Am I My Brother's Keeper: Disabilities, Paternalism, and Threats to Self

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In the United States, at least forty-three million people have disabilities. "Discrimination denies people with disabilities the opportunity to compete on an equal basis with others and costs the United States, local governments, and the private sector billions of dollars in unnecessary expenses resulting from dependency and non-productivity." Discrimination against individuals with disabilities persists in critical areas of society, such as employment. Individuals with disabilities continually encounter various forms of discrimination, including overprotective rules and policies and exclusionary qualification standards and criteria.

One example of an overprotective rule is the Equal Employment Opportunity Commission's (EEOC) regulation interpreting the Americans with Disabilities Act's (ADA) "direct threat defense." The "direct threat defense" is a defense to a valid claim of disability discrimination. The EEOC's regulation allows an employer to fire or refuse to hire an individual

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4. See 29 C.F.R. § 1630.15(b)(2) (2001). The EEOC's regulation is comprised of two parts: "threats to self" and "threats to others." This article is concerned with only the first part, "threats to self."
with a disability based solely on the basis that the individual's disability poses a threat to an individual's own safety, assuming a reasonable accommodation cannot eliminate or reduce the threat.\(^5\) In 2002, the United States Supreme Court held that this EEOC regulation was a valid exercise of the EEOC's power delegated to it under the ADA.\(^6\) This holding allows employers to treat people with disabilities differently from other minorities even though the courts and society have refused to allow overprotective rules against women.\(^7\) However, this paper will show that the Court has allowed employers to claim they know what is best for individuals with disabilities and to continue to keep individuals with disabilities as a subordinate class. As reflected in the jurisprudence of the courts, society generally allows adults to decide for themselves what risks are too great to take in choosing where to work.\(^8\) However, when it comes to people with disabilities, the Court has held that disabled individuals cannot make decisions about what risks are too great in their employment.\(^9\)

The "threat-to-self" defense under the ADA is a paternalistic infringement on the right of a person with a disability to make the decision to work in a dangerous environment. This restriction infringes on the right of a person with a disability to have full control and autonomy to make decisions about what is in his best interest. The ADA was enacted to bring people with disabilities out of their subordinated class and onto the same level as others in society.\(^10\) However, the Court's decision in \textit{Echazabal} seems to counteract this initial purpose by continuing to subordinate people with disabilities.\(^11\) Because people with disabilities are viewed as existing in a subordinate state, they are denied the right to sell their labor skills in the market in the same manner as other

\begin{itemize}
\item \textit{5.} 29 C.F.R. § 1630.15(b)(2).
\item \textit{7.} See \textit{UAW v. Johnson Controls,} 499 U.S. 187 (1991) (holding that excluding women with childbearing capacity from lead-exposed jobs created a facial classification based on gender and explicitly discriminated against women on the basis of their sex under section 703(a) of Title VII).
\item \textit{8.} See id.
\item \textit{9.} See \textit{Echazabal,} 536 U.S. at 74.
\item \textit{11.} See \textit{Echazabal,} 536 U.S. at 87.
\end{itemize}
autonomous adults. Denying this right to people with disabilites denies them the right to "alienate" their labor skills as they choose, while nondisabled people are allowed to alienate their labor skills far more freely. Through these paternalistic rules under the ADA, people with disabilities are robbed of their right to be truly free.

Nondisabled adults in society are allowed to work in inherently dangerous jobs. Police officers, fire fighters, window washers, and scientists working with contagious diseases or hazardous materials are just a few of the dangerous occupations that nondisabled adults are allowed to choose for themselves without intervention from society. Society even allows adults to decide to discontinue their lives under certain circumstances. Echazabal, however, holds that adults with disabilities are not allowed to decide for themselves what employment situations are too dangerous for them to undertake. As a result of this paternalism, society continues to subordinate people with disabilities.

Although other articles have been written about Echazabal and the direct threat defense, this article approaches

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13. Id.; see also infra notes 265, 267-68 (discussing Radin's concept of market inalienability).
14. "Do Not Resuscitate" orders are common for individuals to agree to prior to finding themselves in a life threatening situation. Under these orders, if a person finds himself needing life support to remain alive, he can decide that no extraordinary life saving measures can be used on him.
16. See Ann Hubbard, Understanding and Implementing the ADA's Direct Threat Defense, 95 NW. U. L. REV. 1279 (2001) (arguing that personal risk decisions not affecting business operations are best left to the individuals who are the targets of discrimination); Cynthia Nance et al., Discrimination in Employment on the Basis of Genetics: Proceedings of the 2002 Annual Meeting, Association of American Law Schools Section on Employment Discrimination Law, 6 EMPLOYEE RTS. & EMP. POL'Y J. 57, 77 (2002) (arguing that "even applying the EEOC's interpretation of the direct threat defense, the employer failed to prove a direct threat because the plaintiff had worked for twenty years for a contractor with the same exposure and did not have any health problems"); Mark A. Rothstein et al., Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act, 80 WASH. U. L.Q. 243, 275 (2002) (arguing that the "direct threat defense should apply only when the risk is immediate and severe"); Nathan J. Barber, Note, "Upside Down and Backwards: The ADA's Direct Threat Defense and the Meaning of a Qualified Individual After Echazabal v. Chevron, 23 BERKELEY J. EMP. & LAB. L. 149 (2002); Deborah Leigh Bender, Note, Echazabal v. Chevron: A Direct Threat to Employers in the Ninth Circuit, 76 WASH. L. REV. 859 (2001); Jonathan C. Drim-
this topic from a completely different perspective, namely that the EEOC's threat-to-self regulation is inconsistent with the antipaternalist purpose of the ADA and liberal theory on paternalism.

Part I of this paper discusses the history of disability legislation. This section tracks disability legislation from the Architectural Barriers Act of 1968 to the Rehabilitation Act of 1973 and traces the different philosophies that caused a change in legislative approaches. Part I also reviews the ADA from its humble beginnings to its current incarnation, looking at the legislative history of the ADA and how Congress's concern with paternalism affected the Act. Part II examines the origins of the ADA's "direct threat defense," starting with the Rehabilitation Act of 1973 then looking at its application in *Strathie v. Department of Transportation* and *School Board of Nassau County Florida v. Arline*. Part II continues with a review of the EEOC's regulations interpreting the ADA, in particular the threat-to-self defense. Part III examines the threat to self as a subset of direct discrimination, Comment, Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities, 40 UCLA L. REV. 1341 (1993); Douglas C. Heuvel, Case Note, Employment Discrimination - Americans with Disabilities Act - Ninth Circuit Holds that the Direct Threat Defense Is Not Available when an Employee Poses a Direct Threat to His Own Health or Safety - Echazabal v. Chevron USA, Inc., 226 F.3d 1063 (9th Cir. 2000); 54 SMU L. REV. 447 (2001); Adam B. Kaplan, Comment, Father Doesn't Always Know Best: Rejecting Paternalistic Expansion of the Direct Threat Defense to Claims Under the Americans with Disabilities Act, 106 DICK. L. REV. 389 (2001); Katelyn S. Oldham, Comment, The Implications of Echazabal v. Chevron, Inc. for Employees and for the Administration of Workers' Compensation and the Occupational Safety and Health Act, 80 OR. L. REV.327 (2001); Scott E. Schaffer, Note, Echazabal v. Chevron USA, Inc.: Conquering the Final Frontier of Paternalistic Employment Practices, 33 CONN. L. REV. 1441 (2001); Sheehan Sullivan, Comment, Employers Beware: The Ninth Circuit's Rejection of the Direct Threat to Self Disability Discrimination Defense in Echazabal v. Chevron, 25 SEATTLE U. L. REV. 517 (2001); David Yee, Current Event, Chevron U.S.A., Inc. v. Echazabal, 122 S. Ct. 2045 (2002), 11 AM. U. J. GENDER, SOC. POL'Y & LAW 213 (2002). Except for the Yee note, all of these articles are about "direct threat defense" generally, or about the Ninth Circuit decision, not the Supreme Court decision.

17. See discussion infra Part I.
18. See discussion infra Part I.A.
19. See discussion infra Part I.B.
23. See discussion infra Part II.
threat defenses.\textsuperscript{24} This section first discusses the split in the circuits over whether to follow the guidance of the EEOC for the threat-to-self defense,\textsuperscript{25} and then discusses the Court's analysis of the threat-to-self defense.\textsuperscript{26} Part IV analyzes the judicial history of paternalistic laws, rules, and regulations in disability discrimination and shows how the Court's decision in \textit{Echazabal} amounts to a paternalistic infringement on the right of people with disabilities to make their own decisions to work in environments that pose risks to them due to their disabilities.\textsuperscript{27}

\section*{I. History of Disability Legislation}

To understand the current state of disability legislation, a review of prior disability legislation is in order. Compared with persons without disabilities, people with disabilities are much poorer, have far less education, have less social and community life, participate much less often in social activities than other Americans regularly enjoy, and express less satisfaction with life.\textsuperscript{28} Historically, the physical and mental limitations imposed by disabilities have been viewed as an inevitable consequence of the inferior economic and social status of disabled people.\textsuperscript{29} Over the years, however, policy makers, citizens with disabilities, the courts, and Congress have challenged this assumption.\textsuperscript{30} “Gradually, public policy affecting persons with disabilities [has] recognized that many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply

\begin{itemize}
\item 24. See discussion infra Part III.A.
\item 25. See discussion infra Part III.B.
\item 26. See discussion infra Part III.C.
\item 27. See discussion infra Part IV.
\item 30. Id. at 448.
\end{itemize}
embedded prejudices toward people with disabilities. These discriminatory policies and practices affect people with disabilities in every aspect of their lives, from securing employment and participating fully in community life, to securing custody of their children and enjoying all of the rights that Americans take for granted.

A. History

During the 1960s, inspiration from other movements led people with disabilities to launch their own civil rights movement. Because of a visible uprising in other minority communities, people with disabilities sought greater societal involvement. The federal government led the charge to protect the rights of the oppressed minority groups.

1. The Architectural Barriers Act

A movement began taking shape during the 1960s to increase architectural accessibility to federal buildings. This movement was based largely on the frustration that, even after being rehabilitated, people with disabilities were excluded from entering the workplace because most buildings were

31. Id.
32. Id.
36. A few examples are the Civil Rights Act of 1964. Pub. L. No. 88-352, July 2, 1964, 78 Stat. 241 (guaranteeing access to employment, education, and public accommodations); the Voting Rights Act of 1965, Pub. L. No. 89-110, Aug. 6, 1965, 79 Stat. 437 (guaranteeing access to political participation); and the Civil Rights Act of 1968, Pub. L. No. 90-284, Apr. 11, 1968, 82 Stat. 81 (guaranteeing access to housing) which were all passed specifically to end discrimination against African-Americans and at the same time establish the powers and limits of government intervention in civil rights issues. See also RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS 6, 25 (2001). Because of civil rights legislation that sought to protect other minority groups, people with disabilities desired to obtain equal rights. See generally Edward V. Roberts, Into the Mainstream: The Civil Rights of People with Disabilities, 10-11 C. R. Dig. 23, 23 (1979) (discussing the implications of the civil rights movement for people with disabilities).
37. SCOTCH, supra note 36, at 29-31.
physically inaccessible to them. In response, Congress enacted the Architectural Barriers Act of 1968. The Act required all new facilities built with federal funds to be accessible to people with disabilities.

Although Congress acknowledged that public buildings should be accessible to people with disabilities, the Act only applied to the construction of new facilities that were to be owned or leased by the federal government. In passing the Act without a provision requiring remodeling of existing buildings, Congress implied that the cost of remodeling existing public buildings outweighed the right of people with disabilities to enter those buildings. Furthermore, the Act contained no enforcement provisions and suffered from inconsistent compliance by federal agencies. Although the Act did not protect the rights of disabled people as extensively as some would have preferred, it did acknowledge the rights of people with disabilities by recognizing that the failure to consider people with disabilities when planning initial construction could result in discrimination.

2. The Rehabilitation Act of 1972

Congress’s next major effort to ensure the civil rights of people with disabilities occurred in 1972 with the restoration of the Vocational Rehabilitation Act. In the spirit of prior amendments to the Vocational Rehabilitation Act of 1920, the Rehabilitation Act of 1972 was designed to expand and improve existing vocational rehabilitation programs. The amendments demonstrated Congress’s intent to provide equal

41. Id.
42. See 42 U.S.C. § 4151(1), (3).
46. Id. §§ 1-2.
rights to people with disabilities.\textsuperscript{47} Congress intended to enable people with disabilities to become employable and productive members of society.\textsuperscript{48} This move to integrate people with disabilities into society shows that people with disabilities can contribute to society and obtain community acceptance and societal recognition, so that people with disabilities enjoy the same rights as any other member of society.\textsuperscript{49}

The philosophy of the vocational rehabilitation programs was that rehabilitation increases the ability of a person with a disability to contribute to society.\textsuperscript{50} However, according to this philosophy, a person with a disability must be "cured" prior to being employable and becoming a productive member of society. This approach to rehabilitation creates problems because it views a disability as a problem that can and must be cured before a person can become a productive member of society.\textsuperscript{51} However, people with disabilities can be productive members of society while still being disabled.

The first major challenge to the notion that being disabled meant lifelong economic dependency was the enactment of the first Rehabilitation Act, the Fess-Kenyon Act of 1920,\textsuperscript{52} prompted by both the return of a vast number of disabled World War I veterans and an ever-increasing incidence of industrial accidents.\textsuperscript{53} "By the mid-1960s, the integration of disabled people into the mainstream of American life was the explicit goal of rehabilitation policy."\textsuperscript{54}

3. \textit{Section 504 of the Rehabilitation Act of 1973}

A major shift in public policy relating to disability culmi-
nated in the passage of a broad anti-discrimination provision, section 504 of the Rehabilitation Act of 1973.\textsuperscript{55} Section 504 states that "[n]o 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."\textsuperscript{56} Congress wrote this section with the intention of remedying past discrimination by prohibiting discrimination against people with disabilities in any program or activity receiving federal financial assistance.\textsuperscript{57} Section 504 recognized that discrimination results from action or inaction, and that discrimination occurs by effect as well as by intent or design.\textsuperscript{58}

With the passage of the final version of the Rehabilitation Act of 1973,\textsuperscript{59} Congress used sweeping language that affected nearly all government contracts, programs, and activities, and established affirmative action hiring practices for federal agencies and contractors.\textsuperscript{60} "From a civil rights perspective a profound and historic shift in disability public policy occurred in the 1970's."\textsuperscript{61} Through landmark litigation and legislation, Americans with disabilities were recognized for the first time as a minority group that was subject to discrimination, and worthy of basic civil rights protections.\textsuperscript{62} Thus, Congress created section 504 of the Rehabilitation Act of 1973 to respond to continued discrimination against people with disabilities in all areas of societal involvement and to advance the basic civil rights protections of people with disabilities. Section 504 acknowledges that, as in the Supreme Court finding fifty years ago in Brown v. Board of Education,
segregation for persons with disabilities "may affect their hearts and minds in a way unlikely ever to be undone."\(^\text{63}\)

4. The Rehabilitation Act Amendments of 1974

The Rehabilitation Act gave the Department of Health, Education and Welfare the responsibility of issuing regulations to interpret and implement section 504 after its enactment in 1973.\(^\text{64}\) Prior to the issuance of the interpretive regulations, however, Congress enacted the Rehabilitation Act Amendments of 1974,\(^\text{65}\) which clarified the new law. One of these amendments redefined "handicapped individual."\(^\text{66}\) In this new definition of "disability,"\(^\text{67}\) Congress considered the fact that attitudinal and physical barriers could keep people with disabilities from fully participating in society.\(^\text{68}\) With these considerations in mind, Congress included section 111(a) in the Rehabilitation Act Amendments of 1974,\(^\text{69}\) which states that a handicapped individual is one "who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such impairment, or (C) is regarded as having such impairment."\(^\text{70}\) This definition places more emphasis on the cul-


\(^{64}\) SCOTCH, supra note 36, at 60-120.


\(^{67}\) See David A. Larson, What Disabilities Are Protected Under the Rehabilitation Act of 1973?, 16 MEM. ST. U. L. REV. 229 (1986); John Parry, Supreme Court Turns Aside Assault on § 504, 11 MENTAL & PHYSICAL DISABILITY L. REP. 74 (1987). Cases interpreting the definition of disability include Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (holding that the definition of "handicap" was broad enough to encompass tuberculosis and remanding the case to determine whether the individual was otherwise qualified for the job); Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985) (determining that the definition of impairment at issue must be evaluated with reference to the individual job seeker); Tudyman v. United Airlines, 608 F. Supp. 739 (C.D. Cal. 1984) (concluding that the inability to obtain a single job does not render one handicapped); E.E. Black Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980) (concluding that an impairment that interfered with an individual's ability to obtain satisfactory employment was not otherwise substantially limiting within the meaning of the statute).

\(^{68}\) Drimmer, supra note 16, at 1386.

\(^{69}\) See S. REP. No. 93-1297 (1974).

tural effects of disability discrimination and less emphasis on curing the disability itself. The definition recognizes that people who have had a disability in the past or are considered to have a current disability can also suffer discrimination.\footnote{71} This change in the definition of a disability began to alter the treatment of people with disabilities and has remained the definition of disability in the latest federal disability legislation.\footnote{72} In spite of Congress’s efforts to ensure the civil rights of people with disabilities, Congress waited more than four years to issue any regulations. As a result, in the late 1970s, many people with disabilities and disability rights groups grew tired of waiting for the Rehabilitation Act of 1973 to protect the civil rights of the disabled, and engaged in sit-ins to force the administration to issue regulations.\footnote{73} Consequently, the Rehabilitation Act was amended again in 1986 to change the term “handicapped individual” to “individual with handicaps.”\footnote{74} This change in term is significant because it suggests that society began to view a person with a disability not as disabled first and a person second, but as a person first and disabled second.

\section{5. The Developmentally Disabled Assistance and Bill of Rights Act}

The Developmentally Disabled Assistance and Bill of Rights Act begins with a statement of purpose describing that the Act is meant to assist the states in ensuring that people with developmental disabilities receive the care, treatment, and other services necessary to enable them to achieve their maximum potential.\footnote{75} One of the congressional findings in the bill of rights provision states that treatment, services, and habilitation programs to assist people with developmental disabilities should be designed to maximize the individual's

\begin{footnotes}
\item[71] See \textit{Arline}, 480 U.S. at 279-80, 284-88.
\item[72] Drimmer, \textit{supra} note 16, at 1387.
\end{footnotes}
potential and developmentally disabled people should be provided for in a setting that is least restrictive of their personal liberties.\textsuperscript{76}

\section*{B. The Americans with Disabilities Act}

As a result of the increased awareness of the rights of people with disabilities, President George H. W. Bush signed into law the Americans with Disabilities Act (ADA), a comprehensive civil rights bill affecting people with disabilities and the nation as a whole.\textsuperscript{77} Because it is modeled after the Civil Rights Act of 1964, the ADA extends many of the requirements contained in the Rehabilitation Act of 1973.\textsuperscript{78} Although the ADA provides important new rights to people with disabilities in employment, transportation, and other public services public accommodations, and telecommunications,\textsuperscript{79} the attempt to elevate this historically under-protected class to the same societal level with all other citizens falls short of the intended goal.\textsuperscript{80}

\subsection*{1. Legislative History of the Americans with Disabilities Act}

The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life.\textsuperscript{81} The ADA was first introduced in 1988 during the 100th Congress.\textsuperscript{82} This first bill was drafted by the National Council on the Handicapped, an independent federal agency charged with assessing the condition of people with disabilities and making legislative recommendations.\textsuperscript{83} The ADA was rein-

\begin{itemize}
\item \textsuperscript{76} Id.
\item \textsuperscript{77} 42 U.S.C. § 12101(b)(1) (2003).
\item \textsuperscript{78} Drimmer, \textit{supra} note 16, at 1397.
\item \textsuperscript{80} Drimmer, \textit{supra} note 16, at 1397.
\item \textsuperscript{81} H.R. REP. NO. 101-485, pt. III at 446.
\item \textsuperscript{82} See \textit{id}.
troduced in a modified form in the 101st Congress. This bill establishes a clear and comprehensive prohibition of discrimination on the basis of disability in employment, public services, public accommodations, and telecommunications.

Title I of the ADA prohibits discrimination in employment against a qualified person with a disability. The underlying premise of this title is to avoid the exclusion of persons with disabilities from job opportunities unless they are actually unable to do the job. The requirement that job criteria actually measure skills required by the job is a critical protection, because stereotypes and misconceptions about the abilities and inabilities of persons with disabilities continue to be pervasive. Thus, the ADA assumes that discrimination occurs against people with disabilities primarily because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity.

Society constantly hears people with disabilities described as "either an object of pity or a source of inspiration." The "poster child" elicits pity from society. Society believes that the poster child is someone who needs help because he is not able to help himself. The "supercrip" provides inspiration to society. Through the supercrip, society learns that a disability is something that can be overcome, and people with disabilities deserve pity instead of respect until the disability is overcome.

Constant depictions and images of disabilities in popular culture, religion, and history have caused people with disabilities to become sensitized to these images. These images become reinternalized by society, cause social stereotypes,
create artificial barriers, and add to the discrimination and subordinate status with which many people with disabilities must deal. Paternalism is perhaps the most pervasive form of discrimination faced by people with disabilities. The legislative history of the ADA clearly shows that one of Congress’s purposes under the ADA was to ensure that employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person’s own health. Thus, the antipaternalistic purpose of the ADA addresses the societal concern with depictions of people with disabilities.

2. Congressional Concern with Paternalism

Congress found that discrimination against people with disabilities often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, and irrational fears. In addition, Congress noted that individuals with disabilities continually encounter various forms of discrimination, including overprotective rules and exclusionary qualification standards, based on characteristics that are beyond their control and result from stereotypic assumptions that are not truly indicative of the individual’s ability to participate in and contribute to society. Often, society’s first reaction is to automatically underestimate the abilities of people with disabilities. Paternalistic assumptions by nondisabled people keep people with disabilities from accomplishing the same things that people without disabilities are able and allowed to accomplish.

Discrimination comes in all forms, including subtle forms such as paternalism, which is based on the insulting assumption that people with disabilities are not able to make their own decisions and lead their own lives as nondisabled people are allowed to do. Because of societal discrimination in the

95. Id. at 30.
97. See id.
98. Id. at 30.
100. Id. § 12101(a)(7).
101. SHAPO, supra note 90, at 19.
102. Id.
103. Id. at 25-26. Shapiro tells a story of Tiffany Callo (“Callo”), a woman with cerebral palsy, who had to fight for custody of her two children. Id. Callo-
form of paternalism, the ADA provides a valid qualification standard that requires a person not to pose a direct threat to the health or safety of other individuals in the workplace, including coworkers or customers, but not the employee himself. The drafters of the ADA decided specifically to state clearly in the statute that, as a defense to a claim of discrimination, an employer could prove that an applicant or employee posed "a significant risk to the health or safety of others which could not be eliminated by reasonable accommodation." This is a restatement of the standard set forth by the Supreme Court in *School Board of Nassau County v. Arline*. In *Arline*, the Supreme Court acknowledged a similar standard, using the phrase "significant health and safety risk." Fearing that Gene Arline, a school teacher, might infect others at work, the school board dismissed her after she suffered two relapses of tuberculosis. The issue before the Court was whether contagious diseases are included in the Rehabilitation Act's definition of "handicap." In concluding that they are, the Court reasoned that Congress had extended the Act's protection both to those who are actually disabled and to "those who are regarded as impaired and who, as a result, are substantially limited in a major life activity." In doing so, "Congress acknowledged that

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105. Id.
107. Id. at 287.
108. Id. at 281.
109. Section 706(8)(B) of the Rehabilitation Act defines "handicapped individual" to mean any person who "(i) has a physical ... impairment which substantially limits one or more of [his] major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8) (1995).
society's accumulated myths and fears about disabled and disease are as handicapping as are the physical limitations that flow from actual impairment.” Indeed, “[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.”

Thus, the Court recognized that unfounded or irrational fears can be disabling, and that the ADA must be interpreted to prohibit actions based on such debilitating assumptions. The Court also recognized that employers could have “legitimate reasons” for not extending job offers to persons whose disabilities might present a danger to others. A well-founded conclusion that Arline posed a substantial risk of contagion would justify her dismissal. The Court reasoned:

[A] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place teacher with active, contagious tuberculosis in a classroom with elementary schoolchildren.

Nonetheless, “[t]he fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases.” The Court offered specific guidance on how to determine whether Arline’s tuberculosis posed a significant risk to others. “[I]n most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact.” An individualized inquiry was required to achieve Congress’s goal of “protecting handicapped individuals from deprivations based on prejudice,

111. Id. (internal citations omitted).
112. Id. (citations omitted).
113. Id. at 284-85.
114. Id. at 285 n.14.
115. Id.
116. Arline, 480 U.S. at 287 n.16.
117. Id. at 285.
118. Id. at 287.
119. Id.
stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."\(^{120}\)

However, the ADA specifically refers to health and safety threats to others.\(^{121}\) As stated earlier, the legislative history clearly notes that one of Congress’s purposes under the ADA is to ensure that employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person’s own health.\(^{122}\) For example, as sponsor Senator Kennedy explained, under the ADA an employer could not use an excuse for not hiring a person with HIV that the employer was simply “protecting the individual” from opportunistic diseases to which the individual might be exposed.\(^{123}\) The individual should deal with this concern in consultation with his or her private physician.\(^{124}\)

Another central purpose in passing the ADA was Congress’s view that it was critical that paternalistic concerns for the safety of a person with a disability must not be used to disqualify an otherwise qualified applicant.\(^{125}\) The drafters argued that based on the standards in the ADA, a denial of employment to a person with a disability based on generalized fears about safety would violate the ADA.\(^{126}\) By definition, such fears are based on averages and group-based predictions, and the ADA mandates individualized assessments.\(^{127}\)

Fear is also one of the strongest emotions people with disabilities elicit from nondisabled people.\(^{128}\) Fear lies beneath the “compassion for the poster child and celebration of the supercrip.”\(^{129}\) One example is anthropologist Robert Murphy, who studied his own condition as a person with a disability after suffering a spinal cord injury which left him a para-
He stated that people with disabilities:

[C]ontravene all the values of youth, virility, activity and physical beauty that Americans cherish. We are subverters of the American Ideal, just as the poor are betrayers of the American Dream. The disabled serve as constant, visible reminders to the able-bodied that the society they live in a counterfeit paradise, that they too are vulnerable. We represent a fearsome possibility. So society shields itself from this fearsome possibility by distancing disabled people and subordinating them or in other words treating them as social inferiors.

Therefore, the congressional concern with paternalism in enacting the direct threat defense in the ADA was based on eradicating irrational societal fears about people with disabilities.

II. THE ORIGINS OF THE ADA'S HARM TO SELF PROVISION

As noted previously, Title I of the ADA bars discrimination against a “qualified individual with a disability” in regard to hiring, firing, promotion, or any other “terms, conditions and privileges of employment.” Prior to the passage of the ADA, the direct threat defense appeared in section 504 of the Rehabilitation Act, and was tailored after the provision in Title VI of the Civil Rights Act of 1964, which prohibits discrimination in any federal program or activity on the basis of race, color, or national origin. Section 504 came on the heels of unsuccessful efforts to amend Title VI in order to prohibit the exclusion of a person from federal programs or activity “on the ground of... physical or mental handicap” and to amend Title VII of the Civil Rights Act of 1964 in order to make unlawful employment discrimination “because of

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130. Id.
131. Id.
132. 42 U.S.C. § 12112(a) (2000). The Act’s employment provisions apply to employers with fifteen or more employees, employment agencies, labor organizations, and joint labor-management committees. Id. § 12111(2), (5)(A).
135. Id. at 417-19.
physical or mental handicap.\footnote{136} After its first appearance as an amendment to section 504, the direct threat defense took its final form in \textit{Arlene}.\footnote{137} Because the ADA drafters relied on both of these earlier sources in drafting the ADA direct threat defense, proper statutory interpretation of the direct threat defense requires an understanding of these prior sources.\footnote{138}

In 1973, the Rehabilitation Act did not include any language amounting to a direct threat defense.\footnote{139} A disabled person's ability to perform the job was only part of the inquiry into whether the person was an "otherwise qualified" individual.\footnote{140} The regulations initially implementing the Rehabilitation Act provided that a person who posed a significant risk to the health and safety of others was not otherwise qualified for the job.\footnote{141} With the amendments to the Rehabilitation Act in 1978, the direct threat defense was codified, but only for people who were substance abusers.\footnote{142} Congress rejected a proposal to exclude all recovering substance abusers from the

\footnote{136} \textit{Id.} \footnote{137} 480 U.S. 273 (1987). \footnote{138} See 42 U.S.C. § 12201(a) (1990) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulation issued Federal agencies pursuant to such title."); see also \textit{Braden} v. \textit{Abbott}, 524 U.S. 624, 631 (1998) (noting that interpretation of ADA terms is "informed by interpretations of parallel definitions in previous statutes and the views of various administrative agencies which have faced this interpretive question."). The ADA's legislative history makes references to the Rehabilitation Act and \textit{Arlene} on many occasions. See H.R. REP. NO. 101-485, pt. III, at 454-57 (1990), H.R. REP. NO. 101-485, pt. 2, at 76 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 3549, H.R. CONF. REP. NO. 101-585. \footnote{139} \textit{Cf.} Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979) (holding that a nursing program applicant was not otherwise qualified because her hearing impairment prevented safe performance of the training program and the full range of nursing responsibilities required by the state nursing board). \footnote{140} Nondiscrimination on Basis of Handicap, 45 C.F.R. §§ 84.1-84.60 (1999). \footnote{141} Rehabilitation Comprehensive Services and Development Disabilities Amendments of 1978, Pub. L. No. 95-602, § 122(a)(6)(c), 92 Stat. 2955, 2984-85 (1978) (codified at 29 U.S.C. § 706(8)(B) (1994)). \footnote{142} See 124 CONG. REC. 30,322 (1978): [T]he term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use or include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others. 29 U.S.C. §§ 705(20)(C)(i), (v) (2000).
definition of handicapped individual.\textsuperscript{143} Congress instead adopted language which excluded only those persons who were alcoholics and recovering drug abusers and "whose current use of alcohol or drugs prevents such individual(s) from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others."\textsuperscript{144} Courts then adopted this approach with respect to impairments other than substance abuse.\textsuperscript{145}

Four agencies were responsible for interpreting the Rehabilitation Act:\textsuperscript{146} the EEOC, Department of Labor, Department of Justice, and Department of Health and Human Services.\textsuperscript{147} While the EEOC adopted regulations which recognized a threat-to-self defense along with a threat-to-others defense,\textsuperscript{148} the other three agencies, adopting regulations under the Rehabilitation Act, did not recognize a threat to self.\textsuperscript{149} Therefore, most of the agencies that interpreted the direct threat provision did not recognize a threat-to-self component of the provision.

One major case addressing the direct threat defense under the Rehabilitation Act is \textit{Strathie v. Department of Transportation}.\textsuperscript{150} Cited often in House and Senate Reports accompanying the ADA,\textsuperscript{151} \textit{Strathie} provides an outline for evaluating the direct threat defense. This case involved a challenge to a Pennsylvania Department of Transportation

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\textsuperscript{143} 29 U.S.C. § 706(7)(B) (repealed 1998); see also 29 U.S.C. § 706(8)(D) (repealed 1998) (excluding individuals who, because of a currently contagious disease or infection, "would constitute a direct threat to the health or safety of other individuals").


\textsuperscript{145} See, e.g., \textit{Strathie v. Dept. of Transp.}, 716 F.2d 227 (3d Cir. 1983); \textit{Doe v. N.Y. Univ.}, 666 F.2d 761, 775 (2d Cir. 1981).

\textsuperscript{146} Chevron U.S.A. v. Echazabal, 536 U.S. 73, 82 (2002).

\textsuperscript{147} Id.

\textsuperscript{148} 29 C.F.R. § 1630.15(b)(2) (2002).

\textsuperscript{149} See 29 C.F.R. § 32.3 (1990) (Department of Labor); 28 C.F.R. § 42.540 (1990) (Department of Justice); 45 C.F.R. § 84.3(k)(1) (1990) (Department of Health and Human Services). The EEOC determined that a threat to self is consistent with the legislative history of the ADA and the case law interpreting section 504 of the Rehabilitation Act. It is not clear why the EEOC added threat to self under section 504, and the EEOC gives no reason for this action. The EEOC does give a reason why it took the same action under the ADA—its action was consistent with the legislative history of the ADA and the case law interpreting section 504 of the Rehabilitation Act.

\textsuperscript{150} 716 F.2d at 227.

regulation requiring that school bus drivers be able to hear at certain decibel levels without the use of a hearing aid.\textsuperscript{152} James Strathie proved that he could satisfy the regulation's hearing requirement, but only if he wore his hearing aid.\textsuperscript{153} In all other respects, he was qualified to drive a school bus.\textsuperscript{154} He challenged the suspension of his license, alleging, among other things, that the regulation violated section 504 of the Rehabilitation Act by not making accommodations to allow the use of hearing aids.\textsuperscript{155} The district court entered summary judgment for the defendants, and Strathie appealed.\textsuperscript{156}

Vacating the district court's summary judgment, the Third Circuit reasoned that Strathie was "otherwise qualified" only if his requested modifications or accommodations would not require "modification of the essential nature of the program" or "place undue burdens, such as extensive costs, on the recipient of federal funds."\textsuperscript{157} The court rejected as overbroad the Department's insistence that the essential purpose of the licensing program was "to insure the highest level of safety" by "eliminate[ing] as many potential safety risks as it can."\textsuperscript{158} The court noted that, the Department had granted licenses to drivers with other impairments in cases where the

\textsuperscript{152} \textit{Strathie}, 716 F.2d at 228.
\textsuperscript{153} Id. at 228-29.
\textsuperscript{154} Id. at 229.
\textsuperscript{155} Id. at 229-30 (citing \textit{Southeast Cmty. Coll. v. Davis}, 442 U.S. 397, 412-13 (1979)). The Court derived this analytical framework from \textit{Davis}. Davis involved a nursing school's determination that a prospective student with a serious hearing impairment was not otherwise qualified to participate in its training program. \textit{Davis}, 442 U.S. at 400-01. The Court held that an otherwise qualified handicapped individual is one who can meet all the program's requirements in spite of her handicap. Id. at 406. Because the Court credited the district court's findings that Davis's hearing impairment "actually prevent[ed] her from safely performing in both her training program and her proposed profession," \textit{id.} at 403, its opinion provided little insight into the nature or severity of the anticipated risks. Instead, the opinion focuses on Davis's contention that the nursing program should have modified its program to permit her to participate. \textit{Id.} at 407-14. The Court concluded that the modifications she requested were not mandated by the Rehabilitation Act because they would fundamentally alter the nature of the program, thereby exceeding the reasonable modification that the Act might require. \textit{Id.} at 409-13.
\textsuperscript{156} \textit{Strathie}, 716 F.2d at 230 (citing \textit{Davis}, 442 U.S. at 413); see also 29 C.F.R. § 1613.705 (1983) (providing that selection criteria, which screen out handicapped individuals, must pertain to essential functions of the program in question).
\textsuperscript{158} Id. at 232.
impairment was "likely to interfere with the ability to drive a school bus with safety." In addition, the Department had granted licenses to drivers who must wear eyeglasses to meet the vision standards, despite the risk that a driver might take off or lose his eyeglasses, thereby creating a danger to the passengers. To the court, this "indicate[d] that the Department views some safety risks as too remote to justify the denial of a school bus driver's license." Accordingly, the court identified the essential purpose of the program as "prevent[ing] any and all appreciable risks that a school bus driver will be unable to provide for the control over and safety of his passengers."

The court then considered the possibility of any modifications which would eliminate any appreciable risks without imposing an undue burden on the Department. The issue before the court was whether "accommodating a wearer of a stereo hearing aid would present an appreciable risk to the safety and control of school bus passengers." The court remanded the case for the district court to determine the answer to this issue in light of the facts of this case. Thus, Strathie stands for the proposition that the exclusion of all people with disabilities—as opposed to excluding only those for whom a reasonable accommodation would not eliminate an appreciable risk—violates the Rehabilitation Act.

III. THE ADA'S HARM TO SELF PROVISION

The ADA is codified under three main titles. Title I prohibits discrimination in employment; Title II prohibits discrimination in public accommodations; Title III prohibits discrimination in programs and activities receiving federal financial assistance.

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159. Id. (citing 67 Pa. Code § 71.3(b) (2001)). These impairments included (1) color blindness, (2) respiratory disfunctions [sic], (3) rheumatic, arthritic, orthopedic, muscular or neuromuscular disease, and (4) mental, nervous, organic or functional diseases," as well as loss or impairment of a foot, leg, arm, hand, or fingers. Id. (citing § 71.3(b)(2)).
160. Id.
161. Id.
162. Id.
163. Strathie, 716 F.2d at 232.
164. Id. at 234.
165. Id.
166. See id.
168. 42 U.S.C. §§ 12111-17 (2000). Title I of the ADA applies to all employers with fifteen or more employees, other than the federal government and private
discrimination in state and local government programs, and Title III prohibits discrimination by private entities in providing public accommodations. The Act delegates to the EEOC regulatory and enforcement authority over Title I of the ADA. Pursuant to congressional direction, the EEOC has promulgated formal regulations defining such terms as “direct threat” and “qualified individual.” These interpretive regulations have caused substantial controversy and commentary, most notably on the EEOC’s expansive interpretation of the direct threat defense to include a harm-to-self provision.

The ADA defines the term “direct threat” to mean “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” However, the EEOC defines the term “direct threat” to mean “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.” In addition to these regulations, the EEOC published a technical assistance manual “to help employers . . . and persons with disabilities learn about their obligations and rights under the employment provisions of the Americans with Disabilities Act.” As with the interpretive

membership clubs. Id. § 12115. In addition to employers, Title I also applies to employment agencies, labor organizations, and labor-management committees. Id. § 12111(2).

169. Id. §§ 12131-50.
170. Id. §§ 12181-89.
171. Id. § 12116 (“Not later than one year after [the date of enactment of this act] . . . the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5 . . . ”).
172. 29 C.F.R. § 1630.2 (2002).
173. See, e.g., Koshinski v. Decatur Foundry Inc., 177 F.3d 599, 599 (7th Cir. 1999) (declining to decide the “tough question” of whether “an employer [may] use the ADA as a sword to keep off the job an employee who is qualified to do that job now, but will, at some future point, become unable to do so due to a degenerative disease, which will be exacerbated by the employee’s continued employment”); see also Amanda Wong, Comment, 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 (2000) (discussing the controversy at length).
175. 29 C.F.R. § 1630.2(r) (2001) (emphasis added).
176. 42 U.S.C. § 12206(c)(1) (1993) (explaining that “[e]ach federal agency that has [the] responsibility . . . for implementing [the ADA] may render technical assistance to individuals and institutions that have rights or duties under the respective subchapter”). In addition, the EEOC technical assistance manual
regulations, the technical assistance manual is routinely cited by courts as guidance on congressional intent in enacting the ADA.\textsuperscript{177}

\textbf{A. The Direct Threat Provision}

The ADA and EEOC regulation both set out provisions addressing the "direct threat" defense.\textsuperscript{178} However, as mentioned previously, those provisions seem to contradict each other because the regulations expand upon the statutory definition. The ADA itself does not define direct threat\textsuperscript{179} as including threats to self, whereas the EEOC’s regulations do.\textsuperscript{180} The term of art in use is "direct threat," which, as noted previously, can encompass two very different approaches with different levels of restrictiveness on the job options for people with disabilities. This paper will use more precise terms by dividing the direct threat defense into two concepts: threats to others and threats to self.

\textbf{B. Circuit Split over the Threat-to-self Provision}

Only a few courts have addressed the narrow issue of whether the direct threat provision extends to threats to the person with a disability when threats to others do not exist.\textsuperscript{181} Many courts have addressed whether the provision applies to direct threats both to oneself and to others,\textsuperscript{182} but only the

\begin{itemize}
  \item \textsuperscript{178} See 29 C.F.R. § 1630.2(r) (2001).
  \item \textsuperscript{179} See \textit{42 U.S.C.} § 12111(3).
  \item \textsuperscript{181} \textit{LaChance v. Duffy’s Draft House, Inc.}, 146 F.3d 832 (11th Cir. 1998) (explained \textit{infra} note 196); \textit{see also} \textit{Rizzo v. Children’s World Learning Centers,}}
Ninth and Eleventh Circuits and the District Court for the Northern District of Illinois have specifically addressed the issue of whether threats solely to the person with a disability are encompassed within the direct threat defense.\footnote{183}

1. Case Law Accepting Threats to Self as a Defense

The case that follows used the EEOC’s regulation of threats to self in its analyses. In Moses v. American Nonwovens, Inc.,\footnote{184} Moses, an epileptic employee, brought suit against American Nonwovens alleging that the company fired him in violation of the ADA.\footnote{185} Moses worked as a product inspector, web operator and hot splicer assistant.\footnote{186} "As a product inspector, Moses sat on a platform above fast-moving press rollers."\footnote{187} "As a web operator, he sat underneath a conveyer belt with in-running pinch-points."\footnote{188} "As a hot splicer assistant, he worked next to exposed machinery that reached temperatures of 350 degrees Fahrenheit."\footnote{189} The opinion of the Eleventh Circuit Court of Appeals relied on the EEOC’s regulations, which state that an employer may fire an employee if the disability causes the employee to be a threat to his own health or safety.\footnote{190} The court found that Moses’ seizures caused him to be a threat to himself, because his assigned

\footnote{184} Moses, 97 F.3d 446 (11th Cir. 1996).
\footnote{185} Id. at 447.
\footnote{186} Id. at 447-48.
\footnote{187} Id. at 447.
\footnote{188} Id. at 447-48.
\footnote{189} Id. at 448.
\footnote{190} Moses, 97 F.3d at 447 (citing 42 U.S.C. § 12113(a)-(b) (1994); 29 C.F.R. § 1630.2(r) (2001)).
tasks involved working around dangerous equipment.\textsuperscript{191} Because Moses presented no evidence that he did not pose a threat to himself or that any reasonable accommodation could be made to eliminate the threat, the court affirmed the district court’s grant of summary judgment in favor of the employer.\textsuperscript{192}

Moses argued unpersuasively that American Nonwovens failed to investigate his condition and failed to consider possible accommodations.\textsuperscript{193} When American Nonwovens fired Moses, it knew he was taking medication for his epilepsy; however, his medication was not controlling his seizures.\textsuperscript{194} The court found difficulty with American Nonwovens’ failure to investigate possible accommodations, but ultimately the court was not persuaded that American Nonwovens’ failure to investigate relieved Moses of his burden of producing probative evidence that reasonable accommodations were available.\textsuperscript{195} In comparison, other cases that arguably allow threats to self as a defense are not really threats to self cases but actually involve threats to others.\textsuperscript{196}

\textsuperscript{191} \textit{Id.} at 447-48.
\textsuperscript{192} \textit{Id.} at 448.
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.} The court argued that this is not a case in which the employee, although diagnosed as epileptic, had never suffered a seizure, and the employer had no basis for concluding that he was likely to suffer one. \textit{Id.}
\textsuperscript{195} \textit{Id.} The court reasoned that a contrary holding would mean that an employer would be liable for not investigating even though an investigation would have been fruitless. \textit{Id.}
\textsuperscript{196} \textit{See, e.g.,} LaChance v. Duffy’s Draft House, Inc., 146 F.3d 832 (11th Cir. 1998). A line cook at the defendant’s restaurant, LaChance had a history of seizures. \textit{Id.} at 833-34. Duffy’s fired LaChance following two seizures during work hours. \textit{Id.} LaChance’s supervisor provided testimony that line cooks were required to cook on a flat top gas grill, use a “fryolater” filled with hot grease, and use slicing machines. \textit{Id.} at 834. Duffy’s also provided testimony that a person with the type of seizures LaChance experienced should be restricted from working with such machines and that LaChance posed a threat of harm to himself and others while working around those appliances. \textit{Id.} As in American Nonwovens, the court found that LaChance failed to produce adequate evidence that he was not a threat to others or that Duffy’s could have provided a reasonable accommodation to eliminate the threat. \textit{Id.} at 836. As a result, the court upheld the district court’s summary judgment on behalf of Duffy’s. \textit{Id.} at 836.

The Fifth Circuit applied a similar standard in \textit{Rizzo v. Children’s World Learning Centers, Inc.}, 213 F.3d 209 (5th Cir. 2000). Children’s World Learning Centers employed Rizzo, who was hearing impaired, as a teacher’s aide. \textit{Id.} at 211. As one of her duties, Rizzo transported children to and from school in a van. \textit{Id.} Rizzo was relieved of her driving duties because Children’s World Learning Centers had concerns about Rizzo’s ability to safely operate the van
2. Case Law Rejecting Threats to Self as a Defense

In *Kohnke v. Delta Airlines, Inc.*, Kohnke, a customer service agent, suffered injuries to his neck, elbow, back, and leg and took a medical leave of absence. He alleged employment discrimination in violation of the ADA when Delta invoked Kohnke's disability as grounds for refusing to place Kohnke back into his customer service agent position when he returned to work. Kohnke sought reconsideration of the magistrate judge's ruling that the direct threat jury instruction should refer to a threat to the employee or to others, rather than to others only. The district court granted the motion for reconsideration and concluded that any direct threat jury instruction should refer to a threat to others only and not to the employee himself.

After considering the statutory language, legislative history, and interpretive case law, the district court held that a direct threat must refer to a direct threat to others, not merely to the person himself. The court first determined that the ADA was clear in referring to "a direct threat to the health or safety of other individuals in the workplace," and not to the individual himself. Second, the court observed that the House Judiciary Report on the ADA mentions a threat "to other individuals" or "to others" many times, without ever mentioning a threat to the disabled person himself.

Another case that clearly presents only a threat-to-self

and supervise the children in the van at the same time. *Id.* The court's determination in favor of Rizzo turned on evidence that she could operate the van safely without causing a threat of harm to the passengers. *Id.* The court did not evaluate whether Rizzo caused a threat of harm to herself. *Id.* However, the court applied the EEOC's standard, which included an analysis of potential threats both to the children and to Rizzo herself. *Id.* Although the court in Rizzo looked at the threat Rizzo posed to others, it did so by applying the EEOC regulation. *Id.* Therefore, this case does not squarely fit under case law accepting the threat-to-self defense. *See id.*

198. *Id.*
199. *Id.* at 1113.
200. *Id.* at 1110.
201. *Id.* at 1113.
202. *Id.* at 1111.
204. *Id.* at 1112 (citation omitted). The court found only non-precedential case law dealing with the difference between the language of the ADA and the EEOC’s regulation specifically. *Id.* at 1113. The only similar case found was an unpublished opinion that was deemed to have little precedential value. *Id.*
issue is *Echazabal v. Chevron U.S.A., Inc.* In *Echazabal*, the Court of Appeals for the Ninth Circuit considered whether the ADA’s “direct threat” provision applies to an employee or applicant for employment who poses a threat of harm to himself, where a threat to others does not exist. In 1992, Echazabal applied for a job at Chevron, where he had worked for over twenty years as a contract employee. Chevron offered Echazabal a position, contingent upon his passing a physical. Based on the results of the physical, Chevron determined that Echazabal’s liver was releasing enzymes at an abnormally high level and concluded that exposure to the solvents and chemicals present at the refinery might cause further damage to his liver. As a result, Chevron rescinded its job offer. Echazabal subsequently consulted private physicians, who diagnosed him with asymptomatic, chronic active hepatitis C. Echazabal explained to his physicians the nature of his job and the chemicals he would be working around. His doctors, however, advised Echazabal that the chemicals and solvents would cause no further damage to his liver. Echazabal continued to work at the oil refinery as a contract employee, and re-applied for a permanent position a few years later. Again, Chevron offered him a position contingent upon his passing a physical, but rescinded the employment offer after Echazabal failed the examination. Chevron feared that he would suffer additional damage to his liver if he worked at the refinery with the chemicals and solvents. This time, however, Chevron prohibited Echazabal from continuing to work on the premises with any contractor.

On the basis of these facts, the district court entered

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206. See id. at 1064.
207. Id. at 1065.
208. Id.
209. Id.
210. Id.
211. *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1065 (9th Cir. 2000).
212. Id.
213. Id.
214. Id.
215. Id.
216. Id.
summary judgment in favor of Chevron, reasoning that the
direct threat provision of the ADA encompassed threats to
self. However, the court of appeals reversed the district
court's judgment, and held that the ADA's direct threat de-
finite does not apply to a person with a disability who only
poses a threat of harm to himself. The court of appeals
found that in drafting the ADA's direct threat provision, Con-
gress intended to codify the Supreme Court's interpretation of
the similar provision in the Rehabilitation Act, as inter-
preted in School Board of Nassau County v. Arline. Because
Arline's holding does not refer to harm to the individual
himself, the Echazabal majority reasoned that Congress in-
tended for the direct threat provision in the ADA to encom-
pass threats to others but not to self.

The court of appeals also looked to the plain meaning of
the ADA's direct threat language. In light of both the text
and the legislative history, the court of appeals ruled that the
EEOC's interpretive regulations defining "direct threat" as
encompassing threats to self contradicted congressional in-
tent when Congress enacted the ADA. The court stated:
"[Chevron's] reading of 'essential functions' would... circum-
vent Congress's decision to exclude a paternalistic risk-to-self
defense in circumstances in which an employee's disability
does not prevent him from performing the requisite work."

218. Id. at 1064.
219. Dissenting, Judge Trott would have affirmed the district court's holding. See id. at 1075 (Trott, J., dissenting). Judge Trott believed that Echazabal was not "otherwise qualified" for the position, because he could not perform the essential functions of the position. Id. at 1073. Trott reasoned that because of Echazabal's disability, the essential functions at issue might have killed him. Id. at 1073-74. Further, Judge Trott asserted that the oil refinery was entitled to use the "direct threat" defense, citing other circuits that had addressed the issue. Id. at 1074.
220. Id. at 1072.
221. Id. at 1067 (citing H.R. REP. NO. 101-485, pt. 3, at 45 (1990)).
222. 480 U.S. 273 (1987). In Arline, the Supreme Court held that a teacher diagnosed with tuberculosis was not automatically excluded from coverage under the Rehabilitation Act without an objective and individual inquiry based on prevailing medical knowledge. Id. at 287-89.
223. Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1067 (9th Cir. 2000).
224. See id. at 1065-70.
225. See id. at 1069-70.
226. Id. at 1071. While the Ninth Circuit's decision in Echazabal preserves the right of disabled employees to make employment decisions that affect their own health or safety, the ruling also raises several policy concerns. Some policy concerns raised by the decision are employer exposure to tort liability, id. at
In making their rulings, the Court of Appeals for the Ninth Circuit and the District Court for the Northern District of Illinois followed the literal language of the ADA’s direct threat defense, while the Eleventh Circuit followed the EEOC’s definitions. To date, the Court of Appeals for the Ninth Circuit is the only appellate court to reject the EEOC’s regulations that expand the direct threat provision to threats to the individual himself, although the U.S. Supreme Court later overruled the decision rejecting the EEOC’s definition.227 Because the Ninth Circuit’s decision conflicted with another court of appeals decision in ADA direct threat cases,228 the Supreme Court granted certiorari.229

C. The Supreme Court’s Analysis of Threats to Self

In Chevron U.S.A., Inc. v. Echazabal230 the U.S. Supreme Court unanimously held that the ADA allows the EEOC regulation that permits an employer to refuse to hire people with disabilities when job performance may pose a threat of harm to those people.231 The Court held that the EEOC regulation struck an appropriate balance between employment regulations and workers’ rights.232 The Court 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.”233 The Court reversed the Ninth Circuit’s decision and remanded the case for proceedings consistent with its opinion.234

In its decision, the Court stated that because “Congress has not spoken exhaustively on threats to a worker’s own

1070, employers committing state crimes, id. at 1074, conflicting responsibilities for employers under different labor laws, id., nullification of state and federal workplace safety laws, id. at 1074-75, and antipaternalism trumping basic safety concerns. Id. at 1075.
231. Id. at 74-75; see 42 U.S.C. §§ 12101-12213 (1994 & Supp. 2002).
233. Echazabal, 536 U.S. at 86.
234. See id.
health," the EEOC could claim administrative deference as long as the qualification standards remain "job-related and consistent with business necessity." The Court stated that the Ninth Circuit's argument relied on the interpretive expression, expressio unius exclusion alterius. The Court gave three reasons not to apply the expression-exclusion rule. First, the Court stated that Congress included the harm-to-others provision as only an example of a legitimate qualification that is "job related and consistent with business necessity." Second, the Court reasoned that by failing to include both threats to others and threats to self, Congress appears to have made a deliberate choice to omit the latter item as a signal of the affirmative defense's scope. Third, the Court found "no apparent stopping point to the argument that by specifying a threat-to-others defense, Congress intended a negative implication about those whose safety could be considered." Further, the Court stated that the EEOC regula-

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235. The Court articulated this form of deference in yet another Chevron-related case, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (holding that if the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress).

236. See Echazabal, 536 U.S. at 84 (limiting agency discretion to the conditions of qualification standards and quoting 42 U.S.C. § 12,113(a) (1994 & Supp. 2002)).

237. Id. at 80. This expression means "expressing one item of an associated group or series excludes another left unmentioned." Id.

238. Id.

239. Id. The Court stated that "[t]hese are spacious defensive categories, which seem to give an agency or court discretion in setting limits for permissible qualification standards." Id. The expansive phrasing of "may include" does not fall into the sort of exclusive terminology of the exclusion-expression rule. Id.

240. Id. The Court noted that "two reasons stand in the way of treating the omission as an unequivocal implication of congressional intent." Id. at 82. The first reason is that "the EEOC was not the only agency interpreting the Rehabilitation Act, with the consequence that its regulation did not establish a clear, standard pairing of threats to self and others." Id. As stated earlier, "[w]hile the EEOC did expand upon the text of the Rehabilitation Act exclusion by recognizing threats-to-self along with threats-to-others," the Department of Justice, Labor and Health and Human Services adopted regulations under the Rehabilitation Act did not recognize threats-to-self along with threats-to-others. Id. The second reason is that "[i]nstead of making the ADA different from the Rehabilitation Act on the point at issue, Congress used identical language, knowing full well what the EEOC had made of that language under the earlier statute." Id. at 83. The Court reasoned that "[o]mitting the EEOC's reference of self-harm while using the very language that the EEOC had read as consistent with recognizing self-harm is equivocal at best." Id.

241. Id. The Court reasoned that "[w]hen Congress specified threats to oth-
tion advanced the goals of the Occupational Safety and Health Act of 1970 (OSH Act),\textsuperscript{42} thus the Court's position supported Chevron's defense.\textsuperscript{43}

Most significantly, the Court decided that although Congress had paternalism in mind when it enacted the ADA, the


\textsuperscript{43} \textit{See Echazabal}, 536 U.S. at 84-85 (dismissing Echazabal's allegations that Chevron's reasons for calling the EEOC regulation reasonable are illegitimate). Chevron claimed that the EEOC regulation helps avoid lost time due to illness, curbs excessive turnover caused by medical retirement or death, decreases state tort litigation, and minimizes the risks of violating the Occupational Safety and Health Act. \textit{Id.} at 84. Echazabal responded that there are no known instances of OSH Act enforcement against an employer who relied on the ADA to hire a person with a disability willing to accept health or safety risks on the job. \textit{See Brief for Respondent} at 36, Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002) (No. 00-1406) (indicating that OSHA has no rule requiring employers to exclude employees with Hepatitis C). Echazabal further argued that although Chevron relied heavily on the Occupational Safety and Health Act's "general duty" clause, imposing only a duty of feasible prevention, Chevron did not identify any case in which OSHA enforced such clause. \textit{Id.} at 37-38; \textit{see also} 29 U.S.C. § 654(a)(1) (1994 & Supp. 2002) (mandating that employers furnish a workplace free from recognizable hazards that may cause serious bodily harm or death). However, the Court asserted that this fact was not "a red herring to excuse covert discrimination." \textit{See Echazabal}, 536 U.S. at 84 (emphasizing that employers would escape liability just by disclosing all risks and "taking all feasible steps to mitigate those risks."); \textit{see also} Brief for Respondent at 37. With this fact in mind, the Court replied that the OSH Act requires employers to provide safe working conditions, and compels employees to be in compliance with the OSH Act while at work. \textit{See 29 U.S.C. § 654} (outlining duties of employers and employees for compliance with occupational safety and health standards). In addition, although the OSH Act and the ADA may appear to operate with conflicting purposes in this type of case, \textit{see Echazabal}, 536 U.S. at 85 (contrasting the Occupational Safety and Health Act with the ADA by indicating that the Occupational Safety and Health Act seeks to ensure the safety of workers, whereas the ADA seeks to eliminate employment discrimination against individuals with disabilities), when permitted by Congress, agencies are allowed and expected to resolve conflicting statutes. \textit{See id.} at 85 (highlighting that the EEOC's efforts exemplify an agency's responsibility to resolve statutory conflicts when Congress leaves competing objectives subject to administrative resolution).
EEOC regulation was reasonable because it did not allow the type of paternalism in employment that the ADA was enacted to eradicate. The Court reasoned that Congress was not aiming at an employer’s refusal to place individual disabled workers in demonstrated risks; instead, Congress was trying to get at refusals claiming to act for the good of people with disabilities that were in fact relying on untested pretextual stereotypes. The EEOC regulation disallows just this sort of sham protection, and instead demands an individualized particularized inquiry into the harms the employee would probably face. The threat to self “must be ‘based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,’ and upon an expressly ‘individualized assessment of the individual’s present ability to safely perform the essential functions of the job.’” The Court reached this decision only after considering, among other things, “the imminence of the risk and the severity of the harm portended.” In other words, the Court argued that two types of paternalism existed: good paternalism and bad paternalism, and the ADA was enacted to eradicate bad paternalism. The Court reasoned that although paternalistic, the EEOC regulation constituted the good type of paternalism, because it requires an individualized inquiry into the threat of harm to the employee instead of allowing the use of generalized stereotypes against an entire class of people with disabilities. Thus, consistent with the ADA’s purpose, the EEOC’s regulation focused on eliminating workplace protections that were based on false presumptions.

In reaching this conclusion, however, the Supreme Court overlooked its extensive jurisprudence rejecting paternalism in employment law. In 1991, for example, the Court held, in *UAW v. Johnson Controls*, that fetal protection policies that prohibit women of child-bearing age from working in positions that are potentially harmful to their fetuses are a form

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244. *Echazabal*, 536 U.S. at 85.
245. *Id.* at 85.
246. *Id.*
247. *Id.* at 86.
248. *Id.*
249. *Id.* at 85-86.
of discrimination based on sex in violation of the Civil Rights Act of 1964. Based on evidence that exposure to lead in very early pregnancy can harm fetuses, Johnson Controls implemented a policy that prevented women capable of bearing children from working in jobs with possible lead exposure.

In rejecting the company's defense that sex was a bona fide occupational qualification (BFOQ) for jobs involving lead exposure, the Court stated "[o]ur cases have stressed that discrimination on the basis of sex because of safety concerns is allowed only in narrow circumstances." The Court narrowed further the use of the BFOQ defense to situations where the third parties the business seeks to protect "were indispensable to the particular business at issue." The

252. Id. at 211.
253. Id. at 191-92.
254. Id. at 202 (discussing Dothard v. Rawlinson, 433 U.S. 321, 335 (1997)). In Dothard, the Court held that excluding women from employment as security guards at a men's maximum security Alabama prison was constitutional due to the risk of possible injury not only to female guards themselves, but also to inmates or other guards. 433 U.S. at 335-36. Because twenty percent of the prisoners were sex offenders who were not separated from the prison population, the Court reasoned that there was a substantial probability of an attack on a female guard. Id. at 355. The Court explained that an essential element of the position was to maintain order and security, and the presence of females in this male penitentiary, notorious for its "jungle atmosphere," was incompatible with this goal. Id. at 334-55. The Dothard Court relied on the very narrow BFOQ defense, and found that normally an employee would be allowed to choose which employment risks are acceptable. Id. at 355. In Dothard, the Court found permissible an employer's policy of hiring only male guards in contact areas of maximum-security male penitentiaries because more was at stake than the "individual woman's decision to weigh and accept the risks of employment," but indicated that danger to a woman herself, absent the danger to others, did not justify discrimination. Id. In upholding the BFOQ defense, the Court noted that the employment of a female guard in male penitentiaries where sex offenders were spread throughout the prison population would create real risks of safety to others if violence broke out because of the female guard's presence. Id. at 336. In addition, the Court noted that "some courts have approved airlines' layoffs of pregnant flight attendants at different points during the first five months of pregnancy on the ground that the employer's policy was necessary to ensure the safety of passengers." Johnson Controls, 499 U.S. at 211 (citing Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980)); Burwell v. E. Airlines, Inc., 633 F.2d 361 (4th Cir. 1980); Condit v. United Air Lines, Inc., 558 F.2d 1176 (4th Cir. 1977)).

255. Johnson Controls, 499 U.S. at 203-04 (noting that in Dothard and W. Air Lines, Inc., v. Criswell, 472 U.S. 400, 413 (1985), the third parties potentially affected were indispensable to the particular business at issue). The Court noted:

In Dothard, the third parties were the inmates; in Criswell, the third parties were the passengers on the plane. We stressed that in order to
Court summarized its position by noting:

Unless pregnant employees differ from others “in their ability or inability to work,” they must be “treated the same” as other employees “for all employment-related purposes.” This language clearly sets forth Congress’ remedy for discrimination on the basis of pregnancy and potential pregnancy. Women who are either pregnant or potentially pregnant must be treated like others “similar in their ability . . . to work.” In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.

In *Echazabal*, the Court held that *Johnson Controls* was not controlling because it falls under Title VII, which is “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 assessment.”

Comparable in nature to a “qualification standard” that screens out people with disabilities, the ADA’s direct threat defense must be “job-related and consistent with business necessity” and should be limited to those instances where a person with a disability cannot perform the functions of the job or puts others at harm in doing the job. If the particular harm is only to oneself, the person is not unable to do the job and cannot be barred from doing so. Any other result contravenes the anti-paternalistic purpose of the ADA.

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qualify as a BFOQ, a job qualification must relate to the “essence,” or to the “central mission of the employer’s business” . . . . Third-party safety considerations properly entered into the BFOQ analysis in *Dothard* and *Criswell* because they went to the core of the employee’s job performance. Moreover, that performance involved the central purpose of the enterprise . . . . No one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of battery making.

*Id.* (citations omitted).

256. *Id.* at 204 (relying on the Pregnancy in Discrimination Act’s amendment to Title VII, 42 U.S.C. § 2000e(k) (1994)) (citations omitted).


259. *Id.*
IV. PATERNALISM AND THE RIGHTS OF PEOPLE WITH DISABILITIES

The decision by the Supreme Court in *Echazabal* fails to acknowledge the anti-paternalistic purpose of the ADA. As discussed in Part I, the central purpose of the ADA was to bring people with disabilities out of a subordinate state and onto the same level as all other individuals. This includes allowing people with disabilities to take risks that are more severe because of the person’s disability. For example, the ADA would allow a person with a disability to drive a school bus even though he had a hearing impairment as long as he can perform the essential functions of his job without posing a threat of harm to the passengers. The EEOC’s rule seems to view people with disabilities as incapable of making decisions as to what is best for them.

This approach belies the classic liberal thought underpinning much of the legal doctrine applied to nondisabled people’s ability to choose risky occupations, and this approach belies the classic liberal thought of when the law may interfere with legal subjects’ rights to autonomous decision making. Under liberal theory, state intervention in autonomous decisions of individuals is justified primarily when the results of such decisions may cause harm to another person. The EEOC regulation, however, allows intervention in the autonomous decisions of people with disabilities even in the absence of any claim of harm to others. As such, the regulation meets the classic definition of unwarranted paternalism.

Paternalistic policies and rules restrict a person’s liberty, but are justified exclusively by consideration for that person’s own good or welfare when carried out against his present will. The classic liberalist John Stuart Mill excluded as a possible legitimizing principle for invading a person’s liberty the prevention of harm to the actor himself. Mill said,

His own good, either physical or moral is not sufficient

260. *See supra* notes 83-85 and accompanying text.


warrant. He cannot be rightfully compelled to do or for-
bear because it will be better for him to do so, because it
will make him happier, because in the opinion of others, to
do so would be wise . . . . These are good reasons for re-
monstrating with him, or reasoning with him, or persuad-
ing him or entreating him, but not for compelling him or
visiting him with any evil in case he do otherwise.\textsuperscript{264}

Thus, under a classical liberal approach to employment
law, transactions such as selling your labor to the highest
bidder for whom you want to work are core decisions that
fully autonomous people have the power to make with com-
plete freedom. To state this in another way, one may rely on
Professor Margaret Radin’s concept of market-inalienability
in the context of selling one’s labor in the labor market.
Radin explores nonsalability, a type of inalienability she calls
market-inalienability.\textsuperscript{265} Professor Radin explains that there
are “two theories about freedom that are central to the ideo-
logical framework in which we view inalienability: the notion
that freedom means negative liberty,\textsuperscript{266} and the notion that
negative liberty is identical with, or necessarily connected to,
free alienability of everything in the markets.\textsuperscript{267} The belief
that freedom means negative liberty gives rise to the idea
that inalienabilities, i.e., a rule prohibiting a person from sell-
ing his or her labor on the best terms he or she can get, are
paternalistic limitations on freedom.\textsuperscript{268}

Thus, Radin and Mill reject the principle that that pre-
vention of physical harm to the actor himself is an appropri-
ate reason for invading the liberty of a person by restricting
his right to alienate his labor.\textsuperscript{269} As applied to law, this prin-
ciple is called “legal paternalism.”\textsuperscript{270} Legal paternalism has
been exhaustively explored by the contemporary liberal theo-
rist Joel Feinberg, who draws a distinction between two dif-
ferent types of paternalism.\textsuperscript{271} These two types of paternalism
are (1) presumptively blamable benevolent paternalism and

\textsuperscript{264} JOHN STUART MILL, ON LIBERTY 13 (Bobbs Merrill, 1956) (1871).
\textsuperscript{265} Radin, supra note 12, at 1849.
\textsuperscript{266} Liberty in this context means autonomy or a right.
\textsuperscript{267} Radin, supra note 12, at 1898.
\textsuperscript{268} Id.
\textsuperscript{269} FEINBERG, supra note 263, at 4.
\textsuperscript{270} H.L.A. HART, LAW, LIBERTY AND MORALITY 30-34, 38 (1963).
\textsuperscript{271} FEINBERG, supra note 263, at 5.
(2) presumptively nonblamable paternalism. Presumptively blamable benevolent paternalism "consists in treating adults as if they were children . . . by forcing them to act or forbear in certain ways," for their own good, regardless of their wishes in the matter. Presumptively nonblamable paternalism "consists of defending relatively helpless or vulnerable people from external dangers, including harm from other people when the protected parties have not voluntarily consented to the risk, and doing this in a manner analogous in its motivation and vigilance to that in which parents protect their children."

The EEOC regulation relied on by Chevron in denying Mr. Echazabal a job at its refinery is a presumptively blamable benevolent paternalistic regulation. It allows employers to treat people with disabilities as children by forcing them to forbear in certain ways, for their own good, regardless of their own wishes in the matter, but does not do so in order to defend relatively helpless or vulnerable people from a danger to which they have not consented. The employee with a disability is equally able to decide whether to consent to a known workplace risk as are nondisabled employees. Moreover, the employee with a disability has expressed his decision in his employment choice. The EEOC threat-to-self regulation allows employers to force people with disabilities to forbear from making free and autonomous choices, even against their own wishes, and thus discriminates against a person with a disability in occupations which the employer believes are more harmful to the person with a disability. On the other hand, employers do not force nondisabled adults to forbear in this manner.

In Echazabal, the Court held that the EEOC threat-to-self regulation was an example of "good" paternalism, but such a thing cannot exist under a classical liberal analysis. Nonblamable paternalism involves protecting people from risks to which they have not consented, but in Echazabal, the employee with a disability has knowingly consented to the

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272. Id.
273. Id.
274. Id.
275. At least Mr. Echazabal had that capacity; perhaps not all people with disabilities will have that capacity.
Another useful analytic distinction is between paternalistic laws applied in single-party cases and paternalistic laws applied in two-party cases. Writing on this point in a 1970 article on paternalism, Gerald Dworkin applied the labels "pure" and "impure" paternalism to the one- and two-party cases, respectively. This distinction alone cannot support the Supreme Court's analysis, however, because the cases analyzed here, such as Echazabal, are one-party cases. The only person harmed by his decision is Echazabal himself. Put otherwise, the EEOC regulation is an example of "pure" paternalism because it seeks to prevent harm to the very class of persons whose liberty is being restricted. In cases involving solely harm to self, as in Echazabal, the direct threat defense protects no other class of people.

The employer can protect himself from liability by requiring the employee with a disability who poses a threat to himself to sign a liability waiver. The employer can inform the employee with a disability of the risks associated with performing the functions of the job and recommend that the employee refuse the job or waive his or her right to seek later recourse for harm caused from the risk assumed.

Although this regulation is a paternalistic infringement upon the liberty of a person with a disability to alienate his skills on the labor market, an employer will argue that it is an acceptable infringement based on the employer's aim of avoiding violations of workplace safety regulations, such as

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277. Id. at 76-77.
278. FEINBERG, supra note 263, at 9. Examples are "laws prohibiting suicide, self-mutilation, and drug use." Id.
279. Id. at 9. Examples are "laws prohibiting euthanasia, dueling and drug sales." Id.
280. Gerald Dworkin, Paternalism, in MORALITY AND THE LAW (Richard A. Wasserstrom, ed., 1971). Feinberg suggests "that the terms 'direct' and 'indirect' paternalism are more fitting [because] two-party cases are paternalistic in a less genuine, watered down sort of way." FEINBERG, supra note 263, at 9. Dworkin argues that in the case of direct paternalism, the class of persons whose liberty is being restricted is identical with the class of persons whose harm is intended to be prevented by the restrictions. Dworkin, supra, at 111. (Examples are making suicide a crime, requiring passengers to wear seat belts, and requiring a Christian Scientist to receive a blood transfusion). In the case of indirect paternalism, the only way to protect the welfare of the class of persons is to restrict the freedom of other persons besides those who are benefited. Id.
the OSH Act. In *Johnson Controls*, the company argued that it faced tort liability for employing fertile women in positions with a potential for injury to the female's fetus. The Supreme Court, however, clearly stated that absent negligence, a court would not likely find liability on the part of the employer. The Court reasoned that if "under general tort principles, Title VII bans sex-specific fetal protection policies, the employer fully informs the woman of the risks, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best." 

The same would hold true under the ADA. In the absence of negligence, a court likely would not find liability on the part of the employer. Since the ADA bans employment actions based on threats to self, if the employer has not acted negligently, and has fully informed the person with a disability of the possible risks, and has obtained a signed waiver relating to those risks, the basis for holding an employer liable is remote. In sum, the EEOC regulation at issue here is a coercive paternalistic regulation that restricts the liberty of people with disabilities in order to prevent them from harming themselves.

Liberal theorists, such as Feinberg, argue that paternalist justification of any restriction of personal liberty is extremely offensive because it invades the realms of personal autonomy where each competent, responsible adult should have absolute power. That power is to make decisions about things that affect himself. Constraints justified on paternalistic grounds evoke more than feelings of frustration and hostility. Paternalism, even in benevolent forms, evokes feelings of moral indignation and outrage. Complaints are not based solely on being inconvenienced or "irked," but rather on the person's feelings that he has been violated, invaded, and belittled. These feelings involve protest: "What I do with my own life is no one else's business."

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283. *Id.* at 208.
284. *Id.*
286. *Id.* at 27.
287. *Id.*
288. *Id.*
289. *Id.*
A sense of one's rightful prerogatives being usurped provokes these feelings. \textsuperscript{290} Moreover, the justification for the paternalistic invasions into the private liberties of people with a disability "rub salt in their wound" by telling them that their decisions about what is in their best interest really are not in their best interest. \textsuperscript{291} Thus, the regulation relied on by Chevron usurped the personal autonomy of Mr. Echazabal to decide what ultimately was in his best interest.

"A distinctive feature of market transactions is that people make decisions reflective of their individual circumstances." \textsuperscript{292} "Thus, a voluntary transaction necessarily improves the welfare of all participants in the market transaction, making them better off with respect to their previous situation." \textsuperscript{293} Market transactions also allow for the compensation of individuals for bearing the risk of employment. \textsuperscript{294} When people with disabilities are allowed to alienate their labor in the market, then the riskier the job, the more compensation an individual receives from the marketplace for assuming such risks. \textsuperscript{295} If we allow the marketplace to operate in a normal fashion, just as the marketplace sets the price for risky jobs for nondisabled workers, the marketplace would do the same for workers with disabilities who pose a risk only to themselves. When it comes to risky employment, each individual must decide whether the risk is too high for the benefit he will receive from such employment. Therefore, if the price is not sufficient for the individual to accept the risk of employment, that particular individual will not accept the risk. This holds true for nondisabled workers as well as workers with disabilities.

The goal of the ADA is "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for people with disabilities. \textsuperscript{296} The ADA embodies a national policy that encourages self-reliance and self-sufficiency. \textsuperscript{297} The ADA encourages people with disabilities to

\begin{thebibliography}{99}
\bibitem{290} \textit{Id.}
\bibitem{291} \textit{FEINBERG, supra note 263, at 27.}
\bibitem{292} W. Kip Viscusi, \textit{Risk Equity}, 29 J. LEG. STUDIES 843, 846 (June 2000).
\bibitem{293} \textit{Id. at 846.}
\bibitem{294} \textit{Id.}
\bibitem{295} \textit{Id.}
\bibitem{296} Radin, \textit{supra} note 12, at 1898.
\bibitem{297} \textit{See} 42 U.S.C. \textsection 12101(a)(8) (2003); discussion \textit{supra} text accompanying notes 81, 87.
\end{thebibliography}
take chances and to become full participants in society.\footnote{See 42 U.S.C. § 12101(a)(8) (2003); Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 85-86 (2002).} For instance, the ADA encourages visually impaired people to walk down a busy city street to become independent, hearing-impaired people to obtain employment as bus drivers, and mentally disabled people to use public transportation to move through their daily lives. Therefore, the ADA recognizes that feelings of dignity and self-worth come from accepting risks.

Another way of analyzing the problem in the Supreme Court’s \textit{Echazabal} opinion is to look at the Greek concept of personal autonomy. Personal autonomy describes the realm of inviolable sanctuary that consists of our own bodies.\footnote{Feinberg, supra note 263, at 27.} The word “autonomy” is derived from the Greek stems for “self” and “law” or “rule” and literally means “the having or making of one’s own laws.”\footnote{Id.} Autonomy is known by such terms as “self-rule,” “self-determination,” “self-government,” and “independence.”\footnote{Id. at 53.} To use an example of Feinberg’s, if a person voluntarily chooses to have a surgical operation that will render that person infertile and a physician is willing to perform the operation, then the person’s “bodily autonomy” is infringed if the state forbids the operation on such grounds as wickedness or imprudence.\footnote{Id. at 54.} If no other interests are directly involved, the decision is the person’s own and “nobody else’s business,” or “a matter between the person and his/her doctor only.”\footnote{Id. at 53.} If one’s body is included in one’s sovereign domain, it cannot be treated in certain ways without one’s consent.\footnote{Id.} Thus, the concept of a discretionary competence implies both negative rights\footnote{Feinberg, supra note 263, at 53.} and positive rights.\footnote{Id.}

Every person’s discretionary control of his body is not the end of personal autonomy.\footnote{Id. at 54.} Another portion of the idea of
autonomy is the right to be able to make choices and decisions such as what job to take, "what to put into my body, what contacts with my body to permit, [and] where and how to move my body through public space."308 "Some of these rights are more basic . . . and more indispensable than others.309

Put another way:

[T]he most basic autonomy right is the right to decide how one is to live one's life, in particular how to make critical life decisions—what courses of study to take, what skills and virtues to cultivate, what career to enter, whom or whether to marry, which church if any to join, [or] whether to have children.310

A person's personal domain then consists of his body and, at the very least, his vital life-decisions.311 One such life-decision is the right to sell one's labor for whatever price one so chooses on the same terms as all other autonomous adult actors. "According to those principles, we may locate within the personal domain all those decisions that are 'self-regarding,'" including decisions about employment.312 For example, in Echazabal, Mr. Echazabal wanted to work in a job that may have caused him liver damage in the future, but this decision was self-regarding, as it only would affect him.313 Despite the potential risks to himself, he may have wanted the job because it was the highest paying job he could secure, because he enjoyed working in the industry or at that particular work place, or because he and his doctors assessed the risks differently than his employer did. Regardless of his reasons, which are not mentioned in the published opinion, Echazabal's own good and his right to exercise his autonomous choice were closely related.314 Indeed, Feinberg and Mill would argue that in the majority of cases, an individual knows better than anyone else what is good for him,315 and

308. Id.
309. Id.
310. Id.
311. FEINBERG, supra note 263, at 55.
312. Id. at 56. "Self-regarding" decisions mean those decisions that "primarily and directly affect only the interests of the decision-maker." Id.
313. Some would argue that if Mr. Echazabal died prematurely and left a family in need, his decision did not affect him only. However, that argument is beyond the scope of this article.
314. FEINBERG, supra note 263, at 58.
315. Id.
that “allowing individuals, whenever possible, to choose for themselves, even to choose risky courses, is the policy most likely to promote their personal fulfillment, even though in some cases individuals may predictably exercise their autonomous choice unwisely.”

Outside the personal domain are all those decisions that are also “other-regarding.”

However, even if his reasons are not regarded as good reasons, one must concede that he is making a perfectly valid, voluntary choice based on his own standards. Although his choice may seem unreasonable from others’ perspectives or may be one that others could never make, it is not necessarily an insane or irrational choice. Many able-bodied people would not accept the risks that a person with a disability would accept, but able-bodied people do not have the experience to allow full appreciation of the liberty and dignity interests that might lend a person with a disability to make a risky choice that advances personal autonomy. If the chooser is an autonomous adult making a voluntary decision, the choice must be his to make and not anyone else’s in order to promote a regime of equal civil rights. A completely autonomous adult would have, in Mill’s words, the “power of voluntarily disposing of his own lot in life.”

V. CONCLUSION

“Just tell us, if you would, why the employee would want to take a job where the doctor says it’s going to kill you?” Justice Kennedy posed this question during the oral arguments for Chevron v. Echazaba, even though the case did not present these facts. The answer to this question is “because he is an autonomous adult, capable of making his own risk assessments once provided with the relevant information, and

316. Id.
317. Id. “Other-regarding” decisions mean those decisions that directly and in the first instance affect the interests or sensibilities of other persons. Id.
318. Id. at 69.
319. Id. For example, a person who is hearing impaired may want to work as a city bus driver because the person may enjoy driving a bus, earn a living, or figure that the job is an exceptional way to meet people, even though non-disabled people may view this decision as unreasonable or irrational.
320. Feinberg, supra note 263, at 69.
321. Id.
under the ADA's antipaternalism principle he should be allowed to work anywhere he wants, as long as he is not putting anyone else in danger.” The ADA was created with the purpose of giving people with disabilities the same civil rights as those of other adults in society. One of those rights is the right to make one's own decisions about what kinds of employment-related risks to bear. The EEOC interpretive regulation does not allow the purpose of the ADA to be fully realized. This regulation is thus a presumptively blamable paternalistic infringement on the right of a person with a disability to decide what is in his best interest, because it allows an employer to substitute his judgment for that of a person with a disability.

Over the years, disability legislation has evolved from treating people with disabilities as having defects that need to be cured to integrating them as full members of society entitled to equal rights to self-worth, autonomy, and personal dignity. The Supreme Court's history with paternalistic legislation shows that paternalistic rules are upheld when the safety of others is in jeopardy. In Echazabal, however, the Supreme Court incorrectly decided that for people with disabilities, paternalistic rules are justified when there is a threat to the individual himself, even when there are no threats to others. That decision restricts the ability of people with disabilities to sell their labor in the market on the same terms as other employees, and as a result, sets back the campaign for equal employment rights for persons with disabilities.

323. See supra notes 79-81 and accompanying text.