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Mitigation and the Americans with Disabilities Act

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INTRODUCTION

It is an open question whether the prohibition on employment discrimination in the Americans with Disabilities Act (ADA) protects plaintiffs who have not attempted to mitigate the effect of their disability on their ability to work. Suppose, for example, that a job applicant has severely impaired vision because of a corneal disease.[1]

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1. *See*, *e.g.*, Yaron S. Rabinowitz, *Keratoconus*, 42 SURV. OPHTHALMOLOGY 297, 298-99 (1998) ("Keratoconus is a condition in which the cornea assumes a conical shape as a result of noninflammatory thinning of the corneal stroma. The corneal thinning induces irregular astigmatism, myopia, and protrusion, leading to mild to marked impairment in the quality of vision. It is a progressive disorder ultimately affecting both eyes . . . .") (footnote omitted); Karla Zadnik et al., *Biomicroscopic Signs and Disease Severity in Keratoconus*, 15 CORNEA 139, 139 (1996) ("Keratoconus is characterized by symptoms of visual distortion, observable

He can have corneal transplant surgery that his doctors recommend and expect will allow him to see much more clearly,[2] but he does not want to have the surgery because of the complications sometimes associated with the operation and the possibility that the surgery will not work.[3] He applies for a job that has been structured for people who can see clearly and asks the employer to purchase work equipment (like a new computer) that will enable him to perform the job with limited eyesight. Purchasing this equipment will be costly, and the employer asks why it should have to bear those costs when the applicant could have surgery to enable him to see better.

The question raises a core issue of rights and responsibilities under a civil rights law. But Title I of the ADA,[4] which protects "a qualified individual with a disability" from employment discrimination based on his disability,[5] never indicates whether there is a duty to mitigate, either by undergoing medical procedures, using medication, pursuing physical therapy, losing weight, abstaining from alcohol and cigarettes, or taking other measures to improve health and eliminate obstacles to employment. The Supreme Court has not yet considered the question, and legal commentators have all but ignored it.[6] The few lower courts

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corneal irregularity that steepens with time, classic slit-lamp biomicroscopic signs (Vogt's striae and Fleischer's ring), and progressive corneal scarring.") (citation omitted).

2. *See*, *e.g.*, Kurt A. Buzard & Bradley R. Fundingsland, *Corneal Transplant for Keratoconus: Results in Early and Late Disease*, 23 J. CATARACT & REFRACTIVE SURGERY 398, 405 (1997) ("[T]he results of this study indicate that . . . corneal transplantation [is] the primary choice for permanently eliminating visual problems in eyes with early and moderate keratoconus."); Rabinowitz, *supra* note 1, at 315 ("Corneal transplant (penetrating keratoplasty) is the best and most successful surgical option for keratoconus patients who cannot tolerate contact lenses or are not adequately visually rehabilitated by them. Central scarring may preclude good vision from contact lenses, even when they are tolerated.").

3. *See*, *e.g.*, M.L. Chipman et al., *Changing Risk for Early Transplant Failure: Data from the Ontario Corneal Recipient Registry*, 28 CANADIAN J. OPHTHALMOLOGY 254, 254 (1993) ("To examine the joint effects of donor, recipient and surgical characteristics on the risk of early corneal transplant failure, 73 cases of early failure (no period of clarity or clarity lasting no more than 28 days) reported to the Ontario Corneal Recipient Registry were compared with 1591 control transplants remaining clear for 6 months or more. In logistic regression models donor age was significantly associated with graft failure, with the odds of failure increasing by 24% per decade. In recipients with a history of cataract or glaucoma or with an intraocular lens in place the relative odds of failure ranged from 2.16 to 3.08. Among surgical factors, larger grafts increased risk by 45% per 0.25 mm."); Rabinowitz, *supra* note 1, at 315 ("Because of the avascular nature of the cornea, corneal transplant has a success rate of 93–96%. . . . Complete visual recovery may, however, take as long as 6 months. Patients who are candidates for penetrating keratoplasty should be counseled that in spite of the high success rate of surgery there is still a 50% chance that they may need contact lenses, either because of residual myopia or postkeratoplasty astigmatism."); *id.* at 316 ("In compliant patients, complications after penetrating keratoplasty are rare. These may include rejection, postoperative astigmatism, a fixed dilated pupil, and recurrence of keratoconus.").

4. 42 U.S.C. §§ 12111-12117 (2000).

5. *Id.* § 12112(a).

6. For a discussion of the sparse existing literature, see *infra* note 54 and accompanying text.

to address a duty to mitigate under Title I are divided on whether mitigation should be required,[7] and those in favor of the duty have not developed a clear standard for when that duty should apply.[8] To the extent that the decisions supporting a duty to mitigate imply any principle for implementing the duty, most appear to suggest that Title I plaintiffs are obligated to mitigate whenever mitigation is possible. I reject both extremes of the existing debate. This Article argues that plaintiffs seeking Title I protection should be under a duty to mitigate, but that this duty should require plaintiffs to pursue only those mitigating measures that could reduce their need for workplace accommodation and that a reasonable person in the same situation would pursue.

The question of whether, when, and why there is a duty to mitigate under Title I of the ADA is important both doctrinally and theoretically, and courts enforcing Title I will inevitably have to decide it. Employer-defendants are beginning to press the issue, and existing ADA case law—combined with tort jurisprudence, medical literature, and disabled people's own accounts—makes clear that some people do not mitigate their disabilities when mitigation is possible.

First, many disabled people do not want to bear the risks or side effects associated with some mitigating procedures. These risks and side effects range from the very serious to the less so. The failure rates for mitigating measures vary widely. The side effects associated with mitigation may be mild, but may also entail permanent neurological damage, impaired memory, impaired cognitive function, dulled creativity, aggressive behavior, hyperactivity, tremors, seizures,

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7. For cases holding that courts will consider only mitigation that the plaintiff has undertaken, see Nawrot v. CPC Int'l, 277 F.3d 896, 904 (7th Cir. 2002); Williams v. Thresholds, Inc., No. 02 C 9101, slip op. at 9-10 (N.D. Ill. Sept. 19, 2003); EEOC v. Voss Elec. Co., 257 F. Supp. 2d 1354, 1358 & n.2 (W.D. Okla. 2003); Bertinetti v. Joy Mining Mach., 231 F. Supp. 2d 828, 833-34 (S.D. Ill. 2002); Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032, 1037 (D. Ariz. 1999); *infra* note 53 and accompanying text. For a case holding that a failure to mitigate reduces the plaintiff's damage award, but does not defeat the plaintiff's claim, see Capizzi v. County of Placer, 135 F. Supp. 2d 1105, 1112-13 (E.D. Cal. 2001); *infra* note 53 and accompanying text. For cases holding or suggesting that plaintiffs are under a duty to mitigate, see cases cited *infra* note 8. For a case in which the defendant raised the duty to mitigate issue, but the court did not reach it, see Fraser v. United States Bancorp, 168 F. Supp. 2d 1188, 1193 (D. Or. 2001).

8. For cases finding a duty to mitigate, see Johnson v. Maynard, No. 01 Civ. 7393 (AKH), slip op. at 7-8 (S.D.N.Y. Feb. 20, 2003); Hooper v. Saint Rose Parish, 205 F. Supp. 2d 926, 929 (N.D. Ill. 2002); Rose v. Home Depot U.S.A., Inc., 186 F. Supp. 2d 595, 614 (D. Md. 2002); Hewitt v. Alcan Aluminum Corp., 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001); Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587, 596 (D. Md. 2000), *aff'd*, 230 F.3d 1354 (4th Cir. 2000) (mem.); *infra* notes 66-70 and accompanying text. For cases that seem to suggest, less clearly, that there is a duty to mitigate, see Hill v. Kan. City Area Transp. Auth., 181 F.3d 891, 894 (8th Cir. 1999); Mont-Ros v. City of West Miami, 111 F. Supp. 2d 1338, 1356-57 (S.D. Fla. 2000); Llante v. Am. NTN Bearing Mfg. Corp., No. 99 C 3091, slip op. at 12 (N.D. Ill. Nov. 12, 1999); Spradley v. Custom Campers, Inc., 68 F. Supp. 2d 1225, 1232-33 (D. Kan. 1999); Roberts v. County of Fairfax, Virginia, 937 F. Supp. 541, 548 (E.D. Va. 1996); *infra* notes 69, 71 and accompanying text.

blurred vision, hypothyroidism, blood disorders, liver damage, sedation, sleep disturbances, sexual dysfunction, weight gain, birth defects for one's children, pain, or death.[9]

Second, some disabled people are unable or unwilling to avoid practices and conditions—like smoking, drinking alcohol, or being substantially overweight—that harm their overall health and can intensify the consequences of their disabilities. District courts have already considered Title I suits brought by a plaintiff who did not stop smoking when his doctor advised him that smoking aggravated his respiratory problems,[10] by a plaintiff who did not abstain from alcohol and start exercising when her doctor advised her that doing so would help control her diabetes,[11] and by a plaintiff who did not lose weight when his doctors advised him that weight loss would alleviate his sleep apnea.[12] More cases like these are certain to arise.

Third, some disabled people are unable to afford some, or any, mitigating measures. The jurisprudence on people injured by tort, for example, reveals disabled people unable to pay for surgery that Medicaid would not cover,[13] unable to pay for surgery that their health insurance would not cover,[14] unable to pay for surgery because they had no health insurance,[15] and unable to take time off from work so that an injury could heal because they had no disability insurance to support them in the interim.[16]

Fourth, some disabled people, members of the deaf community most prominent among them, publicly state that they do not attempt to mitigate because they understand their disabilities to be central to their cultural identities. Cochlear implant surgery, for example, has enabled some deaf people to process sounds well enough to understand speech.[17] Other deaf people, however, refuse the surgery, not because of its considerable risks and limitations,[18] but because they believe that their deafness is a crucial part of who they are. A president of the National Association of the Deaf, for instance, has

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9. *See infra* text accompanying notes 72-104.

10. *See Rose*, 186 F. Supp. 2d at 614-15, 614 n.7.

11. *See Fraser*, 168 F. Supp. 2d at 1191.

12. *See Mont-Ros*, 111 F. Supp. 2d at 1346, 1356.

13. *See* McGee v. Jones, 499 S.E.2d 398, 400-01 (Ga. Ct. App. 1998).

14. *See* Seagers v. Pailet, 656 So. 2d 700, 713-14 (La. Ct. App. 1995).

15. *See* Gunn v. Robertson, 801 So. 2d 555, 561 (La. Ct. App. 2001); Dunn v. Maxey, 693 N.E.2d 1138, 1139 (Ohio Ct. App. 1997).

16. *See* Etheredge v. St. Paul Mercury Ins. Co., 814 So. 2d 119, 121-23 (La. Ct. App. 2002).

17. *See infra* text accompanying note 72.

18. *See infra* text accompanying notes 73-75.

expressed such sentiments: "'I'm happy with who I am,'" she has declared, "'and I don't want to be 'fixed.'"'[19]

In addition to the practical urgency of resolving the duty to mitigate question, examining the issue of whether there is a duty to mitigate under Title I also casts new light on an important debate in the Title I case law and scholarship about the extent of the differences between Title I of the ADA and Title VII of the 1964 Civil Rights Act, which prohibits employment discrimination based on "race, color, religion, sex, or national origin."[20] The traditional view in this debate, advanced by many courts[21] and commentators,[22] holds that Title I and

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19. Edward Dolnick, *Deafness as Culture*, ATLANTIC, Sept. 1993, at 37, 38 (quoting Roslyn Rosen).

20. 42 U.S.C. § 2000e-2 (2000).

21. *See*, *e.g.*, Erickson v. Bd. of Governors of State Colls. & Univs. for Northeastern Ill. Univ., 207 F.3d 945, 949 (7th Cir. 2000) ("Title I of the ADA, by contrast [with, *inter alia*, Title VII], requires employers to consider and to accommodate disabilities, and in the process extends beyond the anti-discrimination principle."); Harter v. Univ. of Indianapolis, 5 F. Supp. 2d 657, 661 (S.D. Ind. 1998) ("Unlike other federal employment discrimination laws [including Title VII], the ADA does not simply forbid discrimination on a particular basis. The ADA imposes an affirmative duty on employers to provide 'reasonable accommodations' for a disabled employee.") (citations omitted); Dunlap v. Ass'n of Bay Area Gov'ts, 996 F. Supp. 962, 966 (N.D. Cal. 1998) ("[T]he analogy between race and gender discrimination claims brought under Title VII and disability discrimination claims brought under the ADA is extremely limited. In an action for race or gender discrimination, a plaintiff must prove that she was treated *differently* from those similarly situated because of a protected characteristic. In contrast, under the ADA, a person with a disability need not prove that she was treated differently from non-disabled individuals. Discrimination may be shown precisely where the defendant treated plaintiff *the same* as everyone around her, despite her need for reasonable accommodation.") (citation omitted).

22. *See*, *e.g.*, Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 3 (1996) ("[U]nder the civil rights statutes that protect women, blacks, or older workers, plaintiffs can complain of discrimination against them, but they cannot insist upon discrimination in their favor; disabled individuals often can.") (footnote omitted); *id.* at 9 ("[T]he ADA declares it illegal to deny an individual an employment opportunity by failing to take account of her disability when taking account of it—in the sense of changing the job or physical environment of the workplace—would enable her to do the work. This is a far different definition of 'discrimination' than the definition embraced in other areas of employment discrimination law. Title VII, for instance, essentially takes jobs as it finds them. . . . The failure to undertake positive steps to revamp the job or the environment does not constitute discrimination."); Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 3-4 (2000) ("The ADA incorporated a profoundly different model of equality from that associated with traditional non-discrimination statutes like Title VII of the Civil Rights Act of 1964. Those statutes, for the most part, were geared toward achieving only *formal* equality: equal treatment of similarly situated individuals. . . . The ADA required not only that disabled individuals be treated no worse than non-disabled individuals with whom they were similarly situated, but also directed that in certain contexts they be treated differently, arguably better, to achieve an equal effect.") (footnotes omitted); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1199-1200 (2003) ("The Americans with Disabilities Act of 1990 (ADA) differs fundamentally from Title VII. . . . The central thrust of Title VII employs a 'sameness' model of discrimination, requiring employers to treat African Americans and women exactly the same as others; their race and sex must be ignored and employers must focus instead on factors related to

Title VII are fundamentally different because Title I imposes significant costs on employers, while Title VII does not. This argument emphasizes that Title I has a reasonable accommodation provision that Title VII lacks. That provision requires an employer to provide a disabled employee or job applicant who cannot perform a job as it is currently structured with reasonable accommodations that alter the job so that the disabled person can fill it,[23] unless the employer "can demonstrate that the accommodation would impose an *undue hardship* on the operation of [its] business."[24] The traditionalists contend that this requirement places great costs on employers and that employers bear no equivalent burden under Title VII. More recently, a group of revisionists, led by Christine Jolls, has argued that the traditional view overstates the differences between Title I and Title VII.[25] The revisionists note that Title VII also imposes costs on employers, including costs resulting from the statute's prohibition on intentional discrimination or "disparate treatment." For instance, Title VII forces employers to adopt nondiscriminatory hiring practices that may alienate prejudiced customers and coworkers who want to interact only with employees who have particular demographic characteristics.[26] Title VII also prohibits employers from making

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productivity. Although the ADA uses a sameness model in part, its distinctive thrust is a 'difference' model, requiring employers to treat individuals with disabilities differently and more favorably than others. Employers must treat individuals with disabilities as qualified if they 'can perform the essential functions' of the job. Employers are free to treat others as qualified only if they can perform *all* of the functions of the job. Similarly, employers must make 'reasonable accommodations' for individuals with disabilities. Sometimes these accommodations may be expensive or require significant alterations in the way a job is structured. Yet neither Title VII nor the ADA require employers to make these accommodations for others.") (footnotes omitted).

23. *See* 42 U.S.C. §§ 12112(b)(5)(A), 12111(9) (2000).

24. *Id.* § 12112(b)(5)(A) (emphasis added).

25. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001) ("[I]n a broader respect than has generally been appreciated, some aspects of antidiscrimination law — in particular its disparate impact branch — are in fact requirements of accommodation. In such instances it is hard to resist the conclusion that antidiscrimination and accommodation are overlapping rather than fundamentally distinct categories, despite the frequent claims of commentators to the contrary. . . . [E]ven those aspects of antidiscrimination law that are not in fact accommodation requirements in the sense just described are *similar to* accommodation requirements in respects that have not previously been understood.").

26. *See id.* at 645, 686-87; *see also* Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates—Aren't They All the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111, 125-26 (2003) ("Title VII . . . bans employers from refusing to hire male candidates for a flight attendant position, even when the employer contends that the policy is driven by monetary considerations of aligning the profile of the flight attendant with customer preferences. Even where it is profitable, however, employers must refrain from engaging in sex discrimination. . . . This duty to incur costs to avoid Title VII liability resembles the costs employers incur accommodating certain groups under accommodation mandates. In both cases, employers must abandon the profit maximizing calculus in favor of inclusion of members of protected groups.") (footnote omitted).

employment decisions based on statistically accurate generalizations about a protected class.[27]

Both the traditional and the revisionist accounts of the differences between Title I and Title VII focus, however, on the *quantitative or monetary* costs that each statute imposes on employers.[28] What both sides of this debate miss, and what the duty to mitigate issue helps highlight, is that considering solely quantitative or monetary costs overlooks one of the most important differences between Title I and Title VII: that Title I's reasonable accommodation provision and Title VII's prohibition on intentional discrimination attribute different *moral or normative weight* to the costs that they impose on employers. Title VII's disparate treatment jurisprudence accords no moral or normative weight to the costs that an employer may incur from hiring members of a protected class; it operates on the assumption that these costs give an employer no legitimate cause for complaint. Title VII recognizes no valid justification, including cost, for employment decisions based on race or color. The statute identifies one situation where employers can legitimately make employment decisions based

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27. *See* Jolls, *supra* note 25, at 645, 686-87; *see also* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 832 (2003) ("[A]ccommodation requirements represent nothing more than a specific example of the general prohibition of rational discrimination—a prohibition that is well entrenched in the law [including Title VII]."); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 457 (2000) [hereinafter Bagenstos, *Subordination*] ("[D]iscrimination on the basis of the forbidden classifications is frequently rational for the discriminator, but the civil rights laws [including Title VII] prohibit it anyway.") (footnote omitted); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 846 (2001) ("Title VII sometimes permits cost-saving statistical discrimination and sometimes forbids it: When it forbids it, I believe it is demanding accommodation.").

In addition, Title VII prevents an employer from using a facially-neutral policy that has a disparate impact on a protected class if the employer "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity," 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000), or if the plaintiff "show[s] that other selection devices without a similar discriminatory effect would also serve the employer's legitimate interest in efficient and trustworthy workmanship," Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (citation and internal quotation marks omitted); Jolls, *supra* note 25, at 652-66.

28. *See*, *e.g.*, Jolls, *supra* note 25, at 685-86 ("The point is the way in which prohibitions on discrimination based upon customer or coworker attitudes or upon correct employer beliefs about a particular group impose financial costs on employers, much as do accommodation requirements."); Karlan & Rutherglen, *supra* note 22, at 24 ("[A]n efficiency rationale . . . cannot explain the ADA's requirement of reasonable accommodation. The signal from a genuine disability is not wholly spurious. . . . An individual who is limited in a 'major life activity' might well be limited in some aspect of a given job. Less obviously, even if many disabled workers would not be limited with respect to a particular job, employers still might incur higher costs to accurately assess the productivity of the disabled than other applicants for employment. Even before the passage of the ADA, some employers found such expenditures to be profitable and hired the disabled, but it hardly follows, after the enactment of the ADA, that all employers now find such expenditures to be profitable. If the innovations required by the ADA were generally efficient, they would have been more widely adopted without its enactment.") (footnote omitted).

on religion, sex, or national origin, namely, "those certain instances where religion, sex, or national origin is a *bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise."[29] But as the Supreme Court has emphasized, this is a singular,[30] and "extremely narrow exception,"[31] in which cost is not a valid reason for refusing to employ a protected person. "The extra cost of employing members of one sex," for instance, is not sufficient to defend sex-based hiring practices under Title VII.[32] Title VII's prohibition on intentional discrimination may impose costs on employers, as the revisionists note, but the Title VII jurisprudence assumes that this gives employers no rightful ground for complaint because these costs reflect the moral and normative goals of the statute.

In contrast, Title I's reasonable accommodation provision recognizes that employers can have legitimate grounds to complain about the costs of accommodation, that these are costs that employers can legitimately seek to minimize, and that efforts to minimize the costs of accommodation are not merely a form of prejudice.[33] This is an important difference, and it suggests a powerful reason to impose a duty to mitigate on people asking for reasonable accommodation under Title I. One strong reason that people seeking the protection of Title I's reasonable accommodation provision should have a duty to mitigate is that employers can legitimately expect employees and job applicants to minimize the difficulty and expense of the accommodations that the employees and applicants require. As the statute recognizes, employers have a legitimate interest in reducing these costs.

If the duty to mitigate issue helps cast light on the debate over the differences between Title I and Title VII, a second debate in the Title I scholarship casts light back on the duty to mitigate question. This

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29. 42 U.S.C. § 2000e-2(e)(1) (emphasis added).

30. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (plurality opinion) ("Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.' The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her.") (citation omitted).

31. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); *see also* UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) ("The BFOQ defense is written narrowly, and this Court has read it narrowly.").

32. *Johnson Controls, Inc.*, 499 U.S. at 210.

33. Title I also prohibits intentional discrimination against a disabled job applicant or employee who can perform the job in question as it is currently structured. *See* 42 U.S.C. § 12112(a) (2000). Like Title VII, Title I assumes that an employer has no legitimate cause to complain about the costs of abandoning intentional discrimination. *See infra* text accompanying notes 168-75, 184.

second debate revolves around whether Title I's reasonable accommodation provision has had negative employment effects on disabled people, meaning that the costs that the reasonable accommodation provision imposes on employers have made employers less willing to hire disabled people than the employers were before Title I was enacted. There is at least some evidence to support the view that Title I's reasonable accommodation provision has had negative employment effects, although the issue remains contested.[34] If Title I's reasonable accommodation provision has had negative employment effects, then imposing a duty to mitigate on disabled people seeking reasonable accommodation, which might seem to disadvantage disabled people, could actually help them by reducing the costs that employing disabled people places on employers and thus increasing employers' willingness to hire the disabled. Imposing a duty to mitigate could also help disabled people, even if Title I's reasonable accommodation provision has not had negative employment effects. It may be the case, for instance, that the enactment of Title I has increased employers' willingness to hire disabled people, because employers' fears of being sued under the statute for not hiring disabled people outweigh their reluctance to assume the costs of accommodation. An employer in this position would presumably be even more willing to hire disabled people if the cost of accommodating them was reduced.

This Article aims to contribute, then, both to the resolution of a hard doctrinal problem and to a deeper understanding of Title I and its place within the law of employment discrimination.[35] Part I argues that the Supreme Court (or, better yet, Congress) should find a duty to mitigate under Title I of the ADA. Part II explains why this obligation should take the specific form of a duty of *reasonable* mitigation. The duty of reasonable mitigation I propose would require Title I plaintiffs to undertake those mitigating measures that could

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34. *See infra* note 63.

35. I take as a starting point the fact that the ADA exists and is being enforced. I do not consider whether the ADA should have been enacted, whether the ADA should now be repealed, or how the ADA would compare to a social insurance scheme. For commentary discussing those questions, see RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 494 (1992) ("The ADA fares no better than other forms of antidiscrimination laws, and perhaps worse. It too should be repealed, whether or not some subsidy for disabled persons is retained."); Ruth Colker, *The Death of Section 504*, 35 U. MICH. J.L. REFORM 219, 219 (2001/2002) ("The passage of the Americans with Disabilities Act (ADA) was a significant and positive development for the law of disability discrimination.") (footnote omitted); Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 231 (1994) ("I agree, therefore, with Richard Epstein that the ADA is a deeply-flawed statute. I do not, however, agree that the remedy is repeal. Or, to put the matter more precisely, I do not agree that we should return to a regime in which our disability policy consists entirely of pensioning people out of the work force and providing some extremely modest efforts at increasing the supply of 'able' workers through rehabilitation, vocational counseling, and the like.").

reduce their need for accommodation and that would be undertaken by a reasonable person in the same situation—meaning, at the least, a reasonable person with the same condition, the same mitigating measures available, and the same financial resources for treatment. This duty would reject both of the extreme positions that currently dominate the lower court opinions considering the duty to mitigate. One set of these opinions finds no duty to mitigate, while the other generally suggests that Title I plaintiffs are obligated to mitigate whenever mitigation is possible. In contrast, the duty of reasonable mitigation that I advocate would be limited to mitigation that could reduce a plaintiff's need for accommodation because this is the mitigation that could serve an employer's legitimate interest in minimizing the expense and difficulty that can be associated with providing accommodation. If mitigation could not lessen a plaintiff's need for accommodation, either because the plaintiff already requires no accommodation or because the mitigation could not have a large enough impact on the plaintiff's disability, the duty of reasonable mitigation would not require the plaintiff to mitigate. The duty of reasonable mitigation would also be limited to mitigation that a reasonable person in the same situation would undertake because plaintiffs can have legitimate cause not to mitigate in some circumstances. The duty of reasonable mitigation would obligate a Title I plaintiff to assume only those risks and side effects that a reasonable person would assume to eliminate or ameliorate the condition in question, to follow only those measures to improve overall health that a reasonable person with the same condition would follow, and to shoulder only those financial costs associated with mitigation that a reasonable person with the same financial means would shoulder. Courts should not find the standard of reasonable mitigation too difficult to administer because judges and juries have significant experience with applying similar standards of reasonable mitigation in many legal contexts, including cases about torts, workers' compensation, Social Security disability benefits, and private disability insurance policies.

Requiring plaintiffs to undertake reasonable mitigation should resolve the vast bulk of Title I cases raising the duty to mitigate issue. I also contend, moreover, that the reasonable mitigation standard can appropriately resolve two particularly hard categories of cases. The first involves disabled people who do not want to assume a serious risk or side effect associated with mitigation that a reasonable person in the same situation would assume. The second involves the small number of disabled people who do not mitigate even when a reasonable person would because they understand their disability to be central to their cultural identity. Both cases involve disabled people who have made unreasonable decisions against mitigation in situations where reasonable mitigation would involve particularly significant

sacrifices, at least from the perspective of the disabled person in question. I conclude, however, that disabled people in these difficult situations should still be subject to the duty of reasonable mitigation. The same arguments for imposing a duty to mitigate on other Title I plaintiffs apply here as well. And establishing a separate legal standard, outside of the reasonable mitigation standard, to govern these hard cases would foster endless disputes about when each of the two standards should apply.

Yet these difficult categories of cases illustrate that judges and juries should proceed cautiously before concluding that a plaintiff's decision against mitigation is unreasonable. Empirical data about the behavior of other disabled people in the plaintiff's situation is an important source of information that fact finders can rely upon in making the judgment that a plaintiff has acted unreasonably. The more disabled people in the plaintiff's situation who decide to mitigate, the more evidence there is that mitigation is the only reasonable choice. At the same time, the fact that most people in a certain situation have mitigated should not *always* compel the conclusion that the people who make the other decision are unreasonable. In some situations, the sacrifice associated with mitigation may be large enough, or the costs and benefits of mitigation sufficiently matched, that decisions both for and against mitigation are reasonable, even if a majority of people in the plaintiff's situation choose to mitigate. For this reason, courts should not automatically and immediately equate reasonableness with majority rule. It is worth the effort for courts to evaluate the reasonableness of a plaintiff's conduct carefully, considering to the extent possible not only how many people in the plaintiff's situation have mitigated or not, but *why* they have acted as well. A more cautious approach would help safeguard a plaintiff's most important legitimate interests, justifying its somewhat greater demands on the capacity of fact finders.

Part III briefly examines the legal rights of people who have mitigated in light of the duty of reasonable mitigation that I advocate imposing. It argues that the duty to mitigate should be paired with greater protections for mitigators. For obvious reasons, a person who remains substantially limited in a major life activity even after reasonable mitigation is protected under Title I and entitled to reasonable accommodations. This person has taken reasonable efforts to minimize his need for accommodation, but is still disabled and in potential need of accommodation. I argue, however, that a plaintiff should also be protected from intentional discrimination (although not entitled to accommodation) as a "regarded as" disabled person under Title I if he has no substantial limitations after mitigating, but suffers an adverse employment action because he had to mitigate or because of the (non-substantially-limiting) side effects of the mitigation. Protecting these two classes of mitigators from intentional

discrimination would advance legitimate interests under Title I, without impinging upon the legitimate interests of employers.

Part IV uses the duty to mitigate issue to illuminate a key difference between Title I and Title VII. It argues that Title VII should impose no duty to mitigate, despite the advantages of placing such an obligation on people seeking the protection of Title I's reasonable accommodation provision. Placing a duty to mitigate on Title VII plaintiffs—which the Title VII jurisprudence formally does not do but arguably might be doing indirectly—would allow employers to avoid costs that reflect the very bias the statute seeks to condemn. But imposing a duty to mitigate on plaintiffs seeking the protection of Title I's accommodation provision would serve what the statute recognizes as legitimate interests.

I. THE CASE FOR IMPOSING A DUTY TO MITIGATE ON PLAINTIFFS SEEKING THE PROTECTION OF TITLE I'S REASONABLE ACCOMMODATION PROVISION

The first question to ask in thinking about the duty to mitigate issue under Title I is whether Title I establishes such a duty. If Title I's statutory text answers that question, the status of the duty to mitigate is settled. If the text is unclear, one needs to look elsewhere for guidance. As we will see, the case for imposing a duty to mitigate on plaintiffs seeking the protection of Title I's reasonable accommodation provision focuses on policy considerations because the statutory text is indeterminate on the issue of mitigation.

The ADA defines "'disability'" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[36] Title I defines a "'qualified individual with a disability'" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position."[37] Title I prohibits intentional employment discrimination "against a qualified individual with a disability because of the disability."[38] It also entitles a qualified disabled job applicant or employee to "reasonable accommodations" that alter a job so that the disabled person can perform it,[39] unless the employer can establish that those

36. 42 U.S.C. § 12102(2).

37. *Id.* § 12111(8).

38. *Id.* § 12112(a).

39. *Id.* §§ 12112(b)(5)(A), 12111(9).

accommodations "would impose an undue hardship" on the employer.[40]

This statutory scheme does not indicate whether there is a duty to mitigate. Consider, for example, the job applicant described in the introduction who needs work equipment for the visually impaired because his vision is severely limited, and he has refused an operation that could allow him to see much more clearly.[41] This applicant would certainly count as disabled if he needed equipment for the visually impaired because his severely limited eyesight could not be treated. This applicant would certainly not count as disabled if he needed equipment for the visually impaired because he had made an arbitrary decision to wear a blindfold despite having fully functional vision. In fact, however, this applicant cannot see clearly by simply removing a blindfold, but he can do something to see clearly. Title I's text just does not address whether he has an obligation to reduce or eliminate his disability if he can. It is similarly silent on the obligations of a plaintiff who could control her diabetes much more effectively if she lost weight, exercised, modified her diet, and had surgery to combat the deterioration of her vision,[42] or a plaintiff who could control his manic depression much more effectively if he took lithium and underwent psychological counseling.[43]

Faced with this textual indeterminacy, some of the few lower courts and commentators to consider whether Title I imposes a duty to

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40. *Id.* § 12112(b)(5)(A).

41. *See supra* text accompanying notes 1-3.

42. *See*, *e.g.*, Marion J. Franz et al., *Nutrition Principles for the Management of Diabetes and Related Complications*, 17 DIABETES CARE 490, 491 (1994) ("For obese persons with type II diabetes mellitus, moderate weight loss irrespective of starting weight has been shown to reduce hyperglycemia, dyslipidemia, and hypertension."); Jóhannes Kári Kristinsson, *Diabetic Retinopathy: Screening and Prevention of Blindness*, 75 ACTA OPHTHALMOLOGICA SCANDINAVICA 1, 9 (Supp. 1997) ("In recent years laser treatment has been introduced that can significantly decrease the likelihood of blindness in diabetic patients, if the eyes are treated at the appropriate stage of the disease."); Madelyn L. Wheeler, *Nutrition Management and Physical Activity as Treatments for Diabetes*, 26 PRIMARY CARE 857, 857 (1999) ("Diabetes is essentially a self-management disease. For people with type 1 diabetes, nutrition and physical activity recommendations are integrated with blood glucose monitoring and an insulin regimen. For people with type 2 diabetes, this means integrating blood glucose monitoring with nonpharmacological therapy (nutrition management and physical activity). If necessary, pharmacologic therapy (oral agents or insulin) enters into the equation also."); Shelby R. Wilkes, *Current Therapy of Diabetic Retinopathy: Laser and Vitreoretinal Surgery*, 85 J. NAT'L MED. ASS'N 841, 846 (1993) ("The advent of laser surgery and pars plana vitreous surgery has enhanced the vision and improved the lifestyle of the diabetic patient."); *supra* text accompanying note 11.

43. *See*, *e.g.*, Margaret M. Rea et al., *Family-Focused Treatment Versus Individual Treatment for Bipolar Disorder: Results of a Randomized Clinical Trial*, 71 J. CONSULTING & CLINICAL PSYCHOL. 482, 482 (2003) ("Results suggest that family psychoeducational treatment is a useful adjunct to pharmacotherapy in decreasing the risk of relapse and hospitalization frequently associated with bipolar disorder."); *infra* text accompanying notes 78-85.

mitigate have attempted to resolve the issue by extrapolating from an argument about the ADA's text that appeared in a Supreme Court opinion, *Sutton v. United Air Lines, Inc.*,[44] on another issue. But this effort is unconvincing.

Sutton and two companion cases decided in 1999 considered the status of Title I plaintiffs who have mitigated their disabilities.[45] The duty to mitigate was not at issue in *Sutton*, and none of the *Sutton* opinions addressed it, because the *Sutton* plaintiffs had already mitigated. These plaintiffs had severe myopia, but they wore corrective lenses that allowed them to see 20/20 or better.[46] They sued United Airlines under Title I after the airline refused to hire them as commercial airline pilots because they could not satisfy the airline's requirement that its pilots have uncorrected vision of 20/100 or better.[47] The *Sutton* case raised the question of whether the plaintiffs counted as disabled or "regarded as" disabled people now that they had mitigated. The Court held that if a plaintiff is no longer substantially limited in any major life activity after mitigating, she does not count as a disabled person for purposes of Title I.[48] *Sutton* also held that a plaintiff is not protected under Title I as someone who is "regarded as" disabled unless she can demonstrate that the employer-defendant acted because it *thought* that the plaintiff had an impairment that substantially limited a major life activity.[49] On this holding, the *Sutton* plaintiffs were not protected under Title I because their sight was not substantially limited with the corrective lenses that they wore in place and because there was insufficient evidence that United Airlines thought that the plaintiffs were substantially limited.[50]

One argument that the *Sutton* Court made in reaching its conclusions contended that the use of the present tense in the ADA's definition of disability, where "the phrase 'substantially limits' appears in the Act in the present indicative verb form,"[51] helped establish that a plaintiff who has mitigated should be evaluated in her current, mitigated state for purposes of determining whether she is a disabled

44. 527 U.S. 471 (1999).

45. *See* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).

46. *See Sutton*, 527 U.S. at 475.

47. *See id.* at 475-76.

48. *See id.* at 475, 482, 488; *Albertson's*, 527 U.S. at 565-66; *Murphy*, 527 U.S. at 521. *Sutton* holds that an individual does count as a disabled person under Title I "if, notwithstanding the use of a corrective device, th[e] individual is substantially limited in a major life activity." *Sutton*, 527 U.S. at 488.

49. *See Sutton*, 527 U.S. at 489; *Murphy*, 527 U.S. at 521-22.

50. *See Sutton*, 527 U.S. at 488-93.

51. *Id.* at 482.

person covered under Title I.[52] Some lower courts[53] and commentators[54] have extrapolated from this part of *Sutton* to assert

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52. *See id.* at 482-83.

53. *See* Nawrot v. CPC Int'l, 277 F.3d 896, 904 (7th Cir. 2002) ("[I]n applying the statute to specific impairments, courts may consider only the limitations of an individual that persist after taking into account mitigation measures . . . . This is not, however, license for courts to meander in 'would, could, or should-have' land. We consider only the measures actually taken and consequences that actually follow. *Cf. Sutton*, 527 U.S. at 482-84 . . . . Those who discriminate take their victims as they find them."); Williams v. Thresholds, Inc., No. 02 C 9101, slip op. at 9-10 (N.D. Ill. Sept. 19, 2003) ("Threshold argues that because Williams could have taken prednisone, and that in fact when he later took prednisone he felt much better, he was not disabled for ADA purposes. This misconstrues *Sutton*. The *Sutton* court explicitly stated that courts should not engage in counter-factual hypothesizing, guessing whether a course of treatment would have alleviated a plaintiff's disability.") (citation omitted); Bertinetti v. Joy Mining Mach., 231 F. Supp. 2d 828, 833-34 (S.D. Ill. 2002) ("[T]he defendant urges the Court to consider that Bertinetti's condition might have been improved if he had utilized additional corrective devices. *Sutton*, however, does not give courts a license to 'meander in 'would, could, or should-have' land.' Courts should only consider mitigating steps actually taken and the consequences that actually followed. Accordingly, this court will not speculate about what Bertinetti's condition would be if he had taken additional steps to improve his condition.") (citations omitted); Capizzi v. County of Placer, 135 F. Supp. 2d 1105, 1113 (E.D. Cal. 2001) ("The conclusion that a failure to mitigate does not defeat the cause of action is supported by *Sutton*. There the Court observed that in the ADA 'the phrase 'substantially limits' appears . . . in the present indicative verb form, . . . [indicating that] the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability.' It should follow from the fact that the question of disability addresses plaintiff's current condition, that the fact that a particular procedure would mitigate the condition cannot prevent a finding that the plaintiff is presently disabled, though it might effect the damages awarded upon a finding of liability.") (citation omitted); Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032, 1037-38 (D. Ariz. 1999) ("Defendant asserts that, when mitigating measures are considered, Plaintiff does not have a disability as defined by the ADA. . . . This argument fails because the Supreme Court requires a case-by-case analysis of the limitations an individual faces in his or her current state.").

54. *See* Debra Burke & Malcolm Abel, *Ameliorating Medication and ADA Protection: Use It and Lose It or Refuse It and Lose It?*, 38 AM. BUS. L.J. 785, 811 (2001) ("[T]he Supreme Court concluded in *Sutton* that the present indicative verb tense used by Congress required an individualized inquiry into the actual, not hypothetical, situation of the plaintiff's condition with respect to the issue of an impairment substantially limiting a major life activity. Considering how a plaintiff would fare if he or she employed mitigating measures requires speculation and the consideration of a hypothetical situation, an approach seemingly rejected by the Court in *Sutton*.") (footnote omitted); Joshua C. Dickinson, *Will the Supreme Court Allow Employers to Consider Reasonable Mitigating Measures Not Presently Utilized by Employees When Determining Whether a "Disability" Exists Under Section A of the ADA?*, 68 UMKC L. REV. 389, 398-99 (2000) ("One thing seems evident from the trilogy of cases . . . ; it is the actual condition that the employee presents herself in at the time of consideration which is pertinent to the disability inquiry. . . . [T]he Court placed great emphasis on evaluating the individual in their present state and not some potential or hypothetical state."); Stephanie A. Fishman, Note, *Individuals with Disabilities but Without Mitigating Measures*, 46 WAYNE L. REV. 2013, 2033 (2000) ("According to *Sutton*, a plaintiff is not to be viewed hypothetically but in her present state, with *or without* mitigating measures, to determine whether an impairment is *in fact* substantially limiting. Following the literal reasoning in *Sutton*, however, a plaintiff suffering from an impairment such as myopia, who did not utilize any corrective devices at the time of the alleged discrimination, would also be disabled under the ADA because she is currently substantially limited in the major life activity of seeing.") (footnotes omitted); Sarah Shaw, Comment, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments*, 90 CAL. L. REV. 1981, 2007 (2002) ("[T]he same

that Title I imposes no duty to mitigate because the use of the present tense in the ADA's definition of disability establishes that Title I plaintiffs are to be evaluated based on their current abilities and limitations, whether they have mitigated or not. There are a number of reasons to reject this contention, however.

First, even if one wanted to use the present tense in the ADA's definition of disability to resolve the duty to mitigate issue, one could not. Suppose that the use of the present tense in the definition of disability conclusively establishes that Title I plaintiffs are to be evaluated in their present state. That still would not establish how courts are to determine a plaintiff's present state. What is the present condition of a person who has not mitigated but could? Is he simply someone who is disabled? Or is he best described as someone who is presently not pursuing reasonable efforts to lessen or eliminate his disability?

Second, the text suggests no reason to think that one should use the present tense in the ADA's definition of disability to resolve the duty to mitigate issue. There is no indication in the statute that the issue of mitigation should be decided by examining the definition of disability. It is also hard to characterize Congress as making an important choice in its decision to use the present tense in defining disability because it is impossible to imagine Congress using any tense *but* the present there. Congress could not have defined disability in the future tense of "will substantially limit" because that definition would have necessarily relied on speculation and frequently focused on irrelevant information. A definition of disability that used the past tense of "substantially limited" would have similarly missed vital information, because a plaintiff's present state is always relevant, regardless of whether there is a duty to mitigate. Consider, for

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reasoning that supported the Court's conclusion that mitigating measures must be considered when an individual is currently using such measures demands the opposite conclusion with regard to an individual who is not presently using mitigating measures. As emphasized by the Court, the plain language of the statute indicates that an individual's impairment should be evaluated in its present state rather than in a hypothetical state where it 'might, could, or would' be substantially limiting.") (footnote omitted); Christine M. Tomko, Note, *The Economically Disadvantaged and the ADA: Why Economic Need Should Factor into the Mitigating Measures Disability Analysis*, 52 CASE W. RES. L. REV. 1033, 1043 (2002) ("Furthermore, in explaining its decision, the Court stated that 'a person must be presently—not potentially or hypothetically— substantially limited in order to demonstrate a disability. A disability exists only where an impairment substantially limits, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken.' By extension, disability must also exist where the impairment substantially limits the plaintiff because he cannot afford to take mitigating measures, not where the impairment 'might not,' 'could not,' or 'would not' be substantially limiting if mitigating measures could be taken.") (footnote omitted); *see also* Bagenstos, *Subordination*, *supra* note 27, at 496 ("The Court's conclusion seems entirely sound, both as a matter of basic statutory interpretation and as a means of implementing an antisubordination principle. Showing off its facility with grammatical categories, the *Sutton* Court noted one crucial textual point: '[T]he phrase 'substantially limits' appears in the Act in the present indicative verb form.'").

instance, two plaintiffs who have both mitigated, but one still has substantial limitations and the other does not. Clearly, that present difference is relevant in determining each plaintiff's rights now that each has mitigated. The first plaintiff, for example, has a much better claim to reasonable accommodations because he still has substantial limitations.[55]

In addition, the interpretation of the ADA's definition of disability that some lower courts and commentators have adopted would lead to absurd results if applied to the duty to mitigate issue. Imagine, as these courts and commentators would, that the use of the present tense in the ADA's definition of disability establishes that plaintiffs who have mitigated are to be evaluated in their mitigated state, and also establishes that plaintiffs who have not mitigated are to be evaluated based on their current abilities and limitations without bearing any duty to mitigate. On this reading of the statute, Title I would treat some disabled people *more* favorably *because* they have not mitigated and would accordingly give some disabled people an incentive *not* to mitigate their disabilities when they otherwise would. Let's return to the *Sutton* plaintiffs, for example. On the reading of Title I that some lower courts and commentators have adopted, the *Sutton* plaintiffs should have rationally opted to discard their corrective lenses before applying to United Airlines. Discarding their lenses would have meant that courts would have been required to evaluate the *Sutton* plaintiffs in their unmitigated condition and to grant the plaintiffs Title I protection because their unmitigated eyesight is substantially limited. Coverage under Title I, in turn, would have given the *Sutton* plaintiffs the right, if they were otherwise qualified for the pilot positions they sought, to demand reasonable accommodations from United Airlines, accommodations that might have been the same corrective lenses that the Court deemed to have mitigated the plaintiffs' disability.[56] The interpretation of the ADA's definition of disability that some lower courts and commentators have extrapolated from *Sutton* would create the absurd situation where a plaintiff could be better off demanding mitigation as an ADA remedy from an employer rather than mitigating herself. Elsewhere, the Supreme Court has repeatedly refused to interpret statutory texts literally, even when the texts were

55. *See infra* text accompanying notes 166-70.

56. Of course, establishing that one is covered under Title I is not the same as proving that a particular defendant has violated the statute. Even if the *Sutton* plaintiffs had established their right to demand reasonable accommodation, United Airlines would not have had to provide the accommodation if it could "demonstrate that the accommodation would impose an undue hardship on the operation of [its] business." 42 U.S.C. § 12112(b)(5)(A) (2000). United Airlines might have been able to defend its uncorrected vision requirement for commercial airline pilots under this standard. *See infra* text accompanying note 171.

clear, if literalism would produce absurd results.[57] In this case, the argument for embracing an absurd result is far weaker because the text on which the lower courts and commentators have relied is not clear.

With Title I's statutory text indeterminate on the issue of mitigation, the case for imposing a duty to mitigate turns on policy considerations. The strongest argument for placing a duty to mitigate on plaintiffs seeking the protection of Title I's reasonable accommodation provision is that employers can legitimately expect employees and job applicants to attempt to lessen or eliminate their need for accommodation if doing so is both possible and (as elaborated in Part II) reasonable. Phrased another way, plaintiffs should not be entitled to accommodation under Title I if they have refused to avail themselves of reasonable treatment options. As Title I recognizes, employers have a legitimate interest in minimizing the "significant difficulty or expense" that can be associated with providing accommodations.[58] In indicating how a court is to assess whether an accommodation would impose an undue hardship on an employer, the statute specifically states that a court should consider the "cost of the accommodation needed," "the effect on expenses and resources," and "the impact . . . of such accommodation upon the operation of the facility."[59]

In fact, there are many reasons to believe that it is legitimate to seek to minimize the costs of the accommodations that employers provide under Title I, and that employers' concerns about these costs cannot be dismissed as a form of bias. Title I contemplates accommodations ranging from "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" to "job restructuring, part-time or modified work

57. *See*, *e.g.*, Clinton v. City of New York, 524 U.S. 417, 429 (1998) ("Acceptance of the Government's new-found reading of § 692 'would produce an absurd and unjust result which Congress could not have intended.'") (citation omitted); United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994) ("Some applications of respondents' position would produce results that were not merely odd, but positively absurd. . . . We do not assume that Congress, in passing laws, intended such results."); Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope.") (citation omitted); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509-11 (1989) ("The Rule's plain language commands weighing of prejudice to a defendant in a civil trial as well as in a criminal trial. But that literal reading would compel an odd result in a case like this. . . . No matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant. . . . It is unfathomable why a civil plaintiff — but not a civil defendant — should be subjected to this risk. Thus we agree with the Seventh Circuit that as far as civil trials are concerned, Rule 609(a)(1) 'can't mean what it says.'") (citation omitted).

58. 42 U.S.C. § 12111(10)(A).

59. *Id.* § 12111(10)(B).

schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations."[60] Providing these sorts of accommodations clearly imposes substantial and quantifiable costs on employers in some cases, even if debate necessarily persists over the exact magnitude of the imposed costs because systematic and representative data is unavailable. The President's Committee on Employment of People with Disabilities, for instance, surveyed a sample of the employers who contacted its Job Accommodation Network seeking information about accommodations between July 1994 and June 1995. This survey found that 10% of the 448 reported accommodations cost between $501 and $1000, 4% of the accommodations cost between $1001 and $1500, 4% of the accommodations cost between $1501 and $2000, 9% of the accommodations cost between $2001 and $5000, and 4% of the accommodations cost more than $5000.[61] A study of Sears, Roebuck from January 1993 to December 1995 found that 10% of the 71 accommodations the company provided had direct costs of between $100 and $499, and 1% of the accommodations had direct costs of between $500 and $1000.[62]

The costs that Title I's reasonable accommodation provision imposes on employers may also be distributed unevenly between employers. Title I does not operate like a tax system, in which each employer shares the social cost of helping the disabled by paying according to a rubric applied to many employers. If more disabled job applicants choose to apply to one employer, that employer may ultimately bear more accommodation costs than an otherwise identical competitor.

The duty of reasonable mitigation would mean that before an employer has to accommodate someone—to make changes and to bear costs—that person has to mitigate his disability—to make changes and to bear costs—to the extent that this is possible and reasonable. With this duty in place, employers would have to accommodate only those disabled people who either cannot change in ways that could lessen their need for accommodations or have a good reason not to change.

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60. *Id.* § 12111(9).

61. *See* President's Committee on Employment of People with Disabilities, Report to Congress on the Job Accommodation Network 1, 3, 7 (July 26, 1996) (unpublished manuscript, on file with author).

62. *See* PETER DAVID BLANCK, COMMUNICATING THE AMERICANS WITH DISABILITIES ACT: TRANSCENDING COMPLIANCE: 1996 FOLLOW-UP REPORT ON SEARS, ROEBUCK AND CO. 17 fig.1 (1996).

The debate about the possible negative employment effects associated with Title I's reasonable accommodation provision suggests, moreover, that disabled people could also importantly benefit from a measure that lessened the cost of accommodation.[63]

63. *See supra* text accompanying note 34. For arguments that Title I's reasonable accommodation provision has had negative employment effects, see Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection?: The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 916-17 (2001) ("The empirical analysis looks at the employment and wages of disabled and nondisabled workers using data from the March Current Population Survey (CPS) for 1988-97. . . . The CPS data show a post-ADA decline in the relative employment of disabled men and women aged 21-39, with no change in relative wages. The deterioration in the relative employment position of disabled workers began in 1993 for men and in 1992 for women, the first two years the ADA was in effect. The results are unchanged by controlling for pre-ADA trends in employment of the disabled or for the increase in the fraction of people receiving disability insurance and supplemental security income (SSI). Together these findings lead us to conclude that the ADA reduced employment for disabled workers aged 21-39."); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 711 (2000) ("A main goal of the ADA is to increase labor market opportunities for people with disabilities through its mandate for employer-provided job accommodation and its antidiscrimination measures. Although the ADA may have increased job accommodation for and reduced discrimination against people with disabilities, the costs of complying with the act were large enough to reduce the demand for disabled workers and undo its intended effects. This paper shows that the enactment of the ADA led to a decrease of 7.2 percentage points in their relative employment. Moreover, these relative employment declines began as early as 1990, the year of enactment, and continued to fall through 1995."); *id.* ("These results strongly suggest that the employment mandates of the ADA that require firms to provide job accommodation to all of their disabled workers were an ineffective way to increase labor market opportunities for people with disabilities. In particular, the results suggest that these mandates made it more costly for firms to employ people with disabilities, and, consequently, their employment fell."); CHRISTINE JOLLS & J.J. PRESCOTT, DISAGGREGATING EMPLOYMENT PROTECTION: THE CASE OF DISABILITY DISCRIMINATION 4 (Nat'l Bureau of Econ. Research, Working Paper No. 10740, 2004) ("We estimate that in the years just after its enactment the ADA produced approximately a 10 percent decline in disabled employment in states in which the law's reasonable accommodations requirement was an innovation, compared to states in which a similar requirement existed at the state level prior to the ADA's enactment. By contrast, we consistently find little to no effect of the ADA's enactment on disabled employment in states in which the law's traditional antidiscrimination prohibition, with its associated firing costs, was an innovation, compared to states with similar preexisting prohibitions. Our results therefore suggest that the reasonable accommodations requirement of the ADA, rather than its imposition of firing costs, played the central role in the ADA's near-term employment effects."). For criticism of the contention that Title I's reasonable accommodation provision has had negative employment effects, see Peter Blanck et al., *Calibrating the Impact of the ADA's Employment Provisions*, 14 STAN. L. & POL'Y REV. 267, 289 (2003) ("[E]xisting research provides little basis on which policymakers can make informed decisions regarding how the ADA has impacted ADA-qualified individuals."); Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, 42 INDUS. REL. 31, 31 (2003) ("Studies finding a negative effect of the Americans with Disabilities Act (ADA) on the employment of people with disabilities have used the work disability measure, which has several potential problems in measuring employment trends. Using Survey of Income and Program Participation (SIPP) data that permit alternative measures of disability, this study finds decreased employment among those reporting work disabilities in the first few years after the ADA was passed but increased employment when using a more probably appropriate measure of ADA coverage (functional and activity limitations that do not prevent work)."); Susan Schwochau & Peter David Blanck, *The Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. &

Reducing the cost of providing accommodation could increase employers' willingness to hire disabled people. And augmenting employers' willingness to hire disabled people is probably a surer route to employment for more disabled people than relying on litigation against recalcitrant employers, especially given the mounting evidence that only a very small percentage of Title I suits result in favorable judgments for the plaintiffs.[64]

Title I's statutory text may be indeterminate on the issue of mitigation, but there are good reasons to impose such a duty. Part II considers the form that the duty to mitigate under Title I should take.

II. THE DUTY OF *REASONABLE* MITIGATION

Establishing that there should be a duty to mitigate under Title I does not settle the equally important questions about when that duty should apply, what standard courts should use to enforce the duty, and what evidence should be relevant. Let us turn now to the practical, doctrinal issue of how Title I's duty to mitigate should be structured.

The small number of lower court opinions to consider the duty to mitigate under Title I are divided on the question of whether the duty should exist and have advanced no systematic way of thinking about when the duty should apply. The opinions that reject the duty to mitigate rely on the (unconvincing) argument about the present tense in the ADA's definition of disability.[65] The lower court opinions that endorse a duty to mitigate, in turn, have not established any clear rubric for implementing it. To the extent that these decisions imply any standard for when the duty to mitigate should apply, most appear to suggest that Title I plaintiffs are under a duty to mitigate whenever

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LAB. L. 271, 303 (2000) ("[A]ttribution of disemployment results to the ADA is premature.").

64. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) ("[D]efendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in eighty-four percent of reported cases. These results are worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly.") (footnotes omitted); *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 403 (1998) ("The American Bar Association's (ABA's) Commission on Mental and Physical Disability Law . . . . decided to analyze all the ADA employment cases covered in the *Reporter* to determine the exact percentages of employer and employee victories in such cases. The primary result . . . revealed that employers prevailed in approximately 92 percent of the final case decisions–meaning cases that have gone through the appeals process or have not been overturned on appeal as of March 31, 1998–thus contradicting the public perception that employers were more heavily burdened by ADA Title I. This 92 percent figure is consistent with the results of an analysis of the EEOC's statistics for administrative complaints, which reveals that employers prevail in 86 percent of the administrative complaints resolved by the EEOC.").

65. *See supra* note 53 and accompanying text.

mitigation is possible. One recent United States District Court opinion, for instance, states that "[w]here a person's impairment can be treated and symptoms alleviated by mitigating factors such as medication or treatments, such medications or treatments must be taken into account in determining disability."[66] "The Court cannot permit [the plaintiff] to create a physical disability by failing to pursue treatment options."[67] A second district court opinion holds that a plaintiff is not protected under Title I because her "asthma is correctable by medication," and she has not corrected it.[68] A third declares that "[a] plaintiff who does not avail himself of corrective medication is not a qualified individual under the ADA."[69] A few other decisions seem to understand the duty to mitigate in more limited terms, but none articulates a standard for when that duty should apply. For example, one district court opinion notes in denying a plaintiff Title I protection that the plaintiff has failed to take "a reasonable measure" to mitigate. The opinion, however, does not explore or explain the suggestion that the duty to mitigate might

66. Hooper v. Saint Rose Parish, 205 F. Supp. 2d 926, 929 (N.D. Ill. 2002).

67. *Id.*

68. Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587, 596 (D. Md. 2000), *aff'd*, 230 F.3d 1354 (4th Cir. 2000) (mem.).

69. Hewitt v. Alcan Aluminum Corp., 185 F. Supp. 2d 183, 189 (N.D.N.Y. 2001); *see also* Hill v. Kan. City Area Transp. Auth., 181 F.3d 891, 894 (8th Cir. 1999) ("Hill further argues that the drowsiness caused by taking hypertension medication in combination with the pain relievers prescribed for her work-related injuries was an ADA disability. . . . [W]e find no evidence in the record that Hill's physical condition *compelled* her to take a combination of medications that persistently affected her ability in 1995 to stay awake on the job. Therefore, she failed to present sufficient evidence that this alleged physical impairment substantially limited her major life activity of working."); Johnson v. Maynard, No. 01 Civ. 7393 (AKH), slip op. at 7-8 (S.D.N.Y. Feb. 20, 2003) ("Since plaintiff had medication available to her, and knew that she could function normally if she took it, she cannot be said to have been substantially impaired if she neglected to avail herself of such corrective measures. . . . Plaintiff's failure to take advantage of mitigating measures does not make her a qualified individual under the ADA."); Mont-Ros v. City of West Miami, 111 F. Supp. 2d 1338, 1356-57 (S.D. Fla. 2000) ("[B]ecause Plaintiff's sleep apnea condition is treatable and can be corrected with the use of a CPAP machine at night, Plaintiff cannot demonstrate that he is 'substantially limited in a major life activity.'"); Spradley v. Custom Campers, Inc., 68 F. Supp. 2d 1225, 1232-33 (D. Kan. 1999) ("[P]laintiff has conceded that on both occasions when he had seizures at work, he was not taking Dilantin, which was prescribed to reduce the chance of a seizure. The Supreme Court has recently held that if a disorder can be controlled by medication or other corrective measures, it does not substantially limit a major life activity. Although the facts indicate that taking Dilantin will not necessarily eliminate seizures, it would make it far less likely that he would have seizures. Plaintiff does not address this issue.") (citation omitted); Roberts v. County of Fairfax, Virginia, 937 F. Supp. 541, 548 (E.D. Va. 1996) ("Dr. Wittenburg found in April 1993 that, with treatment, Roberts' depression should not affect his work performance. And it is undisputed that several of Roberts' supervisors urged him to seek treatment, which he refused to do for a period of more than fourteen months. . . . Roberts' refusal to seek the recommended and available treatment precludes him from being a 'qualified individual with a disability' under the ADA.").

require plaintiffs to pursue only reasonable forms of mitigation.[70] Similarly, another district court opinion suggests that the relevant question might be whether the plaintiff's "alleged disability was easily correctable," without elaborating on the suggestion or indicating what the "easily" standard might mean.[71]

Part II's core proposal is that plaintiffs seeking Title I protection should bear a duty of reasonable mitigation, a duty to undertake those mitigating measures that could reduce their need for workplace accommodation and that would be undertaken by a reasonable person in the same situation—meaning, at the least, a reasonable person with the same impairment, the same mitigating measures available, and the same financial resources for mitigation. The justification for excluding measures that could not lessen the plaintiff's accommodation requirements from the duty to mitigate should be clear from the previous discussion. A crucial reason to impose a duty to mitigate is to ease the burden that providing accommodations can place on employers. Mitigation cannot serve that function if it cannot diminish a plaintiff's need for accommodation—either because the plaintiff already requires no accommodation or because the mitigation cannot have a large enough impact on the plaintiff's disability.

Section A explains why the duty to mitigate should be a duty of *reasonable* mitigation, outlining the strengths of this core proposal and describing how it would work with reference to the three major categories of reasons why disabled people do not mitigate. This Section argues that disabled people can have legitimate grounds for not mitigating in some circumstances, so that it would be inappropriate to require Title I plaintiffs to mitigate whenever mitigation could reduce their need for accommodation. It also contends that the reasonable mitigation standard has important advantages over a number of other possible standards for when the duty to mitigate should apply, like a standard requiring mitigation whenever mitigation is not too risky for the plaintiff, or a standard requiring mitigation that is not overly difficult for the plaintiff, or a standard requiring mitigation that is financially affordable for the plaintiff, or a standard requiring mitigation that costs less than what the defendant would bear in accommodating the plaintiff. A reasonable mitigation standard is more universal than a standard that only considers risk or difficulty or expense, and courts can employ the reasonable mitigation standard to evaluate the many different reasons why a plaintiff might not mitigate. A duty of reasonable mitigation also advances the ADA's explicit commitment to combating disabled

70. Rose v. Home Depot U.S.A., Inc., 186 F. Supp. 2d 595, 614, 617 (D. Md. 2002).

71. Llante v. Am. NTN Bearing Mfg. Corp., No. 99 C 3091, slip op. at 12 (N.D. Ill. Nov. 12, 1999).

people's isolation and segregation. Courts should have relatively little difficulty administering the duty of reasonable mitigation because judges and juries already have substantial experience in applying similar reasonable mitigation requirements to many legal settings, including cases about torts, workers' compensation, Social Security disability benefits, and private disability insurance policies.

Imposing a duty of reasonable mitigation should resolve the vast bulk of Title I cases that raise the duty to mitigate issue. I contend, moreover, that the reasonableness standard provides an appropriate way of handling two particularly hard categories of cases. The first involves plaintiffs who do not want to assume risks or side effects that a reasonable person would assume, but that are serious nonetheless. The second involves the small number of disabled people, mostly deaf, who do not want to mitigate their disabilities even if a reasonable person would because they believe that these disabilities are central to their cultural identity. These two cases are discussed separately in Section B.

A. *Core Cases*

The reasonable mitigation standard provides an appropriate and administrable way of dealing with the three major reasons why disabled people do not mitigate: the risks or side effects associated with mitigation, the difficulties of maintaining high levels of overall health, and the financial costs associated with mitigation. This Section will first discuss why it would be inappropriate to demand that all disabled people who are not mitigating for one of these three reasons mitigate as a condition of Title I protection. It will then explore the benefits of applying a standard of reasonable mitigation to these situations, as opposed to a number of other possible standards, and explain how the reasonableness standard would work.

Consider why Title I should not deny protection to all of the plaintiffs who are not mitigating because of risks or side effects associated with mitigation. The risks and side effects that can come with mitigation range widely in seriousness and appear in two main varieties, each of which dissuades some disabled people from mitigating. First, there is the risk that the mitigation will not work, and that attempting the mitigation will cost the person time, suffering, money, or worsened health and functioning. In cochlear implant surgery, for instance, a surgeon implants a device in the inner ear of a deaf person that is meant to enable the person to understand oral communication.[72] But there are dangers associated with the

72. *See*, *e.g.*, Michael F. Dorman, *An Overview of Cochlear Implants*, *in* COCHLEAR IMPLANTS: A HANDBOOK 5, 5-6 (Bonnie Poitras Tucker ed., 1998).

implantation procedure itself,[73] and some people who receive cochlear implants, including almost all adults who were deaf at birth, still cannot process sound sufficiently well to comprehend speech.[74] The surgery, moreover, often damages and sometimes destroys any residual hearing that the person has.[75]

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73. *See*, *e.g.*, Noel L. Cohen & Ronald A. Hoffman, *Complications of Cochlear Implant Surgery in Adults and Children*, 100 ANNALS OTOLOGY, RHINOLOGY & LARYNGOLOGY 708, 708 (1991) ("Surgery for cochlear prosthesis insertion exposes the patient to several potential risks. . . . Major complications usually have to do with surgical technique and include flap necrosis, improper electrode placement, and rare facial nerve problems. Minor complications include dehiscence of incisions, infection, facial nerve stimulation, dizziness, and pedestal problems with the Ineraid device."); *id.* at 711 ("Although life-threatening complications are extremely rare, the devastating effects of major flap breakdown, facial palsy, or incorrect electrode placement cannot be underestimated. Major flap breakdown leads to device contamination and the need for intravenous antibiotics and/or surgical revision. Multiple operations are sometimes required. The trauma of facial paralysis is well known to all otolaryngologists. Faulty electrode placement results in lack of auditory response, a particularly devastating outcome for a patient anticipating hearing restoration. Patients suffer physically, financially, and psychologically."); Robert C. Wang et al., *Cochlear Implant Flap Complications*, 99 ANNALS OTOLOGY, RHINOLOGY & LARYNGOLOGY 791, 791 (1990) ("In a series of 52 patients who received cochlear implants, 4 patients suffered flap complications (7.7%)."); Philip J. Hilts, *Drug Agency Is Studying Ear Implants' Links to Meningitis*, N.Y. TIMES, Aug. 3, 2002, at A7, A7 (reporting that "[t]he Food and Drug Administration is investigating what appears to be an increase in meningitis among deaf patients who have had tiny devices called cochlear implants surgically inserted deep inside their ears to help them hear").

74. *See*, *e.g.*, Dorman, *supra* note 72, at 19-20 ("Tests conducted in several countries indicate, overwhelmingly, that patients who were deafened at birth and who were implanted as adults obtain little speech understanding by means of an implant. Of all the patients reported in the literature, only a few individuals achieve speech understanding scores at a level above chance.").

75. *See*, *e.g.*, William J. Boggess et al., *Loss of Residual Hearing After Cochlear Implantation*, 99 LARYNGOSCOPE 1002, 1004 (1989) ("The findings indicate a significant downward shift in the hearing thresholds of the implanted ear following the insertion of a 25-mm electrode array. Although some patients demonstrated smaller shifts than others, the shift is still great enough to be considered clinically significant (greater than 5 dB) for all patients at one or more frequencies for the implanted ear. These findings are consistent with the previous clinical reports . . . . Dye reported that 20% of single-channel cochlear implant recipients had a loss of residual hearing attributable to the implant. All of those patients received an older, long electrode. Rizer, *et al.* found that each of their six patients who received a long multichannel electrode and the one reported patient who received a short single-channel electrode, showed a loss of residual hearing."); Bernard Fraysse et al., *Cochlear Implants for Adults Obtaining Marginal Benefit from Acoustic Amplification: A European Study*, 19 AM. J. OTOLOGY 591, 594-95 (1998) ("The comparison of thresholds showed that for all subjects, independent of the surgical technique used, a clinically significant downward shift in unaided hearing thresholds was observed for the implant ear after surgery with changes of ≥10-dB HL observed for at least one of the speech frequencies."); Th. Klenzner et al., *Does Depth of Electrode Insertion Influence Inner Ear Function in Cochlear Implant Patients?*, *in* 1 4TH EUROPEAN CONGRESS OF OTO-RHINO-LARYNGOLOGY HEAD AND NECK SURGERY 43, 43 (Klaus Jahnke & Markus Fischer eds., 2000) ("Damage of inner ear function could be caused by the insertion of cochlear implant (CI) electrodes. In the literature the possibility of preserving residual hearing is estimated at about 50%.") (citation omitted); Henryk Skarżyński et al., *Preservation of Residual Hearing in Children and Post-Lingually Deafened Adults After Cochlear Implantation: An Initial Study*, 64 ORL 247, 251 (2002) (reporting that "5 of 26 patients (19%) lost some residual hearing" and "5 of 26 (19%) patients lost all measurable residual hearing after cochlear implantation").

Second, there is the risk that even if the mitigation does work, in the sense of accomplishing what it was supposed to, it may have undesirable or dangerous side effects. Some common adverse features of mitigation are the pain and convalescence period that can follow surgery,[76] and the time and effort consumed by complying with a treatment regime that may require repeated medical visits or multiple doses of medication each day.[77] In addition, many mitigating measures have severe side effects. Lithium, for example, is the leading medication for the treatment of bipolar disorder.[78] But people with bipolar disorder often stop taking lithium because of its side effects,[79]

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76. *See*, *e.g.*, D. Janet Pavlin et al., *Pain as a Factor Complicating Recovery and Discharge After Ambulatory Surgery*, 95 ANESTHESIA & ANALGESIA 627, 627, 630 (2002) ("Pain is the most common medical cause of delayed recovery and discharge after ambulatory surgery . . . . The present study demonstrates the relevance of pain as a factor complicating the recovery and discharge of patients after ambulatory surgery. Nineteen percent of patients reported severe pain after surgery (pain score ≥7 on a 10-point scale).").

77. *See*, *e.g.*, S.P. Conway et al., *Compliance with Treatment in Adult Patients with Cystic Fibrosis*, 51 THORAX 29, 30-31 (1996) ("The degree of effort and time needed for adherence to prescriptions for nebulised antibiotics, dietary supplements and inhaled bronchodilators accounted for 60%, 41%, and 41% of missed doses, respectively. Respondents gave more than twice as many reasons for not doing physiotherapy as for any other treatment studied. The major reasons for omitting physiotherapy were the time and commitment it demands (44%) . . . ."); Seth A. Eisen et al., *The Effect of Prescribed Daily Dose Frequency on Patient Medication Compliance*, 150 ARCHIVES INTERNAL MED. 1881, 1881 (1990) ("The objective of this study was to determine the relationship between prescribed daily dose frequency and patient medication compliance. The medication compliance of 105 patients receiving antihypertensive medications was monitored by analyzing data obtained from special pill containers that electronically record the date and time of medication removal. . . . Compliance was defined as the percent of days during which the prescribed number of doses were removed. Compliance improved from 59.0% on a three-time daily regimen to 83.6% on a once-daily regimen. Thus, compliance improves dramatically as prescribed dose frequency decreases. Probably the single most important action that health care professionals can take to improve compliance is to select medications that permit the lowest daily prescribed dose frequency.").

78. *See*, *e.g.*, Am. Psychiatric Ass'n, *Practice Guideline for the Treatment of Patients with Bipolar Disorder*, 151 AM. J. PSYCHIATRY 1, 5 (Supp. Dec. 1994); Trevor Silverstone & Sarah Romans, *Long Term Treatment of Bipolar Disorder*, 51 DRUGS 367, 367-68, 370 (1996).

79. *See*, *e.g.*, Jørgen Aagaard & Per Vestergaard, *Predictors of Outcome in Prophylactic Lithium Treatment: A 2-Year Prospective Study*, 18 J. AFFECTIVE DISORDERS 259, 260-61, 264 (1990) ("133 patients participated in the study . . . . The non-adherent group was defined as those 56 (42.1%) patients who stopped treatment at least once within the first 2 years. None of these patients were medically advised to stop. . . . The most frequent reason given by the patient to stop treatment was side effects . . . ."); Kay R. Jamison et al., *Patient and Physician Attitudes Toward Lithium: Relationship to Compliance*, 36 ARCHIVES GEN. PSYCHIATRY 866, 869 (1979) ("Approximately one half of our patients reported discontinuing lithium treatment against medical advice at least once."); *id.* at 868 ("From the patient's perspective, the most important reasons for noncompliance were (1) they were bothered by the idea that their moods were controlled by a medication; (2) they were bothered by the idea of having a chronic illness, symbolized by the necessity of lithium therapy, and (3) side effects (particularly lethargy, decreased coordination, and dulling of senses). Those patients who reported actually discontinuing lithium were significantly more likely to also report 'missing highs' and the hassle of taking medications as important reasons for noncompliance."); Mario Maj et al., *Long-Term Outcome of Lithium Prophylaxis in*

which can include impaired memory and cognitive functioning,[80] tremors,[81] hypothyroidism,[82] weight gain,[83] birth defects,[84] and a loss of

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Bipolar Disorder: A 5-Year Prospective Study of 402 Patients at a Lithium Clinic, 155 AM. J. PSYCHIATRY 30, 30, 32 (1998) ("Of the 402 enrolled patients, 27.9% were no longer taking lithium at follow-up . . . . Of the 112 interviewed patients who were not taking lithium at follow-up, 95 (84.8%) had interrupted prophylaxis on their own initiative. The alleged main reason for interruption of medication was its perceived inefficacy in 35 cases, trouble related to side effects in 27, the conviction that the patient was cured and needed no more drugs in 17, the annoyance of taking medicines in 11, and loss of energy or productivity in five."); A.J. Mander, *Is Lithium Justified After One Manic Episode?*, 73 ACTA PSYCHIATRICA SCANDINAVICA 60, 66 (1986) ("The life table analysis clearly indicates that lithium, if taken continuously and, presumably, for life, will significantly reduce the risk of relapse. However, many patients take their lithium for a limited time only, [so that] the outcome of the group that the clinicians intended to treat [with lithium] is not different from the control group."); *id.* ("Most patients are only in their 3rd or 4th decade after their first admission for mania. They are unlikely to view the prospect of long-term prophylaxis with much enthusiasm, especially with the possibility of serious side effects, which include tremor, renal problems and the risk of accidental intoxication. It is not surprising therefore that they quickly discontinue it.").

80. *See*, *e.g.*, ROBERT M. JULIEN, A PRIMER OF DRUG ACTION: A CONCISE, NONTECHNICAL GUIDE TO THE ACTIONS, USES, AND SIDE EFFECTS OF PSYCHOACTIVE DRUGS 316 (rev. ed. 2001) ("Chronic lithium therapy is accompanied by adverse effects on memory and cognitive functioning. Some researchers report improvements in motor performance, cognition, and creative ability after lithium withdrawal, implying detrimental effects of lithium in these areas during drug therapy."); Michael J. Gitlin et al., *Maintenance Lithium Treatment: Side Effects and Compliance*, 50 J. CLINICAL PSYCHIATRY 127, 130 (1989) ("[P]atients indicated that they perceived cognitive changes and weight gain as more troublesome and more likely to provoke lithium noncompliance. This observation was demonstrated by two findings: (1) the five side effects most likely to cause noncompliance were cognitive and weight symptoms; and (2) patients who self-reported lithium discontinuation perceived themselves as having greater cognitive side effects in general—and mental slowness specifically—compared with patients who reported never having stopped lithium treatment.").

81. *See*, *e.g.*, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 805-06 (4th ed., text rev. 2000).

82. *See*, *e.g.*, THE AMERICAN PSYCHIATRIC PRESS TEXTBOOK OF PSYCHIATRY 967 (Robert E. Hales et al. eds., 2d ed. 1994) ("Hypothyroidism may occur in as many as 20% of patients treated with lithium.") (citations omitted); Rose Salata & Irwin Klein, *Effects of Lithium on the Endocrine System: A Review*, 110 J. LABORATORY & CLINICAL MED. 130, 131 (1987) ("On the average, 5% to 15% of patients given long-term lithium treatment are reported to show clinical signs or chemical evidence of hypothyroidism.").

83. *See*, *e.g.*, Y. Chen & T. Silverstone, *Lithium and Weight Gain*, 5 INT'L CLINICAL PSYCHOPHARMACOLOGY 217, 217 (1990) ("We found 14 studies concerning the clinical use of lithium in which data on weight were given. Weight gain was reported to have occurred in 11% to 65% of the patients studied. Among 100 patients taking lithium continuously for 1–2 years, 11 gained more than 5 kg and subsequent weight reduction was said to be difficult.") (citations omitted); P. Vestergaard et al., *Prospective Studies on a Lithium Cohort: 3. Tremor, Weight Gain, Diarrhea, Psychological Complaints*, 78 ACTA PSYCHIATRICA SCANDINAVICA 434, 436 (1988) ("The body weight rose in 73% of the patients [taking lithium], fell in 18% and remained constant in 9%. A weight gain of 10 kg or more was seen in 21% of the patients, of 20 kg or more in 2%.").

84. *See*, *e.g.*, JULIEN, *supra* note 80, at 316 ("Lithium possesses a degree of teratogenic potential, especially to the heart of the developing fetus."); Silverstone & Romans, *supra* note 78, at 373 ("[L]ithium is not advised during pregnancy, particularly in the first trimester, as the risk of fetal malformation involving the cardiovascular system (Ebstein's anomaly) is

the heightened creativity, mental concentration, and productivity that can be associated with mania.[85] Similarly, electroconvulsive therapy is one of the most effective treatments for major depression, yet it commonly results in memory loss.[86] There are also a variety of drugs available to treat depression, but they can have side effects that include cognitive and memory impairment,[87] seizures,[88] blurred vision,[89] sedation,[90] sleep disturbances,[91] sexual dysfunction,[92] weight gain,[93] and the risk of death if a person takes the antidepressants with certain foods and medicines.[94] Similarly, antiepileptic medications can cause interference with learning ability,[95] aggressive behavior,[96]

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greater in the children of women prescribed this drug during pregnancy than that of women not so exposed.").

85. For an eloquent account of this loss, see KAY REDFIELD JAMISON, AN UNQUIET MIND 5-6 (1995) ("My manias, at least in their early and mild forms, were absolutely intoxicating states that gave rise to great personal pleasure, an incomparable flow of thoughts, and a ceaseless energy that allowed the translation of new ideas into papers and projects."); *id.* at 91-92 ("Even though I was a clinician and a scientist, and even though I could read the research literature and see the inevitable, bleak consequences of not taking lithium, I for many years after my initial diagnosis was reluctant to take my medications as prescribed. . . . It was difficult to give up the high flights of mind and mood, even though the depressions that inevitably followed nearly cost me my life. . . . When I am my present 'normal' self, I am far removed from when I have been my liveliest, most productive, most intense, most outgoing and effervescent.").

86. *See*, *e.g.*, Keith G. Rasmussen et al., *Electroconvulsive Therapy and Newer Modalities for the Treatment of Medication-Refractory Mental Illness*, 77 MAYO CLINIC PROC. 552, 553-54 (2002); *id.* at 554 ("Electroconvulsive therapy-induced memory impairment takes 3 forms. The first is posttreatment confusion. . . . The second type of memory impairment with ECT is anterograde amnesia. . . . the inability to recall information learned after the treatments have begun. . . . The third and most bothersome type of ECT-induced memory impairment is retrograde amnesia, forgetting things that happened before the course of treatments. . . . Usually, only a few events, such as conversations, are forgotten, but patients occasionally forget most of the events of this period. Additionally, patients sometimes have sporadic episodes of forgetting personal life events that happened several years before treatment. Some of the forgotten events may never be remembered.").

87. *See*, *e.g.*, JULIEN, *supra* note 80, at 290-91, 296; PHYSICIANS' DESK REFERENCE 749-50, 1106, 1111, 1344, 1347, 1682-83, 2676, 2679 (57th ed. 2003).

88. *See*, *e.g.*, JULIEN, *supra* note 80, at 293; PHYSICIANS' DESK REFERENCE, *supra* note 87, at 1682-83.

89. *See*, *e.g.*, JULIEN, *supra* note 80, at 290; PHYSICIANS' DESK REFERENCE, *supra* note 87, at 749-50, 1106, 1108-09.

90. *See*, *e.g.*, JULIEN, *supra* note 80, at 290, 293, 301; PHYSICIANS' DESK REFERENCE, *supra* note 87, at 1106, 1111, 1603, 1607, 2562-63, 2627.

91. *See*, *e.g.*, JULIEN, *supra* note 80, at 293, 297; PHYSICIANS' DESK REFERENCE, *supra* note 87, at 1603, 1607, 1682, 1685-86, 2562-63.

92. *See*, *e.g.*, JULIEN, *supra* note 80, at 293-94, 297-98; PHYSICIANS' DESK REFERENCE, *supra* note 87, at 749-50, 1232, 1236, 1344, 1346, 1603, 1607, 2562-63, 2676, 2678-79.

93. *See*, *e.g.*, PHYSICIANS' DESK REFERENCE, *supra* note 87, at 749-50, 1232, 1236, 2562-63.

94. *See*, *e.g.*, JULIEN, *supra* note 80, at 302-03; PHYSICIANS' DESK REFERENCE, *supra* note 87, at 2562.

95. *See*, *e.g.*, JULIEN, *supra* note 80, at 96-97.

hyperactivity,[97] blood disorders,[98] liver damage,[99] abnormal vision,[100] weight gain,[101] and birth defects.[102] Haldol can help control the symptoms of Tourette's syndrome, but it can also have a number of side effects, including tardive dyskinesia, a potentially permanent condition that causes the muscles in a person's face and body to spasm and twitch involuntarily.[103] Moreover, Haldol can slow thought, curtail creative inspiration and expression, and—in the words of one person with Tourette's who decided to take the drug only during the work week—make a person "'sober, solid, [and] square.'"[104]

If Title I plaintiffs were required to assume any risk and bear any side effect associated with mitigation that could reduce their need for accommodation, that would mean that they would have to endanger

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96. *See*, *e.g.*, PHYSICIANS' DESK REFERENCE, *supra* note 87, at 2906-07.

97. *See*, *e.g.*, JULIEN, *supra* note 80, at 96.

98. *See*, *e.g.*, *id.* at 96-97; PHYSICIANS' DESK REFERENCE, *supra* note 87, at 421-22, 425, 3249-50.

99. *See*, *e.g.*, PHYSICIANS' DESK REFERENCE, *supra* note 87, at 421-23, 433, 3249-50.

100. *See*, *e.g.*, *id.* at 2565-67.

101. *See*, *e.g.*, Jouko I.T. Isojärvi et al., *Obesity and Endocrine Disorders in Women Taking Valproate for Epilepsy*, 39 ANNALS NEUROLOGY 579, 582 (1996) ("More than half of our patients taking valproate were obese, and the average increase in body weight in the 11 women (50% of the subjects on valproate) experiencing an indisputable weight gain was 21 kg. These findings are in accordance with previous reports of weight gain in 44 to 57% of patients treated with valproate. Therefore, obesity seems to be a common and in some cases, a very severe adverse effect of valproate treatment.") (citations omitted).

102. *See*, *e.g.*, JULIEN, *supra* note 80, at 98; PHYSICIANS' DESK REFERENCE, *supra* note 87, at 421-23, 433.

103. *See*, *e.g.*, PHYSICIANS' DESK REFERENCE, *supra* note 87, at 2464-65.

104. OLIVER SACKS, THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES 95 (1985) (quoting Ray, a patient); *see also id.* at 96 ("'You 'normals', who have the right transmitters in the right places at the right times in your brains, have all feelings, all styles, available all the time – gravity, levity, whatever is appropriate. We Touretters don't: we are forced into levity by our Tourette's and forced into gravity when we take haldol. *You* are free, you have a natural balance: we must make the best of an artificial balance.'" (quoting Ray)).

There is also the risk of something that might be considered a less obvious side effect of mitigation: that the use of the mitigating device or process will itself be stigmatic. Some disabled people avoid using mitigating measures that make their disability more apparent in an effort to avoid this stigma. For instance, some people will walk with great difficulty and pain to avoid using a wheelchair, or will greatly limit their daily movements to avoid using a walker. *See*, *e.g.*, DENNIS BYRD & MICHAEL D'ORSO, RISE AND WALK: THE TRIAL AND TRIUMPH OF DENNIS BYRD 240 (1993); STEVE FIFFER, THREE QUARTERS, TWO DIMES, AND A NICKEL: A MEMOIR OF BECOMING WHOLE 263 (1999); ROBERT F. MURPHY, THE BODY SILENT 61, 92-93 (1987); S. Kay Toombs, *Sufficient unto the Day: A Life with Multiple Sclerosis*, *in* CHRONIC ILLNESS: FROM EXPERIENCE TO POLICY 3, 18 (S. Kay Toombs et al. eds., 1995). Some people will not use a white cane because they do not want to reveal their blindness. *See*, *e.g.*, STEPHEN KUUSISTO, PLANET OF THE BLIND 65, 100 (1998); Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 903 (1966). Some people will leave their mental illnesses untreated so that they do not have to identify themselves as mentally ill. *See*, *e.g.*, JAMISON, *supra* note 85, at 54; *see also* Roberts v. County of Fairfax, Virginia, 937 F. Supp. 541, 543 (E.D. Va. 1996).

themselves, no matter the probability of benefit. As we have seen, the dangers associated with mitigation can be substantial, and mitigating measures with high failure rates or serious side effects may have a relatively small chance of causing a notable improvement in the plaintiff's overall condition. Requiring plaintiffs to assume any risk and bear any side effect would also be massively inefficient, as it would encourage plaintiffs to expend significant efforts on activities unlikely to make them more prepared for employment. A person who undertakes a mitigating measure that has a large risk of failure or that brings substantial side effects may often do little to enhance his ability to work and may instead simply replace a biological impairment with a medically induced one.

It would be similarly inappropriate to exclude plaintiffs from Title I protection because they do not maintain extremely high levels of overall health as a means of mitigation. While even able-bodied Americans frequently have trouble sustaining high standards of general health,[105] some physical and mental impairments make general health maintenance especially difficult. Exercise may be arduous or impossible given some impairments.[106] Weight gain is a common side effect of many of the drugs designed to mitigate various disabilities.[107] Studies suggest that smoking, which is much more common among the mentally ill than in the general population,[108] can alleviate the

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105. *See*, *e.g.*, Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *State-Specific Prevalence of Current Cigarette Smoking Among Adults — United States, 2002*, 52 MORBIDITY & MORTALITY WKLY. REP. 1277, 1277 (2004) ("Cigarette smoking in the United States causes serious illnesses among an estimated 8.6 million persons and approximately 440,000 deaths annually . . . .") (footnote omitted); *id.* at 1278 ("During 2002, the median prevalence of current smoking in the 50 states and DC was 23.1% (range: 12.7% [Utah]–32.6% [Kentucky]).") (citation omitted); Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among US Adults, 1999-2000*, 288 JAMA 1723, 1723 (2002) ("[A] [s]urvey of 4115 adult men and women conducted in 1999 and 2000 as part of the National Health and Nutrition Examination Survey (NHANES), a nationally representative sample of the US population. . . . [found that] [t]he age-adjusted prevalence of obesity was 30.5% in 1999-2000 compared with 22.9% in [a nationally representative survey conducted between 1988 and 1994] . . . . The prevalence of overweight also increased during this period from 55.9% to 64.5% . . . .").

106. *See*, *e.g.*, ABLE LIVES: WOMEN'S EXPERIENCE OF PARALYSIS 63 (Jenny Morris ed., 1989) ("Many were concerned about putting on weight, echoing the problems faced by a lot of non-disabled women as they grow older. Most people tend to put on weight as they age, but we have the added difficulty of not being able to exercise so easily, and of extra weight being more noticeable when you are sitting down.").

107. *See supra* text accompanying notes 83, 93, 101.

108. *See*, *e.g.*, Alexander H. Glassman et al., *Smoking, Smoking Cessation, and Major Depression*, 264 JAMA 1546, 1546 (1990) ("We conducted a test of th[e] association ['between cigarette smoking and major depressive disorder'], employing population-based data (n=3213) collected between 1980 and 1983 in the St Louis Epidemiologic Catchment Area Survey of the National Institute of Mental Health. A history of regular smoking was observed more frequently among individuals who had experienced major depressive disorder at some time in their lives than among individuals who had never experienced major depression or among individuals with no psychiatric diagnosis. Smokers with major

symptoms of various mental illnesses and that some people with mental illnesses may use smoking to self-medicate.[109] A disability can

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depression were also less successful at their attempts to quit than were either of the comparison groups."); *id.* at 1548 ("A multiple logistic regression showed that the relationship between major depression and smoking was independent of age, sex, education, marital status, and race . . . ."); John R. Hughes et al., *Prevalence of Smoking Amongst Psychiatric Outpatients*, 143 AM. J. PSYCHIATRY 993, 993 (1986) ("The prevalence of smoking among psychiatric outpatients (N=277) was significantly higher than among either local or national population-based samples (N=1,440 and 17,000) (52% versus 30% and 33%). The higher prevalence was not associated with the age, sex, marital status, socioeconomic status, alcohol use, coffee use, or institutionalization of the psychiatric patients. Smoking was especially prevalent among patients with schizophrenia (88%) or mania (70%) and among the more severely ill patients."); *id.* at 995 tbl.2 (reporting the smoking rates for patients with major depressive disorder (49%), anxiety disorder (47%), personality disorder (46%), and adjustment disorder (45%)); Karen Lasser et al., *Smoking and Mental Illness: A Population-Based Prevalence Study*, 284 JAMA 2606, 2606 (2000) ("[In a nationally representative population sample,] [c]urrent smoking rates for respondents with no mental illness, lifetime mental illness, and past-month mental illness were 22.5%, 34.8%, and 41.0%, respectively. Lifetime smoking rates were 39.1%, 55.3%, and 59.0%, respectively . . . . Smokers with any history of mental illness had a self-reported quit rate of 37.1% . . . , and smokers with past-month mental illness had a self-reported quit rate of 30.5% . . . compared with smokers without mental illness (42.5%). . . . Persons with a mental disorder in the past month consumed approximately 44.3% of cigarettes smoked by this nationally representative sample."); *id.* at 2607 ("We defined mental illness as major depression, bipolar disorder, dysthymia, panic disorder, agoraphobia, social phobia, simple phobia, generalized anxiety disorder, alcohol abuse, alcohol dependence, drug abuse, drug dependence, antisocial personality, conduct disorder, or nonaffective psychosis. The latter includes schizophrenia, schizophreniform disorder, schizoaffective disorder, delusional disorder, and atypical psychosis."); *id.* at 2608 ("The relationship between smoking and mental illness persisted when we controlled for age, sex, and geographic region using logistic regression . . . .").

109. *See*, *e.g.*, Glassman, *supra* note 108, at 1548 ("In a recent examination of withdrawal symptoms during the first week following smoking cessation, we observed that, among smokers without a history of major depression, symptoms of depression were, in fact, rather uncommon and, when they did occur, were generally mild. However, among smokers with a history of major depression, depressed mood during withdrawal was very common and was associated with failure in smoking cessation efforts."); *id.* at 1548-49 ("Clinical experience suggests that those few depressed smokers who do succeed in stopping are at increased risk to develop another episode of major depression. We have seen a number of cases in which smokers with a history of major depression who are not depressed at the time they try to quit get seriously depressed shortly after giving up cigarettes."); *id.* at 1549 ("[O]n a number of occasions we have seen serious depressions that gradually developed following smoking cessation disappear within hours of resuming cigarette smoking. In addition, a number of these patients had experienced depressive episodes associated with prior smoking cessation attempts. These observations, together with our earlier evidence that these smokers frequently develop depressive symptoms when they try to stop, suggest that these are causally connected events and that nicotine withdrawal can provoke episodes of major depression.") (footnote omitted); Donald C. Goff et al., *Cigarette Smoking in Schizophrenia: Relationship to Psychopathology and Medication Side Effects*, 149 AM. J. PSYCHIATRY 1189, 1192-93 (1992) ("Nicotine also improves concentration and decreases distractibility in normal subjects evaluated with the Stroop Test. Patients with schizophrenia have been shown to be particularly impaired in their performance on this test, raising the possibility that schizophrenic smokers may be self-medicating a cognitive deficit. . . . Self-medication of more subtle cognitive or affective symptoms during adolescence, before the onset of overt psychotic illness, may also contribute to the higher rate of smoking in schizophrenic patients.") (citations omitted).

also be a source of stress, which may make weight gain[110] and smoking[111] more likely.

Along the same lines, a duty of mitigation that required disabled people to bear any financial cost associated with mitigation, no matter their financial resources, would ignore Congress's recognition "that people with disabilities, as a group, . . . are severely disadvantaged socially, vocationally, economically, and educationally."[112] Mitigation can sometimes be expensive. For example, glaucoma medication needed to preserve vision can cost over $2000 a year.[113] A manual wheelchair can cost between $500 and $4000, and a motorized wheelchair can cost as much as $20,000.[114] The cost of a single hearing

110. *See*, *e.g.*, Henry A. Jordan et al., *Patterns of Weight Change: The Interval 6 to 10 Years After Initial Weight Loss in a Cognitive-Behavioral Treatment Program*, 57 PSYCHOL. REP. 195, 202 (1985) ("The fluctuation in weight over time may suggest, perhaps, that patients may experience weight gains during periods of stress. When the stress is alleviated, they lose the weight. Motivation for weight control for most of the present patients probably waxes and wanes, perhaps in relation to the major events in their lives. Such fluctuations are related not only to a commitment to control eating but also to the effort necessary to handle both routine and nonroutine life events.").

111. *See*, *e.g.*, Ovide F. Pomerleau & Cynthia S. Pomerleau, *Neuroregulators and the Reinforcement of Smoking: Towards a Biobehavioral Explanation*, 8 NEUROSCIENCE & BIOBEHAVIORAL REV. 503, 504 (1984) ("It has been observed that many schedules and situations found to be effective in provoking nicotine self-administration might accurately be described as stressful. A link between nicotine and stress is also suggested by the findings of Schachter and colleagues, who demonstrated that smokers smoke more when anxious or when subjected to painful stimulation (e.g., before giving a lecture, during doctoral examinations, receiving electric shocks, etc.).") (citations omitted); *see also* Rose v. Home Depot U.S.A., Inc., 186 F. Supp. 2d 595, 614 n.7 (D. Md. 2002) ("Rose [who has respiratory problems] attempts to explain away his smoking habit as an unavoidable condition, possibly even a disability. . . . He . . . blames his 'smoking addiction' on stress. He states '[w]hen I am undergoing periods of stress, I smoke more. In the past, I have smoked as few as 1/2 pack of cigarettes a day (without Wellbutrin). When I am undergoing stressful periods, I have smoked up to two packs of cigarettes a day.'"); LIZZIE SIMON, DETOUR: MY BIPOLAR ROAD TRIP IN 4-D, at 26 (2002) ("Lithium wasn't the only drug that helped me recover after I was diagnosed with manic depression. Eventually I was smoking pot about five times a day . . . . I needed to be high all the time because I couldn't deal with the intensity of what had happened to me . . . . For me, pot was a bridge back to real life, a cushiony warm soft bridge that made the day-to-day OK while my brain and body adjusted to lithium and while my soul began to digest the trauma. Also, pot made it easy to be social again after the most alienating and horrifying experience of my life.").

112. 42 U.S.C. § 12101(a)(6) (2000).

113. *See*, *e.g.*, J. William Doyle et al., *Glaucoma Medical Treatment—2002: Does Yearly Cost Now Equal the Year?*, 79 OPTOMETRY & VISION SCI. 489, 489 (2002).

114. *See*, *e.g.*, Lynn Bryant, *Cost of Wheelchairs: Are You Paying Too Much?*, ACCENT ON LIVING, Fall 1994, at 28, 28; *see also* Ian Austen, *A Leg with a Mind of Its Own*, N.Y. TIMES, Jan. 3, 2002, at G1, G4 ("The C-Leg [prosthetic leg], which was introduced to the United States market in 1999, costs $40,000 to $50,000, compared with $15,000 for a non-electronic hydraulic model.").

aid can range from approximately $400 to approximately $3000,[115] and a cochlear implant device can cost approximately $20,000.[116]

Not surprisingly, tort jurisprudence indicates that some disabled people do not have access to the funds needed for mitigation,[117] and that people disabled by tort are not obligated to mitigate if they cannot afford the cost of doing so.[118] Medicaid and private health insurance policies do not always pay for mitigation. For example, Medicaid programs in five states do not provide customized wheelchairs to adults, and Medicaid programs in six states do not provide motorized wheelchairs to adults.[119] Medicaid programs in at least eighteen states usually or often fail to cover the full cost of a cochlear implant device.[120] Some private insurance policies also do not cover the full cost of a cochlear implant device,[121] and most private insurance policies do not pay for hearing aids.[122]

Forty-five million people in America, moreover, currently have no public or private health insurance, often because they are unemployed.[123] It would be ironic if the duty of mitigation denied some disabled people protection against employment discrimination because they cannot afford to mitigate, when they cannot afford to mitigate because no one will hire them. Even if a disabled person managed to undertake mitigation by going into debt, protection under Title I is no guarantee of obtaining employment.

Given that a disabled person's reasons for not mitigating can sometimes be legitimate and sometimes not, it would be inappropriate

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115. *See*, *e.g.*, *Time to Deal with Hearing Loss?*, CONSUMER REP. ON HEALTH, May 2002, at 1, 1.

116. *See*, *e.g.*, J. Robert Wyatt et al., *Cost Utility of the Multichannel Cochlear Implant in 258 Profoundly Deaf Individuals*, 106 LARYNGOSCOPE 816, 819 tbl.IV (1996).

117. *See supra* text accompanying notes 13-16.

118. *See*, *e.g.*, Fuches v. S.E.S. Co., 459 N.W.2d 642, 643 (Iowa Ct. App. 1990) ("[A] person may be excused from mitigating damages if they lack sufficient financial resources to do so."); Seagers v. Pailet, 656 So. 2d 700, 714 (La. Ct. App. 1995) ("Failure to undergo corrective surgery because the plaintiff cannot monetarily afford to do so is not failure to mitigate damages.").

119. *See* Esteban v. Cook, 77 F. Supp. 2d 1256, 1257 (S.D. Fla. 1999).

120. *See* Steven Garber et al., *Payment Under Public and Private Insurance and Access to Cochlear Implants*, 128 ARCHIVES OTOLARYNGOLOGY—HEAD & NECK SURGERY 1145, 1150 (2002).

121. *See id.*

122. *See Time to Deal with Hearing Loss?*, *supra* note 115, at 1.

123. *See* CARMEN DENAVAS-WALT ET AL., U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2003, at 14 (2004) ("An estimated 15.6 percent of the population, or 45.0 million people, were without health insurance coverage in 2003, up from 15.2 percent and 43.6 million people in 2002."); *id.* at 17 ("Of those 18 to 64 years old in 2003, full-time workers were more likely to be covered by health insurance (82.5 percent) than part-time workers (76.2 percent) or nonworkers (74.0 percent).").

for the duty to mitigate to demand mitigation whenever it could reduce the person's need for accommodation. A rule demanding all possible mitigation to lessen accommodation requirements might, in its relative absoluteness, have the advantage of relative clarity, but it would not take account of the plaintiff's legitimate interests. Yet that still does not answer the question of when mitigation should be required. A plaintiff seeking the protection of Title I could, for example, be obligated to mitigate when mitigation is not too risky for the plaintiff, or could be obligated to mitigate when mitigation is not overly difficult for the plaintiff, or could be obligated to mitigate when mitigation is not too expensive for the plaintiff, or could be obligated to mitigate when mitigation costs less than what the defendant would bear in accommodating the plaintiff (a "least-cost-avoider" standard).

A duty of reasonable mitigation would have a number of advantages over these other potential standards. First, the reasonable mitigation standard is more universal than a standard that looks exclusively at risk or difficulty or expense, and it provides courts with a means of assessing the many different reasons why a disabled person might decide not to mitigate. The duty of reasonable mitigation would require a plaintiff seeking Title I protection to undertake those mitigating measures that could reduce the plaintiff's need for accommodation and that a reasonable person in the same situation would undertake. There are a variety of ways to define the "same situation," but some clear requirements suggested by the preceding discussion of reasons for avoiding mitigation are that the reasonable person have the same condition, the same mitigating measures available, and the same financial resources for mitigation. This reasonable mitigation standard would mean that a Title I plaintiff would be obligated to assume only those risks or side effects that a reasonable person would assume to eliminate or improve the condition in question, to take only those steps to improve his overall health that a reasonable person with the same condition would take, and to bear only those costs associated with mitigation that a reasonable person with the same financial means would bear. In this way, the reasonable mitigation standard would provide some assurance that the law is not obligating Title I plaintiffs to subject themselves to pointless harm, along with a means of recognizing the obstacles to health maintenance that a plaintiff may be experiencing and adjusting for what the plaintiff can afford.

Second, the reasonable mitigation standard advances the ADA's goal of combating the "isolat[ion] and segregat[ion]" of disabled people.[124] A least-cost-avoider standard for applying the duty to mitigate would promote the clustering of disabled employees in

124. 42 U.S.C. § 12101(a)(2) (2000).

relatively few workplaces—those able to provide accommodations at relatively low cost because of their efficiency, economies of scale, centralized location, or industry. Plaintiffs suing employers with relatively low costs of accommodation would be more likely to win Title I protection on the ground that mitigation would be more expensive than accommodation; plaintiffs suing employers with relatively high costs of accommodation would be more likely to be denied Title I protection on the ground that accommodation would be more expensive than mitigation. This clustering of disabled employees, however, would at least partially frustrate the ADA's commitment to the integration of disabled people in the workplace. The clustering would also help concentrate the costs that Title I imposes on a relatively small group of employers, which would raise distributional fairness concerns.[125] A least-cost-avoider standard for applying the duty to mitigate is not necessary to limit an employer's financial liability, moreover. Title I already provides that an employer does not have to make an accommodation where it "can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."[126] Perhaps more importantly, the duty of reasonable mitigation leaves employers with significant flexibility in many situations where the cost of mitigation is less than the cost of accommodation. Where mitigation would be reasonable but for the expense it would impose on the plaintiff, and the defendant-employer agrees to bear all or part of that expense, the plaintiff would be obligated to mitigate if a reasonable person in the plaintiff's situation, faced with whatever expenses remain, would mitigate.

Third, the reasonable mitigation standard should not be unduly difficult for courts to administer because judges and juries have substantial experience in applying similar standards of reasonable mitigation to many related legal contexts.[127] Defendants in common law tort actions, for example, frequently contend that the people they have disabled by tort have failed to mitigate, and many courts have held in these cases that a tort victim's damage award will be reduced if he did not undertake mitigating measures that a reasonable person in

125. *See supra* Part I.

126. 42 U.S.C. § 12112(b)(5)(A).

127. Compared to a least-cost-avoider standard, a duty of reasonable mitigation would also make it more possible for disabled people to assess whether they have complied with the duty to mitigate and to plan accordingly. The reasonable mitigation standard depends on information outside the employer's control, such as information about what other disabled people in the same situation have done. *See infra* text accompanying notes 134-37. A least-cost-avoider standard, in contrast, depends on the defendant's cost of accommodation, information that the employer controls and that only it may know. A disabled person may have few ways of determining an employer's cost of accommodation until he requests an accommodation, and even then he may not gain access to all the relevant data.

the same situation would have undertaken.[128] This jurisprudence, in turn, evaluates when mitigation is reasonable,[129] and when it is not.[130]

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128. *See*, *e.g.*, Stark v. Shell Oil Co., 450 F.2d 994, 997 (5th Cir. 1971) ("This case is governed by Louisiana law. The law of Louisiana is that an injured person must submit to reasonable treatment, including an operation if it is shown that the operation will alleviate the disability.") (citation omitted); Salas v. United States, 974 F. Supp. 202, 211 (W.D.N.Y. 1997) ("Under New York law, an injured party has a duty to mitigate her damages, and in that regard is required to make a reasonable effort and to act as a reasonable, prudent person would under the circumstances."); Greenwood v. Mitchell, 621 N.W.2d 200, 205 (Iowa 2001) ("[T]here must be substantial evidence that there was something that the plaintiff could do to mitigate his loss and that requiring the plaintiff to do so was reasonable under the circumstances. Furthermore, it must be shown that the plaintiff acted unreasonably in failing to undertake the mitigating activity.") (citation omitted); Jacobs v. New Orleans Pub. Serv., Inc., 432 So. 2d 843, 845 (La. 1983) ("[A]n accident victim has a duty to exercise reasonable diligence and ordinary care to minimize his damages after the injury has been inflicted."); Michaud v. Steckino, 390 A.2d 524, 531 (Me. 1978) ("There is a positive duty upon a person injured through the negligence of another to minimize his damages and to use reasonable diligence in securing medical or *surgical* aid."); Adee v. Evanson, 281 N.W.2d 177, 180 (Minn. 1979) ("Plaintiff has a duty to mitigate damages by acting reasonably in obtaining treatment for her injury."); Flight Line, Inc. v. Tanksley, 608 So. 2d 1149, 1162-63 (Miss. 1992) ("Without question, a person injured in tort is required to take reasonable steps to mitigate his damages, and this, at the very least, includes giving attention to doctor's orders regarding his course of recovery."); Frisnegger v. Gibson, 598 P.2d 574, 581 (Mont. 1979) ("[T]he trial court . . . allowed the jury to consider whether Frisnegger should have submitted to treatment, including possible surgery, on the reasonable person test. Where mitigation of damages is concerned, we have supported the reasonable person test or the ordinarily prudent person test in property damage cases. We hold that the District Court properly submitted the mitigation issues to the jury on that basis here . . . ."); (citations omitted); Automatic Merchandisers, Inc. v. Ward, 646 P.2d 553, 554 (Nev. 1982) (per curiam) ("It is unquestioned that an injured person cannot recover for damages which could have been avoided by the exercise of reasonable care. The doctrine of mitigation of damages has been applied to preclude recovery for disability which could have been avoided if the plaintiff had exercised reasonable diligence in seeking medical care, including surgical treatment.") (citation omitted); Favier v. Winick, 583 N.Y.S.2d 907, 908 (N.Y. Sup. Ct. 1992) ("Generally, a party who claims to have suffered personal injuries by reason of the defendant's negligence or other tortious conduct is required to use reasonable and proper effort to make the damage as small as practicable, and is not entitled to recover for any damage which by the use of such effort might have been avoided.") (citations omitted); Dunn v. Maxey, 693 N.E.2d 1138, 1140 (Ohio Ct. App. 1997) ("The law in Ohio precludes one who is injured by the tort of another from recovering damages for harm that could have been avoided by reasonable effort or expenditure after the commission of the tort."); Zimmerman v. Ausland, 513 P.2d 1167, 1169 (Or. 1973) ("It is equally well established that the plaintiff in a personal injury case cannot claim damages for what would otherwise be a permanent injury if the permanency of the injury could have been avoided by submitting to treatment by a physician, including possible surgery, when a reasonable person would do so under the same circumstances."); Yost v. Union R.R. Co., 551 A.2d 317, 322 (Pa. Super. Ct. 1988) ("When determining damages for personal injuries in Pennsylvania, it is proper for a jury to consider the failure of the plaintiff to undergo surgery or medical treatment that an ordinarily prudent man would have submitted to under the circumstances in an effort to better his condition."); Cox v. Keg Rests. U.S., Inc., 935 P.2d 1377, 1380 (Wash. Ct. App. 1997) ("An injured party generally may not recover damages proximately caused by that person's unreasonable failure to mitigate."); Lobermeier v. Gen. Tel. Co. of Wis., 349 N.W.2d 466, 474 (Wis. 1984) ("The question is one of fact for the jury—what was a reasonable course of conduct, under the circumstances, to mitigate the injuries or damages.").

129. *See*, *e.g.*, Pisciotta v. Allstate Ins. Co., 385 So. 2d 1176, 1182 (La. 1979) ("Dr. Vogel opined that at least eighty or ninety percent of the patient's discomfort should be relieved by treatment, which would probably include an operation. . . . We therefore agree that the trial

Along the same lines, many courts reviewing the decisions of workers' compensation boards have found that a plaintiff seeking compensation for a workplace accident has a duty to take reasonable steps to mitigate his injury.[131] Similarly, many courts reviewing decisions on

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court's award should be amended to eliminate any recovery for permanent loss of earning capacity."); Leaman v. Cont'l Cas. Co., 798 So. 2d 285, 293 (La. Ct. App. 2001) ("[W]e find that Cooper's decision not to use a permanent orthodontic retainer or splint recommended by her orthodontist, Dr. Marshall Gottsgen, was error."); *Flight Line, Inc.*, 608 So. 2d at 1162-63 ("Substantial evidence reflects Tanksley did not follow doctor's orders and likely worsened his injuries as result. On November 4, 1984, he ignored instructions and reinjured himself, and it is true this led to his first surgery. Following this first surgery, Tanksley did indeed lie about a pinprick test because he was bored at home and thought he should return to work and, as a result, Dr. Stringer released him to go back to work to 'light duty' sooner than he otherwise would have. After the surgery, he worked difficult, strenuous shifts and further aggravated his condition. Without question, a person injured in tort is required to take reasonable steps to mitigate his damages, and this, at the very least, includes giving attention to doctor's orders regarding his course of recovery. In the relevant posture of the case, the Circuit Court was no doubt obliged to accept that Tanksley had failed in this duty, that he had in fact aggravated his condition by his own course of conduct.") (citations omitted).

130. *See*, *e.g.*, *Stark*, 450 F.2d at 998 ("We think that Shell's proof fell far short of demonstrating that Stark unreasonably refused to submit to treatment of his back injury. Even without weighing the seriousness of the operation proposed by Dr. Purvis, there was no showing that that operation offered a reasonable certainty of correcting the disability. There was direct medical testimony that it did not. There was also the undisputed evidence that an identical operation had already been performed with negative results."); *Automatic Merchandisers, Inc.*, 646 P.2d at 555 ("[A]ppellant failed to present evidence that respondent's disinclination to undergo surgery was unreasonable. . . . [S]urgery was not even consistently recommended prior to trial, and neither Ward's treating physician nor appellant's expert witness recommended surgical intervention by the time of trial, since respondent's condition had improved with conservative treatment."); *Zimmerman*, 513 P.2d at 1171 ("Neither is there any evidence that plaintiff had been advised by any doctor that she should submit to a surgical operation on her knee and that she then failed or refused to do so. Indeed, both plaintiff's and defendant's doctors agreed that surgery was not indicated at the time of their examination. . . . No case has been cited to us in which it has been held that a plaintiff with a torn cartilage in the knee must submit to surgery to remove the damaged cartilage or be barred, as a matter of law, from seeking damages for an otherwise permanent injury, at least in the absence of such evidence."); *Cox*, 935 P.2d at 1380 ("The Keg first argues that Cox's unreasonable failure to mitigate is demonstrated by his refusal to have his shunt removed or restructured as recommended by his physiatrist, Dr. Evan Cantini. But Cantini only testified that he felt that it might have been useful to consider revising or eliminating the shunt and that he discussed shunt revision as a treatment option. . . . Moreover, Cantini stated that he was not an expert in evaluating hydrocephalus and deferred to Cox's neurosurgeon, Dr. Richard Winn, who testified that it was reasonable to decline a shunt revision.").

131. *See*, *e.g.*, Thurman v. Clarke Indus., Inc., 872 S.W.2d 418, 420 (Ark. Ct. App. 1994) (en banc) ("Section 11-9-512 provides as follows: 'Except in cases of hernia, which are specifically covered by § 11-9-523, where an injured person unreasonably refuses to submit to a surgical operation which has been advised by at least two (2) qualified physicians and where the recommended operation does not involve unreasonable risk of life or additional serious physical impairment, the Commission, in fixing the amount of compensation, may take into consideration such refusal to submit to the advised operation.'"); Beth-Elkhorn Corp. v. Epling, 450 S.W.2d 814, 815 (Ky. 1970) ("KRS 342.035(2) provides, so far as pertinent to this case: 'No compensation shall be payable for the * * * disability of an employe[e] * * * in so far as his disability is * * * continued, by an unreasonable failure to submit to or follow any competent surgical treatment or medical aid or advice.'"); Veal v. Trans Gulf, Inc., 723 So. 2d 987, 992 (La. Ct. App. 1998) (per curiam) ("Though the claimant

Social Security disability benefits have held that benefits will be denied to a claimant with "an impairment that can be remedied by treatment with reasonable effort and safety."[132] Courts interpreting

cannot be forced to submit to surgery, his compensation may be jeopardized if he *unreasonably* refuses."); Gordon v. Me. Reduction Co., 358 A.2d 544, 548 (Me. 1976) (per curiam) ("We do not doubt that under 39 M.R.S.A. § 65 a claimant's unreasonable refusal to submit to surgery or any reasonable examination attendant thereto is an affirmative defense to the employer's obligation to continue to provide compensation benefits . . . .") (footnote omitted); Jacobs v. Ryder Sys./Complete Auto Transit, 789 S.W.2d 233, 235 (Mo. Ct. App. 1990) ("A claimant's refusal to submit to medical treatment bars an award of compensation only when the refusal is unreasonable."); Yarns v. Leon Plastics, Inc., 464 N.W.2d 801, 804 (Neb. 1991) ("[W]hile a disabled employee may not be required to undergo surgery, an unreasonable refusal to submit to surgery, taking into account the risk involved to the employee, the nature of the surgery, and the likelihood of improving the condition, may result in the forfeiture or reduction of compensation benefits, as may be appropriate."); Saif Corp. v. Orr, 792 P.2d 454, 456 (Or. Ct. App. 1990) ("A claimant who unreasonably fails or refuses to mitigate the extent of his permanent disability is not entitled to compensation for that portion of his disability attributable to the unreasonable failure or refusal."); Am. Red Cross v. Workers' Comp. Appeal Bd., 741 A.2d 244, 247 (Pa. Commw. Ct. 1999) ("Section 306(f.1)(8) of the Workers' Compensation Act . . . provides: 'If the employe[e] shall refuse reasonable services of health care providers, surgical, medical and hospital services, treatment, medicines and supplies, he shall forfeit all rights to compensation for any injury or increase in his incapacity shown to have resulted from such refusal.'"); Klein Indus. Salvage v. Dep't of Indus., Labor & Human Relations, 259 N.W.2d 124, 125 (Wis. 1977) (per curiam) ("Under the Workers' Compensation Act, a claimant may receive reduced benefits or be denied them altogether if he or she fails to mitigate the damages resulting from a work-related injury. The statute provides as follows: 'TREATMENT REJECTED BY EMPLOYE[E]. Unless the employe[e] shall have elected Christian Science treatment . . . , no compensation shall be payable for the death or disability of an employe[e], if his death be caused, or insofar as his disability may be aggravated, caused or continued (a) by an unreasonable refusal or neglect to submit to or follow any competent and reasonable medical or surgical treatment . . . .'").

132. Johnson v. Sec'y of Health & Human Servs., 794 F.2d 1106, 1111 (6th Cir. 1986); *see also* Gross v. Heckler, 785 F.2d 1163, 1166 (4th Cir. 1986) (per curiam) ("If a symptom can be reasonably controlled by medication or treatment, it is not disabling."); Schena v. Sec'y of Health & Human Servs., 635 F.2d 15, 19 (1st Cir. 1980) ("'In determining whether a claimant's refusal to undergo treatment is reasonable–i. e. supported by justifiable cause under 20 C.F.R. § 404.1507–several factors must be considered.' . . . A reasonable fear may justify the refusal of treatment.") (citation omitted); Hephner v. Mathews, 574 F.2d 359, 362 (6th Cir. 1978) ("The Secretary's reliance on appellant's refusal to undergo a surgical spinal fusion does not support a denial of benefits. Appellant's surgeon testified that it was not unreasonable for his patient to decline to submit to this serious surgery.") (citation omitted); Nichols v. Califano, 556 F.2d 931, 933 (9th Cir. 1977) ("A claimant under a disability need not submit to all treatment, no matter how painful, dangerous, or uncertain of success, merely because one physician believes that a remedy may be effective. In determining whether a claimant's refusal to undergo treatment is reasonable—*i. e.*, supported by justifiable cause under 20 C.F.R. § 404.1507—several factors must be considered.") (citations omitted); Fessler v. Apfel, 11 F. Supp. 2d 1244, 1253 (D. Colo. 1998) ("'If an impairment can reasonably be treated or controlled it cannot constitute a disability.'") (citation omitted); Valdez v. Heckler, 616 F. Supp. 933, 939 (N.D. Cal. 1985) ("Impairments that can be reasonably remedied by treatment cannot function as the basis for a finding of disability."); Benedict v. Heckler, 593 F. Supp. 755, 760-61 (E.D.N.Y. 1984) ("[E]ven if the treatment were prescribed and would restore plaintiff's ability to work, plaintiff may still refuse such treatment where justifiable cause exists. . . . The overwhelming majority of cases in this area deal with the refusal of surgery. In those cases, doctor's predictions of success, patient's fear of pain, or fear of the surgery itself and even the doctor-patient relationship are factors to be considered. The refusal, however, must be reasonable.") (citations omitted); Martin v. Schweiker, 550 F. Supp. 199, 201 (N.D. Cal. 1982) ("It is well settled that where an

private disability insurance policies have also found that some policies either explicitly or implicitly condition benefits on the insured's pursuit of reasonable mitigation.[133]

One piece of evidence that fact finders judging the reasonableness of a plaintiff's actions should consider when it is available is what other people in the same situation—with the same condition, the same available mitigating measures, and the same financial resources—have actually done.[134] The more people in the plaintiff's situation who have mitigated, the stronger the evidence that mitigation is the only

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impairment reasonably can be remedied by treatment, it cannot serve as the basis for disability."); Holguin v. Harris, 480 F. Supp. 1171, 1179 (N.D. Cal. 1979) ("If an impairment reasonably can be remedied or controlled by treatment or medication, it cannot serve as a basis for a finding of disability."); Fletcher v. Califano, 471 F. Supp. 317, 320 (N.D. Tex. 1979) ("If an impairment can reasonably be remedied or controlled by treatment, it cannot serve as a basis for a finding of disability."); Locklear v. Mathews, 424 F. Supp. 639, 647 (D. Md. 1976) ("'[I]f an impairment reasonably can be remedied by treatment, it can not serve as a basis for a finding of disability.'") (citation omitted).

133. *See*, *e.g.*, Provident Life & Accident Ins. Co. v. Henry, 106 F. Supp. 2d 1002, 1003-04 (C.D. Cal. 2000) ("On apparent first impression in the Ninth Circuit, the Court holds a disability insurance policy may condition benefits on the insured's consent to appropriate medical care, which may include surgery. . . . [T]he appropriate-care provision [in the disability insurance policy] here creates an explicit duty to seek and accept appropriate treatment."); Doe v. Provident Life & Accident Ins. Co., No. 96-3951, slip op. at 3 (E.D. Pa. Dec. 24, 1997) ("'[P]olicies 335 and 337 . . . require that plaintiff be 'receiving care by a physician which is appropriate for the condition causing the disability' in order to be entitled to benefits. . . . 'Appropriate' means suitable under the circumstances. It does not mean perfect care, or the best possible care. Thus, in order to prove he is entitled to total disability under policies # 335 and # 337, the plaintiff must also prove that he has received appropriate care for his allegedly disabling condition.'" (quoting jury instructions)); Casson v. Nationwide Ins. Co., 455 A.2d 361, 367 (Del. Super. Ct. 1982) ("Delaware decisional law is aligned with the opposite view—that an insured must submit to treatment to which a reasonably prudent man would ordinarily submit if the disability is correctable. If the insured fails or refuses to submit to reasonable treatment recommended by competent physicians, he is precluded from recovery for the disability for the period the cure would have become effective. . . . I conclude that the duty to minimize a claimed disability is a condition precedent to Nationwide's liability under the contract with plaintiff and that such condition was implied in the policy as a matter of law.") (citations omitted).

134. Reasonableness is a question for the jury or for the judge acting as a finder of fact, unless no reasonable jury could find that the plaintiff's actions were reasonable. *See*, *e.g.*, TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 n.12 (1976) ("[T]he jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment in negligence cases."); Reed v. MBNA Mktg. Sys., Inc., 333 F.3d 27, 34 (1st Cir. 2003) ("[Even if the] raw facts are undisputed . . . . the judgment call as to reasonableness is itself a jury issue unless no reasonable jury could decide it in the plaintiff's favor."); King v. Crossland Sav. Bank, 111 F.3d 251, 259 (2d Cir. 1997) ("[T]he assessment of reasonableness generally is a factual question to be addressed by the jury."); West v. State Farm Fire & Cas. Co., 868 F.2d 348, 351 (9th Cir. 1989) (per curiam) ("[T]he cases show that reasonableness becomes a question of law appropriate for determination on motion for summary judgment when only one conclusion about the conduct's reasonableness is possible."); Matthews v. Ashland Chem., Inc., 703 F.2d 921, 925-26 (5th Cir. 1983) ("[E]ven where there is no dispute as to the facts, it is usually for the jury to decide whether the conduct in question meets the reasonable man standard. Issues that require the determination of the reasonableness of the acts and conduct of the parties under all the facts and circumstances of the case, cannot ordinarily be disposed of by summary judgment.") (citations and internal quotation marks omitted).

reasonable choice. Examining this sort of empirical evidence could improve consistency between cases and would provide fact finders with a firm foundation on which to make their judgments of reasonableness. It would also allow reasonableness to be judged with some reference to the choices that disabled people themselves have made.

The record of disabled people's own decisions is a valuable source of information for at least two reasons. First, disabled people have strong incentives to seek out and pursue beneficial mitigating measures. The biological and physical disadvantages that can be associated with disability are widely (although not universally)[135] acknowledged among the disabled. Many disabled people, with a large variety of disabilities, stress these disadvantages and explain that they would prefer to be able-bodied for that reason.[136] Mitigation can vastly increase a person's realistic chances of securing employment. It generally makes people more able to work, and many, if not most, employers will evaluate employees and job applicants who have mitigated in their mitigated state. Mitigation also frequently improves the quality of a disabled person's life outside work. Disabled people, considered as a group, have powerful motivations to undertake reasonable mitigation, although any one disabled individual will not necessarily act reasonably.

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135. *See supra* text accompanying note 19; *infra* text accompanying notes 140-60.

136. For instance, Martin Milligan, a blind philosopher, explains that: "Certainly, if doctors said there was now a good chance of restoring my sight by an operation, I would be actively interested." *Letter 4: From Martin Milligan to Bryan Magee*, *in* ON BLINDNESS: LETTERS BETWEEN BRYAN MAGEE AND MARTIN MILLIGAN 34, 34-36 (1995). Blindness "is so disadvantaging in such a wide range of frequently encountered circumstances that" it "would still be a serious handicap even if we blind people constituted the overwhelming majority of the world's population, and could arrange things to suit ourselves, and could subject the remaining sighted people to our will." *Id.* at 38. Bonnie Poitras Tucker, a lawyer and legal academic, states that she "would gladly grab any opportunity to fix [her] deafness" because "[d]eaf people lack one of the five critical senses, plain and simple." BONNIE POITRAS TUCKER, THE FEEL OF SILENCE, at xix, xxi (1995). Jenny Morris, a disability rights activist who was paralyzed in an accident, similarly reports "that even if the physical environment in which I live posed no physical barriers, I would still rather walk than not be able to walk. However non-discriminatory the society in which I lived, to be able to walk would give me more choices and experiences than not being able to walk." JENNY MORRIS, PRIDE AGAINST PREJUDICE: TRANSFORMING ATTITUDES TO DISABILITY 1-2, 71 (1991).

On other disabilities, see JASON KINGSLEY & MITCHELL LEVITZ, COUNT US IN: GROWING UP WITH DOWN SYNDROME 35 (1994) ("Mitchell: I wish I didn't have Down syndrome because I would be a regular person, a regular mainstream normal person.") (original emphasis omitted); SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 175, 2 (1996) ("I would joyfully accept a cure [for chronic fatigue immune dysfunction syndrome] if it were offered me . . . ."); Harilyn Rousso, *Fostering Healthy Self Esteem*, EXCEPTIONAL PARENT, Dec. 1984, at 9, 9-10 ("It is not that I would choose to be disabled [with cerebral palsy] . . . ."); Toombs, *supra* note 104, at 19-20 ("Multiple sclerosis is an unlucky break, and I wish I didn't have it. . . . [T]here is nothing intrinsically good about chronic, progressive multiple sclerosis.").

Second, evidence about what other disabled people in the same situation have done can reveal information missing from medical or other outside expert judgments about the disabled. Studies suggest that experts do not always accurately understand disabled people. For instance, a number of studies have found that health care professionals estimate the quality of their disabled patients' lives to be much lower than what the patients themselves report, which may lead the professionals to prescribe too much treatment.[137] Using the record of disabled people's own decisions as evidence in the evaluation of reasonableness can help counteract this bias.

B. *Two Hard Categories of Cases*

The reasonable mitigation standard also provides an appropriate means of handling two particularly hard categories of cases. The first involves disabled people who do not want to take a mitigating

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137. *See*, *e.g.*, John R. Bach & Denise I. Campagnolo, *Psychosocial Adjustment of Post-Poliomyelitis Ventilator Assisted Individuals*, 73 ARCHIVES PHYSICAL MED. & REHABILITATION 934, 934 (1992) ("The effect of severe disability, tracheostomy, and ventilator use on psychosocial functioning, gainful employment, life satisfaction, and perceived well-being were studied for a population of 395 ventilator assisted post-poliomyelitis individuals (PVAIs). . . . Two-hundred-seventy-three physically intact health care professionals served as controls. . . . The controls significantly underestimated the patients' life satisfaction and well-being scores and significantly overestimated the relative hardship associated with ventilator use."); John R. Bach & Margaret C. Tilton, *Life Satisfaction and Well-Being Measures in Ventilator Assisted Individuals with Traumatic Tetraplegia*, 75 ARCHIVES PHYSICAL MED. & REHABILITATION 626, 626 (1994) ("This study evaluates the effect of complete traumatic tetraplegia on the life satisfaction and well-being of 87 individuals, 42 of whom are ventilator supported, 2 years or more postinjury. . . . The . . . life satisfaction [of the 'ventilator assisted individuals with tetraplegia'] and other well-being and quality of life indicators were generally positive, and were significantly underestimated by a control group of health care professionals."); Eugenia Bodenhamer et al., *Staff and Patient Perceptions of the Psychosocial Concerns of Spinal Cord Injured Persons*, 62 AM. J. PHYSICAL MED. 182, 188 (1983) ("[H]ighly significant differences occurred between staff and [the spinal cord injured (SCI)] patients' responses on the four scales of Anxiety, Depression, Social Discomfort, and Positive Outlook. . . . An inspection of the means indicates the staff tended to overestimate the amount of depression and social discomfort, and underestimate positive outlook and anxiety."); *id.* at 191 ("[S]ix of the seven staff members who were most accurate in their predictions of patient responses were new to SCI service, having worked only a year or less with spinal cord injured patients."); Laura A. Cushman & Marcel P. Dijkers, *Depressed Mood in Spinal Cord Injured Patients: Staff Perceptions and Patient Realities*, 71 ARCHIVES PHYSICAL MED. & REHABILITATION 191, 195 (1990) ("There was . . . a consistent bias on the part of staff to overestimate depressed mood, relative to the report of [the SCI] patients themselves. This is consistent with the suggestion that patient behavior is interpreted according to the prevailing professional ideology; in the case of rehabilitation personnel, this view includes depression as a necessary phase of adjustment to SCI.") (footnote omitted); Frederick A. Ernst, *Contrasting Perceptions of Distress by Research Personnel and Their Spinal Cord Injured Subjects*, 66 AM. J. PHYSICAL MED. 12, 13-14 (1987) ("The results of the present study replicate and extend those of Bodenhamer, *et al.* (1983) who reported serious discrepancies in perception of distress comparing SCI patients and the rehabilitative professionals who treat them. . . . [O]ur staff overestimated distress on all four of the questionnaire's measures, including anxiety.").

measure because of the associated risks or side effects, when those risks or side effects are serious but ones that a reasonable person in the same situation would nevertheless assume for the expected benefit. The second involves the small number of disabled people, most frequently members of the deaf community, who refuse mitigation even if a reasonable person in their situation would undertake it because they believe that their disability is central to their cultural identity. This Section will explore why these cases raise hard issues. It concludes, however, that disabled people in each of these situations should still be subject to the duty of reasonable mitigation, although courts should consider a plaintiff's interests and claims carefully before deciding that the plaintiff's decision not to mitigate is unreasonable.

These categories of cases are difficult because they involve unreasonable decisions not to mitigate in circumstances where reasonable mitigation would require especially large sacrifices, at least from the perspective of the disabled person at issue. Without doubt, a disabled person can have legitimate concerns about risks or side effects that he alone will have to bear, and these concerns may be greatest where the risks or side effects involve serious harm. Imagine, for instance, the distress that the duty of reasonable mitigation could cause a disabled person who does not want to undergo mitigating surgery because he fears the risk of death associated with the use of anesthesia, when the disabled person knows that a reasonable person would undergo the surgery because it usually ameliorates the disability in question and death is very unlikely to occur.[138] Consider the dilemma of a person with a serious impairment who does not want to take a mitigating medicine because of its cognitive side effects, when a

138. *See*, *e.g.*, Yukio Kubota et al., *Frequency of Anesthetic Cardiac Arrest and Death in the Operating Room at a Single General Hospital over a 30-Year Period*, 6 J. CLINICAL ANESTHESIA 227, 230-31 (1994) ("Over the 30 years of this prospective study, 85,708 anesthetics of all kinds were performed in the OR [operating room]. During that time, four CAs [cardiac arrests] occurred during anesthesia. Thus, the frequency of CAs is estimated to be 1 in 21,427, or 0.5 in 10,000, anesthetics. Three of our patients were successfully resuscitated, and one died, yielding a mortality rate during anesthesia of 1 in 85,708, or 0.1 in 10,000, anesthetics. Over this 30-year period, there were no surgical deaths due to events such as massive hemorrhage or surgical mismanagement during anesthesia.") (citations omitted); Myrna C. Newland et al., *Anesthetic-Related Cardiac Arrest and Its Mortality: A Report Covering 72,959 Anesthetics over 10 Years from a US Teaching Hospital*, 97 ANESTHESIOLOGY 108, 108 (2002) ("One hundred forty-four cases of cardiac arrest within 24 h of surgery were identified over a 10-yr period from an anesthesia database of 72,959 anesthetics. . . . Fifteen cardiac arrests out of a total number of 144 were judged to be related to anesthesia. Five cardiac arrests were anesthesia-attributable, resulting in an anesthesia-attributable cardiac arrest rate of 0.69 per 10,000 anesthetics . . . . Ten cardiac arrests were found to be anesthesia-contributory, resulting in an anesthesia-contributory rate of 1.37 per 10,000 anesthetics . . . . The risk of death related to anesthesia-attributable perioperative cardiac arrest was 0.55 per 10,000 anesthetics . . . .").

reasonable person with that impairment would be willing to take the medicine for its expected benefits.[139]

Similarly, even if one has doubts about the wisdom of a disabled person constructing a disability-based identity for himself, the lives and public statements of a small number of disabled people do reflect their commitment to such an identity. These disabled people frequently express the conviction that they would not change their disability if they could because it is a significant part of who they are. For instance, I. King Jordan, the president of Gallaudet University, which is dedicated to deaf students,[140] has denied that "there [is] a significant absence when you can't hear" and compared asking a deaf person if he would like to hear to "ask[ing] a black person, 'Suppose you could take a pill and become white, would you take it?'"[141] Some disabled people outside the deaf community articulate similar beliefs. Cyndi Jones, who had polio, has stated that she would not take "a

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139. *See supra* text accompanying notes 80, 85-87, 95, 104.

140. *See*, *e.g.*, JOHN B. CHRISTIANSEN & SHARON N. BARNARTT, DEAF PRESIDENT NOW!: THE 1988 REVOLUTION AT GALLAUDET UNIVERSITY, at vii, 160-63, 194 (1995); JACK R. GANNON, THE WEEK THE WORLD HEARD GALLAUDET 15, 20, 144 (1989).

141. *60 Minutes: King Jordan* (CBS television broadcast, Mar. 11, 1990) (transcript at 14, on file with author). Oliver Markwirth, who has served as president of the Dallas County Deaf Caucus, has similarly contended that: "'Trying to make a deaf person hearing is like telling a black person to change his skin . . . . Why do you want to make all people be the same?'" Christine Wicker, *Sound Barrier: These Deaf People Are Flourishing with Their Own Culture, Language and Humor. And a Strong Bond in Their Isolation*, DALLAS MORNING NEWS, Oct. 17, 1993, Magazine, at 8, 10. Judith Coryell, who has been head of the deaf education program at Western Maryland College, has also employed an analogy to race to describe the importance of deafness to her identity. "'Let me put it this way,'" she has explained. "'Say you were black. Do you think you'd be considering surgery to make yourself white?'" Marie Arana-Ward, *As Technology Advances, a Bitter Debate Divides the Deaf*, WASH. POST, May 11, 1997, at A1, A20. Along the same lines, Genie Gertz, who represented New York in a Miss Deaf America contest, has reported that she "'wouldn't ever change [being deaf]. Why would I?'" Andrew Solomon, *Defiantly Deaf*, N.Y. TIMES, Aug. 28, 1994, § 6 (Magazine), at 38, 45. Clara Gantes, a deaf teacher of sign language, has stated that she doesn't "'regret being deaf at all and I don't want to leave deaf people. It's a part of me.'" John Barry, *Silence Is Golden?*, MIAMI HERALD, Sept. 22, 1991, Tropic, at 8, 12, 16. Susan Philip, who has been coordinator of deaf services at Northeastern University, has said that: "'My deafness is normal to me . . . . and I have no interest in an implant.'" Richard Saltus, *Some Spurn Implants, Say They Don't Want to Abandon the Deaf Culture*, BOSTON GLOBE, July 10, 1989, at 29, 29; *see also* BERNARD BRAGG, LESSONS IN LAUGHTER: THE AUTOBIOGRAPHY OF A DEAF ACTOR 4 (Eugene Bergman trans., 1989) ("I thought deafness was a way of life and never linked it with sickness, defectiveness, or a handicapped condition. I thought, and I still do, that my deafness is just part of who I am."); J. William Evans, *Thoughts on the Psychosocial Implications of Cochlear Implantation in Children*, *in* COCHLEAR IMPLANTS IN YOUNG DEAF CHILDREN 307, 307-08 (Elmer Owens & Dorcas K. Kessler eds., 1989) ("In an informal survey (Evans, unpublished raw data), prelingually deafened adults were asked whether they would choose to have an implant if it were possible that some hearing could be restored. The response was approximately 85 percent negative. The common explanation they offered was that the procedure would be destructive to their social relationships, to the world that they had come to know, and to their adaptive mechanisms."); Solomon, *supra*, at 40 ("'I am black and Deaf and proud and I don't want to be white or hearing or different in any way from who I am.'" (quoting a student at the Lexington Center for the Deaf)).

magic pill" that would allow her to walk again, contending that this question is "'the same thing as asking a black person would he change the color of his skin.'" "'Even if you don't like the way society treats you as a disabled person, it's part of your experience, it's part of how you come to be who you are.'"[142] Indeed, at least some members of this group of disabled people, especially the deaf among them, report that they want their children to share their disability and the associated cultural identity. Joan Philip Meehan, for example, "'want[ed] my daughter to be like me, to be deaf.'"[143] Daniel Smith and his wife "'were very excited, happy [when their child was born deaf]. We were thrilled . . . . Doctors thought it would be bad news — we had different perspectives.'"[144]

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142. JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 12, 14 (1993). Nadina LaSpina, who also had polio, has similarly insisted that she "'would not trade my disability for anything . . . . We will not change to fit the mold . . . . Instead, we will destroy the mold and change the world to make sure there is room for everyone.'" Douglas Martin, *Disability Culture: Eager to Bite the Hands that Would Feed Them*, N.Y. TIMES, June 1, 1997, § 4, at 1, 1. Gene Chelberg, who is blind, has campaigned for the establishment of a cultural center for disabled students at the University of Minnesota by recounting that: "'For years, we have been asked to live in this able-bodied world, trying to become able-bodied people. The idea here is, I'm proud of my disability and I don't need to be fixed.'" *Cultural Center for the Disabled Prompts Debate*, N.Y. TIMES, Apr. 26, 1992, § 1, at 45, 45. Steven E. Brown, a founder of the Institute on Disability Culture, has declared that: "'We claim our disabilities with pride as part of our identity. We are who we are: we are people with disabilities.'" Martin, *supra*, at 1.

143. Saltus, *supra* note 141, at 29.

144. *Deaf Parents Are Happy When Their Baby Is Born Deaf*, ST. PETERSBURG TIMES, Oct. 11, 1994, at 3A, 3A. Paula Sargent explains that "'deaf people feel about deaf children the way Indians feel about Indian children. It's like, 'You're part of us.'" Barry, *supra* note 141, at 13; *see also id.* at 11 ("'Actually, I wish there were more deaf babies being born,' [sign language teacher Lynn Frankel] types. 'That's an awful thing to say if you don't understand my position, but to me a deaf child is a blessing, not a burden, and I am really proud of the fact that when God was handing out handicaps, I was one of the chosen to get a handicap of deafness.'"); *id.* at 12 ("At Gallaudet's genetic counseling center, couples come to find out how likely it is for deafness to be passed on. What is the 'risk,' some ask, of having hearing children?"); HARLAN LANE ET AL., A JOURNEY INTO THE DEAF-WORLD 18 (1996) ("'We were starting on my kids,' said Henry. 'Like Jake's folks, my wife and I weren't expecting our children to be Deaf because we both have hearing parents and the rest of our extended families are all hearing. So it was a surprise to us with both kids, but we were thrilled when we found out. It was pretty confusing for the doctors, let me tell you. The audiologist came in after the test looking very apprehensive and said, 'I am so sorry. The test shows that your baby is Deaf, although there may be a chance of residual . . . .' He stopped because my wife and I were hugging each other, we were so happy. He thought we were nuts.'") (original emphasis omitted); Abigail Trafford, *Controlling Genetic Roulette*, WASH. POST, Nov. 15, 1994, Health, at 6, 6 ("'Many of our families are not interested in fixing or curing deaf genes,' explains genetic counselor Jamie Israel at the genetic services center at Gallaudet. 'Many . . . couples come in and want . . . deaf children.'"); Wicker, *supra* note 141, at 10 ("Ross Roeser, director of Dallas' Callier Center for Communication Disorders, gives an example he hopes will illuminate. 'You know, when we have two parents who are both deaf,' says Dr. Roeser, who is hearing, 'and we test their baby and the baby turns out to be hearing, they grieve, just like hearing parents who are told they have a child who is deaf.'").

Not surprisingly, surveys consistently find that deaf people generally choose other deaf people as marriage partners. *See*, *e.g.*, JEROME D. SCHEIN & MARCUS T. DELK, JR., THE DEAF POPULATION OF THE UNITED STATES 1-2, 41 (1974) ("In choosing a marital partner,

In addition, this category of disabled people has a record of organized resistance to protect their disability-based cultural identity.[145] In March 1988, for instance, deaf students at Gallaudet University in Washington, D.C. succeeded in closing the school for a week until the Board of Trustees agreed to appoint the university's first deaf president, I. King Jordan.[146] The students, joined by thousands of deaf supporters from around the country who staged rallies in their hometowns and who traveled to Washington to participate in marches,[147] protested that the hearing person that the trustees had initially chosen as president was not fluent in sign language and did not understand deaf culture.[148] The social life of this

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the majority of deaf persons favor deaf partners. Among married deaf persons in the current [national] survey [of people deaf before age nineteen], most have deaf spouses . . . . The rate for nonwhite deaf females is nearly the same as for white deaf females: a little over 14 percent having hearing spouses. The overall rates are close to those reported for New York State and Washington, D.C. Rainer et al. asked their deaf sample about preference for spouse's hearing; 86 percent expressed a desire for a deaf mate."); John D. Rainer & W. Edwards Deming, *Demographic Aspects: Number, Distribution, Marriage and Fertility Statistics*, *in* FAMILY AND MENTAL HEALTH PROBLEMS IN A DEAF POPULATION 13, 13, 17 (John D. Rainer et al. eds., 2d ed. 1969) ("[In a survey 'of literate deaf persons,'] only 5.1 per cent of women born deaf, and 8.7 per cent of those that became deaf at an early age, were married to hearing men. The rest had husbands who had been deaf since birth or early childhood. Almost 30 per cent of the marriages where both partners were born deaf, and from 14 to 21 per cent of those where only one partner was born deaf, resulted in deaf children, usually more than one.").

145. This has historically been a crucial marker of the importance of religious identity, for instance. *See*, *e.g.*, Donald A. Erickson, *Showdown at an Amish Schoolhouse*, *in* COMPULSORY EDUCATION AND THE AMISH: THE RIGHT NOT TO BE MODERN 43, 43-48 (Albert N. Keim ed., 1975) (describing organized Amish resistance to efforts to enforce compulsory schooling laws by removing Amish children from schools run by the Amish).

146. *See* CHRISTIANSEN & BARNARTT, *supra* note 140, at vii-viii, 158-63; GANNON, *supra* note 140, at 15, 48, 50, 144.

147. *See* CHRISTIANSEN & BARNARTT, *supra* note 140, at 133, 150-51, 156, 184-85; GANNON, *supra* note 140, at 37-38, 94, 109.

148. *See* CHRISTIANSEN & BARNARTT, *supra* note 140, at vii-viii, 60, 79-81, 94, 96, 100, 102-04, 129, 133; GANNON, *supra* note 140, at 15, 109. Inspired by the successful "Deaf President Now" campaign at Gallaudet, a group of deaf students and alumni from the Lexington Center for the Deaf in New York City organized a series of demonstrations in April and May of 1994 that led to the resignation of the center's hearing chief executive officer and the appointment of Phil Bravin, a leading figure in the deaf community, as president of the center's board. Solomon, *supra* note 141, at 40, 42-43; *see also* David Firestone, *Chief Executive to Step down at Deaf Center*, N.Y. TIMES, June 22, 1994, at B3, B3; David Firestone, *Deaf Students Protest New School Head*, N.Y. TIMES, Apr. 27, 1994, at B3, B3. Students at the Wisconsin School for the Deaf closed the school down for two days in November 1991 until the state agreed to formulate a plan to recruit deaf people for staff positions at the school and to search for a deaf person to serve as the school's next superintendent. *See* Richard L. Kenyon, *Sign It Loud: I'm Deaf, and I'm Proud*, MILWAUKEE J., Apr. 5, 1992, Magazine, at 4, 7.

The broader disability culture movement, in turn, has orchestrated repeated, nationwide protests of the annual Jerry Lewis Muscular Dystrophy Association Telethon, charging that "its pity approach to fund-raising" contributes to the view that disabled people are "childlike, helpless, hopeless, nonfunctioning and noncontributing members of society," Evan Kemp Jr., *Aiding the Disabled: No Pity, Please*, N.Y. TIMES, Sept. 3, 1981, at A19, A19, "'only worthwhile if we can be cured,'" Greg Lopez, *Disabilities Don't Cripple Life, Woman*

category of disabled people also frequently revolves around cultural institutions focused on a disability-based identity. Many deaf people, for example, have devoted significant portions of their lives to deaf clubs.[149] There are also deaf arts festivals,[150] deaf film festivals,[151] deaf beauty pageants,[152] deaf theater companies,[153] and deaf plays.[154] The

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Says, ROCKY MOUNTAIN NEWS, Sept. 6, 1993, at 5A, 5A (quoting the organizers of "the first demonstration in Denver against the telethon"); *see also* Alexandra M. Biesada, *Protesters Object to 'Jerry's Kid' Image*, AUSTIN AM.-STATESMAN, Sept. 7, 1993, at B2, B2; Katy Butler, *Jerry Lewis Telethon Protested in Oakland*, S.F. CHRON., Sept. 7, 1992, at A11, A11; Peter Larsen, *Annual Telethon Protested: Disabled Call Lewis' Style Demeaning*, DAILY NEWS (Los Angeles), Sept. 7, 1992, at 4–News, 4–News; Holly Yettick, *Protesters Arrested at Telethon*, ROCKY MOUNTAIN NEWS, Sept. 4, 2001, at 17A, 17A. This movement has also held demonstrations that denounce efforts to legalize assisted suicide, arguing that the right-to-die movement is "'promulgating the view that disability is inherently undignified'" so "that someone who has become disabled might want to have assisted suicide as an option." Jeanne Malmgren, *Promoting Living Despite Disability*, ST. PETERSBURG TIMES, May 25, 1999, at 1D, 6D (quoting Diane Coleman, "spokeswoman for Not Dead Yet").

149. One deaf woman, for instance, has explained that her deaf social club in Philadelphia "'is like [her] home.'" As she elaborated, "'for Deaf people the Deaf club is like a second home. Hearing people don't have anything like that. They go home from work, put on headphones, and listen to their stereos or watch television. But the Deaf get together and socialize at their club. It's like a second home.'" Stephanie A. Hall, *Door into Deaf Culture: Folklore in an American Deaf Social Club*, 73 SIGN LANGUAGE STUD. 421, 421 (1991). "'The deaf club,'" another deaf person has similarly reported, is "'where the deaf meet. It's their gathering place, the heart of their world, their ballroom, their bar, their theater, their community center—all rolled into one.'" BRAGG, *supra* note 141, at 190-91 (quoting Gene Bergman, coauthor of the deaf play *Tales from a Clubroom*); *see also* LOU ANN WALKER, A LOSS FOR WORDS: THE STORY OF DEAFNESS IN A FAMILY 117-18 (1986) ("The network of organizations Mom and Dad belonged to entailed every conceivable social, intellectual, and athletic function. Obviously, because the deaf population is limited, many of the clubs in Indianapolis had overlapping memberships, but still, the commitment of those members was amazing. . . . The clubs held dances, had basketball and softball leagues, dinners, endless parties and get-togethers. One or several of these groups sponsored nursing homes and children's camps, provided scholarships, crowned a Miss Deaf Indiana, and much, much more.").

150. *See*, *e.g.*, Lynette Clemetson, *An International Gathering for the Deaf in the Arts*, N.Y. TIMES, July 8, 2002, at B1, B1 ("[Willy] Conley, now an actor, playwright and director, is one of 400 artists — visual, performing and literary — whose works are being featured in Deaf Way II, an international arts festival and conference that begins today in Washington. . . . The weeklong extravaganza is said to be the largest event in any country devoted to deaf issues and the arts. More than 8,500 people from 108 countries have registered, and organizers are expecting hundreds more."); *id.* at B5 ("[Gallaudet] university convened the first Deaf Way conference in 1989, planning for 500 people. More than 5,000 showed up.").

151. *See*, *e.g.*, John Petrakis, *Cinema Scoping: A Look at the Local Fests for Nearly Every Interest*, CHI. TRIB., Feb. 22, 2002, § 7A, at 8, 8 ("[The goal of the Festival of Cinema for the Deaf] is to show movies made by or starring deaf artists, while also presenting documentaries or fiction films about the deaf experience.").

152. *See*, *e.g.*, Ray Quintanilla, *Beauty Queen Really Signs on with Kids: Deafness Is Not a Disability, Says Former Miss Deaf America Winner*, CHI. TRIB., Sept. 23, 1994, § 2, at 1, 1 ("Stephanie Long, 24, . . . just completed a two-year stint as Miss Deaf America . . . . [T]here will always be a Miss Deaf America, Long said, referring to the pageant that's in its 20th year."); *id.* at 1, 8 ("Long told the Parkwood pupils not to look upon deafness as a disability. . . . 'The only difference between deaf people and everyone else is that deaf people can't hear,' Long said. 'Don't think of your difference as a weakness,' she said.").

broader disability culture movement has similarly produced plays,[155] theater companies,[156] performing arts festivals,[157] films,[158] film festivals,[159] and cultural centers in universities.[160]

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153. *See*, *e.g.*, HELEN POWERS, SIGNS OF SILENCE: BERNARD BRAGG AND THE NATIONAL THEATRE OF THE DEAF 115-16 (1972) (describing the founding of the National Theatre of the Deaf, "the first professional theater made up of deaf performers"); BRAGG, *supra* note 141, at 111, 116-17 (same); *id.* at 191 (describing "the Hughes Memorial Theatre, Washington's longtime community theater of the deaf").

154. *See*, *e.g.*, BERNARD BRAGG & EUGENE BERGMAN, TALES FROM A CLUBROOM, at xii (1981) ("It is a fact and not puffery that this play, written by the deaf for the deaf, has met with enthusiastic responses from deaf audiences wherever it was performed. So there must be something genuine about it—something with which the deaf can identify—and that was our aim in the first place. . . . As we see it, and as we know other deaf people see it, our play reflects the vibrant and buoyant life of a close-knit community."); GILBERT C. EASTMAN, SIGN ME ALICE, at xi (1974) ("In past years the Gallaudet College Theatre has presented classic or contemporary plays in which the principal characters (antagonists and protagonists) express their ideas, arguments, and feelings in speeches that must be translated, and we the deaf don't fully live the parts because they portray the life of the hearing. *Sign Me Alice* is about the life of the deaf mingling in the world of the hearing. The heroine does not ask for pity but for the right to the deaf's choice: sign language or any of the artificial languages that use signs to represent English.").

155. *See*, *e.g.*, Mike Ervin, The History of Bowling (Oct. 2000) (unpublished manuscript, on file with author); Cheryl Marie Wade, Sassy Girl: Memoirs of a Poster Child Gone Awry (1994) (unpublished manuscript, on file with author); Carrie Sandahl, *7 Plays About Physical Difference: Facets of the Experience of Disability from the Insiders' Perspective*, AM. THEATRE, Apr. 2001, at 21, 22 ("A growing number of playwrights and performance artists have given artistic expression to the experiences and culture of disability from an *insider's* perspective. . . . [T]hese insider plays consistently challenge notions of physical impairment as a metaphor for evil, sin, helplessness and psychological trauma or, conversely, innocence and saintliness. . . . In addition, the characters in these plays cannot be 'reduced' to their impairments . . . . Unlike those portrayed in TV movies-of-the-week or mainstream films, these characters are not obsessed with 'overcoming' or 'curing' their conditions, but take their bodies as givens, exploring the intersection between their subjective and complex experiences of disability and the larger culture's often objectifying and limiting perceptions.").

156. *See*, *e.g.*, Greg Freeman, *Readers Offer Their Favorite "Uniquities" – What's Special About Living in St. Louis Area*, ST. LOUIS POST-DISPATCH, Jan. 28, 2001, at C3, C3 ("'The DisAbility Project [is] a project of That Uppity Theatre Company. An ensemble of disabled and nondisabled adults who range in age from 18-70, we create, perform and tour innovative, original theatrical material about the culture of disability.'" (quoting Joan Lipkin)); Kathleen Tolan, *We Are Not a Metaphor: A Conversation About Representation*, AM. THEATRE, Apr. 2001, at 16, 17-18 ("[T]he disability rights movement and 'crip culture' are challenging our preconceptions about what it is to be human. . . . Working both inside and outside traditional theatre institutions, the disability community has nurtured a body of work devoted to the disability experience. The longest-lived disability-specific group is Brother Rick Curry's National Theatre Workshop for the Handicapped, which has been in existence since 1977 and has campuses in Maine and New York City. NTWH offers professional training and performance opportunities to artists with disabilities. Other companies have explicitly activist aims: to empower people with disabilities to take control of their own stories and their own images through performance. Joan Lipkin's DisAbility Project in St. Louis and Wry Crips, a disabled women's theatre collective in the Bay area, . . . are two such groups.").

157. *See*, *e.g.*, Kenny Fries, *Introduction*, *in* STARING BACK: THE DISABILITY EXPERIENCE FROM THE INSIDE OUT 1, 9 (Kenny Fries ed., 1997) ("In 1994, I was invited to and participated in the historic 'A Contemporary Chautauqua: Disability and Performance,' organized by Victoria Ann-Lewis, director of Other Voices, at the Mark Taper Forum in Los

In each of these two categories of cases, complying with the duty of reasonable mitigation could require plaintiffs to make particularly large sacrifices, at least from the plaintiff's own perspective. Nonetheless, I would still apply the duty of reasonable mitigation to these difficult cases. The same arguments for imposing a duty to mitigate on other plaintiffs seeking the protection of Title I's reasonable accommodation provision hold here as well. The employers or prospective employers of the plaintiffs in the two difficult categories of cases have a legitimate interest in minimizing the costs associated with accommodation if mitigation is possible and reasonable for the plaintiffs to undertake. These plaintiffs should also not be able to avail themselves of Title I's reasonable accommodation provision because they have chosen not to mitigate when mitigation would be reasonable.

Moreover, creating a separate standard, outside of the reasonable mitigation standard, to govern these two difficult categories of cases would produce endless disputes and an extensive collateral jurisprudence about when each of the two standards should apply. Some tort cases, for example, hold that a plaintiff disabled by tort need not mitigate when the associated risks or side effects are

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Angeles. That April weekend, prominent artists with disabilities gathered from all across the United States to perform, read, teach, learn, talk, and get to know one another. That we had something valuable to offer was evidenced not only by an audience hungry to share our work, not only by the overcrowded classes, the sold-out performances, the TV camera crews from CNN and WNET, but also by the lasting nurturing relationships forged by many of the participant artists.").

158. *See*, *e.g.*, Neal Karlen, *No Ordinary Inspirational 'Cripple Story,'* N.Y. TIMES, Nov. 26, 1995, § 2, at 20, 20 ("'When Billy Broke His Head' is more a disabled version of 'On the Road,' with [Billy] Golfus as Jack Kerouac's Sal Paradise. Beginning at a fiery disability-rights demonstration in Chicago, he wends his way to California and back to Minnesota to visit the blind, the bent and the paralyzed, people trying to get by amid social stigmas and government neglect. Also woven into the narrative are what he sees as patronizing images of the disabled: Jerry Lewis crooning to wheelchair-bound children at a Labor Day telethon, Lon Chaney eating the scenery in 'The Hunchback of Notre Dame.'").

159. *See*, *e.g.*, Elizabeth Lenhard, *Disability Film Fest Tries to Even Playing Field*, ATLANTA CONST., Aug. 14, 1996, at D2, D2 ("Miramar's Disability Film Festival, created at the behest of the Third Paralympic Congress, won't look back at cinema's bitter paraplegics and blind damsels in distress. Instead, it will introduce dozens of new films — everything from slick, feature-length documentaries bound for television networks to rough-edged two-minute shorts to public service announcements — that affirm the disability experience and reveal corners of the culture.").

160. *See*, *e.g.*, Meg McSherry Breslin, *Anna Stonum, 40, Activist for Disabled*, CHI. TRIB., Feb. 13, 1999, § 1, at 23, 23 (discussing "the Disability Arts and Culture Center at the University of Illinois"); Dianne B. Piastro, *Rejecting the Role of the Victim*, PLAIN DEALER (Cleveland), July 13, 1993, at 9E, 9E ("As more and more disabled people discard the roles of isolated victims, and reflect pride in their shared experience, disability culture will simply become accepted as an integral part of the cultural diversity of this country. Toward this goal, an exciting gathering of student leaders with disabilities from college campuses around the country is being convened . . . . Hosted by the Disabled Student Cultural Center at the University of Minnesota, this precedent-setting conference will explore disability culture and pride."); *supra* note 142.

particularly serious, even if a reasonable person in the same situation would mitigate.[161] This jurisprudence quickly demonstrates, however, that there is no obvious or widely accepted way to judge when risks or side effects are particularly serious. Minnesota, for instance, originally exempted people disabled by torts from a duty of reasonable mitigation if the mitigation involved "a major surgical operation."[162] But the state supreme court dropped this exception in 1973, after recognizing "that the term 'major surgery' as used in [the state's jury] instruction [was] too indefinite."[163] The judiciary has even less expertise or experience in determining whether a disability is central to a plaintiff's cultural identity.

Yet these two hard categories of cases do suggest that courts need to proceed carefully before deciding that a Title I plaintiff's decision not to mitigate is unreasonable. As noted above, for example, empirical evidence about what other disabled people in the same situation have done should be relevant in judging reasonableness. It gives fact finders a solid foundation from which to work in deciding hard cases. The greater the percentage of disabled people in the plaintiff's situation who have mitigated, the more likely it is that mitigation is the only reasonable choice.[164] At the same time, decisions by a majority of people in the same situation to mitigate do not *always* mean that the people who have made the other choice are unreasonable. In some situations, the sacrifice that mitigation would demand from a plaintiff may be great enough, or the costs and benefits of mitigation so closely matched, that decisions both in favor and against mitigation are reasonable, even though a majority of people in the situation choose to mitigate. Courts, accordingly, should not automatically and mechanically equate reasonableness with majority rule. Instead, courts should appraise the reasonableness of a plaintiff's decision against mitigation carefully, considering to the extent possible *why* people in the plaintiff's situation have or have not mitigated and

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161. *See*, *e.g.*, McDonnell v. McPartlin, 708 N.E.2d 412, 420 (Ill. App. Ct. 1999) ("Illinois law is clear: a plaintiff has no duty to mitigate his damages by submitting to serious or major surgery."); Hall v. Dumitru, 620 N.E.2d 668, 673 (Ill. App. Ct. 1993) ("[T]he rule regarding mitigation of damages in relation to suggested medical treatment is as follows: A patient has a duty to submit to reasonable medical care and treatment intended to improve the patient's condition and reduce or eliminate the consequences of the defendant's tortious act. . . . An exception to this general rule exists with respect to surgical procedures as well as nonsurgical procedures which present a risk of enhanced or additional injury.").

162. Couture v. Novotny, 211 N.W.2d 172, 174-75 (Minn. 1973).

163. *Id.* at 176; *see also id.* ("We . . . direct that the following instruction, at least in substance, be used in this case: If you find that the injuries suffered by Couture can be alleviated by a surgical operation and that a reasonably prudent person would undergo such an operation, under all of the circumstances in this case, then such a finding should be taken into consideration by you as a factor which would reduce the amount of damages to which Couture would otherwise be entitled.").

164. *See supra* text accompanying notes 134-37.

not just how many people have made each choice. This somewhat more flexible approach could do much more to recognize plaintiffs' legitimate interests, justifying its somewhat higher demands on fact finders.[165] In this way, courts applying a reasonable mitigation standard in Title I suits can appropriately adjudicate and resolve both the vast bulk of cases in which the plaintiff has not mitigated, and two particularly difficult categories of cases as well.

III. PROTECTION FOR PEOPLE WHO HAVE MITIGATED

The case for imposing a duty to mitigate on plaintiffs seeking the protection of Title I's reasonable accommodation provision does not depend on whether *Sutton*'s rulings about the status of plaintiffs who have mitigated remain in force or are legislatively overridden. But this Part briefly reexamines the legal rights of mitigators in light of the proposed duty of reasonable mitigation. Under *Sutton*, only two groups of mitigators are protected under Title I. The first group consists of mitigators who are still substantially limited in a major life activity after mitigating. They count as "disabled" people under *Sutton*.[166] The second group consists of mitigators who are not substantially limited after mitigation, but who suffer an adverse employment action because an employer *thinks* that they have an impairment that substantially limits a major life activity. These plaintiffs count as "regarded as" disabled people under *Sutton*.[167] Both of these groups of mitigators merit Title I protection. The plaintiffs in the first situation have complied with the duty to mitigate, yet remain disabled and in potential need of accommodation, and the employers' intentions and motivations in the second situation are exactly the sort that Title I seeks to regulate. This Part argues, however, that *Sutton*'s definition of "regarded as" disabled persons should be expanded to include two more classes of mitigators who are not substantially limited after mitigation: people who suffer an adverse employment action because they had to mitigate and people who suffer an adverse employment action because of the (non-substantially-limiting) side effects of the mitigation.

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165. For some leading examples from the extensive debate over the relative advantages of rules and standards, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 104 & n.35 (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-68 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685-1713 (1976); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379-90 (1985); Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 56-95 (1992).

166. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 488 (1999).

167. *See id.* at 489; *see also* Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521-22 (1999).

Identifying these two classes of mitigators as people who are "regarded as" disabled would protect them from intentional discrimination. Stated more precisely, it would mean that if these mitigators "can perform the essential functions of the employment position," they cannot legally be denied a job because they had to mitigate or because they have non-substantially-limiting side effects from mitigation.[168] This protection would advance what Title I recognizes as legitimate interests, while infringing upon none of the legitimate interests of employers. These plaintiffs should be considered "regarded as" disabled rather than disabled people, however, because they no longer have actual substantial limitations. For the same reason, they should not have a right to reasonable accommodation. The case law is currently divided on whether "regarded as" disabled plaintiffs are entitled to reasonable accommodation.[169] But the majority of courts that have found no accommodation right for "regarded as" disabled plaintiffs have the better argument.[170] Although Title I's text does not indicate that

168. 42 U.S.C. §§ 12111(8), 12112(a) (2000).

169. For decisions holding that Title I plaintiffs who are "regarded as" disabled are not entitled to reasonable accommodations, see cases cited *infra* note 170. For decisions holding or suggesting that Title I plaintiffs who are "regarded as" disabled are entitled to reasonable accommodations, see Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 774 (3d Cir. 2004) ("While we do not rule out the possibility that there may be situations in which applying the reasonable accommodation requirement in favor of a 'regarded as' disabled employee would produce 'bizarre results,' we perceive no basis for an across-the-board refusal to apply the ADA in accordance with the plain meaning of its text. Here, and in what seem to us to be at least the vast majority of cases, a literal reading of the Act will not produce such results. Accordingly, we will remain faithful to its directive in this case."); Katz v. City Metal Co., 87 F.3d 26, 33 (1st Cir. 1996) (concluding that whether "regarded as" disabled plaintiff could have performed his job with reasonable accommodations was an issue for the jury); Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151, 163, 166 (E.D.N.Y. 2002) ("The Court disagrees with *Weber* and all the other courts that have held that reasonable accommodations should not be available where a plaintiff is 'regarded as' disabled. The Court's conclusion is driven by a number of considerations: (1) the plain language of the ADA; (2) the legislative history behind the 'regarded as' prong; (3) the mandatory interactive process, as referenced in *Jewell*, and (4) the Court's critiques of *Weber*'s underlying rationale.").

170. *See* Kaplan v. City of North Las Vegas, 323 F.3d 1226, 1232-33 (9th Cir. 2003) ("If we were to conclude that 'regarded as' plaintiffs are entitled to reasonable accommodation, impaired employees would be better off under the statute if their employers treated them as disabled even if they were not. This would be a perverse and troubling result under a statute aimed at decreasing 'stereotypic assumptions not truly indicative of the individual ability of [people with disabilities].' . . . To require accommodation for those not truly disabled would [also] compel employers to waste resources unnecessarily, when the employers' limited resources would be better spent assisting those persons who are actually disabled and in genuine need of accommodation to perform to their potential. . . . [W]e hold that there is no duty to accommodate an employee in an 'as regarded' case.") (citation omitted); Weber v. Strippit, Inc., 186 F.3d 907, 916-17 (8th Cir. 1999) ("Imposing liability on employers who fail to accommodate non-disabled employees who are simply regarded as disabled would lead to bizarre results. . . . The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded

"regarded as" disabled people are to be treated differently than disabled people, the motivating logic behind the reasonable accommodation provision is that accommodations are a way of restructuring jobs to take account of a person's substantial limitations. People without actual substantial limitations have no need for reasonable accommodations. People who are discriminated against because they had to mitigate or because of the non-substantially-limiting side effects of the mitigation do, however, have a strong case for protection from intentional discrimination. Consider each of these two classes of mitigators in turn.

Begin with the situation of a plaintiff who is no longer substantially limited after mitigating, but is denied employment because he had to mitigate. The myopic *Sutton* plaintiffs fit into this category. Their eyesight was no longer substantially limited when they wore corrective lenses, but United Airlines would not hire them because they needed to mitigate by wearing the lenses.[171] Another potential example might involve a manic depressive who is no longer substantially limited when he takes lithium, but is denied employment because he needs to mitigate by consuming the lithium.

It would be impossible to predict all of the reasons why an employer might refuse to hire this class of job applicants because they had to mitigate, but four possibilities are apparent. First, an employer may harbor something like pure prejudice against disabled people or people that the employer associates with disability. An employer may fear or loathe people with manic depression, for instance, no matter what they do to mitigate. Second, an employer may have unfounded doubts about the effectiveness of an applicant's mitigation. The employer may not actually think that the applicant remains substantially limited, which would allow the applicant to be protected under *Sutton*'s narrow definition of "regarded as" disabled.[172] But the employer may be convinced without reason that the applicant has some lesser, yet still disqualifying, limitation. For example, an employer may not believe how effective lithium is at controlling manic

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actually disabled employees. Accordingly, we hold that 'regarded as' disabled plaintiffs are not entitled to reasonable accommodations . . . ."); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999) ("Under the third prong, 'regarded as' having a disability, the defendant correctly contends that a finding on this basis would obviate the Company's obligation to reasonably accommodate Workman."); Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998) ("[A]n employer need not provide reasonable accommodation to an employee who does not suffer from a substantially limiting impairment merely because the employer thinks the employee has such an impairment."); Cebertowicz v. Motorola, Inc., 178 F. Supp. 2d 949, 953-54 (N.D. Ill. 2001) ("[T]his Court joins those courts that have held an employer has no duty under the [ADA] to provide a viewed-as-disabled (but not actually disabled) employee with *any* accommodation.") (citations omitted).

171. *See supra* text accompanying notes 46-47.

172. *See supra* text accompanying note 167.

depression, or how much corrective lenses can improve someone's ability to see. Third, an employer may not trust the applicant to continue to mitigate, in circumstances where mitigation requires efforts that are ongoing (like the daily consumption of medicine or the daily use of corrective lenses) rather than singular (like surgery). If the applicant decides to stop mitigating, and thereby fails to satisfy his duty of reasonable mitigation, he would no longer be protected under Title I and could legitimately be denied employment. But the employer may believe that this is inadequate protection with respect to a particular job or applicant. For instance, United Airlines might not want to hire manic depressive pilots who mitigate with lithium because of the importance of airplane safety and the risk that the airline will not be able to detect immediately whether the pilots have decided to stop taking lithium. Fourth, an employer may fear that a presently effective mitigating measure will fail at an inopportune moment for reasons beyond the applicant's control. United Airlines, for example, might believe that the *Sutton* plaintiffs have no substantial limitations when they wear corrective lenses, but worry that the plaintiffs' lenses could be lost or broken in an emergency.

An employer's first two possible reasons for refusing to hire an applicant because he had to mitigate would be prohibited if the applicant was protected as a "regarded as" disabled person. But an employer has no legitimate interest under Title I in taking adverse employment actions for those reasons, and including the applicant in these situations within the protection of Title I would advance legitimate interests under the statute. First, employers have no legitimate interest under Title I in acting out of pure animus toward disability. Indeed, one of Title I's goals is to combat fear and loathing of the disabled.[173] Second, employers have no legitimate interest under Title I in acting on baseless doubts about whether mitigation can be effective. To the contrary, one of the core premises behind imposing a duty to mitigate has to be the conviction that mitigation can materially lessen or eliminate disabilities in some situations.

Moreover, recognizing plaintiffs who are discriminated against because they had to mitigate as "regarded as" disabled people would still protect the *legitimate* interests of employers. As a preliminary matter, an employer's legitimate interest in minimizing the cost that can be associated with providing accommodations is not at stake here. These plaintiffs no longer need accommodation because they have complied with the duty to mitigate. In addition, employers would remain free to refuse employment to people who actually cannot perform a job because they had to mitigate. Recall that Title I defines the "qualified" people who are entitled to protection from intentional

173. *See*, *e.g.*, 42 U.S.C. §§ 12101, 12112(a).

employment discrimination as people who "can perform the essential functions of the employment position."[174] In most cases, the fact that an applicant has mitigated will not prevent her from performing the essential functions of a job. The fact that a myopic person depends on corrective lenses that may break, for instance, does not plausibly disqualify that person from office work because the lenses can be easily replaced with little disruption for the employer. But in some cases the fact of mitigation will make someone unable to perform the essential functions of the job, and an employer would then be free to deny the applicant work for that reason. Myopic pilots who mitigate with corrective lenses or manic depressive pilots who mitigate with lithium, for instance, might very well be unable to establish that they can perform the essential functions of a pilot's job, given the importance that job places on maintaining extremely high safety levels and constant preparedness.

Turn to the situation of a plaintiff who is no longer substantially limited in any major life activity after mitigating, but is denied employment because of a non-substantially-limiting side effect of the mitigation. Imagine, for example, a job applicant who mitigates her disability by taking a medicine that leaves her with no substantial limitations, but has the side effect of producing a modest weight gain (which is not, of course, considered a disability itself).[175] An employer refuses to hire the applicant because of her weight gain, although it does not believe that the applicant is substantially limited in a major life activity.

Here, too, protecting this applicant as a "regarded as" disabled person would advance legitimate interests under the statute. Suppose, for instance, that the employer has refused to hire the job applicant with a side effect of modest weight gain because the employer simply dislikes overweight people. Title I is not concerned about protecting the modestly overweight in general, but this job applicant's weight gain is tied to what the duty to mitigate recognizes as important interests under the statute. One of the premises of a duty of reasonable mitigation is that side effects can be an inherent part of mitigation that is worth undertaking. This duty would require a job

174. *Id.* §§ 12111(8), 12112(a).

175. *See*, *e.g.*, Andrews v. Ohio, 104 F.3d 803, 810 (6th Cir. 1997) ("The allegations, which we take as true, establish only that the officers have certain *physical characteristics* either being marginally above a weight limit or marginally below a fitness standard which Ohio has deemed inconsistent with the job requirements of certain law enforcement positions. . . . We thus find that Ohio is entitled to its motion to dismiss."); Murray v. John D. Archbold Mem'l Hosp., Inc., 50 F. Supp. 2d 1368, 1378 (M.D. Ga. 1999) ("Exceeding the boundaries of Defendants' weight policy is no disability at all because the policy drew the line at figures which would exceed the maximum desirable weight of large-framed men and women plus 30% of that weight, figures that are well below the measures for morbid obesity.").

applicant to assume side effects, as long as they are side effects that a reasonable person in the same situation would assume. Denying this applicant Title I protection can function in a way that treats the benefits of mitigation and the associated side effects as separate phenomena, leaving the applicant vulnerable to adverse employment decisions based on those side effects. Protecting a job applicant or employee from employment discrimination based on the side effects of mitigation, like weight gain, would recognize that these side effects are inextricably linked to the fact that the person is mitigating, and the fact that she is mitigating is inextricably linked to both the substantial personal benefits of mitigation and the duty to mitigate that I advocate imposing.

An employer's legitimate interests are safeguarded, moreover. An employer is not required to provide someone who has non-substantially-limiting side effects with reasonable accommodations, even if the person counts as "regarded as" disabled, and an employer has to hire only those people who can perform the essential functions of the job. In most cases, a modest weight gain will not disqualify someone from performing a job, but in some cases it might. So, for instance, a fashion company would still be able to refuse modeling work to an applicant with a modest weight gain if that weight gain made the applicant unqualified for modeling work. A factory would still be able to refuse work as a machine operator to an applicant with a modest weight gain if that weight gain made the applicant unable to operate the factory's machines at the required rate. Classifying plaintiffs who are discriminated against because they had to mitigate or because they have non-substantially-limiting side effects from mitigation as "regarded as" disabled persons would advance legitimate interests under Title I, without infringing upon the legitimate interests of employers.

IV. THE DUTY TO MITIGATE AND AN IMPORTANT DIFFERENCE BETWEEN TITLE I AND TITLE VII

Thus far, I have considered the case for imposing a duty of reasonable mitigation on people seeking the protection of Title I's accommodation provision, and examined the rights of mitigators in light of that duty. This final Part of the Article uses the duty to mitigate issue to illuminate an important difference between Title I's accommodation provision and the prohibition on intentional discrimination in Title VII of the 1964 Civil Rights Act, which bans employment discrimination based on "race, color, religion, sex, or national origin."[176] It argues that Title VII should not require

176. 42 U.S.C. § 2000e-2 (2000).

mitigation. In some contexts, as with Title I's reasonable accommodation provision, imposing a duty to mitigate can serve legitimate interests under a statute. But placing a duty to mitigate on Title VII plaintiffs—which the Title VII jurisprudence officially does not do but arguably might be doing indirectly—would not serve what Title VII recognizes as legitimate interests. Instead, it would allow employers to avoid costs that reflect the very sort of prejudice that Title VII seeks to disestablish.

Title I's reasonable accommodation provision and Title VII's intentional discrimination prohibition attach different moral or normative weight to the costs that they place on employers. As we have seen, Title I's reasonable accommodation provision recognizes that employers have a legitimate interest in minimizing the costs associated with providing accommodation, and this is a powerful reason for imposing a duty to mitigate on people seeking accommodation under Title I.[177] In contrast, however, Title VII operates on the assumption that the costs placed on employers who must hire regardless of race, color, religion, sex, and national origin give employers no legitimate ground for complaint, because these costs reflect Title VII's central moral and normative goals. Title VII may force employers to alienate prejudiced customers and coworkers by adopting nondiscriminatory hiring policies,[178] but the statute is meant to combat rather than indulge that type of prejudice. As one court deciding a sex discrimination claim under Title VII noted, for example, "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."[179] Similarly, Title VII may prohibit employers from acting based on statistically accurate generalizations about a protected class,[180] but the Title VII jurisprudence also identifies these generalizations as a form of impermissible bias. As the Supreme Court has explained, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[181] "[T]he basic policy of [Title VII] requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve

177. *See supra* text accompanying notes 58-59.

178. *See supra* text accompanying note 26.

179. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971).

180. *See supra* text accompanying note 27.

181. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978).

traditional assumptions about groups rather than thoughtful scrutiny of individuals."[182]

Phrased another way, Title I's reasonable accommodation provision recognizes that an employer does have a legitimate reason to prefer an employee or job applicant who needs less accommodation, or no accommodation. But Title VII's prohibition on intentional discrimination operates on the premise that it is illegitimate for an employer to prefer an employee or job applicant based on race, color, religion, sex, or national origin. The only exception Title VII makes is for those rare situations in which religion, sex, or national origin is a "bona fide occupational qualification," and this a very narrow exception that does not accept cost as a permissible reason for refusing to employ a protected person.[183]

In this light, it is clear why Title VII plaintiffs should not be obligated to mitigate their race, color, religion, sex, or national origin. In the context of Title VII, mitigating a plaintiff's race, color, religion, sex, or national origin would mean respecting employer interests that the statute understands to be illegitimate. Indeed, the reasons for not imposing a duty to mitigate under Title VII are very similar to the reasons for not imposing a duty to mitigate on a Title I plaintiff where mitigation could not decrease the plaintiff's need for accommodation. As explained above, only mitigation that could diminish a Title I plaintiff's accommodation requirements could serve an employer's legitimate interest under Title I in minimizing the cost of the accommodations that the employer provides.[184] Employers have no legitimate interest under Title I in being able to discriminate against a disabled person because he is disabled, when the disabled person can perform the job in question as it is currently structured without accommodation. Stated more generally, mitigation is only appropriate when it is serving legitimate interests under the statute. It is not appropriate when it would enable employers to avoid costs that reflect the very sort of bias that the statute seeks to combat.

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182. *Id.* at 709.

183. *See supra* text accompanying notes 29-32. The congressmen who enacted Title VII's "BFOQ" exception explained that it would, for example, permit a Jewish congregation to hire "Jewish cantors and rabbis," 110 CONG. REC. 2559 (1964) (statement of Rep. Corman), "an elderly woman" to hire "a female nurse," *id.* at 2718 (statement of Rep. Goodell), and "a French restaurant" to hire "a French cook," *id.* at 7213 ("INTERPRETATIVE MEMORANDUM OF TITLE VII OF H.R. 7152 SUBMITTED JOINTLY BY SENATOR JOSEPH S. CLARK AND SENATOR CLIFFORD P. CASE, FLOOR MANAGERS"); *see also id.* at 2549 (statement of Rep. Rodino) ("[N]ational origin in the operation of a specialty restaurant such as a French restaurant or Italian restaurant could properly be an occupational qualification that is reasonably necessary to the operation of the restaurant business."); *id.* at 13,170 (statement of Sen. Byrd) ("[I]t would not constitute an unlawful employment practice to hire a person of a particular religion, sex, or national origin in those limited circumstances where religion, sex, or national origin is a bona fide occupational qualification. For example, an Italian chef could be employed for an Italian restaurant.").

184. *See supra* Part II.

As a formal matter at least, Title VII conforms to this insight. It officially imposes no duty to mitigate on the plaintiffs seeking its protection. To some extent, the absence of a duty to mitigate under Title VII may simply reflect the difficulty of changing the characteristics that Title VII protects: race, color, religion, sex, and national origin. But this explanation is insufficient. Most notably, a person experiencing employment discrimination because of his religion could change his religion by converting.[185] If Title VII plaintiffs are not expected to convert, it is presumably because doing so would mean respecting the religious prejudices that the statute is designed to counter.

At the same time, aspects of Title VII's jurisprudence may arguably be imposing a duty to mitigate unofficially and as a matter of practice. Indeed, a longstanding debate in the Title VII case law and commentary can be usefully reconceived as a debate about mitigation and about whether Title VII jurisprudence currently imposes a duty to mitigate.

At the moment, the debate about which employment policies should count as policies that discriminate based on race, color, religion, sex, or national origin is framed around the question of how Title VII's protected classes are best defined. Title VII itself does not specify what it means by race, color, religion, sex, or national origin, and courts and commentators have disputed which definitions are most appropriate. For example, some courts contend that Title VII's prohibition on "sex" discrimination only reaches policies that penalize applicants or employees because of their biological sex (i.e., because of the fact that the applicant or employee is a woman or a man).[186] Other courts and commentators insist that Title VII's prohibition on "sex" discrimination should also be interpreted to reach policies that penalize applicants or employees because they do not conform to societal expectations about how women or men are supposed to act.[187]

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185. *See*, *e.g.*, Garcia v. Gloor, 618 F.2d 264, 270 n.6 (5th Cir. 1980) ("Religion is, of course, a forbidden criterion [under Title VII], even though a matter of individual choice.").

186. *See*, *e.g.*, Wislocki-Goin v. Mears, 831 F.2d 1374, 1376-77, 1379 (7th Cir. 1987) (holding that a requirement that employees conform to "the 'Brooks Brothers look,'" by dressing conservatively, wearing their hair up, and avoiding excessive makeup, is not an employment requirement based on sex under Title VII); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978) (holding that discrimination based on a male job applicant's effeminacy is not sex-based discrimination under Title VII); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1086-88, 1091-93 (5th Cir. 1975) (en banc) (holding that a rule prohibiting male employees from having long hair is not a sex-based rule under Title VII); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1389-92 (W.D. Mo. 1979) (holding that a rule prohibiting female employees from wearing pants is not a sex-based rule under Title VII).

187. For the most important articulation of this view, see Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (plurality opinion) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."); *see also* Nichols v. Azteca Rest. Enters.,

Similarly, some courts have suggested that Title VII's prohibition on "race" discrimination only reaches policies that penalize applicants or employees for being a member of a particular race,[188] and some commentators have argued that Title VII's "race" discrimination prohibition should also be interpreted to reach an employment policy that penalizes applicants or employees who wear their hair in cornrows.[189] Some Title VII decisions indicate that Title VII's prohibition on "national origin" discrimination only reaches policies that penalize applicants or employees for hailing from a foreign country,[190] and some courts and commentators have maintained that Title VII's prohibition on "national origin" discrimination should also be interpreted to reach some employment policies that penalize

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Inc., 256 F.3d 864, 874 (9th Cir. 2001) ("Sexual harassment is actionable under Title VII to the extent it occurs 'because of' the plaintiff's sex. Sanchez asserts that the verbal abuse at issue was based upon the perception that he is effeminate and, therefore, occurred because of sex. In short, Sanchez contends that he was harassed because he failed to conform to a male stereotype. Sanchez's theory derives from *Price Waterhouse v. Hopkins*, in which the Supreme Court held that a woman who was denied partnership in an accounting firm because she did not match a sex stereotype had an actionable claim under Title VII. . . . Sanchez contends that the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine. We agree.") (citations omitted); Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2559-60 (1994) ("Courts that decline to accept preemptive approaches to dress and appearance restrictions based on judgments about their triviality must face the question whether such restrictions discriminate 'on the basis of sex.' . . . In addressing the question, however, courts again have tended to apply highly formal reasoning that accepts and builds upon prevailing community norms rather than challenging them."); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 4 (1995) ("I argue that, at least under Title VII, the existing statutory language and doctrinal categories, if correctly applied, already provide the necessary protection to both effeminate men and feminine women, as well as their masculine counterparts.").

188. *See*, *e.g.*, Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231-32 (S.D.N.Y. 1981) (holding that a rule prohibiting employees from wearing their hair in cornrows is not a race-based rule under Title VII).

189. *See*, *e.g.*, Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 366 ("The case of *Rogers v. American Airlines* upheld the right of employers to prohibit categorically the wearing of braided hairstyles in the workplace. The plaintiff, a black woman, argued that American Airline's policy discriminated against her specifically as a black woman. In effect, she based her claim on the interactive effects of racial and gender discrimination. The court chose, however, to base its decision principally on distinctions between biological and cultural conceptions of race. More importantly, it treated the plaintiff's claims of race and gender discrimination in the alternative and independent of each other, thus denying any interactive relationship between the two.") (footnote omitted).

190. *See*, *e.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86, 87-88 (1973) ("This case involves interpretation of the phrase 'national origin' in Tit. VII of the Civil Rights Act of 1964. . . . The Court of Appeals . . . conclud[ed] that the statutory phrase 'national origin' did not embrace citizenship. We . . . affirm. . . . The term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.") (citation omitted); *id.* at 95 ("[N]othing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.").

applicants or employees for speaking with a foreign accent.[191] This Article is not the place for an evaluation of the merits of these arguments as a matter of interpreting Title VII, but the duty to mitigate issue discussed here provides a new way to understand what is at stake in this debate.

The dispute now framed in terms of the appropriate definition of Title VII's protected classes can also be understood—perhaps more deeply—as a debate about mitigation. The courts and commentators who believe that some of the Title VII case law has defined the Title VII protected classes too narrowly can be understood as arguing that this case law has functioned to impose a duty to mitigate on Title VII plaintiffs, by requiring them to change or lessen aspects of themselves that are part of their protected characteristics. The courts that define the meaning of the Title VII classes more strictly can be understood as contending that their Title VII jurisprudence imposes no duty to mitigate, because it does not require an employee or applicant to change anything that should count as part of a protected characteristic. The unspoken premise that underlies both sides of this argument is that *if* expectations of feminine behavior from women *are* part of what "sex" means, and *if* wearing one's hair in certain styles *is* part of what "race" means, and *if* having a foreign accent *is* part of what "national origin" means, *then* an employee or applicant should not have to change those aspects of himself in order to secure protection under Title VII. Courts and commentators may dispute whether Title VII's case law currently imposes a duty to mitigate, but both sides of this debate implicitly agree that Title VII should not impose such a duty.

Title VII plaintiffs should not have to change their protected characteristics, or lessen the impact of their protected characteristics, because such a mitigation requirement would serve to respect the very prejudices that Title VII seeks to contest. As our exploration of the duty to mitigate issue under Title I illustrates, imposing a duty to mitigate is only appropriate when it serves legitimate interests under the operative statute.

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191. *See*, *e.g.*, Fragante v. City & County of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989) (holding that accent discrimination can constitute national origin discrimination under Title VII when the plaintiff's accent does not "interfere[] materially with job performance"); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1367-68 (1991) (arguing that courts deciding whether an instance of accent discrimination constitutes discrimination under Title VII "should consider four separate questions": "1. What level of communication is required for the job? 2. Was the candidate's speech fairly evaluated? 3. Is the candidate intelligible to the pool of relevant, nonprejudiced listeners, such that job performance is not unreasonably impeded? 4. What accommodations are reasonable given the job and any limitations in intelligibility?").

CONCLUSION

The question of whether plaintiffs seeking the protection of Title I's reasonable accommodation provision should be under a duty to mitigate is important doctrinally, and it will have to be decided. But the issue of mitigation also helps cast light on Title I's reasonable accommodation provision, and a crucial difference between that provision and Title VII's prohibition on intentional discrimination. Mitigation involves not only questions of costs and the interests of employers versus employees and job applicants. At its core, it is about which costs and which interests an antidiscrimination statute recognizes as legitimate concerns, which interests the statute identifies as merely a form of bias, and which costs the statute is willing to impose as part of the price for combating discrimination.