

# Reproduction Is Not a Major Life Activity: Implications for HIV Infection As a Per Se Disability under the Americans with Disabilities Act

Timothy D. Johnston

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## NOTE

# REPRODUCTION IS NOT A MAJOR LIFE ACTIVITY: IMPLICATIONS FOR HIV INFECTION AS A PER SE DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT

*Timothy D. Johnston*†

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† I would like to thank Bruce MacLeod, who first directed my attention towards the *Bragdon* case, and inspired this Note.

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## INTRODUCTION

In a recent article, Wendy E. Parmet and Daniel Jackson discuss the promising search for an AIDS cure.<sup>1</sup> At the Vancouver AIDS Conference in July of 1996, researchers unveiled the encouraging results of tests performed with new antiviral drugs (protease inhibitors) that, in test cases, reduced levels of the human immunodeficiency virus

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<sup>1</sup> See Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 27-28 (1997).

(HIV) in certain individuals to nearly undetectable levels.<sup>2</sup> The announcement heralded improved prospects for the battle against the HIV-AIDS epidemic, as suggested by an article in Newsweek magazine that asked if these drugs might bring “[t]he [e]nd of AIDS.”<sup>3</sup> Parmet and Jackson argue that the Vancouver announcement, viewed in conjunction with other partially effective HIV drugs discovered in the 1980s and 1990s, like AZT, marked the turning point in a gradual change from society’s traditional construction of HIV as a “disabling and terminal” plague<sup>4</sup> to a perception of the disease as “chronic” and potentially avoidable.<sup>5</sup> Parmet and Jackson point out the dangerous consequence of this softer construction of HIV: the protection of HIV-infected individuals under American disability laws will be eroded as the disease comes to be viewed as less of a society-endangering plague.<sup>6</sup> Indeed, these fears are already being realized in a line of cases within the Fourth Circuit<sup>7</sup> that diverges from the traditional judi-

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<sup>2</sup> See *id.* (citing Lawrence K. Altman, *AIDS Meeting: Sings of Hope and Obstacles*, N.Y. TIMES, July 7, 1996, at A1, and Nigel Hawkes, *New Drugs Cut Level of HIV*, THE TIMES, July 8, 1996, Homes News Sec., at 6).

<sup>3</sup> See *id.* (citing John Leland, *The End of AIDS?*, NEWSWEEK, Dec. 2, 1996, at 64).

<sup>4</sup> Parmet & Jackson, *supra* note 1, at 8.

<sup>5</sup> *Id.* at 27-28.

<sup>6</sup> See *id.* at 9. Of course, as these drugs come closer to a cure for HIV, the need for protecting HIV-infected individuals via American disability laws would correspondingly decline, and thus, the fear expressed by Parmet and Jackson would prove irrelevant. However, implicit in their discussion is the assumption that the slightest signs of promise from these drugs will push HIV away from the plague end of the spectrum to the controllable-disease end, before it really belongs there. See *id.* The consequence of such a premature social construction of HIV is that disability protection will be eroded before society can really classify HIV as a manageable disease, leaving the HIV-infected community in a sort of legal purgatory. See *id.* at 43.

In fact, a recent study suggests that there is reason to restrain our optimism about the success of so-called drug “cocktails” in reducing HIV levels. Researchers at the Johns Hopkins University School of Medicine have discovered that the HIV virus can hide in immune-system T-cells, lying dormant for up to 60 years until these cells are called upon to fight an infection. See *AIDS Virus Can Lurk for 60 Years, Study Finds* (April 26, 1999) <<http://cnn.com/HEALTH/9904/26/aids.reservoir>>.

<sup>7</sup> See, e.g., *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156, 172 (4th Cir. 1997) (holding that an employee’s asymptomatic HIV infection is not a disability under the ADA); *Ennis v. National Ass’n of Bus. & Educ. Radio*, 53 F.3d 55, 60 (4th Cir. 1995) (holding that merely being infected with HIV is not per se a disability within the meaning of the ADA); *Doe v. University of Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995) (holding that an HIV-infected resident in neurosurgery “pose[d] a significant risk to the health or safety of . . . patients that cannot be eliminated by reasonable accommodations, and therefore [is] not otherwise qualified” within the meaning of the ADA). Several district courts within the Fourth Circuit have reached similar conclusions. See, e.g., *Cortes v. McDonald’s Corp.*, 955 F. Supp. 541, 547 (E.D.N.C. 1996) (following the Fourth Circuit in ruling that asymptomatic HIV is not a disability); *EEOC v. Newport News Shipbuilding & Drydock Co.*, 949 F. Supp. 403, 407 n.5 (E.D. Va. 1996) (acknowledging Fourth Circuit precedent that HIV-positive status is not a per se disability).

cial consensus that HIV-infected individuals are "disabled" and thus protected by the Americans with Disabilities Act of 1990<sup>8</sup> (ADA).<sup>9</sup>

The Supreme Court undertook to resolve this split just over a year ago in *Bragdon v. Abbott*.<sup>10</sup> Although the decision may allay the fears of Parmet and Jackson, lingering doubts about the future of the law remain. In *Bragdon*, the Court reaffirmed the majority view, holding that HIV infection is a "disability" under § 12102 of the ADA,<sup>11</sup> even in the asymptomatic stage,<sup>12</sup> because it is a physical impairment

<sup>8</sup> 42 U.S.C. §§ 12101-12213 (1994). Congress enacted the ADA to prohibit discrimination against individuals with disabilities and specifically to achieve the following goals:

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

*Id.* § 12101 (b).

<sup>9</sup> See, e.g., *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994) (finding that "a person infected with the HIV virus is an individual with a disability within the meaning of the [ADA]"); *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 774-75 (E.D. Tex. 1996) (holding that HIV-infection is a per se disability); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994) (holding that an attorney infected with HIV is disabled under the ADA).

<sup>10</sup> 524 U.S. 624 (1998).

<sup>11</sup> Section 12102 defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102 (1994).

<sup>12</sup> Clearly, any attempt to provide a comprehensive medical overview of HIV infection and AIDS lies outside the scope of this Note. However, the majority opinion in *Bragdon* provides an excellent overview of the three stages of HIV infection:

The initial stage of HIV infection is known as acute or primary HIV infection. In a typical case, this stage lasts three months. The virus concentrates in the blood. The assault on the immune system is immediate. The victim suffers from a sudden and serious decline in the number of white blood cells. There is no latency period. Mononucleosis-like symptoms often emerge between six days and six weeks after infection, at times accompanied by fever, headache, enlargement of the lymph nodes (lymphadenopathy), muscle pain (myalgia), rash, lethargy, gastrointestinal disorders, and neurological disorders. Usually these symptoms abate within 14 to 21 days. HIV antibodies appear in the bloodstream within 3 weeks; circulating HIV can be detected within 10 weeks.

After the symptoms associated with the initial stage subside, the disease enters what is referred to sometimes as its asymptomatic phase. The term is a misnomer, in some respects, for clinical features persist throughout, including lymphadenopathy, dermatological disorders, oral lesions, and bacterial infections. Although it varies with each individual, in most instances this stage lasts from 7 to 11 years. The virus now tends to concentrate in the lymph nodes, though low levels of the virus continue to appear in the blood

that substantially limits the "major life activity"<sup>13</sup> of reproduction through the risk of HIV transmission from mother to child "during gestation and childbirth."<sup>14</sup> Certainly, this inclusion of HIV infection under the ADA definition of disability as an impairment of the major life activity of reproduction is not without substantial support. For example, prior to the ADA's passage, a report from the House Education and Labor Committee noted that "a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships."<sup>15</sup> But despite the seeming clarity of this statement, the dissent in *Bragdon* argued that reproduction is not a major life activity as contemplated by the ADA, and thus should not form the basis for qualifying HIV infection as a disability.<sup>16</sup> This position emulates opinions of the Fourth Circuit<sup>17</sup> and its followers,<sup>18</sup> which hold that reproduction is not a major life activity and that consequently, one should not consider HIV infection a disability, at least insofar as it impairs this activity.

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A person is regarded as having full-blown AIDS when his or her CD4+ count drops below 200 cells/mm<sup>3</sup> of blood or when CD4+ cells comprise less than 14% of his or her total lymphocytes. During this stage, the clinical conditions most often associated with HIV, such as *pneumocystis carinii* pneumonia, Kaposi's sarcoma, and non-Hodgkins lymphoma, tend to appear. In addition, the general systemic disorders present during all stages of the disease, such as fever, weight loss, fatigue lesions, nausea, and diarrhea, tend to worsen. In most cases, once the patient's CD4+ count drops below 10 cells/mm<sup>3</sup>, death soon follows.

*Bragdon*, 524 U.S. at 635-37 (citations omitted).

<sup>13</sup> 42 U.S.C. § 12102 (1994).

<sup>14</sup> *Bragdon*, 524 U.S. at 640. A recent study estimates that "15 to 40 percent of infants born to infected mothers become infected in utero, during labor and delivery or by breast feeding." Edward M. Connor et al., *Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment*, 331 NEW ENG. J. MED. 1173, 1173 (1994). However, it has been shown that treating HIV-positive women with AZT (zidovudine) "reduce[s] the risk of maternal-infant transmission of HIV by approximately two thirds." *Id.* at 1178. These statistics provoke the question of whether society should encourage, or perhaps even require, all pregnant women to submit to HIV testing. The answer to this question depends on the extent to which a mother owes a duty to provide her unborn child with a certain quality of life. The possibility of such an obligation suggests that the fetus itself may have certain protected rights. See *infra* note 468 and accompanying text.

<sup>15</sup> H.R. REP. NO. 101-485, pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 (relying on the Justice Department Memorandum on the Application of Section 504 of the 1973 Rehabilitation Act to HIV-Infected Individuals, 12 U.S. Op. Off. Legal Counsel 209, 215 (1988)).

<sup>16</sup> See *Bragdon*, 524 U.S. at 659-60 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>17</sup> See *supra* note 7 and accompanying text.

<sup>18</sup> See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (holding that an employee's infertility is not an impairment that substantially affects a major life activity under the ADA); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995) (holding that reproduction is not a major life activity under the ADA), *aff'd*, 79 F.3d 1143 (5th Cir. 1996) (unpublished table decision).

The question thus remains as to whether reproduction as a major life activity provides the proper means by which to bring HIV infection within the protection of the ADA. It has been noted that "focusing on reproduction and sexual activity arbitrarily distinguishes between individuals based on circumstances (the plaintiff's fertility and reproductive intentions) that have nothing to do with the discrimination at issue," namely, discrimination based on HIV infection and fear of individuals with HIV.<sup>19</sup> The majority in *Bragdon* incorrectly directed the inquiry as to whether an HIV-infected individual is disabled under the ADA to "irrelevant questions about the individual's sexual habits and plans to have children."<sup>20</sup> The Court thus ignored two much more important reasons for considering HIV-infected individuals as disabled: (1) a symptomatic HIV-infected individual has an impairment of the immune system which substantially limits the ability to fight infection; and (2) the asymptomatic HIV-infected individual, while not necessarily physically impaired, is subject to society's "myths and fears about disability and disease,"<sup>21</sup> and thus suffers a disability under the ADA.

This Note argues that the Supreme Court's decision in *Bragdon v. Abbott* wrongly perpetuated a problematic standard for deeming HIV infection to be a disability under the ADA. This Note proposes a two-part alternative to the Supreme Court's approach which brings HIV infection within the statute and yet distinguishes between symptomatic and asymptomatic HIV in so doing. Part I traces the history of disability law in America from the Rehabilitation Act of 1973<sup>22</sup> to its modern successor, the Americans with Disabilities Act of 1990, and outlines the definition of disability under the ADA. Part II looks to the legislative history of the ADA, as well as the various administrative regulations by which it is implemented and enforced, to see whether the statute covers HIV infection as a disability. This Part then describes the judicial debate prior to *Bragdon* concerning whether HIV infection constitutes a per se disability under the ADA and which major life activity should provide the basis for this rule. Part III discusses the case law dealing with the related issue of reproduction as a major life activity in the context of infertility, which provides a point of departure for analyzing the *Bragdon* line. Part IV discusses the facts and

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<sup>19</sup> Elizabeth C. Chambers, Note, *Asymptomatic HIV as a Disability Under the Americans with Disabilities Act*, 73 WASH. L. REV. 403, 422-23 (1998).

<sup>20</sup> *Id.* at 423.

<sup>21</sup> *School Bd. v. Arline*, 480 U.S. 273, 284 (1986) (holding that a school teacher with the contagious disease of tuberculosis is a "handicapped individual" under § 504 of the Rehabilitation Act, which prohibits federally-funded programs from discriminating against handicapped individuals solely by reason of the handicap).

<sup>22</sup> Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C.A. §§ 701-796 (1998)).

primary issues raised by the *Bragdon* opinion and the dissent. Part V argues against any per se rule of disability and instead advocates a case-by-case approach to disability assessment that considers the specific effect of an impairment on the individual. Although the Supreme Court effectively established a per se rule in *Bragdon*, the new social construction of HIV may warrant treating the disease differently throughout its spectrum of phases. Within this framework, both symptomatic and asymptomatic HIV infection can, and should, constitute a disability, but not because they substantially impair the reproductive process. Additionally, this Note rejects the notion that the inability to reproduce, whether as a result of HIV infection or infertility, falls within the Fourteenth Amendment protection awarded to the fundamental right to privacy.

## I

### AMERICANS WITH DISABILITIES ACT

#### A. History of the ADA

President George Bush signed the ADA into law in 1990, stating that it signaled the end of “unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.”<sup>23</sup> Congress based the ADA in part on a finding that “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.”<sup>24</sup> Additionally, Congress had determined that “discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, . . . [and] health services,”<sup>25</sup> and that the disabled represent

a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.<sup>26</sup>

Armed with these findings, Congress stated that the purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabili-

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<sup>23</sup> Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of “Disability” Undermines the ADA*, 42 VILL. L. REV. 327, 327 (1997) (quoting Statement on Signing the Americans with Disabilities Act of 1990, PUB. PAPERS 1070 (July 26, 1990)) (internal quotation marks omitted).

<sup>24</sup> 42 U.S.C. § 12101(a)(1) (1994).

<sup>25</sup> *Id.* § 12101(a)(3).

<sup>26</sup> *Id.* § 12101(a)(7).



ties<sup>27</sup> and to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."<sup>28</sup>

These bold pronouncements marked a significant break from the relatively narrow scope of earlier federal disability legislation. A post-World War II act prohibited employment discrimination in the United States Civil Service based on physical handicaps.<sup>29</sup> The Architectural Barriers Act of 1968 required that buildings constructed, altered, or financed by the federal government be accessible to and usable by the disabled.<sup>30</sup> The Rehabilitation Act of 1973<sup>31</sup> sought primarily to "rehabilitate" the disabled by "providing vocational rehabilitation services to handicapped individuals"<sup>32</sup> so that they might live independent, self-sufficient lives and "engage in gainful employment."<sup>33</sup> Title V of the Rehabilitation Act did guarantee certain basic rights for people with disabilities.<sup>34</sup> Its most significant provision, section 504, prohibited discrimination against any "otherwise qualified individual with a disability" in "any program or activity receiving Federal financial assistance."<sup>35</sup> However, none of this pre-ADA legislation contemplated the breadth of the ADA's goals as articulated by Congress: "[T]o assure equality of opportunity, full participation, independent living, and economic self-sufficiency"<sup>36</sup> for the disabled. Further, the ADA sought to redefine the notion of "disability" in our society. As noted by one of the ADA's architects, Governor Lowell P. Weicker, the discrimination that disabled Americans face constitutes their greatest handicap.<sup>37</sup> Hence, the ADA specifically targets this pervasive discrimination rather than attempting to rehabilitate the physical or mental impairment that qualifies an individual as disabled.

<sup>27</sup> *Id.* § 12101(b)(1).

<sup>28</sup> *Id.* § 12101(b)(2).

<sup>29</sup> *See* Act of June 10, 1948, Pub. L. No. 80-617, ch. 434, 62 Stat. 351 (codified as amended in 5 U.S.C. § 633); *see also* Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 387 (1991) (describing the history of disability-protection legislation).

<sup>30</sup> *See* Act of Aug. 12, 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151-4157 (1994)).

<sup>31</sup> Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended in 29 U.S.C.A. §§ 701-796 (1998)).

<sup>32</sup> *Id.* § 2(1).

<sup>33</sup> *Id.*

<sup>34</sup> *See* 29 U.S.C. §§ 791-794 (1994). For example, the Act required federal executive agencies to create affirmative action programs for the "hiring, placement, and advancement of individuals with disabilities." *Id.* § 791. Similar efforts were required by government contractors on contracts exceeding \$10,000. *See id.* § 793. The Act also established the Architectural and Transportation Barriers Compliance Board to enforce compliance with the Architectural Barriers Act. *See id.* § 792.

<sup>35</sup> *Id.* § 794. A 1978 amendment to the Act extended this coverage to federal executive agencies and the United States Postal Service. *See* Act of Nov. 6, 1978, Pub. L. No. 95-602, § 119(2), 92 Stat. 2955, 2982 (codified as amended at 29 U.S.C. 794(a)-(b) (1988)).

<sup>36</sup> 42 U.S.C. § 12101(a)(8) (1994).

<sup>37</sup> *See* Weicker, *supra* note 29, at 390, 392.

## B. Definition of Disability

The ADA achieves its stated goals via a broad three-prong definition of disability,<sup>38</sup> which modifies the definition of disability set forth in the Rehabilitation Act of 1973.<sup>39</sup> Each subchapter of the ADA specifically delegates authority to the Equal Employment Opportunity Commission (EEOC) or the Department of Justice (DOJ) to implement and regulate its provisions.<sup>40</sup> Consequently, EEOC and DOJ regulations and guidelines prove useful in interpreting the scope of this definition.

### 1. *Impairment That Substantially Limits a Major Life Activity*

The first prong of the ADA's definition covers those who are disabled in the traditional sense of the word—by a physical or mental impairment that substantially limits a major life activity.<sup>41</sup> This prong consists of three elements, each of which must be satisfied for an individual to qualify as disabled.

#### a. *Impairment*

In its Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act,<sup>42</sup> the EEOC defines "physical or mental impairment" as follows:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive,

<sup>38</sup> The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

<sup>39</sup> The 1973 version of the Rehabilitation Act used the word "handicapped" rather than "disabled," defining it in terms of one's ability to work:

The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.

Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (1973). Later amendments substituted "disability" for "handicapped individual" and incorporated the language that would later appear in the ADA three-prong definition. See Pub. L. 93-516, § 111, 88 Stat. 1617, 1619 (1974).

<sup>40</sup> Subchapter I (Employment) delegates regulatory authority to the Equal Employment Opportunity Commission. See 42 U.S.C. § 12116. Subchapter II (Public Services) delegates regulatory authority to the Attorney General. See *id.* § 12134. Subchapter III (Public Accommodations and Services Operated by Private Entities) also delegates regulatory authority to the Attorney General, with the exception of "[t]ransportation provisions" covered under § 12182(a). *Id.* § 12186(h).

<sup>41</sup> See *id.* § 12102(2)(A).

<sup>42</sup> See 29 C.F.R. § 1630 (1998).

digestive, genito-urinary, hemic and lymphatic, skin, and endocrine;  
or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>43</sup>

The DOJ regulations parallel this language very closely, but add a list of various diseases and conditions which qualify as a "physical or mental impairment."<sup>44</sup> While the list is extensive, the appendix to the regulations makes clear that it is not comprehensive, "particularly in light of the fact that other conditions or disorders may be identified in the future."<sup>45</sup>

### b. *Substantially Limits*

The EEOC defines "substantially limits" as follows:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.<sup>46</sup>

Three factors should be considered in determining whether an individual is substantially limited in a major life activity:

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.<sup>47</sup>

The DOJ recommends consideration of similar factors, stating that a person's impairment will be substantially limiting "when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people."<sup>48</sup> The DOJ emphasizes that "trivial impair-

<sup>43</sup> *Id.* § 1630.2(h)(1)-(2).

<sup>44</sup> 28 C.F.R. § 36.104(1)(iii) (1998). The DOJ regulations define disability as follows: [P]hysical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, *HIV disease (whether symptomatic or asymptomatic)*, tuberculosis, drug addiction, and alcoholism.

*Id.* (emphasis added).

<sup>45</sup> Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. pt. 36 app. B § 36.104, at 582 (1998).

<sup>46</sup> 29 C.F.R. § 1630.2(j)(1)(i)-(ii).

<sup>47</sup> *Id.* § 1630.2(j)(2)(i)-(iii).

<sup>48</sup> 28 C.F.R. pt. 36 app. B § 36.104, at 582-83.

ment[s], such as a simple infected finger," do not fall within the statute and strongly suggests that "temporary" impairments do not qualify for protection either.<sup>49</sup>

According to the EEOC interpretive guidelines, few impairments are per se substantially limiting.<sup>50</sup> Rather, the EEOC advocates analysis of impairments on a case-by-case basis, focusing "on the effect of that impairment on the life of the individual."<sup>51</sup> Some impairments, however, are inherently substantially limiting, thus eliminating the need for this case-specific analysis.<sup>52</sup> For example, the EEOC cites HIV infection as an example of an inherently substantially limiting impairment.<sup>53</sup>

### c. *Major Life Activity*

"Major life activities," as defined by both the EEOC and the DOJ, include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>54</sup> Yet, the EEOC interpretive guidelines admit that this list is not exhaustive and provide other examples of major life activities, such as sitting, standing, lifting, and reaching.<sup>55</sup> Section 902 of the *EEOC Compliance Manual* adds "[m]ental and emotional processes such as thinking, concentrating, and interacting with others" to this list.<sup>56</sup> Ultimately, major life activities "are those basic activities that the average person in the general population can perform with little or no difficulty."<sup>57</sup>

## 2. *Record of Impairment*

The EEOC and the DOJ define the phrase "has a record of such impairment" to mean "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."<sup>58</sup> This provision seeks to "ensure that people are not discriminated against because of a history of disability,"

<sup>49</sup> *Id.* at 583.

<sup>50</sup> See Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(j), at 347 (1998).

<sup>51</sup> *Id.* at 347 ("Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.").

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* Discussion of such per se disabilities is deferred until Part II. See *infra* Part II.B.

<sup>54</sup> 29 C.F.R. § 1630.2(i); see also 28 C.F.R. § 36.104(2) (also defining disability).

<sup>55</sup> See 29 C.F.R. pt. 1630 app. § 1630.2(i), at 347.

<sup>56</sup> EEOC Compl. Man. (CCH) ¶ 6883, § 902.3 (1995).

<sup>57</sup> 29 C.F.R. pt. 1630 app. § 1630.2(i), at 347.

<sup>58</sup> 29 C.F.R. § 1630.2(k); see also 28 C.F.R. § 36.104(3) (also defining a record of impairment).

such as a misdiagnosed learning disability,<sup>59</sup> and to protect those "who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity."<sup>60</sup>

### 3. *Regarded as Having an Impairment*

The final "regarded as" prong of the ADA's disability test sweeps broadly to encompass individuals with impairments who do not fall within the first two prongs, but nonetheless suffer from discrimination.<sup>61</sup> In this way, the ADA attacks discrimination as a moral wrong in itself, penalizing discriminatory attitudes expressed towards the ostensibly disabled. The EEOC and DOJ regulations list three ways in which an individual can come under the protection of this section. A qualifying individual

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.<sup>62</sup>

In *School Board v. Arline*,<sup>63</sup> the Supreme Court articulated the rationale for the "regarded as" prong in the context of the Rehabilitation Act of 1973. In this case, the plaintiff was hospitalized for tuberculosis in 1957 but taught elementary school in Florida for the next twenty years while the disease was in remission.<sup>64</sup> After suffering her second and third relapses, the school board suspended the plaintiff with pay for the remainder of the academic year, after which time the plaintiff was discharged.<sup>65</sup> Plaintiff brought suit in federal court, alleging that the school board's decision to dismiss her based on the contagious nature of tuberculosis violated section 504 of the Rehabilitation Act of 1973.<sup>66</sup> The Court held that the plaintiff's hospitalization in 1957 qualified her as handicapped under the "record of impairment" prong of the Rehabilitation Act test.<sup>67</sup> The contagiousness of tuberculosis did not warrant excluding all individuals with "ac-

<sup>59</sup> 29 C.F.R. pt. 1630 app. § 1630.2(k), at 349.

<sup>60</sup> 28 C.F.R. pt. 36 app. B § 36.104, at 583.

<sup>61</sup> See *supra* note 37 and accompanying text.

<sup>62</sup> 29 C.F.R. § 1630.2(l); see also 28 C.F.R. §36.104(4) (same).

<sup>63</sup> 480 U.S. 273 (1987).

<sup>64</sup> See *id.* at 276.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* at 276-77.

<sup>67</sup> See *id.* at 285-86.

tual or perceived contagious diseases" from the Act's coverage.<sup>68</sup> In so holding, the Court noted that a contagious impairment might not substantially limit an individual's physical or mental abilities, but that the negative reactions of others to such a disease could well impair that individual's ability to work.<sup>69</sup> The Court concluded that by including the regarded as prong in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."<sup>70</sup>

### C. Direct Threat Exception

Subchapter III of the ADA prohibits discrimination against disabled individuals by any person who owns, leases, or operates a place of public accommodation.<sup>71</sup> This subchapter is not central to the analysis in *Bragdon v. Abbott*,<sup>72</sup> but it is worth noting here because it contains an exception to the otherwise broad prohibitions of the ADA that potentially offers relief to the medical community when dealing with HIV-infected patients. Section 12182(b)(3) states:

Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others . . . that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.<sup>73</sup>

The DOJ leaves determination of what constitutes a direct threat up to the public entity, requiring that it make this decision on an individualized basis and in reliance on "current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk."<sup>74</sup>

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<sup>68</sup> *Id.* at 285.

<sup>69</sup> *See id.* at 283.

<sup>70</sup> *Id.* at 284.

<sup>71</sup> *See* 42 U.S.C. § 12182(a) (1994) ("No individual shall be discriminated against 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 owns, leases (or leases to), or operates a place of public accommodation.").

<sup>72</sup> 524 U.S. 624 (1998).

<sup>73</sup> 42 U.S.C. § 12182(b)(3) (1994).

<sup>74</sup> 28 C.F.R. § 36.208(c) (1998). The "direct threat" exception codifies the standard first articulated by the Supreme Court in *Arline*, 480 U.S. at 287-88. In *Arline*, the Court recognized a need to balance the interests of disabled individuals against public safety concerns. *See id.*; *see also* Preamble to Regulation on Nondiscrimination on the Basis of

The "direct threat" exception prompts examination of the possibility that HIV-infected individuals present a risk of transmission to certain medical personnel.<sup>75</sup> Despite the general medical consensus that the risk of transmission in the patient-provider context is small,<sup>76</sup> the risk of infection is real and the consequences are grave. It has been noted that patients lack any formal legal obligation to protect their healthcare providers from risk comparable to the duty of healthcare professionals to avoid causing harm to their patients.<sup>77</sup> Fearful providers may thus be inclined to limit an HIV-infected individual's access to medical care by choosing to perform only noninvasive procedures, referring infected patients to other providers or denying care completely. The outcome of any ADA claim against a provider will thus depend on a careful balancing of two values inherent in the ADA and its "direct threat" exception: "the non-discrimination principle and the goal of risk reduction."<sup>78</sup>

## II

### HIV INFECTION AS A DISABILITY UNDER THE ADA

According to a recent report by the Centers for Disease Control and Prevention (CDC), 665,357 Americans have been infected with the HIV virus and subsequently developed acquired immunodeficiency syndrome (AIDS).<sup>79</sup> As of June 1998, 261,560 individuals were living with AIDS, while 90,819 were reported as infected but asymptomatic (HIV positive, but not displaying the symptoms of

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Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. pt. 36 app. B § 36.208, at 598 (1998) (describing the *Arline* decision and the "direct threat" exception).

<sup>75</sup> See Mary Anne Bobinski, *Patients and Providers in the Courts: Fractures in the Americans with Disabilities Act*, 61 ALB. L. REV. 785, 788 (1998) ("The precise risk of HIV transmission in health care settings is unknown. The opportunity for transmission is clear."). HIV may be transmitted when bodily fluids of an infected individual come in contact with "an open sore or mucosal membrane of an uninfected person." *Id.* For example, a health care worker or physician who "sustains a cut during surgery" could contract HIV if then exposed to the infected fluids of the patient. *Id.* Conversely, patients are at risk of acquiring HIV from an infected health care worker or physician who "sustains a cut during surgery" and then "bleeds into a patient's open wound." *Id.* To reduce the risk of HIV transmission from patient to provider, the Centers for Disease Control and Prevention (CDC) recommends the use of "universal precautions," which treat all patients as "potential sources of blood-borne infections." *Id.* at 794. Health care workers use various prophylactics such as gloves "to reduce the likelihood of coming into contact with the blood or infectious body fluids of patients." *Id.* To reduce the risk of transmission from provider to patient, the CDC advises that HIV-positive health care workers refrain from performing "exposure-prone procedures," unless they have obtained the informed consent of the patient and the permission of an expert review board. *Id.* at 791.

<sup>76</sup> See *id.* at 796.

<sup>77</sup> See *id.* at 822-23.

<sup>78</sup> *Id.* at 802.

<sup>79</sup> See CDC, U.S. Dep't of Health & Human Servs., *U.S. HIV and AIDS Cases Reported Through June 1998*, 10 HIV/AIDS SURVEILLANCE REP., Midyear ed. 1998, at 3.

AIDS).<sup>80</sup> Certainly, few would argue with the proposition that the United States has established an embarrassing record of discrimination against HIV-infected individuals over the past fifteen years.

As noted above, Congress adopted a broad definition of disability in the ADA, intending to protect the disabled not only from discrimination based on actual physical or mental impairments, but also from discriminatory treatment flowing from stereotypical assumptions about a disabled person's ability to contribute to society.<sup>81</sup> However, despite the apparent scope of the three-prong test, it remains unclear whether asymptomatic HIV-infected individuals fall within the ADA's definition of disability and thus qualify for protection from employment and public accommodation discrimination.<sup>82</sup> Furthermore, the ADA itself is silent as to what major life activity, if any, might be substantially limited such that HIV infection, even if asymptomatic, could be brought within the statute's protection.

#### A. Interpreting the ADA to Cover HIV Infection

The judicial debate as to ADA coverage of both the symptomatic and the asymptomatic invariably turns on this question of whether HIV infection substantially limits a major life activity. Despite the ADA's silence, courts have recourse to a wealth of extrinsic aids to help them interpret the statute, including the legislative history of the ADA, various EEOC and DOJ regulations and compliance manuals, and case law and standards developed under the Rehabilitation Act of 1973.<sup>83</sup>

##### 1. Legislative History

Carlis and McCabe point out that Congress conceived of the ADA in a political environment in which it seemed clear that new federal legislation prohibiting disability-based discrimination might well include all stages of HIV infection as a disability.<sup>84</sup> For example, in July of 1988, Surgeon General C. Everett Koop wrote to Douglas Kmiec, Acting Assistant Attorney General in the Office of Legal Counsel of the Department of Justice, concerning the "medical and public health

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<sup>80</sup> See *id.* at 5 tbl.1. These numbers represent only those cases reported to the CDC.

<sup>81</sup> See *supra* Part I.A.

<sup>82</sup> See Chambers, *supra* note 19, at 403-04.

<sup>83</sup> See 42 U.S.C. § 12201(a) (1994) ("Except as otherwise provided in this chapter, nothing in this chapter 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." (citations omitted)). See *infra* Part V for a discussion of the appropriate weight courts should afford these authorities when interpreting a statute.

<sup>84</sup> See Michael D. Carlis & Scott A. McCabe, Comment, *Are There No Per Se Disabilities Under the Americans with Disabilities Act? The Fate of Asymptomatic HIV Disease*, 57 MD. L. REV. 558, 569 (1998).



concerns regarding discrimination and the current HIV epidemic.”<sup>85</sup> The Surgeon General essentially argued that no bright line can be drawn between symptomatic and asymptomatic HIV, stating that “from a purely scientific perspective, persons with HIV infection are clearly impaired” and “are not comparable to an immune carrier of a contagious disease” because “they may appear outwardly healthy but are in fact seriously ill.”<sup>86</sup> Dr. Koop asserted that the government’s “primary public health strategy is prevention of HIV transmission.”<sup>87</sup> He thus advocated an attack on HIV-related discrimination to encourage counseling and testing for HIV,<sup>88</sup> presumably out of concern for those who might avoid such services for fear of revealing their HIV status in a hostile environment.

The Surgeon General letter prompted President Reagan’s Counsel to request an opinion from the Department of Justice as to whether section 504 of the Rehabilitation Act of 1973 covered those infected with HIV.<sup>89</sup> In the resultant opinion letter, Kmiec concluded that section 504 covers both symptomatic and asymptomatic HIV-infected individuals, provided they are “otherwise qualified” under the statute.<sup>90</sup>

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<sup>85</sup> Justice Department Memorandum on the Application of Section 504 of the 1973 Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 209, 230-31 (1988), *reprinted in* 8 Fair Empl. Prac. Cas. (BNA) 405:18-19 (1998) [hereinafter Application of Section 504] (letter dated July 29, 1988 from Dr. C. Everett Koop, Surgeon General of Public Health Services, to Douglas Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice) [hereinafter Surgeon General Letter].

<sup>86</sup> *Id.* at 405:19.

<sup>87</sup> *Id.* at 405:18.

<sup>88</sup> *See id.*

<sup>89</sup> *See Carlis & McCabe, supra* note 84, at 570-72.

<sup>90</sup> Application of Section 504, *supra* note 85, at 405:1-2 (memorandum dated Sept. 27, 1988 from Douglas W. Kmiec, Acting Assistance Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President) [hereinafter Kmiec Memorandum]. Section 504 of the Rehabilitation Act guarantees that no “otherwise qualified” handicapped individuals will be excluded from any programs or benefits that receive federal funds. 29 U.S.C. § 794 (1994). Originally, the Rehabilitation Act defined an “otherwise qualified” handicapped individual as one who “can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.” Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6)(b), 87 Stat. 355. The 1988 amendments excluded from those “otherwise qualified” any

individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

29 U.S.C. § 706(8)(D). Thus, at least in the employment context, the Kmiec memorandum contemplates the possibility that an HIV-infected individual might pose a direct threat to fellow employees or customers, or by reason of his HIV infection, be unable to perform his job. In this case, an employer would not violate the ADA by firing or refusing to hire such an individual.

First, relying on the Supreme Court's holding in *School Board v. Arline*,<sup>91</sup> Kmiec asserted that the contagiousness of HIV could not remove symptomatic individuals from section 504.<sup>92</sup> Additionally, he stated that the substantial limiting effects of various clinical symptoms associated with symptomatic HIV (i.e., weakening of the immune system leading to development of cancer or pneumonia) warrant including such individuals under section 504's "individual with handicaps" definition of disability.<sup>93</sup> Given the fact that AIDS often requires hospitalization, Kmiec reasoned that a substantial limitation of one or more major life activities naturally follows.<sup>94</sup> But, beyond the reference to HIV's assault on the immune system, Kmiec failed to indicate which major life activity is substantially limited by symptomatic HIV infection.

Second, he argued that section 504 covers asymptomatic individuals who do not appear outwardly disabled "based either on the effect that the knowledge of infection will have on the individual or the effect that knowledge of the infection will have on others."<sup>95</sup> Regarding the first part of this test, Kmiec suggested that an HIV-infected individual's decision to forgo having children due to the substantial risk of transmitting HIV to his or her offspring constituted a behavioral choice completely dependant on HIV.<sup>96</sup> Assuming that procreation is a major life activity under section 504, courts might find that HIV limits a major life activity and thus qualifies an individual for coverage under the first prong of the Rehabilitation Act's definition of disability.<sup>97</sup> Additionally, section 504 could protect HIV-infected individuals via the "regarded as" prong<sup>98</sup> of the Rehabilitation Act's definition of "handicapped individual."<sup>99</sup> Kmiec argued that the Supreme Court's decision in *Arline* expanded the scope of the "regarded as" prong to include those who have no incapacity at present, but are nonetheless substantially limited in a major life activity because others perceive them as handicapped.<sup>100</sup> Consequently, an asymptomatic individual, although not visibly incapacitated, could qualify as handicapped if those aware of his infection treat him as such.<sup>101</sup>

Passage of the ADA seems to have had little effect on the conclusions reached by the Office of Legal Counsel. In 1994, the office pub-

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91 480 U.S. 273 (1987).

92 See Kmiec Memorandum, *supra* note 90, at 405:3-4.

93 See *id.* at 405:4.

94 See *id.* at 405:6.

95 *Id.*

96 See *id.* at 405:6-7.

97 See *id.*

98 See 29 U.S.C.A. § 705(20)(B)(iii) (1998).

99 See Kmiec Memorandum, *supra* note 90, at 405:7-8.

100 See *id.*

101 See *id.* at 405:8.

lished a follow-up to the Kmiec memorandum that essentially confirmed its findings within the context of the ADA.<sup>102</sup> Deputy Assistant Attorney General Dawn E. Johnsen drew no distinction between symptomatic and asymptomatic HIV infection, asserting that "HIV infection, whether or not an individual has developed any overt symptoms as a result of the infection, is a disability under the Rehabilitation Act and under the Americans with Disabilities Act."<sup>103</sup> This opinion letter thus suggests that HIV infection is a per se disability whether or not an individual exhibits any physical symptoms of AIDS.

Indeed, a review of the House and Senate reports regarding the history of the ADA reveals that Congress did not condition coverage of HIV infection as a disability on the symptomatic-asymptomatic distinction. Instead, the legislative history provides strong evidence that Congress intended HIV infection to constitute a per se disability. For example, in its discussion of the meaning of "disability" under the ADA, the House Education and Labor Committee conceded that it would be impossible to list every physical or mental impairment,<sup>104</sup> however, the Committee expressly included "infection with the Human Immunodeficiency Virus" on its non-exhaustive list.<sup>105</sup> The Committee then laid down a per se rule, noting that "a person infected with Human Immunodeficiency Virus is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships."<sup>106</sup> The House Judiciary Committee similarly included HIV infection on its non-exhaustive list of physical and mental impairments,<sup>107</sup> noting "[p]ersons infected with the Human Immunodeficiency Virus are considered to have an impairment that substantially limits a major life activity, and thus are considered disabled under the first test of the definition."<sup>108</sup> Finally, the Senate Committee on Labor and Human

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102 See Justice Department Memorandum on the Review of 1988 Opinion Concerning the Applicability of Section 504 of the Rehabilitation Act to Individuals Infected with HIV, 18 Op. Off. Legal Counsel 141, 141 (1994) ("The subsequent passage of the Americans with Disabilities Act did not alter the analysis of cases arising under the Rehabilitation Act, although an amendment to section 504 now requires reference to standards set forth in the ADA.") [hereinafter Johnsen Memorandum].

103 *Id.*

104 See H.R. REP. NO. 101-485, pt. 2, at 51 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 333.

105 *Id.*

106 *Id.* at 334 (citing Kmiec Memorandum, *supra* note 90, at 405:5-6).

107 See H.R. REP. NO. 101-485, pt. 3, at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451.

108 *Id.* at 451 n.18 (citing Kmiec Memorandum, *supra* note 90, at 405:5). *But see* H.R. REP. NO. 101-485, pt. 4, at 80-83 (1990), reprinted in 1990 U.S.C.C.A.N. 512, 564-65 (House Committee on Energy and Commerce, Dissenting Views on the Americans with Disabilities Act). These dissenters argue, somewhat violently, that the DOJ wrongly extended the Ar-

Resources agreed that HIV infection constitutes a physical or mental impairment<sup>109</sup> and is therefore covered under the first prong of the ADA definition of "disability."<sup>110</sup>

These reports represent only the highlights of a much larger body of extrinsic material available to aid in the interpretation of the ADA. Clearly, however, this limited overview indicates that "[d]uring the years immediately preceding the enactment of the ADA, every indicator of congressional intent unequivocally pointed toward the conclusion that individuals with asymptomatic HIV disease were covered as individuals with a 'disability.'"<sup>111</sup>

## 2. *Implementing Regulations*

The EEOC and DOJ implementing regulations reinforce the clear implication of these congressional reports: HIV infection is *per se* disabling regardless of whether an infected individual is symptomatic or asymptomatic.

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*line* standard to include asymptomatic HIV-infected individuals, and that therefore, the ADA constitutes a "homosexual rights bill in disguise." *Id.* at 565.

<sup>109</sup> See S. REP. NO. 101-116, at 22 (1990).

<sup>110</sup> See *id.* (citing Kmiec Memorandum, *supra* note 90, at 404:5). The Senate Report does not specifically state what major life activity HIV infection impairs for purposes of the statute. However, in its explicit reliance on the Kmiec memorandum, the Committee on Labor and Human Resources must have assumed that HIV substantially limits the major life activity of reproduction.

<sup>111</sup> Carlis & McCabe, *supra* note 84, at 580. Carlis and McCabe refer to various statements by members of Congress regarding the intended coverage of HIV-infected individuals under the ADA. See *id.* at 573-77 & nn.91-99. For example, they note the following statements: (1) "People with HIV disease are individuals who have any condition along the full spectrum of HIV infection—[including] asymptomatic HIV infection. . . . These individuals[ ] have a physical impairment that substantially limits a major life activity," *id.* at 576 n.91 (quoting 136 CONG. REC. S9696 (daily ed. July 13, 1990) (statement of Senator Kennedy)) (internal quotation marks omitted); and (2) "It is of exceptional significance that this bill will offer protection to the thousands of Americans with HIV disease—from those who are asymptomatic to those with fully developed AIDS. Persons living with HIV disease suffer from all the forms of discrimination found in our society," *id.* at 576 n.92 (quoting 136 CONG. REC. H2442 (daily ed. May 17, 1990) (statement of Rep. Weiss) (internal quotation marks omitted)). Carlis and McCabe also cite Democratic Representative Jim McDermott:

I am particularly pleased that [the ADA] will finally also extend necessary protection to people with HIV disease. . . . As a physician, I know that although the major life activity that is affected at any point along the spectrum by the HIV infection may be different, an effect on some major life activity exists from the time of HIV infection.

*Id.* at 576 (quoting 136 CONG. REC. H2626 (daily ed. May 22, 1990) (statement of Rep. McDermott)) (internal quotation marks omitted). For an in-depth treatment of congressional intent as to HIV coverage under the ADA and the legislative history surrounding enactment of the ADA, see *id.* at 569-80.

a. *EEOC Regulations*

As mentioned above, the EEOC interpretative guidelines require that a determination of whether an impairment substantially limits a major life activity must be made on a case-by-case basis by accounting for the effect of an impairment on the life of the particular individual in question.<sup>112</sup> Nevertheless, the EEOC admits that certain impairments are “inherently substantially limiting” regardless of whom they might affect and thus constitute per se disabilities,<sup>113</sup> the illustrative example being HIV infection.<sup>114</sup> Significantly, in sweepingly granting HIV-infection disability status irrespective of the symptomatic-asymptomatic distinction, the EEOC neglects to mention, or perhaps purposefully omits, any discussion of the precise major life activity (reproduction or other) HIV infection might substantially limit in all cases.

b. *DOJ Regulations*

The DOJ specifically includes “HIV disease (whether symptomatic or asymptomatic)” on its list of physical or mental impairments covered under the ADA definition of disability.<sup>115</sup> The DOJ interpretive guidelines discuss this characterization in light of the 1988 Kmiec memorandum,<sup>116</sup> which concluded that HIV infection is an impairment that substantially limits a major life activity.<sup>117</sup> The use of “or” between “symptomatic” and “asymptomatic” in the parenthetical following “HIV disease” further suggests that one should ignore any distinction between the two phases of HIV infection for the purpose of establishing a disability based thereon.<sup>118</sup> In fact, reference to the Kmiec memorandum only strengthens the implication that HIV infection is a per se disability. As with the EEOC interpretive guidelines, the DOJ appendix fails to tie this per se disability rule to a particular major life activity which is substantially limited by HIV infection.<sup>119</sup>

While the EEOC and DOJ guidelines certainly support the conclusion that HIV infection is a per se disability under the ADA, they

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<sup>112</sup> See Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(j), at 347 (1998) (“Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.”).

<sup>113</sup> *Id.*

<sup>114</sup> See *id.*

<sup>115</sup> 28 C.F.R. § 36.104(1)(iii) (1998).

<sup>116</sup> See Kmiec Memorandum, *supra* note 90.

<sup>117</sup> See Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. pt. 36 app. B § 36.104, at 582 (1998).

<sup>118</sup> 28 C.F.R. § 36.104(1)(iii).

<sup>119</sup> See 28 C.F.R. pt. 36 app. B § 36.104, at 582.

conspicuously omit the references made in the legislative history to reproduction as the major life activity that HIV substantially limits. Perhaps this omission constitutes no more than a natural function of a per se rule—if the disability is automatic, then the usual three-part inquiry (physical or mental impairment; substantially limits; major life activity) required by the first prong of the ADA's disability test is by definition irrelevant. Alternatively, the omission might reflect some measure of uncertainty on the part of the EEOC and the DOJ as to the precise rationale for making HIV infection a per se disability; after all, at least in the asymptomatic stage, one could argue that HIV is not substantially limiting. The Kmiec memorandum suggested that asymptomatic individuals could be deemed disabled under the Rehabilitation Act if their infection is known to an employer or other entity because they might be "regarded as" having an impairment that substantially limits a major life activity when in fact they do not.<sup>120</sup> But, pushing the asymptomatic into the "regarded as" prong still leaves unanswered the question of what major life activity is substantially limited for the symptomatic. As the next Part argues, reproduction is not the answer.

### 3. Pre-ADA Cases

Prior to enactment of the ADA, most federal courts regarded HIV infection as an absolute disability, although some criticize the analyses adopted in reaching this conclusion as less than thorough.<sup>121</sup>

In the well-publicized case of *Thomas v. Atascadero Unified School District*,<sup>122</sup> a federal district court in California held that an HIV-positive child, Ryan Thomas, was "handicapped" under the Rehabilitation Act, but "otherwise qualified" to attend kindergarten, in the absence of any evidence that he posed a significant risk of harm to his classmates or teachers.<sup>123</sup> The court stated that "[p]ersons infected with the AIDS virus suffer significant impairments of their major life activities"<sup>124</sup> and that even asymptomatic individuals are substantially limited in their ability to reproduce.<sup>125</sup>

The court noted that Ryan "suffer[ed] from significant impairment of his major life activities."<sup>126</sup> Indeed, Ryan experienced repeated pulmonary and ear complications, as well as chronic

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<sup>120</sup> See Kmiec Memorandum, *supra* note 90, at 405:6-7.

<sup>121</sup> See Carlis & McCabe, *supra* note 84, at 580-81.

<sup>122</sup> 662 F. Supp. 376 (C.D. Cal. 1987).

<sup>123</sup> See *id.* at 381-82.

<sup>124</sup> *Id.* at 379. As examples of such significantly impaired major life activities, the court listed "caring for [oneself], performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Id.*

<sup>125</sup> See *id.*

<sup>126</sup> *Id.*

lymphadenopathy during the first four years of his life. However, he had been relatively healthy and had experienced no recent complications for more than a year following his diagnosis and the commencement of treatment.<sup>127</sup> Both of Ryan's treating physicians notified the defendant school district in writing that no "medical reason" existed that would preclude Ryan from attending school.<sup>128</sup> Although the court did not specify whether Ryan was symptomatic or asymptomatic, the noted symptoms are consistent with those attributed to asymptomatic HIV.<sup>129</sup> If we thus assume that Ryan was indeed asymptomatic, or at least sufficiently far removed from the symptomatic range of the HIV spectrum to function in school on a daily basis, then we must wonder exactly what major life activity was substantially limited by his infection. The court must have half-consciously relied on its own statement that "[e]ven those who are asymptomatic have abnormalities in their hemic and reproductive systems making procreation and childbirth dangerous to themselves and others."<sup>130</sup>

But rather than any substantial limitation of the major life activity of reproduction, which seems obviously irrelevant to a six-year-old boy, the importance of *Thomas* rests more on the manner in which he was perceived by the defendant school district.<sup>131</sup> For example, the school ejected Ryan from class and relegated him to home tutoring, pursuant to a school district policy regarding the admission of students infected with "communicable diseases."<sup>132</sup> Following an incident in which Ryan bit the leg of another child but did not break the skin, a county psychologist evaluated Ryan and concluded that he would "behave 'aggressively' in a kindergarten setting because his level of social and language skills and maturity was below those of his classmates."<sup>133</sup> The school district clearly feared that Ryan would transmit HIV to other school children via the exchange of bodily secretions through biting.<sup>134</sup> Nevertheless, the court held that the

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<sup>127</sup> See *id.* at 379-80.

<sup>128</sup> *Id.* at 380.

<sup>129</sup> For a description of asymptomatic HIV, see *supra* note 12.

<sup>130</sup> *Thomas*, 662 F. Supp. at 379.

<sup>131</sup> See *id.* at 382 ("Ryan Thomas has been subjected to different treatment from the treatment received by other kindergarten students in the District and excluded from his kindergarten class because of his 'handicap.'").

<sup>132</sup> *Id.* at 380-81.

<sup>133</sup> *Id.* at 380.

<sup>134</sup> See *id.* at 381. In deciding to remove Ryan from school, the school district relied on the following information and recommendations published by the CDC regarding the education of children infected with the AIDS virus:

For the infected preschool-aged child and for some neurologically handicapped children who lack control of their body secretions or who display behavior, such as biting, and those children who have uncoverable, oozing lesions, a more restricted environment is advisable until more is known about transmission in these settings. Children infected with HTLV-III/LAV

school district did not present sufficient medical evidence to prove that human bites could transmit the AIDS virus.<sup>135</sup> Consequently, the court concluded that the school district had treated Ryan differently than his classmates and had excluded him from kindergarten solely because of his "handicap."<sup>136</sup>

A more rigorous analysis of the Rehabilitation Act suggests that because Ryan was asymptomatic and medically able to attend kindergarten, he did not suffer from an impairment that substantially limited a major life activity under the first prong of the definition of disability.<sup>137</sup> Rather, his HIV infection created a misperception that he was handicapped, based on a lack of knowledge in the medical community as to the vectors for transmitting HIV.<sup>138</sup> Consequently, the "regarded as" prong of the Rehabilitation Act<sup>139</sup> offered the more appropriate basis for qualifying Ryan as handicapped and thus entitling him to the protection he deserved, without resorting to some vague predictions about the effect of HIV on his future reproductive choices.

In *Cain v. Hyatt*,<sup>140</sup> the United States District Court for the Eastern District of Pennsylvania similarly conflated the first ("substantially limits a major life activity") and third ("regarded as") prongs of the Rehabilitation Act. Here, the court granted punitive damages to an attorney whose law firm dismissed him after discovering that he had AIDS.<sup>141</sup> The court held that AIDS constitutes a handicap under the Pennsylvania Human Relations Act, which adopts the Rehabilitation Act's disability standard,<sup>142</sup> and that the plaintiff established that the firm discharged him on the basis of his handicap.<sup>143</sup>

In reaching this conclusion, the court articulated two reasons justifying the inclusion of AIDS under the statutory definition of a handicap: "First, both the underlying viral condition and the symptomology

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[HIV] should be cared for and educated in settings that minimize exposure of other children to blood or body fluids.

*Id.*

<sup>135</sup> See *id.* at 382.

<sup>136</sup> See *id.*

<sup>137</sup> See 29 U.S.C.A. § 705(20)(B)(i) (1998). The Rehabilitation Act lays out the same three-prong test for disability later employed by the ADA.

<sup>138</sup> The court actually implied this misperception in determining that the medical report relied on by defendants provided insufficient information regarding HIV on which to base a school policy. See *Thomas*, 662 F. Supp. at 381.

<sup>139</sup> See 29 U.S.C.A. § 705(20)(B)(iii).

<sup>140</sup> 734 F. Supp. 671 (E.D. Pa. 1990).

<sup>141</sup> See *id.* 686-87.

<sup>142</sup> See *id.* at 677-78. The court cited substantial authority, including *Thomas*, 662 F. Supp. 376, to support this conclusion, noting that "the consensus of opinion holds AIDS qualifies as a handicap or disability under various federal and state antidiscrimination laws." 734 F. Supp. at 678.

<sup>143</sup> See *id.* at 680-81.



of AIDS give rise to physical impairments that substantially limit one's abilities to engage in major life activities. Second, societal prejudices deem persons with AIDS as having such an impairment."<sup>144</sup> This interpretation suggests that asymptomatic individuals, while perhaps not physically impaired in their daily lives, would nevertheless qualify as handicapped under the "regarded as" prong of the Rehabilitation Act. Indeed, the court admitted that society's misconceptions about HIV often substantially limit the lives of HIV-infected individuals.<sup>145</sup> Finding that the defendants "considered the plaintiff to be handicapped,"<sup>146</sup> the court thus effectively applied the "regarded as prong" of the Rehabilitation Act without explicitly claiming to do so.

However, the court also argued in dictum that the statute should cover asymptomatic individuals because an HIV carrier cannot reproduce without endangering the lives of both that person's partner and potential offspring.<sup>147</sup> Therefore, this significant injury to the reproductive system substantially limits a major life activity because "[t]he interests in conceiving and raising one's own children" constitute a "basic civil libert[y]."<sup>148</sup>

The court need never have gone this far in search of a major life activity to which to tie the substantially limiting effects of HIV. First, the court could simply have contented itself with covering Cain under the "regarded as" prong as they implicitly did anyway, without ever arguing that he suffered from a substantial limitation of any major life activity. In fact, the "regarded as" analysis better targets what we find on a base level to be the moral wrong committed here: Cain's colleagues discriminated against him because they feared his infection and thus incorrectly viewed him as unable to perform his job adequately. Second, if determined to ground Cain's suffering in a major life activity under the first prong, the court simply could have stopped at its own statement that HIV disables white blood cells, which "creates a physiological disorder of the hemic (blood) and lymphatic systems."<sup>149</sup> Surely, a fully functioning immune system is a prerequisite for fighting infection, which in turn is necessary for survival. HIV, at least at the symptomatic stage, thus substantially limits the major life activity of fighting infections.

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<sup>144</sup> *Id.* at 678.

<sup>145</sup> *See id.* at 680 (noting that almost one third of the American population believes AIDS to be at least as contagious as, if not more contagious than, the common cold).

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* at 679.

<sup>148</sup> *Id.* (internal quotation marks omitted).

<sup>149</sup> *Id.* (internal quotation marks omitted).

### B. Majority View: Per Se Rule

Since passage of the ADA in 1990, most courts have followed the pre-ADA cases in effectively holding that HIV infection is a per se disability, often tying this determination largely to the effects of HIV infection on reproduction. For example, in *Anderson v. Gus Mayer Boston Store*,<sup>150</sup> the United States District Court for the Eastern District of Texas explicitly held that AIDS is a per se disability.<sup>151</sup> Plaintiff David Anderson had spent his entire career working for the Gus Mayer Boston Store, a women's fashion retailer, when he was diagnosed with AIDS in July of 1991.<sup>152</sup> Randolph Ney, the sole proprietor of Gus Mayer, switched to a health insurance policy that denied coverage to Anderson, ostensibly because Anderson had been treated for testicular cancer within the last ten years.<sup>153</sup> Anderson filed a complaint with the EEOC, which determined that Gus Mayer violated the ADA because it denied Anderson access to group health insurance and entered into a contract that discriminated against him.<sup>154</sup> In concluding that Mayer discriminated against Anderson on the basis of his disability, the court did not distinguish between symptomatic and asymptomatic HIV,<sup>155</sup> even though Anderson had been diagnosed with full-blown AIDS.<sup>156</sup> Rather, the court recognized that HIV infection, whether symptomatic or asymptomatic, interferes with various major life activities, the most obvious being "the ability to procreate."<sup>157</sup> Further, the court deferred to section 36.104(1)(iii) of the DOJ implementing regulations, interpreting them to include both HIV infection and AIDS within the definition of disability.<sup>158</sup>

In *Doe v. Kohn Nast & Graf, P.C.*,<sup>159</sup> the court similarly relied on the effects of HIV infection on reproduction to extend the protections of the ADA to HIV-infected individuals.<sup>160</sup> The plaintiff, a lawyer infected with HIV, complained that his former law firm violated several state and federal statutes, including Title I of the ADA.<sup>161</sup> Specifi-

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<sup>150</sup> 924 F. Supp. 763 (E.D. Tex. 1996).

<sup>151</sup> See *id.* at 777.

<sup>152</sup> See *id.* at 769.

<sup>153</sup> See *id.* at 770.

<sup>154</sup> See *id.*

<sup>155</sup> See *id.* at 774-75.

<sup>156</sup> See *id.* at 769.

<sup>157</sup> *Id.* at 777 n.37 ("Beyond the obvious impairment on the ability to procreate, even an asymptomatic HIV-positive individual can not travel freely. Such an individual must be always mindful of exposure to bacterial infection and fungi or even places requiring vaccinations."). Although the court did not expressly couch this impairment in the ADA's terms, as a substantial limitation of a major life activity, the obvious implication is that the ability to travel and procreate constitute major life activities under the ADA.

<sup>158</sup> See *id.* at 777 n.36.

<sup>159</sup> 862 F. Supp. 1310 (E.D. Pa. 1994).

<sup>160</sup> See *id.* at 1321.

<sup>161</sup> See *id.* at 1313.

cally, he alleged that his supervisors discriminated against him after learning that he was infected with HIV and that they ultimately terminated his employment without the ninety-day written notice required by his contract.<sup>162</sup> In determining that the plaintiff had met his burden of establishing a prima facie case of disability discrimination, the court relied heavily on the ruling in *Cain v. Hyatt*.<sup>163</sup> The court noted the obvious impairment generated by HIV infection—"a physical disorder of the hemic (blood) and lymphatic systems"<sup>164</sup>—but, like the pre-ADA *Cain* court, ignored the logical conclusion that such an impairment substantially limits the major life activity of fighting infection. Instead, the court felt compelled to find that an HIV-infected individual is substantially limited in the major life activity of procreation.<sup>165</sup>

And yet, as in the *Cain* and *Ryan* cases, the rationale behind *Anderson v. Gus Mayer Boston Store* and *Doe v. Kohn, Nast & Graf P.C.* fails to realistically address the actual cause of discrimination in each case. In *Anderson*, defendant Randolph Ney feared withdrawal of several employees from his business's health insurance group if he did not secure a plan with reduced premiums.<sup>166</sup> Thus, Ney viewed Anderson as a financial liability but never discriminated against him on any basis related to the effects of HIV infection on Anderson's reproductive abilities or Anderson's ability to carry out his job.

In *Kohn*, the court rejected plaintiff's motion for summary judgment on the discrimination claim under the "regarded as" prong of the ADA.<sup>167</sup> In this case, lawyers found a copy of a letter to Doe from a doctor at Johns Hopkins University AIDS Services in the personal file of Steven Asher, the partner for whom Anderson did the majority of his work.<sup>168</sup> Indeed, the plaintiff contended that shortly after the firm inadvertently received this letter, "Asher stopped assigning him work, stopped speaking with him, and avoided physical contact with him."<sup>169</sup> Asher's conduct, and by extension that of the entire defendant firm, smacks of the very unfounded myths and fears about HIV

<sup>162</sup> See *id.* at 1314-15.

<sup>163</sup> See *id.* at 1321.

<sup>164</sup> *Id.* at 1320 (quoting *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990)) (internal quotation marks omitted).

<sup>165</sup> See *id.* ("It is clear, therefore, that the language of the [ADA] does not preclude procreating as a major life activity, but may well include it.")

<sup>166</sup> See *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 770 (E.D. Tex. 1996).

<sup>167</sup> See *Doe*, 862 F. Supp. at 1322-23.

<sup>168</sup> See *id.* at 1322.

<sup>169</sup> *Id.* at 1315. The only other evidence of a perception of impairment by members of the law firm was the fact that two secretaries and a member of the support staff had overheard and spread rumors that plaintiff had HIV. See *id.* at 1322. Although Asher's conduct provides clear proof that fear of HIV influenced at least some superiors, "[r]ather than assuming that the social stigma associated with HIV invariably sustained a finding that an infected individual be regarded as having such an impairment, the court required that the

and AIDS that Congress intended the “regarded as” prong of section 12102(2) to cover, especially because the decision mentions no evidence that Anderson could not perform his job adequately or that he had, for that matter, fallen from his previous high level of performance.<sup>170</sup> One must then question the efficacy of a statute, or at least its interpretation, that leads HIV-infected plaintiffs such as Doe to claim coverage on the grounds that HIV infection irreparably impairs their ability to produce uninfected offspring.<sup>171</sup> These cases represent an “ends justifies the means” principle, apparently content to find HIV infection per se disabling in its effect on reproduction when that effect is not the object of the discrimination itself. We might be happy with the outcome of this approach, but implementing a discrimination statute in a manner that does not convey social condemnation of the fears and prejudices that produce discrimination seems hollow at best.

In fact, this reliance on reproductive impairment as the basis for coverage indicates that the apparently per se rule laid down by *Anderson* and *Kohn* may contain certain holes. Parmet and Jackson note that “the *Kohn* court was clearly unwilling to assume that HIV infection is inevitably a disability” and “insisted on tying the finding of disability to the literal language of the statute, as opposed to the social construction of plague.”<sup>172</sup> This statement suggests the absurd result that an asymptomatic individual who does not find HIV to be a substantial limitation on his reproductive abilities might not fall within the statute, unless he could prove a similar limitation of some other major life activity.<sup>173</sup>

However, any skepticism of the *Kohn* court as to the inevitability of HIV as a disability does little to erode the majority rule that HIV infection is a per se disability. Many courts never reach the question of what major life activity is substantially limited by HIV infection, instead deferring to the DOJ and EEOC implementing regulations<sup>174</sup> to find that HIV infection qualifies both symptomatic and asymptomatic individuals as disabled under the ADA. For example, in a Rehabilitation Act case in which a correctional facility denied food service jobs

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plaintiff show that members of the defendant law firm subjectively perceived him to be impaired.” Parmet & Jackson, *supra* note 1, at 31.

<sup>170</sup> See *Doe*, 862 F. Supp. at 1314-15.

<sup>171</sup> See *id.* at 1321. Ironically, the defense attempted to turn Anderson’s asymptomatic status against him, claiming that he could not be covered by the ADA because he was not occupationally disabled. See *id.* at 1318. And yet, Asher told Anderson that the firm would not renew his contract because his work product did not meet the firm’s expectations. See *id.* at 1315. Thus, one could perhaps argue that Anderson was pigeonholed into claiming substantial impairment of reproductive abilities as the basis for ADA coverage.

<sup>172</sup> Parmet & Jackson, *supra* note 1, at 31.

<sup>173</sup> See *id.* at 39-40.

<sup>174</sup> See *supra* Part II.A.2.

to HIV-positive inmates, the Ninth Circuit stated that "there is no distinction to be drawn . . . between those persons in whom the HIV virus has developed into AIDS and those persons who have remained asymptomatic."<sup>175</sup> Similarly, in *Hoepfl v. Barlow*, the court asserted that "[i]t is now settled law that HIV-positive individuals are 'disabled' within the meaning of the ADA."<sup>176</sup>

### C. Minority View: Fourth Circuit

The Fourth Circuit rejects per se disabilities, basing its disability jurisprudence on the theory that a determination of disability must be made on a case-by-case basis. *Forrisi v. Bowen*<sup>177</sup> provides the point of departure for this insistence on an individualized inquiry. In this case, the Department of Health and Human Services fired a utility repairer and operator because his fear of heights hindered his ability to climb ladders and stairways in the performance of routine and emergency maintenance.<sup>178</sup> Forrisi claimed protection as a handicapped individual under section 505 of the Rehabilitation Act of 1973.<sup>179</sup> In holding that Forrisi was not a handicapped individual, the court stated:

The question of who is a handicapped person under the Act is best suited to a "case-by-case determination" as courts assess the effects of various impairments upon varied individuals. The definitional task cannot be accomplished merely through abstract lists and categories of impairments. The inquiry is, of necessity, an individualized one—whether the particular impairment constitutes for the particular person a significant barrier to employment.<sup>180</sup>

The Fourth Circuit relied heavily on this statement in *Ennis v. National Ass'n of Business and Educational Radio*<sup>181</sup> when it determined that the plain language of ADA section 12102(2) demands that courts make a finding of disability on a case-by-case basis.<sup>182</sup> The National Association of Business and Educational Radio (NABER) hired Joan Ennis in 1990 as a bookkeeping clerk.<sup>183</sup> At this time, Ennis was in the

<sup>175</sup> *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994) (deferring to the DOJ regulations).

<sup>176</sup> 906 F. Supp. 317, 319 n.7 (E.D. Va. 1995) (citing as support for this proposition *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D. Ohio 1994), *Gonzales v. Garner Food Services Inc.*, 855 F. Supp. 371, 374 n.5 (N.D. Ga. 1994), *United States v. Morvant*, 843 F. Supp. 1092, 1093-94 (E.D. La. 1994), and *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993)).

<sup>177</sup> 794 F.2d 931 (4th Cir. 1986).

<sup>178</sup> *See id.* at 933.

<sup>179</sup> *See* 29 U.S.C. § 794 (1994). As noted above, Congress intended courts to read the relevant provisions of the Rehabilitation Act into the ADA, *see supra* note 84; therefore, the Rehabilitation Act cases remain relevant for our purposes.

<sup>180</sup> *Forrisi*, 794 F.2d at 933.

<sup>181</sup> 53 F.3d 55 (4th Cir. 1995).

<sup>182</sup> *See id.* at 59-60 (citing *Forrisi*, 794 F.3d at 933).

<sup>183</sup> *See id.* at 56.

process of adopting an asymptomatic HIV-positive child.<sup>184</sup> Three years later, Ennis's supervisor fired her based on an unacceptable level of job performance.<sup>185</sup> Ennis filed suit, alleging discriminatory termination due to her "known association" with her HIV-positive son.<sup>186</sup> She claimed that NABER's decision to fire her stemmed from fear of the possible "catastrophic impact" that her son's illness might have on defendant's insurance rates.<sup>187</sup> Ennis argued that her son's HIV-positive status rendered him disabled under the ADA regardless of whether or not he suffered from full-blown AIDS, because his asymptomatic illness limited many of his life functions, such as playing.<sup>188</sup> However, the court found, at that stage of litigation, no evidence of her son's alleged disability, much less any substantial limitation of a major life activity that might affect his life on a daily basis.<sup>189</sup> Nor did the court find that her son had a record of, or was regarded as having, an impairment that substantially limits a major life activity under the second or third prong of section 12102(2).<sup>190</sup> Most importantly, the court noted that finding her son disabled would inevitably force the conclusion that HIV infection is a per se disability—a conclusion that would clearly violate the plain language of the statute.<sup>191</sup> Thus rejecting Ennis's claim of discrimination due to association with a disabled child, the court found that her record of poor performance was such that no reasonable jury could find that she was performing her job satisfactorily.<sup>192</sup>

In *Runnebaum v. NationsBank of Maryland, N.A.*,<sup>193</sup> the Fourth Circuit cited *Ennis* for the following two propositions: First, the determination of disability requires an individualized inquiry. Second, asymptomatic HIV infection is not a per se disability under the ADA.<sup>194</sup> Runnebaum, an employee at NationsBank, was fired by his supervisor three months after revealing to the bank's senior managing officer that he had asymptomatic HIV.<sup>195</sup> Runnebaum alleged that his termination violated the ADA, while his supervisor contended that she had already decided to fire him prior to learning of his HIV-positive

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184 See *id.*

185 See *id.* at 57.

186 *Id.*

187 *Id.*

188 See Carlis & McCabe, *supra* note 84, at 592-93 (citing Appellant's Opening Brief at 26 & n.29, *Ennis* (No. 94-1585)).

189 See *Ennis*, 53 F.3d at 60.

190 See *id.*

191 See *id.*

192 See *id.* at 62.

193 123 F.3d 156 (4th Cir. 1997) (en banc).

194 See *id.* at 169-70.

195 See *id.* at 163.

status.<sup>196</sup> The Fourth Circuit determined that under the individualized inquiry into disability, Runnebaum had to establish that asymptomatic HIV constitutes a "physical or mental impairment" that substantially limited one or more of his major life activities according to the plain language of section 12102(2) of the ADA.<sup>197</sup>

As to the impairment question, the majority looked to *Webster's Dictionary*, which defines "impair" as to "make worse by or as if by diminishing in some material respect."<sup>198</sup> Under this definition, the court concluded that asymptomatic HIV does not qualify as an impairment because "without symptoms, there are no diminishing effects on the individual."<sup>199</sup> By extension, this logic suggests that "asymptomatic HIV infection will never qualify as an impairment."<sup>200</sup> The court again turned to *Webster's Dictionary* for the definition of "major" in interpreting "major life activities" to mean those activities which are "relatively more significant or important than other life activities."<sup>201</sup> Amici argued that engaging in intimate sexual relations is a major life activity contemplated by the ADA and is substantially limited by HIV infection.<sup>202</sup> Although the court admitted that procreation is a "fundamental human activity," it rejected the contention that it constitutes a major life activity under the ADA.<sup>203</sup> Further, even assuming that procreation and intimate sexual relations are major life activities, the court found that asymptomatic HIV does not limit either for purposes of the ADA.<sup>204</sup> Here, the court narrowly interpreted "substantially limits" to refer only to the major life activity in question, not an individual's reaction to the impairment.<sup>205</sup> For example, an HIV-infected individual might forgo having children for fear of transmitting the infection to those children or might abstain from sexual relations to avoid the risk of infecting a partner.<sup>206</sup> However, the court viewed these behavioral decisions as reactions to the impairment of HIV infection, not direct consequences of the impairment itself.<sup>207</sup> Consequently, the Fourth Circuit held that Runnebaum was not disabled

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<sup>196</sup> *See id.*

<sup>197</sup> *Id.* at 167.

<sup>198</sup> *Id.* at 168 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 603 (1986)) (internal quotation marks omitted).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 169.

<sup>201</sup> *Id.* at 170.

<sup>202</sup> *See id.*

<sup>203</sup> *Id.*

<sup>204</sup> *See id.* at 171-72.

<sup>205</sup> *See id.* at 172.

<sup>206</sup> *See id.*

<sup>207</sup> *See id.*

under the statute, and affirmed the order of the district court granting summary judgment for NationsBank.<sup>208</sup>

*Ennis* and *Runnebaum* have already influenced judicial thought within the circuit,<sup>209</sup> partially realizing the fear that the new social construction of HIV may lead courts to prematurely reduce disability discrimination protection for the HIV-infected.<sup>210</sup> Indeed, one commentator has noted that “[b]y interpreting the statutory language to preclude protection for individuals with asymptomatic HIV, the majority opinion [in *Runnebaum*] flouts the ADA’s ‘clear and comprehensive national mandate’ to eliminate discrimination against individuals with disabilities.”<sup>211</sup>

The Supreme Court may have laid such fears to rest in its recent decision in *Bragdon v. Abbott*.<sup>212</sup> Nevertheless, these Fourth Circuit cases prove significant even if only to point out the puzzling and circuitous rationale used to cover asymptomatic HIV-infected individuals under the ADA’s definition of disability on the basis of a substantial limitation of the major life activity of reproduction. Impairments of the reproductive system seem curiously disconnected from the social stigma that HIV infection carries and the discrimination that follows therefrom. But since we find the reproductive system at the heart of the debate as to whether HIV infection constitutes a per se disability, an analysis of the case law dealing with purely reproductive disorders as disabilities, particularly infertility, proves helpful in understanding the split between the majority of courts and the Fourth Circuit.

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<sup>208</sup> See *id.* at 175.

<sup>209</sup> See *Carlis & McCabe, supra* note 84, at 610-13 (citing several cases). For instance, in *Cortes v. MacDonald’s Corp.* the court granted defendant employer’s motion for summary judgment on an employment discrimination claim filed by an asymptomatic HIV-positive former employee. See 955 F. Supp. 541, 547 (E.D.N.C. 1996). The court deferred to the Fourth Circuit’s determination that HIV is not a per se disability, rejecting the plaintiff’s argument that HIV infection substantially limited his ability to work, not to mention any major life activity. See *id.* at 545-46; see also *EEOC v. Newport News Shipbuilding & Drydock Co.*, 949 F. Supp. 403, 407 n.5 (E.D. Va. 1996) (acknowledging the Fourth Circuit rule that HIV infection is not a per se disability).

<sup>210</sup> See *supra* notes 4-6 and accompanying notes.

<sup>211</sup> Recent Cases, 111 HARV. L. REV. 843, 848 (1998) (quoting 42 U.S.C. § 12101(b)(i) (1994)). Similarly, as noted by a lawyer for the plaintiff in the *Bragdon* case, the holding in *Runnebaum* has “challenged a central tenet of public health policy: that HIV is a single disease, infectious at all times, always requiring antidiscrimination protection.” Wendy E. Parmet, *The Supreme Court Confronts HIV: Reflections on Bragdon v. Abbott*, J.L. MED. & ETHICS 225, 229 (1998).

<sup>212</sup> 524 U.S. 624 (1998).



## III

## INFERTILITY AS A DISABILITY UNDER THE ADA

Infertility affects approximately five million Americans, forty percent of whom are women.<sup>213</sup> It has been classified as "a disease, a disorder, a disability, a handicap, an illness, a syndrome, a condition,"<sup>214</sup> and even an "epidemic."<sup>215</sup> But for our purposes, the classification of infertility as a "physiological disorder affecting the reproductive system"<sup>216</sup> proves most salient. Both the DOJ implementing regulations for Title III of the ADA and the corresponding EEOC regulations for Title I of the ADA define "physical or mental impairment" as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss," affecting various body systems including the reproductive system.<sup>217</sup> Consequently, infertility clearly constitutes a physical impairment under the ADA. The judicial disagreement as to whether infertility is a disability thus turns on an assessment of whether the physical impairment of infertility substantially limits a major life activity. And, as with the HIV-as-disability debate, this question depends on whether the courts consider reproduction to be a major life activity under the ADA. The leading cases on this issue, *Pacourek v. Inland Steel Co.*<sup>218</sup> and *Zatarain v. WDSU Television, Inc.*,<sup>219</sup> reveal the ambiguity of section 12102(2) of the ADA and the various interpretations to which it is subject.

A. *Pacourek* Line

In *Pacourek*, the Northern District of Illinois held that infertility is an impairment that substantially limits the major life activity of reproduction, thus finding an infertile woman disabled under the ADA.<sup>220</sup> After working at Inland Steel for over ten years, Charline Pacourek was diagnosed as having "unexplained infertility."<sup>221</sup> Her medical treatments— injection of a hormone drug and intrauterine insemina-

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<sup>213</sup> See Deborah K. Dallmann, Note, *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, 385-86 (1996).

<sup>214</sup> *Id.* at 385 (quoting Joel N. Ephross, *In Vitro Fertilization: Perspectives on Current Issues*, 32 JURIMETRICS J. 447, 449 (1992)) (internal quotation marks omitted).

<sup>215</sup> *Id.* at 386 (quoting Philip Elmer-Dewitt, *Making Babies*, TIME, Sept. 30, 1991, at 56) (internal quotation marks omitted).

<sup>216</sup> *Id.* at 394.

<sup>217</sup> 29 C.F.R. § 1630.2(h)1 (1998); 28 C.F.R. § 36.104(1)(iii) (1998); see *supra* Part I.B.1.a.

<sup>218</sup> 916 F. Supp. 797 (N.D. Ill. 1996).

<sup>219</sup> 881 F. Supp. 240 (E.D. La. 1995), *aff'd* 79 F.3d 1143 (5th Cir. 1996) (unpublished table decision).

<sup>220</sup> See *Pacourek*, 916 F. Supp. at 804.

<sup>221</sup> *Id.* at 799.

tion—occasionally caused her to miss work.<sup>222</sup> Pacourek's supervisor discovered that these treatments were responsible for her absences and ordered her to obtain an explanatory letter from a doctor for any further absences.<sup>223</sup> Her supervisor further warned that Inland Steel might terminate her employment if her attendance did not improve.<sup>224</sup> Another superior informed Pacourek that she was considered "high risk" for termination, and approximately two months later, Inland Steel fired her.<sup>225</sup> After receiving her right-to-sue letter from the EEOC, Pacourek filed suit against Inland Steel, alleging violations of the ADA and several other federal statutes.<sup>226</sup> Inland Steel moved for partial summary judgment, claiming that Pacourek had no claim under the ADA because "unexplained infertility" is not an impairment and reproduction does not constitute a major life activity.<sup>227</sup>

The district court looked to the EEOC implementing regulations<sup>228</sup> for aid in interpreting section 12102(2) of the ADA.<sup>229</sup> Because the reproductive system is one of the many "body systems" listed by the EEOC that can be impaired for purposes of the ADA if affected by a "physiological disorder, or condition,"<sup>230</sup> the court concluded that infertility easily qualifies as an impairment.<sup>231</sup> The court noted that "[i]t defies common sense to say that infertility is not a physiological disorder or condition affecting the reproductive system" and that "[i]n fact, infertility is the ultimate impairment of the reproductive system."<sup>232</sup>

While this reasoning as to the "impairment" element of the definition of disability flows easily from the wording of the statute and the implementing regulations, the court's rationale for finding reproduction to be a major life activity proves significantly less convincing. The court argued that the EEOC rulemakers must have intended reproduction to be a major life activity.<sup>233</sup> Otherwise, including the reproductive system on the list of body systems that can be impaired would be meaningless because an impairment of the reproductive system could never substantially limit a major life activity and thus could

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<sup>222</sup> See *id.*

<sup>223</sup> See *id.*

<sup>224</sup> See *id.*

<sup>225</sup> *Id.*

<sup>226</sup> See *id.*

<sup>227</sup> *Id.* at 801.

<sup>228</sup> See 29 C.F.R. § 1630.2(h)(1) (1998); *supra* Part II.A.2.

<sup>229</sup> See *Pacourek*, 916 F. Supp. at 801.

<sup>230</sup> 29 C.F.R. § 1630.2(h)(1) (1998).

<sup>231</sup> See *Pacourek*, 916 F. Supp. at 801.

<sup>232</sup> *Id.*

<sup>233</sup> See *id.* at 801-02.

never constitute a disability.<sup>234</sup> But following this line of reasoning leads to the impossible conclusion that all impairments under the ADA substantially limit a major life activity and thus are automatic disabilities. If so, the “substantially limits” and “major life activity” elements of the first prong of section 12102(2) “would be superfluous”<sup>235</sup> because all impairments under the first element would already qualify as disabilities. Surely the EEOC did not mean to negate two thirds of Congress’s definition of disability under the first prong of section 12102(2). The court’s conclusion that “the EEOC rulemakers contemplated that reproduction may be considered a major life activity”<sup>236</sup> therefore seems hollow at best. In fact, it is this very tortured construction that the Louisiana district court in *Zatarain v. WDSU-Television, Inc.* noted “would allow [a plaintiff] to bootstrap a finding of substantial limitation of a major life activity on to a finding of an impairment.”<sup>237</sup>

After concluding that reproduction is a major life activity, the *Pacourek* court quickly dispensed with the “substantially limits” element of section 12102(2), apparently considering it a matter of common sense that infertility substantially limits the major life activity of reproduction.<sup>238</sup>

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<sup>234</sup> See *id.* The court quoted from an earlier disposition of the case, in which it noted that “[i]f a physiological disorder affecting the reproductive system constitutes an impairment under the ADA, then ‘it logically flows from that instruction that reproduction is a covered major life activity.’” *Id.* at 801 (quoting *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994)).

The *Pacourek* court further supported its position with two earlier infertility cases. The court quoted dictum from a Seventh Circuit case stating that the implementing regulations of the Rehabilitation Act define “handicapped individuals to include any persons with a physiological disorder affecting the reproductive system.” *Id.* at 802 (quoting *McWright v. Alexander*, 982 F.2d 222, 226-27 (7th Cir. 1992)) (internal quotation marks omitted). The court also relied on *Erickson v. Board of Governors*, 911 F. Supp. 316 (N.D. Ill. 1995). See *Pacourek*, 916 F. Supp. at 802-03. In *Erickson*, the court held that infertility is an impairment of the reproductive system which substantially limits the ability to reproduce. See *Erickson*, 911 F. Supp. at 321. Further, the court relied on the House Report of the Committee on Education and Labor and its discussion of ADA coverage for HIV-infected individuals, see *supra* notes 105-11, to determine that Congress actually intended reproduction to be a major life activity for purposes of the ADA. See *Erickson*, 911 F. Supp. at 323.

<sup>235</sup> Theresa A. Schneider, Note, *Stretching the Limits of the ADA: Asymptomatic HIV-Positive Status as a Disability in Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), 77 NEB. L. REV. 206, 218 (1998).

<sup>236</sup> *Pacourek*, 916 F. Supp. at 802.

<sup>237</sup> 881 F. Supp. 240, 243 (E.D. La. 1995), *aff'd* 79 F.3d 1143 (5th Cir. 1996) (unpublished table decision).

<sup>238</sup> See *Pacourek*, 916 F. Supp. at 804. The same district court undertook a similar analysis in *Soodman v. Wildman, Harrold, Allen & Dixon*, No. 95-C3834, 1997 WL 106257 (N.D. Ill. Feb. 10, 1997), relying on the *Pacourek*, *McWright*, and *Erickson* cases to support its conclusion that plaintiff’s “incompetent” cervix constituted a disability under the ADA because it was an impairment that substantially limited the major life activity of reproduction. See *id.* at \*2, 5-6. Unlike infertility, however, the plaintiff’s condition did not fully prevent reproduction, but rather seriously jeopardized her ability to carry a fetus to term. See *id.* at \*2.

## B. *Zatarain* Line

The *Zatarain* case presents a much narrower, disciplined construction of section 12102(2) and the corresponding implementing regulations. Plaintiff, Lynn Gansar Zatarain, worked as an anchor and a reporter for WDSU-Television, Inc., pursuant to a personal services contract scheduled to expire on November 30, 1992.<sup>239</sup> Plaintiff started receiving fertility treatments in July of 1992, which required that she arrive late for work each day.<sup>240</sup> During this time, Zatarain and the defendant television station were negotiating her contract renewal.<sup>241</sup> In November of 1992, Zatarain told the defendant station that her doctor recommended a four-month-long reduced work schedule while she received the treatments.<sup>242</sup> Shortly thereafter, defendant decided not to renew Zatarain's contract.<sup>243</sup> Zatarain sued WDSU, alleging discriminatory discharge in violation of the ADA.<sup>244</sup> WDSU moved for partial summary judgment, claiming that infertility is not a disability under the ADA and that Zatarain's condition did not substantially limit her from engaging in a major life activity under the ADA.<sup>245</sup>

The court agreed that infertility is a physical impairment under the ADA, concluding that Zatarain had produced sufficient expert testimony regarding her reproductive disorder to preclude summary judgment on the "impairment" element of section 12102(2)(A).<sup>246</sup> However, the court rejected Zatarain's argument that reproduction is a major life activity, holding that such a construction "would be a conscious expansion of the law, which is beyond the province of this Court."<sup>247</sup>

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In response to the defendant's contention that plaintiff's condition was temporary—that she was not completely unable to reproduce, but rather was simply impaired for the duration of her pregnancy—the court noted that plaintiff's "impairment results from a long-standing underlying condition the effects of which continually reappear and limit her ability to bear children." *Id.* at \*6. Further, the court pointed out that the ADA does not require "total impairment of a major life activity" and that the major life activity of procreation encompasses more than the act of conceiving a child and bringing it to term. *Id.* The parallel with HIV infection is obvious. For example, like an "incompetent cervix," HIV-infection does not preclude reproduction but does make it very risky, at least for the unborn child. Consequently, a court applying the *Soodman* line of reasoning might very well find that HIV infection constitutes a physical impairment that substantially limits the major life activity of reproduction.

<sup>239</sup> See *Zatarain*, 881 F. Supp. at 241.

<sup>240</sup> See *id.* at 241-42.

<sup>241</sup> See *id.* at 242.

<sup>242</sup> See *id.*

<sup>243</sup> See *id.*

<sup>244</sup> See *id.*

<sup>245</sup> See *id.*

<sup>246</sup> See *id.* at 242-43.

<sup>247</sup> *Id.* at 243.

First, the court made its “bootstrapping” argument, noting that “the ADA and its regulations indicate that the major life activity that is allegedly limited [should be] separate and distinct from the impairment that limits it.”<sup>248</sup> In other words, just because a condition qualifies as an impairment under the ADA does not mean that it must substantially limit a major life activity and thus constitute a disability. Certainly, the very existence of two elements after the impairment elements in section 12102(2)(A) argues persuasively for the court’s interpretation. But perhaps the court goes too far in requiring a strict separation of impairment and the limited major life activity. For example, the EEOC regulations include the “respiratory” system among those body systems that can be impaired.<sup>249</sup> The regulations also list “breathing” as a major life activity.<sup>250</sup> Thus, an impairment of the respiratory system could substantially limit the major life activity of breathing. The relationship between the respiratory system and breathing seems no less close than that between the reproductive system and reproduction, the only difference being that the ADA and its implementing regulations do not clearly contemplate reproduction as a major life activity. Therefore, what the *Zatarain* court must have meant is that all three elements of section 12102(2)(A) are necessary to the determination of disability under the ADA and that the *Pacourek* court’s argument for reproduction as a major life activity fails because it infers satisfaction of the “substantially limits” and “major life activity” elements solely from satisfaction of the “impairment” element.<sup>251</sup>

The court then turned to the “frequency” argument which later provided Justice Rehnquist with the basis for his dissent in *Bragdon v. Abbott*.<sup>252</sup> The *Zatarain* court noted that “[r]eproduction is not an activity engaged in with the same degree of frequency as the [the EEOC implementing regulation’s] listed [major life] activities of walking, seeing, speaking, breathing, learning, and working.”<sup>253</sup> Although an

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<sup>248</sup> *Id.*

<sup>249</sup> 29 C.F.R. § 1630.2(h)(1) (1998).

<sup>250</sup> *Id.* § 1630.2(i).

<sup>251</sup> See *supra* notes 229-37 and accompanying text.

<sup>252</sup> See *infra* Part IV.C. Todd Lebowitz offers a refinement of the *Zatarain* test which he refers to as the “Frequency-Universality Test.” Todd Lebowitz, Note, *Evaluating Purely Reproductive Disorders Under the Americans with Disabilities Act*, 96 MICH. L. REV. 724, 740 (1997). Under this test, major life activities must be performed:

(1) with *microfrequency*: repeatedly throughout the day, if the activity is brief in duration, or for a large portion of the day, if the activity is of longer duration;

(2) with *macrofrequency*: every day or nearly every day; and

(3) *universally*: by nearly all persons, except those who are prevented from performing the activity by an ADA-defined “impairment.”

*Id.* at 741-42 (footnotes omitted). For Lebowitz’s application of this test to reproduction as a major life activity, see *infra* note 454.

<sup>253</sup> *Zatarain*, 881 F. Supp. at 243.

individual must do each of these things every day, throughout the day, an individual need not reproduce every day or, as the court implies, at all during his or her lifetime.<sup>254</sup> Consequently, Zatarain was not disabled under the ADA, and therefore WDSU had no duty to provide reasonable accommodations for her infertility treatments.<sup>255</sup>

In addition to illustrating the rationales for either including or excluding reproduction from the list of major life activities under the ADA, the infertility cases illustrate that if anything, the current HIV-as-a-disability debate can be reduced to a question of statutory interpretation. How narrowly or broadly should one construe the ADA and its implementing regulations? Should courts consult extrinsic evidence such as congressional reports and congressional statements reprinted in the Congressional Record to determine what Congress "intended" when enacting the ADA? If we view the infertility cases as companions to the pre- and post-ADA cases interpreting HIV infection as a disability, two basic concerns arise as crucial to an analysis of the Supreme Court's opinion in *Bragdon v. Abbott*: (1) what theory of statutory interpretation ought to apply in interpreting the ADA; and (2) to what extent do we desire a disability statute that not only prohibits discrimination against the HIV infected, but does so in a manner that directly indicates society's condemnation for such discrimination?

#### IV

##### *BRAGDON V. ABBOTT*

###### A. Background

Plaintiff Sidney Abbott had been HIV positive for several years but remained asymptomatic when she arrived for an appointment at the Bangor, Maine office of defendant Randon Bragdon, a dentist licensed to practice in Maine.<sup>256</sup> Abbott indicated on her registration form that she had HIV.<sup>257</sup> While examining Abbott, Dr. Bragdon dis-

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<sup>254</sup> See *id.*

<sup>255</sup> See *id.* at 243-44. In *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996), the Eighth Circuit relied on *Zatarain*, holding that the plaintiff's infertility did not substantially limit the major life activity of reproduction. See *Krauel*, 95 F.3d at 677. The Eighth Circuit laid out both the frequency and bootstrapping arguments of the *Zatarain* court. See *id.* Interestingly, here the plaintiff claimed not only that infertility limited her ability to reproduce, but also her ability to care for others. See *id.* at 677. The Eighth Circuit dispensed with both alleged major life activities together, see *id.*, thus rejecting the expansive definition of procreation used by the *Soodman* court. See *supra* note 238. By refusing to include the ability to care for others, the court restricted procreation to the physical act of reproduction, and implicitly rejected the notion that individuals are somehow entitled to experience conception and all its consequences. See *Krauel*, 95 F.3d at 677.

<sup>256</sup> See *Abbott v. Bragdon*, 912 F. Supp. 580, 584 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *aff'd in part, vacated and remanded in part*, 524 U.S. 624, *aff'd*, 163 F.3d 87 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1805 (1999).

<sup>257</sup> See *Bragdon*, 524 U.S. at 628-29.

covered a cavity and informed her that, pursuant to his infectious disease policy, he would not fill her cavity at his office but could do so in a hospital setting.<sup>258</sup> Dr. Bragdon quoted his standard fee for filling a cavity, and explained that Abbott would be responsible for the additional charges for the use of hospital facilities.<sup>259</sup>

Abbott rejected this offer and filed suit, alleging that Dr. Bragdon's conduct violated Title III of the ADA and parallel provisions of the Maine Human Rights Act (MHRA), which prohibit discrimination against individuals by operators of public accommodations on the basis of disability.<sup>260</sup> Dr. Bragdon's office fell within Title III's definition of a "public accommodation," which includes the "professional office of a health care provider."<sup>261</sup> Both sides moved for summary judgment regarding the following two issues: "(1) whether [Abbott's] asymptomatic HIV constitutes a disability under the statute, and (2) whether treatment of [Abbott] in [Dr. Bragdon's] office poses a direct threat to the health and safety of others such that [Dr. Bragdon] may lawfully refuse such treatment [under § 12183(3) of the ADA]."<sup>262</sup>

As to the disability issue, Abbott identified only reproduction as the major life activity limited by her asymptomatic HIV status.<sup>263</sup> Specifically, she asserted that the possibility of "transmitting HIV to a potential child, as well as possible harm to her own immune system, ha[d] deterred her from having children."<sup>264</sup> Bragdon contended that asymptomatic HIV does not constitute a per se disability and that Abbott had failed to produce any evidence that her condition substantially limited a major life activity.<sup>265</sup> The district court granted summary judgment for Abbott on the first issue, finding that she was disabled under the ADA because asymptomatic HIV constitutes a physical impairment that substantially limited her major life activity of reproduction.<sup>266</sup>

The district court also granted the plaintiff's motion for summary judgment on the "direct threat" issue, holding that determination of a "direct threat" to the health and safety of health care workers must be made according to the "reasonable medical judgments of public health officials" using the "current state of medical knowledge."<sup>267</sup>

<sup>258</sup> See *id.* at 629.

<sup>259</sup> See *id.*

<sup>260</sup> See *id.* See *supra* note 71 for the relevant text of ADA Subchapter III.

<sup>261</sup> 42 U.S.C. § 12181(7) (1994).

<sup>262</sup> *Abbott v. Bragdon*, 912 F. Supp. 580, 584 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *aff'd in part, vacated and remanded in part*, 524 U.S. 624, *aff'd*, 163 F.3d 87 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1805 (1999).

<sup>263</sup> See *id.* at 586.

<sup>264</sup> *Id.*

<sup>265</sup> See *id.* at 585.

<sup>266</sup> See *id.* at 586-87.

<sup>267</sup> *Id.* at 589.

Dr. Bragdon failed to provide sufficient evidence to meet this test; he offered only his speculation as to the existence of any threat posed by operating on an HIV-infected patient in his office.<sup>268</sup> Conversely, Abbott presented the testimony of an official from the CDC, who stated that “routine dental treatment to persons with HIV or AIDS requires no additional procedures beyond the CDC recommendations” for dealing with the transmission of infectious diseases.<sup>269</sup>

The First Circuit affirmed both rulings,<sup>270</sup> and the Supreme Court granted certiorari to review the following two questions: (1) whether asymptomatic HIV infection is a disability under the ADA and (2) whether the First Circuit cited sufficient evidence in the record to determine that Abbott’s infection posed no direct threat to the health and safety of Dr. Bragdon.<sup>271</sup> Although the “direct threat” issue raises interesting questions regarding the obligations between patients and healthcare providers, and the protocols necessary to control the spread of infectious diseases,<sup>272</sup> this Note focuses only on the disability

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<sup>268</sup> See *id.* at 588-89.

<sup>269</sup> *Id.* at 589.

<sup>270</sup> See *Abbott v. Bragdon*, 107 F.3d 934, 949 (1st Cir. 1997), *aff’d*, 107 F.3d 934 (1st Cir. 1997), *aff’d in part, vacated and remanded in part*, 524 U.S. 624, *aff’d*, 163 F.3d 87 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1805 (1999).

<sup>271</sup> See *Bragdon v. Abbott*, 524 U.S. 624, 630 (1998).

<sup>272</sup> The Supreme Court agreed with the lower courts as to the proper standard for determining whether an infectious individual constitutes a “direct threat” to a private health care provider under the ADA, concluding that “courts should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments,” in light of “available medical evidence.” *Id.* at 650. In determining the “prevailing medical consensus” regarding the threat posed by an infectious disease, courts should give “special weight and authority” to certain public health authorities, particularly the U.S. Public Health Service, the Centers for Disease Control and Prevention, and the National Institutes of Health. *Id.* However, the Court also admitted that a provider might disagree with the “prevailing medical consensus” and still be vindicated under the “direct threat” exception by producing “a credible scientific basis for deviating from the accepted norm.” *Id.*

The Court questioned whether Dr. Bragdon presented “evidence sufficient to raise a triable issue of fact on the significance of the risk” of HIV infection from an HIV-positive patient. *Id.* at 653. First, Dr. Bragdon claimed a risk of airborne HIV transmission via spray from high-speed dental drills and surface cooling with water. See *id.* But neither the study cited by Dr. Bragdon nor his own expert witness could state conclusively that spray can transmit HIV. See *id.* Second, defendant noted that the “CDC had identified seven dental workers with possible occupational transmission of HIV,” as of 1994. *Id.* at 653-54. However, various flaws in the methods used to compile these results led the Court to conclude that this evidence would probably fail the objective, prevailing medical opinion test. See *id.* at 654.

Nevertheless, the Court was similarly skeptical of two authorities—the 1993 CDC Dentistry Guidelines and the 1991 American Dental Association Policy on HIV—relied on by Abbott as proof that the medical community does not view HIV-positive individuals as posing a significant risk during routine dental care, suggesting that the First Circuit may have given them too much weight. See *id.* at 651-52. Consequently, the Court remanded the case “to determine whether our analysis of some of the studies cited by the parties would change [the First Circuit’s] conclusion that petitioner presented neither objective evidence nor a triable issue of fact on the question of risk.” *Id.* at 655. On remand, the First



issue in seeking to articulate the proper rationale for including individuals with asymptomatic HIV within the ADA's protection.

### B. Majority Opinion

Justice Kennedy authored the majority opinion, with Justices Stevens, Breyer, and Ginsburg concurring.<sup>273</sup> Kennedy began his ADA analysis of Mrs. Abbott's claim with an extensive description of HIV and AIDS, charting the disease's course from the asymptomatic to symptomatic stages and detailing many of its attendant complications.<sup>274</sup> Because HIV immediately attacks the body's immune system upon infection, the Court concluded that HIV infection constitutes "a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems."<sup>275</sup> Consequently, the Court held HIV infection to be a physical impairment "from the moment of infection."<sup>276</sup>

The Court then dealt with the question of whether reproduction constitutes a major life activity under the ADA.<sup>277</sup> Interestingly, Justice Kennedy pointed out that, although Abbott based her ADA claim on the assertion that HIV substantially limits her only in the major life activity of reproduction, HIV may in fact affect many other major life activities.<sup>278</sup> However, the Court's policy of addressing only the questions directly considered by the lower court precluded Kennedy from discussing these other life activities, thus channelling the analysis to the reproduction issue.<sup>279</sup> The Court agreed with the First Circuit's

Circuit affirmed the district court's grant of summary judgment for Abbott on the "direct threat issue." See *Abbott v. Bragdon*, 163 F.3d 87, 90 (1st Cir. 1998). The First Circuit devoted most of its opinion to justifying their reliance on the 1993 CDC Dentistry Guidelines and the 1991 American Dental Association Policy on HIV, also noting that several expert witnesses for Mrs. Abbott had testified that her cavity could have been safely filled in a private dental office. See *id.* at 89. Consequently, Abbott's experts proved that the prevailing medical consensus does not consider such dental treatment of asymptomatic HIV-positive individuals unduly dangerous. See *id.*

<sup>273</sup> See *Bragdon*, 524 U.S. at 628, 655-56.

<sup>274</sup> See *id.* at 633-37. See *supra* note 12 for the Court's description of HIV and AIDS.

<sup>275</sup> *Bragdon*, 524 U.S. at 637. Kennedy must have been referring here to the language found in the DOJ and EEOC definitions of physical impairment. See 28 C.F.R. § 36.104(1)(i) (1998); 29 C.F.R. § 1630.2(h)(1) (1998).

<sup>276</sup> *Bragdon*, 524 U.S. at 637.

<sup>277</sup> See *id.* at 638-39.

<sup>278</sup> See *id.* at 637 ("We have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities.").

<sup>279</sup> See *id.* And yet the mere suggestion that reproduction may not be the sole major life activity through which the ADA can cover HIV infection begs the central question of this Note: Is reproduction even the appropriate means for bringing HIV infection within the ADA's purview? Further, if other major life activities may be substantially limited by HIV, why do most HIV-as-a-disability cases stubbornly focus only on the major life activity of reproduction to obtain ADA coverage? See *supra* Part II. The preoccupation with HIV's effects on reproduction defies common sense, especially when the truly insidious conse-

analysis that the word "major" in section 12102(2) (A) of the ADA indicates the "significance" or "comparative importance" of such life activities and rejected Dr. Bragdon's assertion that major life activities include only "those aspects of a person's life which have a public, economic, or daily character."<sup>280</sup> Because "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself,"<sup>281</sup> the Court concluded that reproduction was sufficiently important to qualify as a major life activity.<sup>282</sup>

Finally, the Court determined that HIV infection, even in the asymptomatic stage, satisfies the "substantially limits" prong of the ADA's definition of disability.<sup>283</sup> Specifically, the Court found that HIV substantially limited Abbott's ability to reproduce in two ways: First, an HIV-infected woman imposes a significant risk of infection on her male partner when attempting to conceive.<sup>284</sup> Second, an HIV-infected woman risks perinatal transmission (infection of her child during gestation and childbirth).<sup>285</sup> Dr. Bragdon offered evidence that the risk of perinatal transmission can be lowered to eight percent via antiretroviral therapy, but the Court proved unwilling to rule that such a risk is not substantially limiting as a matter of law, especially since HIV is such a "dread and fatal disease."<sup>286</sup> Furthermore, the Court dispensed with the argument that HIV-positive status does not literally prevent a woman from having children and therefore is not substantially limiting, by replying that the ADA does not limit its protection to "utter inabilities."<sup>287</sup>

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quence of HIV infection is its effect on the victim's immune system. See *supra* note 12. Justice Kennedy actually alluded to a more logical basis for providing ADA coverage to HIV-infected individuals before going down the reproduction path when he stated that HIV is a physiological disorder of the "infected person's hemic and lymphatic systems." *Bragdon*, 524 U.S. at 637. Accordingly, we might say that HIV infection substantially limits the major life function served by the hemic and lymphatic systems—fighting infection. See *infra* Part V.C.3 for a discussion of this argument.

<sup>280</sup> *Bragdon*, 524 U.S. at 638. The Court also relied on the list of major life activities located in the Rehabilitation Act regulations to refute Dr. Bragdon's argument. See *id.* (citing 45 C.F.R. § 84.3(j)(2)(ii) (1997) and 28 C.F.R. § 41.31(b)(2) (1997)). This list, which includes activities such as "walking, seeing, hearing, speaking, breathing, learning and working," is replicated in the DOJ's and EEOC's implementing regulations for the ADA. 28 C.F.R. §36.104(2) (1998); 29 C.F.R. §1630.2(i) (1998). The Court determined that this list is not exhaustive and that nothing therein indicates that major life activities must be daily, public, or economic in nature. See *Bragdon*, 524 U.S. at 639.

<sup>281</sup> *Bragdon*, 524 U.S. at 638.

<sup>282</sup> See *id.*

<sup>283</sup> See *id.* at 647.

<sup>284</sup> See *id.* at 639-40 (citing studies approximating that 20% to 25% of male partners of HIV-positive women contract HIV).

<sup>285</sup> See *id.* at 640 (citing several studies indicating a variety of transmission rates ranging from 14% to 45%).

<sup>286</sup> *Id.* at 641.

<sup>287</sup> *Id.*

Having addressed each element of the ADA's three-part definition of disability, the Court held that Mrs. Abbott's asymptomatic HIV infection was a physical impairment that substantially limited her in the major life activity of reproduction, thus qualifying her as disabled for the purposes of the ADA antidiscrimination protection.<sup>288</sup> At this point, the Court declined to address the question of whether HIV infection constitutes a *per se* disability under the ADA.<sup>289</sup> However, Justice Kennedy's suggestion that "the pervasive, and invariably fatal, course of the disease" may substantially limit "major life activities of many sorts"<sup>290</sup> suggests that the Court would likely view HIV infection as a *per se* disability if ever presented with the question. Furthermore, if we broadly interpret the Court's holding to be that asymptomatic HIV infection is a disability regardless of which major life activity it substantially limits, then by logical extension symptomatic HIV, which is inherently more debilitating, must also be a disability. This conclusion leaves unprotected by the ADA only the three-week primary (or acute) phase of HIV infection which precedes the asymptomatic phase.<sup>291</sup> But if we ignore the relatively short duration of the primary phase, then the Supreme Court's ruling effectively amounts to a *per se* rule because it seems quite likely that any asymptomatic plaintiff could reasonably point to a substantial limitation of his or her reproductive system.

In support of its holding, the Court reviewed the relevant case law, regulations, and legislative history dealing with HIV as a disability. For example, the Court relied on the Kmiec memorandum from the Office of Legal Counsel of the Department of Justice,<sup>292</sup> which concluded that the ADA extends protection to both symptomatic and asymptomatic individuals.<sup>293</sup> The Court also acknowledged the Kmiec memorandum's determination that asymptomatic HIV substantially limits the major life activities of procreation and "engaging in sexual relations."<sup>294</sup> The Court reasoned that several reports from the various congressional committee hearings surrounding passage of the ADA indicated a congressional endorsement of the positions set forth by the Office of Legal Counsel.<sup>295</sup> The Court stated that federal agencies have supported these conclusions both before and after enactment of the ADA,<sup>296</sup> and that "[e]very court which addressed the issue

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288 See *id.* at 639.

289 See *id.* at 641-42.

290 *Id.* at 637.

291 For a summary on the progression of the disease, see *supra* note 12.

292 See *supra* Part II.A.1.

293 See *Bragdon*, 524 U.S. at 642.

294 *Id.* at 643 (internal quotation marks omitted).

295 See *id.* at 645.

296 See *id.* at 643-44.

before the ADA was enacted in July 1990 . . . concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of a handicap."<sup>297</sup> Finally, the Court claimed support from the interpretation of the definition of disability in the ADA's implementing regulations.<sup>298</sup> For instance, the DOJ regulations include "HIV infection (symptomatic and asymptomatic)" on the list of physiological disorders constituting physical impairments.<sup>299</sup> Similarly, the EEOC has concluded that "an individual who has HIV infection (including asymptomatic HIV infection) is an individual with a disability."<sup>300</sup>

### C. Dissent

Chief Justice Rehnquist, joined by Justices Scalia and Thomas and in part by Justice O'Connor, opened his dissent with the warning that any determination of disability under the ADA must be made on an individualized basis.<sup>301</sup> Consequently, a plaintiff should have to prove all three elements of the ADA definition of disability,<sup>302</sup> a conclusion which clearly ignores the EEOC's statement that HIV is an inherently substantially limiting (i.e., per se) disability.<sup>303</sup> Assuming that asymptomatic HIV infection is an impairment under the ADA,<sup>304</sup> the dissent

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<sup>297</sup> *Id.* at 644. The Court noted that the Rehabilitation Act's "handicap" standard parallels the "disability" standard later implemented in the ADA, pursuant to § 12201(a) of the ADA. *Id.* at 631-32. See *supra* note 83 for the statutory text of 42 U.S.C. § 12201(a). Interestingly, the Court failed to mention any of the post-ADA cases holding that HIV is not a per se disability, or as in the *Runnebaum* case, never a disability. See *supra* Part II.C. Although this omission ignores only a minority of courts, it nevertheless weakens the majority opinion by refusing to confront the arguments against inclusion of asymptomatic HIV within the ADA's umbrella.

<sup>298</sup> See *Bragdon*, 524 U.S. at 646-47.

<sup>299</sup> *Id.* at 646 (quoting 28 C.F.R. § 36.104(1)(iii) (1998)) (internal quotation marks omitted).

<sup>300</sup> *Id.* at 647 (quoting EEOC Interpretive Manual § 902.4(c)(1)) (internal quotation marks omitted). The Court also cited the EEOC Interpretive Guidelines, which state: "[I]mpairments . . . such as HIV infection, are inherently substantially limiting." *Id.* (quoting Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. A § 1630.2(j), at 347 (1998)) (internal quotation marks omitted).

<sup>301</sup> See *id.* at 657 (Rehnquist, C.J., concurring in part and dissenting in part). Rehnquist paid close attention to the ADA's definition of disability, which states: "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." 42 U.S.C. § 12102(2) (1994) (emphasis added), quoted in *Bragdon*, 524 U.S. at 657 (Rehnquist, C.J., concurring in part and dissenting in part). Rehnquist reasoned that the emphasis in the statutory language on the word "individual" indicated that disability determinations must be made on a case-by-case basis. See *Bragdon*, 524 U.S. at 657.

<sup>302</sup> See *Bragdon*, 524 U.S. at 658 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>303</sup> See Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(j), at 347 (1998).

<sup>304</sup> See *Bragdon*, 524 U.S. at 658 (Rehnquist, C.J., concurring in part and dissenting in part).

next argued that reproduction is not a major life activity.<sup>305</sup> Rehnquist appears to have doubted Mrs. Abbott's sincerity in alleging that reproduction was a major life activity for her. He noted that there was no evidence in the record indicating that Mrs. Abbott's major life activities included reproduction or that she even considered having children prior to her infection with HIV.<sup>306</sup> The implicit argument here is that, assuming reproduction is a major life activity, Mrs. Abbott was not disabled because reproduction was clearly not a major life activity in her particular case.<sup>307</sup>

Justice Rehnquist then rejected the majority's construction of the word "major" as "of comparative importance." He argued that the alternative definition of "major" as "greater in quantity, number, or extent" is more consistent with the representative list of major life activities contained in the regulations issued under the Rehabilitation Act<sup>308</sup> and replicated in the DOJ and EEOC implementing regulations, such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>309</sup> Indeed, "fundamental importance" could not be the "common thread" linking these major life activities;<sup>310</sup> otherwise, the ADA would have to cover decisions such as "who to marry, where to live, and how to earn one's living," as well.<sup>311</sup> Instead, Rehnquist tied the illustrative activities together with a variation of the *Zatarain* frequency test:<sup>312</sup> "The common thread is . . . that the activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual."<sup>313</sup> For Rehnquist, the word "reproduction" encompassed not a single act, but rather "numerous discrete activities that comprise the reproductive process."<sup>314</sup> While this series of activities culminating in childbirth comprises extremely important aspects of a person's life, they lack the daily necessity of activities such as walking, breathing, and seeing.<sup>315</sup>

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<sup>305</sup> See *id.* at 659-60 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>306</sup> See *id.* at 658-59 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>307</sup> See *id.* at 659 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>308</sup> *Id.* at 660 (Rehnquist, C.J., concurring in part and dissenting in part) (citing WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1994)).

<sup>309</sup> 28 C.F.R. § 36.104(2) (1998); 29 C.F.R. § 1630.2(i) (1998). See *supra* Part II.A.2 for a discussion of the DOJ and EEOC regulations regarding major life activities under the ADA.

<sup>310</sup> *Bragdon*, 524 U.S. at 660 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>311</sup> *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>312</sup> See *supra* Part III.B.

<sup>313</sup> *Bragdon*, 524 U.S. at 660 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>314</sup> *Id.* at 658 n.2 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>315</sup> See *id.* at 659 (Rehnquist, C.J., concurring in part and dissenting in part).

The dissent also relied on the “bootstrapping” argument used by the *Zatarain* court<sup>316</sup> to reject the contention that reproduction must be a major life activity simply because the DOJ regulations include physiological disorders of the reproductive system under the term “physical impairment.”<sup>317</sup> As Rehnquist pointed out, “[t]here are numerous disorders of the reproductive system, such as dysmenorrhea and endometriosis, which are so painful that they limit a woman’s ability to engage in major life activities such as walking and working.”<sup>318</sup> These disorders explain why the regulations list the reproductive system as a body system that can be impaired, without necessarily implying that reproduction itself is the major life activity that is substantially limited.

Finally, Rehnquist argued that asymptomatic HIV does not impose a substantial limitation on reproduction, even assuming that reproduction is a major life activity.<sup>319</sup> For example, although an HIV-positive individual risks transmitting the virus to his or her partner, or, in the case of a woman, to her child, the decision not to engage in the reproductive process is essentially a self-imposed limitation and not a physical inability or even a reduced ability to reproduce.<sup>320</sup> Similarly, asymptomatic HIV did not substantially limit Mrs. Abbott’s ability to bear or raise her children, even if the infection meant she may not live to see her child reach adulthood.<sup>321</sup> In fact, basing determinations of disability on possible future disabling events “would render every individual with a genetic marker for some debilitating disease ‘disabled’ here and now.”<sup>322</sup> Consequently, Rehnquist concluded that Mrs. Abbott failed to demonstrate a substantial limitation of the major life activity of reproduction.<sup>323</sup>

## V

### RETHINKING HIV AS A DISABILITY

#### A. Appropriate Theory of Statutory Interpretation

The disagreement between the majority and the dissent in *Bragdon* can be attributed largely to a difference in theories of statutory interpretation. Since the early 1990s, the Court has proven increasingly willing to ignore legislative history and other extrinsic aids—sources outside the text of the statute—when interpreting statutes, in

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<sup>316</sup> See *supra* Part III.B.

<sup>317</sup> See *Bragdon*, 524 U.S. at 660 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>318</sup> *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>319</sup> See *id.* (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>320</sup> See *id.* at 660-61 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>321</sup> See *id.* at 661 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>322</sup> *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>323</sup> See *id.* (Rehnquist, C.J., concurring in part and dissenting in part).

part through the influence of Justice Scalia, a major proponent of the so-called textualist approach to statutory interpretation.<sup>324</sup> In a 1992 article, Stephen Breyer, then Chief Judge of the First Circuit, lamented this decline in the Supreme Court's use of legislative history, forecasting that "referring to legislative history to resolve even difficult cases may soon be the exception rather than the rule."<sup>325</sup> Justice Breyer joined Justice Stevens's concurring opinion in *Bragdon*, which voiced a preference for an "outright affirmance" of the appellate court but nevertheless agreed with the majority's legal analysis.<sup>326</sup> Consequently, one can view Justices Breyer and Scalia as personifying the interpretive split between the majority and the dissent in *Bragdon*—between a desire to divine Congress's true purpose in enacting the ADA through a review of legislative history, and a fear that such extrinsic aids will only confuse the plain meaning of the statute.

### 1. A "Soft" Plain Meaning Rule Approach to the ADA

Traditionally, the Court has sought out the "original intent or purpose of the enacting Congress" when confronted with a statute.<sup>327</sup> The best indicator of legislative intent is the statutory text itself, and thus the Court typically has looked first to the plain meaning of the statute.<sup>328</sup> However, applying what some refer to as a "'soft' plain meaning rule," the Court may review the legislative history of a statute (e.g., committee reports, statements from the floor of Congress, congressional hearings, congressional committee reports, legislative inaction) to elicit congressional intent,<sup>329</sup> and legislative history that strongly contradicts the plain meaning of the statute will often prevail.<sup>330</sup> In fact, the Court may go even further and engage in a full-fledged historical documentation of the statute in order to "recon-

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<sup>324</sup> See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990).

<sup>325</sup> Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 846 (1992).

<sup>326</sup> *Bragdon*, 524 U.S. at 656 (Stevens, J., concurring).

<sup>327</sup> Eskridge, *supra* note 324, at 626.

<sup>328</sup> See *id.*

<sup>329</sup> *Id.* Narrowly construed, legislative history refers to the "the institutional progress of a bill to enactment." WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 733 (2d ed. 1995).

<sup>330</sup> See Eskridge, *supra* note 324, at 628-29 (citing several cases illustrative of the "soft plain meaning rule," such as *TVA v. Hill*, 437 U.S. 153 (1978) and *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892)). Eskridge repeats perhaps the best pronouncement of the Court's theory of statutory interpretation in its own words: "[T]he circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Id.* at 628 (quoting *Watt v. Alaska*, 451 U.S. 259, 266 (1981)) (internal quotation marks omitted).

struct' the answer the enacting Congress would have given if the interpretive issue had been posed directly."<sup>331</sup>

The majority in *Bragdon* compiled just such a body of legislative history to supplement the text of the ADA and its implementing regulations,<sup>332</sup> despite some apparent concern with fidelity to the plain meaning of the ADA's definition of disability.<sup>333</sup> For example, as noted previously,<sup>334</sup> the Court consulted the following sources: the letter from Surgeon General C. Everett Koop concluding both symptomatic and asymptomatic HIV-positive individuals are "clearly impaired";<sup>335</sup> the Kmiec memorandum issued by the Office of Legal Counsel of the Department of Justice, which states that the Rehabilitation Act protects symptomatic and asymptomatic individuals against discrimination by any federally funded program and that asymptomatic HIV substantially limits the major life activity of reproduction;<sup>336</sup> the House Education and Labor Committee Report on the passage of the ADA,<sup>337</sup> which asserts that "a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships";<sup>338</sup> and similar language in the Senate Committee on Labor and Human Resources Report.<sup>339</sup> To this group we can also add various statements from the floor of both houses concerning enactment of the ADA, such as the aforementioned statement of Representative Owens: "[Both symptomatic and asymptomatic HIV-positive] individuals are covered under the first prong of the definition of disability in the ADA, as individuals who have a physical impairment that substantially limits a major life

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<sup>331</sup> Eskridge, *supra* note 324, at 630 (referring to this documentation as "imaginative reconstruction"). For example, in *Immigration & Naturalization Service v. Cardoza-Fonesca*, 480 U.S. 421 (1987), the Court considered "committee reports in both the House and Senate, the report of the conference committee, a United Nations protocol and its handbook . . . , prior administrative practice, testimony at hearings by an assistant Attorney General and a law professor, and academic commentary." Eskridge, *supra* note 324, at 631.

<sup>332</sup> See *Bragdon v. Abbott*, 524 U.S. 624, 642-47 (1998).

<sup>333</sup> See *id.* at 638 ("As the Court of Appeals held, '[t]he plain meaning of the word "major" denotes comparative importance' . . ." (quoting *Abbott v. Bragdon*, 107 F.3d 934, 939 (1st Cir. 1997)) (alteration in original)). See also *id.* at 631 ("In construing the statute, we are informed by interpretations of parallel definitions in previous statutes and the views of various administrative agencies which have faced this interpretive question.").

<sup>334</sup> See *supra* Part IV.B.

<sup>335</sup> *Bragdon*, 524 U.S. at 642 (citing Surgeon General C. Everett Koop) (internal quotation marks omitted); *supra* notes 85-88 and accompanying text.

<sup>336</sup> See *Bragdon*, 524 U.S. at 642; *supra* notes 90-101 and accompanying text.

<sup>337</sup> See *Bragdon*, 524 U.S. at 645; *supra* notes 104-06 and accompanying text.

<sup>338</sup> H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333.

<sup>339</sup> See *Bragdon*, 524 U.S. at 645; S. REP. NO. 101-116, at 22 (1990); see also *supra* notes 109-10 and accompanying text.



activity."<sup>340</sup> Justice Breyer might justify reliance on these materials by noting that in no sense do they constitute positive law.<sup>341</sup> Rather, courts should carefully use legislative history to help understand the meaning of ambiguous words or phrases in a statute.<sup>342</sup> A discussion of the weight traditionally accorded various types of legislative history will thus prove helpful in analyzing the Supreme Court's use of extrinsic aids in *Bragdon*.<sup>343</sup>

#### a. *Committee Reports*

Generally considered authoritative, committee reports should be "given great weight," particularly because they represent the collective view of the committee or subcommittee members who actually draft most legislation.<sup>344</sup> Although committee reports may suffer from the same ambiguity as the statutes they discuss,<sup>345</sup> at least in this case, the aforementioned reports clearly state what the ADA fails to mention: the statute covers all HIV-infected individuals because they are substantially limited in the major life activity of reproduction.<sup>346</sup> However, critics point out that staff members who write committee reports

<sup>340</sup> 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens); see *supra* notes 110-11. Interestingly, none of the congressmen whose statements have been so exhaustively compiled by Carlis and McCabe specify which major life activity is substantially limited by both symptomatic and asymptomatic HIV infection. See Carlis & McCabe, *supra* note 84, at 573-77. This omission in the legislative history and in the ADA itself is possibly the result of uncertainty within Congress regarding the appropriate major life activity or activities to which to tie ADA coverage for HIV, perhaps an ambiguity consciously inserted as a partisan compromise, or perhaps simply the result of impassioned rhetoric and careless statutory draftsmanship. Nevertheless, it casts doubt on the Court's assertion that "Congress was well aware of the position taken by OLC when enacting the ADA and intended to give that position its active endorsement," *Bragdon*, 524 U.S. at 645, because the Kmiec memorandum and the 1988 follow-up memorandum from Dawn E. Johnsen, see *supra* notes 90-103, relied so heavily on HIV's substantial limitation of the major life activity of reproduction to qualify asymptomatic HIV infection as a disability under the ADA. Although the various committee reports cited above, see *supra* notes 104-10 and accompanying text, expressly refer to reproduction as the major life activity that HIV substantially limits, their authority is seriously challenged when contradicted by such vague statements from the floor.

<sup>341</sup> See Breyer, *supra* note 325, at 863.

<sup>342</sup> See *id.* ("A judge cannot interpret the words of an ambiguous statute without looking beyond its words for the words have simply ceased to provide univocal guidance to decide the case at hand.")

<sup>343</sup> The Surgeon General's letter and the DOJ memorandum fall within the purview of administrative materials, and thus are discussed *infra* note 387.

<sup>344</sup> ESKRIDGE & FRICKEY, *supra* note 329, at 743; see also *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969) (alteration in original))).

<sup>345</sup> See ESKRIDGE & FRICKEY, *supra* note 329, at 743-44.

<sup>346</sup> See H.R. REP. NO. 101-485, pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 333; *supra* Part II.A.1.

are subject to constant pressure by lobbyists to include language that perhaps does not make it into the statute.<sup>347</sup> Thus, we might wonder whether discussion of coverage for HIV-positive individuals in the reports issued by the House Education and Labor Committee,<sup>348</sup> the House Judiciary Committee, and the Senate Committee on Labor and Human Resources constitutes an attempt to placate certain interest groups and not Congress's desire for a statute purposely left ambiguous to provide for the broadest possible coverage.

b. *Hearings and Floor Debates*

Scholars and judges consider statements made during committee hearings and floor debates much less reliable than committee reports.<sup>349</sup> The adversarial nature of the proceedings tends to compromise their value as authority.<sup>350</sup> Floor debates similarly suffer from "sales talk," as well as the common legislative practice, of amending remarks before publication in the Congressional Record.<sup>351</sup> Nevertheless, in practice, courts often consider such statements with appropriate weight granted according to the author's expertise and his or her ability to accurately represent the views of colleagues.<sup>352</sup>

The large group of congressional statements concerning enactment of the ADA strongly indicates that all HIV-positive individuals are disabled for the purposes of the statute.<sup>353</sup> However, the possibility remains that these remarks went through substantial revision prior to publication or perhaps that they represent pandering to certain interest groups. Interestingly, none of the statements expressly mentions exactly which major life activity HIV infection substantially limits.<sup>354</sup> Perhaps this omission indicates a lack of consensus within Congress as to the exact mechanics for covering the HIV infected,

<sup>347</sup> See ESKRIDGE & FRICKEY, *supra* note 329, at 744.

<sup>348</sup> See H.R. REP. NO. 101-485, pt. 2, at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333; H.R. REP. NO. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. REP. NO. 101-116, at 22 (1990); *supra* Part II.A.1.

<sup>349</sup> See ESKRIDGE & FRICKEY, *supra* note 329, at 773-75 (citing WILLIAM KEEFE & MORRIS OGUL, *THE AMERICAN LEGISLATIVE PROCESS* 258 (5th ed. 1981)); *see also* *Garcia*, 469 U.S. at 76 n.3 ("[T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions." (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring))).

<sup>350</sup> See ESKRIDGE & FRICKEY, *supra* note 329, at 773-75.

<sup>351</sup> *Id.* at 774 (citation omitted).

<sup>352</sup> See *id.* at 774-75. Eskridge and Frickey cite the case of *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), in which the Supreme Court relied almost exclusively on statements made by the legislation's sponsor and drafter to interpret Title IV of the Landrum-Griffin Act. See *id.*

<sup>353</sup> See *supra* note 111 and accompanying text.

<sup>354</sup> See *supra* note 340.

coupled nonetheless with a desire to pass some sort of protective legislation. Certainly these statements convey an immediate idealism without confronting practical questions of implementation. But while we should approach these statements carefully, Carlis and McCabe are, I believe, quite correct in arguing that they belong to a larger body of fairly reliable legislative history unified by the common goal of covering all HIV-infected individuals as disabled under the ADA.<sup>355</sup>

## 2. *A Textualist Approach to the ADA*

In a recent case decided during the same term as *Bragdon*, Justice Breyer, writing for the majority, relied heavily on (1) the history of the drafting of the statute at issue, (2) a committee report, and (3) legislative debates.<sup>356</sup> Justice Scalia dissented, voicing various concerns as to this use of legislative history.<sup>357</sup> Justice Scalia, the quintessential textualist, believes that the Court should ignore legislative history unless the text of the statute is “absurd on its face.”<sup>358</sup> Textualists believe that the primary source of authority for interpreting statutes should be the plain meaning of the statutory text, supplemented by certain limited canons of construction.<sup>359</sup> While Justice Scalia would allow “textual, or horizontal, coherence” arguments—looking to other parts of the statute or similar statutes—to determine the meaning of an ambiguous term, he rejects “historical, or vertical, coherence” arguments—searching through the legislative history for the intent of the enacting legislators.<sup>360</sup>

His criticisms of the Court’s traditional approach to statutory interpretation focus primarily on the concerns discussed above regarding committee reports and statements from congressional hearings and floor debates.<sup>361</sup> For instance, Scalia argues that the proper goal of statutory interpretation is not to determine legislative intent.<sup>362</sup> Even assuming that it is, the history preceding a statute’s enactment cannot provide reliable evidence of this intent because, in most cases, there is no consensus as to the purpose of a statute.<sup>363</sup> Further, members of Congress do not read committee reports, so how can these materials contain an “intent” of people who possess no knowledge of

<sup>355</sup> See *infra* Part V.A.3.

<sup>356</sup> See WILLIAM N. ESKRIDGE ET AL., *ESKRIDGE & FRICKEY’S CASES AND MATERIALS ON LEGISLATION* 131 (2d ed. Supp. 1998) (describing Justice Breyer’s opinion for the Court in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

<sup>357</sup> See *id.* (describing Justice Scalia’s dissent in the *Almendarez-Torres* case).

<sup>358</sup> Eskridge, *supra* note 324, at 651.

<sup>359</sup> See ESKRIDGE ET AL., *supra* note 356, at 90.

<sup>360</sup> Eskridge, *supra* note 324, at 655.

<sup>361</sup> See *supra* Part V.A.1.

<sup>362</sup> See ESKRIDGE ET AL., *supra* note 356, at 91.

<sup>363</sup> See *id.*

their contents?<sup>364</sup> Several functional advantages may also flow from ignoring legislative history. First, the Court will not be “misled by manipulative legislative history.” Second, incentives to create such history will be removed. Finally, the time and cost devoted to compiling legislative history will be saved, leading to a more efficient judiciary.<sup>365</sup>

Not surprisingly, Justice Scalia’s textualist influence in the *Bragdon* dissent is quite clear.<sup>366</sup> The dissent relied only on the ADA itself, the implementing regulations, and some relevant case law,<sup>367</sup> completely ignoring the mass of legislative history utilized by the majority.<sup>368</sup> Whereas the majority emphasized the nonexhaustive quality of the Rehabilitation Act’s list of major life activities so as to allow inclusion of reproduction as a major life activity,<sup>369</sup> the dissent focused on the unifying quality in the activities actually listed—acts essential for daily living.<sup>370</sup> The dissent then opted for a definition of “major” that it considered “most consistent with the ADA’s illustrative list of major life activities.”<sup>371</sup> A textualist approach to the ADA thus conveniently dispenses with almost all evidence supporting the view that reproduction is a major life activity substantially impaired by HIV.

### 3. *A More Realistic Approach*

Consider again the legislative history relied on by the *Bragdon* court.<sup>372</sup> This is a persuasive body of material. Indeed, if we adopt some form of the “soft” plain meaning rule and allow this legislative history to inform our interpretation of section 12102(2) of the ADA, it proves nearly impossible to conclude other than that Congress clearly intended the ADA to cover all HIV-infected individuals—the symptomatic because they are outwardly impaired and the asymptomatic because they are substantially limited in the major life activity of reproduction. An argument that the effects of HIV on reproduction do not constitute an appropriate means for qualifying the asymptomatic as disabled can thus only succeed if, as evidenced by the dissent in *Bragdon*, the legislative history of the ADA is ignored or largely dis-

<sup>364</sup> See *id.*

<sup>365</sup> Eskridge, *supra* note 324, at 656.

<sup>366</sup> See *Bragdon v. Abbott*, 524 U.S. 624, 657-64 (1998) (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>367</sup> See *id.* (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>368</sup> See *id.* at 642-47.

<sup>369</sup> See *id.* at 638-39 (citing 45 C.F.R. § 84.3(j)(2)(ii) (1997) and 28 C.F.R. § 41.31(b)(2) (1997)). Note that the list of major life activities located in the Rehabilitation Act regulations is the same as the corresponding list in the DOJ and EEOC regulations implementing the ADA. See 28 C.F.R. § 36.104(2) (1998); 29 C.F.R. § 1630.2(i) (1998).

<sup>370</sup> See *Bragdon*, 524 U.S. at 660 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>371</sup> *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>372</sup> See *supra* Parts IV.B, V.A.1.

counted. This Note could certainly achieve its goals more easily by taking a textualist posture with respect to the ADA, yet such an approach seems naïve at best. Carlis and McCabe admirably confront any textualist opposition to the use of legislative history when interpreting the ADA, essentially arguing that the sheer inertia of the circumstances surrounding passage of the ADA demands that courts look beyond this history:

[T]he problems cited by textualists are not relevant to the legislative development of the ADA on the issue of whether asymptomatic HIV disease was intended to be covered as a disability under the primary statutory definition. Instead of isolated references to this issue, the ADA's legislative history, from its introduction in 1988, through the House and Senate committee reports, and culminating with the statement of President Bush just prior to presentment in 1990 consistently elucidates Congress's recognition and support for covering asymptomatic HIV disease under the primary statutory definition of disability.

Additionally, Congress's articulated rationale for not expressly including a list of qualifying impairments in the statutory text—so as not to limit unintentionally the broad scope of the Act's coverage—does not indicate sloppy congressional drafting, but instead demonstrates wise legislative judgment in crafting the remedial civil rights statute.<sup>373</sup>

Of course, such debate proves somewhat academic in light of the Supreme Court's final ruling in *Bragdon*. But this Note does not propose to solve the HIV-as-disability dilemma solely by adopting one method of statutory interpretation over another. Instead, it assumes that any change in the rationale for covering both symptomatic and asymptomatic HIV-positive individuals under the ADA is ultimately a question of public policy for Congress and the administrative agencies responsible for implementing the ADA, rather than an issue that the interpretive powers of the courts should solve. Further, this Note does not seek a drastic reduction in the current level of ADA coverage for HIV-positive individuals. The argument offered here is simply that courts should tie such coverage not to reproduction, but to the direct consequence of HIV infection: an impairment of the immune system. What we can perhaps take from the textualist approach is an appreciation for a cautious approach to legislative history, as well as the need to engage in a disciplined analysis of the text of both the ADA and its interpreting regulations.

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<sup>373</sup> Carlis & McCabe, *supra* note 84, at 578 n.100 (internal citations omitted).

#### 4. *Judicial Deference to Administrative Regulations and Interpretations*

In *Bragdon*, the Supreme Court relied heavily on the Rehabilitation Act regulations concerning handicapped persons<sup>374</sup> and major life activities,<sup>375</sup> pursuant to the ADA's command that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act."<sup>376</sup> However, the ADA regulations on disability track those of the Rehabilitation Act almost verbatim and consequently provide a more relevant means for interpreting the ADA definition of disability. Although the ADA specifically authorizes the DOJ and EEOC to formulate implementing regulations,<sup>377</sup> it does not provide for the guidelines and interpretive rules that follow both sets of regulations.<sup>378</sup> The DOJ regulations track those promulgated by the EEOC but add "HIV disease (whether symptomatic or asymptomatic)" to the illustrative list of physical impairments.<sup>379</sup> Beyond this reference, neither set of regulations mentions HIV or AIDS. Only the EEOC interpretive guidelines assert that "[o]ther impairments . . . such as HIV infection, are inherently substantially limiting."<sup>380</sup> Thus, the EEOC guidelines provide strong support for the argument that the ADA covers asymptomatic individuals, although without articulating by what means such coverage is achieved. Consequently, a review of judicial deference toward administrative regulations is needed to determine the proper weight to afford these administrative pronouncements.

##### a. *Legislative Rules*

Legislative rules, such as the DOJ and EEOC regulations, possess four distinguishing characteristics.<sup>381</sup> First, legislative rules are binding like statutes.<sup>382</sup> Second, section 553 of the Administrative Procedure Act (APA) requires a notice-and-comment period before an

<sup>374</sup> See 45 C.F.R. § 84.3(j)(1) (1998).

<sup>375</sup> See *id.* § 84.3(j)(2)(ii).

<sup>376</sup> *Bragdon*, 524 U.S. at 631-32 (1998) (quoting 42 U.S.C. § 12201(a) (1994)) (internal quotation marks omitted).

<sup>377</sup> See *supra* note 40.

<sup>378</sup> See Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Public Commercial Facilities, 28 C.F.R. pt. 36 app. B §36.104, at 579 (1998); Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. §1630.2(j), at 345 (1998).

<sup>379</sup> 28 C.F.R. § 36.104(1)(iii) (1998).

<sup>380</sup> 29 C.F.R. pt. 1630 app. § 1630.2(j), at 347.

<sup>381</sup> See 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 233-34 (3d ed. 1994).

<sup>382</sup> See *id.*

agency may adopt legislative rules.<sup>383</sup> Third, an agency can “issue binding legislative rules only if . . . Congress has authorize[d] it to do so.”<sup>384</sup> In sections 12182(b) and 12116, the ADA authorizes the DOJ and the EEOC to issue such rules.<sup>385</sup> Finally, “a legislative rule can impose distinct obligations on members of the public in addition to those imposed by statute, as long as the rule is within the scope of rulemaking authority conferred on the agency by statute.”<sup>386</sup>

The Supreme Court set forth its test for determining the requisite degree of judicial deference to legislative rules in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>387</sup> Under *Chevron*, a court reviewing an agency’s construction of a statute via regulations conducts a two-step analysis.<sup>388</sup> First, the court must ask if Congress has specifically addressed the question at issue in the relevant statute; if so, the statutory text prevails.<sup>389</sup> If not, or if the statute is ambiguous, the court must determine whether the agency’s interpretation constitutes a “permissible construction of the statute.”<sup>390</sup> Regulations promulgated through an agency’s “permissible construction” of a statutory provision are binding on the courts<sup>391</sup> unless “they are arbitrary, capri-

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<sup>383</sup> See *id.* at 234. The APA provides for notice of both formal and informal administrative rulemaking: “General notice of proposed rule making shall be published in the Federal Register. . . .” 5 U.S.C. § 553(b) (1994). The Act also requires a comment period: “After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” *Id.* § 553(c).

<sup>384</sup> 1 DAVIS & PIERCE, *supra* note 381, § 6.3, at 234.

<sup>385</sup> See *supra* note 40.

<sup>386</sup> 1 DAVIS & PIERCE, *supra* note 381, § 6.3, at 234.

<sup>387</sup> 467 U.S. 837 (1984). Davis and Pierce argue that *Chevron* applies only to legislative rules, not to other, less formal agency statements such as “manuals, letters, guidelines, interpretive rules, or litigating positions.” 1 DAVIS & PIERCE, *supra* note 381, § 3.5, at 119. The letter from Surgeon General C. Everett Koop, *supra* note 85, and the DOJ’s Kmiec memorandum, *supra* note 90, which constitutes a litigating position, should thus not be binding on the courts. Similarly, the EEOC Compliance Manual does not have the force of law.

<sup>388</sup> See *Chevron*, 467 U.S. at 842-43. The Court articulated the two-step test as follows: First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

*Id.* (footnotes omitted).

<sup>389</sup> See *id.*

<sup>390</sup> *Id.* at 843.

<sup>391</sup> 1 DAVIS & PIERCE, *supra* note 381, § 6.3, at 235 (quoting *Chevron*, 467 U.S. at 843) (internal quotation marks omitted).

cious, or manifestly contrary to the statute.”<sup>392</sup> This test illustrates the Court’s acknowledgement that an agency must have the power to fill in any gaps left in the statute by Congress if it is to exercise its delegated powers and administer congressional programs effectively.<sup>393</sup> The Court also noted that a reasonable administrative construction may survive the two-step test, even if legislative delegation to the agency is implicit rather than explicit.<sup>394</sup>

Carlis and McCabe rely on this statement to contend that while the ADA does not explicitly delegate authority to the EEOC and the DOJ to interpret the statute’s three-prong definition of disability, it nevertheless does so implicitly by means of the “gap-filling” power.<sup>395</sup> However, the text of the ADA sections on delegation of authority suggests otherwise. Section 12116 orders the EEOC to “issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II [Employment] of chapter 5 of title 5,”<sup>396</sup> and the DOJ delegation contains similar language regarding public accommodations.<sup>397</sup> These delegations specifically authorize the DOJ and EEOC to promulgate rules that interpret their respective subchapters as well as those terms that apply to all the subchapters of the ADA, such as the term “disability.” Consequently, we have an express delegation from Congress authorizing the DOJ and EEOC to implement regulations, though no explicit authorization to adopt interpretive rules and guidelines.

Under the first step of the *Chevron* test, the ADA proves decidedly ambiguous as to the meaning of several words contained in the definition of disability. Earlier sections of this Note, for example, indicate that terms such as “impairment,” “major life activities,” and “substantially limits,” all require further explanation.<sup>398</sup> Turning to step two, we must ask whether the DOJ and EEOC regulations constitute reasonable or arbitrary constructions of the ADA. The aforementioned tools of statutory construction can be helpful in making this reasonableness determination, although the Supreme Court’s application of interpretive tools in *Chevron*-based analyses has proven somewhat con-

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<sup>392</sup> *Chevron*, 467 U.S. at 844.

<sup>393</sup> See *id.* at 843 (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” (alteration in original) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974))). The Court also noted that “[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” *Id.* at 843-44.

<sup>394</sup> See *id.* at 844.

<sup>395</sup> See Carlis & McCabe, *supra* note 84, at 568.

<sup>396</sup> 42 U.S.C. § 12116 (1994).

<sup>397</sup> See *id.* § 12186(b).

<sup>398</sup> See *supra* Part I.B.



fusing.<sup>399</sup> Here, however, the overwhelming body of legislative history dealing with HIV as a disability strongly supports the apparently sensible rule set forth by both the DOJ and EEOC implementing regulations that the "hemic and lymphatic" systems constitute body systems that can be impaired,<sup>400</sup> and the DOJ's additional assertion that "HIV disease (whether symptomatic or asymptomatic)" is a physical impairment.<sup>401</sup> Similarly, it seems completely reasonable for both agencies to establish a list of major life activities because the ADA provides none.<sup>402</sup>

### b. *Interpretive Rules*

Interpretive rules lack each of the four major characteristics of legislative rules.<sup>403</sup> They are not binding on the courts or the public.<sup>404</sup> The APA does not require a notice and comment period in the formulation of interpretive rules, and agencies can issue interpretive rules without an express delegation from Congress.<sup>405</sup> Finally, interpretive rules cannot create new rights and duties beyond those "fairly attributable to Congress through the process of statutory interpretation."<sup>406</sup>

Although interpretive rules, such as the DOJ's Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities<sup>407</sup> and the EEOC's Interpretive Guidance on Title I of the Americans with Disabilities Act,<sup>408</sup> provide useful insight into how an agency will construe its own

<sup>399</sup> See 1 DAVIS & PIERCE, *supra* note 381, § 3.6, at 123-31. For example, the Court has disagreed on whether to apply the "traditional tools of statutory construction" when reviewing an agency's interpretation of a delegated statute. *Id.* at 126-27 (describing the Court's split on this issue in *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988)). Interestingly, some commentators argue that "textualism triumphant would lead to a permanent subordination of the *Chevron* doctrine," by effectively reading out step two of the analysis. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 371-72 (1994). For a strict textualist, it is the rare statute that proves too ambiguous to offer some sort of reasonable interpretation. Consider Justice Scalia's statement:

One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.

Hon. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

<sup>400</sup> 28 C.F.R. § 36.104(1)(i) (1998); 29 C.F.R. § 1630.2(h)(1) (1998).

<sup>401</sup> 28 C.F.R. § 36.104(1)(iii).

<sup>402</sup> See 28 C.F.R. § 36.104(2); 29 C.F.R. § 1630.2(i); *supra* Part I.B.1.c.

<sup>403</sup> See *supra* notes 381-86 and accompanying text.

<sup>404</sup> See 1 DAVIS & PIERCE, *supra* note 381, § 6.3, at 233-34.

<sup>405</sup> See *id.* at 234.

<sup>406</sup> *Id.*

<sup>407</sup> 28 C.F.R. pt. 36 app. B, at 579 (1998).

<sup>408</sup> 29 C.F.R. pt. 1630 app., at 345 (1998).

regulations, Professor Robert A. Anthony argues that interpretive rules should never be binding.<sup>409</sup> But even so, he admits that "the status conferred on an agency as the delegate of Congress and by its expertise often leads courts to defer to the agency's interpretation of its governing statute."<sup>410</sup> Indeed, Davis and Pierce note that courts often find interpretive rules highly persuasive and give them binding effect.<sup>411</sup> Furthermore, Davis and Pierce state that an agency's interpretation of its own statutorily mandated regulations "is controlling unless plainly erroneous or inconsistent with the regulation."<sup>412</sup> The Supreme Court articulated this rule in *Bowles v. Seminole Rock & Sand Co.*,<sup>413</sup> reasoning that agencies are in the best position to interpret their own rules.<sup>414</sup> More recently, the Court reaffirmed the *Bowles* rule in *Stinson v. United States*,<sup>415</sup> holding that the "commentary in the Guidelines Manual" of the United States Sentencing Commission binds the courts "unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."<sup>416</sup>

It thus appears clear that the DOJ and EEOC interpretive rules provide highly persuasive, if not controlling, authority as to the proper definition of disability. Yet the EEOC's claim that certain im-

<sup>409</sup> See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 55 (1990).

<sup>410</sup> *Id.* (quoting *National Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987)) (internal quotation marks omitted).

<sup>411</sup> See I DAVIS & PIERCE, *supra* note 381, § 6.3, at 241-42. Factors in favor of persuasiveness include "a contemporaneous and long-continued construction" by an agency and "congressional reenactment of a statute after an agency has interpreted it." *Id.* at 244-45. Incorporation of the Rehabilitation Act's definition of "handicapped persons" into the ADA's definition of "disability" is somewhat analogous to this notion of congressional reenactment. In fact, the Court in *Bragdon* used this repetition of the Rehabilitation Act's language to open the door to consideration of the pre-ADA cases holding that HIV infection is a disability, as well as the relevant Rehabilitation Act regulations. See *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). For instance, the Court noted that "[t]he ADA's definition of disability is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973," *id.*, and later stated that "[e]very court which addressed the issue before the ADA was enacted in July 1990 . . . concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of a handicap," *id.* at 644.

<sup>412</sup> I DAVIS & PIERCE, *supra* note 381, § 6.10, at 281.

<sup>413</sup> 325 U.S. 410, 414 (1945); see also *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.")

<sup>414</sup> See I DAVIS & PIERCE, *supra* note 381, § 6.10, at 282.

<sup>415</sup> 508 U.S. 36 (1993). Regarding the *Stinson* opinion, it has been noted that "[t]he Court has never used such strong and unequivocal language to suggest that courts would be bound in their own functions by an administrative agency's official explanation of a rule it had adopted." PETER L. STRAUSS ET AL., *GELHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* 63 (9th ed. 1995).

<sup>416</sup> *Stinson*, 508 U.S. at 38.

pairments such as HIV are inherently disabling<sup>417</sup> sets forth a per se rule that conflicts with the three-part definition of disability in section 12102(2)(A) of the ADA.<sup>418</sup> Perhaps then, the EEOC interpretive rules fail the *Stinson* test because they violate a federal statute.<sup>419</sup> Conversely, the EEOC interpretive rules note that the list of major life activities in its corresponding regulations is "not exhaustive."<sup>420</sup> Because section 12102(2) of the ADA makes no attempt to qualify the words "major life activity," it would be difficult to say that the interpretive guidelines "violate" the statute. However, this interpretation, like the dissent's textualist analysis in *Bragdon*, feels wooden and oversimplified. If we trust the ADA's legislative history, particularly the House Education and Labor Committee Report, which states that "a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships,"<sup>421</sup> then the EEOC per se rule seems more consistent with the statute than the initial inspection might reveal.

Interestingly, however, the *Stinson* decision also echoes the holding of *Bowles* that a court can reject an agency interpretation of its own regulations that is "plainly erroneous."<sup>422</sup> Scholars point out that the "plainly erroneous" standard is far from clear,<sup>423</sup> but as such, it opens the door for criticism of the EEOC guidelines which state that HIV is per se substantially limiting. Even without challenging the basic congressional intent to guarantee protection against discrimination for all HIV-infected individuals, the EEOC's implementation of that intent in the form of a per se rule remains vulnerable. One can imagine an

<sup>417</sup> See Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(j), at 347 (1998).

<sup>418</sup> For a discussion of the ADA's definition of disability, see *supra* Part I.B.1.

<sup>419</sup> *Cf. Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994) (holding that the EEOC's assertion in its interpretive guidelines that an insulin-dependant diabetic is per se disabled is inconsistent with the ADA's three-part definition of disability). The district court argued that an insulin-dependant diabetic could perform major life activities if he or she took insulin and thus would not be substantially limited. See *id.* Consequently, a per se rule would effectively operate to read out the "substantially limits" element of the ADA's definition of disability. See *id.*

<sup>420</sup> 29 C.F.R. pt. 1630 app. § 1630.2(i), at 347.

<sup>421</sup> H.R. REP. NO. 101-485, pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334.

<sup>422</sup> *Stinson v. United States*, 508 U.S. 36, 45 (1993) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (internal quotation marks omitted); see also 1 DAVIS & PIERCE, *supra* note 381, § 6.10, at 281 (discussing *Bowles*). In *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994) (5-4 decision), the Supreme Court stated:

[T]he agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." In other words, we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation."

*Id.* at 512 (citations omitted).

<sup>423</sup> See 1 DAVIS & PIERCE, *supra* note 381, § 6.10, at 284-86.

HIV-positive individual who experiences no physical impairment in his or her daily life because the individual is asymptomatic. Further, suppose that this person does not experience discriminatory treatment from an employer, health care provider, or anyone else, either because they do not know of the individual's infection or, as we might hope, because they simply do not harbor any of the "accumulated myths and fears" about HIV which still pervade our society.<sup>424</sup> What reason justifies the costs in terms of federal funds, clogging of the federal courts with frivolous discrimination cases, and possible insurance consequences for employers,<sup>425</sup> that classifying such an individ-

<sup>424</sup> School Bd. v. Arline, 480 U.S. 273, 284 (1987).

<sup>425</sup> For example, section 12201(c) of the ADA creates a safe harbor for insurance plans calculating rates on the basis of the greater risks presented by disabled beneficiaries. See CLARK C. HAVIGHURST ET AL., *HEALTH CARE LAW AND POLICY* 189 (2d ed. 1998). Section 12201(c) provides that:

[The Act] shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan . . . ; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter[s] 1 and III of this chapter.

42 U.S.C. § 12201(c) (1994) (footnote omitted). Consequently, an employer who buys health insurance for his employees may face higher costs if he employs asymptomatic individuals, and the insurer then charges higher premiums because these individuals are termed "disabled" under the ADA. This prompts the question of whether the employer pays for these costs out of employee wages. The President's Council of Economic Advisers suggests that, in general, they do:

A firm's cost of health insurance must be passed along to someone—customers, owners, employees, suppliers, or some combination of these groups. In most cases, employers are constrained in their ability to pass along these costs to their customers, owners, and suppliers. In general, when health insurance costs rise, firms must raise the cash component of wages less than they would otherwise in order to meet the higher health insurance costs. Between 1973 and 1989, employer's contributions to health insurance absorbed more than one-half of worker's real gains in compensation. Much of the growth in compensation reported for the 1980s took the form of higher health insurance premiums.

JUDITH AREEN ET AL., *LAW, SCIENCE, AND MEDICINE* 705 (2d ed. 1996) (quoting Council of Economic Advisors, *Economic Report of the President Transmitted to Congress January 1993*, at 124-127 (1993)). Additionally, employers who self-insure can take advantage of an unfortunate "gap" in the Employee Retirement Income Security Act (ERISA) and thus cap health insurance for HIV-positive employees. See, e.g., Nancy Mansfield et al., *Insurance Caps on AIDS-Related Healthcare Costs: Will the ADA Fill the Gap Created by ERISA?*, 14 GA. ST. U. L. REV. 601 (1998); see also *McGann v. H & H Music Co.*, 946 F.2d 401 (1992) (holding that ERISA's anti-discrimination provision does not prohibit a self-insured employer from distinguishing among categories of disease, such as AIDS, in providing health benefits).

ual as disabled may entail? The answer must clearly be none; this individual is not suffering from a reduced quality of life, aside from the emotional burden of HIV, which, while incontestably horrible, falls outside the scope of government protection. Instead, courts can more efficiently protect the asymptomatic by offering protection on a case-by-case basis.

Interestingly, however, interpretive guidelines issued by the EEOC may deserve substantial deference even if arguably inconsistent with a federal statute. Professor Rebecca Hanner White argues that Congress has implicitly granted the EEOC interpretive authority under the ADA beyond its explicit authority to adopt legislative rules implementing the statute.<sup>426</sup> White finds EEOC interpretive guidelines particularly authoritative, because “[s]ince the mid-1970s, following the Court’s pointed hint in *Albermarle Paper Co. v. Moody*, the EEOC has issued its interpretive guidelines only after following notice and comment procedures and sometimes after public hearings.”<sup>427</sup> She notes that these procedures satisfy the “political-accountability goal” of *Chevron*, thereby entitling the guidelines to the benefits of the deferential standard of review under step two of *Chevron*.<sup>428</sup> An examination of the EEOC’s Notice of Proposed Rulemaking<sup>429</sup> regarding the creation of the regulations codified in part 1630 of 29 C.F.R. and the publication of its Final Rule<sup>430</sup> reveals that the EEOC issued its interpretive guidelines along with part 1630, subjecting both to notice-and-comment procedures.<sup>431</sup> Consequently, a strong argument

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For a description of the difficulties faced by persons with AIDS and HIV in obtaining private insurance, and the inadequacies of such insurance, see KAREN DAVIS ET AL., NATIONAL COMM’N ON AIDS, FINANCING HEALTH CARE FOR PERSONS WITH HIV DISEASE: POLICY OPTIONS 15-17 (1991). Then, we might ask whether asymptomatic employees really would choose to take the pay reduction or even possible loss of health insurance altogether in return for their “disabled” status? If not, the Supreme Court’s ruling in *Bragdon* creates economic inefficiencies because asymptomatic individuals are paying for a statutory protection that they do not need—they are, in effect, getting nothing for something. If, instead, we grant asymptomatic individuals protection only when they actually suffer discrimination by invoking the “regarded as” prong of section 12102(2), then society can defer these costs, assuming they exist, until they actually procure a benefit.

<sup>426</sup> See Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1 UTAH L. REV. 51, 89 (1995).

<sup>427</sup> *Id.* at 103 (footnotes omitted) (internal quotation marks omitted).

<sup>428</sup> *Id.* at 104.

<sup>429</sup> Notice of Proposed Rulemaking, 56 Fed. Reg. 8578 (1991).

<sup>430</sup> Final Rule, 56 Fed. Reg. 35,726 (1991).

<sup>431</sup> See Final Rule, 56 Fed. Reg. 35,726 (1991), which states:

The Commission is also issuing interpretive guidance concurrently with the issuance of part 1630 . . . . Therefore, part 1630 is accompanied by an appendix.

. . . .  
To assist us in the development of this guidance, the Commission requested comment in the [notice of proposed rulemaking] from disability

can be made for giving the EEOC guidelines controlling weight when determining a disability under the ADA.

Unfortunately, the DOJ's Notice of Proposed Rulemaking<sup>432</sup> and Final Rule<sup>433</sup> for part 36 of 38 C.F.R. dealing with title III of the ADA (public accommodations) contain no such similar reference to its parallel interpretive guidelines. Despite this omission, a number of factors suggest that the guidelines merit judicial deference. First, the subheading of the DOJ guidelines is entitled "Section-by-Section Analysis and Response to Comments,"<sup>434</sup> indicating that the DOJ issued the guidelines only in response to the same notice-and-comment procedure afforded the DOJ regulations. Second, the close connection between the guidelines and the DOJ regulations, which are themselves subject to the APA's procedural requirements, may be enough to clothe these interpretive rules with a legitimacy similar to that of the EEOC guidelines. The DOJ preamble to part 36 therefore likely merits substantial judicial deference.

Delving through this morass of legislative history and administrative regulations is an intimidating prospect to say the least. The above attempt only scratches the surface; however, a few general principles emerge from the mass of information: (1) Congress clearly intended the ADA to protect HIV-infected individuals, whether symptomatic or asymptomatic, from discrimination; (2) the ADA's implementing regulations reasonably construe the statute; and (3) the EEOC's interpretive guidelines perhaps go beyond the ADA's literal language in

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rights organizations, employers, unions, [and] state agencies concerned with employment or workers compensation practices. . . . Many commenters responded to these questions. . . . The Commission has considered these comments in the development of the final rule and will continue to consider them as it develops further ADA guidance.

*Id.*; accord Notice of Proposed Rulemaking, 56 Fed. Reg. 8578 (1991); see also *Wilson v. Pennsylvania State Police Dep't*, 964 F. Supp. 898, 902-03 n.4 (E.D. Pa. 1997) ("[I]t appears that the guidelines [to part 1630] were subject to public notice and comment procedures similar to those which normally apply to regulations. Thus, the guidelines arguably have more force than would an ordinary interpretive rule." (citations omitted)). But see *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464 (5th Cir. 1998), *vacated*, 119 S. Ct. 2388 (1999), in which the court stated:

Because the EEOC's Interpretive Guidelines [to part 1630] are not only not promulgated pursuant to any delegated authority to define statutory terms or the like but are also not subject to the notice and comment procedure like regulations are, they are not entitled to the high degree of deference that is accorded to regulations under the *Chevron* doctrine, but the interpretations are given *some* deference.

*Id.* at 469-70 (footnote omitted).

<sup>432</sup> Notice of Proposed Rulemaking, 56 Fed. Reg. 7452 (1991).

<sup>433</sup> Final Rule, 56 Fed. Reg. 35544 (1991).

<sup>434</sup> Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Public Commercial Facilities, 28 C.F.R. pt. 36 app. B, at 579 (1998).

declaring HIV a per se disability, but nonetheless deserve a high, though difficult to determine, degree of deference.

B. Substantial Physical Impairment of Reproduction Should Not Provide the Basis for Making HIV Infection a Per Se Disability

Accepting that Congress intended to protect all HIV-infected individuals via the ADA, it is interesting to note that focusing on reproduction as the means for bringing asymptomatic HIV-positive individuals within the ADA may actually exclude many such individuals from coverage. For example, Elizabeth C. Chambers argues that under a reproduction-based scheme, "women who have gone through menopause, young children, infertile people, or individuals who simply do not desire to have children would not be entitled to ADA protection."<sup>435</sup> She contends that arbitrarily drawing the line at those asymptomatic individuals who, like Mrs. Abbott, allege a substantial impairment of their ability to reproduce conflicts with the ADA's express purpose of preventing unequal treatment of disabled individuals based on characteristics and stereotypes beyond their control.<sup>436</sup> Similarly, Parmet and Jackson suggest that the "reproductive intentions" standard leads to situations in which "the fate of many individuals who cannot show that their HIV status had caused them to alter their childbearing plans will be uncertain."<sup>437</sup>

*Bragdon* partially addresses these concerns through Justice Kennedy's vague suggestion that HIV infection may substantially limit "other major life activities."<sup>438</sup> But this hypothesizing does not necessarily indicate that the Court would be willing to establish a per se rule regarding HIV. Rather, the logical extension of Justice Kennedy's argument is a framework in which asymptomatic individuals can only receive coverage if they successfully place themselves into one of a handful of judicially created, major life activity pigeonholes. Certainly, this scheme neither provides the universal coverage contemplated by Congress, nor addresses the true issue faced in each of the asymptomatic HIV-as-a-disability cases analyzed above.

Recall that in *Thomas v. Atascadero Unified School District*,<sup>439</sup> the real issue was not the limiting effects of HIV on the future reproductive abilities of a six-year-old boy, but rather the fear with which the

<sup>435</sup> Chambers, *supra* note 19, at 423.

<sup>436</sup> See *id.*

<sup>437</sup> Parmet & Jackson, *supra* note 1, at 35. The authors give a hypothetical example of the ironic consequences of a reproduction-based test, in which a health care provider could discriminate against a woman who became infected with HIV after menopause, but not against one who was infected prior to menopause. See *id.*

<sup>438</sup> *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998).

<sup>439</sup> 662 F. Supp. 376 (C.D. Cal. 1987).

school district regarded Thomas and from which his discriminatory treatment flowed.<sup>440</sup> Similarly, in *Cain v. Hyatt*,<sup>441</sup> Cain's colleagues discriminated against him because they feared his infection would impair his job performance.<sup>442</sup> And, in the *Bragdon* case itself, the true wrong committed by Dr. Bragdon against Mrs. Abbott bore no relationship to the effects of HIV on her reproductive system.<sup>443</sup> Because the medical community did not share Dr. Bragdon's concerns about HIV transmission in the dental workplace, we can say that he discriminated against Abbott due to the same "accumulated myths and fears" whose validity lies at the center of the *Thomas* and *Cain* cases, as well as the post-ADA cases.<sup>444</sup> Thus, those who object to the limiting aspects of a "reproductive-intentions" standard have also pointed out the absurdity of reading the ADA to offer plaintiffs a reproduction loophole, thereby avoiding the real problem of HIV-based discrimination.<sup>445</sup>

### 1. *Reproduction Is Not a Major Life Activity*

Given the weakness of the "reproductive-intentions" standard, the ADA should require a more rational mechanism to cover asymptomatic HIV-positive individuals. In rejecting reproduction as a major life activity, however, several hurdles must be crossed.

#### a. *Reproduction Does Not Fall Within the Scope of the DOJ and EEOC List of Major Life Activities*

Use of the words "such as" to introduce the illustrative list of major life activities in the DOJ and EEOC implementing regulations<sup>446</sup> indicates that both agencies contemplated the existence of further,

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<sup>440</sup> See *supra* Part II.A.3.

<sup>441</sup> 734 F. Supp. 671 (E.D. Pa. 1990).

<sup>442</sup> See *supra* Part II.A.3.

<sup>443</sup> Zita Lazzarini, Director of Medical Humanities, Health Law and Ethics at the University of Connecticut Health Center, argues that the *Bragdon* Court's emphasis on the medical fact that HIV affects the immune system at every stage of the disease is misplaced. See Zita Lazzarini, *The Americans with Disabilities Act After Bragdon v. Abbott: HIV Infection, Other Disabilities, and Access to Care*, HUM. RTS., Fall 1998, at 15, 18 (1998) ("[T]his [medical] analysis . . . may have obscured a more fundamental point—the discrimination Sydney Abbott faced had more to do with prejudice and fear than with the nature and level of her disability or scientific and epidemiological evidence of the risk she posed to Dr. Bragdon and his staff.").

<sup>444</sup> See *supra* Part II.B.

<sup>445</sup> See Parmet & Jackson, *supra* note 1, at 35-36 ("[T]he protection for asymptomatic HIV-positive individuals might be quite haphazard at best and depends on a circumstance—the plaintiff's fertility and reproductive intentions—that *really has nothing to do with the discrimination at issue*" (emphasis added)); Chambers, *supra* note 19, at 422-23 ("[F]ocusing on reproduction and sexual activity arbitrarily distinguishes between individuals based on circumstances (the plaintiff's fertility and reproductive intentions) that have *nothing to do with the discrimination at issue*" (emphasis added)).

<sup>446</sup> 28 C.F.R. § 36.104(2) (1998); 29 C.F.R. § 1630.2(i) (1998).



but at the time unidentified, major life activities.<sup>447</sup> Although the interpretive guidelines that follow the EEOC's ADA-mandated regulations are somewhat doubtful,<sup>448</sup> they confirm this suspicion, stating that "[t]his list is not intended to be exhaustive."<sup>449</sup> In *Bragdon*, the Supreme Court interpreted this declaration of non-exclusivity to mean that *significance* alone was the unifying characteristic among qualifying major life activities.<sup>450</sup> But it does not necessarily follow that simply because the list is not exclusive, it also lacks some unifying principle more concrete than significance. In the *Bragdon* dissent, Justice Rehnquist found just such a principle, adopting a version of the *Zatarain* court's "frequency test."<sup>451</sup> For Justice Rehnquist, each of the activities on the list—"caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working"<sup>452</sup>—are "repetitively performed and essential in the day-to-day existence of a normally functioning individual."<sup>453</sup> This test proves much more workable than the majority's "importance" test, which Todd Lebowitz refers to as a "momentous event" standard.<sup>454</sup> He

<sup>447</sup> See *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) ("As the use of the term 'such as' confirms, the list is illustrative, not exhaustive.").

<sup>448</sup> See *supra* Part V.A.4.

<sup>449</sup> Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.2(i), at 347 (1998).

<sup>450</sup> See *Bragdon*, 524 U.S. at 638.

<sup>451</sup> See *id.* at 660 (Rehnquist, C.J., concurring in part and dissenting in part); *supra* Part III.B.

<sup>452</sup> 28 C.F.R. § 36.104(2) (1998); see also 29 C.F.R. § 1630.2(i) (1998).

<sup>453</sup> *Bragdon*, 524 U.S. at 660 (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>454</sup> Lebowitz, *supra* note 252, at 750. Lebowitz explains why reproduction does not qualify as a major life activity under his variation of Rehnquist's test (the Frequency-Universality Test). For example, reproduction is not performed with macrofrequency because "[a]bsent a multiple birth, a person simply cannot reproduce on more than one or two occasions per year," nor by extension is it performed with "microfrequency." *Id.* at 745. Reproduction also fails the universality component of Lebowitz's test for several reasons. First, reproduction is volitional—" [u]nlike the other previously recognized major life activities [in the DOJ and EEOC lists], many people capable of reproducing simply choose not to reproduce." *Id.* at 746. Further, not every "average person in the general population can reproduce with little or no difficulty; many people are too young to reproduce, and many woman are too old." *Id.* at 747. Thus, reproduction cannot meet the EEOC test of major life activities. According to Lebowitz, "major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty." *Id.* (citing 29 C.F.R. pt. 1630 app. § 1630.2(i), at 347 (1998)). Finally, Lebowitz accounts nicely for the reproductive differences between men and women:

Sperm production and ovulation fail the universality component of the test because all of these reproductive functions are unique to either males or females. Not one of the sixteen previously recognized major life activities [is] unique to one sex; on the contrary, every previously recognized major life activity is performed by everyone, or nearly everyone, regardless of sex. It makes no sense to consider something a major life activity if half the population, or more, is precluded from ever performing it.

*Id.* at 748 (footnotes omitted).

notes that “[n]ot only is momentousness a criterion inconsistent with every major life activity previously recognized by Congress or the EEOC, it is also hopelessly vague as a standard to apply to specific activities.”<sup>455</sup>

Applying Rehnquist’s “common thread” analysis and a dose of restrained textualism, each of the major life activities listed by the DOJ and EEOC activities can be distinguished from reproduction. For instance, one who cannot care for himself or herself is by definition dependent on another for survival. Similarly, one who cannot “perform manual tasks” is greatly limited in his ability to work (what job, even the most intellectually oriented, does not require the performance of a substantial number of everyday manual tasks?) and thus to support himself. The inability to walk, see, hear, or breathe so limits an individual’s basic daily functioning that some sort of costly assistance, whether it be a wheelchair, seeing-eye dog, hearing aid or respirator, is required to approximate normal functioning. Yet, present technology cannot restore these functions fully. Indeed, the inability to breathe is almost a euphemism for death.

An individual who cannot reproduce suffers in a much different way. An impairment of the reproductive system usually does not require the constant care of another, nor does it necessitate some sort of expensive device to aid in the most basic acts such as navigation, movement, and various sense perceptions. The reproductively impaired do not face death because of their limited ability, although the actual cause of the impairment such as cancer or HIV might be fatal. Finally, such an impairment does not effectively shut one off from society by limiting the ability to communicate with others. It seems that the primary consequence of a reproductive impairment like infertility or HIV, aside from the obvious physical consequences, comes in the form of the disappointment, shattered dreams, embarrassment, and hopelessness that must surely flow from discovering that one cannot enjoy the pleasures of fathering or bearing his or her own child. An infertile woman may further suffer in that she is “precluded from performing the major life functions commonly assigned to women” and thus violently disassociated from her cultural identity as a nurturer.<sup>456</sup>

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<sup>455</sup> *Id.* at 750-51.

<sup>456</sup> Anita Silvers, *Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights*, 13 BERKELEY WOMEN’S L.J. 81, 86 (1998). Silvers argues that feminist theory is guilty of marginalizing disabled women just as much as the patriarchal society in which we live. *See id.* at 81. Cultural feminism, in particular, emphasizes the unique importance for women of human connection, caring, and relationships. *See id.* at 85-86. In light of these gender-specific qualities, it is understandable that an infertile woman might feel great emotional distress at being cut off from “the roles customary for [her] gender by being identified as disabled.” *Id.* at 92. In fact, Silvers cites a study showing that the low sociocultural participation rate of disabled women stems from the fact that society traditionally views women as nurturers. *See id.* at 90. When they can no longer nurture, disabled women lose

Of course, I do not intend to trivialize the experience or presume to possess any understanding of what an infertile woman feels.<sup>457</sup> But at the same time, qualifying reproduction as a major life activity such that any substantial impairment thereof constitutes a disability extends the ADA's protection to cover emotional, personalized pain. The law cannot be the guarantor of personal happiness. Indeed, the law consists of commands laid down to order relationships among citizens,<sup>458</sup> not the relationship between an individual and his or her emotional suffering, at least when that pain is not inflicted by another member of society.<sup>459</sup> Would we want to qualify the short, slow, and unathletic as disabled because they cannot participate in the varsity collegiate sport of their choice? Surely the pressure to achieve athletic success is as culturally ingrained in men as the role of the nurturer is in women. Or, how about the individual slighted in love, abandoned at the altar by his betrothed? Is this person disabled in the major life activity of marriage? Certainly marriage is no less "significant" a part of life, to use the Supreme Court's term, than

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their cultural identity and assume the role of dependents who themselves require nurturing. See *id.*; cf. John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 409 (1983) ("[T]he biological experience of bearing and giving birth is so important for women that it should be recognized as an independent exercise of procreative freedom.").

<sup>457</sup> Deborah K. Dallmann describes the devastating effects of infertility on couples. See Dallmann, *supra* note 213, who states:

[F]or an infertile couple desiring to have children, [infertility] 'exact[s] a terrible emotional and physical toll.' Infertility causes feelings of envy as the couple watches others with small children. Often, feelings of frustration and lack of control envelop an infertile couple as the desire to have children becomes all-consuming.

*Id.* at 386 (citations omitted).

<sup>458</sup> See BLACK'S LAW DICTIONARY 884 (6th ed. 1990) (stating that law is "[t]hat which must be obeyed and followed by citizens subject to sanctions or legal consequences."). The word "citizen" implies relationships among members of a society which encompass the duties that they owe one another in return for the rights of citizenship. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 412 (Philip Babcock Grove ed., 1993) (defining citizenship as "the quality of an individual's adjustment, responsibility, or contribution to his community").

<sup>459</sup> Various tort causes of action, such as intentional infliction of emotional distress, represent attempts by the state to correct for the distress sustained by plaintiffs as a result of intentional conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965), *quoted in* STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW 173 (2d ed. 1998). Note that the Restatement requires a certain thickness of skin as a human in our society. See *id.* ("The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language."). Transferring, to the extent possible, these common law notions of tort into the federal statutory context, one can argue that the infertile woman is an example of the unfortunate victim of expected hardships for whom the law simply refuses to provide a remedy.

"[r]eproduction and the sexual dynamics surrounding it."<sup>460</sup> A "frequency/necessary for daily survival" test for major life activities will avoid such endlessly absurd results and discourage claims like Mrs. Abbott's, which, as the *Bragdon* dissent implies, seize on the reproduction loophole to get their foot in the court's door.<sup>461</sup>

Challengers to removal of reproduction from the list of major life activities will likely make what the *Zatarain* court referred to as the "bootstrap[ping]" argument.<sup>462</sup> Following this argument, reproduction must necessarily be a major life activity because both the DOJ and EEOC regulations list the "reproductive" system as a body system that can be physically impaired under the ADA.<sup>463</sup> Otherwise, including the reproductive system on the list of possibly impaired systems would prove meaningless.<sup>464</sup> However, as the dissent in *Bragdon* and other commentators have pointed out, various disorders of the reproductive system, such as dysmenorrhea, endometriosis, and cancer, may be so painful that they limit women in major life activities such as walking

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<sup>460</sup> *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998). For other examples of the bizarre results achieved in reliance on *Bragdon*, consider the following recent decisions: *McAlindin v. County of San Diego*, No. 97-56787, 1999 WL 717728, at \*1, \*4-5 (9th Cir. Sept. 16, 1999) (finding a triable issue of fact as to whether plaintiff's impotence caused by anxiety disorders substantially limited his major life activity of "engaging in sexual relations"); *Quick v. Tripp, Scott, Conklin & Smith*, 43 F. Supp. 2d 1357, 1367-68 (S.D. Fla. 1999) (holding that the Hepatitis-C virus substantially limited a woman in the major life activity of reproduction because the risk of transmitting the virus from mother to fetus forced her to forgo having any more children); *Corrman v. N.P. Dodge Management Co.*, 43 F. Supp. 2d 1066, 1072 (D. Minn. 1999) (finding that the question of whether plaintiff's breast cancer was a disability under the ADA constitutes a genuine issue of material fact because "society clearly considers a woman's breasts to be an integral part of her sexuality, the loss of which would necessarily involve some significant impact on her sexual self-image"); and *Berk v. Bates Advertising USA, Inc.*, 25 F. Supp. 2d 265, 268-70 (S.D.N.Y. 1998) (holding that plaintiff's cancer substantially limited her major life activity of reproduction by making pregnancy extremely risky for plaintiff and requiring surgical procedures which rendered reproduction impossible).

<sup>461</sup> See *id.* at 659 (Rehnquist, C.J., concurring in part and dissenting in part). The dissent notes:

It is further telling that in the course of her entire brief to this Court, respondent studiously avoids asserting even once that reproduction is a major life activity to her. To the contrary, she argues that the 'major life activity' inquiry should not turn on a particularized assessment of the circumstances of this or any other case.

*Id.* Mrs. Abbott's insistence that the Court bypass the traditional individualized approach to disability determinations would appear to betray the insincerity of her claim that HIV infection substantially limits her in the major life activity of reproduction. In fact, the dissent points out that Mrs. Abbott answered "no" when questioned at her deposition as to whether HIV infection impaired any of her life functions. See *id.* Reading the ADA to allow such frivolous claims compromises its ability to efficiently target actual instances of HIV-based discrimination.

<sup>462</sup> *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

<sup>463</sup> See 28 C.F.R. § 36.104(1)(i) (1998); 29 C.F.R. § 1630.2(h)(1) (1998).

<sup>464</sup> See *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 802 (N.D. Ill. 1996).

and working.<sup>465</sup> Thus, impairments of the reproductive system can substantially limit activities other than reproduction. As argued earlier, what the "bootstrapping" criticism really does is emphasize the three-part nature of the ADA's disability inquiry.<sup>466</sup> An individual must satisfy each element of section 12102(2)(A) to qualify as disabled. A per se rule that all HIV-infected individuals are substantially limited in the major life activity of reproduction effectively eliminates the individualized inquiry required by the statute.

Of course, this rejection of reproduction as a major life activity does not imply that HIV infection does not substantially limit reproduction. Indeed, the majority in *Bragdon* quite correctly concluded that it is not for the courts to ascribe a legal value to the estimated eight percent risk of "transmitting a dread and fatal disease to one's child."<sup>467</sup> Although outside the scope of this Note, a substantial body of literature exists that examines the proposition that HIV-positive women should be counseled or perhaps even prohibited from having children due to the horrible medical and ethical consequences of perinatal HIV transmission.<sup>468</sup> Consequently, the callous argument that "[a]ny limitation comes not from the physical impairment itself, but from the individual's reaction to the disease"<sup>469</sup> goes too far. This argument essentially repeats Justice Rehnquist's dissent in *Bragdon*, which emphasizes that the HIV-infected woman's voluntary decision not to bear children—her reaction to HIV—impairs the reproductive system, not HIV itself.<sup>470</sup> It is needlessly unsympathetic to say that an

<sup>465</sup> See *Bragdon*, 524 U.S. at 660; Schneider, *supra* note 235, at 220. Schneider recaps the *Bragdon* dissent and lists some other impairments of the reproductive system that might be so painful as to substantially limit the major life activity of working, including "cystic-ovarian disease, uterine tumors, and pelvic inflammatory disease." *Id.* (relying on a 1997 telephone interview with a physician's assistant employed by a clinic for sexually transmitted diseases).

<sup>466</sup> See *supra* Part III.B.

<sup>467</sup> *Bragdon*, 524 U.S. at 641.

<sup>468</sup> See, e.g., John D. Arras, *AIDS and Reproductive Decisions: Having Children in Fear and Trembling*, 68 MILBANK Q. 353 (1990); Suzanne Sangree, *Control of Childbearing by HIV-Positive Women: Some Responses to Emerging Legal Policies*, 41 BUFF. L. REV. 309 (1993); Joelle S. Weiss, Comment, *Controlling HIV-Positive Women's Procreative Destiny: A Critical Equal Protection Analysis*, 2 SETON HALL CONST. L.J. 643, 644-60 (1992).

<sup>469</sup> Schneider, *supra* note 235, at 210.

<sup>470</sup> See *Bragdon*, 524 U.S. at 660-61 (Rehnquist, C.J., concurring in part and dissenting in part). Rehnquist wrote:

The record before us leaves no doubt that those so infected [with HIV] are still entirely able to engage in sexual intercourse [or] give birth to a child if they become pregnant . . . . While individuals infected with HIV may choose not to engage in these activities, there is no support in language, logic, or our case law for the proposition that such voluntary choices constitute a "limit" on one's own life activities.

*Id.* (Rehnquist, C.J., concurring in part and dissenting in part); see also Schneider, *supra* note 235, at 225 ("There is nothing about the infection itself which substantially limits reproductive activity.").

HIV-infected woman has any real choice as to whether or not to have children.

Commentators also rely on the *Runnebaum* court's citation to a portion of the Kmiec memorandum that states that "nothing inherent in the infection . . . actually prevents either procreation or intimate relations."<sup>471</sup> But these scholars pervert this language by taking it out of context. While the Kmiec memorandum admits that HIV specifically impairs an asymptomatic individual's decision to engage in the major life activity of reproduction rather than the actual act, the memorandum does so while arguing that, such precision aside, this sort of drastic alteration of a behavioral choice—whether or not to bear children—should nonetheless qualify as disabling.<sup>472</sup> Accordingly, the assertion that if Congress wanted to cover the reaction of HIV-positive individuals to their disease it would have expressly done so in the statute<sup>473</sup> seems somewhat simplistic.

This Note has already explored the immense ambiguity inherent in the ADA's definition of disability, which does not begin to account for all of the legislative history discussed above. Under step two of *Chevron*,<sup>474</sup> a DOJ regulation stating that the ADA covers HIV-infected individuals because they are substantially limited in the major life activity of reproduction could indeed capitalize on this ambiguity, and yet the courts may deem it arbitrary and capricious. However, this Note seeks to find a coherent rationale for covering HIV as a disability, not a technical argument on which it can rely.

Completely ignoring the reaction of HIV-infected women to their infection—their decision not to bear children—is clearly unrealistic. At the same time, however, we can use the rationale that HIV infection does not prevent production to illustrate the basic characteristic of reproduction which clearly warrants its removal from the list of major life activities. That Mrs. Abbott could choose not to have children stands as proof that she could live day-to-day without reproducing. The voluntary nature of the reproductive act, while it does not lessen the effects of HIV infection on the reproductive system, at least relegates reproduction to the status of an important life activity that we can reasonably expect certain unlucky individuals to forgo.<sup>475</sup>

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<sup>471</sup> Schneider, *supra* note 235, at 222 (quoting Kmiec Memorandum, *supra* note 90, at 405:4-7).

<sup>472</sup> See Kmiec Memorandum, *supra* note 90, at 405:6-7.

<sup>473</sup> See Schneider, *supra* note 235, at 223.

<sup>474</sup> See *supra* Part V.A.4.a.

<sup>475</sup> In fact, the infertile or HIV-positive woman need not totally forgo the joys of motherhood. Adoption may remain a viable option for many, although this option prompts the question of whether adoption agencies will allow HIV-positive women to adopt.

b. *Failure to Include Reproduction as a Major Life Activity Does Not Violate the Fundamental Right to Reproductive Privacy*

Several cases holding that HIV is a disability because it substantially limits the major life activity of reproduction generally refer to the idea that the entire act of procreation is a fundamental privacy right.<sup>476</sup> The infertility cases also rely on this vague notion of reproduction as a special, protected act, albeit with more stirring rhetoric:

In essence, *Zatarain* and *Krauel* trivialize reproduction. At the risk of waxing philosophical, none of us, nor any living thing, would exist without reproduction. Many, if not most, people would consider having a child to be one of life's most significant moments and greatest achievements, and the inability to do so, one of life's greatest disappointments. Since time immemorial, people have procreated, not as a lifestyle choice, but as an integral part of life.<sup>477</sup>

These assertions, however, implicitly rest on the mistaken belief that the Supreme Court's reproductive autonomy cases directly address restrictions on the ability to reproduce.<sup>478</sup> Instead, this line of cases takes a passive stance regarding reproduction in that the Supreme Court guarantees individuals only a right to certain freedom from state intrusions into such personal decisions as birth control, when to have children, and when to have an abortion.<sup>479</sup> The Supreme Court has never expanded the privacy right to include an affirmative entitlement, in the form of protection from discrimination, to state or federal compensation for the inability to reproduce.

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<sup>476</sup> See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) ("Reproduction falls well within the phrase 'major life activity.' Reproduction and the sexual dynamics surrounding it are central to the life process itself."); *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 777 n.37 (E.D. Tex. 1996) (noting that HIV is an "obvious impairment on the ability to procreate"); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990) ("There is no gainsaying that this significant injury to the reproductive system impedes a major life activity.").

<sup>477</sup> *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 804 (N.D. Ill. 1996); see also, e.g., *Soodman v. Wildman, Harrold, Allen & Dixon*, No. 95-C3834, 1997 WL 106257, at \*5 (N.D. Ill. Feb. 10, 1997). The *Soodman* court noted:

While people typically perform other life activities (e.g., walking, breathing, learning or working) more often than they attempt to have children, child bearing remains a significant and basic aspect of life. To find it to be something less than a major life activity would reduce it to nothing more than a lifestyle choice. Such a narrow interpretation would be inconsistent with the importance Congress has elsewhere afforded pregnancy and childbearing.

*Id.* (citation omitted); see also *Erickson v. Board of Governors*, 911 F. Supp. 316, 322 (N.D. Ill. 1995) ("The Court disagrees with this reasoning [in *Zatarain*], which appears to view reproduction as the act of conception only, thus ignoring the processes that occur continually in both male and female reproductive systems in order to achieve conception."); see also *supra* Part III.A.

<sup>478</sup> See *Robertson*, *supra* note 456, at 414-20.

<sup>479</sup> See *id.*

The privacy cases consist of two distinct but related lines, one dealing with access to contraceptives and the other with the right to an abortion. *Skinner v. Oklahoma*<sup>480</sup> provides the point of departure for both. Here, the Court invalidated on equal protection grounds an Oklahoma statute providing for compulsory sterilization of individuals convicted three times of felonies showing "moral turpitude," but not of those convicted of white-collar crimes.<sup>481</sup> Yet the real impetus for the Court's strict scrutiny of the statute actually rested on the statute's interference in the realm of marriage and procreation.<sup>482</sup> In the founding decision of the Court's contraceptive line of cases, *Griswold v. Connecticut*,<sup>483</sup> Justice Douglas relied in part on *Skinner* and its emphasis on a zone of privacy to create his famous penumbral rights of privacy surrounding the Bill of Rights.<sup>484</sup> In *Griswold*, the Court overturned a Connecticut statute which forbade both the use of contraceptives and the aiding or counseling of others in their use,<sup>485</sup> finding the statute "repulsive to the notions of privacy surrounding the marriage relationship."<sup>486</sup> Later contraception cases held unconstitutional similar state intrusions into reproductive privacy, gradually expanding the scope of that privacy beyond the marriage relationship to include the reproductive decisions of single persons<sup>487</sup> and minors.<sup>488</sup>

The abortion line of cases, while affirming the protected status of reproductive decisions established by the contraception line,<sup>489</sup> nevertheless asserts that the right to be free from governmental incursions into the reproductive sphere is not absolute. In *Roe v. Wade*,<sup>490</sup> for example, the Court held that although the privacy right "is broad

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<sup>480</sup> 316 U.S. 535 (1942).

<sup>481</sup> *Id.* at 536-37.

<sup>482</sup> *See id.* at 541 ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are *fundamental* to the very existence and survival of the race." (emphasis added)).

<sup>483</sup> 381 U.S. 479 (1965).

<sup>484</sup> *See id.* at 485 ("These cases [including *Skinner*] bear witness that the right of privacy which presses for recognition here is a legitimate one.").

<sup>485</sup> *See id.* at 481.

<sup>486</sup> *Id.* at 486.

<sup>487</sup> *See Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972) (overturning, on equal protection grounds, a Massachusetts statute prohibiting distribution of contraceptives to married persons because "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

<sup>488</sup> *See Carey v. Population Servs., Int'l*, 431 U.S. 678, 687 (1977) (finding unconstitutional a New York statute prohibiting the sale or distribution of contraceptives to anyone under sixteen because "the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State").

<sup>489</sup> *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (citing among others the *Skinner*, *Griswold*, and *Eisenstadt* cases as authority for the existence of "certain areas or zones of privacy" under the Constitution).

<sup>490</sup> 410 U.S. 113 (1973).



enough to encompass a woman's decision whether or not to terminate her pregnancy," it is "not unqualified" and may be outweighed by a compelling state interest (i.e., preserving the life of the fetus after the first trimester).<sup>491</sup>

If the Supreme Court permits state inference with reproductive decisions covered by the general privacy right, one cannot possibly argue that the state must insure each citizen against the loss of the ability to procreate effectively. Nonetheless, this is just the argument that proponents of reproduction as a major life activity, such as Deborah K. Dallmann, make: "Although none of these . . . [contraception and abortion] cases specifically address the right of infertile couples to reproduce, at bottom they embrace one undeniable principle: reproduction is a fundamental human right."<sup>492</sup> For Dallmann, if reproduction is a fundamental right, it must be a major life activity, and consequently it can serve as the basis for qualifying infertility as a disability under the ADA.<sup>493</sup> But as previously discussed,<sup>494</sup> labeling infertility as disabling entitles an infertile or HIV-infected woman to protection under the ADA and thus to federal compensation<sup>495</sup> for the emotional pain of what is surely a devastating occurrence, but most assuredly not an activity necessary to an individual's survival. Accordingly, failure to qualify reproduction as a major life activity does not violate the fundamental right to procreative autonomy because no federal imposition on that right is involved. Rather, this failure demonstrates a reluctance to interfere at all.

c. *Failure to Include Reproduction as a Major Life Activity Does Not Violate the Fundamental Right to Raise and Educate One's Children*

Also encompassed within the general privacy right is the right to raise and educate one's children, first set out by the Supreme Court in

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<sup>491</sup> *Id.* at 153-54, 163; cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (affirming the essential holding of *Roe*, but on a liberty interest rather than a privacy right basis, and noting that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"). But see *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (finding the belief of the Georgia electorate that homosexual sodomy is immoral sufficient to uphold Georgia's anti-sodomy statute). The *Hardwick* Court noted that "[t]here should be . . . great resistance to expand the substantive reach of [the Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental." *Id.* at 195.

<sup>492</sup> Dallmann, *supra* note 213, at 413.

<sup>493</sup> See *id.*

<sup>494</sup> See *supra* Part V.B.1.a.

<sup>495</sup> This compensation might come in the form of an order requiring the discriminator to accommodate the reproductively impaired individual under Title III of the ADA. Although the cost of a judgment under Title III may well fall on the discriminator, the state will still have to bear the expense of presiding over the litigation.

*Pierce v. Society of Sisters*.<sup>496</sup> In *Pierce*, the Court enjoined enforcement of Oregon's Compulsory Education Act of 1922, which required children to attend public school, thus prohibiting attendance at private and parochial schools.<sup>497</sup> The Court explained that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>498</sup> Similarly, some fifty years later in *Stanley v. Illinois*,<sup>499</sup> the Court stressed that "[t]he rights to conceive and to raise one's children have been deemed 'essential,'"<sup>500</sup> due process rights. In that case, the Court invalidated a state law that denied a hearing to an unwed father as to his parental fitness, before his children could be taken from him in a dependency proceeding.<sup>501</sup>

Dallmann refers to this constitutional right to raise one's children as further support for her claim that reproduction is a major life activity under the ADA.<sup>502</sup> But her claim fails to make the important distinction between reproduction, which encompasses the processes leading up to and including birth, if we accept Justice Rehnquist's construction of the term,<sup>503</sup> and child rearing, which refers to the post-birth period.<sup>504</sup> For an infertile or HIV-infected woman, her degree of autonomy after birth is irrelevant because birth is either extremely dangerous or not an option at all. Thus, removal of reproduction from the regulatory list of major life activities does not implicate the constitutional right to raise one's children.

## 2. *State and Federal Governments Are Not Required to Enable People to Avail Themselves of Constitutionally-Protected Choices*

If the reproductive privacy and child bearing cases establish a ceiling beyond which state intervention in the private sphere may not proceed absent a compelling state interest, then three companion

<sup>496</sup> 268 U.S. 510 (1925).

<sup>497</sup> See *id.* at 530-31.

<sup>498</sup> *Id.* at 534-35.

<sup>499</sup> 405 U.S. 645 (1972).

<sup>500</sup> *Id.* at 651 (citations omitted); cf. *Hodgson v. Minnesota*, 497 U.S. 417, 445-46 (1990) ("Parents have an interest in controlling the education and upbringing of their children . . . [and] [t]he family has a privacy interest in the upbringing and education of children . . . which is protected by the Constitution against undue state interference.").

<sup>501</sup> See *Stanley*, 405 U.S. at 658.

<sup>502</sup> See Dallmann, *supra* note 213, at 411 (citing Justice Kennedy's statement in *Hodgson* that the right to conceive and raise one's children is "far more precious . . . than property rights" (internal quotation marks omitted)).

<sup>503</sup> See *Bragdon v. Abbott*, 524 U.S. 624, 658 n.2 (1998) (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>504</sup> See Robertson, *supra* note 456, at 415 ("Yet a closer look reveals that except for *Skinner v. Oklahoma* . . . none of the Court's cases asserting a right to procreate, directly address restrictions on reproduction . . . . Instead, they assume the children's existence and assert the parents' right to autonomy in rearing them." (footnotes omitted)).

cases, *Maher v. Roe*,<sup>505</sup> *Poelker v. Doe*,<sup>506</sup> and *Beal v. Doe*,<sup>507</sup> each holding that "neither the Constitution nor federal law required states to fund nontherapeutic abortions for women with financial need,"<sup>508</sup> similarly define the limitations of government in assuring that all individuals are presented with the same basket of choices and opportunities in life. Consistent with these three cases, the Court's ruling in *Harris v. McRae*<sup>509</sup> proves especially interesting for the more general proposition that "the due process clause does not require states to provide funds to enable people to avail themselves of constitutionally-protected choices."<sup>510</sup> The Court stated that even though "government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."<sup>511</sup> Therefore, although *Roe v. Wade* had established a limited constitutional right to have an abortion, *Harris* effectively held that the state did not have to provide the financing to realize that right as long as it did not affirmatively interfere to compromise the right.

Extending *Harris* to the case of HIV-infected or infertile women alleging that their impairment substantially limits the major life activity of reproduction illustrates that the ADA would not violate a constitutional right by refusing to recognize such a claim. Clearly, by denying this claim under the ADA, the federal government would not be creating any additional obstacles to these women's exercise of their freedom of reproductive choice. The obstacle—HIV or infertility—is already in place. Denial of discrimination protection and the potential damages that might accompany a successful suit does not restrict the basic reproductive choice of the allegedly disabled HIV-positive woman: whether or not to have children. For the infertile woman, no real choice exists, but again, the government did not impose the infertility on her in the first place. Perhaps a federal statute prohibiting HIV-positive women from having children<sup>512</sup> would unduly limit reproductive autonomy under *Harris*, but we can easily imagine a suffi-

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<sup>505</sup> 432 U.S. 464 (1977) (holding that Connecticut's refusal to pay for nontherapeutic abortions for indigent women did not violate the Equal Protection Clause).

<sup>506</sup> 432 U.S. 519 (1977) (per curiam) (rejecting an attack on the decision of municipal hospitals in St. Louis to subsidize childbirth services, but not nontherapeutic abortion services).

<sup>507</sup> 432 U.S. 438 (1977) (holding that a state participating in the Medicaid program was not required by Title XIX of the Social Security Act to fund the cost of nontherapeutic abortions).

<sup>508</sup> AREEN ET AL., *supra* note 425, at 1280.

<sup>509</sup> 448 U.S. 297 (1980) (finding that the 1976 Hyde Amendment which prohibited Medicaid reimbursement for most medically necessary abortions, did not unduly restrict a woman's right to an abortion).

<sup>510</sup> AREEN ET AL., *supra* note 425, at 1281.

<sup>511</sup> *Harris*, 448 U.S. at 316.

<sup>512</sup> See *supra* note 468 and accompanying text.

ciently compelling state interest, such as protecting newborns from contracting HIV, that would justify this imposition.

Ultimately, then, rejecting reproduction as a major life activity under the ADA avoids any constitutional pitfalls while closing a loophole through which normally functioning individuals can achieve disability status.

C. Alternative Standard: ADA Coverage of HIV Infection Should Be Based on an Individualized, Case-by-Case Analysis

The three-stage progression of HIV presented at the beginning of this Note<sup>513</sup> offers possibly the most obvious answer to the tension between Congress's apparent desire for a per se rule that applies to HIV-infected individuals<sup>514</sup> and the equally clear fact that a certain class of HIV-infected individuals—the asymptomatic, if not yet targets of HIV-based discrimination—do not need a per se rule. During the initial stage of HIV, which precedes the asymptomatic phase, the virus concentrates in the blood and immediately assaults the immune system.<sup>515</sup> The horrible consequences of AIDS (symptomatic HIV)—muscle pain, oral lesions, bacterial infections, Kaposi's sarcoma, non-Hodgkins lymphoma<sup>516</sup>—all follow from this single invasion of the immune system. In the asymptomatic stage, some minor symptoms persist, but the virus essentially lies dormant in the lymph nodes.<sup>517</sup>

A sliding-scale construction of the disease thus suggests itself. The asymptomatic, while incontestably infected with a potentially disabling disease of the immune system, do not presently suffer from such a disabled immune system that they cannot proceed with their everyday lives.<sup>518</sup> Once an infected individual reaches the symptomatic stage and the appurtenant symptoms manifest themselves to a disabling extent,<sup>519</sup> we could say that the individual is substantially limited in the major life activity of fighting off infections that the non-HIV-infected individual could normally withstand. It thus follows that fighting infection falls within the EEOC Compliance Manual definition of major life activities: “[T]hose basic activities that the average person in the general population can perform with little or no diffi-

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<sup>513</sup> See *supra* note 12.

<sup>514</sup> See *supra* Part II.A.1.

<sup>515</sup> See *supra* note 12.

<sup>516</sup> See *id.*

<sup>517</sup> See *id.*

<sup>518</sup> Recall that in her deposition, Mrs. Abbott answered “no” to the question of whether she was limited in the ability to perform any of her life functions. See *Bragdon v. Abbott*, 524 U.S. 624, 659 (1998) (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>519</sup> See *supra* note 12.

culty."<sup>520</sup> Of course, different individuals may become symptomatic at different points during their lives after contracting HIV, if at all, and may exhibit symptoms of full-blown AIDS to varying degrees. Recognizing this lack of uniformity argues for a return to the case-by-case analysis implicit in the words "of such individual" in section 12102(2)(A) of the ADA, which the Fourth Circuit<sup>521</sup> as well as the DOJ and EEOC interpretive guidelines recommend.<sup>522</sup>

### 1. *Dangers of a Per Se Disability Rule*

The ADA has received substantial criticism for producing absurd results.<sup>523</sup> As noted above, covering HIV-infected individuals under the ADA via the substantial limitation imposed by HIV infection on reproduction might actually achieve results contrary to Congress's intent to provide protection for both asymptomatic and symptomatic individuals by excluding those unable to allege a substantial impairment of their reproductive abilities.<sup>524</sup>

This Note has already discussed some of the hypothetical costs of covering asymptomatic individuals under a per se rule before they become subject to discriminatory treatment.<sup>525</sup> Additionally, it has considered how tying ADA coverage of HIV-positive individuals to reproduction fails to punish the discriminatory attitudes clearly targeted by the statute.<sup>526</sup> But consider the potential consequences of a rule that HIV is per se disabling. For example, we might wonder whether asymptomatic HIV-positive individuals truly desire the protections offered by the ADA at the price of being labeled as disabled. Indeed, it has been noted that "[t]he perception that people with disabilities are distinctively different and 'special' is closely associated with attitudes of patronization and pity that most individuals with disabilities decry."<sup>527</sup>

In the recent right-to-die case, *Vacco v. Quill*,<sup>528</sup> two national organizations of disabled persons submitted amicus briefs arguing that as-

<sup>520</sup> EEOC Compl. Man. (CCH) ¶ 6883, § 902.3 (1995).

<sup>521</sup> See *supra* Part II.C.

<sup>522</sup> See Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. pt. 36 app. B § 36.104, at 583 (1998); Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. §1630.2(j), at 347 (1998).

<sup>523</sup> See, e.g., James Bovard, *The Disabilities Act's Parade of Absurdities*, WALL ST. J., June 22, 1995, at A16. But see Gilbert F. Casellas, EEOC Chairman, Editorial, *Forget the Sympathy; We're Talking Justice*, WALL ST. J., July 14, 1995, at A13 (replying to the Bovard piece).

<sup>524</sup> See *supra* Part V.B.

<sup>525</sup> See *supra* Part V.

<sup>526</sup> See *supra* Part III.B.

<sup>527</sup> Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 525 (1997).

<sup>528</sup> 521 U.S. 793 (1997).

sisted suicide constitutes "the most lethal form" of discrimination against the disabled.<sup>529</sup> In so doing, these groups rejected as discriminatory treatment a procedure which many argued offered terminally ill patients suffering unendurable pain the same honorable, painless death available to most people. The Not Dead Yet brief further argues that assisted suicide devalues people with disabilities by essentially telling them that their disabled lives are not worth living.<sup>530</sup> Thus, for Not Dead Yet, an attempt to equalize the disabled through the vehicle of assisted suicide actually constitutes discriminatory treatment.

Although clearly a less extreme example, creating a per se disability rule regarding HIV infection could arguably have a similar effect by sending a message to the asymptomatic that they are really incapable individuals, something less than "normal citizens," and thus the proper beneficiaries of the federal government's altruism. Similarly, Anita Silvers notes that:

[I]t is misleading to take one person with a disability as speaking for others, or to presume that to adjust an environment for one will facilitate most others. . . . To be disabled is, fundamentally, to be unique in one's mode(s) of performance. To be so makes one exceptionally vulnerable to, and unduly limited by policies, practices, and environments designed to be applied uniformly on the basis of what is common to a class.<sup>531</sup>

Extrapolate this statement to the entire HIV-positive population. We might then say that it is dangerous to take the unifying characteristic of all symptomatic and asymptomatic HIV-positive individuals—an impairment of the immune system—and then apply a disability rule uniformly to these two groups when, in fact, one group is significantly less limited in its "modes of performance" than the other. Silver's approach suggests that some value exists for disabled individuals to view their disability as the normal state of affairs in their micro-environment.<sup>532</sup>

Consequently, the primary lesson to be taken from these hypotheticals is that we might want to consider the advantages of fashioning an antidisability discrimination statute that accounts for the differences in the HIV-positive population rather than masking them over at the risk of some degree of overbreadth. This goal can be achieved by making determinations of disability for the asymptomatic on a case-by-case basis.

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<sup>529</sup> Amici Curiae Brief of Not Dead Yet and American Disabled for Attendant Programs Today in Support of Petitioners at 2, *Vacco* (No. 95-1858).

<sup>530</sup> See *id.* at 8.

<sup>531</sup> Silvers, *supra* note 456, at 103.

<sup>532</sup> See *id.* at 105 ("[W]e find that the main ingredient of being (perceived as) normal lies in being in an environment arranged to suit one's self.").

## 2. *Asymptomatic HIV: "Regarded as" Element*

Having rejected reproduction as the proper means for covering asymptomatic individuals under the ADA, several scholars propose that when the asymptomatic suffer from discrimination, the "regarded as" prong of the ADA's definition of disability should kick in to provide protection against society's misperceptions about HIV infection.<sup>533</sup> These suggestions offer nothing new to the HIV-as-disability analysis. As far back as 1988, the Kmiec memo argued that the Rehabilitation Act may protect asymptomatic HIV-infected individuals via its "regarded as" prong.<sup>534</sup> And, as discussed in Parts II.A.3 and II.B, both the pre- and post-ADA cases dealing with asymptomatic HIV as a disability all involved instances of discrimination based on unfounded fears as to the victim's ability to perform in the workplace, interact with others, and so on. Consequently, the "regarded as" prong proves well-tailored to remain dormant when protection is not needed, and yet rise to the occasion when discrimination appears. Furthermore, in keeping with the notion that we may not want a disability statute to devalue its beneficiaries, the "regarded as" prong assumes that the fault lies with the discriminator.<sup>535</sup>

The Fourth Circuit's decision in *Runnebaum v. NationsBank of Maryland, N.A.*<sup>536</sup> clearly goes to extremes in holding that asymptomatic HIV infection does not constitute an impairment under the ADA simply because it creates "no diminishing effects on the individual."<sup>537</sup> This ruling baldly ignores the medical evidence compiled above, which states that during the asymptomatic stage, the virus migrates to the lymph nodes and certain symptoms such as "dermatological disorders, oral lesions, and bacterial infections," may persist.<sup>538</sup> In this regard, the term "asymptomatic" is something of a misnomer, and consequently, the majority in *Bragdon* held it to be an impairment.<sup>539</sup> To conclude otherwise would violate the clear and reasonable inter-

<sup>533</sup> See, e.g., Lazzarini, *supra* note 443, at 18; Chambers, *supra* note 19, at 427; Schneider, *supra* note 235, at 226-27.

<sup>534</sup> See Kmiec Memorandum, *supra* note 90, at 405:1-2 ("[S]ection 504 protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past, or perceived effect of HIV infection that substantially limits any major life activity so long as the HIV-individual is 'otherwise qualified' to participate in the program or activity . . ."); Johnsen Memorandum, *supra* note 102.

<sup>535</sup> See 28 C.F.R. § 36.104(4)(ii) (1998); 29 C.F.R. § 1630.2(l)(2) (1998) (defining "regarded as" as "ha[ving] a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment").

<sup>536</sup> 123 F.3d 156 (4th Cir. 1997).

<sup>537</sup> *Id.* at 168.

<sup>538</sup> *Bragdon v. Abbott*, 524 U.S. 624, 635-37 (1998).

<sup>539</sup> See *id.* at 644.

pretation adopted by the DOJ and EEOC implementing regulations that the “hemic and lymphatic” systems can suffer an impairment.<sup>540</sup>

The “regarded as” prong thus acknowledges what the asymptomatic can do. At the same time, it offers them protection when society fails to recognize these abilities, without creating a loophole that bypasses the requirement of actual discrimination. Mary Anne Bobinski nicely sums up this tension between the abilities of asymptomatic individuals, the challenges they face, and the dangers of a per se rule tied to reproduction:

During [the asymptomatic stage], people with HIV infection may continue to work and engage in other activities, often unaware of their HIV status. Furthermore, even casual media consumers have heard about advances in treatments for persons with HIV infection that apparently can help many to lead longer and healthier lives. Magic Johnson came back, only to be retired by low ratings rather than poor health. Advertisements for HIV-related therapies inevitably picture amateur marathoners or weight lifters. Local community centers hold workshops for persons with HIV infection on giving up disability benefits and returning to work. These facts require a stretching and pulling of the concept of disability if it is to be worn as a protective cloak by persons with HIV infection. What does it mean to be “disabled” if you can run 26 miles and put in a full day at work? On the other hand, few would doubt the continued need for protective legislation, given public fears and attitudes toward people infected with the virus.<sup>541</sup>

### 3. *Symptomatic HIV: Substantially Limits the Major Life Activity of Fighting Infection*

The hemic and lymphatic systems offer the most logical and obvious means for covering symptomatic HIV-positive individuals under the ADA. Indeed, this solution seems exceedingly apparent from even a cursory reading of the list of body systems that can be impaired under the EEOC and DOJ implementing regulations, which includes the “hemic and lymphatic” systems—the immune system.<sup>542</sup> Furthermore, the Federal Office of Contract Compliance has defined AIDS (symptomatic HIV) as an immune disease: “AIDS is primarily a disease of the body’s immune system, which causes the system’s collapse, and consequently, renders the afflicted individual vulnerable to many infections and cancers . . . . AIDS is the most severe form of a progres-

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<sup>540</sup> See 28 C.F.R. § 36.104(1)(i) (1998); 29 C.F.R. § 1630.2(h)(1) (1998).

<sup>541</sup> Mary Anne Bobinski, *The Expanding Domain of the ADA: The Supreme Court’s Decision in Abbott v. Bragdon*, 61 Tex. B.J. 918, 921-22 (1998).

<sup>542</sup> See 29 C.F.R. § 1630.2(h)(1); 28 C.F.R. § 36.104(1)(i).



sive immunologic compromise caused by HIV.”<sup>543</sup> We thus come full circle to the conclusions of one of the first legal scholars to tackle the HIV-AIDS epidemic, Professor Arthur Leonard. Professor Leonard argued in 1985 that “[p]ersons with AIDS would appear to be within the ‘impairment’ category because the ability to fight infection and preserve health is logically a ‘major life function’ albeit less visible than walking, talking, or lifting.”<sup>544</sup>

It simply makes sense to tie coverage for the symptomatic to the specific impairment from which they suffer. Further, fighting off infection fits in well with the illustrative list of major life activities, performed frequently and on a daily basis. Foreign materials constantly bombard the body, thus satisfying the frequency and daily requirements if necessary. Moreover, because an impaired immune system can lead to death, as in the case of full-blown AIDS itself, the ability to fight infection must necessarily be a major life activity—how could one live without it?

Admittedly, skeptics like Justice Rehnquist may cite this rationale as an example of “bootstrapping.”<sup>545</sup> To some extent, they would be correct. Since symptomatic HIV infection will always be an impairment of the hemic and lymphatic systems, in essence a per se rule says that it will always substantially limit the major life activity of fighting infection. Perhaps the judicial obsession with basing the ADA’s coverage of HIV-infected individuals on reproduction evolved out of a desire to avoid any bootstrapping and thus to preserve the three-part disability test of section 12102(2)(A) of the ADA. But, although per se rules may be dangerous, in this instance at least the per se rule would be applied to a coherent subgroup of HIV-positive individuals, not both the asymptomatic and the symptomatic. Finally, the strict ADA analysis need not change to accommodate a per se rule. Rather, we can apply the three steps of section 12102(2)(A) of the ADA with every symptomatic individual, preserving the integrity of the statute, yet knowing all along that this is a constructive per se disability.

#### CONCLUSION

This framework for HIV infection as a disability, consisting of a de facto per se rule regarding the symptomatic and a “regarded as” test for the asymptomatic, provides a flexible framework within which Congress’s desire to “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with

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<sup>543</sup> Office Fed. Contract Compliance Programs, Directive on AIDS as a Protected Handicap (1988), reprinted in 8 Fair. Empl. Prac. Man. (BNA) 405:351 (1995).

<sup>544</sup> Arthur S. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 691 (1985).

<sup>545</sup> See *supra* notes 316-18 and accompanying text.

disabilities"<sup>546</sup> can be realized. This scheme condemns the "accumulated myths and fears"<sup>547</sup> that give rise to discrimination by basing coverage for the asymptomatic on that very discrimination rather than the technical loophole produced by the notion that reproduction is a major life activity under the ADA. When the disability is real, as in the case of symptomatic individuals, the per se rule provides a quick and just remedy.

The introduction to this Note pointed out the fear voiced by Parmet and Jackson, that as society, fueled by the promise of new wonder drugs, comes to view HIV as just another disease rather than an epidemic, protection for the HIV-infected will disintegrate before medicine can really handle the disease.<sup>548</sup> The "regarded as"-per se framework allays these fears by protecting those individuals whose HIV may appear to be under control for the moment but suddenly progresses to the next stage, either physically or in the eyes of another. If an asymptomatic individual becomes symptomatic, the protection he or she enjoys is immediately ratcheted up to the symptomatic per se standard. If an asymptomatic individual suffers discrimination from someone like a Dr. Bragdon who misperceives the true risks imposed by AIDS, similar protections fall into place. Hence, the framework allows for optimism in the battle against AIDS. As we come closer to a cure, more HIV-positive individuals will move into the "regarded as" pool, but remain protected by the back-up per se rule, should their status or society's perception thereof changes.

Under a "regarded as" analysis, the Supreme Court achieved a morally admirable result in *Bragdon v. Abbott*, if we assume that Dr. Bragdon's refusal to treat Mrs. Abbott in his office stemmed from some stereotypic fears as to her contagiousness rather than sound medical evidence of a "direct threat." But in so doing, the Court perpetuated a tortured legal analysis, entangling itself in a puzzling zeal for basing ADA coverage of the asymptomatic on reproduction. In fact, the absurdity of tying coverage to reproduction proves to be of more than an academic interest. I first heard about the *Bragdon* case last summer while visiting a friend in New Hampshire. Her neighbor, aware that we were both law students, excitedly showed us the day's newspaper report describing the Court's decision. He simply could not understand why the law should label Mrs. Abbott disabled just because her HIV infection impaired her ability to reproduce. At some level, his reaction to the opinion conveyed a skepticism as to the sincerity of Mrs. Abbott's claim. But more importantly, he instantly recognized the Court's unfortunate reasoning. One wonders why

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<sup>546</sup> 42 U.S.C. § 12101(b)(1) (1994).

<sup>547</sup> *School Bd. v. Arline*, 480 U.S. 273, 284 (1987).

<sup>548</sup> See Parmet & Jackson, *supra* note 1, at 8-9, 28-29.

someone with no formal legal training so quickly saw the oddity of a reproduction-based disability standard for asymptomatic HIV patients when the Supreme Court still cannot.