sponsors are so eager to get something passed that what passes hasn't been as carefully written as a group of law professors might put together . . . This act is one of those that did leave uncertainties in what it was Congress had in mind." NAMI Update (National Alliance for the Mentally Ill, Santa Cruz, CA), *O'Connor: Disabilities Act Has Gaps, available at* http://www.namiscc.org/newsletters/February02/DisabilityActGaps.htm (last visited Sept.12, 2003). The confusion generated by the ADA may also be attributable to its reliance on the Rehabilitation Act of 1973, an Act that, since it did not create private rights of action, did not produce much litigation. As a result, the major contours of a more expansive civil rights approach to disability discrimination have only recently been investigated.

4. *See, e.g.*, Linda Hamilton Krieger, Foreword—*Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 Berkeley J. Emp. & Lab. L. 1, 3-4 (2000); Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 Berkeley J. Emp. & Lab. L. 223 (2000).

5. *See id.*

6. NAMI Update (National Alliance for the Mentally Ill, Santa Cruz, CA), *O'Connor: Disabilities Act Has Gaps, available at* http://www.namiscc.org/newsletters/February02/DisabilityActGaps.htm (last visited Sept.12, 2003).

7. *Id.*

8. 535 U.S. 391, 122 S. Ct. 1516 (2002) (holding that the ADA does not usually require an employer making job assignments to deviate from a legitimate seniority system even when the system is not part of a collective bargaining agreement).

Kentucky v. Williams,[9] (3) *Barnes v. Gorman,*[10] and (4) *Chevron U.S.A. Incorporated v. Echazabal.*[11]

This note uses the last of these cases, *Echazabal*, to illustrate fundamental flaws inherent in Congress's approach to disability discrimination in the workplace. The *Echazabal* decision stands for the proposition that an employer is free to exclude a disabled applicant or employee from a position that would place him in certain danger.[12] Using several lenses, including social science, discrimination theory, and history, this piece examines the implications of this unanimous decision, and argues for a modified approach to disability discrimination in the workplace that would incorporate lessons learned in the context of other protected groups.

Part I offers a brief overview of the process leading up to the passage of the ADA and the substantive provisions thereof. Part II discusses the *Echazabal* decision and the divergent approaches to self-harm taken by the Ninth Circuit Court of Appeals and the United States Supreme Court respectively. Part III(A) examines the implications of this opinion; particularly, the distinction, announced by the Supreme Court, between individualized risk assessments made pursuant to the ADA's direct threat provision, and "paternalistic judgments based on the broad category of gender," which are forbidden in the Title VII context.[13] This note attributes the Supreme Court's decision in *Echazabal* to the ADA's confusing combination of paternalistic notions of inherent vulnerabilities with the rhetoric of previous civil rights enactments that purport to grant equality.

Following a discussion of the stubbornly persistent historical paternalism evident in the ADA, part III(B) examines an alternative approach to biological variance that arose during the women's equality movement. During this examination, special attention is

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9. 534 U.S. 184, 196, 122 S. Ct. 681, 691 (2002) (holding that key terms in the ADA's definition of an actual disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled").

10. 536 U.S. 181, 122 S. Ct. 2097 (2002) (holding that punitive damages are not available to private plaintiffs suing under § 504 of the Rehabilitation Act and § 202 of the Americans with Disabilities Act).

11. 536 U.S. 73, 122 S. Ct. 2045 (2002) (unanimously upholding an EEOC regulation that allowed an employer to refuse to hire an otherwise qualified individual if, by virtue of his disability, the employment posed a direct threat to the disabled individual's own health or safety).

12. *Id.* at 86, 122 S. Ct. at 2053.

13. *Id.* at 86 n.5, 122 S. Ct. at 2053 n.5, *citing* Dothard v. Rawlinson, 433 U.S. 321, 97 S. Ct. 2720 (1977); International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 111 S. Ct. 1196 (1991). In *Echazabal*, the Court stated that Title VII is generally concerned with "paternalistic judgments based on the broad category of gender, while the EEOC has required that judgments based on the direct threat provision be made on the basis of individualized risk assessments." 536 U.S. at 86 n.5, 122 S. Ct. at 2053 n.5.

devoted to the argument that the ADA and Title VII, which are popularly understood to require accommodation and antidiscrimination respectively, embody profoundly different antidiscrimination models. Building on Professor Jolls's provocative thesis in this regard—which asserts that the categories of antidiscrimination and accommodation are actually overlapping rather than conceptually distinct[14]—part IV(A) extends this understanding to propose a revision of the ADA that would incorporate lessons learned from Title VII. Part IV(B) then seeks to explore an alternative argument that questions the propriety of dispensing with the "conventional wisdom" attacked by Professor Jolls. Drawing on arguments recently propounded by Professor Verkerke,[15] this section examines the antidiscrimination/accommodation distinction in light of normative considerations of the proper scope of civil rights law, and concludes that meaningful distinctions between the two categories are possible and consequential. This section extends Professor Verkerke's research further, however, to argue that the true distinction between antidiscrimination and accommodationist provisions relate to principle, and not merely cost. The paper concludes by illustrating the unintended consequences of expansively drafted accommodationist provisions and offers an alternative reform that would align the ADA more closely with "traditional" antidiscrimination mandates.

At the outset, the author concedes that the two revisions proposed in part IV of this note represent opposite and mutually exclusive extremes on the spectrum of potential legislative reforms of the ADA. Hence, they are best understood as an "either/or" proposition: either Congress must provide a clearer, stronger, and more definitive accommodation mandate (and legislatively safeguard the statute from predictable judicial resistance), or Congress must align the ADA more closely with previous, more "traditional," antidiscrimination mandates. Ultimately, the "backlash" against the ADA has all but destroyed the statute as a litigation tool.[16] Given the serious consequences of judicial resistance to core elements of the statute, the unifying central theme of the proposals presented in this note is consistent: major (and potentially extreme) revisions of the ADA are imminently necessary.

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14. Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 645 (2001) [hereinafter "Jolls"].

15. J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 Wm. & Mary L. Rev. 1385 (2003) [hereinafter "Verkerke"].

16. *See infra,* text accompanying notes 23 & 24, and the sources cited therein.

I. TRIUMPH OR TRAGEDY?: THE HISTORY AND MAKING OF THE ADA

A. A Most Unlikely Marriage

In the midst of a Republican administration tenaciously pursuing deregulation and limitations on the cost of government, the most unlikely of marriages transpired: a "landmark" in the arena of civil rights legislation received unprecedented bipartisan support in Congress. The Americans with Disabilities Act of 1990,[17] termed the "most sweeping civil rights legislation in a generation,"[18] sailed through Congress by an overwhelming majority and received the active support and cooperation of the Bush Administration.[19] Sponsors described the ADA as a "long-overdue 'emancipation proclamation' for the disabled,"[20] and proponents held high hopes that the legislation would usher in a new era of changing attitudes and perceptions comparable to that succeeding antidiscrimination laws affecting race and gender.[21] President Bush evoked images of the fall of the Berlin Wall, which had occurred the year before, when he announced that the ADA took "a sledgehammer to [the] wall . . . which has, for too many generations, separated [disabled] Americans from the freedom they could glimpse, but not grasp. . . . Let the shameful wall of exclusion finally come tumbling down."[22] Such starry-eyed visions would be short-lived, however, as reports indicate

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17. 42 U.S.C. §§ 12101-12213 (2000).

18. Glen Elsasser, *Senate OKs Rights Bill for Disabled*, Chicago Tribune, Sept. 8, 1989, at 1.

19. *See* Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 Ga. L. Rev. 27, 30 & n.2 (2002) [hereinafter "McGowan"]. This support is even more astonishing when compared with the Bush Administration's treatment of the proposed Civil Rights Act of 1990, which President Bush vetoed, calling it a "quota bill." *See* Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 La. L. Rev. 1459 (1994).

20. Helen Dewar, *Senate Approves Disabled Rights Bill: Bush Expected to Sign Landmark Legislation*, The Washington Post, July 14, 1990, at A1.

21. *See* G. Phelan & J. Atherton, Disability Discrimination in the Workplace § 1.07 (1997) (stating that "[t]wenty-six years after the Civil Rights Act of 1964, our nation has conferred upon people with disabilities the same protections afforded other minorities and women."). This general sentiment is further reflected by the statement, in a House Committee Report, that "the Americans with Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964." H.R. Rep. No. 101-485, pt. III, at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 449.

22. National Council on Disability, Equality of Opportunity: The Making of the Americans with Disabilities Act at 179-80 (1997) [hereinafter "National Council on Disability"].

that well over 90 percent of ADA plaintiffs fail at the summary judgment stage,[23] and disability advocates balk at judicial interpretations which cripple the once-heralded enactment.[24] Before examining possible reasons for this phenomenon, it is necessary to first understand the justifications and findings that led Congress to enact the ADA.

B. An Enticing Vision: The Objectives Underlying the Design and Promulgation of the ADA

Congress enacted the ADA in 1990 upon determining that the approximately 43 million disabled Americans comprise "a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of [their] individual ability . . . to participate in, and contribute to, society."[25] The discrimination sought to be corrected often took the form of "intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to

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23. A recent survey conducted by the American Bar Association found that a significant percentage of ADA discrimination claims are dismissed on summary judgment because plaintiffs cannot prove the prima facie elements, which include disabled status. The survey also revealed that in cases in which one party clearly prevailed, 92% of judicial decisions favored defendants. *See Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 Mental & Physical Disability Law Reporter (ABA Comm'n on the Mentally Disabled) 403, 403-05 (1998). Additionally, Ohio State Law Professor Ruth Colker recently published an even more comprehensive two-part study of outcomes in federal district and appellate ADA Title I decisions. Her findings revealed that of those cases included in the appeals court data set defendants had prevailed at the trial court level 94% of the time. Of those 94%, defendants prevailed on appeal 84% of the time. Of the remaining 6% of district court cases in which plaintiffs had prevailed, 48%, were reversed in defendants' favor on appeal. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99 (1999).

24. *See, e.g.*, Alison Barnes, *Envisioning a Future for Age and Disability Discrimination Claims*, 35 U. Mich. J.L. Reform 263, 264 (2002) ("Altogether, the ideals and optimism represented by [the ADA and ADEA] have given way to political forces that favor deregulated business interests and diminished individual rights."); Diane L. Kimberlin and Linda Ottinger Headley, *ADA Overview and Update: What has the Supreme Court Done to Disability Law?*, 19 Rev. Litig. 579, 581-82 (2000) ("Court decisions since the ADA's passage . . . have created the perception that employers will usually prevail in ADA lawsuits and that employees have little chance of successfully establishing disability discrimination.").

25. 42 U.S.C. § 12101(a)(7) (2000).

existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."[26] The legislative goals were to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency."[27] In this way, the Act provided an enticing vision of equal opportunity for all Americans, while simultaneously reducing the unnecessary expenses concomitant to dependency and nonproductivity.[28] At the Republican Convention in 1988, President Bush declared, "I am going to do whatever it takes to make sure the disabled are included in the mainstream. For too long, they have been left out, but they are not going to be left out anymore."[29] The ADA sought to make this vision a reality with sweeping provisions and broad language aimed at addressing the wide range of difficulties, and eliminating many of the barriers, preventing the disabled from full participation in everyday life.

C. Translating Vision Into Reality: An Overview of the Substantive Provisions of the ADA

The ADA is codified under three substantive titles,[30] each designed to address distinct obstacles faced by individuals with disabilities. Title I prohibits disability discrimination in employment[31]

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26. 42 U.S.C. § 12101(a)(5) (2000).

27. 42 U.S.C. § 12101(a)(8) (2000); *see also* 42 U.S.C. 12101(b) (2000) (discussing the legislative purpose of the ADA).

28. *See* 42 U.S.C. § 12101(a)(9) (2000).

29. National Council on Disability, *supra* note 22, at 84.

30. Title II of the ADA bans discrimination in state and local government programs (*see* 42 U.S.C. §§ 12131-12165 (2000)), while Title III does the same with respect to private entities offering commercial facilities and providing places of public accommodation (*see* 42 U.S.C. §§ 12181-12189 (2000)). Title IV contains miscellaneous enforcement provisions and exemptions (*see* 42 U.S.C. §§ 12201-12213 (2000)).

31. 42 U.S.C. §§ 12111-12117 (2000). In addition to the guidance provided in the text of the Act, the ADA delegates regulatory and enforcement authority over Title I to the Equal Employment Opportunity Commission (EEOC) (*see* 42 U.S.C. § 12116 (2000). Pursuant to this grant of authority, the commission has promulgated formal regulations defining and illustrating the substantive provisions of the Act, as well as several interpretive guides and manuals. The formal EEOC regulations addressing Title I are codified at 29 C.F.R. §§ 1630.1-.16 (2002). The commission also promulgated interpretive guidance at 29 C.F.R. app. §§ 1630.1-.16 (2002). Unlike regulations, interpretive guidelines are not promulgated according to formal notice and comment procedures, and, hence, do not generally receive the same level of judicial deference as regulations. An EEOC technical assistance manual addressing the provisions of Title I [Equal Opportunity Commission, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* (1992)] is also *available at* http://www.ada-

and serves as the focus for this comment. With the exclusion of the federal government and private membership clubs, Title I of the ADA applies to those entities employing fifteen or more employees. The Act prohibits a covered entity from discriminating against a qualified individual with a disability because of his disability in regard to all terms, conditions, and privileges of employment.[32] The Act specifically describes a broad array of actions constituting discrimination such as denying a qualified individual with a disability a reasonable accommodation[33] or using standards or criteria "that have the effect of discrimination on the basis of a disability."[34] In this catalogue of proscribed discriminatory conduct, however, the ADA transcends previous prohibitions on discrimination[35] by inserting an affirmative duty, on the part of employers, to make "*reasonable accommodations* to the known physical or mental limitations of an otherwise qualified individual with a disability."[36] Hence, in order to establish a prima facie case of discrimination under the ADA, the plaintiff must prove, by a preponderance of the evidence: (1) that he or she has a disability within the meaning of the ADA; (2) that he or she is qualified, or able, to perform the essential functions of the position with or without reasonable accommodation; and (3) that the employer took an adverse employment action against him or her in whole or in part because of the protected disability. The majority of litigation has focused on defining the terms "disability," "qualified individual," and "reasonable accommodation," as well as outlining the contours of available employer defenses.

An individual is considered to have a disability under the ADA in three separate instances: (1) if he or she has a "physical or mental impairment that substantially limits one or more of the major life

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infonet.org/documents/titleI/titleI.asp (last visited Sept. 12, 2003). See also, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*, *available at* http://www.eeoc.gov/docs/accommodation.html (last visited Sept 12, 2003), for a detailed analysis of ADA provisions.

32. 42 U.S.C. § 12112(a) (2000).

33. 42 U.S.C. § 12112(b)(5)(A) (2000). See 42 U.S.C. § 12112(b) (2000) for a complete listing of the proscribed discrimination.

34. 42 U.S.C.§ 12112(b)(3)(A).

35. Title VII does include an explicit duty to provide reasonable accommodation where religion is concerned, however, this has been interpreted very restrictively. *See, e.g.,* Trans World Airlines v. Hardison, 432 U.S. 63, 97 S. Ct. 2264 (1977); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 107 S. Ct. 367 (1986). Professor Christine Jolls, in *Antidiscrimination and Accommodation*, argues that other antidiscrimination mandates applying to race and sex can, likewise, be classified as accommodation mandates because they impose similar costs on employers. *See* Jolls, *supra* note 14. For further discussion of this topic *see infra* text accompanying notes 188-198.

36. 42 U.S.C.§ 12112(b)(5)(A) (2000) (emphasis added).

activities of such individual;" (2) if he or she has a "record of" having such a physical or mental impairment; or (3) if he or she is "regarded as" having such an impairment.[37] Under the first category of covered disabilities a plaintiff must establish three things: (1) he or she has a physical or mental impairment;[38] (2) the impairment affects his or her ability to perform a "major life activity;"[39] and (3) the limitation is "substantial."[40] The second and third categories of protected disabilities under the ADA, i.e. the "record of" and "regarded as" definitions, protect those individuals who may not have a covered physical or mental impairment from being treated by employers as if they did. Persons who previously suffered from a covered impairment, or who were wrongly classified as having such an impairment, frequently fall into the category of individuals having a "record of" such impairments. The ADA's protection of persons "regarded as" having a covered impairment includes individuals whose impairments do not substantially limit a major life activity, but who are treated by employers as having such limitations. This language would also encompass those individuals who are impaired solely by the attitude of others toward such impairments.[41]

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37. 42 U.S.C. § 12102; *see also* 29 C.F.R. § 1630.2(g)(1) (2000), 29 C.F.R. § 1630.2(g)(2-3) (2000), 29 C.F.R. § 1630.2(k) (2000) ("Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."), 29 C.F.R. § 1630.2(l)(1-3) (2000) ("Is regarded as having such an impairment means: (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) Has none of the impairments defined in paragraphs (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.").

38. The EEOC regulations define the terms "physical or mental impairment" to encompass virtually any physiological or psychological disorder. *See* 29 C.F.R. § 1630.2(h)(1-2) (2000).

39. Like its ancestor statute, the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, the ADA defines "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, reading, learning, and working." 29 C.F.R. § 1630.2(i) (2000).

40. An individual is "substantially limited" if he or she is unable to perform, or is significantly restricted (as compared with other individuals) in the performance of, a major life activity that the average person in the general population can perform. 29 C.F.R. § 1630.2(j)(1)(i-ii) (2000). Factors influencing a determination of substantial limitation include the nature and severity of the impairment, how long the impairment is expected to last, and whether the impairment may be characterized as permanent or long-term. 29 C.F.R. § 1630.2(j)(2)(i)-(iii) (2002).

41. 29 C.F.R. § 1630.2(l)(1). The Supreme Court explained the rationale for this standard in Sch. Bd. of Nassau County, Fla. v. Arline, when it stated that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." 480

Regardless of disabled status, the ADA only prevents an employer from discriminating against a "qualified" worker with a disability.[42] The idea of "reasonable accommodation" factors into the meaning of a "qualified individual with a disability," which includes persons who can, "with or without reasonable accommodation," perform the essential functions of the job in question.[43] Each and every person who is a qualified individual with a disability is entitled to reasonable accommodation under the ADA. Although the cost may not always be *de minimis,*[44] if the accommodation is "reasonable" it is mandated by the Act and, hence, must be provided by the employer.[45] The accommodation duty is balanced by the provision that it must not create an "undue hardship" for the employer. An employer's "undue

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U.S. 273, 284, 107 S. Ct. 1123, 1129 (1987). *See also* EEOC v. Tex. Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996) (employer's refusal to hire obese job applicant based on assumptions about impaired mobility not derived from objective medical testings or findings violated the antidiscrimination mandate of the ADA); Riemer v. Illinois Dep't of Transp., 148 F.3d 800 (7th Cir. 1998) (reasonable juror could find that discrimination against employee based on an asthma condition regarded by employer as substantially limiting the major life activity of breathing violated the ADA); E.E.O.C. v. Joslyn Mfg. Co., 5 A.D. Cas. 1220 (N.D. Ill. 1996) (punch press operator with record of carpel tunnel syndrome overcame summary judgment and was entitled to a trial on whether his perceived impairment substantially limited his ability to work).

42. 42 U.S.C. § 12112(a) (2000).

43. 42 U.S.C. § 12111(8) (2000). The ADA states that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." *Id.* The EEOC regulations set up a two-step analysis for determining whether an individual is qualified: (1) the individual must satisfy the prerequisites of the position, such as possessing the appropriate educational background, employment experience, skills, and licenses, and (2) the individual must be able to perform the essential functions of the desired position once a reasonable accommodation is provided. 29 C.F.R. app. § 1630.2(m) (2002).

44. *See* 29 C.F.R. § 1630(p) (2000). The *de minimis* standard was applied to cases of religious discrimination under Title VII. Under this approach, any accommodation that requires the employer to incur more than a slight cost would likely constitute an undue hardship. Congress specifically rejected the *de minimis* standard in the context of the ADA. *See* H.R. Rep. No. 101-485, pt. 2, at 68 (1990); *see also,* Lyons v. Legal Aid Soc'y, 68 F.3d 1512 (2d Cir. 1995) (cost of parking spaces for disabled Legal Aid attorney may be a reasonable accommodation, although possibly costing as much as $520 per month).

45. While not specifically defined, the statute does list possible accommodations, including: "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(A)-(B) (2000).

hardship" arises if the accommodation requires "significant difficulty or expense," when considered in light of factors such as the employer's size, financial resources, and the nature and structure of its operation.[46] Hence, the terms "reasonable accommodation," "qualified individual," and "undue hardship" are interdependent and entangled, rendering them nearly impossible to categorize neatly or define separately.[47] An individual is qualified only if he can perform the job with or without reasonable accommodation, and an accommodation is reasonable only if it does not pose an undue hardship.

Once a plaintiff satisfies the three prima facie elements– disability, qualification, and adverse employment decision because of a disability– n employer has several available mechanisms for defending against claims of disability discrimination. Section 12113(a) of the ADA provides a defense for employment qualification standards "shown to be job-related and consistent with business necessity," although their effect is to exclude persons with disabilities, provided that "such performance cannot be accomplished by reasonable accommodation."[48] This defense is termed the "business necessity defense." The ADA states that the term, "'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[49] Hence, an employer may also defend against discrimination claims by arguing that the disabled individual poses a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[50] The latter defense, termed the "direct threat defense,"[51] is considerably narrow as

46. *See* 42 U.S.C. § 12111(10) (2000). The EEOC regulations state that an accommodation poses an "undue hardship" if it would be "unduly costly, extensive, substantial, disruptive, or . . . would fundamentally alter the nature or operation of the business." 29 C.F.R. app. § 1630.2(p) (2000).

47. *See generally,* Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent,* 14 Berkeley J. Emp. & Lab. L. 201 (1993).

48. 42 U.S.C. § 12113(a) (2000). "The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* at § 12113(b).

49. 42 U.S.C. § 12113(b) (2000).

50. 42 U.S.C. § 12111(3) (2000).

51. For an overview of the origin and meaning of the direct threat defense see Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense,* 95 Nw. U. L. Rev. 1279, 1298 (2001); *see also* Amanda J. Wong, *Distinguishing Speculative and Substantial Risk in the Presymptomatic Job Applicant: Interpreting the Interpretation of The Americans With Disabilities Act Direct Threat Defense,* 47 UCLA L. Rev. 1135, 1143-1156 (2000) (discussing policy concerns underlying the direct threat defense and the EEOC interpretation allowing for direct threat-to-self as a defense to liability under the ADA).

outlined in the text of the ADA: only significant health or safety risks warrant an adverse employment decision and, even then, only when the risks cannot be mitigated by reasonable accommodation.[52] The EEOC regulations, however, advance this defense a step further to include significant threats to the health or safety of the disabled individual himself.[53] The regulations mandate that such determinations be based on "individualized assessments" of the disabled person's ability to safely perform the essential functions of the job, which, in turn, should be predicated on reasonable medical judgments relying on the most current medical knowledge and/or best available objective evidence.[54] Disability advocates and numerous commentators criticized the EEOC's inclusion of self-harm as flying in the face of an obvious Congressional intent to do away with overprotective, paternalistic employment practices.[55] However, the

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52. There has been considerable debate regarding whether the business necessity and direct threat defenses should be understood to operate in tandem or as completely separate standards. The EEOC Interpretive Guidance states that "[w]ith regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the 'direct threat' standard in § 1630.2(r) in order to show that the requirement is job related and consistent with business necessity." 29 C.F.R. § 1630 app. §§ 1630.15(b), 1630.15(c) (2000); *see also* 29 C.F.R. § 1630.10 (requiring that selection criteria that screen out persons with disabilities, including "safety requirements," must be job-related, consistent with business necessity, and not amenable to reasonable accommodation); E.E.O.C. v. Exxon Corp., 1 F. Supp. 2d 635, 642 (N.D. Tex. 1998) (finding that applying the generic "business necessity" test to safety qualifications would "arguably render the direct threat test superfluous"), *rev'd on other grounds*, 203 F.3d 871 (5th Cir. 2000); *but see* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 122 S. Ct. 2045 (2002) (interpreting the direct threat defense as a smaller subpart, or illustration, of the more expansive defense of business necessity).

53. 29 C.F.R. § 1630.2(r) (2000) ("Direct Threat means a significant risk of substantial harm to the health or safety of *the individual* or others that cannot be eliminated or reduced by reasonable accommodation.") (emphasis added).

54. 29 C.F.R. § 1630.2(r). Factors to be considered when making this individualized risk assessment include: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm." *Id.*

55. Congressional intent is a troublesome and often indiscernible concept. For example, the appendix to the EEOC regulations cite a Senate report (29 C.F.R. app. § 1630.2(r), *citing* S. Rep. No. 101-116, at 56 (1989)), a House Judiciary Committee report (*Id., citing* H.R. Rep. No. 101-485, pt. 3, at 45-46 (1990)), and a House Labor Committee report (*Id., citing* H.R. Rep. No. 101-485. pt. 2, at 56-57 (1990)) in support of its interpretation of the direct threat defense as including self-harm. Commentators criticizing the EEOC interpretation find ample support for their position in the legislative history as well. *See, e.g.*, H.R. Conf. Rep. No. 101-596, at 57, 60, 77, 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 566, 569, 586, 593; H.R. Rep. No. 101-485, pt. 3, at 34, 45-46 (1990), *reprinted in* 1990

Supreme Court unanimously resolved the matter in *Chevron U.S.A. Incorporated v. Echazabal*.[56] In doing so, the Court explicitly distinguished the ADA from previous antidiscrimination legislation in a manner that is examined further in Part III of this note.

II. *CHEVRON U.S.A. INCORPORATED V. ECHAZABAL*: THE GENERALIZED VS. THE INDIVIDUALIZED

The case arose after Mario Echazabal's application for employment with Chevron U.S.A. Incorporated (Chevron) was denied twice, and his then-current employment with independent contractors retained by Chevron was terminated following two separate company doctors' determinations that his medical condition would be exacerbated by exposure to toxins present in the refinery. Mario Echazabal worked for various independent contractors retained by Chevron for approximately 17 years before applying directly to Chevron for a job in the coker unit of its El Segundo refinery. The company extended him an offer of employment conditioned on the results of a physical examination. The examination showed an uncorrectable liver abnormality ultimately found to be due to the hepatitis C virus. Chevron's physicians concluded that exposure to hepatoxic chemicals involved in the job would further damage Echazabal's already reduced liver capacity, seriously endanger his health, and potentially cause his death.[57] On the basis of this examination, Echazabal was not hired by Chevron. Three years later Echazabal applied for a position as a "plant helper" in the El Segundo coker unit, and again underwent a similar physical examination. Once again Chevron withdrew its conditional offer of employment on the basis of this exam, and this time Chevron requested that the contractor for whom Echazabal was then working immediately remove him from the refinery or place him in a position that would eliminate his exposure to chemicals. Subsequently, Echazabal was removed from the refinery altogether.

U.S.C.C.A.N. 445, 457; H.R. Rep. No. 101-485, pt. 2, at 76, *reprinted in* 1990 U.S.C.C.A.N. 303, 359. Frequent citation is also made to the following statement by ADA co-sponsor, Senator Kennedy:

> The ADA provides that a valid qualification standard is that a person not pose a direct threat to the health or safety of other individuals in the workplace—that is, to other coworkers or customers.... It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health.

136 Cong. Rec. S9684-03, at S9697 (1990).

56. 536 U.S. 73, 122 S. Ct. 2045 (2002).

57. Brief for Petitioner at 1-2, Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 122 S. Ct. 2045 (2002) (No. 00-1406).

Echazabal filed suit in state court claiming that Chevron's decision to exclude him from the refinery violated the ADA. Chevron removed the suit to federal court and successfully moved for summary judgment arguing that the company was entitled to exclude Echazabal because his employment would pose a "direct threat" to his own health or safety.

A. Ninth Circuit Reversal

On appeal to the Ninth Circuit, the question was squarely presented: does the direct threat defense encompass threats to a worker's own health or safety?[58] On rehearing, a divided panel of the court[59] reversed the district court's judgment, holding (1) any direct threat posed to Echazabal's own health or safety did not provide Chevron with an affirmative defense to liability under the ADA for refusing to hire him, and (2) any risk that Echazabal's liver would be damaged from further exposure to solvents and chemicals present in the refinery did not preclude him from being "otherwise qualified" within the meaning of ADA.[60] The court first examined whether Chevron had satisfied the direct threat defense, relying foremost on a textual argument from the wording of the ADA. The majority found that, "[o]n its face, the provision does not include direct threats to the health or safety of the disabled individual himself."[61] Using the maxim *expressio unius est exclusio alterius*, the court asserted that "by specifying only threats to 'other individuals in the workplace,' the statute makes it clear that threats to other persons—including the

58. Echazabal v. Chevron U.S.A. Inc., 226 F.3d 1063, 1066 (9th Cir. Cal. 2000).

59. The court initially rendered a unanimous opinion, 213 F.3d 1098 (9th Cir. Cal. 2000), but on rehearing Judge Trott dissented, 226 F.3d 1063 (9th Cir. Cal. 2000).

60. 226 F.3d 1063 (9th Cir. Cal. 2000). Other circuits had interpreted the provision requiring that an ADA plaintiff be "otherwise qualified" to include, as an essential function of the job, being able to perform the job without harming himself. *See* Koshinski v. Decatur Foundry, Inc., 177 F.3d 599 (7th Cir. 1999) (degenerative arthritis which would be exacerbated by employment position rendered the plaintiff not qualified to do the job because he could not perform the essential functions of the position); E.E.O.C. v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997) (suicidal therapist dismissed from her job was not a qualified individual because the ability to handle prescription medications without posing a threat to herself was an essential function of the job). The Ninth Circuit majority later addressed whether Echazabal was an "otherwise qualified" individual, defining the term "essential functions" to mean those "job functions . . . that constitute a part of the performance of the job." *Echazabal*, 226 F.3d at 1071. For Mario Echazabal, the majority interpreted this narrowly to consist of "various actions that helped keep the coker unit running." *Id.* at 1071.

61. *Echazabal*, 226 F.3d at 1066.

disabled individual himself—are not included within the scope of the defense."[62] The majority also found that the legislative history of the ADA further bolstered their interpretation, noting that in nearly every instance in which the term "direct threat" appeared in conference reports, committee reports and hearings, and even the floor debate, it was accompanied by a reference to "threats to others" or "other individuals in the workplace."[63] The court found their reading of the ADA even more persuasive in light of what they perceived to be the policies underlying the enactment of the ADA, namely, Congress's desire to prohibit discrimination based on overprotective rules or policies.[64]

The majority understood the ADA to embody a general principle against the paternalistic treatment of disabled persons. The court found support for this objective in two Title VII cases: *Dothard v. Rawlinson*[65] and *International Union, UAW v. Johnson Controls, Incorporated.*[66] In the context of a Title VII claim of gender discrimination against a female prison guard, the *Dothard* Court stated that "[i]n the usual case, 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."[67] Similarly, in *Johnson Controls*, the Court restated that "danger to a woman herself does not justify discrimination," and held that an employer could not justify exclusion of women from certain positions at a battery manufacturing plant simply because of the threats that lead exposure posed to a woman's own reproductive health.[68] The Ninth Circuit majority concluded that "[g]iven Congress's decision in the Title VII context to allow all individuals to decide for themselves whether to put their own health

62. *Id.* at 1066-67.

63. *Id.* at 1067, *citing* H.R. Conf. Rep. No. 101-596, at 57, 60, 77, 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 566, 569, 586, 593. The court noted one passage in the legislative history which appeared to contradict their reading of the defense. However, the majority found that, since it did not take place in the context of discussing the direct threat defense, it was not directly applicable to their inquiry. *See Echazabal,* 226 F.3d at 1068 n.6 (citing the report of the House Committee on Education and Labor, which states that, "if the examining physician [finds] that there [is] a high probability of substantial harm if the candidate performs the particular functions of the job in question, the employer [may] reject the candidate." H.R. Rep. No. 101-485, pt. 2, at 73-74, *reprinted in* 1990 U.S.C.C.A.N. 303, 355-56).

64. *Echazabal,* 226 F.3d at 1068, *citing* H.R. Rep. No. 101-485, pt. 2, at 74, *reprinted in* 1990 U.S.C.C.A.N. 303, 356 (noting that "[p]aternalism is perhaps the most pervasive form of discrimination for people with disabilities").

65. 433 U.S. 321, 97 S. Ct. 2720 (1977).

66. 499 U.S. 187, 111 S. Ct. 1196 (1991).

67. *Dothard,* 433 U.S. at 335, 97 S. Ct. at 2730.

68. *Johnson Controls,* 499 U.S. at 202, 111 S. Ct. at 1205 (*citing Dothard,* 433 U.S. at 335, 97 S. Ct. at 2729-30).

and safety at risk, it should come as no surprise that it would enact legislation allowing the same freedom of choice to disabled individuals."[69] On further appeal however, a unanimous Supreme Court was scarcely convinced by this jurisprudence, and appeared highly skeptical of the applicability of Title VII case law in the context of ADA discrimination claims.

B. Unanimous Disagreement

The Supreme Court granted certiorari to consider the sole issue of whether the EEOC interpretation of the direct threat defense is permitted by the ADA.[70] The Court first addressed the Ninth Circuit's textual interpretation of the statute, specifically their use of the maxim *expressio unius est exclusio alterius,* finding three logical flaws with the lower court's reasoning. First, the Court stated that the "direct threat to others" provision was included only as an illustration, rather than an exclusive list, of legitimate qualification standards falling within the larger category of qualifications which are "job-related and consistent with business necessity."[71] The Court found that these "spacious defensive categories" indicate that broad discretion was to be used (either by an agency or a court) in setting the limits of permissible qualification standards,[72] and in such instances utilization of the expression-exclusion maxim is misplaced. Furthermore, the Court found that Congress's decision to use

69. *Echazabal v. Chevron U.S.A. Inc.*, 226 F.3d 1063, 1068-69 (9th Cir. 2000). The circuit court's interpretation of the direct threat defense created tension with the decisions of at least two other circuits. *See* Koshinski v. Decatur Foundry, Inc., 177 F.3d 599, 603 (7th Cir. 1999) (finding that employee with degenerative arthritis was not qualified within the meaning of the ADA since he could not perform the essential functions of the job without exacerbating his arthritis), and Moses v. American Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996) (termination of epileptic employee upheld because of the significant risk to himself posed by the possibility that he might have a seizure while exposed to machinery reaching temperatures of 350 degrees Fahrenheit)

70. *Chevron U.S.A. Inc. v Echazabal,* 536 U.S. 73, 122 S. Ct. 2045 (2002). The Court passed on the issue of whether Echazabal was a "qualified individual" within the meaning of the ADA. The Court stated, "[t]hat issue will only resurface if the Circuit concludes that the decision of respondent's employer to exclude him was not based on the sort of individualized medical enquiry required by the regulation, an issue on which the District Court granted summary judgment for petitioner and which we leave to the Ninth Circuit for initial appellate consideration if warranted." *Id.* at 76 n.1, 122 S. Ct. at 2047 n.1.

71. *Id.* at 80, 122 S. Ct. at 2050. The Court found support for this argument in the language of the statute specifying that qualification standards which are job-related and consistent with business necessity *may include* a requirement that the individual not pose a direct threat to others in the workplace. *Id.*

72. *Id.*

language identical to the direct threat provision contained in the Rehabilitation Act, while knowing that the EEOC had interpreted that language to include threats-to-self, precluded a convincing argument that Congress unequivocally intended to exclude threats-to-self from the direct threat provision of the ADA.[73] Finally, the Court found that Congress could not possibly have meant the direct threat provision to be an exhaustive listing of safety defenses available to employers because they did not even list threats to others outside of the workplace. The Court insisted, "If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?"[74] In sum, the Court viewed the direct threat provision of the ADA as merely one example of a possible defense which would fall within the more general category of qualification standards shown to be job-related and consistent with business necessity. In this way, the agency interpretation extending the provision to allow for other examples, namely threats to the disabled individual himself, did not contradict the text of the ADA.

After determining that Congress did not speak exhaustively on the matter, the Court employed the *Chevron U.S.A. Incorporated v. Natural Resources Defense Council, Incorporated*[75] analysis to determine whether the regulation was a reasonable interpretation of the statutory defense for qualification standards that are job-related and consistent with business necessity. Chevron's proffered reasons for the regulation included a desire to avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating the national Occupational Safety and Health Act of 1970 (OSHA).[76] The Court found the OSHA concern sufficient to declare the regulation reasonable, stating that although there is uncertainty as to whether an employer would be liable for hiring an individual who knowingly

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73. *Id.* at 82, 122 S. Ct. at 2051. The Court questioned, "Did Congress mean to imply that the agency had been wrong in reading the earlier language to allow it to recognize threats to self, or did Congress just assume that the agency was free to do under the ADA what it had already done under the earlier Act's identical language? There is no way to tell." *Id.* at 83, 122 S. Ct. at 2051.

74. *Id.* at 84, 122 S. Ct. at 2051. Arguably, "other individuals in the workplace" can be read to encompass customers. *See* 42 U.S.C. § 12113(b) (2000). In fact, the caselaw is relatively settled that the employer may lawfully require that its employees not pose a direct threat to the health or safety of other individuals in the workplace, including customers and co-workers. *See, e.g.*, Robertson v. Neuromedical Ctr., 161 F.3d 292 (5th Cir. 1998) (holding that neurologist with ADD, which affected his memory, posed direct threat to his patients).

75. 467 U.S. 837, 104 S. Ct. 2778 (1984).

76. *Echazabal*, 536 U.S. at 84, 122 S. Ct. at 2052, *citing* OSHA, 84 Stat. 1590, as amended, 29 U.S.C. § 651 *et seq.* (2000).

consented to the dangers posed by the job, "there is no denying that the employer would be asking for trouble."[77]

Lastly, the Court addressed the Ninth Circuit's resort to the ADA's principle against paternalism. The Court announced a distinction between individualized risk assessments and the type of workplace paternalism prohibited by Title VII and the jurisprudence cited by the Ninth Circuit. Noting that the ADA was intended to address workplace paternalism, the Court cited the Congressional findings' recognition of "overprotective rules and policies"[78] as a form of discrimination. However, the Court rejected the contention that Congress sought to eliminate an employer's ability to refuse to place particular disabled workers at a specifically demonstrated risk. They pointed instead to an overall goal of breaking down the barriers created by an employer's generalized assessments, rooted in unproven stereotypes and bias, which were too often applied to the class of disabled persons as a whole. The Court found that the EEOC regulation outlawed precisely this sort of "sham protection," by demanding a "particularized enquiry into the harms the employee would probably face."[79] The Court noted the contrary legislative history which decried paternalism in general terms but found that "those comments that elaborate actually express the more pointed concern that such justifications are usually pretextual, rooted in generalities and misperceptions about disabilities."[80]

Advancing the distinction between generalized and individualized risk assessments even further, the Court went on to address the Title VII jurisprudence that had employed a contradictory analysis in the context of sex discrimination. The Court briefly noted that Title VII, like the ADA, "allows employers to defend otherwise discriminatory practices that are 'consistent with business necessity.'"[81] Yet they stated, simply, that *Dothard* and *Johnson Controls* are "beside the point," because Title VII is generally concerned with "paternalistic judgments based on the broad category of gender, while the EEOC has required that judgments based on the direct threat provision be made on the basis of individualized risk assessments."[82] Hence, the

77. *Echazabal,* 536 U.S. at 84, 122 S. Ct. at 2052.

78. 42 U.S.C. § 12101(a)(5) (2000).

79. *Echazabal,* 536 U.S. at 86, 122 S. Ct. at 2053.They stated that the "EEOC was certainly acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job." *Id.*

80. *Id.* at 86 n.5, 122 S. Ct. at 2053 n.5.

81. *Id., citing* 42 U.S.C. § 2000e-2(k).

82. *Id.* at 86 n.5, 122 S. Ct. at 2053 n.5, *citing* Dothard v. Rawlinson,433 U.S. 321, 335, 97 S. Ct. 2720, 2730 (1977); International Union, UAW v. Johnson

Court apparently suggested that generalized discrimination based on pretext is unlawful, both with respect to women and disabled persons. However, adverse employment decisions which are individualized - i.e. based on the specific characteristics and risk associated with a single disabled individual - are permitted by the ADA and should, therefore, be upheld.

III. UNRAVELING *ECHAZABAL*: INCOMPATIBLE MODEL OR DISINGENUOUS MANDATE?

In making the distinction between generalized and individualized risk assessments, the Supreme Court erected something of a wall of separation between Title VII sex discrimination and the antidiscrimination mandate embodied in the ADA. The implications of this unanimous decision require thorough examination in order to determine the future applicability of Title VII discrimination theory in the disability context. This section seeks to do just that. Part A seeks to determine whether there is something inherent in the ADA's antidiscrimination mandate that sets it apart from Title VII sex discrimination prohibitions, and particularly lends itself to recognition of the self-harm defense provided by *Echazabal*. Part A1 discusses the paternalistic framework through which disability has traditionally been viewed, and part A2 illustrates how paternalistic models of disability have influenced the evolution of disability rights in America. Part A3 then demonstrates how this paternalistic approach is manifest in the current version of the ADA. Following this investigation, part B of this section contrasts Congress's approach to disability discrimination in the workplace with its approach to discrimination based on another form of biological variance, namely sex.

The essence of my argument is that the inequality of disabled persons with the nondisabled majority[83] is strikingly similar to the inequality of women with men. However, disability discrimination was not a party to the social movement underlying sex discrimination prohibitions. Lacking this history, and perhaps political clout, the provisions of the ADA are predominantly understood against a backdrop that views the accommodation mandated by the statute as an inherently paternalistic "helpful intervention" rather than a civil

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Controls, Inc., 499 U.S. 187, 202, 111 S. Ct. 1196, 1205 (1991).

83. The author notes that the existence of a "nondisabled *majority*" depends entirely on how we define the category of "disabled." As Michael Kaback, professor and Chief M.D. in the Medical Genetics Division at the University of California at San Diego, remarked, "We're all mutants . . . [e]verybody is genetically defective." John Rennie, Grading the Gene Tests, Sci. Am., June 1994, at 88, 90-91.

right. This is largely attributable to the fact that the ADA was not enacted according to the same model utilized in Title VII sex discrimination prohibitions, suggesting that Congress's civil rights rhetoric, in the context of the ADA, may be somewhat disingenuous. Therefore, while the Supreme Court was likely correct in *Echazabal* to treat the statute in a different manner than Title VII sex discrimination, if Congress is serious about actualizing their enticing rhetoric of "emancipating" disabled persons from an exclusionary workplace, then the ADA must be revised to provide a clearer and more sincere antidiscrimination statute that could operate from the premise that freedom from discrimination in this context is, indeed, a civil right. Toward this end, part IV of this note offers two distinct potential revisions of the ADA.

A. The Stubborn Paternalistic Assumption

Conflicts between autonomy and paternalism strike at the very heart of civil rights controversies. While embodying many possible meanings, the term "paternalism," as used in this comment, refers to deliberate interference with an individual's freedom of choice, contrary to his express wishes, and under the guise of acting for his own good.[84] The Court in *Echazabal* essentially declared that an employer is free to exclude a worker from a position which would place him in certain danger. Hence, the Court's decision allows employers to directly interfere with an applicant's or an employee's freedom of choice contrary to his express wishes and under the guise of acting for his own good, thus falling within the definition of paternalism employed in this note.[85] While this decision is the first

84. *See also*, Paul Burrows, *Analyzing Legal Paternalism*, 15 Int'l Rev. L. & Econ. 489, 490 (1995); Gerald Dworkin, *Paternalism*, 56 MONIST 64, 65 (1972) ("By paternalism I shall understand roughly the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced."); David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454, 461 (1981) (defining paternalism as "the imposing of constraints on an individual's liberty for the purpose of promoting his or her own good."); Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 Duke L.J. 848, 889 (1990) ("With its roots in the notion of fatherhood and acting like a father, 'paternalism' means making decisions on others' behalf to protect them from harm or to advance their well-being. Although the motivation for paternalistic intervention may be altruistic, it inevitably involves an element of autonomy-deprivation for the 'protected' party.").

85. The author notes that such action may not always be taken in order to protect the employee or applicant from harm, but, rather, is oftentimes a product of economic self interest - i.e. fear of increased insurance, workers' compensation, tort liability, or, as mentioned by the Supreme Court in *Echazabal*, OSHA sanctions. However, the motive for the employer's action, for purposes of this comment, is not

pronouncement from the Supreme Court recognizing an express threat-to-self defense, other lower court decisions have reached essentially the same result by finding that either an applicant or employee was not a qualified individual with a disability because he could not safely perform the essential functions of the job in question[86] or that the safety-based qualification standard was a business necessity.[87] Many commentators assert that the ADA is intended to forbid such paternalistic employment decisions. In support for this proposition these critics frequently cite the Congressional findings' concern about "the discriminatory effects of . . . overprotective rules and policies" as well as similar statements in Congressional reports.[88] These same scholars condemn the EEOC's incorporation of a self-harm defense as introducing an element of paternalism that directly contradicts the ADA's legislative purpose. However, Congressional intent is a troublesome, clouded, and often indiscernible concept.[89]

What is clear is that, with limited modification, the text of the ADA largely incorporates the precedent and definitions that evolved under the Rehabilitation Act of 1973. Arguably, a paternalistic

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essential. Action taken under the guise of protecting a worker from the type of harm that might result in such claims still serves to limit his or her freedom of choice against his wishes, and, hence, may be characterized as paternalistic.

86. *See, e.g.*, Chandler v. City of Dallas, 2 F.3d 1385, 1388, 1393 (5th Cir. 1993) (Rehabilitation Act case upholding city's application of DOT's diabetes standard to drivers of non-DOT-covered vehicles: "[A]n individual is not qualified for a job if there is a genuine substantial risk that he or she could be injured or could injure others, and the employer cannot modify the job to eliminate that risk."); Davis v. Meese, 692 F. Supp. 505, 520 (E.D. Pa. 1988) (Rehabilitation Act case upholding FBI's ban on insulin-dependent diabetic special agents: "Congress' intent in enacting the Rehabilitation Act was not that employers must accept applicants for jobs where eminently qualified medical specialists are of the opinion that the job requirements pose a reasonably probable risk of harm to the applicant and others by reason of the applicant's 'handicap.'"); Wann v. American Airlines, Inc., 878 F. Supp. 82 (S.D. Tex. 1994) (finding a safety requirement included in the definition of "qualified individual with a disability,"and holding that applicant's breathing problems rendered him unqualified for position in question because he could not safely perform the essential functions of the job, which entailed exposure to exhaust and other fumes).

87. *See* E.E.O.C. v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000) (finding that safety-based qualification standards applying across the board to an entire class of employees need not be defended under the direct threat provision, but rather may be defended on the grounds that the qualification standard was a business necessity).

88. 42 U.S.C. § 12101(a)(5) (2000); *see also*, House Comm. on Education and Labor, Americans with Disabilities Act of 1990, H.R. Rep. No. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267; and S. Rep. No. 101-116, at 38 (Report of Senate Comm. on Labor and Human Resources) (1990).

89. *See supra* text accompanying note 55, and the sources cited therein.

interpretation of the direct threat defense is a logical result of the inherently paternalistic approach employed by the Rehabilitation Act of 1973 and, ultimately, incorporated into the ADA. In order to expose the paternalistic approach to disability discrimination that was incorporated into the ADA, it is helpful to understand the history and evolution of disability rights in America and, specifically, the models of disability that have traditionally affected legislative enactments in this arena.

1. Disability Models: The Helpless, the Unrealistic, and the Overachievers

The evolution of disability rights in America is a product of the influence of two predominant models of disability: the medical model and the social pathology model.[90] The medical model of disability operates from the fundamental premise that disability is an "infirmity" best addressed by doctors who can attempt to "cure" or rehabilitate the individual.[91] Hence, by definition, disabled persons under this model are fundamentally unequal because of their inherently defective internal traits. By treating disability as an internal or inherent defect possessed by the individual,[92] this view establishes that the primary duty of disabled persons is to actively seek out rehabilitation through modern science so that they can rid themselves of their defects and, once "healed," rejoin a nondisabled society.[93] Correspondingly, the duty of government under a medical

90. *See, e.g.*, Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. Rev. 1341 (1993) [hereinafter "Drimmer"]; Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 Berkeley J. Emp. & Lab. L. 213 (2000) (examining other theoretical paradigms to explain how disability is conceptualized including the moral model, the medical model, the economic model, the social model, and the civil rights model) [hereinafter "Scotch, Models"]; Linda Hamilton Krieger, Foreword—*Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 Berkeley J. Emp. & Lab. L. 1 (2000); Mary Crossley, *The Disability Kaleidoscope*, 74 Notre Dame L. Rev. 621, 649-55 (1999); Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 Cath. U. L. Rev. 323, 328-38 (1999); Bonnie O'Day, *Economics versus Civil Rights*, 3 Cornell J.L. & Pub. Pol'y 291 (1994).

91. Drimmer, *supra* note 90, at 1347; *see also* Richard K. Scotch, From Good Will to Civil Rights (2d ed. 2001) [hereinafter "Scotch, Good Will"]. For a more detailed examination and critical discussion of the medical model of disability see Gary L. Albrecht, The Disability Business: Rehabilitation in America 67-90 (1992).

92. Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 Yale L. & Pol'y Rev. 1, 7 (1999).

93. *See* Drimmer, *supra* note 90, at 1348-49.

model is both to supply financial support to this helpless, yet deserving group, and to encourage the rehabilitation of their damaged bodies and minds.[94]

The social pathology model similarly seeks to remedy the "inherent defect" of disability, but operates from the premise that disability is a "deviant" characteristic, largely resulting from internal attitudinal or behavioral obstacles possessed by the disabled individual.[95] Hence, the marginal economic and social status of the disabled, under this view, stems from a lack of motivation and emotional adjustment.[96] The goal, then, under a social pathology model, is to "retrain" the attitudinal and behavioral abnormalities afflicting the disabled person in order to introduce the reformed individual into the mainstream of society.[97] Special attention is devoted to motivating the disabled individual to overcome his inherent "defeatist" attitude.[98]

Both models share the assumption that, to the extent that a disabled person struggles in adjusting to environments designed for people with few or no impairments, the fault lies in the disabled person himself, rather than in the environments. The medical model produces narratives of "helpless cripples" in need of charity or pity, while the social pathology model induces the idea that disabled persons should overcome their disabilities through persistently attacking their limitations.[99] One writer aptly illustrates the logical consequences of the often melded views: "Our attitudes toward disabilities seem to be a curious amalgam of fear and ignorance,

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94. Scotch, Models, *supra* note 90, at 214.

95. *See generally,* Drimmer, *supra* note 90, at 1349; Peter Blanck, *Civil War Pensions and Disability, in* Ohio State Law Journal 2001 Symposium: Facing the Challenges of the ADA: The First Ten Years and Beyond, 62 Ohio St. L.J. 109, 146 (2001); Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 Utah L. Rev. 247, 271-75 (2001); Joseph P. Shapiro, No Pity: People with Disabilities Forging a New Civil Rights Movement 30-32 (1993); Anita Silvers, *Formal Justice, in* Anita Silvers et al., Disability, Difference, Discrimination 56-59 (1998); Wendy Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 Berkeley J. Emp. & Lab. L. 53, 56-62 (2000).

96. *See* Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, 21 Berkeley J. Emp. & Lab. L. 166 (2000) [hereinafter "Hahn"].

97. *See* Drimmer, *supra* note 90, at 1349.

98. *See* Karl A. Menninger, Psychiatric Aspects of Physical Disability, at 8-17, *in* Psychological Aspects of Physical Disability (James F. Garret ed., 1952) (advocating for psychological counseling to address what he viewed as the major problem with individuals with disabilities, motivation). For a more contemporary illustration of the influence of this model of disability see Stuart Silverstein, *Opening Doors*, Los Angeles Times, Jan 26, 1992, at D1, D8.

99. *See generally,* Drimmer, *supra* note 90; Scotch, Models, *supra* note 90, at 219.

optimism and loathing . . . We applaud stories about overachieving 'super-cripples,' yet segregate disabled children in basement classrooms and isolated institutions."[100] The medical and social pathology models entrench these notions of inherent inferiority which, in turn, induce either pity and admiration or, alternatively, disapproval and intolerance toward the disabled and the policies that target them. Policies relying on these models are traditionally justified in terms of economic efficiency and marked by rhetoric displaying the hope of rendering the disabled individuals "productive" members of society.[101]

The consequence of viewing disability in terms of the medical and social pathology models is particularly troublesome. "Inferior" and "non-productive" are relative concepts defined by their corresponding "superior" and "productive" counterparts. This notion of superiority is often, perhaps unconsciously, accepted by the nondisabled majority and manifest in policies targeting disabled persons. The primary consequence of this framework is the notion that the superior must act as guardians to the inferior. When this notion of guardianship is combined with a predisposition regarding the "normal" activities that the disabled should strive toward – i.e. that of becoming a productive citizen – the role of guardian takes on a paternalistic component. The views of the superior, able-bodied majority are imposed upon the inferior, disabled individual under the guise of helping them to achieve what is their "proper" objective. By focusing on the inherent inferiority of the individual, the external environment faced by the disabled individual remains an afterthought, and it is only after the disabled individual conforms to the nondisabled majority that he is thought to be entitled to the same privileges enjoyed by the rest of society. This notion of guardianship centered around productivity uncovers the paternalistic assumption of the medical and social pathology models: disabled persons are fundamentally unequal due

100. Frank Bowe, Handicapping America, 23 (1978).

101. *See* Claire H. Liachowitz, Disability as a Social Construct: Legislative Roots 57, at 20, 77-79, 82-83, 107-08 (arguing that American public policy demonstrates the attitude that disabled persons who are unable to work are of diminished and lesser value); Robert Funk, Disability Rights: From Caste to Class in the Context of Civil Rights, in Images of the Disabled, Disabling Images at 1, 16 (Alan Gartner & Tom Joe eds., 1987) (discussing the Rehabilitation Act of 1973's decree to develop vocational, rehabilitative, and independent living programs and stating that focus of rehabilitation programs was "to create a nearly normal person"); Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 Yale L. & Pol'y Rev. 1, 5, 8-23 (1999) ("The definition of disability in antidiscrimination law is part of a larger cultural discourse that establishes and upholds dominant notions of health, illness, and disability while imposing a particular set of expectations upon individuals deemed to occupy each class.").

to their inherent inferiority. As such, the superior, able-bodied majority are in the best position to render helpful assistance to this inherently flawed class of persons in order help them realize the rights and privileges associated with productive citizenship (i.e. the privileges of conformity).

Explicit endorsement of these models contributes to stereotypical views of the disabled as broken, weak, and helpless. These stereotypes inevitably foster the patronizing attitudes that the nondisabled society generally holds toward people with disabilities. Although oftentimes justified in terms of economic efficiency, such views transform disability policies into a form of social welfare or affirmative action far removed from a civil rights statute.[102] Consequently, disability legislation utilizing these models has persistently portrayed an inferior class of disabled persons in need of outside intervention and rehabilitation in order to become fully productive "equal" citizens. The persistence of these views contributes to the paternalistic assumptions generally employed with regard to polices targeting the disabled and, ultimately, the jurisprudence interpreting such policies.

2. The Evolution of Disability Rights in America

Contemporary disability legislation originated following World War I when numerous veterans and injured soldiers successfully lobbied Congress for the Smith-Sears Act in 1918.[103] One year later, Congress enacted the first federal legislation addressing the problem of civilian disability, the Vocational Rehabilitation Act.[104] The model embodied in this law stubbornly remains a decidedly influential framework through which disability policy is viewed more than 80 years after its passage.[105] The Act attempted to address deficiencies

102. Affirmative action has a remedial goal that is designed to redress past wrongdoing. This is inconsistent with a proper goal of disability discrimination policy, which should aim at redressing present discrimination. *See* Paul C. Higgins, Making Disability: Exploring the Social Transformation of Human Variation 199-200 (1992).

103. Vocational Rehabilitation Act, ch. 107, 40 Stat. 617 (1918) (amended 1919) ("to provide for vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces."). For a discussion of disability policy prior to this enactment see Peter Blanck, *Civil War Pensions and Disability, in* Ohio State Law Journal 2001 Symposium: *Facing the Challenges of the ADA: The First Ten Years and Beyond,* 62 Ohio St. L.J. 109 (2001).

104. Act of June 2, 1920, ch. 219, 41 Stat. 735 (1920) (codified as amended at 29 U.S.C. §§ 731-741) (repealed 1973, and reenacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355).

105. *See* Drimmer, *supra* note 90, at 1362-66; *see also*, Scotch, Models, *supra* note 90; Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights*

in workers' compensation laws by promoting the "vocational rehabilitation of persons disabled in industry or in any legitimate occupation and their return to civilian employment."[106] Strongly influenced by the medical and social pathology models, the Act views the problem as one of "infirmity" and the solution as one of "rehabilitation." The Act defers to professionals to administer the rehabilitative services and grants them the power to determine whether an individual will ever be able to realize gainful employment, thus rendering him entitled to receive the benefits of the Act. Consequently, and consistent with the medical and social pathology models underlying its enactment, the Act robbed disabled individuals of their freedom of choice by granting "trained experts" the power to make all decisions concerning their rehabilitative potential, and thus, their societal inclusion.[107] The provisions of the Act were largely viewed as altruistic, rather than civil rights, in nature. Subsequent amendments to the Vocational Rehabilitation Act reinforced the medical and social pathology models of disability and entrenched the view that enactments in this arena were charitable in nature.[108]

Litigation, 2001 Utah L. Rev. 247, 271-73 (2001). ("The definition of an 'individual with a disability' (or 'handicapped individual') in the federal disability laws enacted between 1920 and 1973 reflected the medical and social pathology models of disability, as well as Congress' primary concern about people with disabilities: that many of them were unemployed and were therefore a burden on the national economy . . . While the [present definition of disability] represents significant progress toward conceiving disability as a civil rights construct, an unpacking of its terms reveals remnants of the medical and social pathology models lurking just below the surface."). Similarly, Ruth O'Brien, in her recent book, Crippled Justice: The History of Modern Disability Policy in the Workplace, argues that the focus of vocational rehabilitation during the 1950s and 1960s was on "treating" the disabled and, resultantly, entrenched the notion that it is people with disabilities, rather than society, that must change. According to her assessment, modern disability employment practices are influenced by vocational rehabilitation policies that only integrate disabled workers who have fully adapted themselves to the workplace. O'Brien argues that this normative schema influences judicial attitudes towards people with disabilities, and attributes Supreme Court resistance to the ADA's employment provisions, to this phenomenon. *See generally,* Ruth O'Brien, Crippled Justice: The History of Modern Disability Policy in the Workplace (2001).

106. Vocational Rehabilitation Act, at 735, Act of June 2, 1920, ch. 219, 41 Stat. 735 (1920) (codified as amended at 29 U.S.C. §§ 731-741) (repealed 1973, and reenacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973)); *see also* Drimmer, *supra* note 90, at 1364.

107. *See* Drimmer, *supra* note 90, at 1366; Chai R. Feldblum, *Definition of disability under federal anti-discrimination law: What happened? Why? And what can we do about it?*, 21 Berkeley J. Emp. & Lab. L. 91 (2000); McGowan, *supra* note 19, at 53-64.

108. The Randolph-Sheppard Vending Act Amendment of 1936 authorized

The Rehabilitation Act of 1973,[109] the first federal law expressly prohibiting discrimination against people with disabilities, extended this progress by explicitly recognizing that obstacles facing the disabled were discriminatory in nature. The sections dealing with employment—501, 503, and 504—apply only to the federal government, federal contractors, and recipients of federal funds. The most far-reaching antidiscrimination provision of the Act, Section 504, stated that "no otherwise qualified handicapped individual in the United States...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[110]

However, subsequent amendments clarifying the new law compromised the civil rights potential of the Act in two significant ways. Both the definition of the term "handicap" and the justifications for the Act rely heavily upon medical and social pathology models. An individual is "handicapped" within the meaning of the Rehabilitation Act if the person "has a physical or mental impairment which substantially limits one or more of such person's major life activities," has a "record of such impairment," or

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blind persons to operate vending stands on federal property. Randolph-Sheppard Act, ch. 638, 49 Stat. 1559 (1936) (codified as amended at 20 U.S.C. § 107 (1988)). This Act evidenced the "paramount social consideration" underlying disability legislation at this time: self-support. "[S]o long as the individual with a disability was employed, it mattered not that the job was menial and without opportunity for promotion or use of skills. Moreover the job chosen by Congress reinforced the view of federal charity, as the government provided the equipment and allowed blind vendors to sell their wares on federal property." Drimmer, *supra* note 90, at 1367; *see also*, The Vocation Rehabilitation Act Amendments of 1943, ch. 190, 57 Stat. 374, 374-380 (1943) (codified at 29 U.S.C. §§ 31-41) (repealed 1973 and reenacted in the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355), and the Vocation Rehabilitation Act Amendments of 1954 § 2. Some progress away from the medical and social pathology models was evident with the enactment of the Architectural Barriers Act in 1968, which required that all new facilities owned or leased by the federal government or built with public money be made accessible to people with disabilities. Pub. L. No. 90-480, 82 Stat. 718 (1968) (codified as amended at 42 U.S.C. §§ 4151-4157 (1988)); *see also* 36 C.F.R. §§ 1190.1-1192.79 (1992) (setting the minimum standards for the four federal agencies charged with enforcement). The progress of the Act lies in its acknowledgment that discrimination could be found in the external environment that disabled persons face, rather than simply a product of the inherent inferior condition of disabled individuals. However, the limitation of the Act to new public buildings implied that the cost of remodeling existing public buildings overrode the disabled person's right of accessibility. *See* Drimmer, *supra* note 90, at 1378. Moreover, enforcement of the Act was inconsistent at best. *Id.*

109. Pub. L. No. 93-112, 87 Stat. 393 (codified as amended at 29 U.S.C. §§ 793-94 (2000)).

110. § 504, 87 Stat. at 395 (codified as amended at 29 U.S.C. § 794 (2000)).

is "regarded as having such impairment."[111] The term "impairment," evoking images of a person who is inherently defective in some fashion, reinforces the stereotypes associated with the medical model of disability.[112] The idea is that disabled persons are flawed, although by no fault of their own, and societal inclusion is, then, premised on the correction or repair of this disabling condition. This tendency to equate disability with impairment significantly limited the effectiveness of the Rehabilitation Act. Hence, in a manner antithetical to its expressed goal, the Act served to reinforce the medical model's portrayal of helpless disabled persons, unable to function in any meaningful fashion and, therefore, deserving of pity, charity, or "special" services. This is further strengthened by the Act's description of disability as a condition that "substantially limits one or more . . . major life activities."[113] Equating biological anomaly with inferiority and a generalized limitation of ability characterizes disability in a fashion that presupposes incompetence and particularly lends itself to paternalistic interpretation.[114] Consequently, notwithstanding its civil rights rhetoric, the Rehabilitation Act definition of disability is centered on a framework that views the inherent physical defect within the disabled individual, rather than the external discriminatory environment, as the primary source of the impairment. Critics of this definition argue that Congress failed to grant full citizenship to people with disabilities, but rather

111. Pub. L. No. 93-516 § 111(a), 88 Stat. 1617, 1619 (1974) (codified at 29 U.S.C. § 706(8)(B) (2000)). The 1978 regulations provided the specific definitions of "physical or mental impairment," "major life activity," and "has a record of such impairment." *See* 45 C.F.R. § 84.3(j) (2002); *see also* Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 407 (1979) (defining an "otherwise qualified handicapped individual" as one who can meet all of the requirements "in spite of" his or her handicap).

112. See Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 Utah L. Rev. 247, 273 (2001); *see also* Drimmer, *supra* note 90, at 1384.

113. Pub. L. No. 93-112, 87 Stat. 355, 361 (codified as amended at 29 U.S.C. § 705(9) (2002)). *See also,* Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 Utah L. Rev. 247, 273-74 (2001) ("[B]ecause the definition frames disability as an impairment within an individual...it reinforces the idea that disability is a phenomenon located squarely in the individual herself, rather than in the societal structures that surround her and contribute to the disabling effects of her difference.").

114. *See* Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. Mich. J.L. Reform 81, 84 (2001) [hereinafter "Silvers & Stein"]. Courts interpreting this provision stress the "substantially limited" portion of the definition of disability to the extent that the question of defining whether or not a plaintiff has a disability is determined almost exclusively by disputes about the loss of a major life activity. *See* Hahn, *supra* note 96, at 171.

acknowledged them "only as 'flawed' individuals not at fault for shortcomings that society must endure."[115]

The rights provided in the regulations implementing the Rehabilitation Act of 1973 further reflect a view of the inferiority of disabled persons. Like the Act itself, the regulations melded civil rights notions with ideas predicated on the medical and social pathology models.[116] The Department of Health, Education, and Welfare (HEW) regulations,[117] at first glance, appeared to recognize the discriminatory structural barriers to equal participation faced by disabled individuals and to aggressively pronounce expansive civil rights. The regulations forcefully declared that "[a] recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee."[118] Yet they backed away from this pronouncement by making the right entirely dependent on the employer's pocketbook: if a proposed reasonable accommodation should impose an "undue hardship," the accommodation is unnecessary.[119] Some scholars have argued that this emphasis on economic notions hearkens back to the medical and social pathology models.[120] As long as the goal is based on productive citizenship, the argument goes, an accommodation that outweighs its economic potential will undoubtedly be viewed as unnecessarily burdensome. Phrased in these terms, the right to be free from discrimination is not a civil right; rather, it is an economic determination of relative cost and benefit. In so severely compromising its method, Congress appears insincere in its assertion that the elimination of discriminatory impediments to equality is, in fact, the goal.[121] Hence, in

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115. Drimmer, *supra* note 90, at 1344-45.

> Congress has issued a message that people with disabilities do not deserve full citizenship or equal participation in the community and are merely tolerated when they can become economic participants. This treatment in the law results in the granting of limited rights that do not guarantee people with disabilities full access to society. *Id.*

116. Drimmer, *supra* note 90, at 1387.

117. The task of implementing regulations to interpret the Rehabilitation Act was marked by delay and controversy. For the reasons underlying the delay see Scotch, Good Will, *supra* note 91, at 60-120.

118. 45 C.F.R. § 84.12(a) (2000).

119. *Id.*

120. *See, e.g.*, Drimmer, *supra* note 90, at 1387.

121. The preamble to the regulation states: "[T]he proposed regulation does not take into account the cost or difficulty of eliminating discrimination in establishing the standards for what practices constitute discriminations . . . The Department agrees in principle with the concept that cost or difficulty are appropriate considerations, not in determining what constitutes discrimination, but in fashioning a remedy if a recipient has been found to be discriminating." Programs and Activities Receiving or Benefitting from Federal Financial Assistance: Nondiscrimination on the Basis of Handicap, 41 Fed. Reg. 29,548, 29,550 (1976). Nonetheless, the provision of undue hardship does not factor only into

the view of some scholars, the undue hardship provision further reflects the notion, still embraced by much of society, that the inequality of the disabled with the nondisabled majority is a product of flaws within the disabled individuals, rather than flaws in the system.

The contrary position embraced by some fiscal conservatives is that the ADA goes much farther than traditional civil rights laws because it requires employers to do more than simply treat individuals with disabilities the same way that they would treat other similarly qualified applicants or workers. Indeed, the ADA imposes an affirmative obligation to provide reasonable accommodations to make it possible for people with disabilities to perform essential job functions and to secure equal enjoyment of all terms and conditions of employment. On this ground, observers draw sharp lines between Title VII of the Civil Rights Act of 1964[122] and other older civil rights enactments, which are said to be "real anti-discrimination law[s],"[123] and the mandate embodied in the ADA and the Family and Medical Leave Act of 1993 (FMLA),[124] said to be "accommodation" laws.[125] Accordingly, it is charged that the

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determinations of appropriate remedies, rather it acts as an affirmative defense to compliance with the enactment.

122. 42 U.S.C. § 2000e-2000e-17 (2000).

123. Erickson v. Bd. of Governors of State Colls. and Univs. for Northeastern Ill. Univ., 207 F.3d 945, 951 (7th Cir. 2000) (the Age Discrimination in Employment Act of 1967 is a "real anti-discrimination law"), *cert. denied*, 531 U.S. 1190, 121 S. Ct. 1187 (2001).

124. 29 U.S.C. §§ 2601-2654 (2000).

125. Numerous commentators have advanced this distinction. *See, e.g.*, Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 Or. L. Rev. 27, 75 (1999) (arguing that reasonable accommodation "is a concept alien to most antidiscrimination claims brought under Title VII" and "is, in essence, a form of affirmative action for disabled individuals"); Deborah A. Calloway, *Dealing With Diversity: Changing Theories of Discrimination*, 10 St. John's J. Legal Comment. 481, 491 (1995) ("Equality in one dimension means inequality in another dimension. Equal employment opportunity is achieved under the ADA by mandating different treatment for individuals with disabilities; different treatment in the form of reasonable accommodations."); John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 Mich. L. Rev. 2583, 2585-86 (1994) (characterizing antidiscrimination requirements as pursuing the widely endorsed goal of "intrinsic equality" and accommodation requirements as pursuing the more normatively questionable and controversial goal of "constructed equality"); Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-And-Paste Function*, 77 Wash. L. Rev. 575, 605 (2002) ("In the end, whether the ADA's reasonable accommodation provision represents a subcategory of affirmative action legislation or a different animal altogether, it departs starkly from the formal equality model and necessitates an expanded understanding of civil rights and equal opportunity."); Patricia Illingworth & Wendy E. Parmet, *Positively Disabled: The Relationship Between the Definition of Disability and Rights Under the ADA*, *in* Americans with Disabilities:

undue hardship provision is essential to prevent critics from targeting the ADA as another "unfunded federal mandate" imposed on private business.[126]

Exploring Implications of the Law for Individuals and Institutions 3, 8 (Leslie Pickering Francis & Anita Silvers eds., 2000) ("The genius of the ADA is that it forthrightly melds positive and negative rights, creating a civil rights statute that goes beyond the simplistic equal-opportunity-as-negative-rights model represented by Title VII."); Mark Kelman, Market Discrimination and Groups, 53 Stan. L. Rev. 833 (2001) (arguing that the law should prohibit "simple discrimination" without limit, but that requirements of accommodation must be limited to the extent that the resources used in accommodation might be better spent on other societal priorities); S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different,* 33 Conn. L. Rev. 603, 608 (2001) ("The ADA relies on a different vision of equality [than that of Title VII] to address workplace discrimination."); Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act,* 35 Ga. L. Rev. 27, 35 (2000) ("[T]he ADA appears to make a revolutionary break with the old ways of thinking about discrimination while charting a new course of affirmative obligations to ensure real equality."); George Rutherglen, *Discrimination and Its Discontents,* 81 Va. L. Rev. 117, 145 (1995) (finding it "[s]omewhat paradoxical[]" that the ADA defines "the employer's duty not to discriminate" as "includ[ing] the duty to take account of an individual's disability in order to make a reasonable accommodation"); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws In The Civil Rights Paradigm,* 62 Ohio St. L.J. 335, 353 (2001) (referring to the "contradiction between the traditional civil rights label given the ADA and the affirmative action obligation imposed by the Act, which vastly exceeds the traditional nondiscrimination mandate of the civil rights laws the ADA purports to emulate"); John M. Vande Walle, Note, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled,* 73 Chi.-Kent L. Rev. 897, 923-25 (1998) (arguing that Title VII and the ADEA serve the interest of corrective justice, while the ADA's accommodation requirement "primarily serves the purposes of distributive justice in that it establishes criteria that identify a group that needs or merits a greater distribution of societal goods."); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?,* 79 N.C. L. Rev. 307, 310-11 & nn.21-22 (2001); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation,* 46 Duke L.J. 1, 2-4, 9 (1996); Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies,* 21 Berkeley J. Emp. & Lab. L. 1, 3-4 (2000)("The ADA incorporated a profoundly different model of equality from that associated with traditional non- discrimination statutes like Title VII of the Civil Rights Act of 1964 . . . The ADA required not only that disabled individuals be treated no worse than non- disabled individuals with whom they were similarly situated, but also directed that in certain contexts they be treated differently, arguably better, to achieve an equal effect."); Sherwin Rosen, Disability Accommodation and the Labor Market, in Disability and Work 18, 21 (Carolyn L. Weaver ed., 1991); *but see,* Jolls, *supra* note 14, at 643 (arguing that many aspects of antidiscrimination law are in fact requirements of accommodation).

126. The claim that the ADA represents an unfunded mandate was voiced by conservative critics of the ADA from the time of its passage in 1991. Professor

The ADA's reasonable accommodation provision may represent a more explicit or readily apparent case of accommodation than was evident in previous antidiscrimination laws, but an argument may be made that the line between accommodation and antidiscrimination is not as bright as some scholars and politicians would suggest. Several scholars have demonstrated that many aspects of antidiscrimination law are in fact requirements of accommodation.[127] Particularly with regard to the disparate impact branch of Title VII, specific, demonstrable costs are frequently imposed on employers in order to effect compliance with its mandate. This is discussed in more detail in part B of this section (and revisited, to some extent, in part IV(B)). But for now it is sufficient to say that the undue hardship provision of the ADA may not be justifiable solely by resort to the argument that the ADA stands apart from previous antidiscrimination law by virtue of its accommodation requirement.

Hence, the argument that the undue hardship provision severely dilutes the Act's civil rights potential appears to have some merit.

Jerry Mashaw immediately observed that the ADA uses "potentially unfair taxation to provide in-kind benefits, which a deficit-happy Congress does not want to fund through the budget process." Jerry L. Mashaw, In Search of the Disabled, *in* Disability and Work: Incentives, Rights and Opportunities 70 (Carolyn L. Weaver ed., 1991). Carolyn Weaver refers to the ADA's reasonable accommodation requirement as a feature that "distorts a civil rights measure into what is essentially a mandated benefits program for the disabled." Carolyn L. Weaver, Incentives vs. Controls in Federal Disability Policy, in Disability & Work: Incentives, Rights, and Opportunities 1, 3-17 (Carolyn L. Weaver, ed., 1991) (arguing for incentives to replace rights-based policies toward disability). Likewise, Professors Issacharoff and Nelson assert that the "'unfunded mandate' quality of the obligation was magnified by the undefined scope of the ensuing responsibility to accommodate." Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. Rev. 307, 317-18 (2001). Professor Richard Epstein similarly argues, "Under the ADA, Congress mandates a set of off-budget subsidies not explicitly taken into account in setting federal policy. The expenditures are borne by private businesses and by state and local governments, which are left to scramble for resources as best they can. By working through the regulatory mode, Congress ensures the fatal separation of the right to order changes from the duty to pay for them." Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Law 493 (1992) (arguing that a system of federal grants should replace the ADA so that Congress pays for the accommodations that it wants employers to make)[hereinafter "Epstein"].

127. *See, e.g.*, Jolls, *supra* note 14, at 645; Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation, and Universal Mandates—Aren't They All the Same?*, 24 Berkeley J. Emp. & Lab. L. 111 (2003). *See also*, Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 940-46 (1985) [hereinafter "Siegel"]; Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 Golden Gate U. L. Rev. 513, 559-60 (1983) [hereinafter "Krieger & Cooney"].

Consideration of the cost of eliminating discriminatory structural barriers to equality effectively "redefines" the right such that "equal treatment" for people with disabilities becomes less than equal, and cripples who require greater than reasonable accommodations are viewed as obviously unfit for the workplace and unworthy of integration.[128] Discrimination is illegal when it can be conveniently remedied, yet somehow defensible when its eradication would be too burdensome. This evidences an approach marked by "toleration" rather than civil rights.[129]

By explicitly endorsing the medical and social pathology models, the Rehabilitation Act reinforced stereotypical views of a broken, inferior class of disabled persons dragging down the national economy and requiring helpful intervention.[130] The goal of helping a class of inferior persons to become productive members of society, while perhaps morally commendable, does not lend itself to recognition as a "landmark" civil rights statute. On the contrary, views of inferiority and goals of productivity lend themselves to patronizing and paternalistic attitudes targeting the disabled under the guise of charity, helpful intervention, and even protection. Rather than a decisive break from these models, the ADA was, for the most part, a wholesale incorporation of the language of the Rehabilitation Act and its implementing regulations.[131] Consequently, the paternalistic, stereotypical philosophy associated with the medical and social pathology models persists in the framework manifest in the ADA.

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128. *See* Drimmer, *supra* note 90, at 1390-91.

129. Similar approaches were used to limit the civil rights associated with the Act's provision regarding program accessibility. The burden of making facilities accessible did not apply to every existing facility and not even to every part of a single facility. *See* 45 C.F.R. § 84.22(a) (1992). In the arena of education, the situation was quite different as the regulations were similar to provisions of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1461 (2000). These provisions, perhaps influenced by Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan., 347 U.S. 483, 745 S. Ct. 686 (1954), incorporated a "pure" civil rights approach. *See* Drimmer, *supra* note 90, at 1394-95.

130. Richard Scotch observed that Section 504 of the Rehabilitation Act was "not the result of the efforts of a social movement or of traditional interest group politics but rather the result of a spontaneous impulse by a group of Senate aides who had little experience with or knowledge about the problem of discrimination against disabled people." Scotch, Good Will, *supra* note 91, at 139.

131. *See* Statement of President Bush, 1990 U.S.C.C.A.N. 601 (July 26, 1990) (noting that "existing language and standards from the Rehabilitation Act were incorporated into the ADA."); Bragdon v. Abbott, 524 U.S. 624, 645, 118 S. Ct. 2196, 2208 (1998) (Congress in the ADA adopted the "administrative and judicial interpretations" of the Rehabilitation Act.)

3. The Operation of Paternalistic Models of Disability in the ADA

In the ADA, Congress made minor adjustments—greatly overdramatized by ADA proponents—that are fully *consistent* with the Rehabilitation Act approach. Throughout the Congressional findings, substantive provisions, and implementing regulations, the ADA, like its predecessor statute, compromises its civil rights potential and displays the persisting residue of views associated with the medical and social pathology models. Despite its recognition of the widespread discrimination faced by disabled individuals, the ADA reiterates the two notions associated with the medical and social pathology models: inferiority and nonproductivity. Although slightly more covert, the paternalistic nature of the policy is nonetheless evident, being embodied both implicitly in the language used and explicitly by way of limitations on the liberties provided. Hence, the rights provided in the ADA are diluted by philosophies of inferiority and nonproductivity which particularly lend themselves to paternalistic interpretation.

a. Rhetoric and Its Contradictions

The ADA incorporates much of the rhetoric and structure of previous civil rights enactments.[132] By referring to people with disabilities as "a discrete and insular minority," historically relegated to a position of "political powerlessness" in our society, the Congressional findings adopted the rhetoric associated with legal remedies for violations of civil rights.[133] The Act uses the term "discrimination" to refer to employment decisions which unlawfully take into account an applicant or employee's disabled status and further incorporates the remedial and administrative structure of the Civil Rights Act of 1964.[134] However, the Congressional findings contradict this rhetoric by expressly adopting notions of biological inferiority. In the statement of purposes, Congress declares its goal of eradicating discrimination against individuals with disabilities "based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of [their] individual ability . . . to participate in, and contribute to, society."[135] Referencing discrimination in the previous

132. *See* Matthew Diller, *Judicial Backlash, the ADA and the Civil Rights Model,* 21 Berkeley J. Emp. & Lab. L. 19, 32 (2000).
133. 42 U.S.C. § 12101 (2000).
134. 42 U.S.C. § 12117 (2000).
135. 42 U.S.C. § 12101(a)(7) (2000).

specific terms reiterates that disability is a mark of inferiority: "removing the element of 'fault' from the 'characteristics' of people with disabilities is an acknowledgment that something 'wrong' exists within the individual, albeit not by choice or design of the individual, that ought to be fixed."[136] This characterizes disability in terms of the medical and social pathology models, and renders the view that discrimination in this context is a result of inferiority seemingly inescapable. The Congressional findings add, however, that stereotypic assumptions and miscalculations of the ability of disabled persons also contribute to the discrimination. This frames the obstacles faced by the disabled as a confusing mix of inferiority, based on uncontrollable substandard characteristics, as well as discrimination based on stereotypes and miscalculations. Thus, in recognizing the widespread discrimination against persons with disabilities, the purpose section of the ADA suggests that the causes of the discrimination are somewhat understandable, as a logical result of the inferiority of the disabled individual, yet indefensible, when based on stereotypes and prejudicial animus. Resultantly, disability, framed in terms of inferiority, is itself still viewed as a significant cause of the discrimination, and the political powerlessness experienced by the disabled is, strangely and simultaneously, both justified and unjustified.[137]

The Congressional findings further combine civil rights justifications with justifications for disability policies that developed under the medical and social pathology models. The findings state that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[138] This statement melds notions of equal opportunity with aspirations of national productivity, suggesting that the former is not reason enough to justify a bill prohibiting discrimination against the disabled.[139] In other words, in order to justify imposing the civil rights of the disabled upon the nondisabled majority, Congress felt it necessary to demonstrate that it made good economic sense to grant this class of individuals equality. Justifying freedom from discrimination in economic terms expressly invokes the theme of nonproductivity associated with the medical and social pathology models. Hence,

136. Drimmer, *supra* note 90, at 1399.
137. Drimmer, *supra* note 90, at 1399.
138. 42 U.S.C. § 12101(a)(9) (2002).
139. *See* Drimmer, *supra* note 90, at 1400.

economic efficiency, rather than constitutional rights, endures as a major touchstone of federal disability legislation.[140]

b. Perpetuation of Discarded Philosophies

The substantive provisions of the ADA further reflect the philosophy of the medical and social pathology models both semantically and tangibly. The ADA's definition of disability is imported directly from its predecessor statute, the Rehabilitation Act of 1973, only substituting the word "disabled" for the Rehabilitation Act term "handicapped."[141] Consequently, the ADA reintroduces all of the problems associated with recognizing the inherent inferiority of the disabled individual as a major source of the obstacles being addressed and, more importantly, as a prerequisite to gaining the protections of the Act. The disabled individual is not eligible for coverage under the ADA unless he can demonstrate that he is substantially impaired in one or more major life activities. Phrased in these terms, the ADA's definition of disability continues the traditional focus of disability policies by emphasizing the characteristics of the person being discriminated against, rather than the existence of discrimination. Judicial concentration, under the ADA, on the technical distinctions about how much impairment makes a person disabled and, specifically, on defining "major life activity," is directly attributable to this definitional framework. This statutory focus on the inward characteristics of the disabled person has engendered a climate in which many claims of disability discrimination are decided solely by looking at the characteristics of

140. It should be noted that economic efficiency was also a major argument in favor of prohibiting race discrimination in Title VII of the Civil Rights Act of 1964. Arguments of economic efficiency have been characterized as relying on an "economic model." The goal of the economic model is "to promote the economic self-sufficiency of individuals with disabilities by increasing their participation in compensated labor;" however, the organizing principle underlying economic models is economic efficiency. Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 Yale L. & Pol'y Rev. 1, 8-9 (1999). As such, economic models are poorly suited to accomplishing the goal of integrating disabled Americans into the workplace. Under such an approach, if the cost of accommodation outweighs the benefit to business then employers should not be required to accommodate the disabled worker. *See, e.g.*, Carolyn L. Weaver, Incentives vs. Controls in Federal Disability Policy, *in* Disability & Work: Incentives, Rights, and Opportunities 3 (Carolyn L. Weaver, ed., 1991). *Cf.* Sue A. Krenek, *Beyond Reasonable Accommodation*, 72 Tex. L. Rev. 1969 (1994).

141. *See* Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 Ohio St. L.J. 335, 343 (2001) [hereinafter "Tucker"] (noting that the term "handicapped" was "viewed as describing one who held his cap in hand, asking for charitable assistance.").

the plaintiff.[142] More damagingly, however, the perpetual focus on the inherently inferior condition of the disabled individual contributes to the idea that the disabled are fundamentally unequal and in need of "special" protection. This special or preferential treatment mentality contravenes the purpose of antidiscrimination laws, which are premised on a guarantee of equality rather than special services reserved for a select few.[143] Like its predecessor statute, the definition incorporated into the ADA reinforces stereotypical assumptions that the disabled are an inherently vulnerable and inadequate class of persons in need of special protections. Thus, as one scholar aptly stated,

> [E]mpowering this "weak" group with legal rights and remedies is partially a charitable act designed to compensate for individual shortcomings, and not an explicit recognition of constitutional equal rights. Of course, treating [the ADA] as an act of charity makes the limitations on the rights more palatable. After all, some rights are better than none at all.[144]

c. Trumping of Rights Individually Based on Employer Financial Hardship

Accordingly, the ADA severely limits the primary right that it set out to provide: the right to equal access. In the context of disability, accommodations are widely understood as requisite before any purported grant of equality can be actualized.[145] Indeed, for the majority of disabled individuals, a failure to provide accommodations inevitably results in exclusion. The Congressional findings aggressively pronounce that such exclusion is patently discriminatory. However, this right of accommodation is subsequently limited by its

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142. Robert L. Burgdorf compares this focus on the inherent characteristics of the disabled to placing the victim on trial, rather than the defendant:

> The intense focus on the abilities and impairments of the complainant instead of on the allegedly discriminatory conduct of the employer is reminiscent of the complaint leveled at investigations and trials of rape and other sexual offense charges—that the alleged victim is often on trial rather than the alleged perpetrator.

Robert L. Burgdorf, *'Substantially Limited' Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Vill. L. Rev. 409, 561 (1997) [hereinafter "Burgdorf"].

143. Burgdorf, *supra* note 142, at 568.

144. Drimmer, *supra* note 90, at 1399.

145. *But see, infra*, section IV(B) of this note, which further examines and, ultimately, questions the propriety of the accommodationist provisions of the ADA in light of normative considerations of the proper scope of civil rights law and the unintended consequences that expansively drafted accommodationist provisions may be responsible for creating.

persistent twin concept, "undue hardship." Hence the ADA, like Section 504 of the Rehabilitation Act—and consistent with the compromised, diluted nature of the rights provided elsewhere in the Act—measures the right of accommodation against the resultant financial hardship to employers. Accommodations need not be provided if doing so would place an "undue" financial burden on the employer's business.[146] The undue hardship provision, defined as "an action requiring significant difficulty or expense,"[147] thus continues the tradition of disability legislation in America. With the use of seductive civil rights rhetoric, Congress asserts aggressive rights only to predicate entitlement to such "rights" on financial considerations of relative cost and benefit.[148] Rather than providing specific guidance as to the implementation of these confusing, seemingly contradictory concepts, Congress simply suggests, as they had done elsewhere, that what constitutes a reasonable accommodation should be determined on a case by case basis.[149] Sacrificing rights to financial concerns, however, is no less discriminatory and insincere when done on an individualized basis, than when done on a generalized and systematic basis by businesses seeking to mitigate the costs of employing an "expensive" class of persons. In other words, if disability plaintiffs are fortunate enough to reach this stage of litigation, the compromise between cost and the right of accommodation provides a glaring opportunity for employers to ignore the antidiscrimination mandate of the Act and maintain the status quo evident prior to its enactment. Disability discrimination is frequently a product of considerations of cost and financial burden. By expressly recognizing this barrier to equality as an escape from complying with the basic antidiscrimination principle of the Act, the ADA so severely compromises its method that it appears disingenuous in its mandate.[150]

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146. *See* 42 U.S.C.§ 12112(b)(5)(A) (2000); 42 U.S.C. § 12111(10) (2000).

147. 42 U.S.C. § 12111(10) (2000).

148. Some scholars argue that the very use of the term "reasonable" accommodation suggests that society merely tolerates people with disabilities. *See, e.g.*, Drimmer, *supra* note 90, at 1406.

149. *See* H.R. Rep. No. 101-485, pt. 2, at 62, *reprinted in* 1990 U.S.C.C.A.N. 303; S. Rep. No. 116, at 31 (1989).

150. *See also*, Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans with Disabilities Act*, 26 Tulsa L.J. 1, 3 (1990) ("The ADA's open-ended undue hardship defense provisions thus constitute an invitation to regulators and judges to impose their values in the disability rights context."); Bonnie O'Day, *Economics versus Civil Rights*, 3 Cornell J. L & Pub. Pol'y 291, 300-301 (1994) (arguing for a "third wave message" to inform disability policy that would focus primarily on "civil rights for persons with disabilities . . . with the understanding that some accommodations for persons with severe disabilities may be expensive and that an analysis based only on costs and benefits

d. Direct Threat Paternalism

The concept of "reasonable accommodation" enters the ADA in yet another definition, that of direct threat. As noted previously, the term "direct threat" is defined in the ADA as a "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation," and a requirement that an individual not pose such a threat may be included as a job qualification.[151] The regulation implementing this provision simply extends the general philosophy of the ADA to flesh out the details of its meaning. As noted previously, the EEOC regulation at issue in *Echazabal* added to the ADA's direct threat definition the possibility that an individual may pose a danger to himself.[152] The regulation, thus, substitutes the employer's decision assessing the danger to the disabled individual for the employee or applicant's decision, under at least the premise of preventing the disabled individual from harming himself.[153] This is obvious paternalism. Nonetheless, this paternalism is a logical result of the persistent paternalistic philosophy that has marked disability legislation in America for over 80 years. It should come as little surprise that the ADA – operating from the fundamental premise that the disabled are inherently flawed, justifying its pronouncements in economic terms, and limiting the rights provided by their respective economic burden on employers – would be interpreted by the EEOC in a paternalistic fashion that minimizes the cost of employing potentially "expensive" persons. Paternalistic attitudes are a natural extension of persistent assumptions concerning the alleged biological inferiority of people with disabilities. Paternalism is implicitly sanctioned in the ADA under the guise of helping a class of inferior unproductive persons realize their proper goal of economic productivity. Hence, in the spirit of the paternalistic philosophy implicit throughout the ADA, the *Echazabal* Court unanimously found that the explicit paternalism evident in the EEOC regulation was

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to employers may incorrectly suggest that some societally beneficial accommodations should not be provided.").

151. 42 U.S.C. § 12111(3) (2000).

152. *See* 29 C.F.R. § 1630.2(r) (2000) ("Direct Threat means a significant risk of substantial harm to the health or safety of *the individual* or others that cannot be eliminated or reduced by reasonable accommodation . . . ") (emphasis added).

153. The Rehabilitation Act cases routinely held that a person who, in doing a job, would pose a substantial risk to "the health or safety of the individual or others" is not "qualified." Those include cases in which the principal risk is to the employee himself. *See, e.g.*, Chiari v. City of League City, 920 F.2d 311, 317 (5th Cir. 1991) (applying the legal rule that "a significant risk of personal injury can disqualify a handicapped individual from a job"); Knapp v. Northwestern Univ., 101 F.3d 473 (7th Cir. 1996) (holding that a student with a heart condition is not qualified under the Rehabilitation Act for a university sports program solely because of the risk that he would die).

permissible because it required an individualized assessment of the potential risk to the applicant or employee in question. This is a natural extension of the philosophy incorporated directly into the Rehabilitation Act of 1973, and reincorporated into the ADA both semantically (through the use of language portraying the disabled as an inherently vulnerable and inferior class of persons) and substantively (through considerations of economic efficiency which severely compromise its civil rights rhetoric).[154] The uproar by disability proponents following the promulgation of this regulation and the Supreme Court's interpretation of the direct threat defense in *Echazabal* is, to some extent, like balking at the gnat after having already swallowed the camel.

Obviously, however, concerns over paternalistic approaches to disability policy are well-founded. Covert paternalism permeating the ADA serves to perpetuate the discriminatory impediments to equality faced by persons with disabilities. Indeed, paternalistic sentiments may be more damaging to the advancement of the rights of people with disabilities than would outright hostility. As Professor Hahn aptly stated, "Paternalism . . . engenders a climate of deceit and hypocrisy that makes it difficult for leaders of the disability rights movement to challenge the opinions of non-disabled professionals who claim to be acting in the best interests of this beleaguered minority."[155]

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154. Moreover, the Supreme Court has manifested paternalistic sentiments in a variety of opinions related to disability issues. In Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249 (1985), Justice White, writing for the majority, extensively evaluated whether or not legal distinctions based on disability should be constitutionally suspect under the Equal Protection clause. He suggested that the condition of disabled persons, who possess a "reduced ability to cope with and function in the everyday world," inevitably necessitates their reliance on others. *Id.* at 442, 105 S. Ct. at 3255. Furthermore, he intimated that this reliance on others was sufficient to eliminate any serious risk that the disabled might need to challenge action taken contrary to their best interests: "[b]oth State and Federal Governments have recently committed themselves to assisting the [disabled] . . . we will not presume that any given legislative action, even one that disadvantages [disabled] individuals, is rooted in considerations that the Constitution will not tolerate." *Id.* at 446, 105 S. Ct. at 3257. Hence, "the concept of paternalism played a pivotal role in the decision by the Supreme Court which denied the disabled minority heightened scrutiny under the Constitution." Hahn, *supra* note 96, at 183. Additionally, in Youngberg v. Romero, 457 U.S. 307, 102 S. Ct. 2452 (1982), Justice Powell concluded that treatment imposed on a disabled plaintiff was generally acceptable as long as it reflected the judgment of a qualified expert. *See* Hahn, *supra* note 96, at 183. Powell explained that the "decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg*, 457 U.S. at 323, 102 S. Ct. at 2462.

155. Hahn, *supra* note 96, at 181.

The ADA's confusing combination of enduring paternalistic sentiments with the rhetoric of civil rights enactments is largely attributable to the failure of the disabled to effectively refute allegations of biological inferiority which entrench views that produce paternalistic policies. Most judicial decisions interpreting disability policies steadfastly cling to the problematic suggestion that the problems of disabled citizens are a direct result of their biological impairments. From this foundation, it should be no surprise that the ADA is often judicially viewed as a burdensome statute whose scope is continually subject to limitation.

The struggle to rebut implicit and explicit charges of inferiority is a process with which other minority groups have had to contend in order to ultimately secure legal protection. Particularly, policies impacting women, as well as judicial interpretations of such policies, were, until recently, pervaded by remarkably patriarchal and paternalistic stereotypes.[156] As Justice Brennan graphically stated, discrimination against women traditionally "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage."[157] Similarly for disabled persons, the notion of inherent biological inferiority contributes to ideas that disabled people are "quite different from others and need special help and protection."[158] A strong argument can be made that the ADA is permeated by concepts of paternalism entangled with the rhetoric of civil rights in a manner that is considered "outmoded" in the context of sex discrimination.[159] Consequently, the experience of and the theories that have developed concomitant with the sex equality movement are particularly relevant in understanding and reformulating a civil rights approach to disability discrimination that could finally break with its chronicle of paternalistic protection.

B. An Alternative Approach to Biological Variance

Disability and sex share a defining quality: both are a biological variant from an apparently dominant norm. Consequently, the inherent biological "difference" of sex presents perplexing difficulties similar to those associated with the biological "difference" of disability. In the context of employment, women are commonly confronted with obstacles resulting from a workplace defined by and according to the needs of men. Likewise, disabled persons are faced

156. *See* Hahn, *supra* note 96, at 171.
157. Frontiero v. Richardson, 411 U.S. 677, 684, 93 S. Ct. 1764, 1769 (1973) (Brennan, J., concurring).
158. Burgdorf, *supra* note 142, at 568.
159. *See generally,* Silvers & Stein, *supra* note 114, at 85.

with obstacles inherent in a workplace defined by and for the nondisabled majority. Moreover, the development and history of both the feminist movement and the disability movement demonstrate striking similarities. The history of sex discrimination, like disability discrimination, evidences the notion that a certain class of persons are in need of special protections due to distinctive vulnerabilities that they face. Given these similarities, the experience of the women's equality movement is particularly applicable to the disability debate.

1. The Evolution of Sex Discrimination Theory

Among classes of persons to receive civil rights protection, women were nearly last in line. Until relatively recently, women could not hold office, serve on juries, or bring suit in their own names; and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.[160] While African-Americans were guaranteed the right to vote in 1870, women were denied even that right until adoption of the Nineteenth Amendment half a century later. The right to vote is understood to be preservative of other basic civil and political rights. Hence, the growing recognition of women's socio-economic significance and independence is a fairly recent phenomenon.

The early history of the women's movement stands in sharp contrast to the progress made by modern theories of equality applied to the biological difference of sex. Early jurisprudence addressing questions of sex equality was infused with what has now been termed "romantic paternalism."[161] These paternalistic notions characterized discriminatory impediments to women's equality through a framework that focused on women's inherent vulnerability and need for special protection.[162] For example, in *Muller v. Oregon*, the Supreme Court upheld a law limiting the amount of time worked by women in laundries, while explicitly recognizing that similar legislation affecting males might be unconstitutional.[163] In order to

160. *See generally,* L. Kanowitz, Women and the Law: The Unfinished Revolution 5-6 (1969); G. Myrdal, An American Dilemma 1073 (20th Anniversary ed. 1962).

161. *See supra* text accompanying note 157.

162. *See generally,* J. Baer, The Chains of Protection: The Judicial Response to Women's Labor Legislation 14-106 (1978).

163. 208 U.S. 412, 28 S. Ct. 324 (1908). The Court cited Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539 (1905), in which the Court found that a law limiting the amount of permissible work time in bakeries was not, "as to men, a legitimate exercise of the police power of the state, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in

justify this paternalistic protection, the Court resorted to arguments about the inherent frailty of women: "woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."[164]

Notions of justified protection and guardianship over women persisted long after adoption of the Fourteenth Amendment.[165] For example, the Supreme Court, in *Bradwell v. People of State of Illinois,*[166] found that a refusal by the courts of a state to admit a woman to practice law did not violate the Constitution. Ideas of paternalistic protection were so firmly rooted and widely accepted that one member of the *Bradwell* Court was able to proclaim:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests

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relation to his labor, and as such was in conflict with, and void under, the Federal Constitution." *Id.* at 419, 28 S. Ct. at 325. The Court dismissed the arguments based on *Lochner* as wrongly assuming that "the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor." *Id.* The law in question in *Muller* carried with it a criminal penalty for violations.

164. 208 U.S. at 420, 28 S.Ct. at 326. The Court further stated:

> [H]istory discloses the fact that woman has always been dependent upon man . . . As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights.

Id.

165. For example, thirty years after *Muller*, the Supreme Court, in Goesaert v. Cleary, upheld, as obvious, the constitutionality of a Michigan statute requiring the licensing of all bartenders, but providing that no female could be licensed unless she was the wife or daughter of a male owner of a licensed liquor establishment. 335 U.S. 464, 69 S. Ct. 198 (1948). In fact, most courts prior to 1950 found that statutes which forbade the sale of liquor to women in certain establishments, the employment of females in some businesses dispensing liquor, or even the presence of women in such places were constitutional as a reasonable exercise of the state's police power to protect the public safety, welfare and morals. *See e.g.*, Randles v. Washington State Liquor Control Bd., 206 P.2d 1209 (Wash. 1949); Great Atl. & Pac. Tea Co. v. Mayor & Commissioners of Danville, 11 N.E.2d 388 (Ill. 1937); Laughlin v. Tillamook County, 147 P. 547 (Or. 1915); People v. Case, 116 N.W. 558 (Mich. 1908); Hoboken v. Greiner, 53 A. 693 (N.J. 1902). A rational basis test was applied to such laws until the 1970s.

166. 83 U.S. (16 Wall.) 130 (1872).

> and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[167]

This statutorily imposed and judicially sanctioned denial of equality to women sparked a fury among women's rights advocates that led to the establishment of a distinctive body of scholarship and theory to address the inequality burdening women. Feminist legal scholars struggled to educate decisionmakers and the public that something was wrong with their perception of the world.[168] In doing so, scholars were forced to wrestle with the difficulties associated with structuring a model of equality that could be applied to inherent biological differences. Consequently, research in this arena has produced a rich variety of theoretical perspectives that have largely redefined discrimination theory. Particularly, feminist legal scholars have advanced theories that understand biological "difference" as a relative concept defined by its relationship to a dominant norm, and have taken great strides toward uncovering institutional norms and patterns that exclusively reflect and reinforce the values of that dominant norm.[169] The increased awareness, debate, and multifaceted

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167. *Id. at* 141 (Bradley, J., concurring).

168. *See* Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School*, 102 Colum. L. Rev. 1441, 1442 (2002).

169. Numerous theories have developed during the progress of the women's equality movement. *See, e.g.*, Kathryn Abrams, *The Constitution of Women*, 48 Ala. L. Rev. 861, 867 (1997). Equality theory, which is grounded in the idea that women are functionally indistinguishable from men, and that discrimination occurs when they are treated as if they were different, is supported by advocates such as Justice Ruth Bader Ginsburg and scholars such as Wendy Williams. Increased awareness of the difficulties associated with structuring a model of equality that would account for issues that highlight women's biological differences, such as pregnancy, led to the rise of a "difference theory" of equality, which incorporates a non-equivalent model that focuses on, and demands the accommodation of, sex differences. *See, id.* at 869-70. This theory is supported by feminists like Leslie Bender, Carrie Menkel-Meadow and Chris Littleton. *Id.* A more recent feminist legal theory, dominance theory, emerged to address, among other things, the criticism that difference theory revived a focus on "separate spheres," which associated women with, and only with, reproduction, child-rearing and nurturing. Critics such as Catharine MacKinnon argued that the fundamental limitation of both equality and difference theories is their suggestion that women's inequality can be traced to something inherent in them, rather than something done to them. *See* Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination, in* Feminism Unmodified: Discourses on Life and Law 32, 40-41 (1987). Dominance theorists assert that institutional norms and patterns purposefully reflect male values

and innovative approaches that developed during the women's equality movement inevitably found their way into more recent jurisprudence brought under the Equal Protection clause, Title VII of the Civil Rights Act of 1964, and related statutes.

2. Modern Approaches to Sex Discrimination

In the 1971 case of *Reed v. Reed*, the Supreme Court, for the first time in our nation's history, ruled in favor of a woman who complained that her state had denied her the equal protection of its laws.[170] Since *Reed*, the Court has repeatedly recognized that a law or policy that denies equal opportunity to women, simply because they are women, violates the Equal Protection Clause of the United States Constitution.[171] The passage of Title VII in 1964 also signaled a command that employers would be held liable for any failure to treat women equally in the workforce. Justice Brennan announced that "[i]n passing Title VII Congress made the simple but momentous announcement that sex . . . [is] not relevant to the selection, evaluation or compensation of employees."[172] However, the model employed by Congress to enact the Title VII prohibition against sex discrimination is decidedly different than the model later utilized in the ADA. In order to expose this divergence, it is necessary to first understand the distinctive antidiscrimination framework incorporated into Title VII.

a. Overview of Title VII

Title VII broadly applies to all units of local government and private companies employing at least 15 workers,[173] and generally

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and serve to entrench the subordination of women to the point that women ultimately see themselves as men do. *Id.*

170. Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251 (1971) (holding unconstitutional an Idaho Code prescription requiring that, among persons equally entitled to administer a decedent's estate, males must be preferred to females).

171. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764 (1973) (holding it unconstitutional to deny female military officers housing and medical benefits covering their husbands on the same automatic basis as those family benefits were accorded to male military officers for their wives); Kirchberg v. Feenstra, 450 U.S. 455, 459-63, 101 S. Ct. 1195, 1198-1200 (1981) (affirming invalidity of Louisiana law that made husband "head and master" of property jointly owned with his wife, giving him the unilateral right to dispose of such property without his wife's consent); Stanton v. Stanton, 421 U.S. 7, 95 S. Ct. 1373 (1975) (invalidating Utah requirement that parents support boys until age 21, girls only until age 18).

172. Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 109 S. Ct. 1775, 1784 (1989) (Brennan, J., plurality opinion).

173. 42 U.S.C. § 2000e(b) (2000).

declares it unlawful to discriminate against otherwise similarly situated employees and applicants on the basis of certain protected characteristics.[174] An employer who treats or evaluates an individual on the basis of characteristics proscribed by the Act—i.e. race, color, sex, religion, and national origin—has engaged in conduct violative of Title VII.[175]

Covered employees,[176] believing that they have been discriminated against on the basis of a characteristic protected by Title VII, may proceed under either of two available theories of liability – disparate impact or disparate treatment – depending upon the intent or motive of the alleged perpetrator. Disparate treatment claims allege that an employer intentionally discriminated against a covered employee on the basis of a protected characteristic. Hence, in order to establish a prima facie case of disparate treatment, an employee must offer proof of discriminatory motive.[177] Once the plaintiff presents a prima facie case of discrimination, the defendant must present "some legitimate, nondiscriminatory reason" for the action in question.[178] However, even after the defendant produces a legitimate nondiscriminatory reason, the plaintiff may still prevail by demonstrating that the proffered reason was merely a pretext for intentional

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174. *Id.* at § 2000e-2(a)(1).

175. Title VII provides that it is unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." *Id.* at § 2000e-2(a). The statute further makes it unlawful to limit, segregate or classify employees or applicants, so as to deprive protected individuals of employment opportunities or adversely affect their employment status. *Id.*

176. Under Title VII the term "employee" is circularly defined as "an individual employed by an employer." *Id.* § 2000e(f). The Supreme Court has interpreted this to mean "the conventional master-servant relationship as understood by common-law agency doctrine." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23, 112 S. Ct. 1344, 1348 (1992), *citing*, Cmty. for Creating Non-Violence v. Reid, 490 U.S. 730, 739-40, 109 S. Ct. 2166, 2172 (1989).

177. *See* Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642, 645-46, 109 S. Ct. 2115, 2119 (1989); Burwell v. E. Airlines, 633 F.2d 361, 369 (4th Cir. 1980), *cert. denied*, 450 U.S. 965, 101 S. Ct. 1480 (1981). Frequently, plaintiffs seeking to establish a prima facie case of discrimination proceed under the framework set out by the Supreme Court in McDonnell Douglas Corp. v Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), and its progeny. Accordingly, a plaintiff may demonstrate a prima facie case of discrimination upon showing that (1) he or she is a member of a protected class; (2) he or she applied for an available position; (3) he or she was qualified, yet rejected; and (4) after his or her rejection, the position remained open. *See id.* at 802, 93 S. Ct. at 1824. The ultimate burden of persuasion remains, at all times, with the plaintiff, while the defendant's burden is one of production only. *Id.*

178. McDonnell Douglas Corp. v Green, 411 U.S. at 802, 93 S. Ct. at 1824.

discrimination.[179] A disparate impact claim alleges, in contrast, that certain employment practices or policies in place by the employer have a disproportionately discriminatory effect upon the class to which the plaintiff belongs. Unlike disparate treatment, disparate impact claims do not entail a requirement of intentional discrimination.

Title VII explicitly provides two available affirmative defenses through which an allegedly discriminatory practice may be justified: (1) business necessity (to defend claims of disparate impact), and (2) bona fide occupational qualification (BFOQ) (to defend claims of disparate treatment). The business necessity defense, codified in subsection 703(k)(1) of Title VII as a result of the Civil Rights Act of 1991, requires the employer to articulate a legitimate business reason for policies that adversely and disproportionately impact a given group of employees.[180] The BFOQ defense does not apply as an exception to employer discrimination based upon race, but does explicitly apply to sex.[181] An employer will only be successful in asserting a valid BFOQ defense where the discriminatory employment practice in question is "reasonably necessary to the normal operation of that particular business or enterprise."[182]

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179. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749 (1993).

180. Civil Rights Act of 1991, 42 U.S.C. § 1981(a) (1994); *see also* Toni Scott Reed, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Policy Problems?,* 58 J. Air L. & Com. 267, 335-36 (1992) (discussing how the Civil Rights Act of 1991 codified the business necessity defense and clarified that the burden of proving the defense rested with the employer). Even after the defendant employer sufficiently demonstrates business necessity, the plaintiff may still demonstrate that another employment practice - which would not produce such a disproportionately discriminatory effect - is available to the employer, in which case the defendant's failure to adopt this practice will result in liability under Title VII. *See* Harold S. Lewis, Jr., Civil Rights and Employment Discrimination Law 217-18 (1997).

181. *See* 42 U.S.C. § 2000e-2(e) (1994) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . "); *see also* Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination,* 52 Ohio St. L.J. 5, 10 (1991) [hereinafter "Befort"]. The EEOC guidelines emphasize the limited nature of the exception and add that it should not be applied in situations including "[t]he refusal to hire an individual based on stereotyped characterizations of the sexes," and "[t]he refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except . . . [w]here it is necessary for the purpose of authenticity or genuineness . . . e.g., an actor or actress." 29 C.F.R. § 1604.2(a)(1)(ii)-(iii), § 1604.2(a)(2)(2000).

182. 42 U.S.C. § 2000e-2(e) (2002).

b. Rejection of the Stubborn Paternalistic Assumption

Remarking on the significant advances made by the women's rights movement, one federal court of appeals judge has stated that enactments targeting women under the guise of paternalistic protection are now "museum pieces, reminders of wrong turns in the law."[183] However, the advances in the disability rights movement do not parallel the progress of the women's rights movement. As noted previously, the ADA falls short of granting full equality to disabled persons in three ways: (1) by defining disability as a condition of inherent inferiority that leads to the conclusion that the disabled are fundamentally unequal, (2) by justifying the granting of equality in economic terms, leading to the conclusion that its pronouncements are not justifiable on civil rights grounds alone, and (3) by making the rights provided in the statute dependent on economic considerations of relative cost and benefit through provisions such as "undue hardship" and "reasonableness." The success of Title VII from purely a statutory framework is at least partially attributable to its departure from each of these shortcomings.

At the outset, Title VII's anti-sex-discrimination mandate characterizes sex along with other conditions or categorizations which are, for the most part, popularly understood to have no bearing whatsoever on an individual's merit and capability as an employee: race, color, national origin, and religion. Title VII clearly does not operate from the fundamental premise that women are inherently inferior or flawed as compared to men. In contrast, the ADA lumps together mental and physical conditions defined as "impairments," which are popularly understood to have considerable bearing on an individual's capability and merit. Consequently, as distinguished from employees proceeding under Title VII, disabled plaintiffs must endure the arduous process of proving their inferiority, and thus their fundamental inequality, in order to establish protection under the ADA.

Additionally, the rights provided in Title VII are not limited by their respective economic burden on employers. As our Supreme Court has powerfully stated, "[t]he extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender."[184]

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183. UAW v. Johnson Controls, Inc., 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting); *rev'd*, 499 U.S. 187, 111 S. Ct. 1196 (1991).

184. *Johnson Controls*, 499 U.S. at 210, 111 S. Ct. at 1209. The *Johnson Controls* Court further stated, "[i]ndeed, in passing the PDA, Congress considered at length the considerable cost of providing equal treatment of pregnancy and related conditions, but made the 'decision to forbid special treatment of pregnancy

Accordingly, there is no corresponding "undue hardship" provision in Title VII, but rather a recognition that equality, while not always economically efficient, is mandated by considerations that preempt notions of relative cost and benefit. As a result, the civil rights granted to female employees by Title VII are not constrained by the employer's pocketbook in the manner of the ADA.[185]

This absence of any provision of undue hardship with respect to Title VII sex discrimination is frequently attributed to the corresponding absence of an explicit requirement of accommodation such as the "reasonable accommodation" provision of the ADA.[186] By contrast, the ADA's accommodation mandate explicitly requires private employers to incur specific, demonstrable costs to accommodate disabled workers. It is argued that, as such, an upper level cap on the cost of complying with the ADA is necessary to prevent undue financial burden on private businesses. But the argument that Title VII is not an accommodationist law—i.e. that it does not require employers to incur specific, demonstrable costs in response to the distinctive needs of a particular protected class[187]—

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despite the social costs associated therewith.'" *Id., citing* Arizona Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1085 n.14, 103 S. Ct. 3492, 3499 n.14 (1983) (opinion of Marshall, J.), Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775 (1989). *See also,* Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, at 716-18 & n.32, 98 S. Ct. 1370, 1379-80 & n.32 (1978) (concluding that the greater costs of providing retirement benefits for female employees did not justify the use of a sex-based retirement plan).

185. An argument may be made that, in a more limited sense, the BFOQ and business necessity provisions of Title VII do take economic or financial considerations into account. The *Johnson Controls* Court required a showing of the employer's potential *financial ruin* in order to successfully invoke the BFOQ defense. 499 U.S. at 201, 111 S. Ct. at 1204-05. In comparison, the business necessity defense requires only a showing that the discriminating employment practice is related to employee job performance. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S. Ct. 849, 853 (1971).

186. Indeed, with respect to Title VII religious accommodations, the only explicit accommodation requirement present in Title VII, the economic burden on employers is severely restricted under the *de minimis* standard, and an undue hardship provision is included. Under this approach, any accommodation that requires the employer to incur more than a slight cost would likely constitute an undue hardship. Congress specifically rejected the *de minimis* standard in the context of the ADA. *See* H.R. Rep. No. 101-485, pt. 2, at 68 (1990); *see also,* Lyons v. Legal Aid Soc'y, 68 F.3d 1512 (2nd Cir. 1995) (cost of parking spaces for disabled Legal Aid attorney may be a reasonable accommodation, although possibly costing as much as $520 per month). *See also, supra* text accompanying note 44 and *infra* text accompanying note 262.

187. *See* Jolls, *supra* note 14, at 648 (defining accommodation as "a legal rule that requires employers to incur special costs in response to the distinctive needs (as measured against existing market structures) of particular, identifiable demographic

may be an oversimplification, as recent scholarship suggests that both Title VII and the ADA might be viewed as accommodationist statutes to some extent. Given the important consequences that resolution of this debate poses for the future efficacy of the accommodationist provisions of the ADA, this subject is relevant for discussion in this note.

1) Antidiscrimination vs. Accommodation: Apples and Oranges?

An employer is obviously required to incur specific demonstrable costs in order to accommodate a disabled worker, such as a blind or deaf employee who requires a reader or translator. However, the costs associated with accommodation do not appear to be unique to the ADA. Significant case law has imposed "accommodationist" requirements as a matter of Title VII disparate impact law.[188] Instances of parity between Title VII antidiscrimination and the ADA's accommodation mandate were recently documented by Professor Jolls.[189] Jolls notes that when Title VII "disparate impact law prohibits facially neutral . . . rules that maximize an employer's profits, this law is requiring an employer to 'alter the work

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groups of employees, such as individuals with (observable) disabilities, and imposes this requirement in circumstances in which the employer has no intention of treating the group in question differently on the basis of group membership (or 'discriminating against' the group in the canonical sense).").

188. *See, e.g.*, Bradley v. Pizzaco of Neb., Inc., 939 F.2d 610 (8th Cir. 1991) (Eighth Circuit struck down an employer's no-beard rule on the ground that it had a disproportionately negative effect on black men and was not justified by the business necessity requirement of disparate impact law); Dothard v. Rawlinson, 433 U.S. 321, 329-30, 97 S. Ct. 2720, 2726-27 (1977) (noting that facially neutral height and weight requirements tend to exert a disparate impact on women by excluding them at a higher rate than men); Lanning v. Southeastern Pennsylvania Transp. Auth., 181 F.3d 478 (3d Cir. 1999), *cert. denied*, 528 U.S. 1131, 120 S. Ct. 970 (2000) (reversing judgment in favor of employer after determining that an employment screen requiring transit police officers who might have to apprehend suspects on foot to run 1.5 miles in twelve minutes disproportionately disqualified women and might not be justified by business necessity); *see also, infra* notes 192, 194, and 196, and the cases cited therein. Professor Jolls argues that disparate impact cases of this sort are analogous to accommodation requirements because they act to force employers to incur specific demonstrable costs in response to the distinctive needs of a particular protected group, thereby affecting business' profit maximizing behavior in a manner similar to well recognized "accommodationist" laws such as the ADA and the FMLA. *See* Jolls, *supra* note 14, at 652-66.

189. Jolls, *supra* note 14. *See also*, Siegel, *supra* note 127 at 940-46; Krieger & Cooney, *supra* note 127, at 559-60; Linda Hamilton Krieger, Foreword—*Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 Berkeley J. Emp. & Lab. L. 1, 3-4 & n.14 (2000).

environment' in response to the circumstances of individuals who are less effective employees from the employer's profit-maximizing business perspective."[190]

Using sex discrimination as an illustration, the logic of Title VII disparate impact liability requires employers to provide certain benefits, such as leave from work, to pregnant female employees.[191] Several courts have held that facially neutral employer policies permitting no or limited leave time for illness or disability, including pregnancy, create an unlawful disparate impact on female employees.[192] This provision of medical leave, even when it is unpaid medical leave, requires employers to incur specific demonstrable costs in order to respond to the distinctive circumstances of women.[193] Additionally, under disparate impact logic, when an

190. Jolls, *supra* note 14, at 668.

191. *See* Jolls, *supra* note 14, at 660. *See also,* Deborah A. Calloway, *Accommodating Pregnancy in the Workplace,* 25 Stetson L. Rev. 1, 39-40, 42-43 (1995); Krieger & Cooney, *supra* note 127, at 525 & n.40, 559-60; Laura Schlichtmann, Comment, *Accommodation of Pregnancy- Related Disabilities on the Job,* 15 Berkeley J. Emp. & Lab. L. 335, 370-88, 403-04 (1994); Siegel, *supra* note 127, at 940-46.

192. *See, e.g.,* EEOC v. Warshawsky & Co., 768 F. Supp. 647, 651-55 (N.D. Ill. 1991) (granted summary judgment against an employer on the ground that its policy of discharging all first-year employees who requested long-term sick leave had a disproportionately negative effect on women, because of their ability to become pregnant, and was not justified by business necessity); Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 818-20 (D.C. Cir. 1981) (reversed a grant of summary judgment for an employer because a pregnant employee had shown that the employer's ten-day leave limitation had a disparate impact on women and the employer had not adequately defended its approach); Miller-Wohl Co. v. Comm'r of Labor & Indus., 692 P.2d 1243, 1251- 52 (Mont. 1984) (concluded that an employer's no-leave policy for first-year employees had a disparate impact on women), *vacated and remanded,* 479 U.S. 1050, 107 S. Ct. 919, *judgment and opinion reinstated,* 744 P.2d 871 (Mont. 1987); *but see,* Stout v. Baxter Healthcare Corp., 282 F.3d 856 (5th Cir. 2002)(concluding that employee who had suffered a miscarriage with additional complications during her 90-day probationary period, and subsequently was fired, failed to prove that she was fired "because of" her pregnancy). The EEOC guidelines likewise provide that the absence or inadequacy of a leave policy may create an unlawful disparate impact on female employees. *See* 29 C.F.R. § 1604.10(c) (2000).

193. Following the enactment of the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C.A. §§ 2601-2654 (2000)), failure to provide medical leave time is independently unlawful. However, some scholars have argued that leave time for pregnancy is not required by Title VII unless such leave is offered for other health conditions. *See, e.g.,* Maria O'Brien Hylton, *"Parental" Leaves and Poor Women: Paying the Price for Time Off,* 52 U. Pitt. L. Rev. 475, 506 n.138, 512 (1991); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate,* 86 Colum. L. Rev. 1118, 1125 (1986). It appears that these scholars have entirely ignored the disparate impact branch of Title VII. *See* Jolls, *supra* note 14, at 662-63 ("It is almost as if the very existence of the disparate impact branch of liability

employer offers employee health insurance benefits that cover pregnancy and related medical conditions, that employer must also offer such benefits to the spouses of male employees.[194] Failure to either provide leave time or offer pregnancy benefits to female spouses may reflect nothing more than the increased business cost that it would entail. This is similar to an employer's failure to willingly alter the working environment to accommodate the blind or deaf employee.

Moreover, even under a disparate treatment analysis, one could argue that Title VII's antidiscrimination mandate serves to impose specific, identifiable costs on employers. The primary example here involves an employer's reluctance to employ female applicants due to a demonstrated customer preference for males.[195] Even given such a demonstration, Title VII prohibits an employer's refusal to hire female candidates to work with particular customers, despite the fact that those customers have been shown to be highly reluctant to work with a woman.[196] As such, Title VII imposes identifiable

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under Title VII is being ignored, often based on a reading of the second clause of the Pregnancy Discrimination Act of 1978 (PDA) that the Supreme Court appears, in California Federal Savings & Loan Ass'n v. Guerra to have rejected."). In *Guerra*, the Supreme Court found that the second clause of the PDA was intended to overrule the holding in Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401 (1976), "and to illustrate how discrimination against pregnancy is to be remedied." *Guerra*, 479 U.S. 272, 285, 107 S. Ct. 683, 691 (1987). The *Guerra* Court characterized the PDA as "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." *Id.* In fact, the Reagan Justice Department tried unsuccessfully to argue that disparate impact liability was not available in the pregnancy context in the important Seventh Circuit case, Scherr v. Woodland Sch. Cmty. Consolidated Dist. No. 50, 867 F. 2d 974 (7th Cir. 1988). Even Richard Epstein, a Title VII minimalist, concludes that "it appears that the full apparatus of disparate impact . . . would apply to pregnancy cases under the statute, as it does to ordinary cases of sex discrimination." Epstein, *supra* note 126, at 349. There is, however, some conflicting case law. *See* Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994); Dormeyer v. Comerica Bank-Ill., 223 F.3d 579, 583 (7th Cir. 2000); Kennedy v. Schoenberg, Fisher & Newman, Ltd., No. 93-C-4518, 1997 WL 285488, at *13 (N.D. Ill. May 19, 1997), *aff'd,* 140 F.3d 716 (7th Cir. 1998). Professor Jolls argues that this case law cannot be squared with the larger body of disparate impact law. *See* Jolls, *supra* note 14, at 663.

194. *See* Newport News Shipbuilding and Dry Dock v. EEOC, 462 U.S. 669, 103 S. Ct. 683 (1983) (holding that the PDA prohibits discrimination in compensation terms, conditions or privileges of employment because of sex, and that includes health insurance provided to employees and their spouses).

195. *See* Jolls, *supra* note 14, at 645.

196. Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (concluding that customer preference which prevents customers from dealing with the employer does not qualify as a BFOQ); *see also,* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir.), *cert. denied,* 404 U.S. 950, 97 S. Ct. 275 (1971); Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979), *cert. denied,* 446 U.S. 928, 100 S. Ct. 1865 (1980).

costs on employers in order to effect compliance with its antidiscrimination mandate.

Accordingly, Professor Jolls concludes that traits covered by Title VII require—and in many cases receive—accommodation through the operation of disparate impact liability, and in some cases through disparate treatment liability.[197] Hence, while Title VII does not explicitly state that accommodations are necessary to avoid liability, under the logic of its requirements, accommodations are mandated nonetheless. Jolls's research would suggest that the line between antidiscrimination and accommodation is in fact blurred, and the two are actually overlapping rather than fundamentally distinct categories. This calls into question the criticism that the ADA incorporates "a profoundly different model of equality from that associated with traditional non-discrimination statutes like Title VII" since the ADA requires that disabled individuals "be treated differently, arguably better," than other workers.[198] Moreover, given the startling rates at which ADA plaintiffs typically fail at the summary judgment stage, it is necessary to question whether Title VII, rather than the ADA, actually serves to grant broader protection from discrimination to its protected classes, particularly women, and, if so, whether this situation is justified. Significant to this examination are the Title VII cases which examine employers' safety-based concerns and invalidate paternalistic decisionmaking by the employer on the employee's behalf.

2) Title VII Interpretations

As noted previously, the Title VII antidiscrimination framework, largely influenced by the equivalency model predominating at the time of its passage, demonstrates the notion that distinctions based on sex are unfair and unnecessary because women are fundamentally equal in every respect that should be relevant and, therefore, deserve equal civil rights. Unlike the disabled, women as a class have, for the most part, successfully refuted allegations of biological inferiority by redefining their biological anomalies from a position that presupposes incompetence to one that emphasizes their unique abilities and fundamental equality. The women's movement has both redefined "difference" as a relative concept that presumes a majority or dominant norm and characterized all classifications based on sex as inherently suspicious from an equal protection standpoint. Because

197. Jolls, *supra* note 14, at 668.

198. Linda Hamilton Krieger, Foreword,—*Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 Berkeley J. Emp. & Lab. L. 1, 3-4 (2000).

women are perceived to be equal in every respect that should be relevant, Title VII replaced paternalistic notions of inherent inferiority with a forceful mandate for equality and independence. However, as with all laws, the devil is in the details, and the true success of Title VII's break from historically paternalistic treatment of women dangled treacherously on the Court's interpretation of the BFOQ defense in connection with safety-based employer concerns.

While significant jurisprudence demonstrates that the courts are willing to interpret Title VII defenses in a fashion that would include employers' reasonable concerns about workplace and public safety, shortly after its enactment the Supreme Court had occasion to address paternalistic "protection" of women in the workplace through employment policies that prevented a female employee from endangering herself. *Dothard v. Rawlinson*[199] and *International Union, UAW v. Johnson Controls*[200] involved Title VII challenges to employer policies that excluded women, but not men, from certain jobs in prisons (*Dothard*) and in battery manufacturing plants (*Johnson Controls*). In both cases the issue was framed as whether the exclusionary policy in question could be justified as a bona fide occupational qualification. Both cases demonstrate that, in the context of Title VII sex discrimination, the Supreme Court has disallowed legitimate safety considerations which encompass a risk to solely the individual claiming discrimination.

In *Dothard* the Supreme Court upheld an Alabama regulation forbidding the hiring of female correctional counselors in contact positions in all-male maximum security prisons. The Court found sex to be a BFOQ because the very fact of womanhood could undermine a woman's ability to maintain prison security. However, in so ruling, the Court was clear to exclude considerations of the woman's safety to herself as legitimate use of the BFOQ defense. The Court stated: "In the usual case, 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."[201] The Court was clear that the regulation in question could be upheld because "more [was] at stake in this case . . . than an individual woman's decision to weigh and accept the risks of employment in a 'contact' position in a

199. Dothard v. Rawlinson, 433 U.S. 321, 97 S. Ct. 2720 (1977).

200. International Union, UAW v. Johnson Controls, 499 U.S. 187, 111 S. Ct. 1196 (1991).

201. *Dothard*, 433 U.S. at 335, 97 S. Ct. at 2730, *citing* Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 232-36 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 717-18 (7th Cir. 1969); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971).

maximum-security male prison."[202] The Court rested their determination of the existence of a BFOQ on the threat that a female prison guard posed "to the basic control of the penitentiary and protection of its inmates and the other security personnel."[203] Thus, *Dothard* stands for the proposition that "a BFOQ based on safety grounds is appropriate only where the exclusion of one sex is necessary to accomplish the performance of the employer's primary business function."[204]

The Court went even further in *International Union, UAW v. Johnson Controls*,[205] holding that an employer could not support a cost-based BFOQ defense despite evidence suggesting increased tort liability. The case involved a fetal exclusion policy that excluded all fertile women from jobs with high lead exposure. The Court found that the "incremental cost of hiring women" cannot excuse an employer's discriminatory employment policy.[206] Thus, the Court stated that employers could not base a BFOQ defense on concerns that were unrelated to women's performance of the essence of the employer's business.[207] They addressed the "beneficent" motives proffered for the policy, i.e. that the policy was intended to protect women's reproductive health, and declared:

> Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on *why* the employer discriminates but rather *on the explicit terms of the discrimination* . . . [T]he motives underlying the employers' express exclusion of women [does] not alter the intentionally discriminatory character of the policy. Nor [do] the arguably benign motives lead to consideration of a business necessity defense . . . The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a BFOQ . . . In sum, Johnson Controls' policy "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"[208]

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202. *Dothard*, 433 U.S. at 335, 97 S. Ct. at 2730.
203. *Id.* at 336, 97 S. Ct. at 2730.
204. Befort, *supra* note 181, at 30.
205. 499 U.S. 187, 111 S. Ct. 1196 (1991).
206. *Id.* at 210, 111 S. Ct. at 1209.
207. *Id.* at 206-07, 111 S. Ct. at 1207.
208. *Id.* at 199-200, 111 S. Ct. at 1203-04 (emphasis added), *quoting*, Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 711, 98 S.Ct. 1370, 1377 (1978).

As a result, the Supreme Court affirmed the capacity of women to make certain decisions for themselves, stating that "[i]t is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."[209]

These two decisions demonstrate that, in the context of Title VII, "the 'safety exception' has been limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job."[210] If the reasoning applied in these two cases had been applied to the issue in *Echazabal,* a decidedly different result would have been reached. The *Echazabal* Court emphasized that, in the context of the ADA's direct threat defense, the employer's decision not to hire the plaintiff is justified when based on an individualized assessment of the disabled person's present ability to safely perform the essential functions of the job. By contrast, the Court stated that Title VII cases deal with "paternalistic judgments based on the broad category of gender," not individualized medical assessment.[211]

Indeed, the history of sex-specific protectionist legislation demonstrates that the argument for limitations on women's employment was based, not on empirical evidence of special hazards for women and their families, but on general assertions that the work was dangerous and that considerations of the strength of women's reproductive capacity and general health should prevail over women's interest in wage work.[212] However, responses to such "protective" statutes and policies recognized the troubling aspects of dismissing out of hand the possibility that women might be competent decisionmakers. Even if an individualized assessment had been undertaken of the risk posed to the *Johnson Controls* and *Dothard* plaintiffs, the language of those cases suggests that Title VII would still serve to prohibit an employer from discriminating against a woman in a paternalistic fashion that denied her the opportunity to put herself at risk if she chose to do so. The underlying notion of Title VII sex discrimination theory, which has evolved beyond its early emphasis on paternalistic protection, is that the very paternalism that is disguised as protection and aid can be used as a cage to trap women in subordinate positions ultimately detrimental and antithetical to their civil rights. As the *Johnson Controls* Court

209. *Johnson Controls,* 499 U.S. at 211, 111 S. Ct. at 1210.

210. Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies,* 53 U. Chi. L. Rev. 1219, 1253 (1986) [hereinafter "Becker"].

211. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 86 n.5, 122 S. Ct. 2045, 2053 n.5 (2002).

212. *See* Becker, *supra* note 210, at 1224.

succinctly stated, "Congress has left this choice to the woman as hers to make."[213] It is highly possible, as suggested in previous sections of this note, that the *Echazabal* Court was responding to the fact that Congress has not clearly left this choice to the disabled individual in the context of the ADA.

As noted previously, the ADA defines disabled persons in a manner that suggests a need for the implementation of special protective policies on their behalf. Moreover, the economic focus of the Act makes it clear that the rights provided are subject to economic considerations of relative cost and benefit. Thus, both the definitional framework and the economic thrust of the ADA illustrate an approach to disability discrimination that diverges from that taken with respect to sex discrimination. This approach lends itself to an interpretation that restricts the disabled employee's autonomous decisionmaking when the possibility for increased cost to the employer or danger to the disabled individual arises. It also uncovers several conspicuous notions that severely jeopardize equality of opportunity for the disabled.

The direct threat-to-self defense, like sex-specific protectionist legislation, fails to consider the effects of such policies on the disabled. In the context of sex discrimination, protective enactments and policies often focused on over-riding considerations of public health due to women's unique reproductive capacity. This focus served to identify women with (and only with) inherent characteristics of vulnerability and inferiority. Likewise, protective policies restricting a disabled individual's freedom of choice exaggerate their alleged vulnerability and inferiority. Ultimately, these policies often serve to exclude only those persons who are perceived as marginal workers and pose the risk of being used as merely an excuse for what would otherwise be patently obvious discrimination on the basis of characteristics protected by the ADA. Furthermore, for both women and the disabled, such policies rely on the assumption that the individual in need of protection is not a competent decisionmaker. This assumption, while providing evidence of the paternalistic approach taken by Congress in the ADA, is particularly damaging to the disability movement. However, the *Echazabal* Court revealed another justification underlying their decision to recognize a direct threat-to-self defense in the ADA context: OSHA liability.[214]

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213. *Johnson Controls,* 499 US at 211, 111 S. Ct. at 1210.

214. *See Echazabal,* 536 U.S. at 84, 122 S. Ct. at 2052 ("[f]ocusing on the concern with OSHA will be enough to show that the regulation is entitled to survive.").

3) The Possibility of OSHA and Tort Liabilities

In *Johnson Controls,* the Court recognized that "OSHA established a series of mandatory protections which, taken together, 'should effectively minimize any risk to the fetus and newborn child.'"[215] The Johnson Controls company claimed that noncompliance with these standards would potentially expose them to liability. However, the Court dismissed this argument by stating that "[i]f... Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best."[216]

In contrast, the *Echazabal* Court rested its justification for Chevron's actions on the *mere possibility* of OSHA liability. The *Echazabal* Court stated simply that "there is no denying that the employer would be asking for trouble: his decision to hire would put Congress's policy in the ADA, a disabled individual's right to operate on equal terms within the workplace, at loggerheads with the competing policy of OSHA, to ensure the safety of 'each' and 'every' worker."[217] The similarities in risk to the worker himself in *Echazabal* and to both the worker and her potential offspring in *Johnson Controls* are apparent. Clearly, the *Johnson Controls* Court was not willing to rest on the mere possibility of liability. The Court noted that, in the sex discrimination context, employers are forbidden from "resorting to an exclusionary policy" as "a method of diverting attention from [its] obligation to police the workplace."[218] In *Echazabal,* it is worth noting that rather than identifying a specific rule adopted by OSHA which required Chevron to exclude people with hepatitis C from areas containing hydrocarbons, Chevron relied only on the Act's "general duty" clause.[219] Neither Chevron nor the government was able to identify a single case in which OSHA has initiated a general duty clause enforcement action in similar circumstances, likely because this clause imposes only a duty of *feasible* prevention.[220] Hence, the reasoning of *Johnson Controls* appears

215. *Johnson Controls,* 499 U.S. at 208, 111 S. Ct. at 1208; *citing* 43 Fed. Reg. 52,952, at 52,966 (1978); *see* 29 C.F.R. § 1910.1025(k)(1)(ii) (1990).

216. *Johnson Controls,* 499 U.S. at 208, 111 S. Ct. at 1208.

217. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 85, 122 S. Ct. 2045, 2052 (2002).

218. *Johnson Controls,* 499 U.S. at 210, 111 S. Ct. at 1209.

219. *See* 29 U.S.C. § 654(a)(1) (2002) ("Each employer—(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees").

220. *See* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 641,

particularly applicable: where the ADA prevents an employer from excluding an employee with increased susceptibility to occupational harm, and the employer discloses the relevant risks to that employee and takes all feasible steps to mitigate those risks, the prospect that the employer would face liability under that clause is likely "remote at best." Obviously, this reasoning depends on a clear mandate from Congress granting disabled persons the right to make decisions for themselves in this context. Significantly, the Court's unanimous recognition of the direct threat-to-self defense demonstrates that, in the ADA, Congress fell far short of providing such an unambiguous declaration.

Regarding state tort liability, the *Johnson Controls* Court stated simply that, "[w]hen it is impossible for an employer to comply with both state and federal requirements, this Court has ruled that federal law pre-empts that of the States."[221] Broadly addressing the fear of increased cost, the *Johnson Controls* Court clearly stated, "[t]he extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender."[222]

Each of the troubling aspects of sex-specific protectionist legislation recur in the contemporary debate over disability threat-to-self qualification standards: the refusal to consider the effects of such policies on the disabled, the identification of the disabled with (and only with) inherent characteristics of vulnerability and inferiority, the perception of disabled persons as marginal workers (which leads to their exclusion), and the assumption that the disabled are not competent decisionmakers. However, the progress made as a result of the women's equality movement demonstrates that paternalistic protectionism can be overcome.

IV. PROPOSALS FOR REFORM

While the previous sections have been devoted to a critique of the current version of the ADA, this final section offers two distinct approaches to reforming the disability discrimination statute. The

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100 S. Ct. 2844, 2863-64 (1980); Mark A Rothstein, Occupational Safety and Health Law 207-208, 213-214, 215-216 (4th ed. 1998).

221. 499 U.S. at 209, 111 S. Ct. at 1209; *citing* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S. Ct. 1210 (1963); *see also* 499 U.S. at 210, 111 S. Ct. at 1209 ("If state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII.").

222. *Johnson Controls,* 499 U.S. at 210, 111 S. Ct. 1209, *citing* Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 716-718 n. 32, 98 S. Ct. 1370, 1379-80 n.32 (1978).

implications of these reforms are both theoretical and practical in nature. Drawing from Title VII sex discrimination's break from "outmoded" paternalistic logic, part A of this section seeks to incorporate lessons learned through the course of the women's equality movement. Against this backdrop, the three-part proposal set forth in part A offers a clearer and more sincere approach to disability discrimination in the workplace that has the potential to finally break with its chronicle of paternalistic "protection." The revisions represented in this proposal would forcefully declare that protection from discrimination in this context is, indeed, a civil right no less important than the right to be free from discrimination on the basis of sex. The following section, part B, addresses the most prominent counter-arguments (from both a theoretical and practical standpoint) to the reform proposed in part A, and introduces an alternative reform that would align the ADA more closely with commonly-recognized (and perhaps theoretically justifiable) "traditional" antidiscrimination mandates. In so doing, the reform in part B would likewise insulate the statute from paternalistic interpretation.

As mentioned in the introductory section of this note, the proposals offered in parts A and B that follow represent two mutually exclusive extremes along the spectrum of potential ADA reforms. At one end of the spectrum, Congress could attempt to bolster the presently diluted version of the ADA by strengthening and clarifying the accommodationist duty and legislatively safeguarding the statute from predictable judicial resistance. Alternatively, Congress may view judicial resistance to core elements of the ADA as an indication of a more fundamental flaw inherent in the statute, which stems from the impossible coexistence of the explicit accommodationist duty represented in the ADA within the framework of more "traditional" antidiscrimination mandates. The following reforms allow for both alternatives. Nonetheless, the premise for each proposal remains consistent: immediate (and potentially extreme) reforms of the ADA are imminently necessary to revive the once-heralded, and now noticeably paralyzed, enactment.

A. Strengthening and Clarifying the Accommodationist Duty

As a favorite adage of pundits, historians, and columnists goes: what we learn from history is how little we learn from history. A sincere antidiscrimination statute forbidding disability discrimination in the workplace should incorporate the lessons learned over the course of the evolution of sex discrimination theory and policy. The progress of the women's equality movement carried with it several important teachings that are particularly applicable to disability

discrimination: (1) biological variance does not necessitate or deserve a finding of inherent inferiority; (2) notions of inherent inferiority contribute to protective legislation and policies that, rather than protect, serve only to entrench discriminatory barriers to equality; and (3) achieving equality will not always be the most cost-effective alternative, but it is imperative nonetheless.

1. Defining Biological Variance to Exclude Notions of Inherent Inferiority

The ADA's current approach to disability discrimination is fundamentally flawed because the definitional framework utilized in the Act defines disability in a way that presupposes inferiority. The Title VII prohibition against sex discrimination, on the other hand, represents a definitional framework that characterizes women as fundamentally equal in every respect that should be relevant. As previously noted, sex is listed alongside characteristics such as race, color, religion, and national origin, all of which are, for the most part, accompanied by a widespread societal understanding that they have virtually no impact on an individual's employability and merit. Consequently, despite women's biological variance and particularly unique circumstances, discriminatory impediments leading to their inequality are analogized to discrimination excluding members of a certain race, color, national origin, or religion. This facilitates a popular understanding that discriminatory impediments to women's equality are a result of external barriers, rather than internal deficiencies. The recognition that women are inherently no less equal than members of a certain race, color, religion, or national origin inevitably spills over into interpretations of the Act, which forcefully declare individual autonomy and invalidate paternalistic decisionmaking on their behalf.

The definition of disabled persons as fundamentally and inherently flawed likewise infects jurisprudence interpreting the ADA, but in the opposite direction. ADA jurisprudence illustrates that conflicts between Congress's confusing mix of civil rights rhetoric and paternalistic notions of inherent inferiority are more often decided in favor of the latter. The progress of the disability rights movement depends on a popular understanding that disabled individuals are equally entitled to the civil rights granted to other minorities. This goal is thwarted by a definition of disability that characterizes the disabled as inherently unequal. To further the teaching function of a civil rights enactment,[223] an effective civil rights statute must clearly proclaim that

223. *See* Teresa Stanton Collett, *Marriage, Family and the Positive Law*, 10

the inequality presently experienced by disabled persons results *exclusively* from discriminatory external barriers to equality, and in no way reflects internal deficient traits.

It is readily apparent, however, that defining "sex" may be considerably simpler than defining "disability." Proscribing an alternative definition of disability to address the problems cited above is beyond the scope of this article, and more research into this arena is clearly warranted. Perhaps, however, the most essential prerequisite to change would be the divorce of mental and physical disabilities.[224] The disabled are a very diverse community both because of the many types of physical and mental disabilities, and because a disability can happen to anyone at any time, cutting across all gender, race, economic, and other social divides. For this reason the ADA, as well as the bulk of previous legislation, has attempted to announce unitary principles that can be applied to both the mentally and physically disabled as a whole.

However, certain policies that may be justified with respect to the mentally disabled find no corollary justification with respect to those individuals who are physically disabled. For example, when the stakes are high, as they are in dangerous employment positions, some degree of protection, or even paternalism, may be justified in dealing with a mentally disabled individual who wishes to place himself in direct danger, because the applicant or employee may not be decisionally competent. In such situations an individualized, scientific assessment of risk to the individual appears to have ample justification. The same justification does not correlate to the physically disabled whose mental faculties are fully intact. Hence, a divided approach to the two topics may prove more beneficial to both groups by more effectively guarding their civil rights while doing much to disassociate physical disability and incompetence.[225]

Notre Dame J.L. Ethics & Pub. Pol'y 467, 468 (1996) (discussing the complex nature of positive law in contemporary society and arguing that law, in addition to a coercive and constitutive function, also carries a teaching function).

224. Mental disability, for purposes of this proposal, should be understood as limited to those conditions affecting brain function in such a way as to impair a covered individual's judgment. Correspondingly, physical disability, for purposes of this proposal would include the remaining conditions which do not impair a covered individual's judgment.

225. Alternatively, an approach which provides for an individualized risk assessment where a mental disability is claimed, while excluding such an inquiry for physical disabilities, might be accomplished through an amendment to the ADA. Such an approach would be consistent, by analogy, with the majority of jurisprudence examining whether the ADA requires that equal benefits be provided to mental and physical disabilities. *See* Lewis v. Kmart Corp., 180 F.3d 166, 172 (4th Cir. 1999) (concluding that the ADA does not require equal levels of benefits for the mentally and physically disabled); Ford v. Schering-Plough Corp., 145 F.3d 601, 608 (3d Cir. 1998) (holding that discrimination between mental and physical

2. Invalidating Paternalism Disguised as Protection

The history of sex discrimination discussed previously evidences that legislative enactments and employment policies disguised as "protection" serve only to reinforce and entrench inequality. It is no less discriminatory to deny a disabled individual the right to make an informed decision to put himself in danger, regardless of the medical certainty of danger, than it is to deny an entire class of women the same right based on generalized or stereotypical assumptions. *Echazabal* essentially sanctioned the very paternalistic treatment deemed unlawful with respect to women with the caveat that the adverse employment decision must be based on an individualized inquiry that relies on the best available medical evidence. This hearkens back to the not so distant past when the disabled were robbed of their autonomy by trained experts who made decisions regarding their potential to become productive citizens and, thus, their societal inclusion.[226] The EEOC correctly stated the proper purpose of the ADA when they interpreted Congress's intent as "trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes."[227] In taking the position that demonstrable evidence applied to an individual is sufficient to excuse denying him the autonomy granted to other protected groups, the EEOC erred.

A civil rights enactment prohibiting disability discrimination in the workplace should comport with the approach taken with respect to sex discrimination and forbid the paternalistic denial of autonomous decisionmaking under the guise of workplace safety. Thus, qualification or other "workplace safety" standards that discriminate on the basis of disability should be deemed presumptively invalid when the risk being addressed affects only the physically disabled applicant or employee. The Title VII sex discrimination cases discussed in previous sections of this note demonstrate the inappropriateness of using Title VII as a vehicle for implementing paternalistic workplace safety policies.[228] The

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disabilities is not prohibited under Title I of ADA), *cert. denied*, 525 U.S. 1093, 119 S. Ct. 850 (1999); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1019 (6th Cir. 1997) (same), *cert. denied*, 522 U.S. 1084, 118 S. Ct. 871 (1998); EEOC v. CNA Ins. Cos., 96 F.3d 1039, 1045 (7th Cir. 1996) (same); *but see* Johnson v. K Mart Corp., 273 F.3d 1035 (11th Cir. 2001) (concluding that the denial of a long-term disability benefit on the express ground that the claimant is mentally disabled constituted discrimination prohibited by the ADA unless the ADA's safe harbor provision exempts such discrimination from liability).

226. *See supra* text accompanying notes 103-08.

227. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 74, 122 S. Ct. 2045, 2047 (2002).

228. *See also*, Befort, *supra* note 181, at 45-46.

arguments for safety-based qualification standards in the context of the fetal-protection policy examined in *Johnson Controls* might at least be rationalized as protecting something other than the woman herself, i.e. a potential fetus. Indeed, the possibility of liability, and even considerations of morality, appear greater in that context than they do when a disabled individual knowingly consents to put only himself in danger. However, as the *Echazabal* Court clearly stated, the purpose of Title VII is to ban discrimination based on the broad category of gender.[229] In the sex discrimination context, this mandate entitles the woman to evaluate the potential risks and decide for herself whether or not to seek possibly dangerous employment.

Likewise, the purpose of a disability civil rights enactment should be to ban discrimination on the basis of disability, and not to regulate workplace safety. Congress set up a separate federal statutory scheme, the Occupational Safety and Health Act, for the latter purpose.[230] Qualification standards affecting the disabled will require an accommodation of these two enactments and their respective goals of curbing discrimination and ensuring a safe work environment. This can be appropriately accomplished by leaving the question of workplace safety to the agency created for that purpose: OSHA. Disability-based qualification standards that serve to implement a safety policy potentially exceeding OSHA requirements should not receive automatic approval by the courts. If OSHA requirements mandate disability-based qualification standards, then, consistent with the approach taken with respect to sex-based workplace safety standards, courts should closely examine the disability-based qualification standard and the possibility of less discriminatory alternatives. In sum, qualification or safety standards that discriminate on the basis of disability should receive the same heightened judicial scrutiny afforded to sex-specific policies.

3. Granting Equality Absent an Economic Analysis or Justification

Granting equality is rarely the most economically efficient alternative. Nearly every antidiscrimination mandate imaginable imposes significant identifiable and demonstrable costs on employers.[231] Accommodations for pregnancy, for example, present

229. *Echazabal*, 536 U.S. at 86 n.5, 122 S. Ct. at 2053 n.5.

230. Occupational Safety and Health Act of 1970, 84 Stat. 1590, as amended, 29 U.S.C. § 651 *et seq.* (2000).

231. Professor Christine Jolls, in *Antidiscrimination and Accommodation*, notes that antidiscrimination mandates applying to race and sex — under both a disparate impact as well as disparate treatment analysis — impose specific demonstrable costs on employers in a manner analogous to the ADA's accommodation mandate.

a significant economic burden. The *Johnson Controls* Court recognized as much when it declared, "Indeed, in passing the [Pregnancy Discrimination Act], Congress considered at length the considerable cost of providing equal treatment of pregnancy and related conditions, but made the 'decision to forbid special treatment of pregnancy despite the social costs associated therewith.'"[232] The Supreme Court has clearly stated that "[t]he extra cost of employing members of one sex . . . does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender."[233] However, the current version of the ADA clings to economic considerations of relative cost and benefit that are deemed largely irrelevant in the sex discrimination context.

A statute addressing disability discrimination in the workplace that leaves the rights provided open to considerations of relative cost and benefit, as does the ADA, cannot be recognized as a revolutionary civil rights enactment or, for that matter, a civil rights enactment at all. A sincere antidiscrimination statute should clearly recognize the economic burden associated with its provisions and refuse to allow economic considerations to dilute its pronouncements. Equality being the goal, not economy, requires abandoning ill-defined notions of undue hardship and reasonableness.

It is frequently assumed that the economic burden associated with accommodating disabilities is far greater than the economic burden associated with Title VII compliance. Whether or not this assessment comports with reality,[234] numerous scholars have proposed creative

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Jolls, *supra* note 14, at 652-66.

232. Int'l Union, UAW v. Johnson Controls, 499 U.S. 187, 210, 111 S. Ct. 1196, 1209 (1991); *citing* Arizona Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1085 n.14, 103 S. Ct. 3492, 3500 n.14 (1983) (opinion of Marshall, J.), Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775 (1989).

233. *Johnson Controls*, 499 U.S. at 210, 111 S. Ct. at 1209, *citing* City of Los Angeles Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 716-18 n. 32, 98 S. Ct. 1370, 1379-80 n.32 (1978).

234. *See* Frederick C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in Disability and the Labor Market 196, 231-38 (Monroe Berkowitz & M. Anne Hill eds., 2d ed. 1989) (arguing that economists' negative theorizing about the costly effects of accommodation often do not consider the actual experiences of businesses); Peter D. Blanck, Communicating the Americans with Disabilities Act, Transcending Compliance: 1996 Follow-Up Report on Sears, Roebuck and Co., Annenberg Washington Program Report (1996) at 42-43 (demonstrating that the low direct costs of accommodations for employees with disabilities has been shown to produce substantial economic benefits to companies, in terms of increased work productivity, injury prevention, reduced workers' compensation costs, and workplace effectiveness and efficiency); Francine S. Hall & Elizabeth L. Hall, The ADA: Going Beyond the Law, 8 Acad. Mgmt. Executives 17, 17-26 (1994) (noting that one of the indirect benefits of following

funding schemes, to be implemented by businesses or the federal government, which could help offset the cost of making reasonable accommodations.[235] Given the aggregate societal savings that could be realized by these funded accommodations, such a scheme may approach paying for itself.[236] Abandoning the undue hardship provision in favor of such a funding program would go considerably farther toward providing a comprehensive "national mandate"[237] for the elimination of disability discrimination than the now diluted version of the ADA.

Nonetheless, the largely ignored alternative—permanent societal division based on immutable characteristics—is, in the view of this author, considerably more costly.

> Its price is the admission that our founding story, with its myths about brotherhood [and] equality ... is just that: a collection of myths. We will then confront the somber realization that, as a

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the ADA occurs when a corporation acknowledges reality and supports people with special needs, thereby gaining a strategic and competitive advantage); President's Committee on Employment of People with Disabilities, Job Accommodation Network (JAN) Reports (Oct.-Dec. 1994) (Washington, D.C., 1994) (JAN reports that for every dollar invested in an effective accommodation, companies sampled realized an average of $50 in benefits.).

235. For a discussion of public funding for reasonable accommodations see Scott A. Moss and Daniel A. Malin, Note, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 Harv. C.R.-C.L. L. Rev. 197 (1998). Such a scheme would remove a major incentive for employers to discriminate: the cost of accommodating the disabled employee. *See also,* Epstein, *supra* note 126, at 493 (concluding that a system of federal grants should replace the ADA so that Congress pays for the accommodations that it wants employers to make); Bonnie O'Day, *Economics versus Civil Rights*, 3 Cornell J. L. & Pub. Pol'y 291, 301 (1994) ("Shifting some of the burden of accommodation from employers to the taxpayer would benefit individuals with disabilities because employers would be more likely to hire them if they were not responsible for the full cost of providing the necessary accommodations.").

236. For example, one report estimates that for every one million disabled people employed, there would be as much as a $21.2 billion annual increase in earned income, a $2.1 billion decrease in means-tested cash income payments, a $286 million annual decrease in the use of food stamps, a $1.8 billion decrease in Supplemental Security Income payments, 284,000 fewer people using Medicaid and 166,000 fewer people using Medicare. *See People with Disabilities Show What They Can Do*, Human Resources, June 1998, at 144 (*citing* Rutgers University economist Douglas Kruse). *See also,* Nish, The JWOD Program: Providing Cost Savings to the Federal Government by Employing People with Disabilities (Feb. 6, 1998) (listing survey results and reporting that the federal government saved $1,963,206 over the course of the study by employing 270 people with disabilities); Taxpayer Return Study California Department of Rehabilitation Mental Health Cooperative Programs (Oct. 1995) (finding that for every disabled person employed, California taxpayers saved an average of $629 per month in costs).

237. *See* 42 U.S.C. § 12101(b)(1) (2002).

> people, we are not serious about equality, that we embrace inequality and status so long as they benefit us, and that in these respects we are no different from the many Western and nonwestern nations that are built on, and willingly accept, permanent, ineradicable divisions of race, sex, and caste.[238]

B. Aligning the ADA with Traditional Antidiscrimination Principles

In the interest of examining all possible explanations for and potential legislative reactions to the *Echazabal* decision, this section will explore an even more fundamental theoretical difficulty that, it may be argued, is built into the ADA. Paternalistic interpretations of the ADA may be attributed to the theoretical perplexities that necessarily accompany any pronouncement of "civil rights" whose implementation ultimately requires resort to accommodation mandates. Indeed, it is one thing to argue, as Professor Jolls effectively does, that both Title VII and the ADA may be characterized as "accommodationist" laws in the sense that they both require employers to incur special and demonstrable costs in response to the distinctive needs (as measured against existing market structures) of particular, identifiable demographic groups of employees. Obviously, each statute imposes this requirement in circumstances in which the employer has no intention of treating the group in question differently on the basis of group membership or "discriminating against" the group in the canonical sense.[239] Yet, it is an entirely separate proposition that, as such, accommodationist provisions are immune from attack on the ground that they extend beyond the proper scope of antidiscrimination — and, indeed, civil rights — law. Professor Jolls does not attempt to offer any clear, normative guidance on the propriety of laws that penalize rational, profit-maximizing behavior. Hence, Professor Jolls's enlightening research exposes a central lingering question: practical similarities notwithstanding, do accommodation mandates extend beyond the proper scope of civil rights law?

1. Theoretical Difficulties and the Proper Scope of Antidiscrimination Law

One scholar defends the "conventional wisdom" called into question by Professor Jolls's research by characterizing the concepts of

238. Richard Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 Wis. L. Rev. 579, 586 (1989); *see also*, Bonnie O'Day, *Economics versus Civil Rights*, 3 Cornell J. L. & Pub. Pol'y 291, 301 (1994) ("To provide the societally optimal level of accommodations to individuals with disabilities, the costs and benefits to society as a whole must inform the accommodation analysis.").

239. *See* Jolls, *supra* note 14, at 648; *see also, supra* text accompanying notes 188-198.

antidiscrimination and accommodation as "a useful shorthand terminology for civil rights policies at opposite ends of a continuum."[240] Professor Verkerke, in "Disaggregating Antidiscrimination and Accommodation," further asserts that the exercise of drawing meaningful distinctions among legal rules that fall on different points along this continuum is not merely possible; it is essential to a coherent understanding of civil rights law. Indeed, as another scholar critiquing Professor Jolls's thesis argues, "Professor Jolls aligns the ADA with non-core cases of discrimination under Title VII, which threatens to impair both the growth and the strength of the accommodation model."[241] In order to fully understand this characterization, the following sections will discuss the major tenets of Professor Verkerke's argument, as well as the unintended consequences, briefly alluded to by Professor Verkerke, that may flow from expansively drafted accommodationist laws such as the ADA.

a. The Civil Rights Continuum

Professor Verkerke begins by defining the outer boundaries of his civil rights continuum, placing the principle of negative equality at one end of the spectrum. According to Verkerke's formulation, negative equality "bars specific grounds for employment decisions that the law deems illegitimate but otherwise leaves business free to manage their affairs as they wish."[242] Positive equality, under which "firms have an affirmative obligation to use merit-based criteria to make employment decisions," finds placement at the midpoint of the continuum.[243] Rooted in meritocractic ideals, the principle of positive equality would allow firms to discharge a disabled employee who produced less or costed more than other workers.[244] Finally, at the end of the continuum directly opposite negative equality lies accommodation. Contrasting accommodation with other equality principles represented on the continuum, Verkerke states, "an 'accommodation' mandate requires employers to make costly exceptions to their merit-based criteria in order to increase employment opportunities for individuals who would otherwise be excluded . . . These additional costs would ordinarily justify a firm's decision to discharge this employee, but the legal requirement of

240. Verkerke, *supra* note 15, at 1419.
241. Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 Wm. & Mary L. Rev. 1197, 1201 (2003) (characterizing antidiscrimination and accommodation mandates as respectively embodying "soft" and "hard preferences") [hereinafter "Schwab & Willborn"].
242. Verkerke, *supra* note 15, at 1389.
243. *Id.*
244. *Id.* at 1390.

reasonable accommodation obliges the employer to make an exception to its normal criteria and incur some cost or loss of productivity as a result."[245] Verkerke notes that if a costless change in work procedures would allow an applicant or employee to perform the job as effectively as others, he would need only to invoke the principle of positive equality rather than seek an accommodation.[246] In such circumstances, the employer could not feasibly defend, on meritocractic grounds, the decision to discharge him.[247] Thus, Professor Verkerke concludes that the true distinction between accommodation and positive equality refers to "the magnitude of any costs associated with permitting an individual with a disability to perform a particular job."[248] If those costs are nonexistent, according to Verkerke, the norm of positive equality provides sufficient protection. Yet, as those costs increase, the case moves along the continuum into the domain of accommodation.[249]

b. Divergence Along the Continuum

1) Title VII and the Continuum

Addressing Professor Jolls's statutory arguments, Professor Verkerke places Title VII disparate treatment liability in the category of negative equality norms, because it prohibits firms from considering certain protected traits when making important employment decisions.[250] Alternatively, the doctrine of disparate impact liability is further subdivided into three distinct versions: "(1) an 'objective theory' for uncovering pretextual discrimination, (2) a concerted effort to attack any 'arbitrary barriers' to the advancement of protected group members, and (3) a demanding requirement that any exclusionary employment practices be genuinely 'necessary' in order to justify them."[251] The first two categories essentially aim to combat pretextual discrimination, thus aligning most closely with negative equality.[252] However, the third category — the strict

245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 1390-91.
249. *Id.* at 1391.
250. *Id.* at 1396.
251. *Id.* at 1397. Professor Verkerke finds support for this subdivision in various passages of Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S. Ct. 849, 854 (1971), as well as subsequent case law. *See id;* citing George Rutherglen, Employment Discrimination Law: Visions of Equality in Theory and Doctrine 70-73 (2001).
252. Verkerke, *supra* note 15, at 1399. With respect to the second category, this is because "an employer may continue to use a practice after offering persuasive

requirement that any exclusionary employment practices be genuinely "necessary" in order to be justified – understandably filters out at least some meritocractic standards and, thus, requires the employer to incur some expenses or lost productivity in order to avoid the practice's exclusionary effect.[253] Hence, the "vanishingly small" number of disparate impact cases falling into this third category do impose something of an implicit accommodation requirement.[254] Yet, Professor Verkerke argues, "the genuine overlap between traditional antidiscrimination statutes and accommodation requirements is probably small enough to be disregarded for many purposes."[255]

2) Apples and Pineapples?

Professor Verkerke's arguments rely, in large part, on the costs associated with accommodation mandates and the degree in which they differ from those generally associated with more traditional antidiscrimination mandates. He notes that, from a practical standpoint, the vast majority of cases brought under Title VII are almost exclusively concerned with negative equality, with a small number of cases seeking to enforce the norm of positive equality, and an even smaller number seeking to impose the limited form of accommodation mandate outlined above.[256] Yet, the ADA noticeably transcends disparate impact liability doctrine, and cost is just one symptom of the theoretical divide.

The doctrine of disparate impact liability is frequently referred to as disparate impact *theory*, partly because it owes its original creation to judicial decisions that expanded the scope of liability that an employer may face under Title VII.[257] The judicially-created "disparate impact" category was later codified at 42 U.S.C. § 2000e-2(k), in response to the Supreme Court's narrower interpretation of the doctrine in *Wards Cove Packing Co. v. Atonio*.[258] Yet, this codification failed to include an explicit duty of accommodation; rather, it quite simply aimed at preventing facially neutral policies that disproportionately disadvantaged a protected class of persons

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evidence that it serves a legitimate business objective." *Id.*

253. *Id.*

254. *Id.* at 1402-03.

255. *Id.* at 1403.

256. *Id.* at 1404.

257. Griggs v. Duke Power Co., 405 U.S. 424, 91 S. Ct. 849 (1971), represents the origin of disparate impact theory. There the Court stated that the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432, 91 S. Ct. at 854.

258. 490 U.S. 642, 109 S. Ct. 2115 (1989).

unless the challenged policy could be justified on the grounds that it was job related and consistent with business necessity.[259] While rare expansive interpretations of the doctrine do exist, given the narrow statutory formulation of disparate impact liability, future enlargement of the doctrine to encompass accommodation requirements rests on the willingness of courts to broaden Title VII coverage to include such situations. The "vanishingly small"[260] number of cases receiving such treatment is precisely a reflection of the courts' hesitation to do so.

In contrast to Title VII, the ADA's accommodation requirements are statutory, overt, and explicit. Indeed, in some circumstances, the ADA requires employers to accommodate individuals with disabilities even though they cost more to employ than others or are able to produce less.[261] But more fundamentally, the language of the statute declares that covered employers must accommodate otherwise qualified individuals with a disability, and (excluding the possibility of an available defense) a failure to do so carries with it the potential for litigation and liability. Accordingly, as argued in previous sections of this note, the ADA's undue hardship provision (and the requirement that any accommodations provided be "reasonable") may not be defensible solely on grounds of the costs associated with their provision. However, the undue hardship provision may be defended on the ground that, with the exception of Title VII's diluted requirement of religious accommodations,[262] no other antidiscrimination law has ever explicitly mandated accommodation, regardless of the infrequent instances in which disparate impact (and even more exceptionally, disparate treatment) liability have imposed similar costs. Thus, the models of antidiscrimination embodied in the two Acts do remain distinct. Ultimately, rather than apples and oranges, the ADA's reasonable

259. 42 U.S.C. § 2000e-2(k) (2000).

260. Verkerke, *supra* note 15, at 1402-03.

261. *See* Schwab & Willborn, *supra* note 241, at 1204.

262. In the context of Title VII discrimination on the basis of religion, any accommodation that requires the employer to incur more than a slight cost would likely constitute an undue hardship. *See supra* text accompanying notes 44 & 186; *see also*, Trans. World Airlines, Inc. v Hardison, 432 U.S. 63, 97 S. Ct. 2264 (1977); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69, 107 S. Ct. 367, 372 (1986). Hence, some commentators argue that there is no substantive value associated with the religious accommodation requirement. *See, e.g.*, Sonny Franklin Miller, Note—*Religious Accommodation Under Title VII: The Burdenless Burden*, 22 J. Corp. L. 789, 799 (1997) (observing that as a result of the *de minimis* standard, the Act only provides workers in need of religious accommodation with "hypothetical protection"); Symposium, *Religion in the Workplace*, 4 Employee Rts. & Emp. Pol'y J. 87, 98 (2000) (comments of Judge Michael W. McConnell) (stating that "the Supreme Court's decisions in *Hardison* and *Philbrook* have made mincemeat of the congressional intention in Title VII").

accommodation provision and Title VII disparate impact liability have about as much in common as apples and pineapples: while sounding vaguely similar, they nonetheless owe their existence to entirely separate theoretical trees.[263]

Nonetheless, the meaning of the ADA's requirement of reasonable accommodation, along with the definitional question of who counts as disabled, are two of the most important and unsettled questions posed by the statute.[264] Yet, as Professor Verkerke demonstrates, expansively written accommodationist laws have a tendency to create potentially troublesome and likely unintended consequences that seriously impact both of these concepts.

c. Judicial Reactions and Unintended Consequences

As noted by countless commentators, judicial interpretation of the ADA has significantly limited the coverage and scope of the statute in a variety of meaningful ways.[265] As Professor Verkerke observes, "it is difficult to deny that the judicial reaction to the ADA has been considerably more skeptical and resistant than it has been toward more traditional civil rights legislation."[266] Professor Verkerke attributes this judicial skepticism, in part, to the location of the ADA's accommodation requirements at the outermost end of the civil rights continuum and the tendency of popular resistance to increase as statutes progress toward this extreme.[267] Given its overt (and consequently controversial) accommodation requirements, courts appear cautious about extending those duties too far. As such, the contours of the ADA are subject to continual examination and modification, which is frequently generalized as unfavorable to ADA plaintiffs. The meaning of the terms "reasonable accommodation" and "qualified individual with a disability" are the two primary areas

263. *See* Cubanski v. Heckler, 794 F.2d 540, 545 (9th Cir. 1986) (Kozinski, J., dissenting from denial of rehearing en banc)(similarly characterizing concepts unrelated to the subject of this paper as "apples and pineapples"), vacated as moot sub nom., Bowen v. Kizer, 485 U.S. 386, 108 S. Ct. 1200 (1988).

264. *See* Schwab & Willborn, *supra* note 241, at 1201.

265. *See, e.g.*, Diane L. Kimberlin and Linda O. Headley, *ADA Overview and Update: What has the Supreme Court Done to Disability Law?*, 19 Rev. Litig. 579, 581-82 (2000) ("Court decisions since the ADA's passage . . . have created the perception that employers will usually prevail in ADA lawsuits and that employees have little chance of successfully establishing disability discrimination."); Linda Hamilton Krieger, Foreword—*Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 Berkeley J. Emp. & Lab. L. 1 (2000) (detailing both a judicial and popular backlash against the broad endorsement of disability rights represented by the ADA).

266. Verkerke, *supra* note 15, at 1418.

267. *Id.*

in which this phenomenon is readily apparent. Yet, judicial skepticism and continuous modification, particularly in areas which trigger the substantive protections of the Act, may be responsible for producing some very serious (and largely negative) consequences for persons who might have otherwise found protection under a more traditional antidiscrimination statute addressing disability discrimination.

With respect to the latter definitional category – that of "qualified individual with a disability" – for example, consider the following hypothetical illustration: Applicant A and her twin B are alike in all respects. Both were born with a congenital disorder (birth defect) known as Syndactyly (joined phalanges), which affects the hypothetical applicants' hands in a manner that renders them unable to perform the physical motions required to twist the circular knobs used on most doors. Both applicants plan to apply for a job with a large nation-wide investment banking firm following their graduation from college. Prior to their application, the applicants learn of the firm's exclusive use of circular door knobs. Anticipating the difficulties these structural obstacles will present, applicant A obtains a prosthetic device designed to give her individual control over at least three fingers by using her original nerve pathways.[268] While the use of this device provides applicant A with increased mobility and access, the artificial nature of the device renders her disability significantly more noticeable than before. Applicant B does not obtain the device. As planned, both apply for the job.

During the interview, Applicant B informs the hiring partner of her disability and her need for accommodations. She explains that such accommodations may be made by replacing each of the firm's 270 doorknobs with straight-handle knobs for easier access. Applicant A does not have to inform the hiring partner of her disability; her prosthetic device is immediately noticed when she introduces herself. Applicant A explains that the prosthetic hand is her response to a congenital birth defect which makes it impossible for her to open doors with circular knobs.

Following the interview, each applicant receives a letter. Applicant B is offered a position pending completed installation of the structural (door knob) accommodations. Applicant A is told that, despite her excellent qualifications, the firm cannot extend her an offer. Upon further inquiry, Applicant A learns that the hiring partner is primarily concerned about the unpleasant appearance of her prosthetic device and its potential to deter future clients. Believing

268. *See, e.g.*, Associated Press, *New Artificial Hand Allows Finger Movement*, CNN Interactive, ¶ 2 (1998), *at* http://www.cnn.com/HEALTH/9806/10/artificial.hand/ (last accessed 08/24/03).

this to be a discriminatory employment decision made on the basis of her disability, Applicant A begins researching the ADA's recent judicial interpretations examining the definition of disability. She uncovers case law suggesting that, had she refused to take steps to integrate herself into the firm of her choosing, she would have qualified for protection under the ADA. But because of her actions, she has removed herself from the scope of legal protection afforded to individuals with a disability.[269]

The point of this exercise is to expose the unintended consequences of expansively written accommodationist laws whose provisions appear to provoke both skepticism and caution on the part of judges charged with interpreting their meaning. Yet, disability case law and equality doctrines notwithstanding, what should determine who is deserving of protection under a civil rights law forbidding discriminatory decisionmaking on the basis of disability? At the risk of oversimplifying the issues at stake, it cannot be ignored

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269. *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S. Ct. 2139 (1999) (finding visually impaired twin female pilots not disabled under the ADA because, with their eyeglasses and contact lenses, they were not substantially limited in a major life activity); Murphy v. United Parcel Serv., 527 U.S. 516, 119 S. Ct. 2133 (1999) (relying on *Sutton* to hold that the plaintiff, whose blood pressure without medication was approximately 250/160, in his medicated state was not substantially limited in a major life activity and, therefore, was not a person with a disability); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 119 S. Ct. 2162 (1999) (holding that a person with monocular vision was not necessarily disabled). The effect of the "*Sutton* trilogy" is that many individuals suffering from physical or mental impairments and chronic diseases that can be corrected through the use of medication, artificial aids, or prosthetic devices are not extended the protections of the ADA in the workplace. The *Sutton* Court had to initially decide whether mitigating measures, such as corrective lenses and prescription medication, should be considered when determining whether particular conditions substantially limit major life activities. The Court noted that a regulation promulgated by the EEOC pursuant to its administrative authority to interpret the employment discrimination provisions of the ADA expressly stated that "[t]he determination of whether an individual is substantially limited . . . must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." *Sutton*, 527 U.S. at 480, 119 S. Ct. at 2145 (*quoting*, 29 C.F.R. app. § 1630.2(j)). The Department of Justice had issued a similar regulation. *Id.* (*citing*, 28 C.F.R. app. A § 35.104 (2002)). Justice O'Connor, writing for the seven-Justice majority, stated that "it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity." *Id.* at 482, 199 S. Ct. at 2146. Hence, the majority concluded that the EEOC regulation constituted an impermissible interpretation of the Act's scope. *Id.* The Court also rejected the claim that an employee denied an opportunity on the basis of a physical impairment was "regarded as" disabled unless the employer subjectively assessed the impairment as substantially limiting major life activities. *See id.* at 489, 119 S. Ct. at 2149.

that having in place a simple and clear mandate, grounded in principles of positive equality, that forbids discrimination on the basis of disability would protect applicant A from an adverse employment decision which could be made solely on the basis of her disability. Against this theoretical backdrop, the hypothetical hiring partner's decision could not feasibly be justified by resort to meritocractic standards and ideals. But as it stands, the presently diluted version of the ADA gives no such protection.

One could clearly argue that the employment decisions illustrated in this hypothetical result from the courts' failure to properly interpret the ADA and that the judicial decisions relied on in support of the outcome of the hypothetical were erroneous.[270] Another argument posits that the unintended consequences of broadening the scope of protection under the statute may be the "backlash" that is being experienced as courts struggle with the difficulties inherent in a law so expansively written and so seemingly contradictory to traditional principles of antidiscrimination law. This "backlash" may serve to deny protection to those who, under a traditional view of civil rights law, would find refuge.

The *Echazabal* decision may likewise be characterized as a judicial reaction to the unclear and contradictory nature of the statute. Here, I pause carefully for all of the reasons outlined in previous sections of this note. That workplace accommodations are rightly the legal duty and responsibility of the employer implies an element of paternalism. Rather than simply protecting individuals from employment decisions unrelated to merit under a regime of positive equality, accommodationist laws deliberately interfere with an employer's freedom of choice, contrary to his or her express wishes, and under the guise of acting for the disabled worker's own good.[271] Paternalistic interpretations of the ADA, such as *Echazabal*, may be attributed to this reality.

Furthermore, the judicial "backlash" to the ADA, which is arguably an equally powerful explanation for the *Echazabal* decision, can be characterized as a reaction to statutes that align closely with accommodation mandates on the civil rights continuum.[272] In other words, despite the similar results that antidiscrimination and accommodation mandates may effect, there does remain a fundamental difference between the antidiscrimination mandate

270. *See, e.g.*, Samuel Bagenstos, *Subordination, Stigma, and "Disability"*, 86 Va. L. Rev. 397, 400 (2000).

271. *See supra* text accompanying note 84.

272. Judicial narrowing of Title VII's explicit accommodation duty where religion is concerned provides further support for this argument. *See supra* notes 44, 186 & 262, and the sources cited therein.

embodied in Title VII and the overt accommodationist requirements of the ADA: a difference of principle and not merely of cost.

Thus, the Act creates confusion. Its provisions are popularly viewed, not as antidiscrimination, but as a framework of special or preferential treatment. Since it is antidiscrimination principles which continue to provide the theoretical rootstock of civil rights law, the confusion created can be best explained as a reaction to the failure of antidiscrimination principles to effectively "accommodate" explicit accommodation mandates, regardless of how frequently the two must coexist.

2. An Alternative Revision

Given this reality, it remains to ask this question: How may antidiscrimination law effectively respond to the complex problems presented by disability discrimination in the workplace? As alluded to previously, one potential response is seductively simple and precisely opposite the reform advocated in part A of this section. Rather than expand and rewrite the definition of disability, this alternative revision would excise the ADA's accommodationist provisions (i.e., the requirement to provide reasonable accommodations, the accommodationist definition of disability, and, correspondingly, the undue hardship provision). The ADA's antidiscrimination mandate would then more closely approximate previous antidiscrimination statutes enacted according to models of positive equality, by forbidding discriminatory decisionmaking on the basis of disability when such decisions do not reflect the individual ability or merit of the employee.

The results of this change appear undeniably harsh. Indeed, employees who require costly accommodations that outweigh individual potential for profit would likely fall outside the definition of "qualified individual with a disability," thus, failing the threshold test for protection under the statute. Ultimately, however, the harm associated with narrowing the scope of the statute must be balanced against the reality of, and the fear of future, backlash against the accommodationist provisions of the ADA. Likewise, the benefit of this revision is that it would provide a relatively clear framework for viewing the goal of the law (i.e., to combat discrimination unrelated to merit), and this goal coincides naturally with what are popularly viewed as the "traditional" functions of antidiscrimination law. Hence, the statute, as revised, would provide greater justification for treating the members of its protected class in a manner similar to those afforded protection under Title VII. Decidedly less controversial in nature (at least among persons supporting the goals

of positive equality), such a revision would move society closer to the goal of achieving equality of opportunity for disabled individuals in the workplace than does the now diluted and judicially-crippled version of the ADA.

CONCLUSION

The Americans with Disabilities Act has fallen short of accomplishing the enticing vision of equality of opportunity for disabled Americans in the workplace which was proclaimed at its passage. The current version of the ADA and its judicial interpretations pose grave obstacles to achieving equal civil rights for the disabled. An antidiscrimination statute operating from the assumption that the class of persons seeking protection is fundamentally unequal will generally only foster mild societal change that can appropriately be characterized as toleration. Toleration falls decisively short of the civil rights rhetoric which accompanied the passage of the ADA. The current version of the Act also contributes to the charitable framework through which it is often, perhaps unconsciously, viewed. Yet, the danger of viewing prohibitions on disability discrimination as a form of charity is acute; it goes to the very essence of our societal understanding of the proper treatment of biological "difference." Our response to this danger defines our commitment to equality and everything that it entails. Ignorance of this danger in a representative democracy such as ours represents nothing less than a national choice to willingly accept "permanent, ineradicable divisions"[273] which are kept firmly in place by formidable external exclusionary practices. These practices serve to eliminate disabled persons from the landscape of those afforded equality of opportunity just as a staircase bars the entry of a person in a wheelchair.

It is natural to blame the ADA's shortcomings on the failure of the courts to properly interpret the law. A more fundamental problem, however, lies in the ADA itself—"in the seemingly conflicting premises underlying the Act and the Act's failure to straightforwardly present its objectives."[274] The assumption that both disabled Americans and women alike "are in danger of hurting themselves and that their very bodies are incompatible with safe and efficient work is more than a coincidental similarity."[275] Because of

273. Richard Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 Wis. L. Rev. 579, 586 (1989).

274. Tucker, *supra* note 141, at 339.

275. Collette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 Geo.

the similarities of the issues faced, an effective revision of the ADA should incorporate the lessons learned over the course of the women's equality movement. Particularly, the ADA should sincerely attack the most pervasive form of discrimination traditionally endured by both women and disabled individuals: paternalistic workplace policies disguised as protection that severely limit the ability of disabled persons to realize independence and equality. Given the divergent approach taken with respect to paternalistic policies targeting or affecting women, it must be considered whether denying the same autonomy to the disabled is justifiable in civil rights terms. With respect to sex discrimination, the empowerment of occupational choice is viewed as a key to achieving independence. Yet, a unanimous Supreme Court has denied precisely this choice to applicants or employees protected under the ADA. If Congress is serious about emancipating disabled individuals from an exclusionary workplace, then major revisions are necessary.

The revisions offered herein represent admittedly opposite and mutually exclusive extremes on the spectrum of potential ADA reforms. Ultimately, any legislative revision of the ADA must forcefully demonstrate that freedom from discrimination in this context is, indeed, a civil right not unlike those afforded to members of other protected classes. Given the judicial resistance to accommodationist laws and the conflict created when "traditional" civil rights doctrine and explicit accommodation mandates are forced to coexist, something may have to give. The proposals presented in this note provide two distinct alternatives to remedy the presently crippled version of the ADA.

In the meantime, in light of the now diluted version of the ADA, the Supreme Court in *Echazabal* appears to have reached the correct result. The discord created by the melding of notions of inherent inferiority, and/or mandated accommodations, with the rhetoric of previous civil rights enactments has significantly paralyzed the ADA in a way that particularly lends itself to a paternalistic interpretation that is precluded in the Title VII context. Nevertheless, it is hoped that the day will come when disabled Americans may realize the emancipatory potential of a sincere and effective civil rights enactment that would transcend the historical emphasis on paternalism and protection and pave the way for a reconstituted perception of biological variance in the workplace. To move toward that day, two approaches are offered: Either strengthen, clarify, and mandate the duty of accommodation

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L.J. 193, 229 (1993).

consistent with granting full and equal civil rights to the disabled, or limit those who will be protected to those who can be within the framework of traditional antidiscrimination principles. Only time will tell which proves more effective. Nonetheless, given the colossal failure of the statute as a litigation tool, the very reasons that led an overwhelming majority of Congress to pass the Americans with Disabilities Act in 1990 require an immediate and thorough reexamination and revision as a top legislative priority.

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