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A PREGNANT PAUSE: ARE WOMEN WHO UNDERGO FERTILITY TREATMENT TO ACHIEVE PREGNANCY WITHIN THE SCOPE OF TITLE VII'S PREGNANCY DISCRIMINATION ACT?

CINTRA D. BENTLEY *

INTRODUCTION

An article describing a recent survey of women’s views on family, work, and society states that women want to “do it all.”

Is the issue really that women want to “do it all,” or is it simply that women want what men have always had—the opportunity to maintain their employment status while having a family?

In 1978, Congress amended Title VII of the Civil Rights Act of 1964 ("Title VII") to include the Pregnancy Discrimination Act ("PDA"), which protects a woman’s choice to become pregnant while maintaining her position in the workforce, thereby ensuring equal opportunity in employment. Should Title VII’s guarantee of equal opportunity in employment for women who choose to become pregnant while working depend on their ability to conceive “naturally?”

Is there really a difference between a woman who chooses to become pregnant, and a woman who chooses to become pregnant but requires

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1. Women Who "Do It All" Say They Like Things That Way, AM. MARKETPLACE, May 18, 1995, at 9. The article examines a statistical survey done by the Families and Work Institute for the philanthropic arm of the Whirlpool corporation, revealing that many women do not adhere to the culturally stereotypical view that women must choose between employment and having a family. See id.


4. See 124 CONG. REC. 21,439 ("This bill will facilitate a woman’s choice to conceive and bear children without facing undue economic hardships."); id. at 21,442 ("[This bill will] put an end to an unrealistic and unfair system that forces women to choose between family and career—clearly a function of sex bias in the law which no longer reflects the conditions of women in our society."). It is important to note that Congress used the term equal opportunity not equality, as these two terms are not synonymous.

5. See JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 12 (1994). John Robertson discusses many criticisms of using medical technology to facilitate conception. See id. For example, one such criticism is the natural versus non-natural conception dichotomy, whereby some individuals view conception through sexual intercourse as “natural” while the use of Assisted Reproductive Technologies ("ARTs") is viewed as “technological power running amok and robbing us of essential human characteristics.” Id.
the assistance of medical technology to achieve that goal? The almost five million couples6 struggling to become parents who may find it difficult to reconcile the goal of achieving pregnancy with employment demands, especially in a workplace that is not supportive of this effort,7 would answer no. This answer seems to be "common sense."8 To construct a barrier to a woman's already difficult struggle to achieve pregnancy seems illogical in light of what Congress designed the PDA to protect. Yet, the issue of whether a woman has a claim against her employer for workplace discrimination based on an employer's policies that deny or affect her use of Assisted Reproductive Technologies ("ARTs") is a subject of debate in the federal courts.9 An unequivocal answer to this question is necessary because the number of individuals using advanced ARTs to achieve pregnancy is steadily increasing.10

This Note will attempt to clarify the issues that courts encounter when deciding whether women undergoing fertility treatment may state a cause of action under Title VII for pregnancy discrimination. Part II contains a discussion of infertility and its treatment, including diagnosis, options for treatment, and the considerations and consequences involved in the use of fertility treatments. Part III discusses the congressional impetus for amending Title VII's definition of discrimination "on the basis of sex" to include "pregnancy, childbirth and

7. This lack of support may manifest itself through the failure to provide medical benefits for fertility treatments, the disparate use of employment policies against women undergoing fertility treatment, or employment policies that are insufficient to allow women to utilize fertility treatments.
9. As of the time of this writing, the author has located four suits filed since 1994. They are 
10. There are currently a variety of ARTs available to couples that are having difficulty with conception. The most common ARTs are artificial insemination, reversal of sterilization, or other surgical procedures to correct conditions such as blocked fallopian tubes. However, when infertility stems from non-treatable conditions, i.e., deficiencies in sperm function, ovulatory dysfunction, endometriosis, or if the cause is an unknown factor, physicians will often recommend the use of more aggressive ARTs. See Howard W. Jones, Jr. & James P. Toner, The Infertile Couple, 329 NEW ENG. J. MED. 1710, 1711-12 (1993). This Note discusses those women using these more aggressive treatments.
other related medical conditions.” This part also examines how two federal district courts considering this question have interpreted the PDA’s scope. Part IV considers whether women undergoing fertility treatment belong under the umbrella of the PDA. Following a brief discussion of the federal courts’ use of statutory canons to interpret the PDA, this part applies feminist jurisprudence principles or perspectives to search for an answer to this question. This Note concludes that allowing a woman undergoing fertility treatment to state a claim under Title VII for pregnancy-based discrimination is consistent with both Congress’s stated purpose of the PDA and what Congress intended the PDA to include.

II: INFERTILITY: THE INOPPORTUNE CONDITION

Infertility is a silent condition, diagnosed only as a result of a woman’s failure to achieve pregnancy after engaging in unprotected sexual intercourse for a period of at least one year. Until a woman has repeatedly failed to conceive, a couple may be unaware that a medical condition is frustrating their goal of parenthood. Currently, it is estimated that 4.9 million couples in the United States have trouble conceiving naturally. Further, these statistics are increasing steadily due to two factors: the large number of thirty-five to forty-four year old women seeking treatment and the overall growth in the number of

11. The Civil Rights Act of 1964 (Title VII) provides as follows: “It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [sic] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .” 42 U.S.C. § 2000e-2. The Pregnancy Discrimination Act, enacted in 1978, amended Title VII to provide as follows:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title [specified authorization employment practices] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.


12. See INFERTILITY, supra note 6, at 3. Infertility is also defined as “a disease resulting in the abnormal function of the reproductive system.” RESOLVE, INC. & AMERICAN FERTILITY SOC’Y., INFERTILITY AND NATIONAL HEALTH CARE REFORM: A BRIEFING PAPER 1 (1993).

13. See INFERTILITY, supra note 6, at 3.

14. See Jones & Toner, supra note 10, at 1710. Many members of the baby boom generation are among those seeking fertility treatment due to the large number that delayed the decision to have children. See Trip Gabriel, The Fertility Market: Conflict and Competition, N.Y. TIMES, Jan.
individuals that actively consider using ARTs in the hope of having children.15

When a couple has been unable to conceive, generally the woman will initiate a discussion with her physician regarding the possible problem of infertility.16 The process of diagnosing infertility involves a "battery" of tests.17 A woman may undergo a laparoscopy,18 an endometrial biopsy,19 and/or a postcoital test,20 while a man will typically have his sperm examined and counted.21 These medical examinations generally reveal that in 40% of cases, infertility is related to a male factor, in 40% of cases it is related to a female factor,
and the remaining 20% is a combination of both a male and female factor.22

After infertility is diagnosed, the infertile couple’s response may range from shock and anger to hopelessness and despair.23 The wish to have a child, an event considered a part of “normal life,” is unfulfilled.24 For infertile couples, the chance to have a child has suddenly become no longer a right, but a privilege.25 While sometimes equally responsible for the failure to conceive, women and men often deal with this diagnosis differently.26

As recently as forty years ago, the medical community considered the types of infertility discussed in this Note to be untreatable, leaving infertile couples with the option either to adopt or remain childless.27 However, times have changed.28 With the advent of ARTs, medicine now provides a third option—continuing the pursuit of pregnancy.29 The first successful birth using In Vitro Fertilization (“IVF”)30 occurred in London, England in 1978.31 It was an additional four years before the first IVF baby was born in the United States.32 Therefore, the current choices facing infertile couples now include remaining childless, adopting, or utilizing ARTs to conceive.33

For some, remaining childless is simply not an option.34 Adoption can provide infertile couples with the experience and joys of child

24. See Elizabeth Liddle, A Right, Not A Luxury, To Have Children, Guardian (London), May 27, 1993, at 23.
26. See Lee, supra note 21, at 1A; Coping, supra note 23, at 5. For a more extensive discussion of infertility’s emotional and psychological effects see generally Cintra D. Bentley, Infertility: All Business, No Pleasure: The Need for Regulation of the Fertility Industry Due to Infertile Couples’ Unique Emotional and Psychological Condition (Dec. 11, 1997) (unpublished manuscript, on file with CHI.-KENT L.Rev.).
27. See Jones & Toner, supra note 10, at 1713-14.
28. See id. at 1714.
29. See Gabriel, supra note 14, at A1 (“Fewer than half the couples are successfully treated by conventional methods....The millions of others...are candidates for high-tech remedies.”).
30. See infra pp. 396-98 (describing IVF procedure).
31. See Guide to ARTs, supra note 18, at 3.
34. This Note does not advocate the position that child-free living is neither desirable, nor a viable option for some infertile couples. Many resources are available that provide valuable information and support for those couples that do decide to remain childless. See generally, e.g., Linda Hunt Anten, Never to Be A Mother: A Guide For All Women Who Didn’t—Or Couldn’t—Have Children (1992).
rearing. Those couples who choose to adopt, however, must relinquish the experience of child bearing. As a result, some infertile couples consider adoption to be a last resort because of the couples’ strong desire to have a genetically- or biologically-related child.\textsuperscript{35} The increased success rates of ARTs and the infertile couples’ desire to “go to almost any lengths . . . to have a biological child,”\textsuperscript{36} lead many to choose what is ultimately a rigorous, challenging, and at times, dangerous course of treatment to achieve pregnancy. The strength of the couples’ desire, in conjunction with the treatment’s element of danger, has fueled further criticism of ARTs as not only unnatural,\textsuperscript{37} but also classist,\textsuperscript{38} sexist,\textsuperscript{39} and noncommunitarian.\textsuperscript{40} However, those couples choosing treatment view ARTs as the path toward “the forgotten afterward to the saga of infertility: the world of children and families, holidays and birthday celebrations that without new technologies would never have been.”\textsuperscript{41}

There are currently a variety of ARTs from which couples can select. The three most commonly known procedures—that when used may result in a pregnancy where both the husband and wife are genetically-related to the child—are IVF, Gamete Intrafallopian Transfer (“GIFT”) and Zygote Intrafallopian Transfer (“ZIFT”). These procedures are comprised of the same four steps: ovulation induction, egg retrieval, insemination, and transfer.\textsuperscript{42} The procedures differ with respect to the location where fertilization of the egg occurs. These steps belong to a woman’s actual life experience of infertility and fertility treatment because even when male infertility is the cause of failed conception, it is the woman who must undergo the treatment.\textsuperscript{43}

\textsuperscript{35} See Bob Shacochis, Missing Children: One Couple’s Anguished Attempt to Conceive, HARPER’S, Oct. 1996, at 57-59; see also Carroll, supra note 17, at B3 (“For most men and women, having children is seen as another of life’s rites of passage, a connection with the deep river of biological continuity that flows from past to future.”). \textit{But see Bartholet, supra} note 15, at 30-35 (advocating strenuously in favor of adoption as a primary option, not as a last resort).


\textsuperscript{37} See \textit{Robertson, supra} note 5, at 12.

\textsuperscript{38} See id. at 225-27.

\textsuperscript{39} See id. at 228-31.

\textsuperscript{40} See id. at 231-34.

\textsuperscript{41} Rosenthal, supra note 32, at A1.

\textsuperscript{42} \textit{See generally Guide to ARTs, supra} note 18, at 4-12.

\textsuperscript{43} See Kong, supra note 36, at A1. The District Court in \textit{Krauel} did not find this fact persuasive when dismissing the plaintiff’s Title VII disparate impact claim, which examines employment practices that are “fair in form or facially neutral [but] are discriminatory in operation.” Krauel v. Iowa Methodist Med. Ctr., 915 F. Supp. 102, 113 (S.D. Iowa 1995), aff’d, 95 F.3d 674 (8th Cir. 1996) (citing Connecticut v. Teal, 457 U.S. 440, 446 (1982)). The \textit{Krauel} court held that the fact that women undergo the majority of infertility treatment was “a consequence of medical techniques and practices,” not a result of the Iowa Methodist Medical Center’s decision.
Step one: During ovulation induction, a woman is placed on one of several possible fertility drugs to allow for the production of multiple mature eggs instead of a single egg, which normally results from natural ovulation.\textsuperscript{44} Fertility drugs have several potentially dangerous, even fatal side effects.\textsuperscript{45} Studies have traced some 60 deaths, 370 hospitalizations, and 50 disabilities to the high-dose hormones used to stimulate a woman’s ovaries to produce the multiple eggs required for these procedures.\textsuperscript{46} Included in these statistics are the increasing number of women experiencing ovarian hyperstimulation syndrome.\textsuperscript{47} Also included are other less severe reactions that range from neurological symptoms to skin problems.\textsuperscript{48} Despite these risks, many women are willing “to pay the price” for the opportunity to become pregnant.\textsuperscript{49}

Step two: Egg retrieval is accomplished through either transvaginal ultrasound aspiration\textsuperscript{50} or laparoscopy.\textsuperscript{51} Both procedures are invasive, requiring the use of a needle to aspirate ripened
eggs directly from the ovarian follicles.\textsuperscript{52} Step three: For insemination to occur, a sperm sample is obtained on the day of egg retrieval and, after preparation,\textsuperscript{53} the sperm is injected into the eggs (with IVF), combined in a petri dish with the eggs (with IVF or ZIFT),\textsuperscript{54} or simply mixed with the eggs (with GIFT) to allow for adhesion or actual fertilization.\textsuperscript{55} Step four: During transfer, another invasive procedure, the embryo, gamete, or zygote resulting from step three is transferred either to the uterine cavity (as with IVF), or into the fallopian tubes (as with GIFT or ZIFT).\textsuperscript{56}

These procedures are both physically and emotionally taxing on the women who undergo them.\textsuperscript{57} While the husband may participate in this process, helping his wife with the various regimens she must follow or providing emotional support, he can never fully understand his wife's experience because it will never be his own.\textsuperscript{58} One husband described this experience in the following manner:

There were cognitive and psychological issues [that] I came to realize were not mine and never would be, given my gender and its biological limitations. In the ongoing rehearsals for parenthood I was conception's silent partner, a passive investor, spermatically speaking, whereas my wife was the line producer, subject to the paralyzing responsibilities of opening night.\textsuperscript{59}

Often one attempt may not achieve pregnancy; therefore some women will voluntarily undergo several attempts,\textsuperscript{60} enduring the emo-

\textsuperscript{51} See supra note 18 (describing procedure). It should be noted that the use of laparoscopy for egg retrieval is not as common as is the use of transvaginal ultrasound aspiration.

\textsuperscript{52} Transvaginal ultrasound aspiration is more commonly used for IVF procedures while laparoscopy is generally used for GIFT and ZIFT procedures. See Guide to ARTs, supra note 18, at 5, 9.

\textsuperscript{53} This procedure segregates the most motile or rapidly moving sperm to be used in the ART procedure. See id. at 6.

\textsuperscript{54} See id.

\textsuperscript{55} See id. at 8-11.

\textsuperscript{56} See id. at 8, 10-11.

\textsuperscript{57} See Tischler, supra note 15, at 251.

\textsuperscript{58} See Luce Irigaray, An Ethics of Sexual Difference 13 (Carolyn Burke and Gillian C. Gill trans., 1984) ("I will never be in a man's place, never will a man be in mine. Whatever identifications are possible, one will never exactly occupy the place of the other—they are irreducible one to the other.").

\textsuperscript{59} Shacochis, supra note 35, at 59.

\textsuperscript{60} Theoretically, a woman may undergo as many procedures as she chooses and can afford to pay for. This fact has generated much criticism of ARTs as being reserved for only those who can actually afford the procedures. See Gabriel, supra note 14, at A1; see also supra note 38 and accompanying text; Bentley, supra note 26, at 7 n.68. Also, some have raised ethical considerations regarding fertility experts who recommend unnecessary aggressive treatment in response to an infertile couple's desperation, which may allow treatment to continue even when further attempts have little chance for success. See Gabriel, supra note 14, at A1. See generally Bentley, supra note 26. Ten states have addressed these concerns by mandating insurance coverage for fertility treatments that generally limits the number of attempts to five, having the effect of
tional pain and physical discomfort involved, simply for the joy of potential parenthood. In other words, the only reason that a woman undergoes fertility treatment is to become pregnant. The process can become all encompassing, compelling some women to leave their employment temporarily because undergoing fertility treatment can be a full-time job. But what about those women who do not, or cannot leave or limit their employment? Recent statistics indicate that most women "have no plans to stop" or "cut back on work" until retirement. Therefore, some women will instead choose to remain in the workplace and attempt to reconcile their efforts to become pregnant with their ongoing employment status. As a result, some of these women may experience an additional unexpected side-effect of their decision: either their employer's insurance plans deny reimbursement for the cost of ART procedures, or their employer terminates them upon learning that they are beginning to undergo fertility treatment. Is this result right, or ethical, or more important, legal?

III. Defining Pregnancy Discrimination: Pregnancy or Potential for Pregnancy?

A. The Pregnancy Discrimination Act: It Is All a Matter of Common Sense.

With the advent of the PDA, common sense returned to the law prohibiting discrimination on the basis of sex in the employment context. The PDA defines employment policies that discriminate against a woman based on her potential for pregnancy, which prevented her full participation in the workplace, as violative of Title VII. How-regulating costs, thereby making fertility treatments more accessible. See id. It is significant that statutes mandating coverage of fertility treatments refer to infertility benefits as "pregnancy-related benefits." See, e.g., MASS. GEN. LAWS. ANN. ch. 175 § 47H (West 1987 & Supp. 1997); Hugh Delliios & Harlene Ellin, Infertility Bill Wins Surprise Edgar OK, CHI. TRIB., Sept. 24, 1991, at 1 ("[Governor] Edgar [of Illinois] said the bill would not constitute just another costly mandate on business, but would be merely an extension of pregnancy coverage.").

61. The District Court for the Northern District of Illinois, in holding that women undergoing fertility treatment are within the scope of the PDA, noted "[a]sj Plaintiff aptly responds, 'medical efforts to deal with infertility have no other goal than to achieve pregnancy.'" Erickson v. Board of Governors, 911 F. Supp. 316, 320 (N.D. Ill. 1995); see also Jones & Toner, supra note 10, at 1711 ("Whether treatment enhances subsequent fertility has not been settled, but several studies report significantly more pregnancies in treated than in untreated couples.").

62. See Carroll, supra note 17, at B3.


64. See H.R. REP. No. 95-948, supra note 8, at 3, reprinted in 1978 U.S.C.C.A.N. at 4751. The Supreme Court has also interpreted the PDA in this manner. See UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) ("Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex.").
ever, it appears that some confusion remains regarding what Congress considers to be the ultimate goal of the PDA. Some scholars interpret the PDA as an independent cause of action, distinct from that under Title VII, which directs employers to treat men and women equally and to ignore any differences between them, biological or otherwise, with regards to matters of employment. In an attempt to support this perception of the PDA, “equal treatment” advocates place an emphasis on the PDA’s second clause, which reads, “and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes.” However, the equal treatment view of the PDA is inaccurate for two reasons: First, the “equal treatment” rationale does not correctly represent the congressional purpose of the PDA, and second, this reading would eliminate a disparate impact analysis for pregnancy-based claims because by definition, facially neutral employment policies treat employees equally. Congress clearly did not intend the PDA to dictate such a result.

Congress amended § 2000e, the definitions section of Title VII, in response to the Supreme Court’s decision in General Electric Co. v. Gilbert. The Gilbert Court applied the same analysis previously used in Geduldig v. Aiello, a pregnancy discrimination case decided under the Fourteenth Amendment’s Equal Protection Clause, to interpret whether Title VII protected women from pregnancy-based discrimination. In Geduldig, the Court upheld an employer’s disability plan, which excluded coverage for disabilities resulting from normal pregnancies, against a constitutional gender discrimination chal-

67. See infra notes 91-97 and accompanying text.
69. See H.R. Rep. No. 95-948, supra note 8, at 3-4, reprinted in 1978 U.S.C.C.A.N. at 4751-52; 124 Cong. Rec. 21435 ("[T]he narrow approach of the bill is simply to eliminate confusion by expressly clarifying that the definition of sex discrimination in Title VII includes pregnancy-based discrimination."). The Supreme Court agrees. See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 n.14 (1983) ("The meaning of the [PDA’s] first clause is not limited by the specific language in the second clause . . . ."); California Fed. Sav. and Loan Ass’n v. Guerra, 479 U.S. 272, 284-85 (1987) ("Rather than imposing a limitation on the remedial purpose of the PDA, we believe that the second clause was intended to overrule the holding in Gilbert and to illustrate how discrimination against pregnancy is to be remedied.").
70. 429 U.S. 125 (1976).
72. See Gilbert, 429 U.S. at 407-10.
Title VII and Infertility

The Geduldig Court reasoned that while the employer’s plan did result in the disparate treatment of two classes, those classes were pregnant and nonpregnant employees not female and male employees. While the employer's plan was underinclusive—the plan did not cover all disabilities suffered by employees—because the nonpregnant class could consist of both men and women, the employer’s plan did not discriminate on the basis of gender. Therefore, after Geduldig, employers could continue to include or exclude pregnancy or pregnancy-related conditions from their benefit plans’ coverage as “with respect to any other physical condition.”

The Gilbert Court applied the above analysis, despite the Equal Employment Opportunity Commission’s (“EEOC”) regulations interpreting Title VII to the contrary, to hold that an employer’s failure to provide insurance coverage for disabilities arising from pregnancy did not discriminate on the basis of sex under Title VII. The Gilbert Court also did not find dispositive the fact that General Electric (“GE”) failed to cover disabilities that are unique to women because with respect to those covered disabilities, men and women received equal coverage. The Gilbert Court considered pregnancy merely an

73. See Geduldig, 417 U.S. at 495-96.
74. See id. at 496-97, 497 n.20.
75. See id.
76. Id. at 497 n.20; see also Andrew Weissmann Note, Sexual Equality Under the Pregnancy Discrimination Act, 83 COLUM. L. REV. 690, 692 (1983). Interestingly, Weissmann notes that the reasoning used by the Geduldig Court to hold that the exclusion of pregnancy benefits is not gender discrimination in violation of the Equal Protection Clause also allows courts to hold that singling out pregnancy as the only disability to receive benefits under an employer’s disability plan is not discriminatory to men. See id. at 692 n.10. This is exactly what at least one court has held. See Miller-Wohl Co. v. Commissioner of Labor & Indus., 515 F. Supp. 1264, 1266 (D. Mont. 1981), vacated on other grounds, 685 F.2d 1088 (9th Cir. 1982). Importantly, the Supreme Court has interpreted the PDA in the same manner. See California Fed. Sav. and Loan Ass’n v. Guerra, 479 U.S. 272, 287 (1987) (“[I]f Congress had intended to prohibit preferential treatment, it would have been the height of understatement to say only that the legislation would not require such conduct.”).
77. The Court considered EEOC guidelines for interpreting the PDA written in 1972 that stated, “[benefits] shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities” inconsistent with earlier EEOC interpretations written in 1966 that stated, “a company's group insurance program which ... excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.” Gilbert, 429 U.S. at 140-43.
78. See id at 145-46.
79. The dissent pointed out that under GE’s plan, “[w]omen like men, would be entitled to draw disability payments for their circumcisions and prostatectomies, and neither sex could claim payment for pregnancies, breast cancer, and other excluded female dominated disabilities,” to demonstrate that GE’s plan actually discriminated against women even though GE argued the plan was gender-neutral. Id. at 153 n.5 (Brennan, J., dissenting).
80. See id. at 138.
extra disability that the employer chose not to cover.\textsuperscript{81} The \textit{Gilbert} Court, echoing the \textit{Geduldig} Court, stated that GE's failure to cover pregnancy and pregnancy-related conditions created two classes, pregnant and nonpregnant employees, and therefore, was not discriminatory to women because the nonpregnant classification included both men and women.\textsuperscript{82}

The \textit{Gilbert} dissenters, Justices Brennan and Stevens, each illustrated the lack of common sense in the majority's holding. First, Justice Brennan stated that the question of whether GE's plan treated men and women equally depended on whether one viewed the plan to cover men and women equally with regard to those conditions that the plan covered, or whether one viewed the plan as covering all male-specific conditions and not all female-specific conditions.\textsuperscript{83} To determine which perspective of GE's plan the Court should use to reach its decision, Brennan would have required the Court to examine additional relevant evidence, including a "realistic" understanding of women's personal experiences regarding pregnancy and employment, in conjunction with Congress's purpose for enacting Title VII: equal employment opportunities for protected groups.\textsuperscript{84}

Justice Stevens stated more succinctly that by excluding coverage for disabilities arising from pregnancy, GE failed to protect employees from risks associated with pregnancy.\textsuperscript{85} Because by definition, "it is the capacity to become pregnant which primarily differentiates the female from the male," the plan failed to cover 100\% of the risks faced by women, while providing men 100\% coverage.\textsuperscript{86}

Three months after the \textit{Gilbert} decision, the first bill defining discrimination based on pregnancy as discrimination based on sex in violation of Title VII was introduced in Congress.\textsuperscript{87} Congress had determined that the \textit{Gilbert} Court's decision would not only effect a reversal in the current trend toward protecting women against discriminatory employment practices,\textsuperscript{88} but would also serve to endorse

\textsuperscript{81} See id. For a discussion on why the terms extra and disability indicate an inherent sex bias, see Martha Minow, \textit{The Supreme Court, 1986 Term: Foreword: Justice Engendered}, 101 Harv. L. Rev. 10, 12-13 (1987).

\textsuperscript{82} See \textit{Gilbert}, 429 U.S. at 135 (citing \textit{Geduldig v. Aiello}, 417 U.S. 484, 496-97 (1974)).

\textsuperscript{83} See \textit{id.} at 147 (Brennan J., dissenting).

\textsuperscript{84} In addition, Brennan also considered GE's history of discriminatory practice against women to be relevant. See \textit{id.} at 148-54, 159.

\textsuperscript{85} See \textit{id.} at 161-62 (Stevens J., dissenting).

\textsuperscript{86} \textit{Id.}


\textsuperscript{88} See H.R. Rep. No. 95-948, supra note 8, at 4, reprinted in 1978 U.S.C.C.A.N. at 4752; see also 123 Cong. Rec. 29,385 (1977) ("By 1973, 73 percent of women workers received maternity
the historical discrimination practiced against women due to stereotypical ideas of a woman's value in the workplace.\textsuperscript{89} Simply put, the \textit{Gilbert} Court misinterpreted the definition of sex-based discrimination that Congress intended when it enacted Title VII.\textsuperscript{90}

By amending Title VII's definition of sex-based discrimination, Congress intended only to define pregnancy discrimination as one possible type of discrimination against women based on their sex, which is to be analyzed under Title VII's existing framework.\textsuperscript{91} The PDA achieves this result through its first clause,\textsuperscript{92} which rejects the reasoning of \textit{Gilbert}, and the second clause,\textsuperscript{93} which overrules the specific holding of \textit{Gilbert}.\textsuperscript{94} Thus, Congress has created a sex-conscious, not a sex-blind, method—which recognizes the biological differences that exist between men and women—to further the goals of Title VII.\textsuperscript{95} The stated purpose of Title VII is to provide those who may face discrimination based on race, sex, or national origin, an equal opportunity to participate in the workforce.\textsuperscript{96} Therefore, when viewed through the lens of the PDA, Congress guarantees women the same opportunity that has always existed for men: the opportunity to participate in the workforce while having a family without the fear of losing job security or seniority.\textsuperscript{97}

\textbf{B. The Reasoning: Legislative History}

Congress recognized that times had changed. Employers' view of women as temporary employees, working only to earn "pin" money until deciding to begin a family, was outdated.\textsuperscript{98} This stereotypical leave accompanied by reemployment rights; and 26 percent were permitted to use sick leave for pregnancy-related illness and disability. Now, however, the \textit{Gilbert} decision has changed this effect of Title VII and has left a gaping hole in the protection which Title VII affords to working women."\textsuperscript{89}

\textsuperscript{89.} See 123 Cong. Rec. 7539 (1977) ("I am afraid that lurking behind the lines of the \textit{Gilbert} opinion is the outdated notion that women are only supplemental or temporary workers—earning 'pin money' or waiting to return home to raise children full-time.").


\textsuperscript{91.} See id. at 4, reprinted in 1978 U.S.C.C.A.N. at 4752 ("The narrow approach utilized by the bill is to eradicate confusion by expressly broadening the definition of sex discrimination in Title VII to include pregnancy-based discrimination."); see also 124 Cong. Rec. 21,435 (1978).

\textsuperscript{92.} See supra note 11.

\textsuperscript{93.} See id.


\textsuperscript{95.} See generally Weissmann, supra note 76.

\textsuperscript{96.} See supra note 11.


\textsuperscript{98.} See supra note 89.
view had prompted employers to use a woman's larger role in the reproductive process to view all female employees as potentially pregnant, thereby causing employers to relegate women to employment's lower rungs. Essentially, employers discriminated against all women because they had the potential for pregnancy, not only those women who were actually pregnant.

Congress found that this stereotypical view of female employees did not comport with reality. The large number of women in the workforce suggested that many women worked due to economic necessity. In some cases, a woman's income was either the dominant or sole source of a household's revenue. Even if this woman became pregnant, she often could not afford to leave her employment. To permit an outdated, culturally stereotypical view that women work only until they decide to begin a family would prevent many women—even those who were not planning to have children—from advancing in the workforce at the same rate as men. Further, it would penalize women who did become pregnant (and their families) by denying women benefits while disabled due to pregnancy. This stereotypical view of women resulted in many cases where women had to choose between their right to work and their right to bear children, compelling some to remain childless to keep or advance their employment opportunities. Congress determined that Title VII must define employment discrimination on the basis of a woman's potential for pregnancy as discrimination on the basis of sex to prevent further injustices from occurring. But, how does one demonstrate discrimination on the basis of a woman's potential for pregnancy? Can this type of discrimination be translated into concrete terms?

99. See H.R. Rep. No. 95-948, at 3 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4751 ("The assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying dead-end jobs.").
100. See 123 Cong. Rec. 21,436 (1977).
103. See supra note 81.
105. See, e.g., 124 Cong. Rec. 21,441 (1978) ("I have often wondered how many prospective mothers we have lost because they knew they would not have any income at the time it was needed most"); id. at 38,574; Samuel Issacharoff & Elyse Rosenblum, Women and the Workplace: Accommodating the Demands of Pregnancy, 94 Colum. L. Rev. 2154, 2155 (1994) (discussing question of "whether the postponement of childbirth to the point of biological uncertainty is the necessary price to be paid for a stellar career trajectory."); Weissmann, supra note 76, at 716 (discussing that in enacting the PDA, Congress recognized a woman's "hidden disability" of remaining childless).
Congress believed that the most rational and perhaps easiest way to prevent an employer from discriminating against a woman's potential for pregnancy would be to define sex discrimination to include discrimination against the entire childbearing process.\textsuperscript{106} However, the definition of the childbearing process would have to be broad enough to ensure that any discrimination stemming from a woman's potential for pregnancy would be considered violative of Title VII.\textsuperscript{107} Absent this broad scope, women would suffer from the "gaping hole" in Title VII's commitment to equal opportunity that the Supreme Court had created in \textit{Gilbert}.\textsuperscript{108} By ensuring that a woman's potential for pregnancy did not restrict her job opportunities—one of Title VII's goals—Congress took another step toward one of society's ultimate goals: equality between men and women.\textsuperscript{109}

\textbf{C. Notable Cases: Pacourek and Krauel—Two Sides of the Same Coin.}

The newest test of the PDA is this Note's topic: Whether women undergoing fertility treatment to achieve pregnancy are included within the scope of the PDA. Women terminated from their employment because they are undergoing fertility treatment and women whose employers' insurance plans do not provide coverage for fertility treatment are filing lawsuits against their employers under Title VII, alleging discrimination on the basis of a medical condition related to pregnancy. The federal courts have decided a small number of these cases, reaching different results.\textsuperscript{110} Two such cases that represent the courts' contrasting views about whether the scope of the PDA does, or

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\textsuperscript{106} See, e.g., H.R. Rep. No. 95-948, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4753 ("In using the broad phrase, 'women affected by pregnancy, childbirth and related medical conditions,' this bill makes clear that its protection extends to the whole range of matters concerning the childbearing process."). One supporter of the bill stated:

It is a pro-life, pro-family bill designed to take the pressure off the millions of families in this country who want to have children, but who need two incomes to survive . . . The legal status of the past often forced women to choose between having children and working . . . . This legislation gives her the right to choose both, to be financially and legally protected before, during, and after her pregnancy.


\textsuperscript{109} See, e.g., 124 Cong. Rec. 21,442, 38,574 (1978).

\textsuperscript{110} See supra note 9.
should, include women undergoing fertility treatment are Pacourek v. Inland Steel Co.,111 and Krauel v. Iowa Methodist Medical Center.112

1. Pacourek: Heads, a claim is made and recognized.

In June 1993, Inland Steel fired employee Charlene Pacourek due to her excessive absences from work, which were a result of her receiving fertility treatment.113 Although Ms. Pacourek received preapproval for her absences and Inland Steel had no official sick leave policy,114 Ms. Pacourek’s supervisor warned her that she may lose her job due to her frequent absences.115 Ms. Pacourek informed her employer that to stop attending her appointments would disrupt her treatment and eliminate her chances for pregnancy.116 So, after employing Ms. Pacourek for eighteen years, Inland Steel fired her.117

Ms. Pacourek filed a lawsuit in January 1994 in federal court, alleging that Inland Steel ended her employment in violation of several anti-discrimination statutes, including Title VII, as amended by the PDA.118 The suit alleged that Inland Steel attempted to implement a sick leave policy for Ms. Pacourek that did not exist for other employees, resulting in the disparate treatment of Ms. Pacourek’s treatment of a pregnancy-related condition.119 Inland Steel moved to dismiss Ms. Pacourek’s PDA claim alleging the claim lacked legal sufficiency and supported its motion with two arguments: First, the PDA does not protect Ms. Pacourek’s inability to become pregnant; and second, infertility is a gender-neutral condition and therefore cannot fall

112. 915 F. Supp. 102 (S.D. Iowa 1995), aff’d, 95 F.3d 674 (8th Cir. 1996).
114. Inland Steel told Ms. Pacourek that the company had no official sick leave policy, as confirmed by Inland Steel’s employee handbook. See Holmes, supra note 113, at M1. The only “policy” used at Inland Steel appeared to be one of notification and consent for paid leave. See id.
115. See id.
116. See id.
117. See id.
118. See Pacourek, 858 F. Supp. at 1397. Ms. Pacourek also filed suit under the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990 (“ADA”). See id. Ms. Pacourek’s ADA claim alleged that infertility is a disability that affects the “major life activity” of reproduction. See id. Several articles have been written in support of this view. See, e.g., Sandra M. Tomkowicz, The Disabling Effects of Infertility: Fertile Grounds for Accommodating Infertile Couples Under the Americans With Disabilities Act, 46 SYRACUSE L. REV. 1051 (1996); Tischler, supra note 15. This view of defining infertility as a disability, however, is considered controversial by some support groups, similar to the view that pregnancy as a disability is prejudicial to women.
119. See Pacourek, 858 F. Supp. at 1397.
within the scope of the PDA.\textsuperscript{120} Critically, by presenting the issue to the court absent any reference to the treatment of infertility, Inland Steel bifurcated the condition of infertility from fertility treatment.

The \textit{Pacourek} court recognized how Inland Steel had chosen to present the issue and addressed the importance of the missing reference to fertility treatment:

The parties cast the conflict here as merely over whether plaintiff's medical inability to become pregnant is a medical condition related to pregnancy for the purposes of the PDA. There is a first level of analysis, however: whether discriminating against employees based on intended or potential pregnancy is covered by the PDA.\textsuperscript{121}

Therefore, before the court began its analysis of whether Ms. Pacourek could state a claim under the PDA, the court reframed the issue to make two inquiries: First, whether an employer's discrimination against an employee's efforts to become pregnant—her use of fertility treatment—was within the scope of the PDA; and second, whether the medical condition of infertility—which prevents women from becoming pregnant naturally—was within the scope of the PDA.\textsuperscript{122} In response to these inquiries, the court reached the following conclusions: First, because Ms. Pacourek alleged that Inland Steel discriminated against her due to her efforts to become pregnant, she stated a claim under the PDA;\textsuperscript{123} and second, a basis existed within the PDA to allow for the inclusion of the condition of infertility.\textsuperscript{124}

Addressing the first issue, the court recognized that the PDA covers a woman's intention to become pregnant, stating that this coverage is, "the kind of truism the PDA wrote into law."\textsuperscript{125} Because Ms. Pacourek was undergoing fertility treatment to become pregnant, her employer might view her as having a potential for pregnancy. Addressing the second issue, the court applied a canon of statutory construction, the plain or ordinary meaning rule,\textsuperscript{126} to hold that the term "related," in the phrase "related medical conditions," was a "generous

\textsuperscript{120} See id. at 1401.
\textsuperscript{121} See id.
\textsuperscript{122} The \textit{Pacourek} court's approach is consistent with Part IV.B of this Note. Part IV states that to accurately represent the life experience of a woman undergoing fertility treatment these two issues cannot be bifurcated. See infra Part IV.B. This Note argues that the reason the \textit{Pacourek} court found in favor of the plaintiff was because the court recognized all aspects of the plaintiff's life experience.
\textsuperscript{123} See \textit{Pacourek}, 858 F. Supp. at 1402.
\textsuperscript{124} See id. at 1402-03.
\textsuperscript{125} \textit{Id.} at 1401.
\textsuperscript{126} This canon states that courts should enforce the language of a statute according to its plain or ordinary meaning. See infra Part IV.A.1.
choice of wording, suggesting that interpretation should favor inclusion rather than exclusion in close cases." 127 The court supported this interpretation with a brief discussion of the PDA’s legislative history and by referencing language from prior Supreme Court decisions that interpreted the PDA. 128

The court did not address Inland Steel’s argument that infertility is gender-neutral because the issue was not properly before the court as Inland Steel did not claim that its policy applied to all infertile workers. 129 Therefore, on the theory that Inland Steel discriminated against Ms. Pacourek’s potential for pregnancy and that infertility is a pregnancy-related medical condition, Inland Steel’s alleged discrimination against Ms. Pacourek stated a claim under Title VII. 130

2. Krauel: Tails, a claim is made and dismissed.

In 1994, Mary Jo Krauel gave birth to a baby girl conceived through GIFT 131 for which her employer’s medical plan (“the plan”) did not provide coverage. 132 Ms. Krauel and her husband then attempted to have another child without the use of ARTs, but after a year of failing to conceive, Ms. Krauel filed suit against her employer, Iowa Methodist Medical Center (“IMMC”), challenging the plan’s failure to provide coverage for fertility treatment as violative of several anti-discrimination statutes, including Title VII, as amended by the PDA. 133

IMMC moved for summary judgment, arguing that the treatment of infertility is not the treatment of a pregnancy-related medical condition. 134 The court, in accordance with IMMC’s motion, analyzed

127. Pacourek, 858 F. Supp. at 1402. By analogy, the court considered pregnancy to be the core of the PDA while infertility would lie on an outer circle. See id. at 1403. This analysis is contradictory to the Krauel court’s statutory construction analysis. See Krauel v. Iowa Methodist Med. Ctr., 915 F. Supp. 102, 111-12 (S.D. Iowa 1995), aff’d 95 F.3d 674 (8th Cir. 1996).

128. See Pacourek, 858 F. Supp. at 1402-03. Apparently, the Pacourek court found no reason to create the negative inference of exclusion that the Krauel court made. See infra note 139 and accompanying text.

129. See Pacourek, 858 F. Supp. at 1403. The court did, however, comment on the veracity of a gender-neutral argument. See id. at 1404. After noting that EEOC guidelines state that an employer must provide pregnancy benefits even where the entire workforce is female, the court concluded that “once it is determined that a classification is in contravention of the PDA, that classification is not to be further tested for gender neutrality with an eye toward approving the classification if it is found to be gender neutral in context.” Id.

130. See id.

131. See supra pp. 396-98 for a description of this procedure.

132. See Krauel, 915 F. Supp. at 105.

133. See id. Ms. Krauel also filed suit under the ADA. See id. at 102.

134. See id. at 111. IMMC also argued that Ms. Krauel failed to establish a prima facie case of disparate impact discrimination under Title VII. See id. However, this Note will limit the discussion of Krauel to Ms. Krauel’s disparate treatment claim.
Ms. Krauel’s claim as if it presented only one issue: “whether the treatment of infertility is the treatment of a medical condition related to pregnancy or childbirth.”\textsuperscript{135} Using a canon of statutory construction, \textit{ejusdem generis}, literally meaning “of the same kind,”\textsuperscript{136} the court held that the general term “related” should be read in context with the specific subjects enumerated in the statute.\textsuperscript{137} Therefore, “related medical conditions” referenced the terms “pregnancy” and “childbirth.” The court then drew a bright line to distinguish infertility from pregnancy and childbirth. The court stated that pregnancy and childbirth occur after conception, which it considered to be the beginning of the childbearing process, while infertility occurs before conception.\textsuperscript{138} To support this interpretation, the court noted the absence of any reference to fertility treatment in the PDA’s legislative history.\textsuperscript{139} The court also gave credence to IMMC’s argument that infertility is gender neutral and granted IMMC’s motion for summary

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\item \textsuperscript{135} \textit{Id.} at 111. This view of infertility is consistent with the court’s decision in favor of the defendant. \textit{See infra} Part IV.B.
\item \textsuperscript{136} For an analysis of the \textit{Krauel} court’s use of this cannon, see \textit{infra} Part IV.A.2. The court also cursorily applied the plain meaning rule to hold that “[t]he plain language of the PDA does not indicate that ‘related medical conditions’ should be interpreted broader [sic] than the context of ‘pregnancy’ and ‘childbirth.’” \textit{See Krauel}, 915 F. Supp. at 112.
\item \textsuperscript{137} \textit{See Krauel}, 915 F. Supp. at 112.
\item \textsuperscript{138} \textit{See id.} at 113. The court makes this assumption after citing to the PDA’s legislative history indicating Congress intended the entire childbearing process to be included under the PDA. \textit{See id.} The court’s assumption, however, has two flaws: First, some women undergo fertility treatment because of repeated miscarriages, therefore these women experience infertility after conception occurs; and second, the assumption fails to consider, as is the belief of this author, that it is the choice to conceive, or the act of unprotected sexual intercourse that marks the true beginning of the childbearing process.
\item \textsuperscript{139} \textit{See id.} at 112. However, the absence of any explicit language referring to fertility treatment would seem to lend force to an argument against creating a “negative inference” that would limit the scope of the PDA only to those issues discussed in the legislative history. A similar issue arose in \textit{Newport News Shipbuilding & Dry Dock Co. v. EEOC}, 462 U.S. 667 (1983), where the Supreme Court decided that an employer’s health insurance plan, which provided male employees with less extensive benefits for the pregnancy-related conditions of their spouses than provided for the company’s female employees, discriminated against male employees in violation of Title VII, as amended by the PDA. The Court held that although “congressional discussion [of the then pregnancy discrimination bill] focused on the needs of female members of the work force rather than spouses of male employees, [this did] not create a ‘negative inference’ limiting the scope of the Act to the specific problem that motivated its enactment.” \textit{Id.} at 679. The majority’s statement lends support to the argument of this Note—favoring inclusion of women undergoing fertility treatment and against creating a negative inference of exclusion. Further, the dissenting justices’ argument in \textit{Newport News}, finding the majority’s failure to find a negative inference in that case flawed, lends further support to the argument of inclusion. In his dissent, Justice Rehnquist stated that, “[t]his [negative inference] reasoning might have some force if the legislative history was silent on an arguably related issue.” \textit{Id.} at 691 (Rehnquist, J., dissenting). As noted previously, as a matter of common sense Congress could not have considered the use of ARTs while either house debated passage of the PDA as these advanced technologies were not yet available to the American population at that time. \textit{See supra} notes 31-32 and accompanying text.
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judgment declaring that "infertility is not a sex-related medical condition." 140

3. The tie breaker.

The two courts appear to have used similar methods when interpreting whether the scope of the PDA includes women undergoing fertility treatment, yet they reached different results. There are two interesting points about the courts’ decisions. First, although Inland Steel attempted to frame the issue before the Pacourek court as whether the condition of infertility, bifurcated from fertility treatment, was within the PDA’s scope, the court reframed the issue by reconnecting the two components. Alternatively, the Krauel court accepted the manner in which IMMC framed the issue and considered only whether the condition of infertility was within the PDA’s scope. Second, neither court gave the PDA’s purpose and legislative history extensive consideration when reaching its decision. The first point suggests that the result of the case depended upon whether the court attempted to understand the real question presented by the case before it: whether women undergoing fertility treatment are included in the PDA’s scope. The second point shows that both courts decided a case involving a matter that Congress itself could not have explicitly considered, as the use of ARTs was not available in the United States in 1978, 141 without seeking any guidance from legislative history to determine how Congress would have resolved the question had it been so presented. Absent this guidance, perhaps the reason for the courts’ different outcomes did not stem from what the courts’ interpretive methods revealed about the PDA, but rather the outcomes depended on who framed the question before the courts and who conducted the analysis.

IV. THE PDA & WOMEN UNDERGOING FERTILITY TREATMENT: DO THE TWO BELONG TOGETHER?

A. Should We Read Between the Lines?

Although issues of statutory construction are beyond the scope of this Note, to decide whether women undergoing fertility treatment are within the PDA’s scope, it is necessary to discuss the Pacourek and Krauel courts’ use of statutory construction canons. The canons are

141. See supra notes 31-32 and accompanying text.
themselves judicial creations, and as such, courts are not required to invoke them when interpreting statutes. Significant amounts of discussion and criticism regarding the use of these canons exists. Some critics have argued that the canons are result-oriented and prevent a detailed examination of legislative purpose. For example, one author stated that the canons are simply “conclusory explanations appended after the fact to justify results reached on other grounds.” Karl Llewellyn authored a well-known critique in which he concluded that the canons were nothing more than neutral principles because for each canon there is an equal and opposite countercanon, thereby rendering the canons useless as aides in decisionmaking. Although the use of canons is not mandated and their criticisms are well-documented, courts nevertheless invoke these canons. Why? One article asserts that why a court would invoke these canons when a variety of techniques exist to decide cases, such as public policy, legislative history, and community values, is the real question to be considered.

Theoretically, courts will use canons of statutory construction when the language of the statute is ambiguous. Should a court invoke canons when it lacks expertise in a highly technical area to avoid immersion in an unfamiliar field; or perhaps when the court cannot accurately determine the policy implications of its policy-based decision; or when it wants to avoid future labeling of a substantive decision as in error? Whether one believes the answer to these questions is yes or no, a second question arises: Once a court has decided to use the canons, which canon will it use? This question may be the more relevant one for the purposes of this Note.

Perhaps the decision of which canons to invoke is also result-oriented. For example, although both the Pacourek and Krauel courts applied canons of statutory construction, the courts invoked two different canons—the plain meaning rule and ejusdem generis, respect-

144. Geoffrey P. Miller, Pragmatics and the Maxims of Interpretation, 1990 WIS. L. REV. 1179, 1180. Miller is referring to academia’s view of the canons’ use after Karl Llewellyn’s critique. See id. Llewellyn demonstrated that the canons’ use is indeterminate, suggesting that if a court invokes a canon at all, the court cannot rely on the canon as the sole factor on which the decision is reached. See KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521-35 (1960).
145. See Llewellyn, supra note 144, at 521.
146. See Macey & Miller, supra note 142, at 649.
147. See Miller, supra note 144, at 1223.
148. See Macey & Miller, supra note 142, at 659-63.
tively—to reach different conclusions regarding the scope of the PDA.\textsuperscript{149} Perhaps insight into the courts' different holdings comes from examining the canons invoked as integral parts of each court's decision rather then looking only to what the courts found the canons to reveal.

1. Related medical conditions: Is it really crystal clear?

The \textit{Pacourek} court invoked the plain meaning rule to hold that women undergoing fertility treatment are within the scope of the PDA.\textsuperscript{150} The court's use of this canon seems axiomatic; why would a court need to interpret a statutory provision whose meaning is clear?\textsuperscript{151} This question represents the most common criticism of this canon, which is that text has no meaning apart from the reader's interpretation.\textsuperscript{152} The many forms that the plain meaning rule has taken\textsuperscript{153} and the notion that a statute's language may be plain to one and ambiguous to another,\textsuperscript{154} reinforce this critique. Therefore, it seems the identity and perspective of the interpreter may determine the outcome of the analysis.

In \textit{Pacourek}, the court set the groundwork for its analysis by invoking a general rule of interpretation "that remedial statutes, such as

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\item [\textsuperscript{149}] On this point, perhaps William Jordan's discussion of the difference between American courts and English courts—stating that the former use legislative history to guide statutory interpretation where as the latter do not—may provide some guidance. See William S. Jordan III, \textit{Legislative History and Statutory Interpretation: The Relevance of English Practice}, 29 U.S.F. L. REV. 1, 39-41 (1994). Specifically, Jordan discusses the fact that the members of the English judiciary are much more homogenous and apolitical than those of the American judiciary. See \textit{id.} at 39. As a result, Jordan argues that due to the diversity of the American bench, judges are "less likely to share common understandings of the meanings of words, or rules, or have the same views of formalism in statutory interpretation." \textit{id.} at 40. The necessary inference, as elucidated by Jordan, is that decisions of American courts are more apt to be a result of political decisions injected into decisionmaking. See \textit{id.} at 40-41.
\item [\textsuperscript{150}] See \textit{Pacourek}, 858 F. Supp. 1393, 1403 (N.D.Ill. 1994).
\item [\textsuperscript{151}] See Joel R. Cornwell, \textit{Smoking Canons: A Guide to Some Favorite Rules of Construction}, CBA Rec., May 10, 1996, at 43. Geoffrey Miller, however, suggests that this understanding of the plain meaning rule is incorrect. See Miller, supra note 144, at 1223-24. According to Miller, one should not see the rule as being "based on a claim of certainty," but instead as a weighing process, which considers "the clarity of statutory language, its consistency with underlying legislative purposes and whether the costs of resort to extrinsic aids to interpretation (such as legislative history) are likely to outweigh whatever benefits may be realized from such an enterprise." \textit{id.} at 1224. The \textit{Pacourek} court appears to have used this approach.
\item [\textsuperscript{152}] See Shapiro, supra note 143, at 931-32 (citing Peter C. Schanck, \textit{The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories}, 38 U. KAN. L. REV. 815, 820-43 (1990)).
\item [\textsuperscript{153}] See Miller, supra note 144, at 1222-23. Geoffrey Miller indicates that several variations of the plain meaning rule exist, ranging from "a virtually conclusive presumption that the plain meaning governs," to "the plain meaning 'ordinarily' controls" to "the plain meaning is the 'starting place' for interpretation." \textit{id.}
\item [\textsuperscript{154}] See \textit{id.} at 1223.
\end{itemize}
civil rights laws, are to be broadly construed.\textsuperscript{155} This foundation enabled the court to hold that Congress's use of such “expansive language,” specifically its use of the term “related” within the phrase “related medical conditions,” suggests favoring inclusion over exclusion.\textsuperscript{156} The traditional notion of the plain meaning rule would have required that the court's interpretation conclude at this point.\textsuperscript{157} However, the court continued its analysis by discussing Supreme Court precedent interpreting the PDA and the PDA's legislative history to hold that “a woman's medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth for the purposes of the [PDA].'\textsuperscript{158}

The \textit{Pacourek} court's use of the plain meaning rule to reach this result reveals that perhaps what was clear to the court was not the PDA's language, but the difference between a woman's and a man's infertility. The court's initial reframing of the issue—to discuss a woman's infertility and her subsequent use of fertility treatment—before beginning its analysis, reinforces this conclusion.\textsuperscript{159} This initial action belies the conclusion that the court included these women solely because the plain meaning rule dictated that result. A court that does not see the importance of how a party presents the issue will not reach the \textit{Pacourek} court's result by using the plain meaning rule.

2. Related medical conditions: Or is it not a similar class member?

\textit{Ejusdem generis}\textsuperscript{160}—the canon that the \textit{Krauel} court relied on to hold that women undergoing fertility treatment are not within the PDA's scope—dictates, “when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.”\textsuperscript{161} The \textit{Krauel} court's use of \textit{ejusdem generis} seems logical because the PDA reads, “pregnancy, childbirth and related medical conditions.” However, two important aspects of the court's analysis must be considered: First, what or who determined what conditions are “akin” to those specifically enumerated in the PDA;\textsuperscript{162} and second, the failure of the court to decide

\textsuperscript{155}. \textit{Pacourek}, 858 F. Supp. at 1402 (citing Stoner v. Department of Agriculture, 846 F. Supp. 738, 742 (W.D. Wis. 1994) (citation omitted)).

\textsuperscript{156}. \textit{See Pacourek}, 858 F. Supp. at 1402.

\textsuperscript{157}. \textit{See supra} note 151 and accompanying text.

\textsuperscript{158}. \textit{Pacourek}, 858 F. Supp. at 1403.

\textsuperscript{159}. \textit{See supra} notes 120-22 and accompanying text.

\textsuperscript{160}. \textit{See supra} notes 136-37 and accompanying text.


\textsuperscript{162}. M.B.W. Sinclair notes that this canon simply begs this question. See M.B.W. Sinclair, \textit{Law & Language: The Role of Pragmatics in Statutory Interpretation}, 46 U. Pitt. L. Rev. 373,
whether including Ms. Krauel's claim would similarly further the PDA's legislative purpose as to the terms "pregnancy" and "childbirth." 

Because the Krauel court evaluated Ms. Krauel's claim as IMMC had defined it—infertility bifurcated from its reference to fertility treatment and potential pregnancy—the court precluded a finding that Ms. Krauel's fertility treatment was akin to pregnancy and childbirth under the PDA before any analysis could even begin. Within this analytical framework, the court's creation of a rigid and narrowly calibrated genus—pregnancy and childbirth occur after conception while infertility occurs before conception—reinforces the conclusion that the court invoked ejusdem generis to bolster a decision that the court had reached on other grounds. The Krauel court attempted to create a bright line rule to substitute for the congressionally created list of examples in the PDA, a rule Congress could just as easily have used if it intended this narrow delineation. However, as a detailed examination of the PDA's legislative history reveals—an examination noticeably absent from the Krauel court's decision—Congress intended to include discrimination based on a woman's potential for pregnancy, however manifested.

The Krauel court's failure to consider seriously the PDA's legislative history raises the second problem with the court's analysis. The Supreme Court has said that courts should use ejusdem generis "for ascertaining the correct meaning of words when there is uncertainty . . . but it may not be used to defeat the obvious purpose of legislation." Indeed, the Krauel court chided the Pacourek court for unnecessarily considering the PDA's legislative history and purpose due to their lack of any explicit reference to fertility treatment.
From the court's action, it seems one may infer that the *Krauel* court decided that Congress had created an exhaustive list of either all conditions included in the scope of the PDA, or all conditions deemed "related medical conditions." However, to interpret the PDA in this manner is not consistent with an analysis using *ejusdem generis*, but rather an analysis using the canon *expressio unis est exclusio alteris*, literally meaning, "the expression of one thing is the exclusion of another." To read this precision into the PDA, the court would effectively remove the benefits conferred by Congress's use of a general term—such as filling the gaping hole in Title VII's commitment to equal opportunity that the Supreme Court had created in *Gilbert*, or the accessibility and ease in defining pregnancy-based discrimination as sex discrimination.

The above analysis of the *Pacourek* and *Krauel* courts' use of canons suggests that the courts' decisions were, in fact, reached on "other grounds." Each court had a different perspective of the issue before it, which in turn affected each court's use of the canons. Therefore, canons of statutory construction do not appear to provide a satisfactory answer to the question of whether women undergoing fertility treatment belong under the umbrella of the PDA. Because it was each court's perspective that led to its interpretation, perhaps an analysis of perspective will provide a cogent explanation for the inclusion or exclusion of these women under the PDA.

**B. Or, Does It Just Depend on How You Look at It?**

Given the above definition of infertility and subsequent fertility treatment and given that Congress intended the PDA to protect a woman's potential for pregnancy, a woman undergoing fertility treatment to become pregnant should have a cause of action under Title VII, as amended by the PDA. This issue is not controversial when

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172. *See* Miller, *supra* note 144, at 1200-02. Miller argues that the costs of requiring greater specificity from legislatures would outweigh the benefits of using a more general term, i.e., the possibility that specificity would create loopholes in the application of the statute, or adding length and complexity to statutes that need to be readily understood by ordinary citizens. *See id.*

173. *See supra* notes 106-08 and accompanying text.

174. *See supra* note 144 and accompanying text.

175. *See supra* Part II.

one accepts that it is the inability to conceive a child that generates the inquiry into whether a medical diagnosis of infertility exists. Accordingly, it makes no sense to talk about fertility treatment without including the potential for pregnancy.

How does one find otherwise? The problem stems from how this issue is approached and subsequently framed. Proponents of including women undergoing fertility treatment within the PDA aver that the diagnosis of infertility cannot be bifurcated from its treatment. This belief allows proponents to frame the issue as: whether women undergoing fertility treatment are included in the scope of the PDA. Conversely, because opponents do not, or cannot, acknowledge that the two aspects of infertility cannot be bifurcated, opponents frame the issue as: whether women who are infertile are included in the scope of the PDA. This explains why a court may conclude that the phrase “treatment for a medical condition related to pregnancy” does not include women undergoing fertility treatment: the condition of infertility is being considered outside the context of diagnosis and treatment. The consideration of infertility in this vacuum is the root of the most common objection to finding that women undergoing fertility treatment are within the scope of the PDA: that infertility is a gender-neutral condition.

The structure of the argument is as follows: because both men and women can experience infertility, it cannot follow that a woman who alleges discrimination based on her usage of fertility treatment is discriminated against on the basis of her sex. From a woman’s perspective, however, the treatment of infertility cannot exist without reference to pregnancy. A diagnosis of infertility occurs when a woman is unable to conceive; therefore, when a woman undergoes

177. Many feminist legal theorists advance the view that many areas of the law do not represent or consider a woman’s perspective, but rather are based on male norms and reflect male perspectives. See, e.g., Katharine T. Bartlett, Feminist Legal Methods, 103 HARM. L. REV. 829, 842-43 (1990); Sally J. Kenney, Pregnancy Discrimination: Toward Substantive Equality, 10 WIS. WOMEN’S L.J. 351, 356 (1995); Christine A. Littleton, Reconstructing Sexual Equality, 75 CAL. L. REV. 1279, 1279-81 (1987); Minow, supra note 81, at 32.

178. This is exactly how the Krauel court arrived at the conclusion that women undergoing fertility treatment are not within the PDA’s scope. See supra Part III.C.2.

179. Congress amended Title VII with the PDA to make clear that because only women have the capacity to conceive a child, pregnancy-based discrimination is, by definition, discrimination on the basis of sex. The reason the issue of whether infertility is within the scope of PDA does not seem clear is because both men and women can be infertile.

180. See supra Part II.

181. This is explicit in the definition of infertility. See supra note 12 and accompanying text.
fertility treatment she is seeking assistance with conception.\textsuperscript{182} When we refer to a woman's infertility as a gender-neutral condition, we have stripped her condition of any reference to its implications for potential pregnancy. A woman's perspective thus has been lost or ignored. Therefore, the labeling of infertility as gender-neutral should act as an alarm indicating that the law has omitted the perspective of such a woman, leaving what is a gender-specific perspective of infertility.\textsuperscript{183} Further analysis explains that due to certain societal patterns, discrimination against these women can exist although both men and women can be infertile.\textsuperscript{184} Closely examining the root of infertility's gender-neutral label will reveal that what some may consider neutral may not be neutral at all.\textsuperscript{185}

The definition of infertility used to reach the conclusion that infertility is a gender-neutral condition appears to represent a male perception of infertility, i.e., a condition unrelated to pregnancy.\textsuperscript{186} Defining infertility in this manner eliminates a woman's personal experience of infertility and replaces it with a male perspective.\textsuperscript{187} What is highlighted is a condition that may exist for both men and women.\textsuperscript{188} The law should not be satisfied with this definition of infertility because this definition, at best, inherently presumes that a woman's experience of infertility is no different from a man's;\textsuperscript{189} while

\textsuperscript{182} It is interesting to note that many insurance companies actually use this premise as a defense against legal challenges to denials of coverage for ARTs. These companies claim that because fertility treatment does not treat the illness or underlying disease, e.g., the reversal of infertility, but are designed to achieve pregnancy they are not necessary procedures and therefore not covered. See, e.g., Egert v. Connecticut Gen. Life Ins., 900 F.2d 1032, 1034, 1037 (7th Cir. 1990); Wicraft v. Sundstrand Health & Disability Group Benefit Plan, 420 N.W.2d 785, 788-89 (Iowa 1988).

\textsuperscript{183} See Heather Ruth Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence, 1 BERKELEY WOMEN'S L.J. 64, 68 (1985). Wishik states that the moment when the omission of a woman's perspective is realized is the first indication that what results from this omission is necessarily gender-specific. See id.


\textsuperscript{185} See Littleton, supra note 177, at 1319.

\textsuperscript{186} Male infertility affects the ability to "deposit adequate numbers of healthy, mature, functioning sperm into the female reproductive tract near the time of ovulation." MALE INFERTILITY, supra note 16, at 8. While the discussion in this section uses a male/female dichotomy, one must remember that some women who themselves have never experienced infertility also cannot understand the nature of the infertile's experience. See Shacochis, supra note 35, at 62.

\textsuperscript{187} See Minow, supra note 81, at 32. Minow states that any discussion of equal treatment attempts to "assimilate" women to an "unstated norm," which ignores the very features that distinguish women from men. See id.

\textsuperscript{188} See Krauel v. Iowa Methodist Med. Ctr., 915 F. Supp. 102, 112 (S.D. Iowa 1995), aff'd, 95 F.3d 674 (8th Cir. 1996).

\textsuperscript{189} See Minow, supra note 81, at 39.
at worst, it suggests that a woman’s experience of infertility is simply irrelevant.  

Interestingly, without the knowledge that this woman’s perspective is missing, leaving infertility out of the scope of the PDA might appear to be a logical and fair outcome. The rationale is if men and women are being treated equally by infertility, highlighting a difference would imply that a woman’s infertility deserves special treatment. This may in fact be an attractive proposition for a legal system that is currently attempting to resolve so many issues regarding the treatment of biological sex differences and gender roles. Accepting this argument, however, ignores that equality is itself a gendered concept. To be deemed equal or the same can only occur when two entities are compared with each other. The critical question during this comparison then becomes, which entity is the norm against which the other is compared? This question is rarely addressed in the legal context, thereby leaving unquestioned the identity of the norm. In the realm of gender differences, the identity of this unstated point of comparison is male. That it is the female’s capacity to conceive is what is considered different, rather than the male’s incapacity illustrates this fact. Therefore, to define infertility as gender-neutral will only serve to perpetuate the use of a male perception of infertility as controlling and place the female experience of infertility beyond the scope of relevant discussion.

Juxtaposing the actual life experiences of a woman undergoing fertility treatment and the experiences asserted under the gender-neu-

190. See Littleton, supra note 177, at 1279. Littleton argues that when we ignore a feature that distinguishes women from men we do not only ignore that feature, we devalue it. See id.

191. This rationale is the result of applying Wendy Williams’s equal treatment argument to the condition of infertility. See generally Williams, supra note 65. But see generally Littleton, supra note 177; Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. Rev. 955 (1984) (applying the equal treatment argument to sex discrimination in the constitutional context).

192. The author recognizes that a difference exists between issues of sex and those of gender and, therefore, one cannot use the two terms interchangeably.

193. See Littleton, supra note 177, at 1302 (“[E]quality, belonging to both law and to language, provides its own case study of phallocentrism.”).

194. See Minow, supra note 81, at 39.

195. See id. at 13 (“Legal treatment of difference tends to take for granted an assumed point of comparison: women are compared to the unstated norm of men . . . .”).

196. See id.

197. See Littleton, supra note 177, at 1306 (“[E]quality analysis defines as beyond its scope precisely those issues that women find crucial to their concrete experience as women. Legal analysis ‘runs out’ when it encounters ‘real’ difference, and only becomes available if and when the difference is analogized to some experience that men can have too.”). With infertility this point is especially problematic because men too can be infertile.
tral argument will also expose the gender-neutral fallacy. Once exposed, a subsequent refusal to find that these women fall within the scope of the PDA will potentially deny a woman undergoing this treatment the opportunity of having a family while remaining employed, thereby frustrating the primary goal of the PDA. Is the answer then to substitute a woman’s perspective for a man’s? This is not the right answer for two reasons: First, this substitution raises the traditional objection of special treatment because it would recognize a woman’s different perspective to provide extra protection; and second, perhaps more important, to do so would perpetuate the use of the unstated male norm allowing a woman’s perspective to remain defined as different. Instead, the answer lies in accepting the existence of a woman’s experience of infertility and giving that experience value. This is what the PDA attempts to do. Now that the inherent sex bias of labeling infertility as gender-neutral has been revealed and the existence of a woman’s perspective has been accepted, a tight legal analysis can begin to determine whether the scope of the PDA includes women undergoing fertility treatment.

It is important to remember that accepting the life experience of women undergoing fertility treatment is only the first step of an accurate analysis. At this stage any attempt to advocate adopting such a woman’s perspective as more correct than a man’s perspective would, as stated, appear simply to exchange one partial perspective for another. Instead the ultimate decision—whether it be the male experience, the female experience or some compilation of the two—must

198. See Wishik, supra note 183, at 72-74. Wishik writes that feminist jurisprudence requires the use of this remedy when attempting to resolve problematic issues of perspective. See id. Wishik argues that this juxtaposition reveals that when the law incorrectly labels something as gender-neutral, the law devalues a woman’s experience. See id.

199. See supra Part III.B.

200. See Minow, supra note 81, at 41. Minow notes that this may appear to be what the Supreme Court did in California Fed. Sav. and Loan Ass’n v. Guerra, 479 U.S. 272 (1987) (holding that a California statute that requires employers to provide a minimum level of pregnancy-related benefits beyond those required by PDA does not discriminate against male employees). Minow, however, argues that the problem of difference should be addressed through the use of multiple perspectives. See Minow, supra note 81, at 14; see also Wishik, supra note 183, at 75-76.

201. See Minow, supra note 81, at 32.

202. See generally Littleton, supra note 177.

203. See supra Part III.B.

204. See Bartlett, supra note 177, at 843.

205. See id. at 846 (“Asking the woman question does not require decision in favor of a woman. Rather, the method requires the decisionmaker to search for gender bias and to reach a decision in the case that is defensible in light of that bias.”).

206. See Minow, supra note 81, at 46 (“What interests us, given who we are and where we stand, affects our ability to perceive.”).
be made in light of what Congress created the PDA to accomplish.207 Therefore, if in the end the women's perspective of infertility is selected, it will be chosen because it is more complete than any other.

To begin interpreting whether women undergoing fertility treatment are within the scope of the PDA, simply recognizing the existence of a woman's alternative perspective of infertility will be meaningless unless those that consider the question also acknowledge two additional points: First, that their view of this woman's experience, which may not be their own, is limited; and second, that this limitation is more than a gap in knowledge, but rather an affirmative duty to gather more information.208 If this duty remains unheeded, the result may still force women undergoing fertility treatment into a category that does not fit: infertility as a gender-neutral condition and, therefore, outside the scope of the PDA.209 Only integrating the actual life experience of women undergoing fertility treatment into legal analysis can achieve the general commitment to equal opportunity that the PDA requires.

Integrating the experience of these women means that all aspects of their life experience are relevant to the analysis.210 The life experience of women undergoing fertility treatment is that a condition that interferes with conception thwarts these women's attempts to become pregnant. This condition is identified only after their failure to become pregnant. As a result, these women have chosen to receive therapeutic treatment that, if successful, will result in pregnancy. Therefore, a woman receiving fertility treatment has a potential for pregnancy.

207. See General Elec. Co. v. Gilbert, 429 U.S. 125, 155 (1976) (Brennan J., dissenting) (“However one defines the risks . . . the determinative question must be whether the social policies and aims to be furthered by Title VII and filtered through the phrase ‘to discriminate’ . . . fairly forbid [the alleged discriminatory practice in question].”).

208. See Minow, supra 81, at 75 n.304 (citing BARBARA JOHNSON, A WORLD OF DIFFERENCE 16 (1987)). Minow writes:

If I perceive my ignorance as a gap in knowledge instead of an imperative that changes the very nature of what I think I know, then I do not truly experience my ignorance.

The surprise of otherness is that moment when a new form or ignorance is suddenly activated as an imperative.

Id.

209. See id. at 91.

210. See Bartlett, supra note 177, at 856-58; see also Minow, supra note 81, at 44 (“Instead of considering the entire individual, we often select one characteristic as representative of the whole.”). The Krauel court rejected as irrelevant the fact that women undergo most of the treatment even when their inability to conceive is due to a male factor. See Krauel v. Iowa Methodist Med. Ctr., 915 F. Supp. 102, 114 (S.D. Iowa 1995), aff'd, 95 F.3d 674 (8th Cir. 1996). The court saw this fact simply as a burden that medicine has placed on women. See id. This fact, however, is relevant, not because it stands for a woman's greater burden, but because it is part of a woman's experience of infertility.
Let us now move this discussion into the workplace. The discussion now concerns a woman who wants to remain employed while undergoing fertility treatment in an attempt to start or enlarge a family. This is exactly what Congress created the PDA to protect. Therefore, not only does denying women who are undergoing fertility treatment protection from unfair employment practices defy common sense, but a failure to do so would lead to a result that Congress intended the PDA to prevent.

The above analysis, which considers the existence of alternate perspectives and the recognition of life experiences to further the social policies and aims of the PDA, is also supported by the PDA's legislative history. As stated, Congress enacted the PDA in response to the Supreme Court's decision in *Gilbert*. Congress specifically endorsed the view of the *Gilbert* dissenters. When Justice Brennan stated in his dissent that the majority's inability to define the exclusion of pregnancy from a disability plan as sex discrimination "offends common sense," he further explained that the issue of whether the defendant's disability plan discriminated against women by failing to provide coverage for pregnancy appeared to turn on the "conceptual framework chosen to identify the . . . features of the [respondent's disability] program." Justice Brennan did not recognize the fact that how the issue was presented depended on the identity or perspective of the presenter to explain away one perspective of the issue while embracing another. Instead, this recognition served as Justice Brennan's basis to advocate for the examination of more relevant information, which included "due consideration to the uniqueness of 'disadvantaged' individuals" and a "realistic understanding of the conditions found in today's labor environment," when conducting a tight legal analysis.

211. See supra note 70 and accompanying text.
214. Id. at 147 (Brennan, J. dissenting). Brennan recognized that from the petitioner's perspective, the program excluded risks that are specific to women from an otherwise comprehensive plan, while the respondent framed the issue as a "gender-free assignment of risks." Id. As stated, this issue of alternative perspectives also exists with the proponents and opponents to finding a woman undergoing fertility treatment as within the scope of the PDA.
215. See id. at 147-48 (Brennan, J. dissenting); see also supra notes 205-207 and accompanying text.
216. See *Gilbert*, 429 U.S. at 159 (citing *Lau* v. Nichols, 414 U.S. 563 (1974)). The full reference to *Lau* reads: "[In *Lau,*] a unanimous Court recognized that discrimination is a social phenomenon enmeshed in a social context and therefore, unavoidably takes its meaning from the desired end products of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of 'disadvantaged' individuals." Id.; see also supra note 204 and accompanying text. The existence of an alternative perspective presents new facts, and "new
Therefore, finding that women undergoing fertility treatment are within the PDA's scope has support from the canons of statutory interpretation, the PDA's legislative history, and also in common-sense, which was Congress's true motivation for amending Title VII with the PDA. Perhaps the only remaining barrier to the inclusion of these women is simply the words that Congress chose to further its purpose.

In 1978, when Congress amended Title VII it probably seemed rational, or even slightly advanced\textsuperscript{217} to use the words "pregnancy, childbirth and other related medical conditions" to reach discrimination on the basis of a woman's potential for pregnancy. In 1998, however, ARTs have created the potential for pregnancy where it never existed before.\textsuperscript{218} Due to the significant medical advances with ARTs, the legal system is faced with many new questions that our laws at times seem unable to address as written.\textsuperscript{219} Therefore, a court may attempt to analogize the issue presented to an existing body of law,\textsuperscript{220} or, as the court in \textit{Krauel} did, hold that because the legislative body did not contemplate the presented situation when it drafted the legislation, the legislation should not cover the issue.\textsuperscript{221} With the advent of new ARTs and their increasing use, the potential facts present opportunities for improved understandings and 'integrations.'" Bartlett, \textit{supra} note 177, at 851.

\textsuperscript{217} Congressional attempts "to inject the abortion issue into every passing bill," including the PDA, suggests that Congress still saw the scope of abortion rights as an unclear and emerging area of the law. 124 \textit{CONG. REC.} 21,442 (1978). If five years after the Supreme Court recognized a woman's right to an abortion in \textit{Roe v. Wade}, 410 U.S. 113 (1973), Congress still considered abortion-related matters only as emerging issues, then arguably the seed to include ARTs within the PDA's scope had not yet even been planted in Congress because the first IVF baby was not born until 1978, the year of the PDA's enactment.

\textsuperscript{218} For example, physicians have begun to extract immature sperm from the testes of men, who due to blockages ejaculate no sperm at all, and through micro-manipulation use a single sperm to fertilize an egg. See Sharon Begley, \textit{The Baby Myth}, \textit{NEWSWEEK}, Sept. 4, 1995, at 43. This fertilization process is called intracytoplasmic sperm injection, or ICSI. See Dolores Kong, \textit{Clinics Get Little Oversight; What Price Pregnancy?}, \textit{BOSTON GLOBE}, Aug. 5, 1996, at A1.

\textsuperscript{219} Many legal questions exist regarding what type of laws apply to ARTs-related issues. See \textit{Robertson}, \textit{supra} note 5, at 103-14.

\textsuperscript{220} \textit{See id.} Who owns frozen embryos? Is this handled by property law or adoption law? \textit{See Davis v. Davis}, 842 S.W.2d 588, 597 (Tenn. 1992) (stating that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category . . . ."). What about surrogacy issues? \textit{See In re Baby M}, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), \textit{modified}, 537 A.2d 1227 (N.J. 1988) (The "only concept of law that can presently attach to surrogacy parenting arrangements are contract law and \textit{parents patriae} concepts for the benefit of the child."). Should the laws for sperm donation apply to egg donation? \textit{See McDonald v. McDonald}, 196 AD.2d 7, 12 (N.Y. App. Div. 1994) (holding that based on a couple's intention to have and raise offspring, the recipient of egg donation is recognized as the natural mother and the donor relinquished all potential parental rights).

\textsuperscript{221} Minnesota, Louisiana, and Illinois have amended their laws on homicide to include destroying or discarding embryos. See \textit{Robertson}, \textit{supra} note 5, at 108.

\textsuperscript{222} \textit{See Krauel v. Iowa Methodist Med. Ctr.}, 915 F. Supp. 102, 112 (S.D. Iowa 1995), \textit{aff'd}, 95 F.3d 674 (8th Cir. 1996).
for new lawsuits will also increase. Perhaps it is time for an amendment that reflected the realities of 1978 to be amended to reflect the realities of 1998.

CONCLUSION

Women undergoing fertility treatment to assist with conception currently face two risks not associated with their treatment that employees with other conditions do not face: their employer’s health plans may deny coverage for these procedures, or their employers may terminate them for “excessive absenteeism” while undergoing their fertility treatment. The question of whether these women have a cause of action under Title VII, as amended by the PDA, which defines discrimination on the basis of a woman’s potential for pregnancy as discrimination on the basis of sex, now confronts the courts.

The fact that courts may reach different conclusions on this issue suggests that two differing perspectives of infertility and its treatment exist. A court that allows a woman undergoing fertility treatment to state a claim recognizes that women and men do not have the same experience of infertility and fertility treatment. For a woman, infertility and fertility treatment are inseparable. A woman seeks diagnosis and treatment to learn why she cannot conceive and to assist with conception. Therefore, one may view a woman undergoing fertility treatment as having a potential for pregnancy. A court that dismisses this woman’s claim—by defining infertility as gender-neutral—does not recognize this woman’s experience of infertility. Instead the court will advance what can be termed a male experience of infertility, which does not include a potential for pregnancy. Moreover, a court that dismisses such a claim is frustrating Congress’s intention to protect women from employment discrimination resulting from a woman’s potential for pregnancy. Congress amended Title VII to prevent employers from affecting a woman’s employment status based solely on an outdated belief that she will resign after she becomes pregnant.

Including a woman undergoing fertility treatment within the scope of the PDA would further Congress’s purpose by protecting that woman’s potential for pregnancy. After all, if the initial premise is that an employer may discriminate against women on the belief that they will become pregnant, it necessarily follows that when a woman informs her employer that she is actively attempting to become pregnant she will face the same discrimination.