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Technology as a Panacea: Why Pregnancy-Related Problems Should Be Defined Without Regard to Mitigating Measures Under the ADA

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Technology as a Panacea: Why Pregnancy-Related Problems Should Be Defined Without Regard to Mitigating Measures Under the ADA

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I. INTRODUCTION

In *Gabriel v. City of Chicago*, the Northern District of Illinois held that, while pregnancy is not a per se disability under the Americans with Disabilities Act ("ADA"),[1] pregnancy-related problems can be considered disabilities under the ADA.[2] The holding in

1. 42 U.S.C. §§ 12101-12213 (1994).
2. Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 980-81 (N.D. Ill. 1998).

Gabriel, however, was not unique, as many other district courts have reached the same conclusion regarding pregnancy-related problems.[3] The real question in cases such as *Gabriel* is whether the pregnancy-related problem at issue constitutes a disability under the ADA. This question requires an analysis of whether the pregnancy-related problem is a physical impairment that substantially limits a major life activity of the plaintiff.[4]

The analysis is complicated by a split in the circuits as to whether a disability should be assessed with or without regard to mitigating measures.[5] The Equal Employment Opportunity Commission ("EEOC"), as well as a majority of the circuits, have stated that the disability in question should be assessed without regard to available corrective measures.[6] This split presents an interesting issue in terms of pregnancy-related problems: Should they be assessed as disabilities notwithstanding the ever-advancing medical and reproductive technologies? This Note answers that question in the affirmative. If the availability of technologically advanced reproductive medical techniques is allowed te define what is and is not a pregnancy-related problem, the list of potential ADA-covered disabilities may become unmanageable.[7] It is much more logical, as

3. *See, e.g.*, Darian v. University of Mass. Boston, 980 F. Supp. 77, 85-87 (D. Mass. 1997); Hernandez v. City of Hartford, 959 F. Supp. 125, 130-31 (D. Conn. 1997); Cerrato v. Durham, 941 F. Supp. 388, 392-93 (S.D.N.Y. 1996); Patterson v. Xerox Corp., 901 F. Supp. 274, 278 (N.D. Ill. 1995).

4. *See* 42 U.S.C. § 12102(2) (1994); *see also, e.g.*, Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858-59, 863-64 (1st Cir. 1998); Sutton v. United Air Lines, Inc., 130 F.3d 893, 897-98 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999).

5. See *Sutton*, 130 F.3d at 901 nn.7-8, for a thorough list of courts on both sides of the mitigating (or corrective) measures debate. *Compare id.* at 902 (noting that the "determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual"), *with Arnold*, 136 F.3d at 863 (concluding "that Congress intended a reviewing court to evaluate [a plaintiff's] disability based on his underlying medical condition without considering the ameliorative effects of [any] medication [or mitigating measures]").

6. *See* 29 C.F.R. app. § 1630.2(j) (1998); Washington v. HCA Health Servs., Inc., 152 F.3d 464, 470-71 (5th Cir. 1998); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629 (7th Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997); *Arnold*, 136 F.3d at 863; Doane v. City of Omaha, 115 F.3d 624, 627-28 (8th Cir. 1997); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995); Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 905 (E.D. Pa. 1997).

7. Although it will not be discussed in this Note, technology is also an important consideration in terms of the ADA's mandate that "reasonable accommodations" be made for a disabled employee. This Note simply focuses on the threshold issue of whether a person is disabled or not under the ADA. See Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471, 495-96 (1991), for a brief discussion of technology and its impact on reasonable accommodations.

many of the circuits and the EEOC have found, to analyze a disability in its unmitigated state.

This Note begins in Part II by briefly discussing the history and purpose of the ADA. Next, it looks at the history of pregnancy discrimination and the remedial measures available to plaintiffs. Then, the Note turns to the ADA and discusses the current law regarding what constitutes a disability, pregnancy-related problems under the ADA, and the current split in the circuits regarding mitigating measures. Part III discusses technology as a mitigating measure, particularly in relation to pregnancy-related problems. This section of the Note explores the consequences that may flow from a decision to evaluate disabilities with regard to mitigating measures. Part IV concludes by proposing that pregnancy-related problems should not be assessed with regard to mitigating measures and technological advances, but rather should be defined in terms of the impairment's impact on a person's life activities.

II. HISTORY AND CURRENT STATUS OF THE LAW UNDER THE ADA REGARDING PREGNANCY-RELATED PROBLEMS AND MITIGATING MEASURES

The ADA is a "federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities."[8] Before delving into the law of the ADA, it is important to understand its precursors, its legislative history, and the purpose of its enactment.

A. History and Purpose of the ADA

Prior to the enactment of the ADA, the Rehabilitation Act of 1973 ("Rehabilitation Act")[9] provided similar remedies for those who were discriminated against based upon a disability. The effectiveness of the Rehabilitation Act is limited, however, in that it applies only to federal contractors, federal agencies, and federal fund recipients.[10]

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8. 29 C.F.R. app. § 1630 (1998).

9. *See* 29 U.S.C. §§ 701-796 (1994).

10. *See id.* §§ 791, 793, 794. The antidiscrimination provisions of the Rehabilitation Act are contained in Title V. Section 501 of the Rehabilitation Act requires affirmative action in employment by federal executive agencies. *See id.* § 791(b). Section 503 requires affirmative action in employment by federal contractors with contracts over $10,000. *See id.* § 793(a).

Despite its defects, including limited coverage of employers, lack of enforcement provisions, funding problems, and ambiguous Supreme Court interpretive decisions,[11] the Rehabilitation Act was the first federally-legislated protection against discrimination toward people with disabilities and, as such, represented a major step forward.[12]

In 1990, Congress passed the ADA as broad legislation aimed at providing a "clear and comprehensive national mandate" to end discrimination against individuals with disabilities.[13] Congress sought to establish "clear, strong, consistent, enforceable standards" for addressing such discrimination.[14] The impetus behind passing the ADA clearly stemmed from both the failures and shortcomings of the Rehabilitation Act and congressional findings regarding the extent of discrimination against persons with disabilities.[15]

B. Title VII and the Pregnancy Discrimination Act

Title VII of the Civil Rights Act of 1964 ("Title VII") provides the most obvious remedial measure for women who feel they have been discriminated against based on their pregnancies. Title VII prohibits employment discrimination based on "race, color, religion, sex, or national origin."[16] It was amended in 1978 by the Pregnancy Discrimination Act ("PDA"), which made Title VII specifically applicable to pregnant workers.[17] Essentially, the PDA equates pregnancy-

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Finally, section 504 of the Rehabilitation Act requires nondiscrimination by federal executive agencies and federal grantees. *See id.* § 794.

11. *See* Robert E. Rains, *A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 190-91 (1992); *see also* Jones, *supra* note 7, at 475-79 (comparing the Rehabilitation Act and the ADA).

12. *See* Rains, *supra* note 11, at 189.

13. 42 U.S.C. § 12101(b)(1) (1994). See generally Jones, *supra* note 7, at 472-75, for a summary of the ADA's "tortuous" legislative history.

14. 42 U.S.C. § 12101(b)(2).

15. *See* Rains, *supra* note 11, at 199-200. *See generally* 42 U.S.C. § 12101(a). Congress found that:

> (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
> (2) histerically, society has tended to isolate and segregato individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.

Id.

16. 42 U.S.C. § 2000e-2(a)(1)-(2) (1994).

17. *See id.* § 2000e(k).

based discrimination with discrimination on the basis of gender.[18] The PDA states:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .[19]

The PDA clearly aspires to eliminate inequality and discrimination in the workplace based upon pregnancy, a gender-related condition.[20]

Under a Title VII pregnancy discrimination case, the plaintiff may proceed under one of two theories: disparate treatment or disparate impact.[21] Under the disparate treatment theory, a plaintiff alleging pregnancy-related discrimination argues that she was treated differently by her employer because of her pregnancy and "no bona fide occupational qualification justified the differential treatment."[22] Under the disparate impact theory, the plaintiff argues that a facially neutral policy disproportionately burdened her as a pregnant woman.[23] While the PDA has proven fairly effective at eliminating more egregious and explicit pregnancy discrimination in the workplace, both the disparate treatment and disparate impact theories

18. *See id.* See also Andrew Weismann, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690, 692-93 (1983), where the author states:

> Congress passed the PDA to amend [T]itle VII so as to include explicitly pregnancy classifications within its definition of sex discrimination. The PDA establishes that pregnancy classifications are sex-based because the condition affects only women. The legislators specifically endorsed [the view] . . . that the underinclusive disability programs differentiated not between the pregnant and the nonpregnant but between those who faced the risk of pregnancy and those who did not. Furthermore, the disability programs, by excluding only pregnancy, still fully covered male sex-specific illnesses, but not female sex-specific disabilities.

Id. (footnotes omitted).

19. 42 U.S.C. § 2000e(k).

20. Put another way, "'Title VII does not permit an employer's paternalistic notions of how a pregnant employee should conduct her affairs to be substituted for the woman's own judgment.'" Martinez v. Labelmaster, No. 96 C 4189, 1998 WL 786391, at *2 (N.D. Ill. Nov. 6, 1998) (quoting EEOC v. Corinth, Inc., 824 F. Supp. 1302, 1309 (N.D. Ind. 1993)). *But see* Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 225-26 (1998) (positing that the PDA reinforces stereotypes of pregnant women and their ability to fully participate in the workforce).

21. *See* Jennifer Gottschalk, *Accommodating Pregnancy on the Job*, 45 U. KAN. L. REV. 241, 265 (1996); D'Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1418 (1996).

22. Gottschalk, *supra* note 21, at 266; *see also* Millsap, *supra* note 21, at 1418.

23. *See* Gottschalk, *supra* note 21, at 267-68; Millsap, *supra* note 21, at 1418-19.

present problems for pregnant women who are discriminated against in more subtle ways.[24]

If a plaintiff proceeds under the disparate treatment theory of discrimination,[25] the plaintiff, in the absence of explicit discriminatory treatment, must often provide circumstantial evidence of pregnancy discrimination.[26] This can be a difficult task—if the plaintiff presents indirect evidence of pregnancy discrimination, the employer is able to escape liability by showing that a legitimate, non-discriminatory reason for the employment decision existed.[27] Moreover, an employer need not provide those accommodations often needed by a pregnant woman (like frequent breaks and more flexible schedules) if those accommodations are not provided to other workers as well.[28] In other words, if the employer denies those accommodations to all workers, the employer cannot be held liable to a pregnant woman under a disparate treatment analysis.

It would seem that a plaintiff might be more successful in a PDA suit by proceeding under the disparate impact theory.[29] PDA suits alleging disparate impact, however, are rarely successful. Moreover, several Supreme Court cases have limited the applicability of disparate impact theory to pregnant women.[30]

A critical difference between the PDA and the ADA is their stated purposes. The PDA's main purpose is to facilitate equality between the sexes in the workplace, while the ADA's main purpose is to eliminate discrimination based on disability. The two statutes

24. *See* Millsap, *supra* note 21, at 1419.

25. In order to prove a prima facie case of disparato treatment, the plaintiff must prove that (1) the plaintiff is a member of a protected classification; (2) the plaintiff is qualified for the job; (3) the employer rejected the plaintiff for the position despite the plaintiff's qualifications for the job; and (4) the position remained open and the employer continued te seek applicants from persons of plaintiff's qualifications or the employer filled the position with someone from a nonprotected group. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *see also* Millsap, *supra* note 21, at 1418 n.31.

26. *See* Gottschalk, *supra* note 21, at 266; Millsap, *supra* note 21, at 1419-20.

27. *See* Millsap, *supra* note 21, at 1420. See *id.* at 1418-21, for a detailed discussion on the advantages and disadvantages of proceeding under a disparate treatment theory under the PDA.

28. *See* Gottschalk, *supra* note 21, at 266-67.

29. One author has argued that the disparate impact theory is more likely than disparate treatment theory to serve as a means of achieving on-the-job accommodations. *See id.* at 267-68. The author also noted, however, that it is not entirely clear that disparate impact theory is available to PDA plaintiffs. *See id.* at 267.

30. *See* Millsap, *supra* note 21, at 1422. See *id.* at 1422-23 for an analysis of the relevant Supreme Court decisions, *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), and *Wimberly v. Labor & Industrial Relations Commission*, 479 U.S. 511 (1987), and their effect on PDA plaintiffs alleging disparate impact. *See also* Gottschalk, *supra* note 21, at 268.

overlap, however, when a pregnancy is perceived as a disability, or a pregnancy-related problem actually is or is perceived as a disability.

While one of the purposes of the ADA is to eliminate disability-based discrimination in the workplace, the ADA also mandates that "reasonable accommodations" be made for the disabled worker.[31] The PDA does not attempt to ease the burden of the pregnant woman in the workplace. One commentator has explained this difference by stating that "[t]he PDA does not grant a pregnant employee the affirmative power to demand accommodation in the workplace, but instead limits her to the negative right to be treated the same as other similarly situated workers."[32]

C. Relevant Law of the ADA

The ADA consists of five titles.[33] This Note will focus on Title I of the ADA, the employment discrimination provision, as this is the section under which pregnancy-related problems are usually litigated.[34] Title I prohibits employment discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advance-

31. See Erica Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability,"* 73 WASH. L. REV. 575, 585 (1998), for a discussion of how the ADA differs from other anti-discrimination statutes in terms of mandating affirmative action on the part of the employer. *See also* Millsap, *supra* note 21, at 1430.

32. Millsap, *supra* note 21, at 1417.

33. Title I addresses employment in the private sector and is applicable te private schools and colleges. *See* 42 U.S.C. § 12112(a) (1994). Title II prohibits discrimination by public entities, both as employers and as providers of services. *See id.* § 12132. Title III applies to public accommodations in buildings and transportation services. *See id.* § 12182(a). Title IV addresses telecommunications services for hearing-impaired and speech-impaired individuals. *See* 47 U.S.C. § 225 (1994). Title V covers miscellaneous provisions. *See* 42 U.S.C. § 12201 (1994); *see also* Jones, *supra* note 7, at 481-89 (discussing the five titles of the ADA); Albert S. Miles et al., *The Reasonable Accommodations Provisions of the Americans with Disabilities Act*, WEST'S EDUC. L. REP., Oct. 1991, at 1, 4 (same).

34. While Title I of the ADA provides the most frequent basis of litigation for pregnancy-related problems as disabilities, several women have filed suits under Title II, the public entities provision of the ADA. *See generally* Darian v. University of Mass. Boston, 980 F. Supp. 77 (D. Mass. 1997); Hernandez v. City of Hartford, 959 F. Supp. 125 (D. Conn. 1997); Garrett v. Chicago Sch. Reform Bd. of Trustees, No. 95 C 7341, 1996 WL 411319 (N.D. Ill. July 19, 1996). *Darian* and *Garrett* both involved students who were unable to complete their coursework due te pregnancy-related problems. *Darian*, 980 F. Supp. at 82-84; *Garrett*, 1996 WL 411319, at *2. In these cases, the use of Title II is appropriate because it is not an *employment* discrimination action and the schools were public entities. *See* 42 U.S.C. § 12132. However, in *Hernandez*, the plaintiff sued her employer, a public entity, under Title II. *Hernandez*, 959 F. Supp. at 127-28. The court suggested that filing under Title I of the ADA may have been more appropriate as Title I explicitly addresses discrimination in all employment situations, whether public or private. *See id.*

ment, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[35]

A "covered entity" is defined by the ADA as "an employer, employment agency, labor organization or joint labor-management committee."[36] A "qualified individual with a disability" is defined by the ADA as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[37] In order to state a prima facie case for employment discrimination under Title I of the ADA, a plaintiff must show that (1) she[38] is "disabled" within the meaning of the ADA; (2) she is qualified, with or without reasonable accommodation, for the job at issue; and (3) the employer discriminated against her based upon her alleged disability.[39] While all three requirements are usually litigated within the context of an ADA employment discrimination case, the topic of this Note implicates only the first requirement—that the plaintiff be disabled.

The first burden the plaintiff must overcome is demonstrating that she is disabled within the meaning of the ADA.[40] The ADA defines a disability as: "(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."[41] Although individuals who qualify under any of the prongs are considered disabled, in cases involving pregnancy-related problems, most ADA plaintiffs fall under the first prong of the definition.[42]

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35. 42 U.S.C. § 12112(a).

36. *Id.* § 12111(2).

37. *Id.* § 12111(8).

38. This Note will use the feminine pronoun throughout because the cases involve pregnancy-related problems.

39. *See* Washington v. HCA Health Servs., Inc., 152 F.3d 464, 467 (5th Cir. 1998); Harris v. H & W Contracting Co., 102 F.3d 516, 519 (11th Cir. 1996); Hernandez v. City of Hartford, 959 F. Supp. 125, 129 (D. Conn. 1997); Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465, 472 (D. Kan. 1996), *aff'd*, 158 F.3d 1074 (10th Cir. 1998). Other courts have listed the requirements of a prima facie case under Title I of the ADA as requiring plaintiff to prove that (1) she was "disabled" as that term is defined by the ADA; (2) she was qualified, with or without accommodation, to do the job; (3) she was discharged; and (4) she was replaced by a non-disabled person. *See, e.g.*, Gutierrez-Usera v. Puerto Rico Tel. Co., 967 F. Supp. 35, 38 (D.P.R. 1997). These requirements are directly modeled after the standards set forth for a prima facie showing of employment discrimination in disparate treatment Title VII cases as enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). See *Vallejo Serrano v. Cigna Insurance Co.*, 970 F. Supp. 78, 82 (D.P.R. 1996), for a list of courts applying the *McDonnell Douglas* framework to ADA cases.

40. *See Washington*, 152 F.3d at 467.

41. 42 U.S.C. § 12102(2)(A)-(C) (1994).

42. *See* Cerrato v. Durham, 941 F. Supp. 388, 391 (S.D.N.Y. 1996) ("Those cases that have addressed whether pregnancy fits within this definition have focused exclusively on the first,

In *Bragdon v. Abbott*, the Supreme Court refined the definition of disability into the following inquiries:

> First, we consider whether [plaintiff's pregnancy-related problems were] a physical impairment. Second, we identify the life activity upon which [plaintiff] relies . . . and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity.[43]

The text of the ADA does not define "physical or mental impairment," "substantially limits," or "major life activities." However, Congress authorized the EEOC to promulgate regulations interpreting the ADA.[44] In response to this authority, the EEOC issued regulations defining the various statutory phrases.[45]

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objective prong of the definition."); *see also* Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 979 (N.D. Ill. 1998) (discussing when pregnancy may be considered a disability); Lacoparra v. Pergament Home Ctrs., Inc., 982 F. Supp. 213, 227 (S.D.N.Y. 1997) (analyzing pregnancy under the first prong of the definition); Darian v. University of Mass. Boston, 980 F. Supp. 77, 85 (D. Mass. 1997) (deciding whether pregnancy is a physical impairment under the ADA); *Hernandez*, 959 F. Supp. at 129-30 (same); *Gudenkauf*, 922 F. Supp. at 472 (same); Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995) (same); Tsetseranos v. Tech Prototype, Inc., 893 F. Supp. 109, 119 (D.N.H. 1995) (same); Pacourek v. Inland Steel Co. (*Pacourek I*), 858 F. Supp. 1393, 1404 (N.D. Ill. 1994) (same). In cases involving pregnancy-related problems, very few plaintiffs attempt to argue that they are also disabled under the third prong of the disability definition—that their employers regarded them as disabled. *See Lacoparra*, 982 F. Supp. at 228-29.

43. Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196, 2202 (1998).

44. *See* 42 U.S.C. §§ 12116-12117 (1994).

45. *See* 29 C.F.R. § 1630.2 (1998). The EEOC regulations define "physical impairment" as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine." *Id.* § 1630.2(h)(1).

The regulations also provide that a person with a disability is "substantially limited" if she is:

> (i) [u]nable to perform a major life activity that the average person in the general population can perform; or
> (ii) [s]ignificantly restricted as to the condition, manner or duration under which [she is able to] perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id. § 1630.2(j)(1)(i)-(ii).

The regulations define "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* § 1630.2(i). The Interpretive Guidance appended to the regulations confirm that this list is "not exhaustive" and lists other major life activities such as sitting, standing, lifting, and reaching. *See* 29 C.F.R. app. § 1630.2(i). In addition, the EEOC Compliance Manual lists thinking, concentrating, and interacting with others as major life activities. *See* 2 EEOC COMPLIANCE MANUAL § 902.3(b) (Mar. 1995), *as compiled in* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DISABILITY DISCRIMINATION: EMPLOYMENT DISCRIMINATION PROHIBITED BY THE AMERICANS WITH DISABILITIES ACT OF 1990, at 902-15 (1998). The regulations also state that:

D. ADA Disability Standards as They Relate to Pregnancy-Related Problems

In order for a woman to establish her pregnancy-related problem as a disability under Title I of the ADA, she must satisfy the ADA's definition of a disability.[46] This requires a plaintiff to establish that (1) her pregnancy-related problem is a physical impairment[47] and (2) the impairment substantially limits a major life activity, as recognized by the ADA.[48] Only the combination of these two inquiries determines whether a particular pregnancy-related problem is a disability. As such, this Note will refer to pregnancy-related problems as impairments when discussing only the first inquiry and as disabilities when discussing the combination of the two inquiries.

The issue of whether pregnancy-related problems qualify as disabilities has been litigated frequently over the past decade. Courts appear to analyze the issue of pregnancy-related problems under the ADA in one of three ways.[49]

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[t]he following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) [t]he nature and severity of the impairment;
(ii) [t]he duration or expected duration of the impairment; and
(iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2)(i)-(iii). Finally, the EEOC regulations make explicit that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities" for the purpose of the ADA. 29 C.F.R. app. § 1630.2(j).

46. This Note will continue to define "disability" as a physical or mental impairment which substantially limits a major life activity because this is the most frequently relied upon definition of disability in the pregnancy-related problem cases. *See supra* notes 41-42 and accompanying text.

47. In one case in which the plaintiff failed to allege a specific physical impairment related to her pregnancy, the court found that no ADA cause of action would lie. *See* Horwitz v. Sterling Miami, Inc., No. 97 C 6322, 1998 WL 245883, at *5 (N.D. Ill. May 4, 1998) (finding plaintiff must allege a specific physical impairment arising from her miscarriage).

48. In addition to the major life activities listed above, *see supra* note 45, the Supreme Court recently held in *Bragdon* that reproduction was a major life activity under the ADA. *Bragdon*, 118 S. Ct. at 2205. After *Bragdon*, plaintiffs will find it easier to assert a disability under the ADA based upon pregnancy-related problems that affect the major life activity of reproduction. Plaintiffs can claim that an assortment of major life activities are substantially limited by pregnancy-related problems. This leads to a wide variety of fact-specific questions in these cases. As a result, the major life activity affected in each case will differ depending on the particular plaintiff and the plaintiff's particular pregnancy-related problems.

49. A fourth category of cases also exists, but it does not address pregnancy-related problems under the ADA. This category includes women who file suit under the ADA claiming that their infertility is a disability. *See, e.g.*, Pacourek v. Inland Steel Co. (*Pacourek II*), 916 F. Supp. 797, 801, 804 (N.D. Ill. 1996) (holding that infertility was a physical impairment that substantially limited the major life activity of reproduction, rendering infertility a disability under the ADA); Erickson v. Board of Governors of State Colleges & Univs. for N.E. Ill. Univ., 911 F. Supp. 316, 323 (N.D. Ill. 1995) (same); Pacourek v. Inland Steel Co. (*Pacourek I*), 858 F. Supp. 1393, 1404-05 (N.D. Ill. 1994) (same as *Pacourek II*, but at dismissal stage instead of summary

1. Always a Disability Approach

Only one court has found that pregnancy is a per se disability under the ADA.[50] *Chapsky v. Baxter V. Mueuller Division* found pregnancy to be a "recognized disability."[51] In *Chapsky*, Baxter fired the plaintiff after her first violation of Baxter's new non-smoking policy.[52] Plaintiff alleged that Baxter utilized the new non-smoking policy as a pretext to terminate her employment after one of her supervisors became aware of her troubled pregnancy.[53] Plaintiff argued that proof of this dissimilar treatment could be found in the fact that other employees had received numerous warnings regarding the new non-smoking policy and had not been terminated after their first infraction.[54] The court found that the plaintiff had made a prima facie showing of disability discrimination based upon the premise that pregnancy was a per se disability and she was treated differently than other employees who were not pregnant.[55]

The holding in *Chapsky* is no longer defensible. First, the court has since modified the ruling in *Chapsky* so that pregnancy is no longer considered a per se disability under the ADA.[56] Second, the *Chapsky* ruling has been sharply criticized by other courts deciding whether pregnancy-related problems are disabilities under the ADA.[57] Third, the *Chapsky* court incorrectly relied on *Pacourek v. Inland Steel Co.*, where the court found that infertility, not pregnancy or

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judgment stage). *But see, e.g.*, Krauel v. Iowa Methodist Med. Ctr., 915 F. Supp. 102, 106-08 (S.D. Iowa 1995) (holding that reproduction is not a major life activity and, hence, that infertility is not a disability under the ADA); Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240, 243-44 (E.D. La. 1995) (same). The Supreme Court's holding in *Bragdon* that reproduction is a major life activity under the ADA has put this debate to rest somewhat. *Bragdon*, 118 S. Ct. at 2205.

50. *Cf.* Colette G. Matzzie, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193, 193-94 (1993) (arguing that pregnancy should be considered a disability under the ADA and that the refusal to do so "results from the misunderstandings surrounding 'disability' ").

51. Chapsky v. Baxter V. Mueuller Div., No. 93-6524, 1995 WL 103299, at *3 (N.D. Ill. Mar. 9, 1995).

52. *Id.* at *2-3.

53. *See id.* at *1-2.

54. *See id.* at *2.

55. *See id.* at *3.

56. *See* Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 980 (N.D. Ill. 1998).

57. *See, e.g.*, Wenzlaff v. NationsBank, 940 F. Supp. 889, 891 (D. Md. 1996); Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465, 473-74 (D. Kan. 1996), *aff'd*, 158 F.3d 1074 (10th Cir. 1998); *see also* Richards v. City of Topeka, 934 F. Supp. 378, 382 (D. Kan. 1996) (holding that pregnancy is not a per se physical impairment).

pregnancy-related problems, could be a disability under the ADA.[58] Finally, the ruling in *Chapsky* is completely contrary to the Interpretive Guidance issued by the EEOC regarding the agency's ADA regulations.[59]

2. Never a Disability Approach

Other courts, at the other end of the spectrum, advocate disallowing any recovery under the ADA for pregnant women, regardless of pregnancy-related problems.[60] Flaws also exist with each of these cases, however, that prevent them from being cited for the proposition that no pregnant woman should recover under the ADA. One of the earliest cases disallowing recovery, *Byerly v. Herr Foods, Inc.*, was decided before ADA case law had substantially developed.[61] Therefore, the *Byerly* court had no precedent to rely upon for a finding that pregnancy-related problems could be disabilities under the ADA. Also, it is not clear from the *Byerly* decision that the plaintiff claimed anything more than that her pregnancy was a disability.[62] As such, it is doubtful that *Byerly* can be cited for the proposition that pregnant women should never be allowed to recover under the ADA; more likely it stands for the proposition that pregnancy is not a per se disability. Despite *Byerly*'s uncertain import, other courts have relied on *Byerly* to deny a right to ADA protection for women experiencing pregnancy-related problems.[63]

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58. *See* Pacourek v. Inland Steel Co. (*Pacourek I*), 858 F. Supp. 1393, 1404-05 (N.D. Ill. 1994); *see also supra* note 49.

59. *See* 29 C.F.R. app. § 1630.2(h) (1998). The EEOC's Interpretive Guidance for the regulations promulgated for Title I of the ADA state that:

> It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within the "normal" range and are not the result of a physiological disorder.... Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.

Id.

60. *See* Leahr v. Metropolitan Pier & Exposition Auth., No. 96 C 1388, 1997 WL 414104, at *4 (N.D. Ill. July 17, 1997) (finding that pregnancy-related problems are not disabilities under the ADA); Johnson v. A.P. Products, Ltd., 934 F. Supp. 625, 627 (S.D.N.Y. 1996) (finding cases holding that pregnancy is not a disability "more persuasive" than those holding the contrary); Byerly v. Herr Foods, Inc., No. Civ. A. 92-7382, 1993 WL 101196, at *4 (E.D. Pa. Apr. 6, 1993) (holding that the statute indicatos that pregnancy is not covered by the ADA).

61. *Byerly*, 1993 WL 101196, at *1.

62. *See id.*

63. *See, e.g., Leahr*, 1997 WL 414104, at *3; *Johnson*, 934 F. Supp. at 627.

One flaw in *Byerly* and its progeny is that these cases cite the EEOC's Interpretive Guidance provisions as evidence that pregnancy and any related problems can never be disabilities.[64] These guidelines, however, simply state that pregnancy, occurring as a natural result of a healthy reproductive system, should not be considered as an impairment per se.[65] The guidelines conclude nothing about pregnancy-related problems.

Two arguments appear repeatedly in cases cited for the proposition that pregnancy and pregnancy-related problems can never be disabilities under the ADA. One argument is that pregnancy-related problems are by their nature temporary and therefore cannot be considered disabilities under the ADA.[66] Two sections of the EEOC guidelines support the interpretation that temporary disabilities cannot be considered disabilities under the ADA. First, the appendix te the section defining "substantially limits" states that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities."[67] Also, in the "substantially limits" definition in the guidelines, the EEOC puts forth three factors for courts to consider when deciding whether an impairment substantially limits a major life activity.[68] Two of these factors relate to duration of the impairment and/or its effects.

Courts have relied on these EEOC guidelines to conclude that pregnancy is a temporary impairment that cannot be considered a disability under the ADA.[69] Without great explanation, these courts have determined that pregnancy is an inherently temporary condition because it can never extend beyond nine months. The ADA, however, mandates a more refined analysis of this question by asking courts to

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64. *See Leahr*, 1997 WL 414104, at *3 (citing 29 C.F.R. app. § 1630.2(h) (1998), which states that "[o]ther conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments"); *Johnson*, 934 F. Supp. at 627 (same); *Byerly*, 1993 WL 101196, at *4 (same).

65. *See* 29 C.F.R. app. § 1630.2(h).

66. *See, e.g.*, Lacoparra v. Pergament Home Ctrs., Inc., 982 F. Supp. 213, 228 (S.D.N.Y. 1997); *Leahr*, 1997 WL 414104, at *4; *Johnson*, 934 F. Supp. at 627; Jessie v. Carter Health Care Ctr., Inc., 926 F. Supp. 613, 616 (E.D. Ky. 1996).

67. 29 C.F.R. app. § 1630.2(j).

68. *See id.* § 1630.2(j)(2)(ii)-(iii) (stating that a court should consider "the duration or expected duration of the impairment" and the "permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment").

69. *See, e.g.*, *Lacoparra*, 982 F. Supp. at 227 (implying that pregnancy is a temporary condition which will not constitute a disability under the ADA); *Jessie*, 926 F. Supp. at 616 (stating that pregnancy is a "temporary, non-chronic condition of short duration which is not a disability under normal circumstances" (citing Villareal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995))).

consider plaintiffs on a case-by-case basis.[70] While it is possible that some plaintiffs will suffer minimal to no pregnancy-related problems, or problems that are only intermittent or purely temporary, it is also possible that certain plaintiffs will suffer from severe pregnancy complications that will prevent them from living and working as they normally would.

Instead of a blanket assertion that pregnancy-related problems are always temporary, some courts have determined that particular pregnancy-related problems were not temporary and could qualify as disabilities under the ADA. Notably, the court in *Gabriel v. City of Chicago* stated that "[a]lthough intermittent, episodic impairments are not considered disabilities under the ADA, Gabriel's condition was not intermittent or episodic . . . . Her ailments began affecting her in July 1995 and did not subside until January 1996. These ailments extended beyond the time Gabriel gave birth . . . ."[71] As with other impairments that are not pregnancy-related, the determination of whether a particular impairment is a disability under the ADA or simply a temporary condition is a fact-specific question and requires close analysis of the particular plaintiff's pregnancy-related problems.[72]

The other argument that courts frequently make when reasoning that pregnancy and pregnancy-related problems are not disabilities is that there is no need to address pregnancy-related problems under the ADA because the PDA already provides remedies for pregnant women who face discrimination.[73] While these courts are right to point out that the PDA covers pregnancy-related discrimination, the courts fail to take into account the very different purposes and

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70. *See* 29 C.F.R. app. § 1630.2(j).

71. Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 983 (N.D. Ill. 1998) (citation omitted).

72. The question of whether a pregnancy-related problem is a per se temporary problem has also been addressed in the context of a perceived disability (the third prong of the EEOC's disability definition in 29 C.F.R. § 1630.2 (1998)). In *Martinez v. Labelmaster*, No. 96 C 4189, 1998 WL 786391 (N.D. Ill. Nov. 6, 1998), the court held that the plaintiff could not show that the defendant perceived the plaintiff as having a physical impairment which substantially limited a major life activity. Specifically, the court stated that while "it is undisputed that defendants believed the perceived 'impairment' would end when Martinez was no longer pregnant, it is also undisputed that defendants did not expect that [the pregnancy] would result in any permanent impact." *Id.* at *8-9.

73. *See Villarreal*, 895 F. Supp. at 152 (stating that "[t]he existence of both Title VII and the Pregnancy Discrimination Act obviate the need to extend the coverage of the ADA to protect pregnancy and related medical conditions"); Tsetseranos v. Tech Prototype, Inc., 893 F. Supp. 109, 119 (D.N.H. 1995) (stating that the PDA "obviates the need for pregnancy-related discrimination to also be covered under the ADA"); Byerly v. Herr Foods, Inc., No. Civ. A 92-7382, 1993 WL 101196, at *4 (E.D. Pa. Apr. 6, 1993).

remedies of the PDA and ADA.[74] It is because of these different purposes and remedies that the ADA might provide the only adequate means of redress to a pregnant worker who has experienced discrimination.

Different theoretical models underlie the PDA and ADA. When a pregnant woman chooses to file suit under either the PDA or the ADA, these different theoretical models may alter the remedies available in the workplace. Legal scholars tend to discuss equality in terms of two different models: equal treatment and special treatment.[75] The reasoning behind the equal treatment model is that those who are alike should be treated alike and those who are not alike should not be treated alike.[76] Under this model, women and men should be treated in a like manner, as the two sexes do not differ in any substantial way. The special treatment model, on the other hand, reasons that women are basically different from men and must be treated differently in particular circumstances, like pregnancy.[77]

Because the ADA focuses not on gender equality but on disability discrimination, the equal/special treatment theoretical models do not apply. Instead, the ADA relies on a reasonable accommodations model. At least one commentater has argued that the ADA's reasonable accommodation model is superior to the PDA's equal/special treatment models.[78] As stated above, the PDA can offer pregnant women only the prospect of not being discriminated against because of their pregnancy. The ADA, however, provides certain pregnant women, those with pregnancy-related problems that qualify as disabilities, with an affirmative right to be reasonably accommodated in the workplace during the duration of their pregnancy-related problems.[79]

3. Moderate Approach

Finally, other courts have taken a moderate approach. These courts conclude that, while pregnancy is not a per se disability, pregnancy-related problems can be disabilities under the ADA. In *Gabriel v. City of Chicago*, one of the most recent of these cases, the plaintiff

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74. *See supra* notes 16-32 and accompanying text.
75. *See* Millsap, *supra* note 21, at 1424.
76. *See id.*
77. See *id.* at 1424-27, for a detailed discussion of the equal and special treatment theoretical models as they pertain to pregnancy discrimination in the workplace.
78. *See id.* at 1433-35.
79. *See supra* text accompanying notes 25-32.

obtained work as a probationary data entry operator with the City of Chicago Police Department in June 1995.[80] In early July, Gabriel informed her immediate supervisor that she was pregnant.[81] Later that month, Gabriel told her supervisor that she was having a difficult pregnancy.[82] Her supervisor then requested that Gabriel get a note from her doctor confirming this.[83] Gabriel submitted a note from her doctor indicating that she was able to perform only light work duties for the duration of her pregnancy.[84] Gabriel's supervisor honored this request and Gabriel was no longer expected to lift boxes, pull cabinets, or carry heavy folders.[85]

In October 1995, Gabriel's supervisor was replaced by another woman, Meehan.[86] Meehan was not as accommodating as Gabriel's previous supervisor regarding her physical restrictions.[87] Meehan insisted that Gabriel be able to perform all the duties at the front desk if she were to remain in her position.[88] As a result of Meehan's continued insistence and Gabriel's problems with standing and completing her job duties, Gabriel informed Meehan in November 1995 that she would be taking a leave of absence beginning in December because of her pregnancy-related problems.[89] In November, Meehan recommended against Gabriel's promotion to permanent status, stating that Gabriel was not always ready to begin work at the scheduled starting time, that she could not work quickly enough to keep up with a fast-paced workload, and that she had taken several days off since starting her job in June.[90]

The city then authorized Gabriel's termination on November 27, 1995, and Meehan terminated her two days later.[91] Five days after Gabriel's termination, Gabriel went into premature labor and gave birth a full two months before her scheduled due date.[92] Gabriel subsequently filed suit against the city of Chicago.[93] The court denied the

80. Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 976 (N.D. Ill. 1998).
81. *See id.*
82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.* at 977.
90. *See id.*
91. *See id.*
92. *See id.*
93. *See id.*

city's motion for summary judgment and found that there were material issues of fact regarding Gabriel's ADA claim.[94]

The court began its analysis by defining the relevant EEOC regulations and definitions and discussing the Supreme Court's recent decision in *Bragdon v. Abbott*.[95] The court acknowledged that while *Bragdon* clarified that reproduction was a major life activity under the ADA, it was unclear how this determination affected particular disabilities of the reproductive system, including pregnancy-related problems.[96] The court further noted that guidance from the United States Court of Appeals for the Seventh Circuit and other circuit courts was visibly lacking in the area of pregnancy-related problems under the ADA, presumably because many of these suits are brought under the PDA.[97] The court engaged in a survey of the various district court decisions addressing this issue and, in doing so, noted the various criticisms of the *Chapsky* decision.[98] After reviewing the various criticisms of *Chapsky*'s holding, the court limited the holding in *Chapsky* and pronounced that, while pregnancy was not a per se disability under the ADA, pregnancy-related problems could constitute disabilities under the ADA.[99]

In reaching its conclusion that pregnancy-related problems could be considered disabilities under the ADA, the court followed the Supreme Court's method of analysis established in *Bragdon* for determining whether the plaintiff suffers from a disability, as defined by the ADA and EEOC regulations.[100] The court first addressed the impairment requirement and drew a distinction between pregnancy and problems caused by pregnancy, "the latter of which may constitute impairments if they are the product of a 'physiological disorder'—one type of physical impairment listed in the EEOC regulations."[101] The

94. *See id.* at 983.
95. *See id.* at 978.
96. *See id.* at 979.
97. *See id.*
98. *See id.* Judge Castillo decided both *Chapsky* and *Gabriel*.
99. *See id.* at 980. The *Gabriel* court also noted the various other district courts that have determined that pregnancy-related problems may be considered disabilities under the ADA. *See, e.g.*, Darian v. University of Mass. Boston, 980 F. Supp. 77, 85-87 (D. Mass. 1997); Hernandez v. City of Hartford, 959 F. Supp. 125, 129 (D. Conn. 1997); Cerrato v. Durham, 941 F. Supp. 388, 391-94 (S.D.N.Y. 1996); Garrett v. Chicago Sch. Reform Bd. of Trustees, No. 95 C 7341, 1996 WL 411319, at *2-3 (N.D. Ill. July 19, 1996); Patterson v. Xerox Corp., 901 F. Supp. 274, 278 (N.D. Ill. 1995).
100. *See supra* notes 40-45 and accompanying text.
101. *Gabriel*, 9 F. Supp. 2d at 980. In analyzing pregnancy-related problems under the ADA, the *Gabriel* court relied heavily upon the analysis of the court in *Hernandez*. In *Hernandez*, the plaintiff filed an ADA employment suit under Title II of the ADA (prohibiting discrimination by public entities), which requires substantially the same analysis as a Title I

court insisted that impairments resulting from a physiological disorder would be easy to identify because current medical knowledge allowed a clear distinction to be drawn between "normal and abnormal functions of pregnancy."[102] The court found that a jury could reasonably find that Gabriel's pregnancy-related problems—premature birth, swelling, and back and stomach pain—were "physiological disorders of the reproductive system."[103] The court continued by stating that it could not, as a matter of law, find that Gabriel's pregnancy-related problems were functions of a normal pregnancy.[104]

The court next addressed the major life activity requirement. Gabriel asserted that her pregnancy-related problems substantially limited her in the major life activity of standing.[105] Once the court acknowledged that standing was a major life activity, as recognized by the EEOC's Interpretive Guidance provisions,[106] the court addressed whether Gabriel's physical impairments substantially limited her in that activity. In making this determination, the court acknowledged its consideration of the three factors outlined by the EEOC.[107] The court found that "Gabriel's testimony that she could not stand for long periods of time throughout most of her pregnancy permits a finding that she was 'significantly restricted as to the condition, manner and duration' of her ability to stand, as compared to the average person."[108]

The court, having found that Gabriel's pregnancy-related problems could qualify as physical impairments which substantially limited her ability to stand, held that material issues of fact existed relating to whether Gabriel's pregnancy-related problems could be considered disabilities under the ADA.[109] In doing so, the court adopted the same approach utilized by other district courts, an approach that requires the court to evaluate the plaintiff's pregnancy-related problems by determining whether the alleged problem is an

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suit. *Hernandez*, 959 F. Supp. at 128. While employed by the city of Hartford, the plaintiff became pregnant and developed uterine fibroids which complicated her pregnancy and restricted her ability to work. *See id.* at 127-28. Hernandez requested to work at home and the request was denied. *See id.* at 128. She subsequently filed suit. *See id.* The court denied the defendant's summary judgment motion, holding that pregnancy-related problems can be disabilities under the ADA if the problems are a function of an abnormal pregnancy. *See id.* at 130.

102. *Gabriel*, 9 F. Supp. 2d at 980.
103. *Id.* at 981-82.
104. *See id.* at 981.
105. *See id.* at 982.
106. *See* 29 C.F.R. app. § 1630.2(i) (1998).
107. *See supra* note 45.
108. *Gabriel*, 9 F. Supp. 2d at 983 (quoting 29 CFR § 1630.2(j)(1)(ii) (1998)).
109. *See id.*

abnormal or unusual pregnancy-related condition and whether the impairment substantially limits a major life activity as defined by the ADA.[110]

While the *Gabriel* court cited numerous other district court decisions that utilized the normal/abnormal pregnancy analysis, many of these decisions do not discuss this distinction in any depth.[111] While all of these courts hold that pregnancy is not a per se physical impairment under the ADA,[112] many of the opinions, such as *Gudenkauf v. Stauffer Communications, Inc.*, *Villarreal v. J.E. Merit Constructors, Inc.*, and *Tsetseranos v. Tech Prototype, Inc.*, do not devote much analysis to which pregnancy-related problems would and would not qualify under the ADA.[113] The courts in *Gudenkauf*, *Villarreal*, and *Tsetseranos* held, in varying langnage, that "pregnancy and [its] related medical conditions do not, absent unusual circumstances, constitute a 'physical impairment' under the ADA."[114] Unfortunately, courts taking this approach often let this holding stand alone without any explanation to illuminate the court's reasoning. In other words, other courts and plaintiffs are left to de-

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110. The court justified taking this approach by stating that:

> Several other district courts have taken a similar approach, distinguishing between functions of normal pregnancies on one hand, and abnormal or unusual pregnancy-related conditions on the other. These courts find that the latter may constitute impairments under the ADA if they meet the EEOC's definition of physiological disorders or impairments of the reproductive system. In making this determination, these decisions examine the symptoms resulting from pregnancy, as opposed to focusing on the condition of pregnancy itself. The courts then ask whether the impairments resulting from pregnancy substantially limit a major life activity.... We believe this approach is grounded firmly in the EEOC regulations and the available medical literature.

Id. at 981.

111. There are some exceptions to this statement. The court in *Cerrato v. Durham* engaged in much of the same analysis as the *Hernandez* and *Gabriel* courts, citing medical knowledge as the beacon for distinguishing between normal pregnancy-related conditions and unusual conditions resulting from an abnormal pregnancy. *See* Cerrato v. Durham, 941 F. Supp. 388, 392-93 (S.D.N.Y. 1996). In *Martinez v. Labelmaster*, No. 96 C 4189, 1998 WL 786391, at *8 (N.D. Ill. Nov. 6, 1998), the court held that "[i]f pregnancy itself is not an impairment for the purposes of the ADA, it is counterintuitive to hold that a general condition of pregnancy, which is not a medical complication with regard to plaintiff's particular pregnancy, is an impairment."

112. *See, e.g.*, Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465, 473 (D. Kan. 1996), *aff'd*, 158 F.3d 1074 (10th Cir. 1998) ("Pregnancy is a physiological condition, but it is not a disorder. Being the natural consequence of a proporly functioning reproductive system, pregnancy cannot be called an impairment.").

113. *Gudenkauf*, 922 F. Supp. at 473; Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995); Tsetseranos v. Tech Prototype, Inc., 893 F. Supp. 109, 119 (D.N.H. 1995); *see also* Lacoparra v. Pergament Home Ctrs., Inc., 982 F. Supp. 213, 227-28 (S.D.N.Y. 1997); Jessie v. Carter Health Care Ctr., Inc., 926 F. Supp. 613, 616 (E.D. Ky. 1996).

114. *Tsetseranos*, 893 F. Supp. at 119; *see also Gudenkauf*, 922 F. Supp. at 473; *Villarreal*, 895 F. Supp. at 152.

termine what constitutes a sufficient deviation from a "normal" pregnancy to establish an impairment under the ADA.

As a result of the vague holdings in these cases, other courts have concluded that pregnant women may never recover under the ADA.[115] This interpretation, however, appears to be a mistaken reading of the courts' language. While language such as "pregnancy and related medical conditions do not, absent unusual circumstances, constitute a 'physical impairment' under the ADA"[116] is undeniably ambiguous, it certainly does not follow that the courts are attempting to bar recovery under the ADA to any pregnant woman. This may partially be explained by the fact that the plaintiffs in *Gudenkauf* and *Villarreal* attempted to proceed with an ADA suit on the theory that their pregnancies were disabilities.[117] The only principle that these cases establish is that plaintiffs with a pregnancy-related problem have *difficulty* recovering under the ADA. The cases do not stand for the proposition that it is impossible.

The major problem with the *Gabriel / Hernandez / Cerrato* and *Gudenkauf / Villarreal / Tsetseranos* lines of cases is that no court has defined what a normal pregnancy is, what an abnormal pregnancy is, and what might constitute unusual circumstances. As stated before, cases such as *Gabriel v. City of Chicago* have attempted to engage in some analysis regarding the normal/abnormal standard, mostly by stating that medical science has advanced enough to draw a clear distinction between normal and abnormal pregnancies or conditions of pregnancy.[118] Another method some courts have suggested is that in order for a pregnancy-related problem to qualify as a physical impairment, the problem must be attributable to some independent

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115. *See, e.g., Cerrato*, 941 F. Supp. at 392 (citing a number of courts, including *Gudenkauf*, *Villarreal*, and *Tsetseranos*, that have relied upon 29 C.F.R. app. § 1630.2(h) (1998) to conclude that a "pregnant woman can never claim the protection of the ADA").

116. *Villarreal*, 895 F. Supp. at 152.

117. *See Gudenkauf*, 922 F. Supp. at 473-74; *Villarreal*, 895 F. Supp. at 152. The *Tsetseranos* decision is more complicated because in that case the plaintiff argued that ovarian cysts complicated her pregnancy. The court granted the defendant's motion for summary judgment on the plaintiff's ADA claim, stating that "[a]lthough plaintiff's pregnancy was clearly complicated by her ovarian cysts, and these complications required her to be out of work for a period of time, the court finds that plaintiff's pregnancy was not a 'disability' under the ADA." *Tsetseranos*, 893 F. Supp. at 119. The court went on to say that "even assuming that plaintiff's pregnancy and ovarian cyst problem constitute a disability under the ADA, the court finds . . . that plaintiff has not produced sufficient evidence to establish a causal nexus between her disability and defendant's decision to terminate her." *Id.* In this way, the *Tsetseranos* court was able to dodge the question of whether the plaintiff's ovarian cyst-complicated pregnancy *should* be a physical impairment under the ADA.

118. *See* Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 980-81 (N.D. Ill. 1998); *see also Cerrato*, 941 F. Supp. at 393.

medical disorder outside of pregnancy.[119] Unfortunately, no courts provide definite guidance as to what factors determine a pregnancy's normality. This elusive standard is problematic because it can change from case to case. This problem is worsened when the "normality" of a pregnancy, as defined by the courts, is entirely dependent on advancing medical knowledge and technology.

E. Law of Mitigating Measures

The toxt of the ADA does not specify whether a disability should be assessed with or without regard to corrective or mitigating measures[120] in detormining whether a plaintiff's major life activity is substantially limited.[121] The term "mitigating measures" refers to anything that lessens or eliminates the effect of an impairment, and includes, but is not limited to, medicines, assistive devices, and prosthetic devices.[122] The decision whether to assess a disability and its effect on the plaintiff with or without regard to mitigating measures is an important one because many people are severely disabled without the use of these corrective measures, but they can function normally or nearly so with the use of mitigating measures.

The statuto does not indictate whether mitigating measures should be taken into account when determining whether a plaintiff is disabled. Consequently, most courts have found the statute to be

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119. *See, e.g., Gudenkauf*, 922 F. Supp. at 473 ("All of the physiological conditions and changes related to a pregnancy also are not impairments unless they exceed normal ranges or are attributable to some disorder.").

120. This Note uses the term "mitigating measures" to refer to whether a major life activity of the plaintiff is substantially limited by the physical/mental impairment in question. This is somewhat confusing because the term "mitigating measures" is usually used in reference to tbe plaintiff's general disability, not the more specific substantial limitation on the plaintiff's major life activities (whether a plaintiff is "substantially limited" is a question to be answered under the first prong of the definition of disability under the EEOC regulations). In fact, at least one court has discussed mitigating measures in terms assessing both the plaintiff's physical impairment and whether the physical impairment substantially limits one or more of the plaintiff's major life activities. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 899, 902 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999). When this Note refers to mitigating measures, it is for simplicity only and not because "mitigating measures" should be taken to qualify the term "disability" as a physical impairment alone. The proper analysis is whether mitigating measures should be considered when assessing whether the plaintiff is substantially limited in one or more major life activities because of an established physical/mental impairment. *See* 29 C.F.R. app. § 1630.2(j) (discussing mitigating measures under the heading of the "substantially limits" portion of the ADA's definitions). The mitigating measures do not eradicate the disability. Therefore, the analysis should focus on whether the mitigating measures lessen the effects of the disability such that the plaintiff is no longer substantially limitod in one or more major life activities.

121. *See* Washington v. HCA Health Servs. of Tex., Inc., 152 F.3d 464, 467 (5th Cir. 1998).

122. *See* 29 C.F.R. app. § 1630.2(j) (1998).

facially ambiguous.[123] As a result of this ambiguity, these courts have turned to various sources to discern whether a disability under the ADA should be assessed with or without regard to mitigating measures.[124] Courts faced with this issue of statutory interpretation frequently consult the EEOC regulations and Interpretive Guidance first.[125] The EEOC is the administrative agency charged with exacting compliance and promulgating regulations under the ADA.[126] As a result of this responsibility conferred by Congress, the EEOC's guidelines are entitled to a high degree of deference by courts.[127] The EEOC Interpretive Guidance to the ADA states that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to miti-

123. *See, e.g., Washington*, 152 F.3d at 467; Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997); Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858-59 (1st Cir. 1998). *But see* Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (2-1 decision) (Kennedy, J., concurring in part and dissenting in part) ("I recognize that portions of the ADA's vast legislative history lend some support to the EEOC's position. Where the statutory text is unambiguous, however, as I believe it is here, that ends the matter.").

124. According to the Supreme Court's analysis in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), only when a statute is silent or ambiguous on a matter must a court defer to the agency's interpretation of the statute and determine the permissibility of the agency's construction of the statute.

125. *See, e.g., Washington*, 152 F.3d at 468-69; *Matczak*, 136 F.3d at 937; *Arnold*, 136 F.3d at 863-64; *Sutton*, 130 F.3d at 899; Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996); Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 902-05 (E.D. Pa. 1997); Murphy v. Unitod Parcel Serv., Inc., 946 F. Supp. 872, 879 (D. Kan. 1996); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1444 (W.D. Wis. 1996).

126. *See* 42 U.S.C. §§ 12116-12117 (1994).

127. In *Chevron*, the Supreme Court stated that when Congress has delegated express "authority to [an] agency te elucidate a specific provision of the statute by regulation," such regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. *Chevron* dictates another standard of deference when Congress has implicitly delegated authority to an agency to interpret a statute. In a case of implicit delegation, "a court may not substitute its own construction of a statutory provison [sic] for a reasonable interpretation made by the administrator of an agency." *Id.* Although at first glance it appears that Congress has expressly delegated to the EEOC the authority te interpret the ADA, it is actually an implicit delegation. While Congress expressly gave the EEOC the power to interpret the ADA by way of regulation, *see* 42 U.S.C. § 12116, there is no such express delegation for the EEOC's Interpretive Guidance provisions. *See* Recent Cases, *Tenth Circuit Holds That Courts Should Consider Mitigating Measures in Evaluating Disability*—Sutton v. United Air Lines, Inc., 111 HARV. L. REV. 2456, 2459 (1998). Therefore, the EEOC's Interpretive Guidance provisions should be interpreted by *Chevron*'s implicit delegation standard—whether the EEOC's intorpretation of the use of mitigating measures in the assessment of disabilities is a "reasonable" interpretation of the ADA. As discussed below, most courts find the EEOC's Interpretive Guidance on mitigating measures to be unquestionably reasonable and extremely persuasive. *See, e.g., Matczak*, 136 F.3d at 937; *Arnold*, 136 F.3d at 863-64; *Harris*, 102 F.3d at 521; *Wilson*, 964 F. Supp. at 904-05; *see also* Michael J. Puma, *Respecting the Plain Language of the ADA: A Textualist Argument Rejecting the EEOC's Analysis of Controlled Disabilities*, 67 GEO. WASH. L. REV. 123, 140-41 (1998) (discussing *Chevron* deference in relation to the EEOC guidelines and arguing for the increased use of textualism in statutory interpretation).

gating measures such as medicines, or assistive or prosthetic devices."[128]

Another source courts have consulted is the legislative history of the ADA.[129] The available legislative history indicates that Congress intended disabilities under the ADA to be assessed without regard to corrective measures. In a House Education and Labor Committee Report discussing the first prong of the three-pronged definition of disability under the ADA, the Committee Report explains:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.[130]

Because the EEOC guidelines, as well as the ADA's legislative history, strongly indicate that disabilities under the ADA should be assessed without regard to mitigating measures, one would think that most or all courts would hold the same. Some courts, however, disregard the guidelines and the legislative history and assess disabilities with regard to mitigating measures. Other courts follow the direction of the EEOC and the ADA's legislative history and, accordingly, assess disabilities without regard to mitigating measures.

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128. 29 C.F.R. app. §1630.2(j) (1998).

129. *See, e.g., Washington*, 152 F.3d at 467-68; *Matczak*, 136 F.3d at 937; *Arnold*, 136 F.3d at 859-60; *Harris*, 102 F.3d at 521; *Wilson*, 964 F. Supp. at 905. At least one court has also consulted the Department of Justice's ("DOJ") interpretation of the ADA. The DOJ, charged with enforcing the ADA's prohibition of discrimination based on disability on the part of state and local governmental entities, interpreted the ADA to mean that disabilities should be assessed without regard to mitigating measures. *See Arnold*, 136 F.3d at 864 (quoting 28 C.F.R. app. § 35.104 (1994)).

130. H.R. REP. NO. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334. The House Judiciary Committee Report indicates a similar understanding of the ADA's definition of disability, stating that the "impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation." H.R. REP. NO. 101-485(III), at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451. The Senate Labor and Human Resources Committee Report also supports the determination that disabilities should be assessed without regard to corrective measures: "[W]hether a person has a disability should be assessed without regard te the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. REP. NO. 101-116, at 23 (1989). It is interesting to note that the majority, if not all, of the courts to consult the legislative history of the ADA have held that disabilities should be assessed without regard to mitigating measures. Courts holding otherwise typically make no mention of the legislative history of the ADA.

1. Assessing Disabilities With Regard to Mitigating Measures

Despite the strong presumed deference to the EEOC's interpretations and the ADA's legislative history, numerous courts have held that disabilities should be assessed with regard to mitigating measures.[131] The most recent of these cases, *Sutton v. United Air Lines, Inc.*, involved twin sisters who filed suit against United Airlines when it refused to hire the plaintiffs as pilots because of the plaintiffs' level of uncorrected vision.[132] The plaintiffs' uncorrected vision in each eye fell below the minimum requirements set by United for pilot visual acuity.[133] The plaintiffs filed suit under the ADA, alleging that the defendant discriminated against them because of their disability of poor uncorrected vision.[134] The district court held that the plaintiffs were not disabled within the meaning of the ADA because their uncorrected vision did not substantially limit them in a major life activity.[135] On appeal, the plaintiffs contended that their disabilities of poor vision should be assessed without regard to corrective measures (like glasses or contact lenses) in determining whether the plaintiffs were substantially limited in the major life activity of seeing.[136] The United States Court of Appeals for the Tenth Circuit affirmed the district court's dismissal of the plaintiffs' claim and, in doing so, held that the plaintiffs' disabilities should be assessed with regard to corrective measures.[137]

In holding that the "determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the indi-

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131. *See, e.g.*, Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 881 (D. Kan. 1996); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1444-45 (W.D. Wis. 1996); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813-14 (N.D. Tex. 1994); *see also* Gilday v. Mecosta County, 124 F.3d 760, 767 (6th Cir. 1997) (2-1 decision) (Kennedy, J., concurring in part and dissenting in part); *id.* at 768 (Guy, J., concurring in part and dissenting in part); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 n.3 (5th Cir. 1996). Commentators have urged this result as well. *See generally* Harris, *supra* note 31 (arguing that controlled impairments should not be considered disabilities under the ADA).

132. *See Sutton*, 130 F.3d at 895. See generally Carolyn V. Counce, Noto, *Corrective Devices and Nearsightedness Under the ADA*, 28 U. MEM. L. REV. 1195 (1998), for a detailed discussion of visual impairments and mitigating measures under the ADA.

133. *See Sutton*, 130 F.3d at 895.

134. *See id.*

135. *See id.* at 896 (discussing Sutton v. United Airlines, Inc., No. 96-S-121, 1996 WL 588917, at *3 (D. Colo. Aug. 28, 1996)).

136. *See id.*

137. *See id.* at 902. The *Sutton* court's holding has been criticized for its "circular reasoning" and lack of deference to the EEOC guidelines. *See generally* Recent Cases, *supra* note 127.

vidual,"[138] the *Sutton* court employed much of the reasoning used by previous courts that have reached the same conclusion. First, the *Sutton* court reasoned that section 1630.2(j)[139] of the EEOC's Interpretive Guidance directly conflicts with the plain language of the ADA.[140] The plain language of the ADA mandates that the court look at whether a plaintiff's disability substantially limits one or more major life activities of the plaintiff. The *Sutton* court stated that this language commands a case-by-case analysis of whether a plaintiff is substantially limited by a disability; the Interpretive Guidance, on the other hand, asks the court to evaluate whether the plaintiff's disability would "hypothetically affect the individual without the use of corrective measures."[141] The *Sutton* court further found that the relevant part of section 1630.2(j) of the EEOC's Interpretive Guidance was not only in conflict with the plain language of the ADA, but also was internally inconsistent with other portions of the Interpretive Guidance.[142] These findings allowed the court to reject the "mitigating measures" portion of section 1630.2(j) and hold that the plaintiffs' disabilities should be assessed with regard to corrective measures in determining whether the plaintiffs were substantially limited in the major life activity of seeing.

The *Sutton* holding placed the plaintiffs in an odd position. As the *Sutton* court stated:

> Plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts their major live [sic] activity of seeing and, thus, they are not qualified individuals for a pilot position with United, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing.[143]

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138. *Sutton*, 130 F.3d at 902.

139. Section 1630.2(j) of the EEOC's Interpretive Guidance states, in part, that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard te mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. app. § 1630.2(j) (1998).

140. *See Sutton*, 130 F.3d at 902. It is important to noto that the only way the *Sutton* court could justify going against the EEOC's interpretations of the ADA was for the court te find that the EEOC guidelines were in direct conflict with the plain language of the ADA. *See supra* notes 123-27 and accompanying text.

141. *Sutton*, 130 F.3d at 902. A few commentators and courts have criticized the "no mitigating measures" approach because it requires courts to evaluate the plaintiff in a hypothetical non-medicated state. *See, e.g.*, Harris, *supra* noto 31, at 581-82.

142. *See Sutton*, 130 F.3d at 902. See also Arthur F. Silbergeld & Stacie S. Polashuk, *Chronic Serious Health Impairments and Worker Absences Under Federal Employment Laws*, 14 LAB. LAW. 1, 18-20 (1998), for a critique of the EEOC guidelines.

143. *Sutton*, 130 F.3d at 903.

Other courts have noted this predicament as well.[144]

Interestingly, at least two of the cases which held that disabilities should be assessed with regard to mitigating measures involved plaintiffs that alleged disabilities directly related to the job qualifications of the position for which they were applying. In *Sutton*, the plaintiffs applied for pilot positions that required uncorrected vision of 20/100 or better.[145] Similarly, in *Murphy v. United Parcel Service, Inc.*, the plaintiff was employed as a mechanic for the defendant, United Parcel Service. As part of the qualifications for the job, the defendant required the plaintiff to pass a physical with minimum standards set by the Department of Transportation ("DOT"). Plaintiff could not meet the minimum standards set for blood pressure levels.[146] While the plaintiff's blood pressure was not directly related to his job as a mechanic for the defendant, plaintiff's passing of the physical was considered a requirement for employment.[147]

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144. *See, e.g.*, Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 878 (D. Kan. 1996). But see *Wilson v. Pennsylvania State Police Department*, 964 F. Supp. 898, 906-07 (E.D. Pa. 1997), in which the court held that the plaintiff's disability and its effect on his major life activities should be assessed without regard to mitigating measures. In support of this holding, the court noted:

> Defendant argues on the one hand that plaintiff's myopia is not limiting or unusual as compared with the general population, while arguing on the other hand that he does not have the requisite visual capacity to be a state trooper due te his poor uncorrected vision. There is a certain irony inherent in defendants' argument: if, by virtue of his glasses or lenses, plaintiff is not substantially limited in seeing, how can he nonetheless be too visually impaired – based on his eyes without correction – to satisfy the position of state trooper? Defendants' position may be intuitively attractive, in that most people would not think of an individual as disabled if he can alleviate the effects of his impairment by putting on eyeglasses, particularly as compared to an individual who, for instance, is confined to a wheelchair. However, intuition alone does not control this Court's statutory interpretation; rather, I conclude, having considered the statutory language, agency interpretations thereof, and existing legislative history, that the statutory term "substantially limits" should not be interpreted to automatically exclude people like plaintiff whose physical circumstances are limiting, but who use mitigating measures to offset the effects of their impairments.

Id. This is an interesting argument because it mirrors the argument made by the courts in *Sutton* and *Murphy*. By approaching the issue from the plaintiff's perspective (placing the irony of the argument on the defendant), the *Wilson* court held that plaintiff's visual impairment should be assessed without regard to mitigating measures, the opposite conclusion reached by the courts in *Sutton* and *Murphy*.

145. *Sutton*, 130 F.3d at 895.

146. *See Murphy*, 946 F. Supp. at 873.

147. *See id.* at 875. In *Arnold v. United Parcel Service, Inc.*, a case with facts similar to those in *Murphy*, the plaintiff applied for the position of mechanic with United Parcel Service and was required to pass a DOT physical. The plaintiff was an insulin-dependent diabetic, however, and the DOT regulations precluded issuing a license to insulin-dependent diabetics. In contrast to *Murphy*, the *Arnold* court held that plaintiff's disability (diabetes) should be assessed without regard to mitigating measures (insulin) in determining whether the plaintiff was substantially limited in one or more major life activities. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 863 (1st Cir. 1998); *see also Wilson*, 964 F. Supp. at 907 (holding tbat the

Murphy and *Sutton* can be distinguished from most other ADA cases in which the plaintiff alleges a disability but the disability is not directly related te the explicit job requirements. When the disability directly affects an integral requirement of the job in question, courts possibly judge the plaintiffs more harshly, disallowing the plaintiffs from working at a job for which they can never be qualified because of an inherent disability. Importantly, the *Murphy* and *Sutton* courts are the same ones that commented that plaintiffs were trying to have it "both ways" by claiming to have a disability that places them under ADA protection, but also makes them unable to fulfill a fundamental qualification for the job in question.[148]

While all courts holding that disabilities should be assessed with regard to corrective measures make some legal arguments as to the EEOC's guidelines directly conflicting with the plain language of the ADA,[149] the driving rationale behind the courts' decisions is that evaluating a disability without regard to mitigating measures reads the "substantially limits" language out of the ADA.[150] As one court stated, "the EEOC interpretation requires that one not having a limitation be considered as having a disability even though the statutory language clearly requires substantial limitation."[151] The courts provide an enticing argument: One who is no longer substantially limited because of corrective measures should not be considered disabled under the ADA. As many of the courts on the opposite side of the issue have noted, however, this approach may have problems as well.

2. Assessing Disabilities Without Regard to Mitigating Measures

Many courts have held that disabilities under the ADA should be assessed without regard to mitigating measures.[152] In reaching

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court should not consider mitigating measures in assessing the plaintiff's visual impairment even though the plaintiff had applied for the position of state trooper, a position requiring a certain level of visual acuity).

148. Again, it must be noted that on very similar facts to *Murphy*, the court in *Arnold* found that the plaintiff's disability should be assessed without regard to mitigating measures. *See Arnold*, 136 F.3d at 863.

149. *See Sutton*, 130 F.3d at 902; *Murphy*, 946 F. Supp. at 880; Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994).

150. *See, e.g.*, *Schluter*, 928 F. Supp. at 1445; *Coghlan*, 851 F. Supp. at 813.

151. *Coghlan*, 851 F. Supp. at 813.

152. *See, e.g.*, Washington v. HCA Health Servs., Inc., 152 F.3d 464, 470-71 (5th Cir. 1998); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629 (7th Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997); *Arnold*, 136 F.3d at 863; Doane v. City of

this conclusion, these courts rely heavily on the EEOC guidelines, backed up by the legislative history of the ADA. Both the EEOC guidelines and the legislative history of the ADA seem to indicate that disabilities under the ADA should be assessed without regard to mitigating measures.[153] In addition to these sources, courts finding that disabilities should be assessed without regard to corrective measures often consider the statutory purpose of the ADA.[154] These courts reason that the underlying purpose of the ADA is to protect individuals who in fact have an impairment, but are capable of performing the job, with or without mitigating measures.[155] When looking at the statutory purpose, the courts reason that "Congress not only considered but actually intended that the ADA's protections sweep broadly, covering a significant portion of the American populace."[156]

Despite the availability of the EEOC guidelines and legislative history, some courts have held that disabilities should be assessed without regard te mitigating measures without providing any rationale for this approach.[157] These courts generally consult the numerous sources already listed (the legislative history of the ADA, the EEOC guidelines, and the statutory purpose), but simply conclude that they should not take mitigating measures into consideration when assessing a plaintiff's disability and its effect on her major life activities.[158]

At least one court, however, has taken a hybrid approach in which some disabilities are assessed without regard to mitigating measures, but other disabilities are assessed with regard to mitigating measures. In *Washington v. HCA Health Services, Inc.*, the court held that only serious impairments and ailments that are analogous to those mentioned in the EEOC guidelines and the legislative history—diabetes, epilepsy, and hearing impairments—will be considered in their unmitigated state.[159] The *Washington* court stated that for impairments to be assessed without regard to mitigating

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Omaha, 115 F.3d 624, 627-28 (8th Cir. 1997); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995); Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 905 (E.D. Pa. 1997).

153. *See supra* notes 123-130 and accompanying text.

154. *See, e.g., Arnold*, 136 F.3d at 861; *see also* Gilday v. Mecosta County, 124 F.3d 760, 764 (6th Cir. 1997).

155. *See, e.g., Arnold*, 136 F.3d at 861.

156. *Id.* at 862.

157. *See, e.g., Baert*, 149 F.3d at 629; *Doane*, 115 F.3d at 627-28; Holihan v. Lucky Steres, Inc., 87 F.3d 362, 366 (9th Cir. 1996); *Roth*, 57 F.3d at 1454.

158. *See, e.g., Arnold*, 136 F.3d at 854. *See generally* Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997).

159. Washington v. HCA Health Servs., Inc., 152 F.3d 464, 470-71 (5th Cir. 1998).

measures, the plaintiff must use the mitigating measures on a regular basis (like daily insulin shots). On the other hand, if the mitigating measures are actually permanent corrections, the impairment will be assessed with regard to the correction.[160]

While the *Washington* court's approach generally follows the EEOC guidelines and the legislative history of the ADA, this court also found merit in the argument that disabilities should be assessed with regard to mitigating measures. The court refused to make a "broad pronouncement that all impairments must be considered in their unmitigated state."[161] The *Washington* court's analysis represents a new kind of analysis in which there is room for cases that do not comfortably fit into either category. The court's decision allows for a case-by-case analysis of any alleged disability which is not along the lines of diabetes, epilepsy, or a hearing problem.

The main thrust behind the argument that disabilities under the ADA should be assessed with regard to mitigating measures is that there must come a point where the mitigating measures are so successful as to render the plaintiff no longer substantially limited in any major life activities. If so, then the ADA should afford no protection. The other side of the argument, however, has strong logical reasoning as well. Primarily, courts promoting the assessment of disabilities without regard to mitigating measures appear to implicitly contend that "[t]he EEOC's 'no mitigating measures' interpretation embodies the sensible position that the use of a prosthetic aid or medication does not eliminate the underlying disability although it may, as a practical matter, reduce or even eliminate its effects."[162]

Beyond the support found in the EEOC guidelines and the ADA's legislative history, strong policy reasons exist for adopting the EEOC approach of assessing disabilities without regard to mitigating measures. One of the policy considerations is that if a court were to adopt the view that the plaintiff's disability and its effect on the plaintiff's major life activities must be assessed with regard to mitigating measures, the ADA would protect the plaintiff before hiring provided that the plaintiff could not afford treatment for her impairment, but not protect the employee once hired and treated

160. *See id.* The *Washington* court likely took the moderate approach because of its reluctance to proceed with a full endorsement of the EEOC guidelines. The court stated that "[a]lthough we think it is more reasonable to say that mitigating measures must be taken into account, we recognize that our position is not so much more reasonable to warrant overruling the EEOC." *Id.* at 470.

161. *Id.* at 471.

162. Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997).

under the employer's health plan.[163] Similarly, the ADA would not protect a plaintiff suffering from a disease such as diabetes who regularly took her medicine, while the ADA would protect the same plaintiff who did not take or could not afford the medication.[164] Essentially, this rule would create a disincentive whereby plaintiffs who cannot afford or just refuse to take advantage of mitigating measures are rewarded with protection by the ADA.

Yet another facet of this policy consideration is that courts should not punish plaintiffs for having taken the initiative to treat any underlying disabilities. A plaintiff who is able to utilize medical knowledge or technology to diminish the effects of her impairment, even to the point that the employer may not need to provide reasonable accommodations, should not then be left vulnerable to the employer's discrimination based on the plaintiff's underlying disability. Denying ADA protection to plaintiffs who act independently to mitigate the effects of an impairment creates a disincentive to self-help.[165] Clearly, Congress would not want to discourage persons with disabilities capable of being controlled from taking affirmative action to actually control the disabilities through whatever means available or necessary.

Finally, as noted earlier,[166] courts holding that disabilities should be assessed with regard to mitigating measures place plaintiffs in an odd position, forcing them to argue out of both sides of their mouths. It was noted as early as 1991 that:

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163. *See Arnold*, 136 F.3d at 862. The defendant in *Arnold* pointed out that this result would never occur because the plaintiff could always file an ADA suit based upon the third prong of the disability definition, the "regarded as" disabled prong, instead of the first prong of the definition of disability. *See id.*; *see also* 29 C.F.R. § 1630.2(g) (1998). The *Arnold* court pointed out, however, that upon review of the legislative history, it was clear that Congress intended plaintiffs with such controllable disabilities to be covered under the first prong, and possibly the third prong as well. *Arnold*, 136 F.3d at 862. In fact, many plaintiffs simultaneously file suit under both the first and third prongs of the definition of disability. *See, e.g.*, Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 936-38 (3d Cir. 1997); Harris v. H & W Contracting Co., 102 F.3d 516, 519 (11th Cir. 1996); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 365 (9th Cir. 1996); Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 901, 909 (E.D. Pa. 1997). *But see* Harris, *supra* note 31, at 582-84, 590 (asserting that assessing a disability without regard to mitigating measures lightens the evidentiary burden on the plaintiff if the plaintiff proceeds under the first prong of the disability definition).

164. *See Arnold*, 136 F.3d at 862. It must be noted, however, that most, if not all, courts would hold that a plaintiff who knows about a disability and refuses to treat it will not be considered a suitable ADA plaintiff. *See* Siefken v. Village of Arlington Heights, 65 F.3d 664, 667 (7th Cir. 1995) (holding that when an employee knows about a disability, needs no accommodation from an employer, and fails to meet the employer's expectations because of a failure to control a controllable disability, the plaintiff cannot state a cause of action under the ADA); Harris, *supra* note 31, at 600-02 (discussing the policy problem of "malingerers").

165. *See Arnold*, 136 F.3d at 863 n.7.

166. *See supra* notes 143-44 and accompanying text.

> [T]he person alleging discrimination under the protected class approach may be placed in a Catch-22 situation. The first task is to prove that he or she has a condition that is a serious limitation—it substantially limits one or more major life activities. If that hurdle is cleared, then the individual must turn around and prove that the condition is not really a serious limitation in the context of the particular job or opportunity at issue, i.e., that she or he is "qualified."[167]

Essentially, this "catch-22" could conceivably allow an employer to escape liability: If the plaintiff were not able to prove that she had a serious impairment that substantially limited one or more major life activities (because the court assessed the plaintiff's disability with regard to mitigating measures), the plaintiff may never get an opportunity to show that she is qualified for the position in question with the help of mitigating measures.[168]

The combination of the EEOC guidelines, the statutory purpose behind the ADA, its legislative history, and the policy considerations present in the issue of mitigating measures suggests that there is a stronger argument to be made that a plaintiff's disability under the ADA should be assessed without regard to mitigating measures.[169]

III. TECHNOLOGY AS A CORRECTIVE MEASURE

All mitigating measures ultimately stem from a technological advancement of one type or another.[170] Whether it be a crude leg prosthesis or a complex drug formula, some form of technology had a

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167. Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 448 (1991).

168. *See Arnold*, 136 F.3d at 863.

169. Although unclear, it is possible that a sentiment expressed in dicta in the Supreme Court's recent decision in *Bragdon v. Abbott* lends support to this proposition. Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196 (1998). When discussing the fact that the HIV-positive plaintiff may not ever want to have children, but that the plaintiff's major life activity of reproduction was nonetheless substantially limited, the court statod that "[i]n the end, the disability definition does not turn on personal choice." *Id.* at 2206. In the context of mitigating measures, this quote could be interpreted as meaning that a person's choice to mitigate a physical/mental impairment should not enter into the assessment of whether the person is substantially limited in a major life activity.

170. When discussing technology in general, it is important to remember that "[t]echnology is not simply the neutral product of rational technical imperatives; rather, it is the result of a series of specific decisions made by particular groups of people in particular places at particular times for their own purposes." Judy Wajcman, *Delivered Into Men's Hands? The Social Construction of Reproductive Technology*, *in* POWER AND DECISION: THE SOCIAL CONTROL OF REPRODUCTION 153, 154 (Gita Sen & Rachel C. Snow eds., 1994).

large part in the development and usage of the mitigating measure. Arguably, as technology advances to a point beyond current capabilities, no more disabilities will exist because every imaginable impairment would be "fixable" in one way or another. One commentator has phrased this precise argument in the following terms:

> If sometime in the future medical science progresses to the point that these impairments are completely controlled by means that are themselves not substantially limiting, then these individuals would not be considered as having disabilities under the first prong definition of disability. In the 1970s television series, The Six Million Dollar Man, scientists rehabilitated a severely injured astronaut with bionic prosthetic limbs, including two legs, one arm, and a bionic prosthetic eye. The result is that the astronaut can run faster, see farther, and lift more than any "normal" man. If and when we are able to create the Six Million Dollar Man, he should not be deemed to have a disability under the first prong definition of disability because he is not substantially limited from any major life activity.[171]

This argument flows logically and appeals to common sense. Yet, several problems arise with this proposition. First, if the discussion is to focus on a hypothetical Six Million Dollar Man, it is not inconceivable that this man might face discrimination based upon his disabilities or "improvements." The author of the above quotation would argue that this is why the third prong of the disability definition exists, so that those who are not actually disabled might still file suit under the "regarded as" disabled prong. It is extremely difficult, however, to argue convincingly that a person who is missing two legs, an arm, and visual capacity is not "disabled" in any basic sense of the word. Even if technology is able to somewhat compensate for these losses or improve upon natural human abilities, the person is still lacking a complete and natural human form. As such, this plaintiff should be entitled to file suit under either the first prong of the disability definition, the third prong, or both.[172]

If technology can compensate for any disability, however, the issue of whether a disability exists is rendered moot. Under this approach, once the argument is posited that technology is a panacea for any human impairment, then that same argument can be used to justify the eradication of any and all disabilities.[173] The question then

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171. Harris, *supra* note 31, at 599-600; *see also* DONNA HARAWAY, SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 149-81 (1991) (promoting the idea of an inevitable cyborg culture and the unique effects it might have upon gender).

172. *See supra* note 163.

173. The belief that technology can be a panacea is also called "technophilia." *See* NANCY LUBLIN, PANDORA'S BOX 23 (1998) ("Technophilia involves embracing technological innovation itself, reverence for the ability to control and explain nature. Accordingly, all things mechanical

becomes: what is a disability? As argued below, this question necessitates that pregnancy-related problems, and all disabilities, be assessed without regard to mitigating measures; for if they are not, technology will dictate what society considers a disability simply by what is correctable.

A. Technological Advances in Reproductive Medicine

Although the bodies of pregnancy discrimination law and mitigating measures law are quite distinct, they come together in an interesting way. As technology advances at an ever-increasing rate, various medical problems will be mitigated or extinguished by ameliorative measures. One area in which this technology is increasing at an alarming rate is reproductive technology.[174] Currently, technology is available to allow conception outside of the human body, screen embryos for various genetic deficiencies or predispositions, monitor a pregnancy from the moment of conception, possibly pre-select various characteristics for a to-be conceived embryo, and correct fetal deformities or problems before birth while the fetus is still in the womb.[175]

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are due greater respect than all things natural because nature is imperfect, inefficient, and untamed."); *see also* Patricia Bayer Richard, *The Tailor-Made Child: Implications for Women and the State*, *in* EXPECTING TROUBLE: SURROGACY, FETAL ABUSE & NEW REPRODUCTIVE TECHNOLOGIES 9, 15-18 (Patricia Boling ed., 1995) (hypothesizing that advances in perinatal diagnostic and treatment technology will lead to the quest for a "perfect" fetus/baby).

174. Reproductive technology is a hotly contested issue. At least one group over the past two decades has been dedicated solely to opposing reproductive technology: FINRRAGE (Feminist International Network of Resistance to Reproductive and Genetic Engineering). *See* LUBLIN, *supra* note 173, at 61-74 (discussing FINRRAGE); JUDY WAJCMAN, FEMINISM CONFRONTS TECHNOLOGY 58-60 (1991). *See generally* DION FARQUHAR, THE OTHER MACHINE: DISCOURSE AND REPRODUCTIVE TECHNOLOGIES (1996) (engaging in a thorough analysis of the various discourses on reproductive technology); CARSON STRONG, ETHICS IN REPRODUCTIVE AND PERINATAL MEDICINE: A NEW FRAMEWORK (1997) (developing an ethical framework for thinking abeut reproductive and perinatal technologies).

175. The treatment of fetuses within the womb is termed perinatology and has already established itself as a necessary and important medical subdivision. Many medical textbooks are dedicated wholly to reproductive medicine and perinatology. *See generally* NEW HORIZONS IN REPRODUCTIVE MEDICINE: THE PROCEEDINGS OF THE IX WORLD CONGRESS ON HUMAN REPRODUCTION, PHILADELPHIA, 1996 (Christos Coutifaris & Luigi Mastroianni eds., 1997); *see also* E. Albert Reece & Carol J. Homko, *Embryoscopy, Fetal Therapy, and Ethical Implications*, 57 ALB. L. REV. 709, 709 (1994) (discussing various prenatal diagnostic techniques and their applications). The concept of diagnosing and treating a fetus while still in the womb raises some very important concerns about women's autonomy and the status of a fetus. While it is not the focus of this Noto, it is important to recognize that there is a large body of scholarship devoted to matornal-fetal conflicts. *See, e.g.*, SUSAN BORDO, UNBEARABLE WEIGHT 71-97 (1993) (discussing reproductive technology and rights as they relate to personhood and "subject-ivity"); Bonnie Steinbock, *Maternal-Fetal Conflict and In Utero Fetal Therapy*, 57 ALB. L. REV. 781, 793 (1994) (arguing tbat "[r]ecognition of the fetus as a patient has the potential to impinge on women's rights to privacy and autonomy"); *Developments in the Law—Medical Technology and*

Although the array of reproductive technologies is immense,[176] this Note is concerned only with the types of technologies that can be termed "intervention" technologies: technologies that are used to intervene in an already-existing pregnancy to fix a problem or complication with either the woman or fetus.[177] This technology includes amniocentesis, chorionic villus sampling, ultrasound, fetoscopy, maternal serum alpha-fetoprotein testing, and fetal surgery.[178] This technology is relevant because it is the type of technology which might alleviate pregnancy-related problems that would cause a woman to miss work, need special accommodations from her employer, or perform at a level lower than that which is expected.

B. Reproductive Technology as It Relates to the ADA's Definition of Disability

Currently, the ADA's definition of disability depends on the effect the impairment has on a person's life, and does not hinge on the advancement of technology. If the definition were read as mandating the assessment of a disability with regard to mitigating measures, the definition would become dependent on technology. This proposition is the nexus between the two bodies of law.

One of the main reasons given by the courts and commentators to support the idea that disabilities under the ADA should be assessed with regard to mitigating measures is that the ADA is really meant to protect only those who are truly affected by their disabilities.[179] At first glance, this argument appears incapable of being used to support the opposite claim: that disabilities under the ADA should be assessed without regard to mitigating measures. This is, however, exactly the argument that needs to be made with regard to pregnancy-related problems. Imagine the following futuristic hypotheti-

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the Law, 103 HARV. L. REV. 1519, 1558-65 (1990) (discussing the history of the maternal versus fetal rights debate).

176. *See* Roger J. Chin, *Assisted Reproductive Technologies Legal Issues in Procreation*, 8 LOY. CONSUMER L. REP. 190, 192-93 (1996) (discussing available reproductive technologies to assist in fertility and conception). See generally *Developments in the Law*, *supra* note 175, at 1525-56, for an introduction to some of the reproductive technologies aimed at conception and pregnancy.

177. *See Developments in the Law*, *supra* note 175, at 1557-58 (noting some of the then-available fetal diagnostic and treatment technologies).

178. *See* ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 134-38, 141-44 (1995) (listing and defining the various perinatal diagnostic and surgical technologies).

179. *See, e.g.*, Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996); *see also* Harris, *supra* note 31, at 607-08.

cal: An employed woman becomes pregnant. After the first trimester, the woman submits to various testing that will determine whether the fetus she is carrying is afflicted with any genetic disorders. The woman learns that her fetus is male and it carries the gene for male pattern baldness. After informing the woman of this genetic defect, the doctors are quick to point out that the defect can be cured by a simple procedure whereby the doctors operate in-utero on the fetus and inject it with genetic material which will correct the male pattern baldness problem before it even materializes (if it ever will). As a result of this procedure, the woman will have to miss several days of work, and when she does return to work, she will require a more flexible schedule and lessened expectations of productivity because of various after-effects of the procedure.

In such a situation, assessing any disability with regard to mitigating measures would be catastrophic. This is where the question "what is a disability?" becomes extremely important.[180] In relation to the hypothetical posed, one would be hard-pressed to argne that the woman suffered from any physical impairment since the fetus' prospective male pattern baldness has absolutely no effect on any of her major life activities. Although male pattern baldness can be correctod in the womb (hypothetically), this should not be the defining factor of whether the genetic anomaly, or the after-effects of the procedure meant to correct it, should be considered a disability.

Moving away from the specifics of the hypothetical, the question of "what is a disability?" is of the utmost importance. Traditionally, the use of the word "disabled" was relegated to only those who were visibly disfigured or truly incapacitated. This is no longer the case. Now one can speak of disabilities ranging from predilections for various unsavory characteristics to genetic anomalies that may or may not ever develop into actual problems. This phenomenon is directly relatod to technological advancement and technology's ability to diagnose and correct. With greater genetic and medical knowledge comes a wider array of those considered at risk, which in turn leads to a greater need to diagnose and fix.[181] As one author has stated, "[a]s soon as technological artefacts and procedures have reached a certain stage of development, their application usually acquires a constructive character. They are then aimed not only at

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180. See Richard, *supra* note 173, at 12-18, for a prediction of the frightening possibilities that prenatal diagnosis and treatment might bring.

181. *See id.* at 14 (paraphrasing Andrea Bonnicksen, *Genetic Diagnosis of Human Embryos*, 22 HASTINGS CENTER REP., July-Aug. 1992, at S5, S7 (special supplement)).

getting natural processes going or at interrupting them, but at reforming or completely redesigning whole natural systems."[182]

As assessing disabilities with regard to technology-based mitigating measures makes advancing technology the linchpin of disability analysis, the real issue should be whether a person is actually and substantially limited by his or her physical/mental impairment. This logic may seem confusing at first: The advocates of the position that disabilities should be assessed with regard to mitigating measures argue that the real issue should always be whether the person is actually affected by their disability. Yet, this is exactly what this Note, advocating a no-mitigating measures approach, is arguing. The reason for this confusion is simple. If one believes that disabilities should always be assessed in their non-medicated, unmitigated state, one is inherently drawn to the belief that the underlying disability will always affect a person's life, no matter the mitigating measures. On the other hand, if one believes that disabilities should always be assessed in their medicated, mitigated state, one is inherently drawn to the belief that technology-based mitigating measures are capable of eliminating any negative effects of an impairment so that the person may live a completely "normal" life.

There are two reasons why assessing disabilities without regard to mitigating measures is the superior argument. First, the advocates of assessing a disability with regard to mitigating measures posit that te do otherwise would read the "substantially limits" language out of the ADA statute.[183] In other words, they argue that technology-based mitigating measures are capable of eliminating a person's mental/physical impairments to the point that no major life activity could possibly be substantially limited. This argument, however, contains a logical lacuna at some level: Disabilities should be assessed with regard to mitigating measures, because if they are not, the mental or physical impairment might produce an actual effect on the plaintiff's life.[184] The problem with this reasoning is that the conclusion that any effects of a disability can be eliminated by the use of mitigating measures only follows if one assumes that mitigating measures should be considered.[185]

182. KURT BAYERTZ, GENETHICS: TECHNOLOGICAL INTERVENTION IN HUMAN REPRODUCTION AS A PHILOSOPHICAL PROBLEM 284 (Sarah L. Kirkby trans., Cambridge Univ. Press 1994) (1987).

183. *See supra* notes 149-151 and accompanying text.

184. *See* Recent Cases, *supra* note 127, at 2460.

185. *See id.*

Another key difference between the two sides in the mitigating measures debate is the impact and results the two solutions are likely te produce. The advocacy of assessing disabilities with regard to mitigating measures carries one distinct risk that the other side does not bear: the risk of the definition of disability hinging upon advancing technology and its ability to correct anything from critical disabilities to minor nuisances.

As noted above,[186] many courts have held that at least some pregnancy-related problems should be considered disabilities under the ADA. In doing so, several of these courts have held that the proper standard for assessing whether a particular problem should be considered a disability under the ADA should turn on whether the problem results from a normal or abnormal pregnancy.[187] These courts place high faith in medical technology and its ability to discern between the normal and abnormal. Without explicitly phrasing it in those terms, it appears that these courts are holding that pregnancy-related problems should be assessed with regard to technology-based mitigating measures.[188] In other words, advances in medical technology become the measuring stick by which normal/abnormal is defined—that which technology can diagnose or "fix" is regarded as abnormal. In this way, the two bodies of law (pregnancy-related problems and mitigating measures) may have already merged to some extent.

IV. CONCLUSION

The ADA law of pregnancy-related problems and mitigating measures can be viewed as distinctly developing areas of the law. Currently, both areas of law are in a state of flux, with courts deciding cases on all sides of the issue. When these two areas of law are viewed together, however, a fuller understanding develops.

Clearly, some pregnancy-related problems must be severe enough to be considered disabilities under the ADA. While these severe problems are arguably not the result of a "normal" pregnancy, medical advances and distinctions between normality and abnormality should not be the foundation upon which this analysis rests.

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186. *See supra* Part II.D.3.

187. *See supra* notes 100-104, 118-119 and accompanying text.

188. *See, e.g.*, Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 980-82 (N.D. Ill. 1998); Cerrato v. Durham, 941 F. Supp. 388, 392-93 (S.D.N.Y. 1996).

Instead, courts should look to whether a particular plaintiff suffered from a pregnancy-related problem severe enough to impinge upon her daily activities in a substantial manner. One does not need to look to standards of a "normal" pregnancy to determine if a woman is afflicted by a particularly difficult pregnancy that is causing her great pain and trauma. Similarly, with regard to mitigating measures, the standard should be the effect the unmitigated disability has on the person's daily life, albeit hypothetically. To assess a disability with regard to mitigating measures is to allow civil rights for disabled persons to hinge upon the rate and level of the advancement of technology.

Pregnancy-related problems and reproductive technology provide a special window into the mitigating measures debate. As reproductive technology is advancing as quickly or more quickly than other areas of technology, it is a useful tool in analyzing the mitigating measures debate. As perinatal diagnostic and treatment technology further develops, it becomes easier and easier to diagnose minor problems or anomalies in a fetus or pregnancy. The newfound ease of diagnosis will undoubtedly lead to more high-tech solutions for treatment of pregnancy-related problems. Almost inevitably, it will seem logical that if the fetus or pregnancy is not "perfect" and there is technology available which will cure any "defects," the defect must be considered a disability of sorts. The problem arises, however, when disabilities become defined as minor glitches in someone's genetic makeup, predilections for a particular lifestyle, or particular unwanted characteristics. It is because of this specter that technology-based mitigating measures cannot function as the standard by which disabilities are defined. Instead, disabilities must be assessed in their unmitigated state. While pills, crutches, glasses, prostheses, and surgical procedures may better the lives of some persons faced with severe disabilities so that they may function at a near-normal or normal level, the disability always remains and will always have some staying effect on the person. If these people ever face discrimination based upon this disability, they should not be punished for either their own affirmative acts of self-help or the relentless progression of technology.

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