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Commentary

RIGHTS OF PEOPLE WITH DISABILITIES TO EMERGENCY EVACUATION UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990

WILLIAM C. HOLLIS III

On September 11, 2001, the world awakened to a new face of terror. Terrorists hijacked and piloted commercial jets and then slammed them into New York City's World Trade Center and the Pentagon.¹ Within the next hour both towers collapsed, killing over three thousand people.² It was not until later that the public learned of the special horror that was endured by the Twin Towers' disabled community.³ Although they may have been located below the level of impact, for many of them their fate was the same as that of the able bodied above the crash sites. While tales emerged of heroes who delayed their own flight to safety to assist, and even carry,⁴ people with disabilities down scores of flights of stairs, we also learned that, sadly, other people with disabilities waited in vain for rescue teams to reach them.⁵ Unlike the able-bodied, the disabled did not have an avenue of escape that they could negotiate independently. They were not able to use the fire stairwells. The elevators were inoperable or unsafe. People with disabilities waited because they had no other option.⁶

The deaths of many at the World Trade Center who waited helplessly for rescue illuminate the daily fears of many in the disabled com-

1. See Ellen Wulforst, *World Trade Center Attacked, Towers Collapse*, REUTERS (Sept. 11, 2001) at <http://www.news.lycos.com/news/story.asp?section=breaking&storyId=241490.htm>.

2. See *Lost But Not Forgotten*, USA TODAY.COM (Nov. 11, 2001) at <http://www.usatoday.com/news/nation/2001/09/11/death-toll.htm>.

3. See Barbara McKee, *Local Comment: Don't leave disabled behind*, DETROIT FREE PRESS (Oct. 18, 2001) http://www.freep.com/voices/columnists/emckee18_20011018.htm. The author is a disabled person who writes on disability issues. Her October 18, 2001, opinion piece paints a moving picture of the fear evoked in a mobility-impaired person by such a commonplace event as a stuck elevator. She writes that, "We are, in fact, reduced to the helplessness of an infant in times of crisis. A set of stairs reminds us just who we are. A fire alarm announces to us that we are completely dependent on altruism. We feel the fear begin in our gut, hoping that just one person will be our Good Samaritan today." *Id.*

4. See *Editorial/Opinion: Reflections on a Week of Terror*, USATODAY.COM (Sept. 13, 2001) at <http://www.usatoday.com/news/comment/2001-09-14-nceditf.htm>.

5. See Wulforst, *supra* note 1.

6. See McKee, *supra* note 3.

munity.⁷ A wheelchair bound person does not have to be in a skyscraper to be imperiled by fire. For such an individual, a fire in a two-story building is just as deadly if no means of egress other than the elevator exists.⁸ For many people safe evacuation has only recently become an issue. For the disabled community, most particularly the mobility impaired, the lack of emergency egress is a recurrent nightmare.⁹ Common fires and even periodic fire drills highlight the inadequacies of the current schemes devised to safeguard people with disabilities.

Unfortunately, when Congress was given a dramatic forewarning of the danger faced by the disabled community, it failed to recognize it. Following the World Trade Center bombing on February 26, 1993, Congress held hearings to examine the issues brought to light by the bombing. Much of the testimony focused on the heroism many New Yorkers exhibited that day.¹⁰ Congress heard testimony detailing the actions of individuals who delayed their own escape to assist disabled co-workers to safety. In the course of these hearings, the plight of the disabled in the building became known. "One woman, whose disability confines her to a wheelchair, was passed from person to person until she was safely on the street outside."¹¹ A paralyzed man was carried down "dozens of flights of stairs through smoke so thick you could not see your shoes" to safety.¹² The heroes of the day were appropriately lauded.¹³ Commendably, Congress recognized the need to examine emergency preparedness systems.¹⁴ However, the inherent peril faced by the disabled community was neither highlighted nor addressed.¹⁵ Consequently, the evacuation of people with disabilities in the World Trade Center on September 11, 2001, was no better accomplished than it had been on February 26, 1993.¹⁶ While others escaped down the stairways, people with disabilities waited and prayed for a Good Samaritan, or failing that, ultimate rescue by firefighters.¹⁷

7. *See id.*

8. *See id.*

9. *See id.*

10. *See generally* 139 CONG. REC. H1159-01 (1993). On February 26, 1993, terrorists exploded a van filled with explosives in an underground parking garage underneath the World Trade Center. This disaster resulted in five fatalities and over one thousand injuries. *Id.* at 1160.

11. *Id.* at 1159.

12. *Id.* at 1160.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See generally* Wulforst, *supra* note 1.

17. *See, e.g.,* McKee, *supra* note 3.

Ironically, just before the September 11 disaster, in August 2001, the White House convened a task force to plan for emergency evacuation of people with disabilities.¹⁸ Its work has taken on a sense of increased urgency.¹⁹ The task force members include disability rights advocacy groups, government agencies, fire protection and emergency associations, and the White House.²⁰ The task force will address the need for legislation, updating emergency preparedness information at the state and local level, and communication.²¹

This paper seeks to answer pressing questions highlighted by the attacks on September 11: What can people with disabilities reasonably expect regarding safe evacuation during emergencies? Does the Americans With Disabilities Act of 1990 (ADA) confer upon people with disabilities the right to an opportunity to survive equal to that afforded the able-bodied in an emergency? And, what impact will the Supreme Court's upcoming ruling in *Chevron USA, Inc., v. Echazabal* have on the use of the "direct threat" defense by employers and public accommodations to discriminate against people with disabilities because of concerns over their safe evacuation?

Part I of this paper examines the current state-of-the-art of emergency planning to protect mobility-impaired persons, including applicable building codes and fire safety plans. Part II discusses the courts' interpretations of the ADA, with emphasis on issues of safety and emergency evacuation. Part III traces the evolution of the "direct threat" doctrine to the upcoming Supreme Court decision in *Chevron USA, Inc. v. Echazabal*, and its potential application to emergency evacuation of individuals with disabilities. Part IV reviews the application of the ADA to issues of emergency evacuation and analyzes the potential impact of the Supreme Court's upcoming *Echazabal* decision.

18. Minutes of the Task Force on Emergency Preparedness and People with Disabilities, (October 4, 2001) (on file with the author). The task force has established the following goals for the disability community and related groups: "For the President to establish a Task Force within the Homeland Security Office (HSO) to deal with emergency issues for people with disabilities; to generate ideas and issues that the HSO should tackle; to establish principles and/or checklists for use when establishing evacuation and other emergency preparedness, response and recovery plans; to get into the consciousness of leaders . . . to involve people with disabilities" *Id.*

19. *See id.*

20. *See id.*

21. Minutes of the Meeting of the Emergency Preparedness and People with Disabilities, p. 3 (September 28, 2001) (on file with the author).

I. IMPACT OF THE ADA ON BUILDING CODE REQUIREMENTS FOR EMERGENCY EVACUATION OF PEOPLE WITH DISABILITIES

A. *The ADA and the Model Building Codes*

The ADA prohibits discrimination against a person based on physical, mental or developmental disability in decisions on employment, the provision of public services and transportation, or the provision of services by public accommodations.²² It sets accessibility standards²³ when public entities²⁴ and places of public accommodation²⁵ renovate existing facilities or construct new facilities.²⁶ To provide technical assistance and guidance to entities undergoing renovation or new construction, Congress charged the Architectural and Transportation Barriers Compliance Board (Access Board) with development of minimum guidelines and requirements for accessible design.²⁷ The Americans with Disabilities Act Access Guidelines (ADAAG) provide the starting point for standards issued by the Departments of Justice (DOJ) and Transportation (DOT) to enforce the law.²⁸ Buildings and facilities covered under ADAAG must also meet the technical requirements specified in the provisions of the American National Standards Institute standards for accessible design (ANSI A117.1).²⁹

State and local planning laws govern new construction and renovation of existing buildings.³⁰ Ninety-seven percent of the jurisdictions in the United States that have adopted and enforce a building

22. See generally Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1990). See *infra* notes 83-94 and accompanying text.

23. 42 U.S.C. §§ 12163, 12204 (1990). Public entities and places of public accommodation are required to conform to the Minimum Guidelines and Requirements for Accessible Design developed by the Architectural and Transportation Barriers Compliance Board.

24. 42 U.S.C. § 12131 (1990). "[A] 'public entity' [is] - (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or local government; and (C) . . . any commuter authority. . . ."

25. 42 U.S.C. § 12181 (1990). The ADA defines public accommodations as private entities affecting commerce. It lists numerous categories of private entities as examples of public accommodations. See § 12181(7).

26. 42 U.S.C. §§ 12146-12147, 12183 (1990).

27. 42 U.S.C. § 12204 (1990).

28. See 36 C.F.R. § 1191.1 (2001); see also Access Board, *The Americans with Disabilities Act of 1990*, at <http://www.access-board.gov/about/ADA.htm> (last visited Oct. 25, 2001) (on file with the author); 28 C.F.R. § 36.406 (2001).

29. 36 C.F.R. § 1190.40 (2001). Requires compliance with, American National Standard for Building and Facilities—Providing Accessibility and Usability for Physically Handicapped People (ANSI A117.1-1986).

30. See Sara Yerkes, International Code Council, *Sorting Fact From Fiction About ICC - NFPA* (Oct. 25, 2001), at http://www.intlcode.org/Sara_ICC-NFPA.html (on file with the author).

code use one of three model-building codes.³¹ Those model codes address emergency design and evacuation, and incorporate by reference ANSI A117.1 standards for accessible design.³² In 1994, the three model code organizations established the International Code Council (ICC)³³ to coordinate the development of a single set of comprehensive national model construction codes.³⁴ The ICC issued the first set of codes for the built environment in 1999.³⁵ State and local jurisdictions nationwide are updating their building code requirements from the predecessor documents to the 2000 edition of the international codes.³⁶ The three model code organizations no longer produce their respective codes.³⁷ ICC has updated the ANSI A117.1 standard to comply with ADAAG.³⁸ Consequently, the International Building Codes adopted by state and local governments comply with ADAAG and reflect the ICC's current state of fire safety philosophy for the disabled population.

B. "Defend in Place" is the Predominant Theory of Fire Safety for People With Disabilities

Modern fire safety planning and emergency evacuation plans address the "normal or typical fire in a building."³⁹ The plans seek to protect people caught in fires that occur with deadly frequency, and

31. See *id.*

32. See, e.g., BUILDING OFFICIALS & CODE ADMINISTRATORS INTERNATIONAL, INC. (BOCA) Chapter 10 § 1007.0 (13th ed. 1996).

33. International Code Council, *About the ICC* (Oct. 25, 2001), at <http://www.intlcode.org/abouticc.htm> (on file with the author). The three model code organizations that comprise the ICC are: Building Officials and Code Administrators International, Inc. (BOCA); International Conference of Building Officials (ICBO); and the Southern Building Code Congress International, Inc. (SBCCI). *Id.*

34. See *id.*

Since the early part of the last century, these nonprofit organizations developed the three separate sets of model codes used throughout the United States. Although regional code development has been effective and responsive . . . the time came for a single set of codes. The nation's three model code groups responded by creating the International Code Council and by developing codes without regional limitations – the International Codes.

Id.

35. See Yerkes, *supra* note 30.

36. See *id.*

37. See *id.*

38. *New ICC/ANSI A117.1-1998 Standard Now Available*, INTERNATIONAL CODE COUNCIL, (Oct. 25, 2001), at <http://www.intlcode.org/standards/newa117.htm>. "ICC/ANSI A117.1-1998 has been developed to work in harmony with Federal accessibility laws, including . . . the Americans with Disabilities Act Accessibility Guidelines (ADAAG)." *Id.*

39. See NFPA ONLINE, *Strategies in Building Evacuation Messages* (2001), at http://www.nfpa.org/BuildingCode/Building_Evacuation/building_evacuation.asp (on file with the author).

take more than four thousand lives each year.⁴⁰ "Defend in place" has evolved as the dominant plan for safeguarding people in high-rise building fires, and people with disabilities located where evacuation is problematic due to their physical limitations.⁴¹ It includes construction of areas of rescue assistance that utilize fire retardant construction materials, active fire suppressants (e.g. sprinkler systems), and emergency means of egress.⁴²

The risk of death or injury from fire is greater for people with physical, mental or sensory disabilities.⁴³ Because people with disabilities may have difficulty negotiating emergency "means of egress"⁴⁴ where such escape is available to the able-bodied, separate plans seek to address their needs. Those plans most often rely on a "defend in place" strategy.⁴⁵ In Section IV of this paper, the author will argue that "defend in place" has a discriminatory effect on people with disabilities because, under some circumstances, it requires that they remain at risk while the able-bodied evacuate the danger area.

All locations required by the ADA to be accessible to people with disabilities must have at least one accessible means of egress.⁴⁶ The model codes require that an "accessible means of egress shall provide a continuous path of travel from a required accessible space to a public way which is usable by a mobility impaired person and shall include

40. United States Fire Administration, *Fire Stops With You. Removing the Barriers: A Fire Safety Factsheet for People with Disabilities and their Caregivers* (2001), at <http://www.usfa.fema.gov/safety/fswy22.htm> (on file with the author).

41. See NFPA ONLINE, *supra* note 39.

42. See generally BOCA Chapter 10 (1996), *supra* note 32. The BOCA standards are referenced here as indicative of the standards of the three model codes.

43. See *id.*

44. BOCA Chapter 10 § 1002.0 (1996), *supra* note 32. "Means of egress" "[is] a continuous and unobstructed path of travel from any point in a building or structure to a public way. A means of egress consists of three separate and distinct parts: the exit access; the exit; and the exit discharge. A means of egress comprises the vertical and horizontal means of travel and shall include intervening room spaces, doors, hallways, corridors, passageways, balconies, ramps, stairs, enclosures, lobbies, horizontal exits, courts and yards." *Id.* (emphasis omitted).

45. See NFPA ONLINE, *Strategies in Building Evacuation Messages* (2001), available at http://www.nfpa.org/BuildingCode/Building_Evacuation/building_evacuation.asp (on file with the author). The National Fire Protection Association posted a message on its website in the wake of the September 11th terrorist attacks defending the current emergency evacuation plans and building code standards. Those standards are based on strategies that are proven to maximize the safe egress and/or protection of people during fires. See also NFPA ONLINE, *NFPA Overview* (2002), at <http://www.nfpa.org/Home/AboutNFPA/NFPAOverview/NFPAOverview.asp> (on file with the author). Founded in 1896, the National Fire Protection Association has over seventy-five thousand members representing nearly 100 nations. It serves as the world's leading advocate of fire prevention and is an authoritative source on public safety.

46. See BOCA, *supra* note 32, § 1007.0.

accessible routes, ramps, exit stairways, elevators, horizontal exits or smoke barriers.”⁴⁷ To meet this requirement buildings must be designed to utilize one or more of the means listed.⁴⁸ “An accessible means of egress is one that complies with these guidelines and does not include stairs, steps, or escalators.”⁴⁹ “Areas of rescue assistance or evacuation elevators may be included as part of accessible means of egress.”⁵⁰

For example, in order to be considered an accessible means of egress, an exit stairway must conform to approved dimensions and either incorporate an area of rescue assistance within an enlarged story-level landing or be accessible from an area of refuge or a horizontal exit.⁵¹ ADAAG defines an area of rescue assistance as “an area, which has direct access to an exit, where people who are unable to use stairs may remain temporarily in safety to await further instructions or assistance during emergency evacuation.”⁵²

Horizontal exits enable people to evacuate the fire danger area by moving to a safe location on the same floor level.⁵³ Depending upon circumstances, horizontal evacuation may be far safer than attempting vertical egress via stairways.⁵⁴ By moving to an area of refuge the mobility impaired person can remain in relative safety for a period of time.⁵⁵ A safe evacuation can occur provided the rescue team reaches the area of refuge before the fire compromises the protective structures. “Defend in place” avoids more losses than would occur if the mobility impaired attempted self-evacuation under existing conditions.⁵⁶ The strategy, however, does not afford the mobility impaired an opportunity at egress equal to that provided the able bodied through ICC fire safety standards.

1. *Emergency Evacuation Technology*

Under some circumstances, emergency evacuation technology offers an alternative to the “defend in place” strategy. Items such as

47. BOCA, *supra* note 32, § 1007.1; *see also* ADAAG, 28 C.F.R. § 3.5 Definitions (1998).

48. *See id.*

49. ADAAG, 28 C.F.R. § 3.5 Definitions (1998).

50. *Id.*

51. *See* BOCA, *supra* note 32, § 1007.2.

52. ADAAG, 28 C.F.R. § 3.5 (1998); *see also* ADAAG, 28 C.F.R. § 4.3.11 (1998).

53. *See* BOCA, *supra* note 32, § 1002.1.

54. *See* NFPA ONLINE, *supra* note 39.

55. *See id.*

56. *See id.*

escape chutes, slidescapes,⁵⁷ and controlled descent devices provide escape routes in some towers and special manufacturing environments.⁵⁸ United States based codes neither permit nor recommend these technologies for commercial and public buildings.⁵⁹ Such devices do not come close to the level of protection provided by the other code-mandated features.⁶⁰ Additionally, the descent devices raise a moral dilemma. Fire stairwells are not designed to accommodate both descent devices and "[t]he necessary egress width for individuals who descend the stairs under their own power."⁶¹ Because the descent devices partially obstruct the stairway, one person could impede the descent of many hundreds.⁶² Consequently, the devices may create more danger than they relieve.

The technology that comes closest to providing effective evacuation of people with disabilities is the emergency evacuation elevator. These elevators utilize standby power and are protected by smoke proof doors and automatic sprinkler systems.⁶³ Emergency evacuation elevators are required in buildings that have a vertical separation of four or more stories between the accessible area and the level of exit discharge.⁶⁴ When other systems are present that reduce the overall risk of fire, however, building owners may elect to forego installation of emergency evacuation elevators. Buildings equipped throughout with automatic sprinkler systems, for example, are exempt from the requirement to have an emergency egress elevator.⁶⁵

Emergency evacuation elevators are, however, problematic from both planning and operational perspectives. Use of elevators by people with disabilities is not practical during emergency events, because "[e]levator use is difficult to control and it is unlikely that able-bodied persons could be kept off an elevator if they thought it would get them to the ground more quickly."⁶⁶ There is simply no mechanism that can preserve elevator use to those who need it most.⁶⁷ Including evacuation elevators in the emergency egress plan is also problematic

57. See BOCA, *supra* note 32, § 1002.1. BOCA defines a slidescape as "[a] straight or spiral chute, erected on the interior or exterior of a building, which is designed as a *means of egress* direct to a street or other *public way*." *Id.*

58. See NFPA ONLINE, *supra* note 39.

59. See *id.*

60. See *id.*

61. *Id.*

62. See *id.*

63. See BOCA, *supra* note 32, § 1007.3.

64. *Id.*

65. *Id.*

66. NFPA ONLINE, *supra* note 39.

67. *Id.*

for firefighters who do not like to use elevators because of their inherent danger.⁶⁸ Elevators are designed to go to a predetermined recall level when a fire occurs.⁶⁹ If there is a malfunction of any type, the elevator may inadvertently travel to the fire floor with potentially deadly results for its occupants.⁷⁰ Consequently, mobility impaired persons are dependent on the "defend in place" strategy.⁷¹

II. INTERPRETING THE AMERICANS WITH DISABILITIES ACT OF 1990

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."⁷² The ADA essentially borrows its definition of "person with a disability" from the Rehabilitation Act of 1973.⁷³ Under the ADA, "[t]he term 'disability' means with respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."⁷⁴ The statute regards people with mobility, sight or hearing impairments as having a disability because the impairments substantially limit the major life activities of walking, seeing and hearing.⁷⁵ The ADA prohibits a "public entity" or "place of public accommodation" from discriminating against an individual with a disability, because of that disability, in access to employment, programs or services.⁷⁶

When enacting the ADA, Congress found that discrimination against people with disabilities takes many forms.⁷⁷ Congress specifically identified "[o]utright intentional exclusion, the discriminatory effects of architectural, transportation and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, . . . and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities" as

68. *See id.*

69. *See id.*

70. *See id.*

71. *See NFPA ONLINE, supra* note 39.

72. 42 U.S.C. § 12101(b)(1) (1990).

73. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

74. 42 U.S.C. § 12102(2) (1990).

75. *See Albertson's Inc., v. Kirkingburg*, 527 U.S. 555, 563 (1999). Supreme Court held that a truck driver suffering from amblyopia was not per se a person with a disability under the ADA but must prove the disability on a case-by-case basis by showing a substantial limitation on a major life activity. *Id.* at 564.

76. *See* 42 U.S.C. §§ 12132, 12182 (1990).

77. *See* 42 U.S.C. § 12101(a)(5) (1990).

discriminatory practices.⁷⁸ Congress also included in the language of the statute its recognition of the pervasive discriminatory effect of overprotective rules and policies that stem from paternalistic attitudes.⁷⁹ "Paternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals."⁸⁰ The ADA defines such paternalistic actions as discriminatory and outlaws them. People with disabilities are concerned, however, that well-meaning people will revert to overprotective measures to achieve enhanced fire safety.⁸¹

Congress intended that the courts construe the ADA to grant at least as much protection as is provided by the Rehabilitation Act of 1973.⁸² The Rehabilitation Act of 1973⁸³ "prohibits a federally funded state program from discriminating against a handicapped individual solely by reason of his or her handicap."⁸⁴ Recent jurisprudence illustrates the consistent application of this Act to actions invoking both it and the ADA.⁸⁵

A. *The ADA Mandates a Strong Bias for Accessibility*

The following cases illustrate that the purpose of the ADA is to provide equal access to existing programs and services.⁸⁶ The ADA does not require the creation of new services or benefits to equalize the effect of those programs or services.⁸⁷ Title II and Title III of the

78. *Id.*

79. *See id.*

80. H.R. REP. NO. 101-485(II), part 2, at 74 (1989), *reprinted in* 1990 U.S.C.C.A.N. 303, 356.

81. *See* Albert R. Hunt, *Those Suffering Special Stress*, WALL ST. J., Oct. 18, 2001, at A27.

82. *See* Bragdon v. Abbott, 524 U.S. 624, 632 (1998); *See also* 42 U.S.C. § 12201(a) (2001).

83. *See* 29 U.S.C. § 794 (2001).

84. *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273, 275 (1987) (holding that a school teacher diagnosed with tuberculosis is an individual with a disability under the Rehabilitation Act of 1973).

85. *See, e.g., Doe v. Pfrommer*, 148 F.3d 73 (2d Cir. 1998) (holding that City of New York's denial of client's requests for extra-program services were not discriminatory under the ADA and the Rehabilitation Act); *Ferguson v. City of Phoenix*, 931 F. Supp. 688 (D.Ariz. 1996), *aff'd*, 157 F.3d 668 (9th Cir. 1998) (holding the city liable under both the Rehabilitation Act of 1973 and the ADA for failing to provide emergency telephone communication system compliant with Department of Justice technical assistance manual); *Shirey ex rel. v. City of Alexandria School Bd.*, 229 F.3d 1143 (4th Cir. 2000) (holding that the plaintiff failed to prove that the school board unlawfully discriminated against a person with a disability, under both the ADA and Rehabilitation Act of 1973, when it did not provide an effective evacuation for a disabled child during an emergency).

86. *See* 28 C.F.R. § 36 (2001).

87. *See* Wright, *infra* note 96.

ADA require public entities⁸⁸ and places of public accommodation,⁸⁹ respectively, to remove barriers to accessibility. This may be achieved through modifications in policies, practices, or procedures unless doing so would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.⁹⁰ Additionally, public accommodations shall utilize auxiliary aids and services,⁹¹ and remove architectural barriers,⁹² if necessary, to ensure that no individual with a disability is excluded or denied services.

The Supreme Court has interpreted the ADA to ban location-based discriminatory action of states as violating the Equal Protection Clause of the Fourteenth Amendment when rational basis for such action does not exist. In *Olmstead v. L.C.*,⁹³ the Supreme Court ruled that unjustified isolation is discrimination. The Court cited Congress' identification of unjustified "segregation" of persons with disabilities as a "for[m] of discrimination"⁹⁴ in reaching its determination.⁹⁵ In doing so, the Supreme Court has proscribed physical segregation of a qualified individual with a disability when such segregation is based on that disability.

Federal courts have consistently interpreted the ADA as prohibiting discrimination in access to services and facilities. The United States Court of Appeals for the Second Circuit, in a series of three cases, distinguished between making reasonable accommodations to assure access to an existing program and providing additional or different substantive benefits. In *Wright v. Guiliani*,⁹⁶ the court affirmed the district court's denial of the plaintiff's request for a preliminary injunction to require the City of New York to provide adequate emergency housing.⁹⁷ The plaintiffs, five HIV positive individuals living in emergency shelters, alleged that the city's failure to provide adequate housing to accommodate their disabilities constituted disability dis-

88. 28 C.F.R. § 35.150 (2001).

89. 42 U.S.C. §§ 12181-12189 (1990).

90. 28 C.F.R. § 36.302(a) (2001).

91. 28 C.F.R. § 36.303 (2001).

92. 28 C.F.R. § 36.304 (2001).

93. 527 U.S. 581, 597 (1999). *Olmstead* concerned two developmentally disabled people who sued the state of Georgia under the ADA. They alleged that Georgia discriminated against them based on their disabilities by denying them community placement in lieu of institutional placement. The Court found that unjustified segregation constituted discrimination under the ADA and held that the patients were qualified for community-based treatment, but that the state could take into account the available resources in determining whether patients were entitled to immediate community placement. *Id.*

94. 42 U.S.C. § 12101(a)(2) (1990).

95. *Olmstead*, 527 U.S. at 600.

96. *See Wright v. Guiliani*, 230 F.3d 543, 548 (2d Cir. 2000).

97. *See id.* at 549.

crimination.⁹⁸ The court held that the ADA and Section 504 of the Rehabilitation Act of 1973 do not require the city to provide benefits in addition to those already afforded by the program.⁹⁹ The court cited the Supreme Court holding in *Alexander v. Choate*,¹⁰⁰ in which the Court rejected the argument that the Rehabilitation Act guarantees the handicapped "equal results" from government initiatives.¹⁰¹ In an earlier interpretation of the Rehabilitation Act, the Supreme Court "[s]truck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs; while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable ones.'"¹⁰²

In *Rodriguez v. City of New York*, the court rejected an ADA challenge based on the city's failure to provide safety-monitoring devices to a subset of individuals with disabilities, reasoning that the ADA requires only that a particular service provided to some not be denied to disabled people.¹⁰³ The ADA does not mandate that states provide services to persons with disabilities that it does not already provide to others.¹⁰⁴ Distinguishing *Olmstead*, the court observed that, "In *Olmstead*, the parties disputed only—and the Court addressed only—*where* Georgia should provide treatment, not *whether* it must provide it . . . *Olmstead* . . . holds only that States must adhere to the ADA's nondiscrimination requirement with regard to the services *they in fact provide*."¹⁰⁵

The Second Circuit introduced this line of reasoning in the 1998 case *Doe v. Pfrommer*.¹⁰⁶ In *Pfrommer*, the court rejected a Rehabilitation Act and ADA challenge to the adequacy of the vocational educa-

98. *See id.*

99. *See id.* at 548. The Second Circuit explained, "that the disabilities statutes do not require that substantively different services be provided to the disabled, no matter how great their need for the services may be. They require only that covered entities make "reasonable accommodations" to enable "meaningful access" to such services as may be provided, whether such services are adequate or not." *Id.*

100. 469 U.S. 287 (1985) (holding Tennessee's proposed reduction in allowable days of hospitalization under the state's Medicaid program did not violate the Rehabilitation Act). *Id.*

101. *See id.* at 304.

102. *Wright*, 230 F.3d at 547-48, *citing Alexander*, 469 U.S. at 300, (*citing Community College v. Davis*, 442 U.S. 367, 412-13 (1979)).

103. *See* 197 F.3d 611, 618 (2d Cir. 1999).

104. *See id.*

105. *Id.* at 619. (internal quotations omitted).

106. 148 F.3d 73 (2d Cir. 1998).

tion benefits provided to the plaintiff by the City of New York.¹⁰⁷ The plaintiff alleged that the city did not make reasonable accommodations for his mental illness because it failed to provide additional services not then included as program benefits.¹⁰⁸ In concluding that the plaintiff was challenging the adequacy of his benefits, not illegal disability discrimination, the Second Circuit explained that “[i]t is important to bear in mind that the purposes of the [ADA and Rehabilitation Act] are to eliminate discrimination on the basis of disability and to ensure evenhanded treatment between the disabled and the able bodied.”¹⁰⁹ *Wright, Rodriguez and Pfrommer* illustrate the theory that even when states provide services and programs equally to people with disabilities, a disparate impact may result, and that disparate impact is permissible.

Not all jurists agree that disparate impact is permissible even where no disparate treatment is intended. In his dissent in *Tyler v. City of Manhattan*, Judge Jenkins of the United States Court of Appeals for the Tenth Circuit distinguished disparate treatment from disparate effect.¹¹⁰

Disparate treatment occurs when a defendant treats some people less favorably than others because of an impermissible criterion, such as [disability] – conduct from which one may infer an intent to discriminate. *Disparate impact* occurs when a facially neutral practice adversely affects members of a protected group more than others regardless of whether such adverse impact was actually intended.¹¹¹

Title II of the ADA creates for state and local governments an affirmative duty to act to remove barriers and take other steps to achieve accessibility.¹¹² Judge Jenkins noted that “[C]ongress recognized that discrimination against the disabled is often the product of indifference rather than animosity.”¹¹³ He concluded that, “[e]ffect, and not motivation, should be the touchstone of an ADA claim.”¹¹⁴

107. *Id.*

108. *Id.* at 81.

109. *Id.* at 82.

110. 118 F.3d 1400, 1405 (10th Cir. 1997) (affirming the district court's ruling that compensatory damages for mental and emotional injury are not available to plaintiffs under Title II of the ADA absent intentional discrimination. The plaintiff did not plead intentional discrimination). *Id.* at 1400.

111. *Id.* at 1405.

112. *See id.* at 1407.

113. *Id.*

114. *Id.* at 1408 (quotations omitted).

In *Layton v. Elder*, the United States Court of Appeals for the Eighth Circuit held that the Montgomery County, Arkansas courthouse had violated Title II of the ADA.¹¹⁵ In *Layton*, the district court had found that even though one of the two plaintiffs had in fact been denied access to the county courthouse due to the inaccessibility of the second floor courtroom, that the county had made dutiful progress to remedy the asserted violations.¹¹⁶ The Eighth Circuit reversed the district court's ruling.¹¹⁷ In so doing, the court declared that the "threat of irreparable harm" to the plaintiff and the strong "public interest" favoring accessibility heavily outweighed the harm to the county of having to make its services accessible.¹¹⁸ This case provides a clear example of the imperative for accessibility.

B. ADA Counterbalances to the Accessibility Requirement

The ADA includes several doctrines that serve as counterbalances to the argument for accessibility. "Reasonable accommodation" and "undue hardship" under Title I are good examples of such counterbalances.

Title I of the ADA prohibits discrimination against people with disabilities who are otherwise qualified for employment.¹¹⁹ Employers with fifteen or more employees may not discriminate against qualified individuals with disabilities.¹²⁰ A qualified individual with a disability is an individual who, "[w]ith or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires."¹²¹ Under the ADA employers must reasonably accommodate the disabilities of qualified applicants or employees, including modifying workstations and equipment, unless undue hardship would result.¹²²

115. 143 F.3d 469, 472-73 (1998). "Appellants sought declaratory and injunctive relief" for alleged violations of the ADA and Rehabilitation Act. At issue was the county courthouse. The second floor courtroom was not accessible, preventing appellants from participating in programs held therein. *Id.* at 470.

116. *Id.* at 471.

117. *Id.* at 472-73.

118. *Id.* at 472. The Eighth Circuit explained, "Once a party has demonstrated actual success on the merits, the court must balance three factors to determine whether relief is appropriate: (1) the threat of irreparable harm to the movant; (2) the harm to be suffered by the nonmoving party if the injunction is granted; and (3) the public interest at stake." *Id.*

119. See 42 U.S.C. § 12112 (1990).

120. See 29 C.F.R. § 1630.4 (2002); 29 C.F.R. § 1630.2 (2001).

121. 42 U.S.C. § 12111 (8) (1990).

122. See 29 C.F.R. §§ 1630.2 (o), 1630.9 (2002).

The Equal Employment Opportunity Commission (EEOC) creates implementing regulations and enforces Title I.¹²³ The EEOC defines undue hardship “[w]ith respect to the provision of an accommodation” as “significant difficulty or expense incurred by a covered entity. . . .”¹²⁴ Several factors may be used to determine whether a proposed accommodation is an undue hardship, including the expense of the accommodation and the relative ability of the organization to absorb that expense.¹²⁵

In the context of fire safety, ADAAG and ICC require that public and commercial buildings incorporate design and construction standards facilitating “defend in place” protections.¹²⁶ Because all new construction must conform to ADAAG and ICC requirements for fire safety and evacuation, compliance imposes no additional financial burdens on employers. Consequently, the undue hardship defense is relatively unavailable to employers in the context of fire safety and evacuation accommodation.

Title II and Title III include factors that modify an organization’s requirement to offer accessibility to its programs and services. The Attorney General enforces Title III,¹²⁷ so accordingly, the Department of Justice (DOJ) creates implementing regulations.¹²⁸ Title III requires “[m]odificatio[n] of policies, practices or procedures” if “readily achievable” and “necessary to afford the public accommodation’s good[s]” and services to individuals with disabilities.¹²⁹ Modifications that would “fundamentally alter” the nature of the programs or services, however, are not required.¹³⁰ Barrier removal is required where it is “readily achievable;”¹³¹ that is, “[e]asily accomplishable and able to be carried out without much difficulty or expense.”¹³² Alterations to existing facilities to accommodate people with disabilities are to be made to the “maximum extent feasible.”¹³³ In light of the strong bias towards accessibility, the DOJ has interpreted “maximum extent feasible” to apply to “the occasional case where the nature of an existing facility makes it virtually impossible to comply fully. . . .”¹³⁴

123. See 42 U.S.C. §§ 12116, 12117 (1990).

124. See 29 C.F.R. § 1630.2 (p) (2001).

125. See 29 C.F.R. § 1630.2 (p), (i), (v) (2001).

126. See NFPA ONLINE, *supra* note 39.

127. 42 U.S.C. § 12188 (1990).

128. 42 U.S.C. § 12186 (1990).

129. 28 C.F.R. § 36.302(a) (2001).

130. *Id.*

131. 28 C.F.R. § 36.304(a) (2001).

132. *Id.*

133. 28 C.F.R. § 36.402(a) (2001).

134. 28 C.F.R. § 36.402(c) (2001).

C. Safety is a Motivating Factor for ADA Compliance and Enforcement

The safety of disabled people has been a powerful argument for compliance with the ADA. In *Campos v. San Francisco State University*,¹³⁵ the court found a cause of action under the ADA and the Rehabilitation Act when disabled students alleged that the university provided facilities to the disabled students that were less safe than those provided to other students.¹³⁶ Citing *Students of California School for the Blind v. Honig*,¹³⁷ the court held that the state is required to make the school as safe for its students with disabilities as other California schools are for their non-handicapped students.¹³⁸ In *Morgan v. State of Idaho Department of Public Works*, the Supreme Court of Idaho held that the state was liable for injuries sustained by a blind man who fell off a loading dock after exiting an elevator through doors that were not marked with appropriate ANSI tactile signage.¹³⁹

Potential safety concerns also prompt judicial enforcement of the ADA. In *Ferguson v. City of Phoenix*,¹⁴⁰ the United States District Court for the District of Arizona ruled that the city violated the ADA and the Rehabilitation Act when it installed TDD telephones in its 911 system that did not comply with the requirements set forth in regulations promulgated by the DOJ.¹⁴¹ The court found that "[t]he overriding concern of the" DOJ's regulations as they related "[t]o this case is that a public entity's communication with a hearing impaired person be 'as effective as [its] communication with others.'"¹⁴²

D. The ADA Does Not Mandate Equal Access to Emergency Evacuation

Neither the ADA nor its implementing regulations specifically address the right of people with disabilities to safe evacuation during

135. *Campos v. San Francisco State Univ.*, No. C-97-2326 MMC, 1999 WL 1201809 (N.D.Cal. June 26, 1999).

136. *Id.* at *1. The plaintiffs "[a]lleged that SFSU maintains physical barriers to students and faculty that use wheelchairs and/or who have mobility impairments and that these physical barriers deny such students and faculty safe and equal access to programs, facilities, services, and activities" in violation of Title II of the ADA. *Id.*

137. 736 F.2d 538 (9th Cir. 1984).

138. *Id.* at 547.

139. 124 Idaho 658 (Idaho 1993).

140. 931 F. Supp. 688 (D.Ariz. 1996), *aff'd*, 157 F.3d 668 (9th Cir. 1998).

141. *See Ferguson*, 931 F. Supp. at 694 (holding that the city failed to provide "direct access" to 911 emergency services for individuals who use TDD. *Id.* "Direct access" means that emergency telephone services can directly receive calls from TDD's and computer modem users without relying on outside relay services or third party services." *Id.* at 694, n.1; *see also* 28 C.F.R. §§ 35.161-162 (2002).

142. *Ferguson*, 931 F. Supp. at 694; 28 C.F.R. § 35.160 (2002).

emergencies.¹⁴³ Although the ADA prohibits discrimination against people with disabilities in access to programs and services, it does not require the delivery of programs and services that are identical to those provided the able bodied.¹⁴⁴ A public accommodation must modify its programs or services to enable their provision to people with disabilities.¹⁴⁵ Yet, when life and death are at stake even minor differences in programs can have catastrophic consequences to the recipients. Does the ADA require equality of access to an emergency evacuation plan or an equally effective evacuation?

In *Shirey ex rel. Kyger v. City of Alexandria School Board*, the United States Court of Appeals for the Fourth Circuit affirmed a district court ruling denying injunctive relief and compensatory and punitive damages to the plaintiffs after finding that the school board had developed a reasonable evacuation plan for disabled children.¹⁴⁶ In this case, a bomb threat forced the evacuation of the middle school where the plaintiff was a student.¹⁴⁷ The plaintiff, a severely mobility-impaired child, was left in the evacuated building for seventy minutes.¹⁴⁸ Following that incident the school developed an emergency evacuation plan incorporating a "safe area" in the library.¹⁴⁹ During an unscheduled fire drill the plaintiff was again left alone for a brief period of time.¹⁵⁰

The plaintiff and her parents sued under the ADA and the Rehabilitation Act, contending that the plan did not provide adequate evacuation procedures and, consequently, illegally discriminated against disabled students.¹⁵¹ The court narrowed the scope of inquiry to "[w]hether the School Board's actions have denied . . . disabled students access to the program in question—namely, safe evacuation from school buildings during an emergency."¹⁵² The plaintiffs had to prove that they were "[e]xcluded from safe evacuation procedures during an emergency."¹⁵³ The court concluded that the school had provided the plaintiff access to an evacuation plan comparable to the

143. See 42 U.S.C. § 12101 (2001).

144. See 28 C.F.R. § 36.302 (2001).

145. See *id.*

146. *Shirey ex rel. Kyger v. City of Alexandria School Bd.*, 229 F.3d 1143, *6 (Table), No. 99-1127, WL 1198054 (4th Cir. Aug. 23, 2000).

147. See *id.* at *1.

148. See *id.*

149. See *id.*

150. See *id.* at *2.

151. See *id.*

152. *Shirey ex rel. Kyger v. City of Alexandria School Bd.*, 229 F.3d 1143, *5 (Table), No. 99-1127, WL 1198054 (4th Cir. Aug. 23, 2000).

153. *Id.*

program offered its non-disabled students and, consequently, did not discriminate.¹⁵⁴

In so holding, the court equated actual evacuation with evacuation procedures. Thus, the court moved from requiring safe evacuation to access to safe evacuation procedures. Consequently, the Fourth Circuit has interpreted the ADA and Rehabilitation Acts as not requiring that disabled persons have equal access to actual safe evacuation during emergencies.

E. The Effect of Paternalism; Good Intentions Gone Wrong

When drafting the ADA, Congress recognized the pervasive and invidious nature of paternalistic views of disabled people and the discriminating effect of actions resulting there from.¹⁵⁵ "Paternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals."¹⁵⁶ The legislative history of the ADA is replete with testimony decrying the discriminatory effects of paternalistic actions taken by state and local governments, public accommodations and employers.¹⁵⁷ Many discriminatory laws and practices have at their base a rationale protective of people who are presumed by society to need greater protection than the norm.¹⁵⁸ This paternalism results in pervasive discrimination.¹⁵⁹

Before the ADA was enacted the Supreme Court referenced Congress' concern about the discriminatory impact of paternalism. In *School Board of Nassau County, Fla. v. Arline*, the Supreme Court explained that what prompted the amended definition of "handicapped individual" in Section 504 of the Rehabilitation Act was Congress' recognition that significant discrimination against the handicapped stemmed from "archaic attitudes and laws," and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps."¹⁶⁰ The awful

154. *See id.*

155. H.R. REP. NO. 101-485(II), part 2, at 74 (1989), *reprinted in* 1990 U.S.C.C.A.N. 303, 356.

156. *Id.*

157. *See* S. REP. NO. 101-116, at 6, 8-9, 15-16 (1989).

158. S. REP. NO. 101-116, at 7 (1989). "Discrimination also includes . . . patronizing attitudes, ignorance, irrational fears, and pernicious mythologies." *Id.* "These injustices coexist with an atmosphere of charity and concern for disabled people." *Id.* at 15.

159. H.R. REP. NO. 101-485(II), pt. III, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356.

160. 480 U.S. 273, 279 (1987).

truth of this contention is evident in the myriad paternalistic laws and regulations currently in force.

Despite relatively recent recognition of the deleterious effects of paternalism, many discriminatory laws are still on the books.¹⁶¹ Commonly, zoning ordinances reflect the good intentions, "[p]atronizing attitudes, ignorance, irrational fears, and pernicious mythologies" that often result in discrimination against people with disabilities.¹⁶²

Three cases illustrate the pernicious effects of paternalism on people with disabilities. In *Marbrunak, Inc. v. City of Stow, Ohio*, the United States Court of Appeals for the Sixth Circuit struck down extensive zoning laws designed to protect developmentally impaired people residing in single-family homes.¹⁶³ The court found that "[t]he City's 'blanket' fire and safety restrictions applied to all homes wherein developmentally disabled persons live, regardless of the individual abilities of the residents, are based on false [and] overprotective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose."¹⁶⁴

In *Potomac Group Home Corporation v. Montgomery County, Md.*, the United States District Court for the District of Maryland observed that, "[w]hile state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities."¹⁶⁵

161. See, e.g., *Buckhannon v. West Virginia Dep't of Health and Human Servs.*, 19 F. Supp. 2d 567 (N.D.W.Va. 1998); *Potomac Group Home Corp. v. Montgomery County, Md.*, 823 F. Supp. 1285, 1294 (D.Md. 1993).

162. See S. REP. NO. 101-116, at 7 (1989).

163. See 974 F.2d 43 (6th Cir. 1992). The case concerned a challenge to the city's zoning ordinance imposing special safety requirements for a home housing four mentally retarded adult women. The ordinance required the installation of a whole-house sprinkler system with alarms, fire retardant wall and floor coverings, lighted exit signs above all doorways, push bars on all doors, fire extinguishers every thirty feet, and smoke alarms even though each of the four women is fully ambulatory, able to hear, and is sighted. They will live with a house parent hired by their parents. *Id.* at 45, n.1.

164. *Id.* at 47. The court instructed the city that "[I]t may impose standards which are different from those to which it subjects the general population, so long as that protection is demonstrated to be warranted by the unique and specific needs and abilities of those handicapped persons." *Id.* Consequently, the court interpreted the FHAA to allow housing ordinances intended to protect developmentally disabled people so long as individual assessments are conducted and the requirements are tailored to the specific needs of the individual in question. *Id.*

165. 823 F. Supp. 1285, 1294 (D.Md. 1993). The court granted the plaintiff's motion for summary judgment on the grounds that the county's "exceptional person" rule, requiring individuals residing in a group home to be able to exit from the home on their own in the event of a fire or other emergency, was overbroad and not tailored to the specific

In *Buckhannon v. West Virginia Department of Health and Human Services*, the United States District Court for Northern District of West Virginia held state statutes and regulations requiring residential based care home (RBCH) residents to possess the ability to remove themselves, termed "self-preservation," from situations of imminent danger violated the ADA and the FHAA.¹⁶⁶ The court found that, "statutes that single out for regulation group homes for the handicapped are facially discriminatory."¹⁶⁷

In *Marbrunak, Potomac Group Home Corporation*, and *Buckhannon* disabled individuals had to overcome discriminatory laws in order to reside in their community. Whether the ordinances required onerous fire safety systems or the demonstrated ability to "self-preserve," "exceptional people" were effectively barred from equal access to community living. These cases illustrate the truth of one of Congress' findings when enacting the ADA. Senator Kennedy, reporting for the Senate Committee on Labor and Human Resources, provided, "The discriminatory nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of good intentions."¹⁶⁸ Discrimination against the disabled is embedded in the bedrock of our laws; mortared in with the good intentions of a caring but misinformed society.

Years of struggling against paternalistic attitudes and actions condition the disabled to be typically "fiercely independent."¹⁶⁹ "People with disabilities . . . do not wish to alter their lives from those of the

health and safety needs of individuals. *See id.* at 1300. Consequently, the court held that the rule violated the FHAA. *See id.* at 1301.

166. 19 F. Supp. 2d 567 (N.D.W.Va. 1998), *aff'd on other grounds*, 203 F.3d 819 (4th Cir. 2000), *cert. dismissed in part*, 531 U.S. 1004 (2000), *aff'd*, 532 U.S. 598 (2001). The court denied the defendants' motion for summary judgment and motion to dismiss, finding that the plaintiffs had stated a claim under both the FHAA and the ADA. *See* 19 F. Supp. 2d 567. The plaintiffs argued that the statute was facially discriminatory under both acts because it subjects a protected group, handicapped people, to "explicitly differential" treatment. *See id.* at 571. The court reasoned that the regulation is not facially neutral because it is not generally applicable. *See id.* The defendants argued that the "self-preservation" regulations are rationally related to the legitimate state interest of ensuring the safety of other RBCH residents, staff, and firefighters. *See id.* at 572. The court found this argument inapposite to the motion to dismiss. *See id.* The West Virginia legislature subsequently eliminated the "self-preservation" requirement in the statute.

167. *Id.* at 571 (citing *Larkin v. Michigan Dep't of Social Servs.*, 89 F.3d 289, 290 (6th Cir. 1996)).

168. S. REP. NO. 101-116, at 15 (1989) (quotations omitted).

169. *See* United States Fire Administration, *Fire Stops With You. Removing the Barriers: A Fire Safety Factsheet for People with Disabilities and their Caregivers* (2001), at <http://www.usfa.fema.gov/safety/fswy22.htm> (on file with the author).

general public.”¹⁷⁰ There is a danger in this mindset, however, for it “[c]an mislead them to ignore their special safety needs.”¹⁷¹ It is indeed perplexing that the misplaced good intentions that engender overprotective, paternalistic actions, may result in an outcome diametrically opposite of that intended – a mindset, prevalent in the most risk vulnerable members of society, that causes them ignore risks in order to maintain a sense of equality.

III. THE “DIRECT THREAT” DOCTRINE

The “direct threat” doctrine, as it has been incorporated into the ADA, is likely to have a substantial impact on the disabled community in the context of emergency egress. Essentially, the direct threat doctrine provides a defense under Title I to a claim of employment discrimination when an employer believes that employment of an otherwise qualified “[i]ndividual with a disability poses a direct threat to the health or safety of others.”¹⁷² Under Title III, a place of public accommodation may deny access to an individual with a disability based on the belief that the “[i]ndividual poses a direct threat to the health or safety of other[s]” by virtue of his disability.¹⁷³

In February 2002, the United States Supreme Court heard arguments in *Chevron USA, Inc. v. Echazabal* in order to resolve a split among the circuits. The issue in *Echazabal* is whether the direct threat defense may be asserted in an employment discrimination dispute where the direct threat is to the future health of the person with a disability.¹⁷⁴ A finding by the *Echazabal* Court that an employer may deny employment to an individual with a disability based on the belief that such employment may pose a direct threat to that individual’s health or safety could result in employment denials over concerns about emergency evacuation of the individual with a disability. A review of the evolution of the direct threat doctrine is warranted here given the impact that the *Echazabal* ruling may ultimately have on access to employment and places of public accommodation where emergency evacuation of people with disabilities is problematic.

170. *Id.*

171. *See id.*

172. *See* 42 U.S.C. § 12113 (1990).

173. *See* 42 U.S.C. § 12182(b)(3) (1990); *see also* 28 C.F.R. § 36.208(a) (2001).

174. *See Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1066 (9th Cir. 2000), *cert. granted*, 122 S. Ct. 456, 151 L. Ed. 2d 375 (Oct. 29, 2001).

A. *Origin of the "Direct Threat" Doctrine*

The direct threat doctrine had its genesis in cases involving challenges under the Civil Rights Act of 1964.¹⁷⁵ In *Dothard v. Rawlinson*,¹⁷⁶ the Supreme Court established the principle that an individual's right to be free from discrimination in employment based on sex may not be absolute.¹⁷⁷ In cases where sex is a bona fide occupational qualification (BFOQ), a member of the non-favored sex may be denied employment. However, when the bona fide occupational qualification is predicated on concerns of safety, the exclusion of one sex must not be based on concerns about the safety of the individual but rather on whether those concerns over safety are "reasonably necessary to the normal operation of that particular business or enterprise."¹⁷⁸

The Supreme Court in *UAW, et al., v. Johnson Controls, Inc.*, further addressed discrimination in employment based on concerns about the health and safety of third parties.¹⁷⁹ In *Johnson Controls*, the Court in-

175. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *UAW et al., v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

176. 433 U.S. 321 (1977). Rawlinson applied for a job with the Alabama Board of Corrections as a correctional counselor at an all male maximum-security prison. See *id.* at 323. After her application was rejected she brought suit under Title VII of the Civil Rights Act of 1964 alleging that she had been denied employment because of her sex in violation of federal law. See *id.* The Supreme Court held that in the particular circumstances of the case, sex is a bona fide occupational qualification and that exclusion of women from the employment position in question is reasonably necessary to the normal operation of the prison. See *id.* at 336-37. The court explained that the particularly dangerous environment of Alabama's male maximum-security prisons was a determining factor in finding that sex was a BFOQ. See *id.* The Court noted that, at that time Alabama's maximum-security prisons were structured in a dormitory style and that sex offenders were interspersed with the general prison population. See *id.* The prisons, characterized as having "rampant violence" and a "jungle atmosphere," were considered "constitutionally intolerable." See *id.* at 334.

177. See *id.* at 335. The Court noted that danger to a woman herself does not justify discrimination. *Id.* However, "the essence of a correctional counselor's job is to maintain prison security." *Id.* The presence of a woman in a prison as operated at that time by Alabama, would pose a real threat not only to the woman but also to the basic control of the penitentiary and the protection of its inmates and other security personnel. *Id.* at 336. The Court noted the tension between safety concerns and the individual's freedom to decide whether to accept risk. See *id.* at 335. "In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." *Id.*

178. See *id.* at 333. While the Court disposed of state hiring criteria purporting to measure strength through the proxies of height and weight requirements, it nonetheless upheld Regulation 204 mandating male correctional counselors in contact positions within maximum security prisons. See *id.*

179. 499 U.S. 187 (1991). The Supreme Court invalidated Johnson Controls' policy excluding fertile women from jobs with lead exposure. See *id.* The employment in question involved the manufacturing of batteries. See *id.* After the company experienced above normal lead blood level tests of pregnant women in battery manufacturing positions it insti-

validated an employer's fetal-protection policy that excluded fertile female employees from certain jobs because of concern for the health of the fetus the woman might conceive.¹⁸⁰

The *Johnson Controls* Court reiterated two important principles: paternalistic rulemaking intended to protect a suspect class of employees is inappropriate when not narrowly focused to support the central mission of the business; and employees have the right to decide whether or not to accept the personal risk inherent in a job. Therefore, a direct threat to the health or safety of a third party posed by the distinguishing factor (e.g., sex, pregnancy, disability) may be a valid justification for discrimination when the third party is indispensable to achievement of the business' mission. The *Johnson Controls* Court noted for example, that a justifiable reason for denying employ-

tuted a ban on their employment in those positions. *See id.* The union challenged the policy under Title VII of the Civil Rights Act of 1964. *See id.* The United States District Court for the Eastern District of Wisconsin applied a business necessity defense, obviating the need for a bona fide occupational qualification analysis, and granted summary judgment to Johnson Controls. *See id.* The Court of Appeals for the Seventh Circuit, sitting en banc, affirmed the decision and the reasoning of the district court. *See id.*

180. *See id.* The Court noted that despite scientific evidence that exposure to high concentrations of lead was debilitating to men as well as women, Johnson Controls' policy offered men a choice as to whether to risk their reproductive health that was not extended to women. *See id.* at 197. Women were excluded from lead-exposed jobs unless they provided proof of their incapacity of reproduction. *See id.* at 197-98. The Court found that the policy created a facial classification based on gender, and that it was facially discriminatory under Section 703(a) of the Civil Rights Act of 1964. *See id.* "Section 703(a) of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. § 2000e-2(a), prohibits sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status." *Id.* at 197. "An explicit gender-based policy is sex discrimination under Section 703(a) and . . . may be defended only as a BFOQ." *Id.* at 200.

The Court explained that in order for a policy of sex-based discrimination to be permissible it must qualify as a BFOQ reasonably necessary to the normal operation of that particular business or enterprise. *See id.* citing 42 U.S.C. § 2000e-2(e)(1). The Supreme Court has interpreted the BFOQ defense narrowly. *See id.* at 201. Writing for the Court, Justice Blackmun explained that use of the term "occupational qualification" narrowed the meaning of the BFOQ defense to qualifications that affect an employee's ability to do the job. *See id.* "[I]n order to qualify as a BFOQ, a job qualification must relate to the 'essence,' or to the 'central mission of the employer's business.'" *Id.* at 203 (citing *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977); *Western Air Lines, Inc., v. Criswell*, 472 U.S. 400, 413 (1985)). The unconceived fetuses of Johnson Controls' female employees, the Court noted however, are neither customers nor third parties whose safety is essential to the business. *Johnson Controls*, 499 U.S. at 203. Justice Blackmun concluded that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to do the job. *See id.* at 204. "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." *Id.* And importantly, "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents." *Id.* at 206.

ment to a pregnant flight attendant is her inability, by virtue of her pregnant condition, to adequately conduct an emergency evacuation of an airliner.¹⁸¹ The concern in that instance is for the safety of the passengers, third parties who are indispensable to the air transportation business.¹⁸² Courts addressing this issue have "pointedly indicated that [decisions about] fetal, as opposed to passenger, safety [were] best left to the mother."¹⁸³

B. "Direct Threat" Under the ADA

Congress included the direct threat language in the ADA to codify the United States Supreme Court's ruling in *School Board of Nassau County, Fla. v. Arline*.¹⁸⁴ In *Arline*,¹⁸⁵ the Supreme Court recognized a need to balance the interests of people with disabilities against legitimate concerns for public safety.¹⁸⁶ In the wake of *Arline*, Congress amended the Rehabilitation Act and the Fair Housing Act to incorporate language excluding individuals who would constitute a direct threat to the health and safety of other individuals.¹⁸⁷ The legislative history of the ADA reflects Congress' awareness of the relationship between paternalism and discrimination against people with disabili-

181. *See id.* at 202-03.

182. *See id.*

183. *Johnson Controls*, 499 U.S. at 202.

184. *Anderson v. Little League Baseball, Inc.*, 794 F.Supp. 342, 345 (D.Ariz. 1992).

185. *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987). The issue in *Arline* was whether a person afflicted with tuberculosis, a contagious disease, may be considered a "handicapped individual" within the meaning of § 504 of the Rehabilitation Act of 1973, and, if so, whether such an individual is "otherwise qualified" to teach elementary school. *See id.* at 275. The Court found that Arline had been dismissed from employment not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed. *See id.* at 281. Recognizing that few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness, the Court nevertheless held that the fact that a person with a record of physical impairment is also contagious does not suffice to remove that person from coverage under § 504. *Id.* at 285-86. The Court remanded the case to the district court to conduct an individualized inquiry as to whether Arline was otherwise qualified for the job of elementary school teacher. *Id.* That inquiry, the Court observed, must include an examination of whether a reasonable accommodation will eliminate the risk of infection of others. *Id.* at 288, n. 16.

186. *Anderson*, 794 F. Supp. at 345. The Court explained that although the contagious aspect of Arline's tuberculosis and her physical impairment each resulted from the same underlying condition, tuberculosis, an employer should not seize upon the distinction between the effects of the disease on others and the effects of the disease on a patient, and use that distinction to justify discriminatory treatment. *See Arline*, 480 U.S. at 282. Further, the employer may not discriminate against a handicapped person on the generalized basis that the handicapping condition poses a significant health or safety risk to others. *See id.* at 287. An individual assessment must be conducted. *Id.*

187. *See Bragdon v. Abbott*, 524 U.S. 624, 649 (1998).

ties. Addressing the issue directly, Senator Kennedy, a co-sponsor of the ADA stated:

The ADA provides that a valid qualification standard is that a person not pose a direct threat to the health or safety of other individuals in the workplace—that is, to other coworkers or customers. . . . It is important, however, that *the ADA specifically refers to health or safety threats to others*. Under the ADA, employers may not deny a person an employment opportunity based on *paternalistic concerns* regarding the person's health. . . . That is a concern that should rightfully be dealt with by the individual. . . .¹⁸⁸

Following passage of the ADA, several cases arose concerning discrimination resulting from application of its "direct threat" doctrine.¹⁸⁹ These cases address the application of the direct threat doctrine when the threat is to the health or safety of others. Because they demonstrate the principles upon which application of the direct threat doctrine relies, these cases illustrate the conditions under which the "direct threat" doctrine may justify discrimination against individuals with a disability when emergency evacuation is the issue.

1. *Whether dispersed wheelchair seating in theaters creates a "direct threat?"*

In order to discriminate against an individual with a disability on the basis that such individual poses a direct threat to the health or safety of others, the determination that the disabled person poses a direct threat must be made on an individualized basis,¹⁹⁰ the risk to

188. 136 CONG. REC. S9684-03, at S9697 (1990) (emphasis added).

189. See, e.g., *Bombrys v. City of Toledo*, 849 F. Supp. 1210 (D.N.D.OH 1993); *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995); *Bragdon*, 524 U.S. 624.

190. See *Bombrys*, 849 F. Supp. at 1210. The District Court held that the City of Toledo's blanket disqualification of persons with insulin-dependent diabetes from employment as police officers violates the Rehabilitation Act, Title I of the ADA, and the Fourteenth Amendment of the United States Constitution. See *id.* at 1221. Citing 28 C.F.R. § 36.208(c), the court found that an employer must determine whether a disabled person poses a direct threat to the health and safety of others on an individualized basis. *Id.* at 1216.

others must be significant,¹⁹¹ and the determination of significant risk must be based on objective information.¹⁹²

The courts have not ruled directly on the issue of whether the direct threat doctrine can be used as the basis to discriminate against an individual with a disability where emergency evacuation from a public accommodation is the concern. In *Fiedler v. American Multi-Cinema, Inc.*, however, the United States District Court for the District of Columbia held that the issue of whether dispersed wheelchair seating in a theater creates a "direct threat" to the safety of others in the event of an emergency evacuation is a triable issue of fact.¹⁹³

Fiedler claimed that the movie theater's decision to locate its entire wheelchair seating in the rear of the theater violates the ADA.¹⁹⁴ By relegating him to inferior seating at the back of the theater, Fiedler alleged that the theater deprived him of full and equal enjoyment of the facilities to which he is entitled under the ADA.¹⁹⁵ He cited ADAAG¹⁹⁶ regulations requiring a public accommodation to provide dispersed seating in assembly areas in support of his claim.¹⁹⁷ Fiedler testified that he possesses the strength to roll his wheelchair up the aisle of the theater and, that when he attends theaters with steeply

191. See *Univ. of Maryland Medical System Corp.*, 50 F.3d at 1261. The court ruled that an HIV positive neurosurgery resident posed a significant risk to patients that could not be eliminated by reasonable accommodation and, thus he was not an otherwise qualified individual with a disability who could be afforded protection under the ADA. See *id.* Further, the court found that the university had conducted an individualized assessment of the potential threat to others and the available means of mitigating that risk. See *id.* at 1266. In a *de novo* review, the court determined that, because of the dire nature of the risk (HIV is a fatal disease) and the inability to completely eliminate it by means of reasonable accommodation, the university's action to curtail the surgery privileges of the plaintiff was justified. *Id.*

192. See *Bragdon*, 524 U.S. at 624. The Court explained that the direct threat provision of the ADA applies to significant risk to others as can be determined from objective information and that risk assessments based on individual beliefs not supported by valid, objective information are unacceptable. See *id.* The case concerned an HIV positive patient who brought an action under the ADA against a dentist who refused to treat her in his office. See *id.* The Court noted that, "[b]ecause few, if any, activities in life are risk free, . . . the ADA do[es] not ask whether a risk exists, but whether it is significant." *Id.* at 649. The Court explained that the existence or nonexistence of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on objective, scientific information. See *id.* The Court then questioned the validity of the information presented in support of the petitioner's position and explained that the views of public health authorities are of special weight and authority before remanding the case to the United States Court of Appeals for the First Circuit for further consideration of the risks of infection. See *id.*

193. 871 F. Supp. 35, 40 (D.D.C. 1994).

194. See *id.* at 36.

195. See *id.*

196. See 28 C.F.R. § 36.308(a)(1); see also ADAAG, 28 C.F.R. Pt. 36, App. A at 4.33.3.

197. See *Fiedler*, 871 F. Supp. at 38.

sloped aisles he is accompanied by a companion who is willing and able to assist him in the event of an emergency.¹⁹⁸ The theater operator argued that dispersed wheelchair seating posed a direct threat to others during an emergency evacuation because the only wheelchair accessible evacuation doors were at the rear of the theater, necessitating wheelchair users to move up the aisles against the flow of crowd traffic heading for nearer exits in the opposite direction.¹⁹⁹

The *Fiedler* court distinguished *Bombrys v. Toledo* and *Anderson v. Little League Baseball, Inc.*²⁰⁰ Unlike those cases, which dealt with policies, practices, or procedures, *Fiedler* was concerned with the "structural amenities" of the theater.²⁰¹ The court observed that once structural modifications have been made to provide reasonable accommodation to *Fiedler*, those same accommodations would be available to other people with disabilities regardless of their specific capabilities. Consequently, the court explained, reasonable accommodations addressing *Fiedler's* claim would make seating accessible to other disabled people who might pose a "direct threat" to the health or safety of others.²⁰² Therefore, the court concluded, the individualized assessment required for *Fiedler* must be expanded to take evidence to determine if other wheelchair users who may not be as physically capable or as prudent as *Fiedler*, will pose a "direct threat" to the health or safety of others in the event of an emergency and, whether the theater "can readily achieve an accommodation that might ameliorate the dangers so posed."²⁰³

With this decision the district court revised the rule mandating an "individualized risk assessment" to require that the assessment encompass other likely beneficiaries of a structural accommodation when determining if the accommodation eliminates the direct threat to the health or safety of others.

198. *See id.* at 39.

199. *See Fiedler v. American Multi-Cinema, Inc.*, 871 F. Supp. 35, 39-40 (D.D.C. 1994).

200. *See Fiedler*, 871 F. Supp. at 40; *See also Bombrys*, *supra* note 189; *see also Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342 (D.Ariz. 1992). The court held that the ADA demands an individualized assessment of whether a direct threat to the health or safety of others exists. *See Anderson*, 794 F. Supp. at 345. The plaintiff was a mobility-impaired person who had successfully coached from his wheelchair for three seasons without incident. *See id.* He challenged a policy that banned wheelchair bound people from coaching from the coaches' boxes. *See id.* at 344. The defendant was enjoined from implementing the policy. *See id.* at 346.

201. *See Fiedler*, 871 F. Supp. at 40.

202. *See id.*

203. *Id.*

2. *"Direct Threat" to the Health or Safety of the Individual with a Disability*

The ADA does not mandate equal access in employment²⁰⁴ or in the provision of programs and services²⁰⁵ to persons who pose a "direct threat" to the health or safety of others. Under the ADA, a "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.²⁰⁶

In only a few cases have the courts addressed whether the ADA "direct threat" doctrine applies to threats to the health or safety of the disabled person. This issue has arisen most commonly in the context in which an employer discharges an employee or refuses employment to an applicant because the employer believes that such employment poses a "direct threat" to the health or safety of the individual with a disability. The United States Courts of Appeals for the Seventh, Ninth and Eleventh Circuits have addressed this issue with varied results.²⁰⁷

The United States Court of Appeals for the Ninth Circuit squarely addressed the issue of whether the ADA "direct threat" provision applies to the disabled person in *Echazabal v. Chevron USA, Inc.*²⁰⁸ The principle question considered by the court was whether the "direct threat" defense available to employers under the ADA applies to employees, or prospective employees, who pose a direct threat to their own health or safety, but not to the health or safety of other persons in the workplace.²⁰⁹ The court found that it did not.²¹⁰

204. 42 U.S.C. § 12111(3) (1990).

205. 28 C.F.R. § 36.208(a) (2001).

206. 28 C.F.R. § 36.208(b) (2001).

207. See *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063 (9th Cir. 2000), *cert. granted*, 122 S. Ct. 456, 151 L. Ed. 2d 375 (Oct. 29, 2001); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996); *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999).

208. 226 F.3d 1063 (9th Cir. 2000), *cert. granted*, 122 S. Ct. 456, 151 L. Ed. 2d 375 (Oct. 29, 2001).

209. See *Echazabal*, 226 F.3d at 1063. The court held that Chevron had discriminated illegally by denying employment to an applicant because of his disability. See *id.* at 1072. The applicant, Echazabal, was required to undergo a pre-employment physical after having been found qualified for the job in question. See *id.* The physical examination revealed liver damage that Chevron's physicians believed would be exacerbated by exposure to the solvents and chemicals present at the refinery. See *id.* Chevron rescinded the offer of employment on the ground that there was a risk that Echazabal's liver would be damaged if he worked at the job. See *id.* Three years later, in 1995, Echazabal again applied for employment with Chevron with the same findings and results. See *id.* Additionally, Chevron wrote to the subcontractor, Echazabal's employer, to request that he not be assigned to work at the refinery. *Id.* at 1065. Consequently, Echazabal was laid off by his employer. See *id.* Chevron defended its action by contending that the direct threat defense includes threats to one's own health or safety. See *id.* at 1065-66.

Conversely, in *Koshinski v. Decatur Foundry, Inc.*, the United States Court of Appeals for the Seventh Circuit held that an employer may find that an employee cannot perform the essential functions of a job because the performance of those functions will cause the exacerbation of an existing disease.²¹¹ In *Moses v. American Nonwovens, Inc.*, the United States Court of Appeals for the Eleventh Circuit stated, without explanation, that the "direct threat" defense applies to threats to oneself.²¹² The apparent disagreement between the circuits has created confusion in the lower courts and industry. The Supreme Court decision in *Chevron USA, Inc. v. Echazabal* should resolve the dispute over correct interpretation of the ADA "direct threat" doctrine.

IV. FINDINGS AND ANALYSIS

The ADA does not clearly address through ADAAG the responsibilities that public and private organizations have for assuring emer-

210. *See id.* The court found that that the language of the defenses section of Title I of the statute was unambiguous and, further, that it was supported by the description of direct threat in the definition section of Title I of the statute. *See id.* at 1066-67. Both locations of the statute refer to the "health or safety of other(s)." *See* 42 U.S.C. § 12111(3) (1990); *see also* 28 C.F.R. § 36.208 (2001). Specifically, the ADA states, in pertinent part, "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health and safety of other individuals in the workplace." 42 U.S.C. § 12113(b). And "[t]he term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111 (3).

Further, the court rejected Chevron's argument that performing the work at the coker plant without posing a direct threat to one's own health or safety is an essential function of the coker unit job. *See Echazabal*, 226 F.3d at 1071. The court explained that job functions are those acts or actions that constitute a part of the performance of the job. *See id.* "Were we to ignore the limits of the actual functions of the job at issue and permit Chevron to add to those functions any condition it chooses to impose on its written job description, the term 'essential function' would be rendered meaningless." *Id.* The court noted that acceptance of Chevron's argument that Echazabal was not otherwise qualified because he could not perform the essential functions of the job without risk of injury to himself would, "by definitional slight of hand, circumvent Congress' 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." *Id.*

211. *See* 177 F.3d 599 (7th Cir. 1999). The case concerned a foundry worker suffering from degenerative osteoarthritis who was fired after his employer learned that his condition would be worsened by performing the physically taxing duties of the job. *See id.* at 600-01. Koshinski sued under the ADA. *See id.* at 601-02. The court cited the EEOC's interpreting regulations in rejecting Koshinski's argument that a direct threat to himself is of no consequence under the ADA. *See id.* at 603; *see also* 29 C.F.R. § 1630.2(r). The court explained that the direct threat issue only arises after a plaintiff establishes a *prima facie* case of discrimination. *See Koshinski*, 177 F.3d at 603. The court concluded that because Koshinski is not an otherwise qualified individual he is not protected under the ADA. *See id.* Consequently, the court did not reach the question of whether the foundry had a valid defense for refusing to reinstate him.

212. *See* 97 F.3d 446 (11th Cir. 1996).

gency evacuation of people with disabilities. People with disabilities are expected to “defend in place” during emergencies because the courts have not required that they be accorded the same right to emergency evacuation as non-disabled persons. “Defend in place” leaves individuals with disabilities and those who remain with them at increased risk when compared to people who evacuate the danger area.

Recognition of the increased risk faced by individuals with disabilities during emergencies may lead employers to conclude that the presence of an individual with a disability in a location where emergency egress is problematic constitutes a “direct threat” to his or her health or safety. A holding by the Supreme Court in *Echazabal* that an employer can deny employment to an otherwise qualified individual with a disability because performance of the job may pose a “direct threat” to his or her health or safety, may result in employers denying work to people with disabilities over concern about their ability to evacuate during an emergency.

A. *ADAAG does not adequately address emergency evacuation requirements*

ADAAG does not sufficiently address requirements for the evacuation of people with disabilities during emergencies. Although the Access Board incorporated ANSI A117.1 accessibility standards into ADAAG, those standards reflect the prevalent theories of fire protection and evacuation of people with disabilities – “defend in place” – not a requirement for emergency evacuation.²¹³ Consequently, ADAAG standards do not mandate that public entities or places of public accommodation provide individuals with disabilities access to emergency evacuation that is as effective as that provided the able bodied.

“Defend in place” relies on structural defenses to offer people a safe haven until rescue professionals arrive.²¹⁴ In most common fire situations, “defend in place” does not provide a degree of safety equivalent to evacuation. Thus, people with disabilities, most particularly the mobility impaired, remain in greater danger during emergencies than do their able bodied counterparts.

The Fourth Circuit Court of Appeals’ holding in *Shirey ex rel. Kyger v. City of Alexandria* comports well with the “defend in place” strategy espoused by the National Fire Protection Association (NFPA) and codified by the ICC. The emergency evacuation plan developed by

213. See 36 C.F.R. § 1190.40 (2001).

214. See NFPA ONLINE, *supra* note 39.

the school in *Shirey* incorporated "defend in place" in its operational design.²¹⁵ The plan required disabled students to horizontally evacuate to a safe haven, the library, and await the arrival of rescue workers before attempting further evacuation.²¹⁶ Because they were not evacuated immediately from the building, this plan put students with disabilities at increased risk when compared to their non-disabled classmates.²¹⁷ While no one would argue with the desirability of immediately evacuating all people, including the mobility impaired, during a life-threatening emergency, the NFPA and ICC contend that technology is not available to achieve it safely.²¹⁸

B. Weaknesses of "Defend in Place"

"Defend in place" has certain inherent weaknesses. It is a passive strategy that relies on fire retardant construction materials to slow the advance of fire and smoke to afford rescuers time to effect an evacuation.²¹⁹ Some individuals may not be suited to waiting helplessly for rescue. They may try to evacuate independently. This can have tragic consequences.

In *Gomez v. United States*, the United States District Court for the Eastern District of Louisiana chronicled the story of a man evacuated by his wife from the hospital after a fire started.²²⁰ Rather than wait for the fire to be extinguished or contained, she removed him to a relative's house where he died of congestive heart failure.²²¹ Decisions to await help, however, can have equally deadly results. In December of 1998, four able-bodied people died of smoke inhalation in the West 60th Street Tower in New York City as they tried to exit down the stairwell.²²² Others died in Las Vegas' MGM Grand fire in 1980,

215. See *Shirey ex rel., Kyger v. City of Alexandria School Bd.*, 229 F.3d 1143 (Table), No. 99-1127, WL 1198054 (4th Cir. Aug. 23, 2000).

216. See *id.*

217. See *id.*

218. See NFPA ONLINE, *supra* note 39; INTERNATIONAL CODE COUNCIL, *supra* note 38.

219. See NFPA ONLINE, *supra* note 39.

220. No. 89-2426, 1990 U.S. Dist. LEXIS 373 (E.D. La. Jan. 16, 1990). Plaintiff settled with the construction company whose employee started the fire. See *id.* When defendant sued VA hospital, the hospital impleaded construction company who then filed a motion for summary judgment based on its settlement with the plaintiff. See *id.* The court denied third party defendant's request for a rehearing of its denial of the motion for summary judgment. See *id.*

221. See *id.*; see also *Access Now, Inc., v. Ambulatory Surgery Center Group, LTD.*, 146 F. Supp. 2d 1334, 1341 (S.D. Fl. 2001). "Gomez demonstrates the potential liabilities and dangers of unsupervised evacuations" *Id.*

222. See NFPA ONLINE, *supra* note 45.

when they decided to stay on the upper floors after hearing the fire alarm.²²³

It is difficult to know which course of action is best when faced with a fire. The National Fire Protection Association warns,

[u]ltimately every individual is responsible for his or her own safety. Building codes, fire codes, those who enforce such codes, and building owners all work in harmony to provide a safe environment, but these collective pieces have inherent boundaries that they are designed for. This . . . extends to . . . those with severe mobility impairments.²²⁴

Because no viable alternatives exist, ADAAG and the ICC mandate that new construction and building modifications include structural systems supporting defend in place protection for people with disabilities.²²⁵ The able bodied may have a choice as to whether to evacuate or defend in place; the mobility impaired do not.

The September 11, 2001, attacks on the World Trade Center highlighted the additional risks faced by the mobility impaired in a multi-story building emergency. People are discussing the wisdom of providing mobility-impaired persons with access to the upper levels of skyscrapers.²²⁶ Yet, high-rise buildings pose safety hazards for everyone. Anyone who works in a high-rise building assumes a larger risk, particularly those people with disabilities.²²⁷ The ADA prohibits discrimination against the disabled in employment and access to public entities and places of public accommodation.²²⁸ Will it be tested in the context of emergency egress options for the mobility impaired?

"Defend in place" has the inherent drawback of leaving the most vulnerable people at the mercy of the clock. In "defend in place" the mobility impaired sit and wait, hoping that rescue will arrive before the smoke and flames. This can create other problems. The knowledge that mobility impaired people must "defend in place" may tempt co-workers or others to delay their own evacuation to assist or wait with the disabled person. This behavior is laudable, but problematic. Does the presence of the disabled person in a precarious position create an unnecessary risk for the able bodied? Should government mandate safety standards that have the effect of denying access to certain people with disabilities? Or should people, able bodied and the

223. *See id.*

224. *Id.*

225. *See id.*; *see also*, 36 C.F.R. § 1190.40 (2001).

226. Albert R. Hunt, *Those Suffering Special Stress*, WALL ST. J., Oct. 18, 2001, at A27.

227. *See id.*

228. *See* 42 U.S.C. §§ 12101-12213 (1990).

disabled, be free to choose to live and work in potentially unsafe conditions? How should society manage risk to promote both safe conditions and free choice for all individuals?

These difficult questions appear to force a solution that must devalue either safety or freedom. Unfortunately, our society has often chosen to protect individuals with disabilities to the detriment of their personal freedoms. Safe conditions for all and free choice for most appears to be the dominant solution.

The concern that people with disabilities are less capable of evacuating safely during emergencies has led many communities to implement protective ordinances that prescribe the conditions under which persons with disabilities may be housed in their communities.²²⁹ This protective rulemaking stems from the traditional notion that a caring society should advocate on behalf of disabled people, who are less capable of achieving parity in the political arena.²³⁰ A common by-product of these paternalistic rules has been discrimination against persons with disabilities in access to housing.²³¹ Although the ADA rendered such discriminatory rules and practices illegal, there is currently talk of restricting access to high rise buildings for people with disabilities that may pose a "direct threat" to health or safety during an emergency evacuation.²³²

C. Applying "Direct Threat" to Emergency Evacuation of People with Disabilities

The difficulties of safely evacuating people with disabilities during emergencies should not be construed to pose a "direct threat" to the health or safety of others. Under common law tort doctrine there exists no duty to aid others in distress absent a special relationship. While that special relationship exists between employer and employee and between business operator and customer it may be met via inclusion of provisions for the emergency evacuation of people with disabili-

229. See *Potomac Group Home Corp. v. Montgomery County, Md.*, 823 F. Supp. 1285, 1294 (D. Md. 1993).

230. See S. REP. NO. 101-116, at 11 (1989). Former Senator Weicker testified that people with disabilities spend a lifetime "overcoming not what God wrought but what man imposed by custom and law." *Id.* "The unfortunate truth is that individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society" *Id.* at 15.

231. See, e.g., *Buckhannon v. West Virginia Dep't of Health and Human Services*, 19 F. Supp. 2d 567 (N.D. W. Va. 1998); *Potomac Group Home Corp. v. Montgomery County, Md.*, 823 F. Supp. 1285, 1294 (D.Md. 1993).

232. See Albert R. Hunt, *Those Suffering Special Stress*, WALL ST. J., Oct. 18, 2001, at A27.

ities in the organization's emergency plan.²³³ Moreover, the Supreme Court strongly suggested in *Johnson Controls* that federal anti-discrimination law would preempt such state tort law issues.²³⁴ People opting to assist a person with a disability during an emergency do so voluntarily and, consequently, should not create liability for employers or places of public accommodation.

Despite extensive evidence that Congress did not intend it to be used as such, the Eleventh Circuit held the "direct threat" defense under Title I to apply to threats to the individual with a disability.²³⁵ Should the *Echazabal* Court affirm this interpretation employers would be justified in discriminating against people with disabilities vying for an employment position located in a place not having a ready means of egress to a public way. Because "defend in place" is inherently riskier than evacuation when that option exists for the able bodied, an employer could discriminate against people with disabilities in circumstances where the emergency plan for them is not the same as for the able bodied. For example, in a building having two or more floors an employer could restrict people with disabilities from working on floors where the plan for able bodied people is to use fire stairwells to escape while the disabled are expected to "defend in place." Acceptance of the Eleventh Circuit's interpretation could lead to massive discrimination against people with disabilities in employment and access to places of public accommodation.

A counter argument, however, is that under *Shirey ex rel. Kyger v. City of Alexandria School Board*, employers and public accommodations need only provide people with disabilities with equal access to an emergency evacuation plan.²³⁶ Consequently, the direct threat is eliminated when the emergency plan includes procedures for safeguarding people with disabilities, even if that plan is inferior to the safeguards afforded the able bodied.

Should the *Echazabal* court adopt the Seventh Circuit's *Koshinski* interpretation allowing a finding that an employee or job applicant's inability to perform the essential functions of a job without posing a "direct threat" to his health or safety renders the individual not otherwise qualified, it would have little effect on the employability of peo-

233. See *Shirey ex rel. Kyger v. City of Alexandria School Bd.*, 229 F.3d 1143 (Table), No. 99-1127, WL 1198054 (4th Cir. Aug. 23, 2000).

234. See *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1070 (9th Cir. 2000) (citing *UAW et al. v. Johnson Controls, Inc.*, 499 U.S. 187, 209-10 (1991)).

235. See *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996).

236. See *Shirey ex rel. Kyger v. City of Alexandria School Bd.*, 229 F.3d 1143 (Table), No. 99-1127, WL 1198054 (4th Cir. Aug. 23, 2000).

ple with disabilities where emergency evacuation is the issue of concern. Because emergency evacuation is rarely, if ever, an essential function of a job, the inability to self-evacuate in an emergency would not render an individual not otherwise qualified. Consequently, adoption of the *Koshinski* theory by the Supreme Court should have little effect on access to employment for people with disabilities.

D. Impact of the United States Supreme Court's Upcoming Decision in Chevron USA, Inc. v. Echazabal

The Supreme Court heard oral argument in *Chevron USA, Inc. v. Echazabal* on February 27, 2002, and will issue its ruling sometime in 2002.²³⁷ The Court should resolve the split between the Seventh, Ninth and Eleventh Circuits regarding the applicability of the "direct threat" defense in situations where the "direct threat" is to the health and safety of the individual with a disability. At stake is the right of people with disabilities to decide for themselves whether to accept the risk to their health and safety posed by a particular employment opportunity.

What affects will the Court's ruling have on access to employment and public accommodations when the concern is emergency evacuation of people with disabilities? May an employer refuse to hire a mobility-impaired person because the job is located on a floor requiring elevator access? May a landlord deny that same individual an apartment on an upper level floor?

The repercussions of the Court's ruling in *Echazabal* may be profound. Should the Court affirm the Ninth Circuit's interpretation banning the "direct threat" defense in all cases involving a "direct threat" to the health or safety of the individual with a disability, people with disabilities will achieve decisional equality with other, able-bodied Americans. A holding by the Court verifying the Eleventh Circuit interpretation of "direct threat" will have a chilling effect on the ability of people with disabilities to decide independently whether potential health risks outweigh the financial gain of a particular employment opportunity. Such a result reinforces the notion that disability and incapacity are inextricably intertwined.

The Supreme Court should affirm the Court of Appeals for the Ninth Circuit holding and reasoning in *Echazabal v. Chevron USA, Inc.* The Ninth Circuit's finding that absence of risk to one's own health and safety cannot constitute an essential job function is correct. Otherwise, inherently dangerous jobs would be impossible to fill.

237. *Chevron U.S.A., Inc., v. Echazabal*, 122 S. Ct. 456, 151 L. Ed. 2d 375 (Oct 29, 2001).

Firefighting, for example, is dangerous work. It is not possible for a firefighter to extinguish fires without being exposed to conditions that pose a "direct threat" to his or her health or safety. While standards have been established to assure a level of competence among firefighters that reduces risk to other firefighters and the public, people desiring work as firefighters themselves decide whether to accept the risk to their own health and safety.

The decisions in *Bragdon* and *Fiedler* support the prevailing belief that the "direct threat" provision relates solely to the notion that other people should not be needlessly endangered by the presence of a disabled person.²³⁸ In *Echazabal*, the Court of Appeals for the Ninth Circuit flatly rejected the contention that employers may use the "direct threat" defense to justify discrimination against people based on the paternalistic belief that denying employment to the disabled person is in his or her own best interest.²³⁹

These decisions, and others like them, have at their core an unstated understanding that the disabled person is the legal and moral equivalent of the able-bodied person. When Congress authorized the ADA it recognized that disability does not equate to diminished capacity.²⁴⁰ Consequently, the statute affords to people with disabilities the same right to decide whether to assume risk as is held by others. In light of this, perhaps the most significant aspect of the ADA is that it portends to convey to the disabled person the right to decide whether to assume the risks inherent in a job, public program or public accommodation, in the same manner as other, able-bodied people.

Congress' recognition that paternalistic beliefs lead to discrimination against disabled people provides strong support for an interpretation limiting the direct threat defense to threats to the health or safety of others. The *Echazabal* court concluded with the following words: "Conscious of the history of paternalistic rules that have often excluded disabled individuals from the workplace, Congress concluded that disabled persons should be afforded the opportunity to decide for themselves what risks to take."²⁴¹ The wisdom of this belief is being tested in the aftermath of September 11.²⁴²

238. See *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Fiedler v. American Multi-Cinema, Inc.*, 871 F. Supp. 35 (D.C. 1994).

239. See *Echazabal*, 226 F.3d at 1072.

240. S. REP. NO. 101-116, at 7 (1989). "[O]ur society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right." *Id.*

241. *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1072 (9th Cir. 2000).

242. See Albert R. Hunt, *Those Suffering Special Stress*, WALL ST. J., Oct. 18, 2001, at A27.

Alternatively, affirmation of the Eleventh Circuit's interpretation may at best lead to paternalistic denial of employment to people with disabilities by employers concerned with the welfare of employees and applicants for employment. Acceptance of the rationale that the "direct threat" defense includes threats to the health or safety of the individual with a disability, as the EEOC interpretation proclaims, provides employers with a powerful sword to deny employment opportunities based on the mere probability of future harm.

Such harm may carry increased expense for employers. Fears that future injuries may result in downtime, increased health benefit costs, or workers compensation claims may encourage some employers to withhold employment in contravention of the purposes of the ADA. It is simply naïve to believe that some employers will not act out of self-interest to deny people with disabilities employment opportunities. Finally, such an interpretation of the "direct threat" defense is counter to the underlying principles of *Johnson Controls* and *Arline*.

The Seventh Circuit holding in *Koshinski* seems at first to provide a middle ground. Upon closer inspection, however, this interpretation, which initially denies employers the "direct threat" defense when the threat is to the individual with a disability but then allows a determination that the disability renders the individual "not otherwise qualified" and outside the protection of the ADA, is in reality a backdoor device enabling employers to discriminate wantonly. As the *Echazabal* court correctly discerns, this logic renders "essential function" meaningless and circumvents Congress' intent in creating the legislation.²⁴³

E. "Direct Threat" In The Aftermath of September 11

The terrorist attacks on September 11 took America by surprise. Many are wondering what could have been done to prevent them or, failing that, to minimize the casualties.²⁴⁴ Some of the actions being discussed, however, would improve our sense of security at the cost of diminished liberties.²⁴⁵

These circumstances are worrisome for people with disabilities. They fear that hard won rights to equal access may be sacrificed in the

243. See *Echazabal*, 213 F.3d at 1071-72.

244. See CNN Access, *Solicitor General: Proposals will not violate rights*, CNN.COM/U.S. (September 25, 2001) at <http://www.cnn.com/2001/US/09/25/rec.olson.cnn.html>.

245. Ellie Phillips, *Congress Debates Security v. Civil Liberties*, PCWorld.COM (October 2, 2001) available at <http://www.pcworld.com/resource/printable/article/0,aid,64424,00.asp>.

name of safety and security.²⁴⁶ There is already discussion about the wisdom of allowing the mobility-impaired access to high-rise buildings.²⁴⁷ Fears about emergency evacuation of the mobility impaired, and the danger to those who attempt to rescue them may lead to a resurgence of paternalistic rulemaking.

Disabled people understand the risks they face in high-rise buildings.²⁴⁸ Heightened risk is a fact-of-life for people with disabilities.²⁴⁹ The mobility-impaired are at greater risk, as compared to the able bodied, when crossing the street, for example: as are the visually impaired, hearing impaired, and developmentally disabled. When a driver runs a red light, the disabled person is at a relative disadvantage in recognizing and/or avoiding the danger: yet, not crossing the street is not an acceptable solution.

People with disabilities readily accept the risks that accompany equal access to programs and services.²⁵⁰ More importantly, Congress and the courts have recognized that equality of access only truly exists when the decision of whether to accept the risks that accompany that access is left to the disabled individual.²⁵¹ Restricting access in the well intentioned, yet paternalistic belief that to do so is necessary to protect the disabled person has been held to be illegal discrimination under the ADA.²⁵² This understanding may be threatened in the near future by the Supreme Court decision in *Chevron USA, Inc., v. Echazabal*. The Court's decision may profoundly affect the liberty exercised by people with disabilities to decide what risks they will take.

Current technology limits the options available to protect people with disabilities during emergencies. The "defend in place" strategy employed for all people in most high-rise fires is generally accepted as the safest plan to protect disabled people in almost all multi-story building emergencies.²⁵³ Although it is arguably the best solution practicable, "defend in place" leaves mobility-impaired people at the

246. See Albert R. Hunt, *Those Suffering Special Stress*, Editorial, WALL ST. J., Oct. 18, 2001, at A27.

247. See *id.*

248. See Hunt, *supra* note 81; see also McKee, *supra* note 3.

249. See Hunt, *supra* note 81.

250. See *id.*

251. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977); see also *UAW, et al., v. Johnson Controls*, 499 U.S. 187 (1991); *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063 (9th Cir. 2000).

252. See, e.g., *Kohnke v. Delta Airlines, Inc.*, 932 F. Supp. 1110 (N.D.Ill. 1996); *Echazabal*, 226 F.3d at 1063.

253. See NFPA ONLINE, *Strategies in Building Evacuation Messages* (Oct. 19, 2001) at http://www.nfpa.org/BuildingCode/Building_Evacuation/building_evacuation.asp (on file with the author).

mercy of the clock.²⁵⁴ This knowledge can take an emotional toll on people with disabilities and their co-workers and friends, and consequently, may endanger the lives of able-bodied people attempting to assist the mobility-impaired during an emergency.

Policy-makers have at least three possible courses of action regarding emergency evacuation of disabled persons in multi-story buildings: do nothing; restrict access of mobility impaired people to upper level floors; or develop safe methods for evacuating the mobility impaired during emergencies. People with disabilities favor option three.²⁵⁵ Concerted efforts by the public and private sectors may result in new technology and procedures that "give the disabled an equal chance at staying alive."²⁵⁶

People with disabilities, their advocates, and government leaders should focus their efforts to create environments that do not place people with disabilities at unnecessary risk. Regulatory agencies and building managers should examine current evacuation procedures to make best use of existing technology. Those responsible for planning and executing emergency evacuations should work to improve awareness in the general population, including people with disabilities, of fire safety and emergency evacuation strategies. Continued study to develop technology capable of saving lives in emergencies is a moral prerogative and should be aggressively pursued.²⁵⁷ The Access Board should specify evacuation requirements in the ADAAG and coordinate state-of-the-art strategies with the ICC. Lastly, continued vigilance is required of all to assure that people with disabilities are not forgotten when emergency plans are drawn or executed.

V. CONCLUSION

Neither the ADA nor its implementing regulations specifically address the right of people with disabilities to safe evacuation during emergencies.²⁵⁸ Judicial interpretation of the ADA has reinforced the notion that people with disabilities are not afforded equal rights to emergency evacuation under the ADA. The United States Court of Appeals for the Fourth Circuit held in *Shirey v. City of Alexandria School*

254. See Barbara McKee, *Local Comment: Don't leave disabled behind*, DETROIT FREE PRESS (Oct. 18, 2001) at http://www.freep.com/voices/columnists/emckee18_20011018.htm.

255. See *id.*

256. See McKee, *supra* note 3.

257. See *id.*

258. See 42 U.S.C. § 12101 (1990).

*Board*²⁵⁹ that the ADA does not guarantee equal access to emergency evacuation – only equal access to an evacuation plan.²⁶⁰ Consequently, the Fourth Circuit views the scope of the ADA as not encompassing true equality of access in this potentially life threatening area.

Although today's buildings are constructed to conform to ADAAG guidelines, those guidelines support the "defend in place" strategy of fire and emergency protection of individuals with disabilities. "Defend in place" leaves persons with disabilities in danger even as able-bodied people evacuate the danger area. Recent recognition of the danger posed to persons with disabilities by the inherent weaknesses of "defend in place," combined with the lack of viable alternatives to it, has sparked discussion of restricting access for individuals with disabilities to places where emergency evacuation is problematic. The upcoming Supreme Court decision in *Chevron USA, Inc. v. Echazabal* may determine if employers can use the "direct threat" doctrine of the ADA to defend such action. The better solution to this legal and moral dilemma is development of new technologies to facilitate safe evacuation of people with disabilities during emergencies; planning that incorporates the new technology; and enhanced awareness of the need to consider people with disabilities in the emergency egress planning process.

In this time of national challenge we would be wise to consider the prescient words of United States Supreme Court Justice Thurgood Marshall, "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."²⁶¹ Ultimately, the true strength of American democracy may be evidenced through courage marshaled in the face of adversity to protect the cherished liberties that define America.

Political fallout from the recent carnage at New York City's World Trade Center may embody challenges to the liberties afforded disabled persons by the ADA. People with disabilities and their supporters need to be prepared to defend their hard won rights.

259. See *Shirey ex rel. Kyger v. City of Alexandria School Bd.*, 229 F.3d 1143 (Table), No. 99-1127, WL 1198054 (4th Cir. Aug. 23, 2000).

260. See *id.*

261. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

