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Lethal But Not Disabled?—The Circuits Split on ADA Coverage of the Asymptomatic HIV-Positive Victim

I. Introduction

The first public report of the Human Immunodeficiency Virus (“HIV”) and Acquired Immune Deficiency Syndrome (“AIDS”) appeared on June 5, 1981, in a report by the Center for Disease Control.¹ As explained by Dr. C. Everett Koop, former Surgeon General of the Public Health Service, HIV infection is the underlying cause of AIDS, a disease that attacks the body with flu-like symptoms, causes detectable abnormalities of the immune system, and may result in physical impairments without visible signs of illness.² HIV also affects the brain and central nervous system and may cause, among other things, memory loss, loss of coordination, paralysis, and dementia.³

Following the 1981 report, people associated HIV and AIDS with generally deviant behavior, homosexuality, and death; they

1. See *Pneumocystis Pneumonia - Los Angeles*, 30 MORBIDITY & MORTALITY WKLY. REP. (U.S. Dep’t Health & Human Servs.), June 5, 1981, No. 21, at 251.

2. See Memorandum from Douglas Kmiec, Acting Assistant Attorney General, to Arthur B. Culvahouse Jr., Counsel to the President, *Justice Department Memorandum on the Application of Section 504 of the 1973 Rehabilitation Act to HIV-Infected Persons*, DAILY LAB. REP. (BNA) No. 195, at 5 (Oct. 7, 1988) [hereinafter Kmiec Memorandum].

3. See *id.* at 5 n.9.

referred to AIDS as the "gay plague."⁴ Panic spread throughout society and led to the exclusion of HIV-infected individuals from such areas as the workplace and schools.⁵ Health officials viewed this mass hysteria and resulting discrimination as an obstruction to rational public health strategies.⁶ They denounced it as negative stereotyping that would discourage the general public from seeking testing and counseling about HIV and AIDS and thus endanger the health of the entire American population.⁷

Over forty-three million Americans currently suffer from disabilities.⁸ Despite this considerable and ever-increasing number, society too often views those with disabilities, including those with HIV infection, as dangerous and deviant social outcasts.⁹ They "remind[] us of our corporeal limitations, our inability to control our fate, and ultimately, our mortality."¹⁰ In 1990, in response to impermissible segregation and isolation of individuals with disabilities,¹¹ Congress passed the Americans with Disabilities Act (the "ADA").¹² It intended to invoke the full sweep of congressional power to eliminate disability-based discrimination.¹³ The ADA forbids discrimination against individuals with disabilities by all entities covered by the ADA.¹⁴

Under the ADA, "The term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having

4. See Daniel J. Jackson & Wendy E. Parmet, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 9 (1997).

5. See *id.* at 10.

6. See *id.*

7. See *id.* at 10-11.

8. See The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)(1) (1990).

9. See Jackson & Parmet, *supra* note 4, at 11.

10. *Id.* at 12.

11. See 42 U.S.C. § 12101(a)(2).

12. 42 U.S.C. §§ 12101-12213.

13. See 42 U.S.C. § 12101(b)(4).

14. See 42 U.S.C. §§ 12101-12213. The ADA forbids discrimination against employees with disabilities by employers, employment agencies, labor organizations, and joint labor-management committees. See 42 U.S.C. § 12111(2). It forbids public entities, including state or local governments and commuter authorities, to discriminate against or deny benefits to individuals with disabilities. See *id.* §§ 12115(1), 12132. The ADA also forbids discrimination against individuals with disabilities by those who own, lease, or operate places of public accommodation, see *id.* § 12182(a), and by private entities that provide public transportation services. See *id.* § 12184(a).

such an impairment.”¹⁵ A recent split in the federal circuits has raised the question of whether an asymptomatic HIV-infected person qualifies as an individual with a disability under the ADA.¹⁶ The cases illustrate the inherent tension in the AIDS debate and perhaps reflect a divergence between political and social viewpoints and established law.

This Comment explores the recent debate over whether the ADA protects asymptomatic HIV-positive individuals from discrimination. First, Section II provides an overview of the history of ADA coverage of HIV infection. It focuses on relevant legislative history, administrative regulations, and case law. Section III presents a detailed look at the split in the federal circuits over ADA coverage of asymptomatic HIV infection. It traces two significant cases, outlining their factual and procedural backgrounds as well as the reasoning behind the First and Fourth Circuits' conflicting resolutions of the same problem. Section IV argues that both the law and public necessity demand ADA protection for asymptomatic HIV-positive victims. It concentrates on the ADA's definition of "disability," and suggests that the Fourth Circuit's denial of ADA coverage is inconsistent with legislative history, administrative regulations, and established case law. Section V addresses the Supreme Court's recent holding that the ADA does protect an asymptomatic HIV-positive plaintiff.¹⁷ Finally, this Comment concludes that asymptomatic HIV-positive persons qualify as individuals with disabilities under the ADA. Section VI examines the Fourth Circuit's narrow interpretation of the ADA, notes certain inconsistencies in and potential consequences of its logic, and recommends resolution of the federal conflict in favor of broad ADA coverage.

15. 42 U.S.C. § 12102(2).

16. Compare *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997) (holding that an asymptomatic HIV-infected person qualifies as an individual with a disability under the ADA), with *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (holding that an asymptomatic HIV-infected person does not qualify as an individual with a disability under the ADA).

17. The author wrote this Comment before the Supreme Court granted certiorari to hear the First Circuit case. Because of printing deadlines, discussion of the Supreme Court decision occurs at the end of the Comment, rather than throughout its text.

II. Background: The Evolution of ADA Coverage of Asymptomatic HIV Infection

Congress enacted the ADA with the intent to provide legal recourse to those suffering from disabling conditions and who have been intentionally "relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the . . . ability of such individuals to participate in, and contribute to, society."¹⁸ Congress defined the term "disability" broadly and failed to specify what conditions the term encompasses.¹⁹ Despite its use of liberal language, however, Congress simplified application of the ADA by requiring both the Department of Justice ("DOJ") and the Equal Employment Opportunity Commission ("EEOC") to issue regulations interpreting and implementing the ADA's scope and mandates.²⁰ Congressional support for agency regulations is evident in the ADA's legislative history.²¹ Legislative history,²² administrative regulations,²³ and settled precedent²⁴ all indicate that asymptomatic HIV infection constitutes a disability under the ADA.

A. Congress Intended ADA Protection for Asymptomatic HIV-Infected Individuals

When Congress passed the ADA in 1990, it intended for the ADA to cover asymptomatic HIV-infected individuals.²⁵ Congress expressly stated that persons with HIV, whether symptomatic or not, "have an impairment that substantially limits a major life

18. 42 U.S.C. § 12101(7).

19. *See id.* § 12102(2). "The term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.*

20. *See id.* §§ 12116, 12117, 12134(a); *see also* *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 585 (D.C. Cir. 1997). "Congress unquestionably delegated to the Department [of Justice] the authority to flesh out the statutory framework by issuance of its regulations." *Id.*

21. *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 52, pt. 3, at 28 n.18 (1990); S. REP. NO. 101-116, at 22 (1990).

22. *See infra* notes 25-44 and accompanying text.

23. *See infra* notes 45-59 and accompanying text.

24. *See infra* notes 60-93 and accompanying text.

25. *See* H.R. REP. NO. 101-485 at 28 n.18, 51-52; S. REP. NO. 101-116 at 22.

activity.”²⁶ It purposefully omitted a list of disabilities from the ADA for fear of excluding disorders that may develop in the future, but contemplated ADA protection for HIV-infected persons because of substantial limitations to both procreation and intimate sexual relations.²⁷ Even the ADA’s opponents agree that asymptomatic HIV infection constitutes a disability under the ADA.²⁸

Furthermore, while the ADA expressly excludes numerous behaviors and conditions from coverage, it does not exclude HIV infection.²⁹ Congress created specific exclusions in order to avoid protecting individuals from discrimination on the basis of socially unacceptable, immoral, or illegal behavior.³⁰ For instance, the ADA denies coverage to kleptomania,³¹ pyromania,³² exhibitionism,³³ and illicit drug use.³⁴ Had Congress viewed HIV infection as unacceptable or immoral, or intended its exclusion from ADA coverage, Congress would have listed it among those ailments to which it expressly denied disability status. Congress recognized, however, that HIV is a deadly condition affecting the hemic³⁵ and

26. H.R. REP. NO. 101-485 at 28 n.18.

27. *See id.* at 51-52; S. REP. NO. 101-116 at 22.

28. *See, e.g.*, 135 CONG. REC. S10,765-01 (daily ed. Sept. 6, 1989) (statement of Sen. Helms).

29. *See* The Americans with Disabilities Act of 1990, 42 U.S.C. § 12211 (1990) (excluding from coverage homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal drug use).

30. *See* 135 CONG. REC. S10,796 (daily ed. Sept. 7, 1989) (statement of Sen. Rudman). [W]e are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand. Where we as a people have through a variety of means, including our legal code, expressed disapproval of certain conduct, I do not understand how Congress can create the possibility that employers are legally liable for taking such conduct into account when making employment-related decisions.

Id.

31. *See* 42 U.S.C. §12211(b)(2). Kleptomania is defined as the “[o]bsessive desire to steal, esp[ecially] in the absence of economic necessity.” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 677 (1984).

32. *See* 42 U.S.C. § 12211(b)(2). Pyromania is defined as “[a]n irresistible urge to start fires.” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 959 (1984).

33. *See* 42 U.S.C. § 12211(b)(1). Exhibitionism is defined as the “[c]ompulsive exposure of the sexual organs in public.” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 452 (1984).

34. *See* 42 U.S.C. § 12211(b)(3).

35. *See* Kmiec Memorandum, *supra* note 2, at 5. Hemic is defined as “[o]f, relating to, or produced by blood.” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 575 (1984).

lymphatic³⁶ systems. Although an asymptomatic individual may appear outwardly healthy, that individual is seriously ill, similar to an individual with a disease like cancer.³⁷

Congress intended to protect both symptomatic and asymptomatic HIV-infected persons from discrimination.³⁸ Expressing agreement with a DOJ memorandum written by the former assistant attorney general, and consistent with DOJ regulations, Congress stated, "as noted by the U.S. Department of Justice, . . . a person infected with HIV is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships."³⁹ When Congress enacts a statute voicing approval of administrative regulations, it essentially adopts those regulations and renders them binding authority.⁴⁰

Congressional resolve to protect asymptomatic HIV-infected persons is evidenced not only by documented legislative history and by the deliberate exclusion of HIV from an enumerated list of non-disabilities, but by the ADA itself.⁴¹ The ADA states that "nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973."⁴² The Rehabilitation Act's definition of an individual with a handicap is substantially the same as the ADA's definition of an individual with a disability.⁴³ Additionally, courts have declared that the Rehabilitation Act protects asymptomatic victims

36. See Kmiec Memorandum, *supra* note 2, at 5. The lymphatic system is "[t]he interconnected system of spaces and vessels between tissues and organs by which lymph is circulated throughout the body," and lymph is "[a] clear, transparent, watery, occas[ionally] faintly yellowish liquid that contains white blood cells and some red blood cells, . . . and acts to remove bacteria and certain proteins from the tissues, transport fat from the intestines, and supply lymphocytes to the blood." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 710 (1984).

37. See Kmiec Memorandum, *supra* note 2, at 5.

38. See *supra* notes 25-34 and accompanying text.

39. H.R. REP. No. 101-485, pt. 2, at 52 (1990).

40. See *United States v. Board of Comm'rs.*, 435 U.S. 110, 134 (1978).

41. See The Americans with Disabilities Act of 1990, 42 U.S.C. § 12201(a) (1990).

42. *Id.*

43. See The Rehabilitation Act of 1973, 29 U.S.C. § 706(7)(b)(1973). An individual with a handicap is "any person who (I) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." *Id.*; see also 42 U.S.C. § 12102(2) (defining "disability" under the ADA).

of HIV.⁴⁴ Hence, it is evident that Congress drafted the ADA intending to protect asymptomatic HIV-positive individuals against undue discrimination.

B. Administrative Regulations Define Asymptomatic HIV Infection as a Disability Under the ADA

In addition to legislative history and statutory text, administrative regulations define asymptomatic HIV infection as a disability under the ADA.⁴⁵ The ADA empowers both the DOJ and the EEOC to promulgate regulations implementing the ADA.⁴⁶ While such regulations are not binding authority, courts must accord them significant deference in applying ADA provisions.⁴⁷

Agency regulations recognize that asymptomatic HIV infection is an impairment under the ADA's definition of disability.⁴⁸ A physical or mental impairment is "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: . . . reproductive, . . . hemic and lymphatic," and "includes, but is not limited to, such contagious and noncontagious diseases and conditions as . . . HIV

44. See, e.g., *Chalk v. United States Dist. Court*, 840 F.2d 701 (9th Cir. 1988); *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989); *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440 (N.D. Ill. 1988); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987); *Local 1812, Am. Fed'n of Gov't Employees v. Department of State*, 662 F. Supp. 50 (D.D.C. 1987); *Martinez v. School Bd.*, 675 F. Supp. 1574 (M.D. Fla. 1987); *Shuttleworth v. Broward County*, 649 F. Supp. 35 (S.D. Fla. 1986); *Raytheon Co. v. California Fair Employment and Hous. Comm'n*, 261 Cal. Rptr. 197 (Cal. Ct. App. 1989); *Board of Educ. v. Cooperman*, 507 A.2d 253 (N.J. Super. App. Div. 1986), *aff'd*, 523 A.2d 655 (N.J. 1987); *District 27 Community Sch. Bd. v. Board of Educ.*, 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986).

45. See *infra* notes 48-59 and accompanying text.

46. See 42 U.S.C. §§ 12116, 12117, 12134(a).

47. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984) (emphasizing that courts must defer to agency regulations implementing ambiguous legislation); see also *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 585 (D.C. Cir. 1997) (relying on DOJ regulations to apply the ADA, and noting that agency regulations are due significant deference because of their legal and policymaking authority); *Board of Regents of the Univ. of Minn. v. Shalala*, 53 F.3d 940, 943 (8th Cir. 1995) (affording broad deference to agency regulations in interpreting the ADA); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 781 (1st Cir. 1990) (finding agency regulations to be significantly persuasive). See generally *Ferguson v. Phoenix*, 931 F. Supp. 688 (D. Ariz. 1996) (deferring to agency technical assistance manuals in interpreting the ADA with respect to its requirements for making 911 emergency systems accessible to hearing impaired persons); *Pinnock v. Int'l House of Pancakes*, 844 F. Supp. 574 (S.D. Cal. 1993), *cert denied*, 512 U.S. 1228 (1994) (relying on administrative regulations and technical assistance manuals in rejecting a constitutional challenge to the ADA).

48. See 29 C.F.R. § 1630(2)(h)-(j) (1995); 28 C.F.R. § 36.104 (1994).

disease (whether symptomatic or asymptomatic)."⁴⁹ The regulations also acknowledge that reproduction is a major life activity within the ADA's contemplation.⁵⁰ While they list only such major life activities as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and reading,⁵¹ they use the words "such as," indicating that the enumeration of activities is not exclusive and is broad enough to include reproduction.⁵² Moreover, the ADA uses the term "major life activity" as defined by the regulations implementing the Rehabilitation Act of 1973,⁵³ and precedent establishes that reproduction is a major life activity within the purview of that Act.⁵⁴

Administrative regulations explain that an impairment will substantially limit a major life activity when it renders an individual less able to perform the activity, or when it significantly restricts an individual in the condition, manner, or duration under which that individual can perform the activity as compared to the average person in the general population.⁵⁵ In determining whether individuals are substantially limited in their ability to perform a major life activity, a court should ignore the availability and effects of medications or other mitigating measures.⁵⁶ A court should focus on the nature and severity of an impairment, how long the impairment will last or is expected to last, and the impairment's

49. 29 C.F.R. § 1630(2)(h)-(j); 28 C.F.R. § 36.104.

50. See *infra* notes 51-54 and accompanying text.

51. See 29 C.F.R. § 1630(2)(i); 28 C.F.R. § 36.104; U.S. Equal Employment Opportunity Commission, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, at II-3, (1992) [hereinafter EEOC TA Manual].

52. See *Abbott v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997).

53. See 29 C.F.R. § 1630(2)(i).

54. See, e.g., *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992) (holding that Doe's HIV-positive status is a physical impairment that substantially limits the major life activities of "procreation, sexual contact, and normal social relationships"); *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 445 (N.D. Ill. 1988) (noting that an asymptomatic HIV-positive child "may not engage in reproductive functions without endangering the lives of others. While [he] may not yet be of an age where such activity is appropriate, the mere prospect of such a limitation is certain to restrict social interaction with those of the opposite sex."); see also *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 379 (C.D. Cal. 1987). "Persons infected with the AIDS virus suffer significant impairments of their major life activities Even those who are asymptomatic have abnormalities . . . making procreation and childbirth dangerous to themselves and others." *Id.*

55. See 29 C.F.R. § 1630(2)(j).

56. See EEOC TA Manual, *supra* note 51, at II-4.

permanent, long term, or expected impact.⁵⁷ Regulations declare that due to the permanently debilitating and deadly nature of HIV infection, whether symptomatic or asymptomatic, the virus is inherently and substantially limiting.⁵⁸ Asymptomatic HIV substantially limits an infected individual's ability to engage in the major life activity of reproduction because of the significant danger of transmitting the virus to the individual's child during pregnancy.⁵⁹

C. Courts Tend to Apply the ADA to Asymptomatic HIV-Positive Individuals

Established case law indicates that asymptomatic HIV infection constitutes a disability under the ADA. The definition of an individual with a handicap under the Rehabilitation Act of 1973 is equivalent to that of an individual with a disability under the ADA.⁶⁰ Also, the ADA states that its provisions do not apply lesser standards than those applied under the Rehabilitation Act.⁶¹ Thus, courts have acknowledged that case law interpreting the meaning of "handicap" under the Rehabilitation Act applies equally to interpretations of "disability" in ADA cases.⁶²

The United States Supreme Court, in *School Board of Nassau County, Florida v. Arline*,⁶³ held that contagious diseases clearly fall within the definition of "handicap" under the Rehabilitation Act.⁶⁴ In *Arline*, where a school teacher with recurring tuberculosis brought a suit under the Rehabilitation Act to challenge her

57. See *id.*

58. See *id.*; 29 C.F.R. § 1630, app. § 1630(2)(I).

59. See 29 C.F.R. § 1630, app. § 1630(2)(I).

60. See The Rehabilitation Act of 1973, 29 U.S.C. § 706(7)(B) (1973). An individual with a handicap is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." *Id.*; see also The Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (1990). "The term 'disability' means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.*

61. See 42 U.S.C. § 12201(a). "[N]othing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title." *Id.* (citation omitted).

62. See, e.g., *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 803 (N.D. Ill. 1996). As the definition of disability is the same under both the Rehabilitation Act and the ADA, case law regarding that definition under the Rehabilitation Act applies to ADA actions. See *id.*

63. 480 U.S. 273 (1987).

64. See *id.* at 277.

dismissal, the Supreme Court explained that contagious diseases are impairments because they cause "diminished physical or mental capabilities" in their victims.⁶⁵ A recent split in the federal circuits has raised the question of whether asymptomatic HIV infection also falls within the definition of "handicap" or "disability".⁶⁶ Consistent with *Arline*, the First Circuit has held that HIV infection, whether symptomatic or not, is a physical impairment under the ADA.⁶⁷ In contrast, the Fourth Circuit has found that an asymptomatic individual does not have an impairment under the ADA due to a lack of visible suffering or illness.⁶⁸

Various courts support the First Circuit's holding, for HIV cripples multiple bodily systems, including the hemic, lymphatic, and reproductive systems, and impairs individuals because of both its biological effects and the fear it inspires in others.⁶⁹ Although one who contracts HIV might not exhibit symptoms for a significant period of time, if ever,⁷⁰ courts do not distinguish between those who have developed full-blown AIDS and those who have remained asymptomatic.⁷¹ For example, in *Gates v. Rowland*,⁷² the Ninth Circuit refused to distinguish between symptomatic and asymptomatic HIV.⁷³ The court explained that "it is the possible transmission of the virus to others that is the basis of the individual's disability under the provisions of the Act."⁷⁴

Similarly, in *Austin v. Pennsylvania Department of Corrections*,⁷⁵ a Pennsylvania district court approved a settlement agreement satisfying inmates' challenges to various prison practices

65. See *id.* at 281.

66. Compare *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997) (holding that an asymptomatic HIV-positive individual has a disability under the ADA) *vacated and remanded*, 118 S. Ct. 2196 (1998), with *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (holding that an asymptomatic HIV-positive individual does not have a disability under the ADA).

67. See *Abbott*, 107 F.3d at 938.

68. See *Runnebaum*, 123 F.3d at 169; *Ennis v. National Ass'n of Bus. and Educ. Radio, Inc.*, 53 F.3d 55, 60 (4th Cir. 1995).

69. See, e.g., *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 281 (1987); *Austin v. Pennsylvania Dep't of Corrections*, 876 F. Supp. 1437, 1465 (E.D. Pa. 1995); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990).

70. See *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Cain*, 734 F. Supp. at 679.

71. See, e.g., *Gates*, 39 F.3d at 1446; *Harris v. Thigpen*, 941 F.2d 1495, 1522-24 (11th Cir. 1991); *Austin*, 876 F. Supp. at 1465; *Cain*, 734 F. Supp. at 679.

72. 39 F.3d 1439.

73. See *id.* at 1446.

74. *Id.*

75. 876 F. Supp. 1437.

and conditions, and noted that asymptomatic HIV infection is an impairment both because of its physical effects on the body and because of the fear it inspires in others.⁷⁶ The *Austin* decision was consistent with prior case law, which established that HIV infection, whether symptomatic or asymptomatic, is an impairment because it is an incurable and fatal disease that collapses its victims' immune systems and leads to various infections and malignancies.⁷⁷

Courts have found not only that asymptomatic HIV infection is an impairment, but that the virus substantially limits the major life activities of procreation, sexual contact, and normal social relations.⁷⁸ In *Doe v. District of Columbia*,⁷⁹ an applicant for a fire-fighter position sued the District of Columbia under the Rehabilitation Act, charging that the District's withdrawal of its offer of employment subsequent to its learning of his HIV-positive status violated the Act.⁸⁰ The court held that the asymptomatic applicant had a physical impairment that substantially limited the major life activities of procreation, sexual contact, and normal social relations.⁸¹

Similarly, in *Abbott v. Bragdon*,⁸² the First Circuit granted relief under the ADA to an asymptomatic HIV-positive woman whose dentist refused to fill her cavity in the routine office setting and for the customary fee.⁸³ The court held that "HIV-positive status has a profound impact upon . . . ability to engage in intimate sexual activity, gestation, giving birth, childrearing, and nurturing familial relations."⁸⁴ The *Abbott* decision reinforced the holding in *Harris v. Thigpen*,⁸⁵ a prior Eleventh Circuit case in which the court found that asymptomatic HIV is a physical impairment that substantially limits the major life activity of normal social relations

76. *See id.* at 1465.

77. *See Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990).

78. *See, e.g., Abbott v. Bragdon*, 107 F.3d 934, 939 (1st Cir. 1997), *vacated and remanded*, 118 S. Ct. 2196 (1998); *Harris v. Thigpen*, 941 F.2d 1495, 1522-1524 (11th Cir. 1991); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992).

79. 796 F. Supp. 559.

80. *See id.* at 559.

81. *See id.* at 568.

82. 107 F.3d 934.

83. *See id.* at 937.

84. *Id.* at 939.

85. 941 F.2d 1495 (11th Cir. 1991).

because the public regards HIV-positive individuals as handicapped and discriminates against them due to a fear of contagion.⁸⁶

Despite some courts' view that procreation is not a major life activity because it involves voluntary conduct that people engage in less frequently than such activities as walking and speaking,⁸⁷ the Supreme Court, in *Stanley v. Illinois*,⁸⁸ labeled reproduction a precious, essential, and basic civil liberty.⁸⁹ In *Pacourek v. Inland Steel Company*,⁹⁰ an employee successfully obtained a judgment under the ADA against her employer who had discriminated against her on the basis of her infertility.⁹¹ The court followed the Supreme Court's reasoning in *Stanley*, defined "major life activity" in terms of quality rather than quantity, and noted that reproduction is esteemed as one of the most significant achievements in life without which the continuation of the human race would be doomed.⁹² Similarly, in *Abbott*, the First Circuit stressed that asymptomatic HIV substantially limits the major life activity of reproduction because it limits its victim's ability to procreate without significant risk to the life of his or her offspring, and perhaps to him- or herself.⁹³ Although a few courts have found that asymptomatic HIV does not satisfy the criteria necessary to obtain ADA protection, many state and federal courts have held that the asymptomatic HIV-positive individual suffers from a disability covered by the ADA.

86. *See id.* at 1522-24.

87. *See Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 170-72 (4th Cir. 1997); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995).

88. 405 U.S. 645 (1972).

89. *See id.* at 651.

90. 916 F. Supp. 797 (N.D.Ill. 1996).

91. *See id.* at 804.

92. *See id.*

93. *See Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir. 1997), *vacated and remanded*, 118 S. Ct. 2196 (1998).

III. Federal Circuits Split: Are Asymptomatic HIV-Positive Individuals Entitled to ADA Protection?

A. *Abbott v. Bragdon: ADA Protection for Asymptomatic HIV Victims*

In March of 1997, in *Abbott v. Bragdon*,⁹⁴ the First Circuit affirmed a lower court ruling in favor of Sidney Abbott, an asymptomatic HIV-positive woman who claimed that her dentist violated the ADA by refusing to treat her in his office because of her HIV status.⁹⁵ On September 16, 1994, Ms. Abbott arrived at Dr. Randon Bragdon's office for a scheduled dentist appointment.⁹⁶ Although asymptomatic at the time, she was honest on her patient registration form and indicated her infection with the HIV virus.⁹⁷ After examining Ms. Abbott and discovering a cavity, Dr. Bragdon informed Ms. Abbott that he would perform the routine treatment of filling her cavity only in a hospital setting and only if she bore the extra costs of using hospital facilities.⁹⁸ After refusing Dr. Bragdon's offer, Ms. Abbott filed a discrimination complaint against him under the ADA.⁹⁹

The United States District Court for the District of Maine granted summary judgment in favor of Ms. Abbott.¹⁰⁰ The court ruled that HIV infection is an impairment that substantially limits its victim in the major life activity of reproduction and thus constitutes a protected disability under the ADA.¹⁰¹ The district court held that Dr. Bragdon's refusal to treat Ms. Abbott in his office, which could be done safely, violated the ADA.¹⁰²

On appeal, the First Circuit noted that a court's role in applying the ADA "is not to set public policy, but, rather, to discern the legislature's will."¹⁰³ Affirming the district court's ruling, the First Circuit held that HIV infection, whether accompa-

94. 107 F.3d 934.

95. *See id.* at 937-38.

96. *See id.* at 937.

97. *See id.*

98. *See id.*

99. *See Abbott*, 107 F.3d at 937-38.

100. *See id.* at 938.

101. *See id.*

102. *See id.*

103. *Id.*

nied by symptoms or not, is a physical impairment under the ADA.¹⁰⁴ The court relied on administrative regulations as well as on the reasoning of other courts, both of which have found asymptomatic HIV to be a disability under the ADA.¹⁰⁵ As Congress did not intend for the ADA to apply only to traditional handicaps, the question of whether asymptomatic HIV constitutes an impairment was not the central issue in the case, and the court viewed an affirmative answer as sufficiently established in both statutory and common law.¹⁰⁶

The *Abbott* court focused primarily on whether reproduction is a major life activity.¹⁰⁷ It emphasized that agencies empowered to promulgate regulations implementing the ADA must view reproduction as a major life activity, for they would not otherwise have included the reproductive system in the regulations as a bodily system the debilitation of which constitutes a physical impairment.¹⁰⁸ The court also noted that as the ADA fails to define "major life activity," courts should look to the terms' natural meanings.¹⁰⁹ As the dictionary defines "major" as greater in importance or rank, the First Circuit reasoned that "the touchstone for determining an activity's inclusion under the statutory rubric is its significance—and reproduction, which is both the source of all life and one of life's most important activities, easily qualifies under that criterion."¹¹⁰

In addition to determining that reproduction is a "major life activity" because of the natural meaning of those terms, the First Circuit denied Dr. Bragdon's claim that reproduction cannot be a major life activity because it is merely a lifestyle choice.¹¹¹ The court stressed that nearly all human conduct has elements of choice.¹¹² For example, speaking is a major life activity, but some, like monks, choose to remain silent.¹¹³ Reproduction is a major life activity regardless of whether an individual chooses to

104. See *Abbott*, 107 F.3d at 939.

105. See *id.*

106. See *id.*

107. See *id.* at 939-42.

108. See *id.* at 940.

109. See *Abbott*, 107 F.3d at 939 (citing *Bailey v. United States*, 516 U.S. 137, 145 (1995); *Smith v. United States*, 508 U.S. 223, 228 (1993)).

110. *Id.* at 939-40.

111. See *id.* at 940-41.

112. See *id.* At 941.

113. See *id.*

procreate in a given situation.¹¹⁴ Neither frequency nor universality is necessary for conduct to be major, and procreation's dependence on the making of lifestyle choices does not render it inferior to other conduct, all of which necessarily depends upon the exercise of volition.¹¹⁵ Reproduction is a major life activity because of its great importance to those who engage in it.¹¹⁶

In *Abbott*, the First Circuit also held that an asymptomatic HIV-positive woman is substantially limited in her ability to reproduce.¹¹⁷ Recognizing that individualized inquiry does not mandate consideration of whether reproduction is of particular importance to a given ADA plaintiff,¹¹⁸ the court held that HIV in general substantially limits the major life activity of reproduction.¹¹⁹ The court found that "No reasonable juror could conclude that an 8% risk of passing an incurable, debilitating, and inevitably fatal disease to one's child is not a substantial restriction on reproductive activity."¹²⁰ Furthermore, the court recognized that if an HIV-positive individual has a healthy child, it is unlikely that the parent will live long enough to raise the child to adulthood.¹²¹ The *Abbott* court held that HIV infection, whether symptomatic or asymptomatic, is a physical impairment that limits the major life activity of reproduction and constitutes a protected disability under the ADA.¹²²

B. Runnebaum v. NationsBank of Maryland: Discrimination Against Asymptomatic HIV Victims Does Not Violate the ADA

In August of 1997, in *Runnebaum v. NationsBank of Maryland*,¹²³ the Fourth Circuit issued an *en banc* ruling against William Runnebaum, an asymptomatic HIV-positive individual charging his former employer with ADA-prohibited discrimination.¹²⁴ Mr. Runnebaum, a homosexual who was diagnosed with

114. See *Abbott*, 107 F.3d at 941.

115. See *id.*

116. See *id.*

117. See *id.* at 942.

118. See *id.* at 941-42.

119. See *Abbott*, 107 F.3d at 942.

120. *Id.*

121. See *id.*

122. See *id.* at 949.

123. 123 F.3d 156 (4th Cir. 1997).

124. See *id.* at 161.

AIDS in 1988, worked for NationsBank for nearly two years before the bank fired him.¹²⁵ He had worked for the bank for over a year before revealing his HIV-positive status to his supervisor.¹²⁶

Although Mr. Runnebaum remained asymptomatic during the course of his employment at NationsBank, his supervisor, also a homosexual, panicked upon learning of his HIV infection.¹²⁷ Three weeks later, another department supervisor scolded Mr. Runnebaum for jocular behavior in staff meetings and decided that the bank should discharge him.¹²⁸ Mr. Runnebaum subsequently inquired into whether the bank's employee health plan would subsidize his AIDS medication, and had azidothymidine ("AZT"), a prescription drug used to treat HIV and AIDS, delivered to him at the bank.¹²⁹ On two separate occasions, bank personnel inadvertently opened packages containing AZT and addressed to Mr. Runnebaum.¹³⁰ Four months later, the bank claimed that Mr. Runnebaum was unable to meet reduced sales goals or to conduct himself professionally and fired him.¹³¹

After receiving a right-to-sue letter from the EEOC, Mr. Runnebaum filed suit against NationsBank in the United States District Court for the District of Maryland.¹³² He claimed that the bank had fired him because of his HIV-positive status, a condition that he contended renders him disabled under the ADA and entitles him to federal protection against discrimination based on his HIV status.¹³³ In 1994, the district court granted summary judgment in favor of NationsBank.¹³⁴ The court found that Mr. Runnebaum had failed to prove that NationsBank had fired him because of his HIV status and that the bank had proffered a legitimate nondiscriminatory reason for its conduct.¹³⁵

On appeal, the Fourth Circuit reviewed not only the district court's grant of summary judgment based on a lack of evidence of discriminatory purpose, but also the assumption made by both

125. *See id.* at 161-63.

126. *See id.* at 161-62.

127. *See id.* at 162.

128. *See Runnebaum*, 123 F.3d at 162.

129. *See id.*

130. *See id.*

131. *See id.* at 163.

132. *See id.*

133. *See Runnebaum*, 123 F.3d at 163.

134. *See id.*

135. *See id.*

parties and by the district court that Mr. Runnebaum suffered from an ADA-protected disability.¹³⁶ Although there was evidence of unsatisfactory work performance that may have hindered Mr. Runnebaum's ability to show discrimination on the basis of HIV status,¹³⁷ the Fourth Circuit held that Mr. Runnebaum was not entitled to ADA protection regardless of whether the bank fired him because of his HIV-positive status.¹³⁸ It held that asymptomatic HIV does not meet the statutory definition of disability because it is not an impairment that substantially limits a major life activity.¹³⁹

The Fourth Circuit first determined that asymptomatic HIV infection is not an impairment.¹⁴⁰ The court stated that neither legislative history nor administrative regulations is persuasive on the issue, and that either's acceptance of the virus as a disability is evidenced merely in "isolated passages" and "obscure references."¹⁴¹ The Fourth Circuit found that the term "impair" can have only one meaning, and as Congress failed to define it, the court relied on its dictionary definition: to make worse or to have diminishing effects.¹⁴² The court ruled that asymptomatic HIV is not an impairment, and reasoned that a deadly virus cannot have diminishing effects on its victims without outwardly visible symptoms.¹⁴³ The court refused to consider legislative history,¹⁴⁴ remarking that Committee Reports fail to distinguish between symptomatic and asymptomatic HIV,¹⁴⁵ and contemplated Mr. Runnebaum's lack of ill experience with medications.¹⁴⁶

The Fourth Circuit next determined that procreation is probably not a major life activity contemplated by the ADA.¹⁴⁷ It found that in order to qualify as a major life activity, an activity must fall within the dictionary definition of "major."¹⁴⁸ The

136. *See id.* at 164, 165 n.4.

137. *See id.* at 161-64.

138. *See Runnebaum*, 123 F.3d at 176.

139. *See id.* at 169.

140. *See id.*

141. *Id.* at 167.

142. *See id.* at 168.

143. *See Runnebaum*, 123 F.3d at 168-69.

144. *See id.* at 168.

145. *See id.* at 169.

146. *See id.*

147. *See id.* at 170.

148. *See Runnebaum*, 123 F.3d at 170.

activity must require attention or concern, and it must be “relatively more significant or important than other life activities.”¹⁴⁹ The court held that although procreation is one of the most fundamental of human activities, it is not major enough to qualify as a major life activity under the ADA.¹⁵⁰

Finally, the Fourth Circuit held that even if procreation were a major life activity, asymptomatic HIV infection does not substantially limit its victim’s ability to engage in procreation.¹⁵¹ The court determined that nothing inherent in asymptomatic HIV prevents procreation, which is merely a matter of personal lifestyle choice and the exercise of one’s good sense.¹⁵² The court rejected the view that HIV infection substantially limits reproduction because of the significant risk of transmission, and held that, as a physical matter, there is no causal nexus between HIV and reproduction.¹⁵³ While claiming not to create a per se rule excluding asymptomatic HIV-positive individuals from ADA coverage,¹⁵⁴ the Fourth Circuit pronounced that “asymptomatic HIV does not substantially limit procreation or intimate sexual relations for purposes of the ADA,”¹⁵⁵ and that “asymptomatic HIV infection will never qualify as an impairment.”¹⁵⁶

The *Runnebaum* court also held that the ADA would not protect Mr. Runnebaum based on his being regarded as having an impairment that substantially limits one or more of his major life activities.¹⁵⁷ It stated that, in order to afford ADA protection on such a basis, a court must make a factual determination that the relevant and allegedly discriminating decisionmakers actually perceived the HIV-positive plaintiff as having such an impairment.¹⁵⁸ The Fourth Circuit concluded that there was no evidence that bank administrators perceived Mr. Runnebaum as having an impairment that substantially limits one or more of his major life activities, or that the bank’s awareness of his HIV

149. *Id.*

150. *See id.*

151. *See id.* at 172.

152. *See id.*

153. *See Runnebaum*, 123 F.3d at 172.

154. *See id.* at 167.

155. *Id.* at 172.

156. *Id.* at 169.

157. *See id.* at 174.

158. *See Runnebaum*, 123 F.3d at 172.

infection motivated its decision to fire him.¹⁵⁹ The court held that Mr. Runnebaum failed to satisfy the ADA's definition of an individual with a disability, and thus affirmed the district court's grant of summary judgment in favor of NationsBank.¹⁶⁰

IV. Legal Requirements and Public Necessity: The Asymptomatic HIV-Positive Individual is Entitled to ADA Protection

Both statutory mandates and societal well-being demand that the judiciary forbid discrimination on the basis of HIV infection, whether symptomatic or asymptomatic.¹⁶¹ Courts should not contemplate individual responsibility for one's own infection, but should focus on the widespread social threat of AIDS.¹⁶² HIV is not a private matter, but an infectious disease and a deadly public threat that increases as discrimination deters openness and honesty with sexual partners as well as willingness to seek testing and to heed health advice.¹⁶³ HIV is lethal to its carrier and to those its carrier contacts via sexual intercourse, blood transfusions, or perinatal activity.¹⁶⁴ HIV is not a trivial or insignificant impairment undeserving of ADA protection, but, whether symptomatic or asymptomatic, is a serious and debilitating illness affecting the immune, nervous, and reproductive systems.¹⁶⁵ Failure to prohibit discrimination based on HIV status constitutes failure to protect those with crippled bodily systems and increases the already significant risk of transmitting the AIDS virus.

159. *See id.* at 173-74.

160. *See id.* at 175.

161. *See* The Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (1990) (defining the term "disability" under the Act); *see also* H.R. REP. NO. 101-485, pt. 2, at 51-52, pt. 3, at 28 n.18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 333-34, 450-51 (supporting ADA coverage of asymptomatic HIV infection) [hereinafter H.R. REP. NO. 101-485]; S. REP. NO. 101-116, at 22 (1990) (supporting ADA coverage of asymptomatic HIV infection); 29 C.F.R. § 1630(2)(h)-(j) (1995) (supporting ADA coverage of asymptomatic HIV infection); 28 C.F.R. § 36.104 (1994) (supporting ADA coverage of asymptomatic HIV infection). *See generally* Jackson & Parmet, *supra* note 4, at 7-20 (discussing the impact of HIV and AIDS on society and the importance of ADA protection of the infected).

162. *See generally* Jackson & Parmet, *supra* note 4, at 10-11 (discussing the reactions of both the President's Commission on the Human Immunodeficiency Virus and public health officials to HIV-motivated discrimination).

163. *See generally id.* at 40-41 (discussing the public nature of HIV and AIDS).

164. *See* Cain v. Hyatt, 734 F. Supp. 671, 679-80 (E.D. Pa. 1990).

165. *See* Kmiec Memorandum, *supra* note 2, at 5 n.9.

The recent split in the federal circuits illustrates the tension inherent in the AIDS debate.¹⁶⁶ In *Abbott*, the First Circuit considered legislative history and administrative regulations, acknowledged the physical effects of HIV on the human body, recognized the central role of reproduction in a person's life, and emphasized the unreasonableness of denying the asymptomatic HIV-positive individual ADA protection.¹⁶⁷ In contrast, in *Runnebaum*, the Fourth Circuit pandered to the very irrationality that denies victims of a permanently debilitating and fatal disease federal protection against undue discrimination.¹⁶⁸ The Fourth Circuit's reasoning that a lack of outwardly visible symptoms proves the lack of any impairment¹⁶⁹ ignores the detectable physical abnormalities of the HIV victim's immune system and the conclusion of the former Surgeon General "that from a purely scientific perspective, persons with HIV infection are clearly impaired."¹⁷⁰ The *Runnebaum* court overlooked regulations that the ADA itself authorizes,¹⁷¹ and rejected the reasoning of the numerous courts that have held in favor of ADA protection for asymptomatic HIV-positive individuals.¹⁷² Perhaps most importantly, the Fourth Circuit has turned its back on a population that is treated with disgust and contempt for no evident reasons other than irrational fear and foolish myth.¹⁷³

Under the ADA, "The term 'disability' means, with respect to an individual, (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."¹⁷⁴ Despite the Fourth Circuit's failure to recognize that an asymptomatic victim of HIV likely

166. See cases cited *supra* note 16.

167. See *Abbott v. Bragdon*, 107 F.3d 934, 942-43 (1st Cir. 1997), *vacated and remanded*, 118 S. Ct. 2196 (1998).

168. See *generally* *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (denying disability status under the ADA to an asymptomatic HIV-positive plaintiff).

169. See *id.* at 168.

170. Kmiec Memorandum, *supra* note 2, at 5.

171. See *Runnebaum*, 123 F.3d at 166; see also The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12116, 12117, 12134(a) (1990) (empowering both the DOJ and the EEOC to promulgate regulations to implement the ADA).

172. See *Runnebaum*, 123 F.3d at 156; see also *supra* notes 59-93 and accompanying text (discussing the tendency at common law to afford disability status under the ADA to the asymptomatic HIV-positive individual).

173. See *Cain v. Hyatt*, 734 F. Supp. 671, 680 (E.D. Pa. 1990).

174. 42 U.S.C. § 12102(2).

meets both the first and third prongs of this definition, courts should hold in future cases that such infected persons qualify as individuals with disabilities under the ADA. Courts should reject the Fourth Circuit's reasoning and adopt the First Circuit's approach to ADA coverage of HIV and AIDS.

A. The Fourth Circuit Failed to Follow the Evidence: Asymptomatic HIV Infection is an Impairment that Substantially Limits One or More Major Life Activities

The Fourth Circuit's 1997 decision in *Runnebaum* to deny disability status under the ADA to an asymptomatic HIV-positive individual discounts established precedent,¹⁷⁵ ignores medical evidence,¹⁷⁶ mocks congressional intent,¹⁷⁷ and defies logic.¹⁷⁸

1. Medical, Legislative, and Administrative Evidence: Asymptomatic HIV Infection is a Physical Impairment—The former Surgeon General, Dr. C. Everett Koop, concluded that asymptomatic HIV-positive individuals are clearly physically impaired from a scientific perspective.¹⁷⁹ He determined that even though they appear outwardly healthy, they are in fact seriously ill with a detectable condition affecting the hemic and lymphatic systems.¹⁸⁰ The United States Supreme Court has pronounced that courts should defer to the advice of medical experts.¹⁸¹

Although the Surgeon General's findings were available to both the First and Fourth Circuits at the time of the *Abbott* and *Runnebaum* decisions,¹⁸² the Fourth Circuit failed to defer to the Surgeon General's medical expertise.¹⁸³ The court relied instead on its own reasoning that, unless one's symptoms are visible to the

175. See *supra* notes 60-93 and accompanying text.

176. See generally Kmiec Memorandum, *supra* note 2, at 5 (discussing the former Surgeon General's medical findings with regard to HIV and AIDS).

177. See *supra* notes 25-59 and accompanying text.

178. See *infra* notes 215-260, 267-269 and accompanying text.

179. See Kmiec Memorandum, *supra* note 2, at 5.

180. See *id.*

181. See *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 288 (1987). Courts "should defer to the reasonable medical judgments of public health officials." *Id.*

182. The Surgeon General's findings are detailed in the Kmiec Memorandum to which both the First and Fourth Circuits had access and on which the Fourth Circuit relied in its *Runnebaum* opinion. See Brief for the United States as Amicus Curiae at 19 n.6, *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997) (No. 96-1643), *vacated and remanded*, 118 S. Ct. 2196 (1998); *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997).

183. See *Runnebaum*, 123 F.3d at .

court's eye, one can suffer no diminishing effects.¹⁸⁴ In addition to defying precedent, such logic fails to follow the type of medical advice that society relies on daily in putting trust and faith in doctors to diagnose and treat ailments. If all courts were to disregard expert medical knowledge and professional advice in favor of their own medical opinions, they would no longer represent a pinnacle of justice, but a mockery of those professions that the public holds in highest esteem.

In addition to clear medical pronouncements, both legislative history and administrative regulations clarify that asymptomatic HIV infection is a physical impairment.¹⁸⁵ In *Abbott*, the First Circuit properly deferred to the regulations in finding that Ms. Abbott suffered from an impairment even though she did not manifest any outwardly visible symptoms.¹⁸⁶ As the *Abbott* court noted, a court's role is to "discern the legislature's will."¹⁸⁷ Furthermore, ADA regulations embody congressional intent in passing the ADA,¹⁸⁸ and courts should accord significant weight to them.¹⁸⁹ As the agencies that promulgate regulations have the final authority to do so, as well as the right to enforce the ADA,¹⁹⁰ their interpretations of the regulations are entitled to "controlling weight."¹⁹¹ Despite the deference due agency regulations, the Fourth Circuit found them to be unpersuasive and dismissed their content.¹⁹²

"The problem of discrimination against persons with HIV was a particular focus of the ADA's drafters."¹⁹³ The Fourth Circuit,

184. *See id.*

185. *See supra* notes 25-59 and accompanying text.

186. *See Abbott v. Bragdon*, 107 F.3d at 938.

187. *Id.*

188. *See* The Americans with Disabilities Act of 1990, 42 U.S.C. § 12201(a) (1990). Congress voiced approval of the regulations' view that asymptomatic HIV-infection is a disability under the ADA. *See* H.R. REP. NO. 101-485, pt. 2, at 52 (1990). When Congress voices such approval, it has essentially imposed the regulations as binding authority upon the courts. *See* *United States v. Board of Comm'rs.*, 435 U.S. 110, 134 (1978).

189. *See* *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863 (1984); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 585, 588 (D.C. Cir. 1997); *Board of Regents of the Univ. of Minn. v. Shalala*, 53 F.3d 940, 943 (8th Cir. 1995); *Ferguson v. Phoenix*, 931 F. Supp. 688, 695 (D. Ariz. 1996); *Pinnock v. Int'l House of Pancakes*, 844 F. Supp. 574 (S.D. Cal. 1993), *cert. denied*, 512 U.S. 1228 (1994).

190. *See* 42 U.S.C. §§ 12116, 12117, 12134.

191. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

192. *See Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997).

193. Brief for the United States as Amicus Curiae at 12, *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997) (No. 96-1643).

however, has failed to adhere to congressional intent.¹⁹⁴ In *Runnebaum*, the court determined that it was not constrained to rely on either legislative history or administrative regulations because the ADA's language is unambiguous.¹⁹⁵ It found that ADA language is clear: Congress failed to define the term "impairment," and the dictionary defines it as a condition having diminishing effects on an individual.¹⁹⁶ The court concluded that asymptomatic HIV infection is not an impairment because an individual cannot suffer diminishing effects without outwardly visible symptoms.¹⁹⁷

The Fourth Circuit's argument that a lack of outwardly visible symptoms necessarily proves a lack of diminishing effects is unpersuasive. One's strength and ability to function might be significantly impaired despite the inability of others to detect such diminishing effects without the aid of medical instruments. It is illogical to conclude that a person's body suffers no diminishing effects when a fatal disease consumes its nervous and immune systems.

Additionally, the *Runnebaum* court's view that the ADA's language is unambiguous and permits a court to defy congressional purpose is questionable at best. First, in 1995, in *Torcasio v. Murray*,¹⁹⁸ the Fourth Circuit itself found that the ADA's definition of disability is "unilluminating" and that the task of defining the term "impairment" was left to the agencies promulgating regulations.¹⁹⁹ Furthermore, in both *Green v. Bock Laundry Machine Company*²⁰⁰ and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁰¹ the Supreme Court held that courts must give deference to legislative history and administrative regulations when interpreting ambiguous statutory language.²⁰² As the Fourth Circuit previously found that ADA language is ambiguous,²⁰³ and as Supreme Court precedent requires judicial

194. See *Runnebaum*, 123 F.3d at 156 (4th Cir. 1997); *Ennis v. National Ass'n of Bus. and Educ. Radio, Inc.*, 53 F.3d 55, 59 (4th Cir. 1995).

195. See *Runnebaum*, 123 F.3d at 168.

196. See *id.*

197. See *id.*

198. 57 F.3d 1340 (4th Cir. 1995).

199. *Id.* at 1353.

200. 490 U.S. 504 (1989).

201. 467 U.S. 837 (1984).

202. See *Green*, 490 U.S. at 508; *Chevron*, 467 U.S. at 844.

203. See *Torcasio*, 57 F.3d at 1353.

deference to legislative history and agency regulations when interpreting ambiguous statutory language,²⁰⁴ the *Runnebaum* court defied both prior Fourth Circuit and Supreme Court precedent when it found ADA language clear and interpreted the ADA's definition of disability without regard to legislative history or administrative regulations.

Second, the ADA expressly demands that courts not construe its language to provide less protection than that provided under the Rehabilitation Act.²⁰⁵ Precedent establishes that asymptomatic HIV is an impairment under the Rehabilitation Act.²⁰⁶ Therefore, in refusing to recognize asymptomatic HIV as an impairment, the Fourth Circuit has afforded less protection under the ADA than that traditionally afforded under the Rehabilitation Act.

Third, the term "impairment" is extremely broad. Even the dictionary on which the *Runnebaum* court relied uses broad language to define it.²⁰⁷ What constitutes "diminishing effects," "deterioration," or a "decrease in strength, value, amount, or quality?" Answering this question raises two problems. First, different individuals and courts will define these vague words differently and thus prevent their uniform application. Second, the determination necessarily implicates the exercise of policy judgments, and such policy-making is a function of the legislative, not the judicial, branch.²⁰⁸ The ADA's language is not clear merely

204. See cases cited *supra* note 202.

205. See The Americans with Disabilities Act of 1990, 42 U.S.C. § 12201(a) (1990).

206. See, e.g., *Harris v. Thigpen*, 941 F.2d 1495, 1522-24 (11th Cir. 1991); *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990); *Austin v. Pennsylvania Dep't of Corrections*, 876 F. Supp. 1437, 1465 (E.D. Pa. 1995); *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992); *Glanz v. Vernick*, 756 F. Supp. 632, 635 (D. Mass. 1991).

207. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 168 (4th Cir. 1997). The dictionary on which the Fourth Circuit relied defines "impair" as, among other things, to cause "diminishing effects," "deterioration," or a "decrease in strength, value, amount, or quality." *Id.*

208. See *Abbott v. Bragdon*, 107 F.3d 934, 938 (1st Cir. 1997), *vacated and remanded*, 118 S. Ct. 2196 (1998). The court's "role is not to set public policy, but, rather, to discern the legislature's will." *Id.*; see also, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (emphasizing that the "intrusion by the judiciary into the realm of legislative value judgments" is impermissible); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 234 (1956) (explaining that the judiciary has no concern with policy questions). In *Hanson*, the court stated:

Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises The decision rests

because it fails to define impairment and because a dictionary definition of impairment exists. ADA language is broad and subject to interpretation. Agencies have authority to promulgate regulations to implement the ADA, and courts should defer to legislative history and agency regulations when interpreting the ADA's definition of disability.²⁰⁹

Although Congress intended to protect the asymptomatic but HIV-positive individual,²¹⁰ and although administrative regulations designate asymptomatic HIV as an impairment,²¹¹ the Fourth Circuit has assumed the right to overreach its judicial bounds. In finding congressional intent unpersuasive,²¹² and in defining the statutory term "impairment" without regard to authorized agency regulations,²¹³ it has entered the realm of policy-making. Such conduct threatens the separation of powers on which the American government is founded.²¹⁴ If upheld, the Fourth Circuit's reasoning will pave the way for activist courts to overstep their judicial functions and to intrude on the realm of the legislative branch. If courts were to ignore habitually the clear congressional intent underlying statutory language, then public confidence in American governance would eventually perish. In order to preserve faith in the law, to prevent judicial overreaching, and to enforce statutory language as written, courts must not intentionally disregard legislative history or administrative regulations.

with the policy makers, not with the judiciary.

Id.

209. See, e.g., *Hanson*, 351 U.S. at 234; *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 585, 588 (D.C. Cir. 1997); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-14 (8th Cir. 1995); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 781 (1st Cir. 1990); *Ferguson v. Phoenix*, 931 F. Supp. 688, 695 (D. Ariz. 1996); *United States v. Morvant*, 898 F. Supp. 1157, 1161 (E.D. La. 1995); *D.B. v. Bloom*, 896 F. Supp. 166, 170 (D.N.J. 1995); *Pinnock v. Int'l House of Pancakes*, 844 F. Supp. 574 (S.D. Cal. 1993), *cert. denied*, 512 U.S. 1228 (1994).

210. See, e.g., H.R. REP. NO. 101-485, pt. 3, at 28 n.18 (1990) (declaring that HIV, whether symptomatic or not, is an impairment under the ADA). Even ADA opponents admit that the ADA applies to asymptomatic HIV-positive individuals. See 135 CONG. REC. § 10,765-01 (daily ed. Sept. 6, 1989) (statement of Sen. Helms).

211. See 29 C.F.R. § 1630, app. § 1630(2)(I) (1995); 28 C.F.R. § 36.104 (1994).

212. See *Runnebaum*, 123 F.3d at 167.

213. See *id.* at 168.

214. See generally U.S. CONST. arts. I, II, III (setting forth the powers of the executive, legislative, and judicial branches of the federal government).

2. *Statutory Language, Common Law, and Logical Persuasion: Reproduction is a Major Life Activity*—Major life activities are “those basic activities that the average person in the general population can perform with little or no difficulty,” and they include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”²¹⁵ This list, however, is not exclusive,²¹⁶ and reproduction “fits comfortably within its sweep.”²¹⁷ Additionally, as the ADA adopts the definition of “major life activities” as found in the regulations implementing the Rehabilitation Act,²¹⁸ and as case law pursuant to those regulations establishes that reproduction is indeed a major life activity,²¹⁹ the ADA contemplates coverage of impairments that substantially limit reproduction.

The First and Fourth Circuits disagree on whether reproduction is a major life activity. While both circuits have relied in part on the dictionary definition of the term “major” as meaning relatively more important or significant than other life activities,²²⁰ they have reached opposite conclusions in applying that definition.²²¹ In *Runnebaum*, the Fourth Circuit acknowledged that reproduction is one of the most fundamental of human activities, but found that the ability to reproduce alone does not render the activity major under the ADA.²²² In contrast, in *Abbott*, the First Circuit reasoned that “[r]eproduction (and the

215. 29 C.F.R. § 1630(2)(I).

216. See 29 C.F.R. § 1630, app. § 1630(2)(I); see also EEOC TA Manual, *supra* note 51, at II-3. “These are examples only. Other activities such as sitting, standing, lifting, or reading are also major life activities.” *Id.*

217. *Abbott v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997), *vacated and remanded*, 118 S. Ct. 2196 (1998).

218. See The Americans with Disabilities Act of 1990, 42 U.S.C. § 12201(a) (1990).

219. See, e.g., *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992) (holding that major life activities include “procreation, sexual contact, and normal social relationships”); *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 445 (N.D. Ill. 1988) (noting that the AIDS victim “may not engage in reproductive functions without endangering the lives of others,” and that “where such activity is appropriate, the mere prospect of such a limitation is certain to restrict social interaction with those of the opposite sex”); see also, e.g., *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 379 (C.D. Cal. 1987) (“Persons infected with the AIDS virus suffer significant impairments of their major life activities Even those who are asymptomatic have abnormalities . . . making procreation and childbirth dangerous to themselves and others.”)

220. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 170 (4th Cir. 1997); *Abbott*, 107 F.3d at 940.

221. See *Runnebaum*, 123 F.3d at 170; *Abbott*, 107 F.3d at 941.

222. See *Runnebaum*, 123 F.3d at 170.

bundle of activities that it encompasses) constitutes a major life activity because of its singular importance to those who engage in it, both in terms of its significance in their lives and in terms of its relation to their day-to-day existence."²²³ In the future, courts should reject the Fourth Circuit's attenuated reasoning in favor of the First Circuit's logic.

The rights to conceive and to raise children are essential and basic civil rights protected under the United States Constitution.²²⁴ Both Congress and courts have long recognized the significance of procreation in an individual's life.²²⁵ Given the traditional constitutional, legislative, and judicial treatment of reproduction as a fundamental right, a holding that such activity is not major trivializes the very act without which the human race would expire. People view reproduction as one of the most significant moments and greatest achievements in life.²²⁶ Many view the inability to procreate as a huge disappointment.²²⁷ Thus,

[T]o call working a major life activity, but to deny the same status to reproduction, seems ludicrous [P]eople have been producing offspring for far longer than they have been working. This holds all the more true for women, who, until

223. *Abbott*, 107 F.3d at 941.

224. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); see also *Abbott*, 107 F.3d at 939. Referring to *Stanley v. Illinois*, the First Circuit stated that "HIV-positive status has a profound impact upon . . . ability to engage in intimate sexual activity, gestation, giving birth, childrearing, and nurturing familial relations. Our society has long recognized the fundamental importance of each element of this cluster of activities, and our jurisprudence reflects this bias." *Id.*; see also Brief for the United States as Amicus Curiae at 25 n.11, *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997) (No. 96-1643). "Reproduction is 'major' because society, the courts, and the Constitution accept it as one of the most fundamental activities in human life." *Id.*

225. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 859 (1992); see also, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 443, 447 (1990) (finding that procreation is part of liberty and is a basic civil right); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (acknowledging the significance of procreation to the individual); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (emphasizing that procreation is a basic civil right that plays a fundamental role in the survival of the human race). See generally *Pregnancy Discrimination Act of 1978*, 42 U.S.C. § 2000e(k) (1994) (recognizing the right of a woman to reproduce and to be free from employment discrimination based on her exercise of that right); H.R. REP. NO. 101-485, pt. 2, at 52 (1990) (expressing that procreation and intimate sexual relations are major life activities); S. REP. NO. 101-116, at 22 (1990) (noting that reproduction and intimate relations are major life activities). Congress has also recognized that employment policies must accommodate working parents to provide them with job security. See 29 U.S.C. §§ 2601(a)(3), 2612(a)(1)(A)-(C) (1994).

226. See *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 804 (N.D. Ill. 1996).

227. See *id.*

relatively recently, had to choose between working and child-bearing, and more frequently chose the latter.²²⁸

In light of the individual and constitutional importance attached to reproduction, the Fourth Circuit's assertion that procreation is a fundamental human activity, but not a major one under the ADA,²²⁹ is disingenuous. The Fourth Circuit essentially stated that reproduction is less significant than other life activities.²³⁰ It is fallacious, however, to argue that the very foundation of human existence, one dependant on the ability to reproduce and aimed at the continued evolution of humankind, is not major. Reproduction is at least as significant as, if not more significant than, such ADA-protected activities as working, walking, speaking, and hearing, for without reproduction, no one would exist to perform those other functions. The First Circuit's recognition that "[t]he plain meaning of the word 'major' denotes comparative importance," and that "reproduction, which is both the source of all life and one of life's most important activities, easily qualifies under that criterion,"²³¹ is consistent with this concept. By relegating procreation to an inferior status under the ADA, the Fourth Circuit has denied value to the most essential component of human life, a fundamental human activity protected by the Federal Constitution and cherished by the American populace.

Equally objectionable is the Eighth Circuit's argument, cited by the *Runnebaum* court,²³² that reproduction is not a major life activity because individuals fail to procreate as frequently as they walk, see, speak, breathe, learn, or engage in other activities.²³³

228. *Id.*

229. *See Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 170 & 173 n.9 (4th Cir. 1997).

230. *See id.* at 170. The court stated that an activity is a major life activity under the ADA "if it is relatively more significant or important than other life activities." *Id.* In finding that reproduction is not major, the court implied that it is no more significant than any other human activity.

231. *Abbott v. Bragdon*, 107 F.3d 934, 939-40 (1st Cir. 1997), *vacated and remanded*, 118 S. Ct. 2196 (1998).

232. *See Runnebaum*, 123 F.3d at 170.

233. *See Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996). Denying an infertile plaintiff disability status under the ADA, the court found that reproduction is not a major life activity because individuals do not procreate as frequently as they engage in other activities. *See id.*; *see also Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995). Denying disability status to a former television anchor who brought an ADA claim against her former employer, the court found that reproduction is not a major life activity because people do not procreate all-day-every-day or thus as often as they walk, seek, speak, breath, or learn. *See id.*

Perhaps that argument would be persuasive were reproduction limited to the mere act of sexual intercourse leading to conception. Procreation, however, implicates continual biological processes in both males and females.²³⁴ It may consume even more time than activities like walking, speaking, working, or learning. "Limitation of reproduction to conception also ignores the process of raising and caring for offspring upon which successful reproduction depends."²³⁵ Even if frequency were the basis for designating major life activities under the ADA, properly viewing reproduction as a continual and complex biological, and possibly social, process would satisfy that requirement.²³⁶

Moreover, there is no reason why an activity must be frequent to be major. There is no evidence in the ADA, the administrative regulations, or the legislative history that major life activities are only those in which individuals engage with frequency.²³⁷ Even those activities enumerated in the regulations and mentioned in legislative history fail to share an element of regularity, for learning, in the sense of attending school, is not a part of everyday life and many people do not work.²³⁸ Perhaps most significantly, to define a major life activity in terms of quantity rather than quality is to trivialize the very significance of activities that the word "major" seeks to include within the ADA framework.²³⁹

As a practical matter, courts should view reproduction as a major life activity for at least three reasons. First, Congress used the term "life," which is inherently broad and necessarily covers procreation as the basis of all life.²⁴⁰ Second, administrative regulations list the reproductive system among those that may be

234. See *Erickson v. Board of Governors of State Colleges*, 911 F. Supp. 316, 322 (N.D. Ill. 1995).

235. *Abbott v. Bragdon*, 912 F. Supp. 580, 586 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated and remanded*, 118 S. Ct. 2196 (1998).

236. See Deborah K. Dallmann, *The Lay View of what "Disability" Means must Give Way to what Congress Says it Means: Infertility as a "Disability" under the Americans with Disabilities Act*, 38 WM. & MARY L. REV. 371, 403 (1996).

237. See *Abbott v. Bragdon*, 107 F.3d 934, 941 (1st Cir. 1997).

238. See *id.*; see also 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, 1068 (1996). Even if all of the activities listed in the EEOC regulations were performed every-day-all-day and each as frequently as the next, "the EEOC has not defined major life activities in terms of the frequency or regularity with which these activities are performed." *Id.*

239. See *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 804 (N.D. Ill. 1996).

240. See *Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994).

impaired for ADA purposes, implying that reproduction is a major life activity.²⁴¹ Third, the ADA's language does not preclude reproduction as a major life activity.²⁴²

3. *Legislative History, Agency Regulations, and Rational Interpretation: Asymptomatic HIV Substantially Limits Its Victim's Ability to Reproduce*—Congress enacted the ADA with the view that HIV infection, whether symptomatic or asymptomatic, substantially limits its victims' ability to reproduce.²⁴³ Agencies promulgating regulations under the ADA agree that asymptomatic HIV substantially limits the major life activity of reproduction.²⁴⁴ "Substantially limits" is defined as the inability to perform, or significantly restricted in the condition, manner, or duration of performance of, a major life activity that the average person in the general population can perform.²⁴⁵ In determining whether an impairment substantially limits a major life activity, courts should consider, without regard to medications or other mitigating measures, the impairment's "nature and severity; how long it will last or is expected to last; [and] its permanent or long term impact, or expected impact."²⁴⁶ Since HIV is a permanent and fatal disease that one has a substantial risk of transmitting to one's offspring through procreation,²⁴⁷ it significantly restricts the condition, manner, and duration under which an infected individual can reproduce as compared to the average person in the general population who can procreate without facing such deadly obstacles.

The Fourth Circuit has concluded that nothing inherent in asymptomatic HIV prevents reproduction, and that there is no "causal nexus" between the physical effects of HIV and reproduction.²⁴⁸ It has reasoned that what limits an infected individual's procreation is merely that individual's reaction to his or her HIV-

241. See *Pacourek*, 916 F. Supp. at 802.

242. See The Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2)(A) (1990).

243. See H.R. REP. NO. 101-485, pt. 2, at 52, pt. 3, at 28 n.18 (1990).

244. See 29 C.F.R. § 1630, app. § 1630(2)(I) (1995); EEOC TA Manual, *supra* note 51, at II-4.

245. See 29 C.F.R. § 1630(2)(j).

246. EEOC TA Manual, *supra* note 51, at II-4.

247. See *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir. 1997), *vacated and remanded*, 118 S. Ct. 2196 (1998); *Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994); see also *Kniec Memorandum*, *supra* note 2, at 5-7 (explaining that asymptomatic HIV infection permanently debilitates, eventually kills, and may be transmitted to a baby during pregnancy).

248. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 172 (4th Cir. 1997).

positive status.²⁴⁹ The ADA, however, requires neither one's complete inability to engage in a particular life activity nor a causal nexus. In addition, it fails to explain how an impairment must limit an activity.²⁵⁰ The ADA requires only a substantial limitation, and it does not distinguish between physical and behavioral limitations.²⁵¹

Furthermore, the Fourth Circuit's claim that HIV does not limit reproduction in a physical sense is illogical. HIV infection physically affects and substantially limits sexual relations and procreation because of the substantial risk of transmission.²⁵²

Based on the medical knowledge available . . . it is reasonable to conclude that the life activity of procreation—the fulfillment of the desire to conceive and bear healthy children—is substantially limited for an asymptomatic HIV-infected individual. In light of the significant risk that the AIDS virus may be transmitted to a baby during pregnancy, HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child. Because of the infection in their system, they will be unable to fulfill this basic human desire. There is little doubt that procreation is a major life activity and that the physical ability to engage in *normal* procreation—procreation free from the fear of what the infection will do to one's child—is substantially limited once an individual is infected with the AIDS virus.²⁵³

The First Circuit's logic in *Abbott* is persuasive: "No reasonable juror could conclude that an 8% risk of passing an incurable, debilitating, and inevitably fatal disease to one's child is not a substantial restriction on reproductive activity."²⁵⁴

249. *See id.*

250. *See Abbott v. Bragdon*, 912 F. Supp. 580, 586 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated and remanded*, 118 S. Ct. 2196 (1998).

251. *See The Americans with Disabilities Act of 1990*, 42 U.S.C. § 12102(2)(A) (1990); *see also Runnebaum*, 123 F.3d at 184 (Michael, J., dissenting) ("There is no requirement that the impairment physically limit the life activity, nor is there any specification about how the impairment must substantially limit that activity.")

252. *See Runnebaum*, 123 F.3d at 185 (Michael, J., dissenting); *see also* Kmiec Memorandum, *supra* note 2, at 5 n.9 ("Infection with the [AIDS] virus affects the reproductive system because of the significant danger that the virus will be transmitted to a baby during pregnancy.")

253. Kmiec Memorandum, *supra* note 2, at 6-7 (footnote omitted)(emphasis added).

254. *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir. 1997), *vacated and remanded*, 118 S. Ct. 2196 (1998).

The Fourth Circuit's argument that asymptomatic HIV infection does not substantially limit reproduction because reproduction is a mere lifestyle choice is unconvincing.²⁵⁵ The First Circuit referred to it as an "emaciated argument" that lacked force and as a mere "exercise in semantics."²⁵⁶ There are at least two reasons why the First Circuit's logic is more practical and thus more persuasive than the Fourth Circuit's reasoning.

First, most acts that individuals perform or fail to perform result from an exercise of volition.²⁵⁷ For example, speaking, which is undisputedly a major life activity, depends on one's making the decision to speak, for there are those, such as monks, who choose to avoid it.²⁵⁸ Also, persons might choose not to work for reasons other than a disability, yet work is undeniably recognized as a major life activity.²⁵⁹ The fact that one may choose whether to exercise one's constitutionally protected option to forego reproduction does not deny reproduction the status of a major life activity, for the very protection of one's right to exercise that choice illuminates the value society places on procreation.²⁶⁰

Second, viewing reproduction as a mere lifestyle choice necessarily requires a determination of whether a particular plaintiff actually chose not to procreate because of his or her HIV-positive status. Although the ADA asks whether an impairment substantially limits a major life activity of a given individual,²⁶¹ and while individualized inquiry is generally proper,²⁶² the nature of HIV infection forces a conclusion that the virus will always substantially limit its victims' reproductive capacities.²⁶³ Courts interpreting either the ADA or the Rehabilitation Act have not questioned whether a given plaintiff intended to procreate before learning of his or her HIV infection; rather, they have held that

255. See *Runnebaum*, 123 F.3d at 172.

256. *Abbott*, 107 F.3d at 941.

257. See *id.*

258. See *id.*

259. See Tomkowicz, *supra* note 238, at 1076.

260. See Brief for the United States as Amicus Curiae at 24-25, *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997) (No. 96-1643), *vacated and remanded*, 118 S. Ct. 2196 (1998).

261. See The Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2)(A) (1990).

262. See *Runnebaum v. NationsBank of Md.*, 123 F.3d at 166 (4th Cir. 1997); *Abbott*, 107 F.3d at 941.

263. See H.R. REP. NO. 101-485, pt. 2, at 52 (1990); S. REP. NO. 101-116, at 22 (1990); 29 C.F.R. § 1630, app. § 1630(2)(I) (1995); see also *Runnebaum*, 123 F.3d at 185 (Michael, J., dissenting) (arguing that common sense compels the conclusion that HIV substantially limits reproduction due to the significant risk of transmission).

HIV itself, whether symptomatic or asymptomatic, inherently and substantially limits reproduction because of its physical effects on the body.²⁶⁴

Case-by-case analysis of whether an individual's impairment substantially limits a major life activity does not require inquiry into whether the activity is of particular importance to the individual, but only into whether the individual is able to perform the activity.²⁶⁵ The substantial limits that asymptomatic HIV places on one's ability to reproduce because of the significant risk of transmission is well established.²⁶⁶ To adopt a rule permitting an individualized inquiry into when and why one decides to procreate is to render a single law susceptible to innumerable interpretations, evading consistency and possibly excluding deserving individuals from ADA coverage.

Furthermore, if whether reproduction is limited depends on one's intent to reproduce, then the fate of those unable to show their reproductive plans will be uncertain.²⁶⁷ Both those who choose to procreate despite HIV infection and homosexuals who may be unable to explain how HIV infection has altered their reproductive plans may be subject to undue discrimination without any recourse.²⁶⁸ ADA protection for HIV-positive individuals will be haphazard and dependant on such circumstances as fertility and reproductive intentions, which are unrelated to the discrimination at issue.²⁶⁹ ADA decisions should not rely on whether an individual intends to have children. Medical evidence suggests that, due to the high risk of transmission, the asymptomatic HIV-positive individual's ability to reproduce is substantially limited in condition, manner, and duration as compared to the average person in the general population.²⁷⁰

264. See, e.g., *Abbott*, 107 F.3d at 934, 942 (1st Cir. 1997); *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Harris v. Thigpen*, 941 F.2d 1495, 1522-24 (11th Cir. 1991); *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990); *Chalk v. United States Dist. Court*, 840 F.2d 701 (9th Cir. 1988); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992).

265. See *Runnebaum*, 123 F.3d at 166; *Abbott*, 107 F.3d at 941.

266. See *supra* notes 243-54 and accompanying text.

267. See *Jackson & Parmet*, *supra* note 4, at 35.

268. See *id.*

269. See *id.* at 35-36.

270. See *Kmiec Memorandum*, *supra* note 2, at 5-8.

B. The Fourth Circuit's Failure to Recognize Public Perception: An Asymptomatic HIV-Positive Person is Regarded as Having an Impairment that Substantially Limits One or More of the Major Life Activities

Judicial focus appears to be on the first prong of the ADA's definition of "disability,"²⁷¹ "a physical or mental impairment that substantially limits one or more of the major life activities."²⁷² An asymptomatic HIV-positive individual, however, may satisfy the third prong of the definition, an individual "regarded as having such an impairment."²⁷³ In *School Board of Nassau County, Florida v. Arline*,²⁷⁴ the Supreme Court recognized that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."²⁷⁵ Despite medical evidence to the contrary, over one-third of Americans believe that AIDS is more contagious than a common cold.²⁷⁶ Consequently, diagnosis with the AIDS virus generates unfounded fear and prejudice against HIV victims that "typically signifies a social death as concrete as the physical one which follows."²⁷⁷

The HIV-positive individual is often shunned and excluded from public life.²⁷⁸ The attitudes of others toward the impairment substantially limit that person's ability to function in society, and may even go so far as to deter that person from seeking medical treatment in an effort to avoid public humiliation.²⁷⁹ People face substantial limitations because of the stigma attached to HIV.²⁸⁰

For example, one may be unable to find employment because of some facial disfigurement,²⁸¹ a limitation Congress intended to

271. See *supra* notes 60-93 and accompanying text.

272. The Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2)(A) (1990).

273. *Id.* § 12102(2)(C).

274. 480 U.S. 273 (1987).

275. *Id.* at 284.

276. See *Cain v. Hyatt*, 734 F. Supp. 671, 679-80 (E.D. Pa. 1990).

277. *Id.* at 679.

278. See generally *Jackson & Parmet, supra* note 4, at 10 (discussing public reaction to the spread of HIV and AIDS).

279. See Brief for the United States as Amicus Curiae at 27, *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997) (No. 96-1643), *vacated and remanded*, 118 S. Ct. 2196 (1998).

280. See generally *Jackson & Parmet, supra* note 4, at 42 (discussing social reactions to disability).

281. See *id.*

protect under the ADA.²⁸² As the public might prevent one with a facial disfigurement from working despite that person's ability to do so, the public might also prevent the asymptomatic HIV-positive individual from participating fully in society because of the unfounded fear-based refusal to associate with him or her.²⁸³ There are in effect socially-created limitations on major life activities.²⁸⁴ Discrimination based on an unsubstantiated fear of contagion is in conflict with the basic purpose of the ADA, which is to protect individuals with disabilities from employment or other discrimination based on prejudice or ignorance.²⁸⁵ Nevertheless, such discrimination continues and consistently denies HIV victims the full benefits of membership in a civilized community.²⁸⁶ As one court has noted:

The particular associations AIDS shares with sexual fault, drug use, social disorder, and with racial minorities, the poor, and other historically disenfranchised groups accentuates the tendency to visit condemnation upon its victims [T]o conclude that persons with AIDS are stigmatized is an understatement; they are widely stereotyped as indelibly miasmatic, untouchable, physically and morally polluted. These and related prejudices substantially curtail the major life activities of AIDS victims.²⁸⁷

The public's misperception of HIV, as well as its exaggerated fear of contagion, may serve to render the asymptomatic HIV-positive person an individual with a disability under the ADA.²⁸⁸

V. The Supreme Court Declares ADA Coverage for the Asymptomatic HIV-Positive Victim

On June 25, 1998, in *Bragdon v. Abbott*,²⁸⁹ the United States Supreme Court affirmed the First Circuit's holding that Ms. Abbott, an asymptomatic HIV-positive individual, is entitled to

282. See H.R. REP. NO. 101-485, pt. 2, at 53 (1990).

283. See *Cain v. Hyatt*, 734 F. Supp. 671, 679-80 (E.D. Pa. 1990).

284. See *Jackson & Parmet*, *supra* note 4, at 43.

285. See *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 284 (1987).

286. See *Cain*, 734 F. Supp. at 680.

287. *Id.*

288. See *Kmiec Memorandum*, *supra* note 2, at 8.

289. 118 S. Ct. 2196 (1998).

ADA protection.²⁹⁰ When Dr. Bragdon refused to perform the routine procedure of filling her cavity outside of a hospital setting, Ms. Abbott brought action against him under Section 302 of the ADA, which prohibits discrimination “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation.”²⁹¹ Public accommodations include the professional office of a health care provider.²⁹² In its holding, the Supreme Court relied on the first prong of the definition of disability—a physical or mental impairment that substantially limits one or more of the major life activities of such individual—and did not consider the potential applicability of the other prongs.²⁹³ Justice Ginsburg, in her concurring opinion, summarized the Court’s views: HIV infection is a disease limiting life itself, inevitably pervading life’s choices, including education, employment, family, and financial undertakings, and affecting the need for and the availability of health care because of the reaction of others to it; it is irrational to forbid discrimination once symptoms become visible, but not beforehand although the disease is still present.²⁹⁴

The Court first noted that the term “disability” in the ADA has the same definition as the term “handicap” in both the Rehabilitation Act of 1973²⁹⁵ and the Fair Housing Amendments of 1988.²⁹⁶ The Court explained that, as Congress had repeated the definition in the ADA, Congress obviously intended it to be construed in accordance with pre-existing regulatory interpretations of the Rehabilitation Act and Fair Housing Amendments, especially as it expressly stated that the ADA would provide at least as much protection as the Rehabilitation Act.²⁹⁷ Thus, interpretations of and case law under the Rehabilitation Act apply equally to the ADA.

290. *See id.* at 2201. Justice Stevens, joined by Justice Breyer, announced that asymptomatic HIV infection easily falls within the ADA’s definition of disability. *See id.* at 2213 (Stevens, J., concurring).

291. The Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(a) (1990).

292. *See id.* § 12181(7)(F).

293. *See Bragdon*, 118 S. Ct. at 2201.

294. *See id.* at 2213-14 (Ginsburg, J., concurring).

295. 29 U.S.C. § 706(7)(B) (1973).

296. 42 U.S.C. §3602(h)(1) (1988).

297. *See Bragdon*, 118 S. Ct. at 2202.

The Court next recognized that asymptomatic HIV is a physical impairment.²⁹⁸ Regulations implementing the Rehabilitation Act have intentionally failed to include a list of disorders constituting physical or mental impairments out of concern that any enumeration would not be comprehensive.²⁹⁹ Additionally, HIV is not included in the representative list relegated to the regulations' commentary because it was not identified as the cause of AIDS until 1983, but the Court found that it "does fall well within the general definition set forth by the regulations."³⁰⁰

Relying on medical evidence, the Court acknowledged that HIV follows a predictable and unalterable course, invading different blood and body tissue cells and using an enzyme to mimic the genetic material of a target cell and to replicate itself in order to attack other cells.³⁰¹ Antibodies are ineffective to eliminate the virus, which eventually kills its victim's cells and deteriorates its victim's ability to combat infections from various sources.³⁰² Symptoms associated with initial infection include fever, headaches, enlargement of the lymph nodes, muscle pain, rashes, lethargy, gastrointestinal distress, and neurological disorders.³⁰³ After such symptoms dissipate, one enters the asymptomatic phase, which usually lasts between seven and eleven years, during which time the virus migrates from its victim's circulatory system to the lymph nodes.³⁰⁴ During this phase, one usually suffers from forms of pneumonia and cancer, fever, weight loss, fatigue, lesions, nausea, and diarrhea.³⁰⁵ The court noted:

In light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, . . . it is an impairment from the moment of infection . . . HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.³⁰⁶

298. *See id.* at 2204.

299. *See id.* at 2202.

300. *Id.* at 2203.

301. *See id.*

302. *See Bragdon*, 118 S. Ct. at 2203.

303. *See id.*

304. *See id.* at 2204.

305. *See id.*

306. *Id.* (recognizing that HIV infection causes immediate abnormalities in the blood with a constant and detrimental effect on the hemic and lymphatic systems).

The Supreme Court also held that reproduction, or child bearing, is a major life activity under the ADA.³⁰⁷ Justice Kennedy stated: "We have little difficulty concluding that it is."³⁰⁸ As noted by the court of appeals, "[t]he plain meaning of the word 'major' denotes comparative importance," and "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself."³⁰⁹ Dr. Bragdon's argument that if activity is not of public, economic, or daily character, it is so unimportant or insignificant as not to be major misconceives the breadth of the term "major."³¹⁰ Furthermore, "the Rehabilitation Act regulations support the inclusion of reproduction as a major life activity, since reproduction could not be regarded as any less important than working and learning."³¹¹

The dissenters, however, pointed out that an additional definition of "major," as greater in quantity, number, or extent, is most consistent with the ADA's illustrative list of major life activities, including caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.³¹² They argued that reproduction is important, but that so are numerous other decisions, such as who to marry, where to live, and what job to have.³¹³ The common thread among the listed activities is not fundamental importance, but repetition and importance to daily existence—"quite different from the series of activities leading to the birth of a child."³¹⁴ Similarly, Justice O'Connor espoused the view that

[T]he act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all persons—"caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"—listed in regulations relevant to the Americans with Disabilities Act of 1990.³¹⁵

307. See *Bragdon*, 118 S. Ct. at 2205.

308. *Id.*

309. *Id.* (quoting *Abbott v. Bragdon*, 107 F.3d 934, 939 (1st Cir. 1997)).

310. See *id.*

311. *Id.*

312. See *Bragdon*, 118 S. Ct. at 2215 (Rehnquist, C.J., concurring in part and dissenting in part).

313. See *id.*

314. *Id.*

315. *Id.* at 2217 (O'Connor, J., concurring in part and dissenting in part).

The dissenters' arguments fail to recognize that an activity may be "major" although it is performed less frequently than others. They fail to account for the fact that bearing children may be more significant to an individual's daily existence than are activities such as speaking or working. For example, many give up their jobs in order to raise children, such that child rearing becomes a greater part of daily life than does working. The dissenters argue that activities such as walking, seeing, hearing, speaking, and learning are greater in quantity, number, and extent than reproduction. Individuals who are unable to walk, see, hear, or speak, however, may be able to reproduce, such that reproduction is a greater part of their lives than are the former activities. Furthermore, some people reproduce numerous times throughout their lives, and spend the majority of their time raising their offspring. In those cases, reproduction and child rearing may be what consumes the majority of one's thought and activity. The fact that so many undergo fertility treatments in attempts to get pregnant suggests the pivotal role that reproduction plays in human life. The dissenters should acknowledge the vital role of reproduction in human life, including the amount of time and effort that is involved in childbirth and child rearing.

The Supreme Court also held that asymptomatic HIV does substantially limit reproduction.³¹⁶ First, an HIV-positive woman who tries to conceive a child imposes on her male partner a significant risk of becoming infected, for 20% of male partners of HIV-positive women become HIV-positive themselves.³¹⁷ Second, an HIV-positive woman risks infecting her child during gestation and childbirth; there is a 25% risk of transmitting the virus to the child.³¹⁸ Even though antiretroviral therapy can reduce the risk of perinatal transmission to about 8%, "[i]t cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction."³¹⁹

In his dissent, Chief Justice Rehnquist postulated that whether Ms. Abbott has a disability under the ADA is an individualized

316. *See id.* at 2206.

317. *See Bragdon*, 118 S. Ct. at 2206.

318. *See id.*

319. *Id.*

inquiry.³²⁰ He argued that Ms. Abbot's major life activities, prior to her infection, did not include reproduction because "[t]here is absolutely no evidence that, absent the HIV, respondent would have had or was even considering having children."³²¹ Similarly to the Fourth Circuit, Justice Rehnquist focused on the voluntary nature of procreation, noting that those infected with HIV are entirely able to have intercourse, to give birth, and to rear a child to maturity.³²² He argued that one may choose not to reproduce, but that voluntary choice does not constitute a limit on one's own life activities and HIV does not even render its victim less able than others to reproduce.³²³ The ADA, Justice Rehnquist believes, focuses on present limitations; Ms. Abbott's potential inability to raise the child to adulthood is irrelevant and the possible future effect of her HIV is insufficient to render her "disabled," for otherwise her argument "would render every individual with a genetic marker for some debilitating disease 'disabled.'"³²⁴

Nevertheless, a majority of the Court recognized that the ADA addresses substantial limitations on life activities, not utter inabilities.³²⁵ While conception and childbirth are not impossible for an HIV victim, they are dangerous to the public health, and so constitute a substantial limitation.³²⁶ The decision to reproduce carries economic and legal consequences as well. Antiretroviral therapy, supplemental insurance, and long-term health care are expensive costs that are necessary to examine and treat infected children.³²⁷ Some states even forbid HIV-positive individuals to have sexual relations with others, regardless of consent.³²⁸ "In the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable."³²⁹

320. *See id.* at 2214 (Rehnquist, C.J., concurring in part and dissenting in part).

321. *Id.* at 2215.

322. *See Bragdon*, 118 S. Ct. at 2216.

323. *See id.*

324. *Id.*

325. *See id.* at 2206.

326. *See id.*

327. *See Bragdon*, 118 S. Ct. at 2206.

328. *See id.*

329. *Id.*

In contrast to the Fourth Circuit's position in *Runnebaum*, the Supreme Court held further that courts must seek guidance from the agencies implementing legislation, for the regulations represent well-reasoned views as well as a body of experience and informed judgment.³³⁰ The Court noted that all agencies that have addressed the definition of "disability" or "handicap" under the Rehabilitation Act, the Fair Housing Act, or the ADA have come to the same conclusion—asymptomatic HIV is a disability or handicap.³³¹ Justice Kennedy stated:

We find the uniformity of the administrative and judicial precedent construing the definition significant. When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well The uniform body of administrative and judicial precedent confirms the conclusion we reach today as the most faithful way to effect the congressional design.³³²

The DOJ has even gone so far as to add asymptomatic HIV infection to the list of disorders constituting a physical impairment under the ADA, and DOJ regulations are entitled to deference.³³³ The EEOC, the Attorney General, and the Secretary of Transportation all also agree that an asymptomatic HIV-positive individual is an individual with a disability under the ADA.³³⁴ Although the Court held that asymptomatic HIV is a disability under the ADA, the Court remanded to the First Circuit to determine whether Dr. Bragdon had presented sufficient objective evidence or a triable issue of fact on the question of risk, namely whether Ms. Abbot's HIV infection presented a substantial enough risk to his health that his refusal to fill her cavity in his office was justified.³³⁵

VI. Conclusion

Despite the recent debate in the federal circuits, the ADA, legislative history, administrative regulations, and judicial precedent all indicate that asymptomatic HIV infection constitutes a disability

330. *See id.* at 2207.

331. *See id.* at 2207-08.

332. *Bragdon*, 118 S. Ct. at 2208.

333. *See id.* at 2209.

334. *See id.*

335. *See id.* at 2210-13.

under the ADA. If Congress had intended to exclude it from protection, it would have listed it among the others it specifically exempted from ADA coverage.³³⁶ Congress, however, intended to protect the asymptomatic HIV-positive individual.³³⁷

As the Supreme Court recently held, asymptomatic HIV satisfies the first prong of the ADA's definition of disability because it is a physical impairment that substantially limits the major life activity of reproduction. It is an impairment because of its physical effects on various bodily systems.³³⁸ Reproduction is a major life activity because of the traditional value attributed to it by the Constitution, the courts, and the public at large.³³⁹ Asymptomatic HIV substantially limits reproduction because of the significant risk of transmission to offspring of an incurable, debilitating, and deadly disease.³⁴⁰ The asymptomatic but HIV-positive individual may also qualify for ADA protection because of the substantially limiting effects on his or her life activities of society's fear-based exclusion of him or her from community life.³⁴¹

The Fourth Circuit's failure to recognize asymptomatic HIV as an ADA-protected disability set a dangerous precedent. In light of the Supreme Court's decision in *Bragdon v. Abbott*, courts now must reject the Fourth Circuit's reasoning in favor of the First Circuit's protection of asymptomatic HIV-positive individuals.

336. See The Americans with Disabilities Act of 1990, 42 U.S.C. § 12211 (1990).

337. See *id.* § 12201(a); H.R. REP. NO. 101-485, pt. 2, at 52 (1990); S. REP. NO. 101-116, at 22 (1990); 135 CONG. REC. § 10,765-01 (daily ed. Sept. 6, 1989) (statement of Sen. Helms); 29 C.F.R. § 1630(2)(h)-(j), § 1630, app. § 1630(2)(I) (1995); 28 C.F.R. § 36.104 (1994); EEOC TA Manual, *supra* note 51, at II-4.

338. See, e.g., *Abbott v. Bragdon*, 107 F.3d 934, 938 (1st Cir. 1997) *vacated and remanded*, 118 S. Ct. 2196 (1998); *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990); *Austin v. Pennsylvania Dep't of Corrections*, 876 F. Supp. 1437, 1465 (E.D. Pa. 1995).

339. See, e.g., *Abbott*, 107 F.3d at 940; *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 804 (N.D. Ill. 1996); *Erickson v. Bd. of Governors of State Colleges*, 911 F. Supp. 316, 323 (N.D. Ill. 1995); *Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310 (E.D. Pa. 1994).

340. See, e.g., *Abbott*, 107 F.3d at 942; *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990).

341. See, e.g., *Harris v. Thigpen*, 941 F.2d 1495, 1522-24 (11th Cir. 1991); *Cain*, 734 F. Supp. at 680; see also *Jackson & Parmet, supra* note 4, at 13, 42-43 (discussing social reactions to HIV and AIDS); Brief for the United States as Amicus Curiae at 27-28, *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997) (No. 96-1643) (arguing that the unfounded perception of HIV contagion constitutes regarding infected individuals as having a disability); Kmiec Memorandum, *supra* note 2, at 8 (explaining that one is an individual with a disability if others perceive one as having an impairment that substantially limits one or more of one's major life activities).

Discrimination against HIV victims is widespread and has serious repercussions both for those already infected and for the nation's efforts to control the AIDS virus.³⁴²

Although courts tend to focus on the major life activity of reproduction, HIV infection substantially limits numerous other life activities. HIV-positive individuals are counseled not to have unprotected sex and not to have children, are instructed to be cautious when traveling because of the risk of illness, may face significant difficulty obtaining life insurance, may have trouble securing employment that requires extensive training because of their short life expectancies, and must take medications that often demand numerous doctors' appointments.³⁴³ While perhaps not all of the aforementioned activities are "major" for ADA purposes, intimate sexual relations should be considered a major life activity.³⁴⁴ "Procreation is perhaps the most important life activity, since we would cease to exist as a species if we no longer reproduced And intimate sexual relations, while less important in nature's scheme, have consumed enough of humanity's energy and interest to count among such activities."³⁴⁵ An HIV-infected individual is substantially limited in the ability to have intimate relations in a similar way to the limitation on reproductive capacity. The substantial risk of transmission renders the HIV victim unable to engage in unprotected sex or to have relations free from the fear of infecting his or her partner.

HIV-positive individuals may be substantially limited in the performance of other major life activities as well. For example, HIV victims, whether symptomatic or not, may be substantially limited in their ability to care for themselves due to reliance on medications and frequent visits to doctors.³⁴⁶ Asymptomatic HIV may substantially limit major life activities because of the effects that knowledge of the virus has on the individual, specifically limiting the ability to pursue certain courses of action.³⁴⁷ For instance, the prospect of a premature death is likely to substantially

342. See Brief for the United States as Amicus Curiae at 20, *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir. 1997) (No. 96-1643), *vacated and remanded*, 118 S. Ct. 2196 (1998).

343. See *id.* at 20-21.

344. See Kmiec Memorandum, *supra* note 2, at 7.

345. *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 184 (4th Cir. 1997) (Michael, J., dissenting).

346. See Jackson & Parmet, *supra* note 4, at 42.

347. See Kmiec Memorandum, *supra* note 2, at 6-7.

limit functioning in a number of ways. Although Congress and the courts have focused on reproduction as the major life activity associated with HIV, there are other alternatives that courts might consider when deciding ADA cases.

The Fourth Circuit's narrow interpretation of what constitutes an impairment or major life activity under the ADA ignores congressional intent to protect individuals with disabilities against undue discrimination. The Fourth Circuit's interpretation makes it extremely difficult for persons to achieve protected status, notwithstanding recent medical information, if they do not fit traditional molds and understandings of disabilities. "Despite the need to retain flexibility under the ADA, . . . the outcome of a plaintiff's claim under that Act depends on a court's willingness to recognize that the ADA's broad language encompasses nontraditional disabilities."³⁴⁸ The *Runnebaum* Court's discussion of symptoms as though they have to be outwardly visible in order to exist demeans all those who battle concealed physical or psychological symptoms that are, in reality, debilitating and substantially limiting of major life activities. The Fourth Circuit has told asymptomatic HIV-positive individuals that they do not have a covered disability, and has left them unprotected in communities where they are shunned and humiliated for no reason other than their suffering from an incurable disease. It is illogical to deny ADA protection to those whose most basic bodily functions are consumed by a deadly virus. Such individuals suffer from incurable interior deterioration, a lifetime reliance on medication, a substantially limited ability to engage in intimate sexual relations or procreation, and subjection to a public that deems them handicapped and disgusting.

In order to preserve humanity and to protect asymptomatic victims of HIV, courts must adhere to the Supreme Court's decision that asymptomatic HIV is a protected disability under the ADA. In light of both settled authority and the public danger of adopting the Fourth Circuit's approach, courts must follow the Supreme Court's command that the ADA protects asymptomatic HIV-positive victims.

Emily J. Carton

348. Dallmann, *supra* note 236, at 398.