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## ***Bragdon v. Abbott*: ADA Protection for Individuals with Asymptomatic HIV**

Individuals living with the Human Immunodeficiency Virus ("HIV") face not only future illness, costly medical care, and premature death, but also discrimination based on societal prejudice and fear about the disease.<sup>1</sup> Whether federal anti-discrimination law protects persons in the asymptomatic stage of HIV<sup>2</sup> from discrimination based on the disease has not always been clear.<sup>3</sup> The Americans with Disabilities Act of 1990 ("ADA" or "Act")<sup>4</sup> protects individuals against discrimination based on disability in a variety of situations, including employment and public services provided by

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1. See ROBERTA COHEN & LAURIE S. WISEBERG, *DOUBLE JEOPARDY—THREAT TO LIFE AND HUMAN RIGHTS: DISCRIMINATION AGAINST PERSONS WITH AIDS* 3 (1990) (describing this intersection of fatal disease and discrimination as "double jeopardy"); see also Michael L. Closen, *The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and Its Adverse Effect on Human Rights*, 61 ALB. L. REV. 897, 906 (1998) (calling AIDS "the modern day equivalent of leprosy"); Michael Smithurst, *Risk, Discrimination and Utility*, in *AIDS: A MORAL ISSUE* 82, 83 (Brenda Almond ed., 2d ed. 1996) (noting that discrimination extends to those who associate with HIV-positive individuals).

2. HIV infection occurs in three stages: primary, asymptomatic, and symptomatic. See J. Michael Howe & Peter C. Jensen, *An Introduction to the Medical Aspects of HIV Disease*, in *AIDS AND THE LAW* § 1.21, at 45-47 (David W. Webber ed., 3d ed. 1997); see also *infra* note 46 (discussing the *Bragdon* Court's description of the primary and asymptomatic stages of HIV). An individual's current stage is frequently determined by her CD4 cell count. See Howe & Jensen, *supra*, § 1.19, at 39. Produced by the lymphoid organs, CD4 cells are white blood cells that are the main target of HIV infection. See *id.* § 1.6, at 12 n.71. A person in the asymptomatic stage of HIV infection has a CD4 cell count greater than 500 and will have few symptoms, although virus replication is actually continuous. See *id.* § 1.21, at 46. The asymptomatic phase may last from months to years. See *id.* For detailed considerations of the medical aspects of HIV infection, see P.T. COHEN ET AL., *THE AIDS KNOWLEDGE BASE* (2d ed. 1994); MERLE A. SANDE & PAUL A. VOLBERG, *THE MEDICAL MANAGEMENT OF AIDS* (5th ed. 1997).

3. See John M. Vande Walle, Note, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 CHI.-KENT L. REV. 897, 900 (1998) (arguing that determining the applicability of the ADA in any given case is more difficult than with other federal anti-discrimination statutes because, unlike race or gender, disability involves a trait that not everyone possesses); see also Julie Shapiro & David W. Webber, *Access to Public Services and Accommodations*, in *AIDS AND THE LAW*, *supra* note 2, §§ 4.1-4.16, at 177-201 (surveying the federal protections against discrimination available to individuals with HIV).

4. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)). For a description of the proposal and passage of the ADA, see Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 429-34 (1991).

private establishments.<sup>5</sup> The broad purpose of Title III of the ADA is the elimination of both physical and attitudinal barriers from places of public accommodation.<sup>6</sup> To advance this goal, Title III of the ADA provides statutory requirements governing building accessibility and provision of services.<sup>7</sup>

The ADA prohibits discrimination against an individual "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>8</sup> The ADA thus offers HIV-infected individuals protection against discrimination only if they are disabled within the meaning of the Act.<sup>9</sup> A disability under the ADA is any of the following: "(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."<sup>10</sup> Subsections (B) and (C) reflect Congress's desire to prohibit discrimination based on a history of disability or the perception of disability as well as discrimination based on an actual disability.<sup>11</sup>

Determining the applicability of the ADA to individual plaintiffs has proven difficult, however, because the ADA does not define "physical or mental impairment" or "major life activity."<sup>12</sup> The

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5. See 1 HENRY H. PERRITT, JR., *AMERICANS WITH DISABILITIES HANDBOOK* § 1.2, at 3-4 (3d ed. 1997). Title I of the ADA governs employment, see 42 U.S.C. §§ 12111-12117; Title II governs state and local governments, see *id.* §§ 12131-12165; and Title III governs places of public accommodation, see *id.* §§ 12181-12189; see also Burgdorf, *supra* note 4, at 434-92 (reviewing the content of the ADA).

6. See 42 U.S.C. § 12101(b); see also 1 PERRITT, *supra* note 5, § 6.1, at 246 (describing the general purposes of the ADA).

7. See 42 U.S.C. § 12182(b)(2)(A).

8. *Id.* § 12182(a). Additionally, the Act enumerates specific prohibitions on covered public accommodations that impose a duty to modify policies, procedures, and structural barriers in order to avoid liability. See *id.* § 12182(b)(2). Remedies and procedures under the ADA are the same as those set forth under the Civil Rights Act of 1964. See *id.* § 12188(a)(1); *id.* § 2000a-3(a). Injunctive relief is available and may include an order to alter facilities or to provide services. See *id.* § 12188(a)(2). Punitive damages are not available under Title III. See *id.* § 12188(b)(4); see also 1 PERRITT, *supra* note 5, § 9.37, at 437 (reviewing damages available under Title III).

9. See 1 PERRITT, *supra* note 5, § 3.2, at 38 (discussing the requirement of statutory disability for ADA eligibility).

10. 42 U.S.C. § 12102(2).

11. Cf. *School Bd. v. Arline*, 480 U.S. 273, 284 (1987) (discussing Congress's pre-ADA concern about perceived impairments).

12. See Burgdorf, *supra* note 4, at 446 (noting that the definition of "impairment" was included in Congress's ADA bills but was deleted in the interest of brevity); see also 1 PERRITT, *supra* note 5, § 3.2, at 40 (suggesting that Congress declined to provide a list of

United States Supreme Court recently considered the applicability of Title III of the ADA to an HIV-infected woman whose dentist refused to fill her cavity in his office and told her that he would perform the procedure at a hospital only if she paid for the additional expenses.<sup>13</sup> In *Bragdon v. Abbott*,<sup>14</sup> the Court held that Sidney Abbott was protected under the ADA because the infection substantially limited her major life activity of reproduction.<sup>15</sup> In an expansive reading of the statutory definition of disability, the Court rejected the argument that whether a life activity is considered "major" under the statute depends upon its daily character and intimated that "substantial limitation" might include legal or economic limitations resulting from a disability.<sup>16</sup> Although the Court held that Abbott's asymptomatic HIV was a disability, the Court declined to decide whether asymptomatic HIV is a per se disability.<sup>17</sup> Consequently, HIV-infected individuals will likely continue to have to prove their disability on a case-by-case basis.<sup>18</sup>

This Note discusses the facts of *Bragdon*, its treatment in the lower courts, and the Supreme Court's resolution of the issue concerning ADA coverage of asymptomatic HIV.<sup>19</sup> The Note then considers past agency interpretations of the applicability of federal anti-discrimination law to individuals with asymptomatic HIV.<sup>20</sup> Next, the Note surveys the treatment of this issue in the federal courts, from the early assumption that the ADA covered asymptomatic HIV<sup>21</sup> to the split that arose when courts began observing the close scrutiny of disability mandated by the statutory definition.<sup>22</sup> The Note then considers *Bragdon's* place in the line of cases requiring an individualized inquiry into a plaintiff's disability

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disorders constituting physical impairments because of the likelihood that new impairments would develop in the future).

13. See *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998). Professor Closen argues that the Supreme Court's failure to grant certiorari in HIV/AIDS cases prior to *Bragdon* constituted an abdication of its responsibility to curb continued human rights violations against those infected with the disease. See Closen, *supra* note 1, at 914. He notes that since 1987 the Court denied certiorari in 25 cases involving substantive HIV/AIDS issues. See *id.* at 900-01.

14. 118 S. Ct. 2196 (1998).

15. See *id.* at 2206-07.

16. See *id.* at 2205-06.

17. See *id.* at 2207.

18. See *id.* at 2210.

19. See *infra* notes 25-79 and accompanying text.

20. See *infra* notes 80-116 and accompanying text.

21. See *infra* notes 117-39 and accompanying text.

22. See *infra* notes 140-96 and accompanying text.

and the desirability of such inquiry over a per se rule.<sup>23</sup> Finally, the Note argues that the Court's decision—based on Abbott's actual disability—was preferable to a decision based on the “regarded as” prong of the disability definition.<sup>24</sup>

Sidney Abbott was infected with HIV in 1986.<sup>25</sup> In September 1994, she went to the dental office of Randon Bragdon for a dental examination.<sup>26</sup> Abbott was in the asymptomatic phase of HIV infection, but she indicated her infection on a form completed when she arrived at the office.<sup>27</sup> During the examination, Bragdon discovered a cavity and informed Abbott of his policy against filling cavities of HIV-infected patients in the office.<sup>28</sup> He offered to fill the cavity at a hospital, but instructed Abbott that she would have to pay for use of the hospital's facilities.<sup>29</sup> Abbott declined and filed discrimination claims against Bragdon in the federal district court in Maine under both Maine state law and Title III of the ADA.<sup>30</sup>

In its decision to grant summary judgment for the plaintiffs,<sup>31</sup> the district court found that Abbott's HIV infection qualified as a disability under the ADA<sup>32</sup> and that Bragdon had failed to raise a genuine issue of material fact as to whether the treatment of Abbott

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23. See *infra* notes 200-42 and accompanying text.

24. See *infra* notes 243-67 and accompanying text.

25. See *Bragdon*, 118 S. Ct. at 2200.

26. See *id.* at 2201.

27. See *id.*

28. See *id.*

29. See *id.*

30. See *id.* The Supreme Court considered only the ADA claims. See *id.* The district court granted summary judgment for the plaintiff on the ADA and Maine Human Rights Act claims, see *Abbott v. Bragdon*, 912 F. Supp. 580, 592 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir.), *cert. granted in part*, 118 S. Ct. 554 (1997), and *vacated*, 118 S. Ct. 2196 (1998), but the ADA claims were the only claims considered on appeal, see *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir.), *cert. granted in part*, 118 S. Ct. 554 (1997), and *vacated*, 118 S. Ct. 2196 (1998). A Title III ADA claim was available to Abbott because a dentist's office, as a “professional office of a health care provider,” is considered a public accommodation under the ADA. 42 U.S.C. § 12181(7)(F) (1994).

31. See *Abbott*, 912 F. Supp. at 584. Both the United States and the Maine Human Rights Commission intervened as plaintiffs prior to discovery. See *Bragdon*, 118 S. Ct. at 2201.

32. Relying on the weight of case authority and the ADA regulations, the district court concluded that asymptomatic HIV is a physical impairment under the ADA. See *Abbott*, 912 F. Supp. at 585. The court followed the majority of courts in concluding that reproduction is a major life activity, noting that the regulations' representative list of activities is not comprehensive. See *id.* at 585-86 (discussing 28 C.F.R. § 36.104 (1995)). Finally, the court concluded that Abbott's HIV infection substantially limited her reproduction because the ADA does not require a showing of a “direct barrier” to the ability to reproduce. *Id.* at 587. The court noted Abbott's undisputed testimony that fear of passing on HIV to a child led to her decision not to reproduce. See *id.*

would have posed a direct threat to the health and safety of others.<sup>33</sup> The First Circuit affirmed,<sup>34</sup> although it relied on different information in determining that treatment of Abbott would not have posed a direct threat.<sup>35</sup>

The Supreme Court granted certiorari on three questions: (1) whether asymptomatic HIV is a physical impairment that substantially limits the major life activity of reproduction for the purposes of the ADA; (2) whether HIV infection is a disability per se under the ADA; and (3) whether the direct threat analysis under the ADA requires a court to defer to the professional judgment of a health care provider as long as it is reasonable in light of current

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33. See *id.* at 591. When a disabled individual poses a direct threat to the health and safety of others, the public accommodation may deny services to that individual without liability. See 42 U.S.C. § 12182(b)(3). "Direct threat" means "a significant risk 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." *Id.* Whether a "direct threat" exists must be determined based on the "current medical knowledge or on the best available objective evidence." 28 C.F.R. § 36.208(c) (1998).

Bradgon's arguments supporting his "direct threat" defense focused on the likelihood that HIV would be transmitted in invasive dental procedures, but the district court found that he had no "quality evidence" to support his argument. *Abbott*, 912 F. Supp. at 588. The court determined, however, that Abbott presented evidence concerning the absence of risk that qualified as the "reasonable medical judgment of a public health official." *Id.* at 589. The court relied on the testimony of the Director of the Division of Oral Health of the Centers for Disease Control and Prevention ("CDC"), who stated that treatment was safe as long as the dentist followed the guidelines provided by the CDC. See *id.* Some commentators have suggested that the intersection of HIV/AIDS and the public health care system has been particularly troublesome because of the need to balance "patients' rights to privacy and nondiscrimination with collective rights to public health protection." Lawrence O. Gostin & David W. Webber, *HIV Infection and AIDS in the Public Health and Health Care Systems: The Role of Law and Litigation*, 279 JAMA 1108, 1108 (1998).

34. See *Abbott*, 107 F.3d at 937. The First Circuit held "unhesitatingly" that asymptomatic HIV is a physical impairment under the ADA. *Id.* at 939. Affirming the district court's finding that reproduction is a major life activity, the court noted that the meaning of "major" suggests that the key to determining whether an activity qualifies is its overall significance. See *id.* at 939-40. The court stated that reproduction is of "singular importance." *Id.* at 941. The court also affirmed the district court's conclusion that asymptomatic HIV substantially limits reproduction, pointing out that an eight percent risk of transmission of a fatal disease during pregnancy is a substantial restriction on reproduction. See *id.* at 942.

35. See *id.* at 947-49. The presence of a "direct threat" had to be evaluated on the basis of the medical knowledge available to Bradgon at the time. See *id.* at 943 (citing 28 C.F.R. § 36.208(c) (1996)). The court therefore rejected the district court's reliance on the testimony of the CDC official because there was no evidence that the views he espoused were public information at the time Bradgon refused to treat Abbott. See *id.* at 946 n.7. Instead, the First Circuit relied directly on the CDC guidelines and on the policies for treatment of HIV-infected patients promulgated by the American Dental Association. See *id.* at 946.

medical knowledge.<sup>36</sup> This Note focuses on the Court's resolution of the first two issues; the Court considered the third issue and remanded the case to the First Circuit for a reconsideration of whether Abbott's HIV infection posed a direct threat to her dentist.<sup>37</sup>

The first question presented the Court with an issue of statutory

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36. See Brief for the Petitioner, *Bragdon* (No. 97-156), available in 1998 WL 4678, at \*i. The Court denied certiorari on two other questions: First, "What is the proper standard of judicial review under Title III of the ADA of a private health care provider's judgment that the performance of certain invasive procedures in his office would pose a direct threat to the health or safety of others?," and second, "Did petitioner, Randon Bragdon, D.M.D., raise a genuine issue of fact for trial as to whether he was warranted in his judgment that the performance of certain invasive procedures on a patient in his office would have posed a direct threat to the health or safety of others?" *Bragdon*, 118 S. Ct. at 2209-10 (quoting Petition for Certiorari at i, *Bragdon* (No. 97-156)).

37. See *Bragdon*, 118 S. Ct. at 2213, on remand, *Abbott v. Bragdon*, 163 F.3d 87 (1st Cir. 1998). After concluding that Abbott had a statutory disability, the Court considered the direct threat issue and concluded that a court's assessment of the objective reasonableness of the views of a health care professional should not involve deference to the professional's individual judgment. See *Bragdon*, 118 S. Ct. at 2210. In so holding, the Court affirmed the standard established in *School Board v. Arline*, 480 U.S. 273 (1987), that the existence of a "significant threat" sufficient to prevent liability for discrimination must be determined from the perspective of the individual who refuses the accommodation and that the assessment of risk must be based on objective evidence. See *Bragdon*, 118 S. Ct. at 2210 (citing *Arline*, 480 U.S. at 288). Applying this standard, the Court concluded that the First Circuit was correct in declining to rely on the affidavits of the CDC official because there was no evidence that his opinions had been published; publication was necessary to make the opinions relevant as objective medical information available to Bragdon when he denied treatment. See *id.* at 2211. Because the Court was concerned that the First Circuit might have relied improperly on sources that did not specifically assess the risk associated with dental treatment of an HIV patient, such as the CDC Dentistry Guidelines, the Court remanded the case for a reconsideration of whether there was a genuine issue of material fact about the existence of a direct threat. See *id.* The Court noted that other evidence in the record not considered by the First Circuit, including testimony from health experts, should be considered and might support the decision of the district court in granting summary judgment for the plaintiffs on the issue of direct threat. See *id.* at 2212. The Court suggested that remand was necessary because it could not determine from the briefs and arguments exactly what medical information was available to Bragdon at the time he refused to treat Abbott. See *id.*

Although he did not believe that remand was necessary, Justice Stevens, joined by Justice Breyer, concurred in the opinion of the Court in order to provide a judgment supported by a majority. See *id.* at 2213 (Stevens, J., concurring). Chief Justice Rehnquist agreed that the direct threat issue should be remanded, but he disagreed with the Court's reasoning. See *id.* at 2216 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The Chief Justice quarreled with the Court's determination that the reasonableness of a health care provider's judgments should be assessed in light of the views of public health officials. See *id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). He argued that because of the severity of the risk posed by HIV infection and the unavailability of procedures for eliminating the risk, a dental care provider's determination that an HIV-infected patient posed a direct threat would likely be found "objectively reasonable." *Id.* at 2217 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

interpretation. Writing for the Court,<sup>38</sup> Justice Kennedy broke the present disability analysis into a three-step inquiry:<sup>39</sup> (1) was Abbott's HIV infection a physical impairment; (2) does reproduction constitute a major life activity; and (3) did HIV infection substantially limit reproduction.<sup>40</sup> The ADA provides no definition for physical impairment, so the Court looked to the regulations interpreting the Rehabilitation Act of 1973 ("Rehabilitation Act")<sup>41</sup> that enumerate body systems which, if affected, constitute

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38. Justices Stevens, Souter, Ginsburg, and Breyer joined in the opinion of the Court. See *Bragdon*, 118 S. Ct. at 2200. Justice Stevens wrote a concurring opinion in which Justice Breyer joined. See *id.* at 2213 (Stevens, J., concurring). Justice Ginsburg concurred separately. See *id.* (Ginsburg, J., concurring). Chief Justice Rehnquist wrote an opinion concurring in the judgment in part and dissenting in part, in which Justices Scalia and Thomas joined, and in part of which Justice O'Connor joined. See *id.* at 2214 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justice O'Connor wrote separately, concurring in the judgment in part and dissenting in part. See *id.* at 2217 (O'Connor, J., concurring in the judgment in part and dissenting in part).

39. See *id.* at 2202 (interpreting 42 U.S.C. § 12102(2)(A) (1994)). At oral argument, the petitioner conceded that the "regarded as" issue was raised in the First Circuit. See Transcript of Oral Argument, *Bragdon* (No. 97-156), available in 1998 WL 141165, at \*6. Because the Court determined that Abbott's HIV infection was a disability under subsection (A), it did not consider whether the HIV infection qualified under the other two subsections. See *Bragdon*, 118 S. Ct. at 2201.

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

41. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C.A. §§ 701-796l (West 1998)). The Rehabilitation Act imposes duties similar to those under the ADA on the federal government and programs receiving federal assistance, but with the enactment of the ADA, Congress extended the protections of § 504 of the Rehabilitation Act to the general public. See 29 U.S.C.A. § 794; 1 PERRITT, *supra* note 5, § 6.1, at 246; see also 1 *id.* §§ 2.1-2.8, at 19-34 (providing an overview of the legislative history behind the enactment of the ADA). The Rehabilitation Act provides: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C.A. § 794(a). Congress amended the Rehabilitation Act in 1998. See Rehabilitation Act Amendments of 1998, Pub. L. No. 105-220, §§ 402-414, 112 Stat. 1092, 1092-242 (codified as amended at 29 U.S.C.A. §§ 701-796l (West 1998)). Prior to the amendment, the definition of "disability" under the Rehabilitation Act was identical to the definition of "disability" under the ADA. See 29 U.S.C. § 706(8)(B) (1994); 1 PERRITT, *supra* note 5, § 1.2, at 4; see also *supra* text accompanying note 10 (quoting the ADA definition of "disability"). Therefore, courts interpreting the ADA have relied heavily on Rehabilitation Act precedent. See, e.g., *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 773 n.18 (E.D. Tex. 1996) (affirming the relevance of Rehabilitation Act case law to the interpretation of the ADA); see also 28 C.F.R. § 36.103(a) (1998) (providing Department of Justice ("DOJ") regulations implementing Title III and stating that Rehabilitation Act precedent sets the floor for the protections provided by the ADA). Although the new definition of "disability" under the Rehabilitation Act no longer mirrors the ADA definition, see 29 U.S.C.A. § 705(9) (West 1998), this Note considers only Rehabilitation Act regulations and cases that interpret the earlier disability definition because of their relevance to the interpretation of the identical definition in the ADA.



impairment.<sup>42</sup> The regulations define physical or mental impairment as “[a]ny physiological disorder or condition . . . affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine.”<sup>43</sup>

The Department of Justice (“DOJ”) incorporated into the Rehabilitation Act regulations a representative list of conditions that qualify as impairments.<sup>44</sup> The Court attributed the absence of HIV from the representative list to the fact that HIV was not known to be the cause of AIDS when the regulations were originally promulgated and concluded that HIV infection falls within the definition provided by the regulations.<sup>45</sup> After tracing the various stages of HIV infection,<sup>46</sup> the Court noted that calling the second phase the “asymptomatic” phase “is a misnomer, in some respects, for clinical features persist throughout, including lymphadenopathy,

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42. See *Bragdon*, 118 S. Ct. at 2202; 28 C.F.R. § 41.31(b)(1) (1998). The regulations were originally promulgated by the Department of Health, Education, and Welfare in 1977, but the definition of physical impairment in those regulations was adopted verbatim by the Attorney General in 1980 when the responsibility for enforcing § 504 of the Rehabilitation Act was transferred to that office. See *Bragdon*, 118 S. Ct. at 2202-03. Similarly, the Attorney General was charged with issuing regulations to implement the provisions of Title III of the ADA, see 42 U.S.C. § 12188(b) (1994), and has adopted the Rehabilitation Act definitions, see 28 C.F.R. § 36.104 (1998). At oral argument, the petitioner essentially conceded that asymptomatic HIV is an impairment. See Transcript of Oral Argument, *Bragdon* (No. 97-156), available in 1998 WL 141165, at \*15 (“And [HIV infection] almost certainly is a physical or mental impairment.”).

43. 28 C.F.R. § 41.31(b)(1).

44. See *Bragdon*, 118 S. Ct. at 2202 (discussing 28 C.F.R. § 41.31(b)(1) (1997)). The regulations provide that impairment “includes, but is not limited to, such 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, and drug addiction and alcoholism.” 28 C.F.R. § 41.31(b)(1) (1998).

45. See *Bragdon*, 118 S. Ct. at 2203. Unlike the Rehabilitation Act regulations, the ADA regulations include symptomatic and asymptomatic HIV on the list of representative impairments, but the Court did not discuss the ADA regulations until later in the opinion. See *id.* at 2209 (discussing 28 C.F.R. § 36.104(1)(iii) (1997)).

46. The Court engaged in a lengthy analysis of the various stages of HIV infection and their symptoms. See *id.* at 2203-04. The initial stage is called “acute or primary” infection and lasts about three months. *Id.* at 2203. The assault on the immune system begins immediately, as evidenced by a sudden decline in the white blood cell count. See *id.* An individual in this stage of the illness experiences symptoms such as fever, muscle pain, and gastrointestinal disorders. See *id.* The next phase of infection is the asymptomatic phase, during which the virus concentrates in the lymph nodes, where viral production continues. See *id.* at 2204. The white blood cell count continues to drop during this phase, and when it reaches a certain level the individual will be said to have full-blown AIDS. See *id.*; see also *supra* note 2 (describing the asymptomatic phase).

dermatological disorders, oral lesions, and bacterial infections.”<sup>47</sup> Because HIV’s detrimental effect on the blood and the lymphatic system begins with the initial infection and persists throughout the various stages, the Court held that HIV is an “impairment from the moment of infection.”<sup>48</sup>

The Court’s recognition that HIV is a physical impairment established only one of the requirements for disability under the ADA.<sup>49</sup> The Court then turned to the major life activity analysis required by the statute.<sup>50</sup> Regarding the meaning of “major life activities,” the Rehabilitation Act and ADA regulations provide that the phrase “means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>51</sup> Because the lower courts treated the case as one in which reproduction was the major life activity in question and that issue was raised in the petition for certiorari, the Court limited its analysis to that claim.<sup>52</sup> The Court easily concluded that reproduction meets the ADA definition of “major life activity,” noting that “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself.”<sup>53</sup> In so holding, the Court rejected Bragdon’s argument that “major life activity” is limited to activities with a “public, economic, or daily character.”<sup>54</sup> In support of its determination that the definition is not as narrow as Bragdon argued, the Court noted that activities included on the regulation’s representative list such as “caring for one’s self” have no economic or public character.<sup>55</sup>

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47. *Bragdon*, 118 S. Ct. at 2204.

48. *Id.*

49. *See id.* at 2202 (breaking the statutory definition into a three-step inquiry).

50. *See id.* at 2204.

51. 28 C.F.R. § 41.31(b)(2) (1998); *id.* § 36.104.

52. *See Bragdon*, 118 S. Ct. at 2205. The Court acknowledged that respondents and amici made arguments that HIV affected not only reproduction but also “almost every phase of the infected person’s life.” *Id.* The Court also noted that “it may seem legalistic” to limit its discussion to reproduction, stating that it had “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.” *Id.* Thus, it was seemingly with some reluctance that Justice Kennedy limited his analysis to reproduction. *See id.* The respondent acknowledged at oral argument that she had not produced specific testimony of substantial limitation of any major life activity other than reproduction. *See* Transcript of Oral Argument, *Bragdon* (No. 97-156), available in 1998 WL 141165, at \*39-40.

53. *Bragdon*, 118 S. Ct. at 2205.

54. *Id.* (citing Brief for the Petitioner, *Bragdon* (No. 97-156), available in 1998 WL 4678, at \*14, \*28, \*30, \*31).

55. *See id.* at 2205. Justice Kennedy also noted that the definition in the regulations provides for activities “such as” the enumerated ones and thus the list cannot be exhaustive. *See id.* (citing 28 C.F.R. § 41.31(b)(2); 45 C.F.R. § 84.3(j)(2)(ii) (1997)).

After deciding that Abbott's asymptomatic HIV satisfied the first two elements of a disability under the ADA, the Court had only to consider whether HIV infection substantially limits reproduction. The Court determined that Abbott's asymptomatic HIV substantially limited her ability to reproduce both because of the risk to the sexual partner and because of the risk of perinatal transmission to the unborn child.<sup>56</sup> Even assuming that the risk of perinatal transmission could be reduced to eight percent by current medications, the Court determined that HIV infection could still be recognized as substantially limiting reproduction.<sup>57</sup> The Court stated that "limitation" does not mean "inability" and noted that the economic and legal effects of choosing to reproduce while infected with HIV could constitute significant limitations.<sup>58</sup> Affirming that "the disability definition does not turn on personal choice," the Court suggested that even when an HIV-infected individual chooses to reproduce, her reproduction might still be substantially limited by the virus.<sup>59</sup> The Court noted, however, that this scenario did not apply in this case, due to Abbott's uncontested testimony that she decided not to have a child because of her HIV infection.<sup>60</sup> Because the Court concluded that Abbott's HIV infection qualified as a disability under the ADA, as it significantly limited the major life activity of reproduction, it declined to reach the issue of whether HIV is a *per se*

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56. See *id.* at 2206. The Court cited the cumulative results of 13 studies on HIV transmission which suggest that 20% of male partners of HIV-positive women become infected. See *id.* The petitioner conceded the risk to children of HIV-infected mothers is about 25%. See *id.* (citing *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir.), *cert. granted in part*, 118 S. Ct. 554 (1997), and *vacated*, 118 S. Ct. 2196 (1998); 912 F. Supp. 580, 587 n.6 (D. Me. 1995)).

57. See *id.*

58. *Id.* The economic effects refer to the cost of antiretroviral treatment and insurance and health care costs if the child of an HIV-infected mother acquires the virus. See *id.* In suggesting that there may be legal effects, the Court noted that "[t]he laws of some States, moreover, forbid persons infected with HIV from having sex with others, regardless of consent." *Id.* The Court cited statutes of several states in support of this proposition. See *id.* None of the cited statutes, however, expressly forbids an HIV-infected individual from engaging in sexual relations; rather, these statutes prevent a person with a communicable disease from knowingly exposing another to infection. See, e.g., IOWA CODE ANN. § 139.31 (West 1997) (providing that "[a]ny person who knowingly exposes another to infection from any communicable disease . . . shall be liable for all damages resulting therefrom"); MONT. CODE ANN. § 50-18-112 (1997) ("A person infected with a sexually transmitted disease may not knowingly expose another person to infection."). For a survey of state laws affecting HIV-infected individuals, see Gostin & Webber, *supra* note 33, at 1108.

59. *Bragdon*, 118 S. Ct. at 2206.

60. See *id.*

disability under the ADA.<sup>61</sup>

In support of its holdings, the Court considered agency and judicial interpretations of the Rehabilitation Act.<sup>62</sup> The Court noted that all courts and agencies considering the issue prior to the enactment of the ADA had ruled that HIV was a handicap under the Rehabilitation Act, and the Court stated that Congress endorsed that interpretation when it incorporated Rehabilitation Act definitions into the ADA.<sup>63</sup> The Court then turned to the ADA regulations promulgated by the DOJ, which add to the regulatory definition developed for the Rehabilitation Act the provision that asymptomatic HIV infection constitutes a physical impairment.<sup>64</sup> Additionally, the Court noted, other agencies responsible for interpreting the other ADA titles have reached the same

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61. See *id.* at 2207. Chief Justice Rehnquist argued that Abbott had not proved substantial limitation of her reproductive activities because she produced no evidence that prior to her HIV infection, reproduction was among one of her major life activities. See *id.* at 2214-15 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The Chief Justice implied that proof of a substantial limitation on reproduction required a showing that if not for the HIV infection, Abbott would be reproducing. See *id.* at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

62. See *id.* at 2207-08. Among other interpretations, the Court cited a 1988 opinion of the Office of Legal Counsel, which asserted that asymptomatic HIV is covered under the Rehabilitation Act and that the virus substantially limits the major life activity of reproduction. See *id.* at 2207 (citing Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 264-65 (1988)). The Court stated that it "need not pause" to consider if *Chevron* deference to agency interpretations was required when responsibility for administration of a statute has been delegated to more than one agency. *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). The Court noted, however, "that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Because it did not reach the issue of per se disability, the Court paid little attention to the legislative history of the ADA, but much of the Petitioner's and Respondent's briefs focused on the issue of congressional intent. See Brief for the Petitioner, *Bragdon* (No. 97-156), available in 1998 WL 4678, at \*19-27; Brief for the Respondent Sidney Abbott, *Bragdon* (No. 97-156), available in 1998 WL 47514, at \*14-17, \*28-35.

63. See *Bragdon*, 118 S. Ct. at 2208. The Court emphasized the uniformity in judicial opinions concerning whether HIV infection is covered by the Rehabilitation Act. See *id.*; see also, e.g., *Martinez v. School Bd.*, 861 F.2d 1502, 1506 (11th Cir. 1988) (holding that the Rehabilitation Act protects an HIV-infected student without distinguishing between the symptomatic and asymptomatic stages); *Ray v. School Dist.*, 666 F. Supp. 1524, 1536 (M.D. Fla. 1987) (holding that the Rehabilitation Act protects asymptomatic HIV-infected students). The Court did not, however, mention the lack of judicial uniformity in the courts of appeals interpreting the ADA. See *infra* notes 140-96 and accompanying text (discussing the split among the courts of appeals on the issue of ADA protection for asymptomatic HIV-infected individuals).

64. See *Bragdon*, 118 S. Ct. at 2209 (citing 28 C.F.R. § 36.104(1)(iii) (1997)).

conclusion.<sup>65</sup>

Justice Ginsburg wrote a concurring opinion in which she emphasized that HIV is "a disease limiting life itself."<sup>66</sup> Justice Ginsburg noted the inevitability of the disease's effect on major life activities, including "the need for and . . . the ability to obtain health care because of the reaction of others to the impairment."<sup>67</sup> Because of this inevitable effect on life choices, she agreed that HIV infection meets the statutory definition of disability.<sup>68</sup>

Chief Justice Rehnquist concurred in the judgment of the Court remanding the case to the First Circuit for a consideration of whether Abbott's HIV infection posed a direct threat to a dental care provider.<sup>69</sup> He dissented, however, from the Court's holding that Abbott's asymptomatic HIV was a disability under the ADA.<sup>70</sup> Initially, Chief Justice Rehnquist emphasized that whether Abbott had a disability falling within the ADA's coverage was an individualized inquiry.<sup>71</sup> The Chief Justice disagreed with the Court's analysis in two of the three steps required for a finding of disability.<sup>72</sup> Asserting that Bragdon had not disputed that asymptomatic HIV was a physical impairment, Chief Justice Rehnquist assumed that the

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65. *See id.* The Equal Employment Opportunity Commission ("EEOC") is responsible for issuing regulations implementing Title I of the ADA. *See* 42 U.S.C. § 12116 (1994). The Attorney General is responsible for regulations implementing the public services provisions of Title II. *See id.* § 12134(a). The Secretary of Transportation is authorized to issue regulations implementing the transportation provisions of Titles II and III. *See id.* §§ 12149, 12164, 12186. The Court noted that the EEOC had even concluded that an individual with HIV has a disability. *See Bragdon*, 118 S. Ct. at 2209 (citing 2 EEOC Compl. Man. (BNA) § 902.4(c)(1), at 35 (Mar. 1995)).

66. *Bragdon*, 118 S. Ct. at 2213 (Ginsburg, J., concurring). Justice Stevens wrote a separate concurring opinion in which he asserted that although he agreed with Justice Kennedy's analysis, he would have affirmed the First Circuit altogether rather than remanding the direct threat issue. *See id.* (Stevens, J., concurring). He joined the opinion of the Court "in order to provide a judgment supported by a majority." *Id.* (Stevens, J., concurring).

67. *Id.* (Ginsburg, J., concurring).

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

69. *See id.* at 2216 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The Chief Justice disagreed, however, with the Court's direct threat analysis, rejecting the notion that the opinions of public health officials should be given special deference in the assessment of risk. *See id.* at 2216-17 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *see also supra* note 37 (discussing the Chief Justice's analysis of the direct threat issue).

70. *See Bragdon*, 118 S. Ct. at 2216 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

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

72. *See id.* at 2214-16 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

definition's first requirement was met.<sup>73</sup>

Turning to the identification of a major life activity, the Chief Justice concluded that the majority's opinion was flawed because it failed to conduct a specific, individualized inquiry to determine that reproduction was a major life activity for Abbott. He asserted that the ADA requirement that the disabled individual's limited major life activity "be one 'of such individual'" necessitates an individualized analysis.<sup>74</sup> Additionally, Chief Justice Rehnquist rejected the conclusion that reproduction is a major life activity under a general analysis.<sup>75</sup> He quarreled with the majority's focus on the qualitative implications of the word "major" as opposed to its quantitative implications.<sup>76</sup> He argued that the frequency of an activity, not its "[f]undamental importance," determines whether it falls within the category of major life activity: "The common thread [in the regulation's enumerated activities] is . . . that the activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual."<sup>77</sup> Even if reproduction were a major life activity, the Chief Justice concluded, the third requirement of the disability definition was not satisfied because HIV infection does not substantially limit reproduction.<sup>78</sup> There is no substantial limitation, he reasoned, because HIV-infected individuals are physically able to reproduce although they may choose not to reproduce.<sup>79</sup>

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

74. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting 42 U.S.C. § 12102(2)(A) (1994)).

75. See *id.* at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Initially the Chief Justice quarreled with the notion that reproduction is an activity: "Calling reproduction a major life activity is somewhat inartful. Reproduction is not an activity at all, but a process." *Id.* at 2215 n.2 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). He noted, "One could be described as breathing, walking, or performing manual tasks, but a human being (as opposed to a copier machine or a gremlin) would never be described as reproducing." *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

76. See *id.* at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

77. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

78. See *id.* at 2215-16 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

79. See *id.* at 2216 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justice O'Connor did not join in Chief Justice Rehnquist's analysis of HIV and the disability definition. In a separate opinion, she agreed with the Chief Justice that reproduction is not a major life activity and that the ADA requires an individualized analysis of disability, but she asserted that the "substantial limitation" analysis was unnecessary in light of these conclusions. See *id.* at 2217-18 (O'Connor, J., concurring in

In reviewing the statutory framework behind the *Bragdon* decision, it should be noted that neither the ADA nor the Rehabilitation Act provide direct guidance as to the applicability of their provisions to HIV-infected individuals.<sup>80</sup> Although Congress did not expressly define HIV as a disability, or even as a physical impairment,<sup>81</sup> it seemingly would have known about past agency interpretations that favored including HIV as a disability under the Rehabilitation Act.<sup>82</sup> The legislative history of the ADA suggests that its interpretation should mirror Rehabilitation Act precedent,<sup>83</sup> and Congress has expressly required that interpretation of Title III be consistent with the earlier statute: "[N]othing in [Title III] 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."<sup>84</sup> Rehabilitation Act precedent thus sets a floor for the protections afforded by Title III of the ADA.

With the explosion of AIDS and HIV infection in the 1980s, questions arose about whether the anti-discrimination provisions of the Rehabilitation Act were available to HIV-infected individuals. The DOJ, the agency in charge of implementing the Rehabilitation Act,<sup>85</sup> thus began to receive inquiries about the applicability of the statute to individuals with HIV. In an opinion issued in 1986 (the "1986 Memorandum"), the Office of the Attorney General responded to questions raised by the Department of Health and

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the judgment in part and dissenting in part).

80. The Court suggested that HIV infection was absent from the Rehabilitation Act regulations listing representative impairments because HIV had not yet been identified as the cause of AIDS when the regulations were drafted. *See id.* at 2203. This explanation, however, does not seem to account for the absence of AIDS on the representative list.

81. HIV infection is, however, among the conditions discussed in the legislative history of the ADA. *See* 1 PERRITT, *supra* note 5, § 3.2, at 40 (citing H.R. REP. NO. 101-485, pt. 2, at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333).

82. Congress was aware of the DOJ opinion that HIV infection is protected by the Rehabilitation Act when it provided that the ADA should not be construed to apply a lesser standard than § 504 of the Rehabilitation Act. *See* 28 C.F.R. § 36.103 (1998); *see also* 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, 22 (1997) (suggesting that the consensus within Congress that HIV would be covered under the ADA might explain the legislative silence). *But see* Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156, 168-69 (4th Cir. 1997) (en banc) (stating that legislative history is not to be consulted when the congressional purpose is evident in the "unambiguous" statutory language, the "plain meaning" of which suggests that HIV infection is not protected).

83. *See* 1 PERRITT, *supra* note 5, § 1.2, at 4.

84. 42 U.S.C. § 12201(a) (1994) (citation omitted).

85. *See* Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 (1994).

Human Services concerning the application of § 504 of the Rehabilitation Act to individuals who have, or are regarded as having, AIDS.<sup>86</sup> The Assistant Attorney General drew the following conclusion: “[S]ection 504 prohibits discrimination based on the disabling effects that AIDS and related conditions may have on their victims. By contrast, we have concluded that an individual’s (real or perceived) ability to transmit the disease to others is not a handicap within the meaning of the statute.”<sup>87</sup> Thus, HIV-infected individuals could be denied services based on their perceived contagiousness, even when there was no reasonable basis for that perception.<sup>88</sup> The Assistant Attorney General reasoned that although persons suffering from AIDS have a physical impairment that substantially limits the major life activity of resisting diseases, a “separate analysis” was required to determine if the communicability of the disease also constituted a handicap.<sup>89</sup> The Assistant Attorney General hypothesized that an “immune carrier” of AIDS with no physical impairment or substantial limitations would not have a handicap based solely on the communicability of his disease; therefore, an individual who is in fact impaired and limited by the disease still is not protected from discrimination based solely on the contagiousness of the disease because contagiousness itself is not a handicap.<sup>90</sup>

Shortly after the issuance of the 1986 Memorandum, the Supreme Court handed down a decision that required the DOJ to rethink its position on discrimination based on the communicability of HIV.<sup>91</sup> Although *School Board v. Arline*<sup>92</sup> involved a plaintiff with tuberculosis, the decision has influenced the applicability of the Rehabilitation Act and the ADA to HIV-infected individuals.<sup>93</sup> In

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86. See Memorandum from Assistant Attorney General Cooper on Application of Section 504 of Rehabilitation Act to Persons with AIDS, Daily Lab. Rep. (BNA), No. 122, at D-1 (June 25, 1986), available in WESTLAW, BNA-DLR database.

87. *Id.*

88. See *id.*

89. *Id.*

90. *Id.* The Assistant Attorney General found “emphatic support” for his reasoning in the history of strict federal and state regulation of contagious diseases. See *id.* The opinion, however, was widely criticized for its flawed legal analysis and its reliance on inaccurate medical information. See DOJ Issues Ruling Permitting Bias Against AIDS Carriers to Stop Spread of Disease, Daily Lab. Rep. (BNA), No. 122, at A-8 (June 25, 1986), available in WESTLAW, BNA-DLR database.

91. See *School Bd. v. Arline*, 480 U.S. 273 (1987).

92. 480 U.S. 273 (1987).

93. See, e.g., *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994) (relying on *Arline* in holding that asymptomatic HIV-infected prison inmates were protected under the Rehabilitation Act); Parmet & Jackson, *supra* note 82, at 15-16 (discussing the impact of *Arline* on the DOJ’s position on HIV and the ADA).



*Arline*, the Court held that a public elementary school teacher with tuberculosis was handicapped within the meaning of the Rehabilitation Act.<sup>94</sup> In November 1978, after her third relapse of tuberculosis in two years, Arline was suspended with pay and later was discharged at the end of the school year.<sup>95</sup> She filed suit alleging violation of § 504 of the Rehabilitation Act, but the district court found that she was not covered under § 504 because Congress did not intend for contagious diseases to fall under the definition of "handicapped."<sup>96</sup> The Eleventh Circuit reversed, holding that contagious diseases are covered by § 504.<sup>97</sup>

The Supreme Court affirmed the Eleventh Circuit's decision.<sup>98</sup> The Court determined that Arline met the statutory requirement of physical impairment because her hospitalization for tuberculosis was sufficient to establish a "record of . . . impairment."<sup>99</sup> The Court rejected the school's argument that Arline did not meet the definition of "handicapped" due to the threat that her relapses posed to others: "Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."<sup>100</sup> In so ruling, the Court noted that the legislative history of the Rehabilitation Act demonstrated that Congress wished to protect individuals from discrimination based on the feared effects of their impairment on others, as indicated by the "regarded as" prong of the "handicapped" definition.<sup>101</sup> With such an expansive definition, the Court noted, Congress sought to prevent

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94. See *Arline*, 480 U.S. at 281.

95. See *id.* at 276.

96. See *id.* at 277; see also *supra* note 41 (quoting the § 504 anti-discrimination provision).

97. See *Arline v. School Bd.*, 772 F.2d 759, 764-65 (11th Cir. 1985), *aff'd*, 480 U.S. 273 (1987).

98. See *Arline*, 480 U.S. at 277, 289.

99. *Id.* at 281. Like the ADA, the Rehabilitation Act formerly provided that an individual had a statutory disability if he had "a record of" an impairment that substantially limited a major life activity. 29 U.S.C. § 706(8)(B) (1994).

100. *Arline*, 480 U.S. at 284; see also *Parmet & Jackson, supra* note 82, at 15 (suggesting that Justice Brennan was surely thinking of HIV when he made this statement and that his *Arline* dicta provides guidance for construing the "regarded as" prong of the disability definition). One of the stated purposes of the Rehabilitation Act is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society" through the statute's various means. 29 U.S.C.A. § 701(b)(1) (West 1998); see also 29 U.S.C. § 701(b)(1) (1994) (providing the same purpose).

101. See *Arline*, 480 U.S. at 284.

discrimination arising from "society's accumulated myths and fears about disability and disease."<sup>102</sup> Thus, the effects of an impairment on others would not prevent a person from being "handicapped," although it might prevent her from being "otherwise qualified"<sup>103</sup> under the Rehabilitation Act.<sup>104</sup>

In response to the Court's decision in *Arline*, the DOJ issued an opinion in 1988 concerning the applicability of § 504 of the Rehabilitation Act to HIV-infected individuals and reached a different conclusion than it had in the 1986 Memorandum.<sup>105</sup> The opinion concluded that "section 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."<sup>106</sup> Demonstrating the impact of *Arline*, the DOJ here required no "separate analysis" for the communicability aspect of the disease.<sup>107</sup> The DOJ concluded that HIV-infected persons have physical impairments as defined by the Rehabilitation Act<sup>108</sup> and that courts would probably conclude that asymptomatic HIV-infected

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102. *Id.*

103. In an oft-quoted footnote, the Court pointed out that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." *Id.* at 287 n.16. This exception to liability was expressly codified by Congress in the "direct threat" provision of the ADA. See 42 U.S.C. § 12182(b)(3) (1994); *Bragdon*, 118 S. Ct. at 2210; see also *supra* note 37 (discussing the ADA's "direct threat" provision). Compare *Martinez v. School Bd.*, 861 F.2d 1502, 1506 (11th Cir. 1988) (holding that the lower court's finding of a "remote theoretical possibility" that an HIV-infected child could transmit the disease to other children was insufficient to constitute the "significant risk" required to justify segregation of the child under the Rehabilitation Act), with *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1266 (4th Cir. 1995) (holding that despite the absence of documented surgeon-to-patient transmission, an HIV-infected physician posed a significant risk to patients and, therefore, was not "otherwise qualified" for employment under the Rehabilitation Act). The Court suggested that at the "otherwise qualified" stage of the analysis an individualized inquiry will be required for most cases. See *Arline*, 480 U.S. at 287.

104. See *Arline*, 480 U.S. at 284-86. The Court expressly declined to decide whether carrying the AIDS virus constitutes a physical impairment and whether an individual with AIDS is protected by the Rehabilitation Act based solely on her contagiousness. See *id.* at 282 n.7.

105. See Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, 12 Op. Off. Legal Counsel 264 (1988) [hereinafter 1988 Memorandum]. The opinion was issued in response to a request by Arthur B. Culvahouse, Jr., Counsel to the President, for a consideration of the applicability of § 504 in light of *Arline*. See *id.*

106. *Id.* at 264-65.

107. See *id.*; see also *Parment & Jackson*, *supra* note 82, at 15-16 (discussing the impact of *Arline* on the DOJ's position regarding HIV and the ADA).

108. See 1988 Memorandum, *supra* note 105, at 270-72.

individuals have an impairment that substantially limits a major life activity.<sup>109</sup> The 1988 Memorandum identified “procreation and intimate personal relations” as major life activities that might be substantially limited by HIV infection,<sup>110</sup> but suggested that a plaintiff would have to prove that he had actually changed his behavior in response to his infection.<sup>111</sup> The DOJ proposed, however, that proof of such change “in fact” would not be required when discrimination was proven under the “regarded as” prong of the Rehabilitation Act’s handicap definition.<sup>112</sup>

The DOJ interpretation of the ADA has followed its interpretation of the Rehabilitation Act in the 1988 Memorandum.<sup>113</sup> The ADA regulations promulgated by the DOJ expressly provide that both symptomatic and asymptomatic HIV meet the requirements of “physical impairment” for the purposes of the ADA.<sup>114</sup> Although the regulation goes only to the issue of “physical impairment” and not “disability,” the DOJ has elsewhere suggested that all HIV-infected individuals qualify for protection under the ADA because they all have a physical impairment that substantially limits a major life activity.<sup>115</sup> Uncertainty remains, however, because the promulgated regulations do not address whether asymptomatic HIV substantially limits a major life activity.<sup>116</sup>

The same uncertainty existed with the applicability of the Rehabilitation Act to individuals with HIV infection,<sup>117</sup> but courts interpreting the Rehabilitation Act avoided these definitional hurdles by simply ruling that HIV was covered.<sup>118</sup> Some of the earliest

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109. *See id.* at 273.

110. *Id.* The Memorandum suggested that individuals with asymptomatic HIV infection suffer two separate limitations: they are physically unable to bear healthy children and will be limited in their sexual relations because of that knowledge. *See id.* at 273-74.

111. *See id.* at 274. The speculation about a requirement of “actual change” was in response to the anticipated causation problem if normative judgment and not physical inability were the actual cause of the substantial limitation. *See id.*

112. *See id.*

113. *See* 28 C.F.R. § 36.104 (1998).

114. *See id.*

115. *See* DISABILITY RIGHTS SECTION, U.S. DEP’T OF JUSTICE, QUESTIONS AND ANSWERS: THE AMERICANS WITH DISABILITIES ACT AND PERSONS WITH HIV/AIDS 2 (1996).

116. *See* 28 C.F.R. § 36.104.

117. The uncertainty was even greater because the Rehabilitation Act regulations do not specifically identify HIV as a physical impairment. *See* 45 C.F.R. § 84.3 (1998).

118. *See, e.g.,* *Martinez v. School Bd.*, 861 F.2d 1502, 1506 (11th Cir. 1988) (holding that a child with AIDS was protected without providing statutory analysis); *Ray v. School Dist.*, 666 F. Supp. 1524, 1536 (M.D. Fla. 1987) (concluding that three HIV-positive

Rehabilitation Act cases to consider the applicability of the statute to individuals with HIV and AIDS involved schoolchildren who were denied access to school because of their infection.<sup>119</sup> In *Thomas v. Atascadero Unified School District*,<sup>120</sup> a pre-*Arline* decision, a district court in California granted a preliminary injunction enjoining the school district from preventing Ryan Thomas from attending kindergarten on the ground that the five-year-old AIDS victim posed a risk of transmitting the virus.<sup>121</sup> Perhaps conflating the requirements of "physical impairment" and "substantial limitation," the court concluded that "[p]ersons infected with the AIDS virus suffer significant impairments of their major life activities."<sup>122</sup> Although Thomas was in the symptomatic stages of the disease, the court noted that "[e]ven those who are asymptomatic have abnormalities in their hemic and reproductive systems making childbirth and procreation dangerous to themselves and others."<sup>123</sup> The court made no individualized inquiry into which of Thomas's major life activities were substantially limited, but merely stated that his activities were significantly impaired.<sup>124</sup>

In many of the Rehabilitation Act cases following *Thomas*, the courts merely assumed that AIDS and HIV infection were handicaps for purposes of the statute without analysis of the statutory requirements.<sup>125</sup> In *Ray v. School District*,<sup>126</sup> a case factually parallel to *Thomas*, the court granted a preliminary injunction enjoining the school from preventing three HIV-positive brothers from attending

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brothers were protected under the Rehabilitation Act without discussing the statutory disability definition); see also Parmet & Jackson, *supra* note 82, at 16-17 (providing an overview of cases reflecting the judicial assumption that HIV is a disability). Because by congressional mandate the Rehabilitation Act sets the floor for ADA protections, see 42 U.S.C. § 12201(a) (1994), the Rehabilitation Act cases are necessarily part of the background to the issues raised in Title III ADA cases.

119. See *Ray*, 666 F. Supp. at 1528; *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 380 (C.D. Cal. 1986); see also Parmet & Jackson, *supra* note 82, at 16 (suggesting that early cases may have avoided close analysis of the statutory requirements because the plaintiffs were schoolchildren in need of protection).

120. 662 F. Supp. 376 (C.D. Cal. 1986).

121. Following an incident at school where he bit a classmate, Thomas was excluded from class and offered home tutoring. See *id.* at 380-81.

122. *Id.* at 379.

123. *Id.* Until he was four years old, Thomas suffered frequent pulmonary and ear problems and chronic lymphadenopathy. See *id.* At the time of the court's findings, his condition had improved, but he was receiving treatments to strengthen his immune system and to prevent other symptoms from developing. See *id.*

124. See *id.*

125. See Parmet & Jackson, *supra* note 82, at 16-19.

126. 666 F. Supp. 1524 (M.D. Fla. 1987).

school in an integrated setting.<sup>127</sup> A consideration of the likelihood of the Rays' success on the merits was a prerequisite to issuance of the preliminary injunction; on this point, the court concluded that success was indeed likely, apparently assuming without considering the statutory requirement that the boys be handicapped under the statute.<sup>128</sup> The court presented a lengthy survey of the then-current medical knowledge about the virus and its medical effects<sup>129</sup> and may have considered this sufficient evidence of handicap; nevertheless, the statutory requirements for handicap were not even discussed by the court. The court may have felt that analysis of each requirement was unnecessary because all three boys were hemophiliacs and thus were clearly "handicapped."<sup>130</sup>

Once the Supreme Court decided *Arline* in 1987, lower courts assumed without analysis that AIDS and HIV were protected under the Rehabilitation Act and cited *Arline* as support.<sup>131</sup> These courts assumed that HIV was a handicap (and later, under the ADA, a disability) without making any inquiries into whether there was a substantial limitation of a major life activity.<sup>132</sup> In *Gates v. Rowland*,<sup>133</sup> for example, the Ninth Circuit considered the claim that prohibiting HIV-infected prison inmates from serving or preparing food violated the Rehabilitation Act.<sup>134</sup> The court interpreted *Arline* as holding that the contagiousness of a disease becomes the basis for a finding of disability under the Rehabilitation Act.<sup>135</sup> By reading

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127. See *id.* at 1538. The court's characterization of the disease is a memorable one: "While we wait for medical science to save us from what many think may be a . . . raging, indiscriminate inferno, it is the task of this Court to deal with the here and now of this lethal, inevitably fatal disease." *Id.* at 1529; see also Parmet & Jackson, *supra* note 82, at 17 (citing the *Ray* opinion as evidence of the courts' early characterization of AIDS and HIV as a plague).

128. See *Ray*, 666 F. Supp. at 1536.

129. See *id.* at 1528-32.

130. See *id.* at 1532.

131. See, e.g., *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994) (relying on *Arline* for the assumption that the mere contagiousness of HIV is sufficient for recognizing disability); *Doe v. Garrett*, 903 F.2d 1455, 1459 (11th Cir. 1990) (citing *Arline* in support of its assertion that "it is well established that infection with AIDS constitutes a handicap for the purposes of the Act"); *Martinez v. School Bd.*, 861 F.2d 1502, 1506 (11th Cir. 1988) (citing *Arline* in support of the assumption that AIDS is protected by the Rehabilitation Act).

132. See *Gates*, 39 F.3d at 1446; *Garrett*, 903 F.2d at 1459; *Martinez*, 861 F.2d at 1506; see also Parmet & Jackson, *supra* note 82, at 22 (noting that early ADA cases followed Rehabilitation Act precedent, which assumed that HIV was protected).

133. 39 F.3d 1439 (9th Cir. 1994).

134. See *id.* at 1442, 1444-45.

135. See *id.* at 1446. The *Arline* Court determined only that the petitioner was handicapped under the "record of . . . impairment" provision of the handicapped

*Arline* to hold that a contagious disease is not only an impairment but also a disability, courts thus determined without further analysis that HIV was a disability.<sup>136</sup> More recently, courts citing ADA regulations providing only that HIV is a physical impairment have erroneously equated "impairment" with "disability" under the statute instead of recognizing that impairment is but one prong of the disability definition.<sup>137</sup> As recently as 1996, the Eleventh Circuit in *Gonzales v. Garner Food Services, Inc.*<sup>138</sup> interpreted the ADA regulations defining "impairment" to provide that HIV is a "disability" under the ADA.<sup>139</sup>

For a time, then, courts ignored the requirements of the statutory disability definition and simply assumed that HIV infection was protected under both the Rehabilitation Act and the ADA. Although this precedent suggested that HIV and AIDS were per se disabilities under the ADA, courts began to take notice of the statutory language and to struggle with the applicability of the antidiscriminatory provisions to individuals with asymptomatic HIV infection.<sup>140</sup> When courts began to apply the three-step analysis that the statutory definition seems to mandate, a split developed among courts, and there was no longer unanimity among courts considering

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definition, noting that her hospitalization for tuberculosis was sufficient to show a record of impairment that substantially limited a major life activity. *See School Bd. v. Arline*, 480 U.S. 273, 281 (1987) (citing 29 U.S.C. § 706(7)(B)(ii) (1994)). The rest of the Court's analysis considered whether the contagiousness of her tuberculosis prevented her from being handicapped when she otherwise met the statutory definition. *See id.* at 282-86. Although the *Arline* Court declined to decide whether § 504 covers AIDS or HIV infection, *see id.* at 282 n.7, the effect of its holding is that an individual with HIV is not prevented from coverage simply because of the communicability of the disease, *see id.* at 285-86.

136. *See Gates*, 39 F.3d at 1446; *see also Garrett*, 903 F.2d at 1459 (noting that it is "well established" that AIDS infection constitutes a handicap under the Rehabilitation Act); *Martinez*, 861 F.2d at 1506 (affirming without analysis that a child's AIDS was a handicap under the Rehabilitation Act); *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 706-09 (9th Cir. 1988) (reviewing the physical effects of AIDS but doing no "major life activity" analysis).

137. *See, e.g., Gates*, 39 F.3d at 1446 (concluding that an HIV-positive individual was protected under the ADA based on the regulation identifying HIV as a physical impairment); *United States v. Morvant*, 898 F. Supp. 1157, 1161 (E.D. La. 1995) (asserting that HIV infection is a disability under the DOJ regulations); *D.B. v. Bloom*, 896 F. Supp. 166, 170 n.4 (D.N.J. 1995) (citing a DOJ regulation providing that HIV disease is a physical impairment in support of an assertion that an asymptomatic plaintiff had a disability).

138. 89 F.3d 1523 (11th Cir. 1996).

139. *See id.* at 1526 n.8 (citing 28 C.F.R. §§ 35.104(1)(ii), 36.104(1)(iii) (1995), which provide only that HIV is a "physical impairment").

140. *See, e.g., Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 774-75, 777 (E.D. Tex. 1996) (concluding that AIDS is a per se disability and suggesting that although the court believed HIV to be a per se disability, the law is unclear).

whether asymptomatic HIV was protected.<sup>141</sup>

The Fourth Circuit on two occasions considered the applicability of the ADA to asymptomatic HIV and concluded that HIV-infected plaintiffs were not protected.<sup>142</sup> In *Ennis v. National Association of Business & Educational Radio*,<sup>143</sup> the plaintiff brought suit under Title I of the ADA against her former employer, alleging that she was terminated because the employer wanted to avoid the impact that her HIV-positive son would have on the company's health insurance rates.<sup>144</sup> Reviewing the district court's finding that the plaintiff had established a prima facie case for discrimination, the Fourth Circuit stated that the "plain language" of the ADA requires that disability be determined on an "individual-by-individual" basis.<sup>145</sup> The plain language cited by the court included the phrase "with respect to an individual" and the requirement that the impairment substantially limit a major life activity "of such individual."<sup>146</sup> Because the court identified no evidence that the child was impaired or that any of his major life activities were substantially limited, it concluded that the plaintiff was protected from discrimination only if HIV infection were a per se disability, a conclusion prohibited by the requirement of a case-by-case determination.<sup>147</sup>

The Fourth Circuit relied on its analysis in *Ennis* when it again

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141. *Compare Doe v. Kohn Nast & Graf*, P.C., 862 F. Supp. 1310, 1321 (E.D. Pa. 1994) (concluding that asymptomatic HIV is a physical impairment that substantially limits the major life activity of reproduction), with *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 168, 172 (4th Cir. 1997) (en banc) (concluding that asymptomatic HIV infection is not a physical impairment and that it does not substantially limit reproduction).

142. See *Runnebaum*, 123 F.3d at 168, 175; *Ennis v. National Ass'n of Bus. & Educ. Radio*, 53 F.3d 55, 60 (4th Cir. 1995).

143. 53 F.3d 55 (4th Cir. 1995).

144. See *id.* at 57. Discrimination under the ADA includes "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4) (1994).

145. *Ennis*, 53 F.3d at 59. Judge Luttig wrote the opinion, in which Judge Hamilton and Senior Judge Butzner joined. See *id.* at 56. Professor Parmet and Mr. Jackson suggest that the *Ennis* court was the first court that expressly required an individualized assessment of disability for an asymptomatic HIV plaintiff. See Parmet & Jackson, *supra* note 82, at 32-33.

146. *Ennis*, 53 F.3d at 59 (citing 42 U.S.C. § 12102(2) (1994)).

147. See *id.* at 60. Because the record at the summary judgment stage had not been fully developed with regard to substantial limitations, the court went on to assume for the purposes of the case that the plaintiff's child was disabled. See *id.* Even with the assumption of disability, the Fourth Circuit held that the district court had erred in finding that the plaintiff had proven the necessary element that at the time of termination she was performing at a level that satisfied her employer's expectations. See *id.* at 61.

considered the applicability of the ADA to HIV infection in *Runnebaum v. NationsBank of Maryland, N.A.*<sup>148</sup> The plaintiff, who worked in a sales position in the trust department of NationsBank, alleged that his employer fired him because of his HIV-positive status.<sup>149</sup> The district court granted summary judgment for NationsBank, holding that the plaintiff had failed to establish a prima facie case.<sup>150</sup> A Fourth Circuit panel reversed the district court's decision,<sup>151</sup> but that reversal was set aside by an en banc decision that affirmed the district court's grant of summary judgment.<sup>152</sup> The initial issue before the court was whether the plaintiff was an individual with a disability under the ADA.<sup>153</sup> Although the EEOC argued as amicus curiae that asymptomatic HIV infection is a per se disability,<sup>154</sup> the Fourth Circuit affirmed en banc its holding in *Ennis* that a finding of disability under the ADA requires an individualized inquiry.<sup>155</sup> It qualified this holding, however, by noting that some impairments, such as blindness and deafness, always substantially limit major life activities and thus require no individualized analysis.<sup>156</sup>

Turning to the initial requirement of physical impairment, the court looked to the dictionary for direction on the meaning of "impairment" and concluded that it contemplates a "diminishing effect."<sup>157</sup> It followed, the court reasoned, that asymptomatic HIV cannot be an impairment because in the absence of symptoms, no diminishing effects exist.<sup>158</sup> In so ruling, the court expressly rejected the decisions of other circuits holding that asymptomatic HIV is an

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148. 123 F.3d 156 (4th Cir. 1997) (en banc).

149. *See id.* at 161.

150. *See id.* at 163.

151. *See Runnebaum v. NationsBank of Md., N.A.*, 95 F.3d 1285, 1297 (4th Cir. 1996).

152. *See Runnebaum*, 123 F.3d at 176. Judge Williams wrote the opinion. *See id.* at 161. Judge Hamilton wrote a concurring opinion. *See id.* (Hamilton, J., concurring). Judge Michael wrote a dissenting opinion in which Judges Hall, Murnaghan, Ervin, and Motz joined. *See id.* (Michael, J., dissenting).

153. *See id.* at 165.

154. *See id.* at 165-66.

155. *See id.* at 166.

156. *See id.* at 166 n.5.

157. *Id.* at 168. Interestingly, the court did not allow agency interpretations of "impairment" to inform its understanding of that word. The dissent argued that the court ignored "a wealth of legislative history and administrative interpretation contradictory to its reading." *Id.* at 176 (Michael, J., dissenting).

158. *See id.* at 168. The court rejected the dissent's argument that attacks on the immune system that occur during the asymptomatic stage could be considered diminishing effects, warning that such a general definition of impairment would mean that otherwise healthy individuals with genetic markers for certain diseases would be protected under the statute. *See id.* at 168 n.6.



impairment, suggesting that those courts had ignored the "plain and unambiguous" meaning of the statute.<sup>159</sup> The court seemed to assert that asymptomatic HIV is per se not a disability, but it then considered the plaintiff's particular case and concluded that he had not asserted or produced any evidence of impairment.<sup>160</sup>

Although the court concluded that an essential element for a finding of disability was missing, it nonetheless considered whether asymptomatic HIV substantially limits a major life activity.<sup>161</sup> As it did with "impairment," rather than looking to agency interpretation or legislative history, the court turned to the dictionary meaning of "major," noting that the word means that which is of greater relative importance.<sup>162</sup> Declining to decide whether procreation is a major life activity,<sup>163</sup> the court held that asymptomatic HIV does not substantially limit procreation or sexual activity as required by the ADA because the disease does not actually prevent either activity.<sup>164</sup> Limitation based on choice, the court noted, lacks the causal nexus between impairment and limitation that is required by the statute.<sup>165</sup> As with the impairment analysis, the court seemed to suggest that asymptomatic HIV infection can never substantially limit procreation, but it also made an individualized inquiry, identifying no evidence in the record that the plaintiff's procreation or sexual activity were limited by his HIV-positive status.<sup>166</sup> The dissent warned that the court's ruling created a per se rule that individuals with asymptomatic HIV are not protected by the ADA and that such

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159. See *id.* at 168 (rejecting the analyses of the First Circuit in *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir.), *cert. granted in part*, 118 S. Ct. 554 (1997), and *vacated*, 118 S. Ct. 2196 (1998), and the Ninth Circuit in *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994)).

160. See *id.* at 169. The dissent suggested that the majority's analysis rejected an individualized inquiry "in substance if not in form." *Id.* at 176 (Michael, J., dissenting).

161. See *id.* at 170. The court noted that the determination of whether an activity is a "major life activity" does not require an individualized analysis. See *id.*

162. See *id.*

163. The court stated, "We agree that procreation is a fundamental human activity, but are not certain that it is one of the major life activities contemplated by the ADA." *Id.* at 170. It then assumed for the purposes of its analysis that procreation and sexual relations were major life activities. See *id.* at 171.

164. See *id.* at 172. Implicit in the majority's analysis is the notion that procreation means having children, as opposed to having *healthy* children because HIV infection physically limits the ability to procreate healthy children.

165. See *id.*

166. See *id.* The court also rejected the plaintiff's claim that he was disabled because his employers regarded him as disabled, noting that the plaintiff had failed to produce evidence that his employers regarded his HIV as substantially limiting any major life activities. See *id.* at 174. The court noted that the bank did not know of the plaintiff's HIV infection when it decided to terminate him, although the bank admitted to knowledge of the infection by the time the plaintiff was actually terminated. See *id.*

a decision moved the Fourth Circuit away from the mainstream.<sup>167</sup>

Other courts required the three-step analysis but, in contrast to the Fourth Circuit, concluded that asymptomatic HIV is protected by the ADA and the Rehabilitation Act. For example, *Doe v. Kohn Nast & Graf, P.C.*<sup>168</sup> was one of the early cases in which a court engaged in the three-step process of determining the applicability of the ADA to asymptomatic HIV infection.<sup>169</sup> An HIV-infected attorney alleged that he was fired in violation of Title I of the ADA because of his HIV status.<sup>170</sup> The plaintiff asserted that the irreparable impairment of his ability to reproduce was a substantial limitation of a major life activity.<sup>171</sup> The defendants challenged the discrimination claim on the ground that the plaintiff was not disabled.<sup>172</sup> The court concluded that the plaintiff's skin disorders and hemic and lymphatic disorders each qualified as a physical impairment.<sup>173</sup> It then accepted the plaintiff's argument that because the ADA regulations define "physical impairment" to include disorders of the reproductive system, it followed that the ability to reproduce is a major life activity under the ADA.<sup>174</sup> Concluding that

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167. See *id.* at 176 (Michael, J., dissenting); see also Elizabeth C. Chambers, Comment, *Asymptomatic HIV as a Disability Under the Americans with Disabilities Act*, 73 WASH. L. REV. 403, 416-18 (1998) (discussing the Fourth Circuit's reasoning in the *Ennis* and *Runnebaum* decisions); Recent Case, 111 HARV. L. REV. 843, 848 (1998) (asserting that the *Runnebaum* decision resulted in the rule that asymptomatic HIV is per se *not* a disability).

168. 862 F. Supp. 1310 (E.D. Pa. 1994).

169. See Parmet & Jackson, *supra* note 82, at 29.

170. See *Kohn Nast & Graf*, 862 F. Supp. at 1313. The plaintiff had received a letter from a physician written on letterhead labeled "AIDS Services," and staff at his office had speculated aloud whether the plaintiff suffered from AIDS. See *id.* at 1314. Days after he received the letter, the plaintiff alleged that his boss's behavior towards him changed. See *id.* at 1315. The plaintiff's contract was not renewed based on unsatisfactory performance, and he was ultimately forced out of the office. See *id.* The plaintiff allegedly returned to work after an out-of-town trip to find his office lock changed and his belongings in boxes. See *id.*

171. See *id.* at 1318. The plaintiff's Title I ADA claim was based on a pretext theory, which required a showing that despite his employer's advanced legitimate reasons for termination, his disability in fact played some role in the decision to terminate. See *id.*

172. See *id.* The defendant argued that the plaintiff could not be disabled because he was able to do everything that his occupation required of him. See *id.* In response to the plaintiff's argument that he was substantially limited in the major life activity of reproduction, the defendant responded that this concern was irrelevant because he was not hired to reproduce. See *id.* Even assuming that the plaintiff did fall into the protected class of individuals with disabilities, the defendant argued that there was no discrimination because he was fired for the legitimate reason of being a disruptive employee. See *id.* at 1317-18.

173. See *id.* at 1320.

174. See *id.* at 1321; see also 28 C.F.R. § 36.104 (1998) (defining "physical impairment" to include disorders of the reproductive system).

nothing in the record countered the plaintiff's argument, the court held that the plaintiff had a physical impairment that substantially limited a major life activity as contemplated by the ADA.<sup>175</sup>

Other courts have determined that reproduction is not a major life activity for the purposes of the ADA, although not in the HIV context.<sup>176</sup> In an unreported opinion, the Fifth Circuit affirmed the district court's finding in *Zatarain v. WDSU-Television, Inc.*<sup>177</sup> that reproduction is not a major life activity under the ADA.<sup>178</sup> The impairment at issue in *Zatarain* was not HIV but infertility; the plaintiff was a television news anchor who requested modifications in her work schedule in order to accommodate infertility treatments.<sup>179</sup> When the station failed to provide those accommodations and did not renew her contract, the plaintiff filed discrimination claims under the ADA and Title VII of the Civil Rights Act of 1964.<sup>180</sup> The television station sought summary judgment on the ADA claim on the ground that infertility is not a disability.<sup>181</sup> Although the district court found that infertility could be a physical impairment, it granted summary judgment because the plaintiff's infertility did not substantially limit a major life activity.<sup>182</sup>

The district court rejected the plaintiff's claim that reproduction is a major life activity on two grounds. First, the court noted the circular reasoning that an impairment on reproduction significantly limits the major life activity of reproduction: "Plaintiff's construction is faulty because it would allow her to bootstrap a finding of substantial limitation of a major life activity on to a finding of an impairment."<sup>183</sup> Second, the court found an inconsistency between reproduction and the major life activities identified in the ADA regulations because reproduction does not occur with the same frequency as activities like walking, breathing, and seeing.<sup>184</sup> Thus, the court focused on the quantitative, rather than the qualitative,

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175. See *Kohn Nast & Graf*, 862 F. Supp. at 1321.

176. See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996) (unpublished table decision).

177. 881 F. Supp. 240 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996) (unpublished table decision).

178. See *Zatarain*, 79 F.3d at 1143.

179. See *Zatarain*, 881 F. Supp. at 242.

180. See *id.* Title VII prohibits employment discrimination on the basis of an individual's race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2 (1994).

181. See *Zatarain*, 881 F. Supp. at 242.

182. See *id.* at 243-44.

183. *Id.* at 243.

184. See *id.*

characteristics of the representative activities.<sup>185</sup>

Asymptomatic HIV has also been protected under the Rehabilitation Act provision protecting perceived disability.<sup>186</sup> In *Harris v. Thigpen*,<sup>187</sup> the Eleventh Circuit held that HIV-positive inmates in an Alabama prison were protected under the "regarded as" prong of the Rehabilitation Act's "handicap" definition.<sup>188</sup> In accordance with Alabama law, the Alabama Department of Corrections required that inmates be tested for sexually transmitted diseases.<sup>189</sup> If the inmate tested positive for HIV on the initial test and on confirmatory tests, the inmate was placed in a segregated HIV ward.<sup>190</sup> The plaintiffs in *Harris* were segregated, HIV-positive inmates who argued that the blanket segregation of HIV-infected inmates violated the Rehabilitation Act.<sup>191</sup> The district court denied the injunctive relief sought by the plaintiffs,<sup>192</sup> but on appeal the Eleventh Circuit remanded the Rehabilitation Act claim for further inquiry into the risk posed by integration of HIV-positive inmates.<sup>193</sup> The Eleventh Circuit noted that *Harris* presented the very issue expressly avoided by the *Arline* Court—whether discrimination against HIV-infected individuals solely on the basis of the contagiousness of their disease violates the Rehabilitation Act.<sup>194</sup>

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185. Following the *Zatarain* reasoning, the Eighth Circuit similarly rejected an infertile woman's argument that reproduction is a major life activity. See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996). But see *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1405 (N.D. Ill. 1994) (concluding that a woman's claim that her infertility substantially limited the major life activity of reproduction was sufficient under the ADA). For a discussion of *Zatarain* and *Krauel* and a survey of both HIV and infertility cases in which courts have considered whether reproduction constitutes a major life activity, see Heidi R. Youngs, *Reproduction as a Major Life Activity Under the ADA: A Survey of the Law Beginning with the Eighth Circuit*, 31 CREIGHTON L. REV. 455, 456-57, 466-67 (1998). Ms. Youngs concludes that the remedial purpose of the ADA suggests that reproduction should be interpreted as a major life activity. See *id.* at 474.

186. See 29 U.S.C. § 706(8)(B)(iii) (1994).

187. 941 F.2d 1495 (11th Cir. 1991), *appeal after remand sub nom.* *Onishea v. Hopper*, 126 F.3d 1323 (11th Cir. 1997), *reh'g en banc granted and vacated*, 133 F.3d 1377 (11th Cir. 1998).

188. See *id.* at 1524.

189. See *id.* at 1499. Alabama law provided that prisoners sentenced to 30 or more days must be tested upon their entrance to the correctional facility for sexually transmitted diseases, as designated by the state board of health. See *id.* at 1499 n.2 (citing ALA. CODE § 22-11A-17(a) (1990)).

190. See *id.* at 1499-500.

191. See *id.* at 1500. The inmates also argued that the segregation violated their constitutionally protected privacy rights. See *id.*

192. See *id.* at 1501.

193. See *id.* at 1527.

194. See *id.* at 1523; see also *supra* notes 91-104 and accompanying text (discussing the *Arline* Court's holding that an individual's contagiousness will not prevent the individual

The court avoided the "physical impairment" and "major life activities" analysis required for a finding of handicap by determining that the inmates were handicapped under the "regarded as" prong of the definition: "Whether or not asymptomatic HIV infection alone is defined as an actual 'physical impairment,' it is clear that this correctional system treats the inmates such that they are unable, or perceived as unable, to engage in 'major life activities' relative to the rest of the prison population."<sup>195</sup> The court held that such treatment meant that the inmates were handicapped even if the treatment were justifiable.<sup>196</sup>

The Supreme Court's decision in *Bragdon* has significant implications for the applicability of the ADA to individuals with asymptomatic HIV and for the interpretation of the ADA in general. First, with *Bragdon* the Court has now mandated close scrutiny of the ADA disability definition, and with its holding that HIV infection substantially limited Abbott's reproduction, the Court pursued an individualized inquiry, a move that is consistent with both the letter and spirit of the ADA.<sup>197</sup> Second, the Court intimated that the reproduction argument might be expanded to include economic or legal limitations on reproduction incurred by asymptomatic HIV-infected plaintiffs who do procreate.<sup>198</sup> Finally, by relying on an actual disability as the basis for its statutory analysis, the Court signaled that asymptomatic HIV infection is a present disability deserving protection and avoided the circularity inherent in holding Abbott disabled under the "regarded as" provision of the statute.<sup>199</sup>

At the first step of the statutory analysis, the Court made a *per se* holding that HIV is a physical impairment under the ADA from the moment of infection.<sup>200</sup> The Court's lengthy analysis on this issue

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from being protected under the Rehabilitation Act).

195. *Harris*, 941 F.2d at 1524.

196. *See id.* On remand the district court ruled for the prison, but on appeal a panel of the Eleventh Circuit vacated the decision and ordered a reassignment of the case on remand. *See Onishea v. Hopper*, 126 F.3d 1323 (11th Cir. 1997). The Eleventh Circuit vacated the district court's decision because the district court failed to comply with *Harris*'s mandate that the plaintiffs did not have to prove complete elimination of risk in order to be considered "otherwise qualified" under the Rehabilitation Act. *See id.* at 1331-32. The Eleventh Circuit vacated the panel opinion and granted a rehearing en banc. *See id.* at 1323. For a pre-*Harris* consideration of the applicability of § 504 to segregated HIV-positive inmates, see Ayesha Khan, *The Application of Section 504 of the Rehabilitation Act to the Segregation of HIV-Positive Inmates*, 65 WASH. L. REV. 839 (1990).

197. *See infra* notes 200-35 and accompanying text.

198. *See infra* notes 236-42 and accompanying text.

199. *See infra* notes 243-67 and accompanying text.

200. *See Bragdon*, 118 S. Ct. at 2204.

traced the "predictable" course of HIV infection and the medical effects at each stage of the disease.<sup>201</sup> Nothing about the analysis at this stage related to the effects of HIV infection on Abbott; rather, it was a scientific overview of the stages of HIV infection.<sup>202</sup> The holding also did not reference the plaintiff's impairment: "In light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, we hold [HIV] is an impairment from the moment of infection."<sup>203</sup> The Court's per se holding as to whether a disease constitutes a physical impairment is consistent with agency interpretations of the ADA.<sup>204</sup> By including a representative list of conditions and disorders that qualify as impairments in its regulations implementing the Act, the DOJ had indicated its understanding that an individualized inquiry is not required at this stage of the analysis.<sup>205</sup> Thus, under *Bragdon*, courts need no longer engage in an individualized inquiry of the impairment of an asymptomatic HIV-infected plaintiff.<sup>206</sup>

Next, the Court considered whether reproduction was a major life activity and again made a per se holding.<sup>207</sup> In holding that reproduction qualifies as a major life activity as contemplated by the

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201. See *id.* at 2203.

202. See *id.*; see also *supra* notes 2, 46 (describing the three stages of HIV disease).

203. *Bragdon*, 118 S. Ct. at 2204. The significance of this holding extends beyond HIV infection to other conditions that have asymptomatic phases or that are asymptomatic when treated properly. See, e.g., *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 780 (6th Cir. 1998) (relying on *Bragdon* for the assertion that the plaintiff's life-threatening psoriasis was a physical impairment even in the dormant stages of the disease); *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 743 (N.D. Ill. 1998) (considering whether diabetes managed by insulin can constitute an ADA disability and noting that *Bragdon* makes it "clear that a disease need not produce continuous, identifiable (to the casual observer) symptoms in order to constitute an impairment").

204. See 28 C.F.R. § 36.104 (1998); see also *supra* notes 113-16 and accompanying text (discussing agency interpretation of the ADA).

205. See 28 C.F.R. § 36.104.

206. *Bragdon* thus corrects the Fourth Circuit's requirement that an asymptomatic HIV plaintiff provide evidence of actual impairment. See *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 169 (4th Cir. 1997) (en banc). Prior to *Bragdon*, even courts determining that asymptomatic HIV was a physical impairment focused on the plaintiff's actual impairment. See, e.g., *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994) (concluding that the plaintiff's skin disorders and swollen lymph nodes qualified as impairments).

207. See *Bragdon*, 118 S. Ct. at 2204-05. Although the *Bragdon* Court held that reproduction is a major life activity under the ADA, plaintiffs will not always be able to demonstrate that their impairments substantially limit reproduction. See, e.g., *McGraw v. Sears, Roebuck & Co.*, 21 F. Supp. 2d 1017, 1021 (D. Minn. 1998) (rejecting a menopausal woman's argument that under *Bragdon* she was disabled because of her inability to procreate, noting that menopause is a "normal consequence of human aging").

ADA, the Court emphasized the qualitative aspects of "major."<sup>208</sup> The Court was not concerned with whether reproduction was a major life activity for the plaintiff, but rather the Court focused on its general significance and its consistency with the representative list of major life activities identified in the regulations, such as walking, breathing, and working.<sup>209</sup>

Only at the third and final step in the statutory analysis, the "substantially limits" inquiry, did the Court consider Abbott's particular situation.<sup>210</sup> The language of the opinion at this point turned from a general evaluation of the physical effects of HIV and the importance of reproduction to an analysis of the actual effects that Abbott's HIV infection had on her reproduction: "Our evaluation of the medical evidence leads us to conclude that respondent's infection substantially limited *her* ability to reproduce . . . ."<sup>211</sup> The Court examined the ways in which an HIV-infected woman is limited in her ability to reproduce.<sup>212</sup> Although this inquiry was not individualized because it focused on statistical evidence concerning the risk of perinatal transmission of the virus, the

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208. See *Bragdon*, 118 S. Ct. at 2205 (noting that reproduction and sexual activity are "central to the life process itself"). Prior to *Bragdon*, some courts holding that reproduction is not a major life activity focused on the quantitative character of "major" and emphasized the non-daily nature of reproduction. See, e.g., *Zatarain v. WSDU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995) (distinguishing reproduction from the representative activities because "a person is not called upon to reproduce throughout the day, every day"), *aff'd*, 79 F.3d 1143 (5th Cir. 1996) (unpublished table decision); see also *Bragdon*, 118 S. Ct. at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (arguing that the definition of major as "greater in quantity" is most consistent with the activities included in the ADA's illustrative list).

209. See *Bragdon*, 118 S. Ct. at 2205 (citing Rehabilitation Act regulations, 28 C.F.R. § 41.31(b)(2) (1997); 45 C.F.R. § 84.3(j)(2)(ii) (1997)). Even the *Runnebaum* court—which required an individualized inquiry into whether a condition was a physical impairment—acknowledged that the determination of whether an activity is a major life activity does not require individualized inquiry. See *Runnebaum*, 123 F.3d at 170. Chief Justice Rehnquist, however, would require an individualized inquiry even at this stage in the analysis. See *Bragdon*, 118 S. Ct. at 2214 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). He was not satisfied by Abbott's assertion that after learning of her HIV infection she decided not to have children. See *id.* at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Assuming only for the sake of argument that reproduction was a major life activity, he noted the absence of evidence demonstrating that reproduction was a part of Abbott's life prior to her infection or that she would have had children if not for the infection. See *id.* at 2214-15 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Thus, there was no evidence that reproduction was a major life activity to *her*. See *id.* at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

210. See *Bragdon*, 118 S. Ct. at 2206-07.

211. *Id.* at 2206 (emphasis added).

212. See *id.*

evidence suggested the reasonableness of Abbott's perception that her ability to reproduce was limited by her HIV infection.<sup>213</sup> The Court then returned to the actual effect that Abbott's HIV had on her reproductive abilities, pointing out that she had produced unchallenged testimony that her decision not to reproduce was based on her HIV infection.<sup>214</sup>

In accordance with the *Bragdon* decision, other courts must follow the three-step framework in determining whether a plaintiff has a statutory disability.<sup>215</sup> Although the Court did not expressly mandate an individualized inquiry at the "substantially limits" stage in the disability analysis, its individualized analysis of Abbott's limited reproduction and its refusal to make a per se holding suggest that courts should engage in an individualized inquiry at the third step in the analysis.<sup>216</sup> It would have been difficult for the Court to

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213. *See id.*

214. *See id.*

215. *See id.* at 2202 (describing the analysis of Abbott's disability status as a three-step process). Courts are using the *Bragdon* Court's three-step analysis in ADA cases involving various disabilities. *See, e.g.,* Colwell v. Suffolk County Police Dep't, 158 F.3d 635 (2d Cir. 1998) (cardiovascular and musculoskeletal impairments); Cehrs v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775 (6th Cir. 1998) (psoriasis); Erjavac v. Holy Family Health Plus, 13 F. Supp. 2d 737 (N.D. Ill. 1998) (diabetes).

216. There is no consensus about the implications of *Bragdon* with regard to the need for individualized inquiry in cases involving plaintiffs with asymptomatic HIV infection. *Compare* Deas v. River West, L.P., 152 F.3d 471, 478 n.15 (5th Cir. 1998) (stating that *Bragdon* was not a per se holding), *and* Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 978 (N.D. Ill. 1998) (noting that the Court in *Bragdon* held that the plaintiffs' HIV constituted a disability), *with* Rivera v. Heyman, 157 F.3d 101, 103 (2d Cir. 1998) (interpreting *Bragdon* to hold that HIV infection is always a disability), *and* Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1445 n.5 (11th Cir. 1998) (stating that the Court in *Bragdon* held that asymptomatic HIV is a disability).

Professor Parmet and Mr. Jackson argue that the unwillingness of today's courts to assume that the ADA protects persons with asymptomatic HIV may reflect the changing "social construction" of HIV and AIDS as a result of new medical developments. *See* Parmet & Jackson, *supra* note 82, at 7-8. They describe the "initial social construction" of HIV as that of a plague, noting that shortly after the disease's discovery it was commonly identified as the "gay plague." *Id.* at 9. Because of the social hysteria about the disease, a legal framework developed to remedy discrimination against the HIV-infected. *See id.* at 10-11. This "framework" was provided by federal disability law, *see id.* at 11-14, and because of the need to provide guaranteed protection to the victims of social hysteria, in decisions like *Ray* and *Thomas*, the courts avoided close scrutiny of whether HIV infection substantially limited a major life activity, *see id.* at 16; *see also supra* notes 117-30 and accompanying text (surveying ADA and Rehabilitation Act decisions that held HIV-infected plaintiffs to be within the protected class without engaging in analysis of the statutory requirements).

Professor Parmet and Mr. Jackson also argue that the country is now involved in a "second construction" of HIV inspired by the medical developments in the management of the HIV virus. *See* Parmet & Jackson, *supra* note 82, at 27-28. In July 1996, the positive results of the antiviral drugs called protease inhibitors were announced at the



reconcile a holding that asymptomatic HIV is a per se disability with the language of the ADA, which suggests that an individualized inquiry is required.<sup>217</sup> Indeed, the statutory requirement that an individual's impairment substantially limits a major life activity "of such individual" seems to mandate an individualized inquiry.<sup>218</sup>

While the statutory language—and now the Supreme Court—seem to mandate a fact-specific inquiry to determine whether a plaintiff has a disability, a question remains whether such an approach actually advances the ADA's purpose of preventing discrimination based on disability.<sup>219</sup> Certainly the individualized inquiry places some burden on plaintiffs to prove actual limitation,

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AIDS Conference in Vancouver, but the changing attitude towards the disease began even earlier as drugs like AZT were shown to be effective against HIV in the late 1980s and early 1990s. *See id.* Additionally, as the numbers of intravenous drug users and homosexual people contracting the disease increased, those suffering from the disease were more frequently characterized not as innocent victims, but rather as those who deserved infection. *See id.* at 29. The result, Professor Parment and Mr. Jackson claim, was that "[b]y the early 1990s, one could begin to say that the era of the innocent victim, who like the traditionally disabled person, was afflicted not due to any of his or her own actions, had ended." *Id.*

While the individual assessment required by the ADA definition may have initially afforded protection to the non-traditional disability of AIDS, it now puts the burden on each asymptomatic HIV plaintiff to prove that her impairment substantially limits a major life activity. *See id.* at 22-26 (arguing that the "plasticity" of the ADA disability definition, which first offered HIV protection under the law, now makes protection more problematic as we move away from the social construction of AIDS as a plague); *see also* 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, 332 (1997) (arguing that the case-by-case approach requires each ADA case to be considered in a vacuum).

217. Although the Court did not reach the issue, much of Abbott's brief was devoted to the argument that the legislative history of the ADA demonstrates that Congress intended HIV to be a per se disability under the statute. *See* Brief for the Respondent Sidney Abbott, *Bragdon* (No. 97-156), available in 1998 WL 47514, at \*32-35 (surveying the House and Senate ADA Reports). The Brief states that Congress was aware of the legal history of the Rehabilitation Act and HIV and that its inclusion of the same language in the ADA indicates congressional intent that HIV always be protected under the statute. *See id.* at \*35-36 (discussing unanimity among courts on the issue of Rehabilitation Act protection of individuals with disabilities). Nevertheless, the language of the disability definition and the absence of any mention of HIV in the statute render the legislative history argument problematic. *See* 42 U.S.C. § 12102(2) (1994).

218. *See* 42 U.S.C. § 12102(2)(A); *see also* *Bragdon*, 118 S. Ct. at 2214 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (identifying this language as the source of the ADA's individualized inquiry requirement). *But see* Lanctot, *supra* note 216, at 329 (arguing that "[s]imple common sense" requires that certain impairments be considered per se disabilities).

219. *See* 42 U.S.C. § 12101(b). Professor Lanctot argues that the refusal to declare certain impairments disabilities as a matter of law is inconsistent with the goal of eliminating discrimination: "[P]rejudice by its very nature is not based on ad hoc reactions to particular individuals." Lanctot, *supra* note 216, at 337.

and some plaintiffs who otherwise might be assumed disabled may not qualify.<sup>220</sup> After *Bragdon*, a young, asymptomatic HIV-infected woman will likely have little difficulty proving actual limitation of the major life activity of reproduction, but *Bragdon* does not guarantee ADA protection for all asymptomatic HIV-infected plaintiffs. Some have suggested that the ADA requires a presently existing limitation and therefore, that the reproduction argument would not be available to children infected with HIV.<sup>221</sup> Homosexual men infected with HIV will likely have a more difficult time persuading courts that their procreation was substantially limited by their infection,<sup>222</sup> and an even harder case would be that of HIV-positive, post-menopausal women who are no longer able to reproduce.<sup>223</sup> Thus, the next plaintiff for whom the reproduction argument is unavailable will have to prove that although he suffers no physical symptoms, he experiences an actual and substantial limitation of a major life activity. While the Court did not require much in the way of proof of

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220. See *Lancot*, *supra* note 216, at 330. As evidence of the "disquieting" effects of courts' refusal to recognize per se disabilities, Professor Lancot cites a Fifth Circuit decision holding that a woman who had a mastectomy and was undergoing radiation failed to raise a material issue of fact as to whether the cancer and treatment substantially limited a major life activity. See *id.* at 329-30 (discussing *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996)).

221. See *Bragdon*, 118 S. Ct. at 2216 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (suggesting that the "limits" language of the statute requires a present limitation); Chambers, *supra* note 167, at 419 (warning that the reproduction argument fails to protect children, post-menopausal women, and celibate monks). But see *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 445 (N.D. Ill. 1988) (finding that a twelve-year-old student was substantially limited in the major life activity of reproduction because "the mere prospect of such a limitation is certain to restrict social interaction with those of the opposite sex").

222. See *Parmet & Jackson*, *supra* note 82, at 35 (noting that homosexual men may have a difficult time arguing that their infection changed their reproductive plans). It is not clear whether the *Runnebaum* court's refusal to recognize that HIV infection substantially limited reproduction was influenced by the plaintiff's homosexuality. See *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156 (4th Cir. 1997) (*en banc*). The court asserted that there was no evidence that the plaintiff chose not to have children because of his infection and noted that there was evidence that he had not foregone sexual relationships, stating that "the record shows that he concealed his HIV infection from his lover." *Id.* at 172. The court made this individual inquiry, however, only after it determined that HIV infection per se does not substantially limit reproduction or sexual activity, so the court thereby extended its ruling beyond the homosexual plaintiff in rejecting the reproduction argument. See *id.*

223. See Chambers, *supra* note 167, at 419. It is difficult to imagine a successful showing of actual limitation of reproductive activities by a woman who contracted HIV infection after menopause. Although heterosexual men cannot directly transmit the virus perinatally to a child, the possibility of transmission to the mother suggests that the risk of perinatal transmission argument may be available to heterosexual male plaintiffs.

substantial limitation,<sup>224</sup> individuals in the asymptomatic stages of a disease may have difficulty identifying any other major life activity that is at all limited by their disease.

Although these hypothetical plaintiffs may suggest the desirability of per se disabilities, there are risks associated with declaring certain impairments disabilities as a matter of law: a per se holding that HIV is a disability might backfire by opening the door to per se exclusions of protection for other conditions.<sup>225</sup> Requiring an individualized assessment promotes Congress's goal of offering expansive protection against discrimination based on disabilities by preventing blanket exclusions.<sup>226</sup> The *Runnebaum* court made such a blanket exclusion when it in effect (though not explicitly) asserted that asymptomatic HIV is per se not protected by the ADA.<sup>227</sup>

The *Bragdon* Court declared HIV only a per se impairment, but some courts have already interpreted the decision as declaring HIV a per se disability.<sup>228</sup> In *Doe v. Dekalb County School District*,<sup>229</sup> for

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224. The *Bragdon* Court was satisfied by the plaintiff's testimony that her HIV infection "controlled her decision not to have a child." *Bragdon*, 118 S. Ct. at 2206. The Court, therefore, did not inquire into whether Abbott would have had a child if not for the infection, nor did it look into whether she was otherwise physically capable of having a child. See *id.* By not inquiring into Abbott's fertility, the Court avoided the problem Professor Parmet and Mr. Jackson have identified with the First Circuit's decision in *Abbott* that the recognition of disability "was based in large part on the fortuity of [Abbott's] own fertility." Parmet & Jackson, *supra* note 82, at 35. Chief Justice Rehnquist implied that the statutory requirement of individual assessment puts a greater burden of proof on the plaintiff than was recognized by the majority. See *Bragdon*, 118 S. Ct. at 2214-15 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

225. See *Runnebaum*, 123 F.3d at 169, 172. If the *Bragdon* Court had made no individual inquiry and had held that asymptomatic HIV is always a disability, courts would have been free to abandon individual inquiry and declare that certain disabilities are never covered. Professor Parmet and Mr. Jackson argue that at the "core" of disability law is the notion that "no one can prepare a list of disabling conditions, because an impairment that affects one individual minimally may well affect another individual significantly." Parmet & Jackson, *supra* note 82, at 23; see also 1 PERRITT, *supra* note 5, § 3.2, at 40 (discussing Congress's reasons for not including a comprehensive list of conditions constituting disabilities).

226. See 42 U.S.C. § 12101(b)(1) (1994) (listing one of the ADA's purposes as providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

227. See *Runnebaum*, 123 F.3d at 169, 172; see also *Lanctot*, *supra* note 216, at 337 (implying that the effect of *Runnebaum* was to exclude per se asymptomatic HIV individuals from ADA protection); Recent Case, *supra* note 167, at 848 (asserting that the *Runnebaum* decision resulted in the rule that asymptomatic HIV is per se not a disability).

228. See *Rivera v. Heyman*, 157 F.3d 101, 103 (2d Cir. 1998); *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1445 n.5 (11th Cir. 1998). But see *Deas v. River West, L.P.*, 152 F.3d 471, 478 n.15 (5th Cir. 1998) (stating that *Bragdon* was not a per se holding); *Gabriel v. City of Chicago*, 9 F. Supp. 2d 974, 978 (N.D. Ill. 1998) (noting that the Court in *Bragdon* held only that the plaintiff's HIV constituted a disability).

example, the Eleventh Circuit considered whether an HIV-positive teacher had an ADA Title I action based on his transfer to a different classroom.<sup>230</sup> The court noted that the first element of a Title I prima facie case for employment discrimination is that the plaintiff has a disability.<sup>231</sup> Although the district court's finding that the plaintiff had met this requirement does not seem to have been challenged on appeal, in a footnote the Eleventh Circuit observed that under *Bragdon* an individual with asymptomatic HIV is "disabled" under the ADA.<sup>232</sup> Such a reading is inconsistent with the Court's holding that Abbott's infection limited her ability to reproduce<sup>233</sup> and with its refusal to decide the per se issue on which it also granted certiorari.<sup>234</sup> Other courts have recognized that the Court made an individualized inquiry into whether Abbott's reproduction was substantially limited and that the Court expressly declined to make a per se ruling.<sup>235</sup>

Although *Bragdon* does not guarantee ADA protection to all individuals with asymptomatic HIV, the Court's analysis suggests that the reproductive argument might be available to a larger class of HIV-infected plaintiffs than previously contemplated by the decisions of the lower courts.<sup>236</sup> After stating that HIV-infected individuals who do choose to reproduce may encounter economic and legal consequences, the Court noted: "[T]he disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are

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229. 145 F.3d 1441 (11th Cir. 1998).

230. See *id.* at 1443. The plaintiff was a special education teacher and was transferred to a classroom of children with less severe behavioral disorders. See *id.* at 1443-44. The transfer was based on the school's fear that HIV might be transmitted if he came into direct contact with the more violent students in his former classroom. See *id.*

231. See *id.* at 1445.

232. See *id.* at 1445 n.5 (citing *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998)).

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

234. See *id.* at 2207.

235. See *Deas v. River West, L.P.*, 152 F.3d 471, 478 (5th Cir. 1998) (recognizing that *Bragdon* was not a per se holding); *Ellis v. Mohenis Servs. Inc.*, No. CIV.A.96-6307, 1998 WL 564478, at \*4 (E.D. Pa. Aug. 24, 1998) (mem.) (same).

236. See *Bragdon*, 118 S. Ct. at 2206. Other courts have accepted the argument that reproduction may be substantially limited only in cases when an HIV-infected individual elected not to reproduce because of the risk of transmission. See, e.g., *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir.) (suggesting that the basis for determining a substantial limitation is the fact that an eight percent risk of transmission to a child will deter HIV-infected women from procreating), *cert. granted in part*, 118 S. Ct. 554 (1997), and *vacated*, 118 S. Ct. 2196 (1998); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994) (implying that the reproduction argument is available to HIV-infected plaintiffs because the risk of transmission causes them not to reproduce). The Court in *Bragdon* seems to have been the first to suggest that reproduction may be limited even when reproduction actually occurs.

not insurmountable.”<sup>237</sup> The Court indicated, however, that the difficulties in Abbott’s case were insurmountable because she had chosen not to reproduce.<sup>238</sup>

In its intimations that a substantial limitation need not be physical, the Court’s opinion may broaden the availability of the reproduction argument to plaintiffs who do reproduce but incur economic or legal limitations as a result.<sup>239</sup> Responding to the Chief Justice’s demand for a less elusive disability definition—one that is not determined by the personal choice of the infected individual<sup>240</sup>—the Court’s dicta expands the notion of limitation beyond the physical and thus opens the door to HIV-infected individuals who bear children and consequently suffer other non-physical limitations,<sup>241</sup> as well as to those who choose not to have children because of the risk of infection.<sup>242</sup>

If the Court had not determined that Abbott had an actual disability, it might have considered whether she had a disability under the “regarded as” prong of the statutory definition.<sup>243</sup> Chief Justice Rehnquist argued that the Court should not consider whether

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237. *Bragdon*, 118 S. Ct. at 2206.

238. *See id.*

239. *See id.*

240. Chief Justice Rehnquist quarreled with the idea that choice could constitute the required limitation and suggested that even if—as the majority suggested—the statute does not require “utter inabilities,” it still requires a showing that the individual is “less able” to engage in the activity. *Id.* at 2216 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Abbott, he suggested, had made no such showing that she was less able to reproduce because of her infection. *See id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The Chief Justice warned that the Court’s interpretation, if “taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease ‘disabled’ here and now because of some possible future effects.” *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The *Runnebaum* majority expressed the same concerns when it declined to recognize asymptomatic HIV as an impairment for fear that individuals with genetic markers would also be protected. *See Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 168 n.6 (4th Cir. 1997) (en banc).

241. The non-physical limitations suggested by the Court are the costs of antiretroviral therapy and long-term health care for an infected child and the legal ramifications in states that have criminalized sexual intercourse by people infected with HIV. *See Bragdon*, 118 S. Ct. at 2206. The implications of the Court’s reasoning are not limited to HIV-infected plaintiffs; *Bragdon* has opened the door for plaintiffs with other impairments to argue that a non-physical limitation of a major life activity is a basis for disability.

242. *See id.* at 2205-07. It has even been argued that counseling HIV-infected women not to reproduce constitutes different and unequal medical treatment inconsistent with the spirit of the ADA. *See Taunya Lovell Banks, The Americans with Disabilities Act and the Reproductive Rights of HIV-Infected Women*, 3 TEX. J. WOMEN & L. 57, 88 (1994). Professor Banks acknowledges, however, that an amendment would be required to make such conduct clearly prohibited. *See id.* at 96.

243. *See* 42 U.S.C. § 12102(2)(C) (1994).

Abbott was "regarded as" having a disability because the First Circuit declined to consider the argument and the Court rarely considers arguments not addressed in the lower courts.<sup>244</sup> The Court only noted that it "need not consider" the other prongs of the definition because it determined that Abbott was disabled under subsection (A) of the disability definition.<sup>245</sup> One commentator has argued that deciding *Bragdon* under the "regarded as" prong of the disability decision would have avoided the limitations inherent in the reproduction argument.<sup>246</sup>

Under the "regarded as" prong of the disability definition, an individual is disabled if she is "regarded as having such an impairment."<sup>247</sup> The phrase "having such an impairment" thus cross-references subsection (A), the actual disability prong of the definition.<sup>248</sup> As Chief Justice Rehnquist urged, the statutory language therefore seems to require the plaintiff to prove not mere prejudice on the basis of an impairment, but that the defendant regarded the plaintiff as having an impairment that substantially limited a major life activity.<sup>249</sup> A more liberal reading of the "regarded as" prong would consider an individual disabled if he were limited in his ability to participate in society because of discrimination on the grounds of a perceived impairment.<sup>250</sup> Although this approach would promote the goal of eliminating discrimination, it does not seem consistent with the statutory language requiring that the individual was perceived as having "such

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244. See *Bragdon*, 118 S. Ct. at 2214 n.1 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

245. See *id.* at 2201; see also *supra* note 39 (discussing *Bragdon*'s concession at oral argument that the "regarded as" issue was raised in lower courts).

246. See Chambers, *supra* note 167, at 403. Ms. Chambers argues that the actual disability prong will not protect those HIV-positive individuals who do not plan to have sex or procreate but who, nevertheless, experience the kind of discrimination that the ADA was designed to prevent. See *id.* at 431. The use of the "regarded as" prong as a way of avoiding the proof problems raised by asymptomatic HIV was predicted by the DOJ in the 1988 Memorandum. See 1988 Memorandum, *supra* note 105, at 274.

247. 42 U.S.C. § 12102(2)(C). The EEOC regulations use HIV infection to illustrate the "regarded as" provision by noting that an employee fired because of a rumor about HIV would be disabled because he was perceived by the employer as being disabled. See 29 C.F.R. § 1630 app. at 350 (1998).

248. See 42 U.S.C. § 12102(2)(A).

249. See *Bragdon*, 118 S. Ct. at 2214 n.1 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

250. See Chambers, *supra* note 167, at 406 ("[A]ll asymptomatic HIV-positive individuals should qualify as disabled under the 'regarded as' prong of the ADA's disability definition whenever they are subjected to purposeful unequal treatment because of their HIV-positive status.").

an impairment.”<sup>251</sup>

The Supreme Court had previously considered the “regarded as” prong of the handicap definition in *Arline* when it noted that allowing discrimination based on the contagiousness of a disease would be inconsistent with Congress’s clear intent to prevent discrimination based on the perception of disability.<sup>252</sup> In considering the intent of Congress in enacting the “regarded as” provision, the *Arline* Court suggested that the type of situation contemplated was one in which an impairment did not actually limit a major life activity, but the prejudices of others limited the person’s ability to work.<sup>253</sup> Rejecting the argument that there is no handicap when only the ability to work is impaired, the *Arline* Court asserted that the Rehabilitation Act was intended to cover individuals with real or perceived disabilities that limit the ability to work.<sup>254</sup> The *Arline* Court thus affirmed that an argument that depends upon the substantial limitation (real or perceived) of the ability to work is not circular.<sup>255</sup>

In *Harris v. Thigpen*,<sup>256</sup> the Eleventh Circuit used the “regarded as” prong to hold that several HIV-positive inmates were disabled under § 504 of the Rehabilitation Act.<sup>257</sup> The segregation of the inmates indicated that they were perceived as unable to participate in prison programs that were directly related to the major life activities of working and learning.<sup>258</sup> Thus, the unusual circumstances of prison life enabled the *Harris* court to relate discrimination in a § 504 case to the major life activity of working.<sup>259</sup> An argument based on perceived impairment of the ability to work generally will be inappropriate for the plaintiff in a public accommodations case, and

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251. 42 U.S.C. § 12102(2)(C).

252. See *School Bd. v. Arline*, 480 U.S. 273, 284 (1987); see also *supra* notes 91-104 and accompanying text (discussing *Arline*).

253. See *Arline*, 480 U.S. at 282-83; see also Parmet & Jackson, *supra* note 82, at 14-16 (discussing the *Arline* Court’s “regarded as” analysis).

254. See *Arline*, 480 U.S. at 283 n.10; see also Vande Walle, *supra* note 3, at 903-22 (surveying the use of the perceived disability argument in ADA employment cases).

255. See *Arline*, 480 U.S. at 283 n.10. As the Court implied in *Bragdon*, the major life activity limited by the impairment (in this case reproduction) need not be related to the discrimination (refusal to provide dental care). See *Bragdon*, 118 S. Ct. at 2205-06 (accepting Abbott’s reproduction argument). Under the “regarded as” analysis, however, a connection between the perceived substantial limitation and the resulting discrimination seems inevitable.

256. 941 F.2d 1495 (11th Cir. 1991), *appeal after remand sub nom.* Onishea v. Hopper, 126 F.3d 1323 (11th Cir. 1997), *reh’g en banc granted and vacated*, 133 F.3d 1377 (11th Cir. 1998).

257. See *id.* at 1524.

258. See *id.* at 1524 n.45.

259. See *id.*

it will, therefore, be difficult under a "regarded as" analysis to avoid bootstrapping a finding of disability to a finding of discrimination.<sup>260</sup>

Following the *Arline* dicta concerning the "regarded as" prong, a plaintiff such as Abbott would still have to show that the frustration of her attempt to participate fully in society constitutes a substantial limitation on a major life activity.<sup>261</sup> The inherent circularity of such an argument is somewhat troubling: she is disabled because she is discriminated against, and, therefore, she cannot be discriminated against. Or even more reductively, freedom from discrimination becomes the major life activity.<sup>262</sup> Although the logic of the "regarded as" analysis seems circular, the ADA clearly protects any plaintiff who can identify a major life activity in which she has been perceived as being substantially limited.<sup>263</sup> Abbott, for instance, might have argued that she was substantially limited in the major life activity of obtaining health care.<sup>264</sup> Justice Ginsburg suggested that

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260. Courts have been troubled by the attempt to bootstrap a finding of impairment to a finding of disability in the infertility cases. See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996) (unpublished table decision). The plaintiffs in these cases argued that infertility is an impairment of the reproductive system and therefore that the substantial life activity of reproduction is substantially limited. Courts have rejected this reasoning as "circular." See *Krauel*, 95 F.3d at 677; *Zatarain*, 881 F. Supp. at 243. The reproduction argument does not have the same "bootstrapping effect" in the HIV cases in which HIV—not infertility—constitutes the physical impairment.

261. Ms. Chambers has urged the Supreme Court to adopt the statutory construction of the "regarded as" prong adopted by the *Arline* Court and to hold that persons with asymptomatic HIV "may be impaired in a major life activity if they are discriminated against because of the disease." Chambers, *supra* note 167, at 428. Although the *Arline* Court did cite the inclusion of the "regarded as" prong as evidence of Congress's intent to protect against not only actual but perceived disability, Ms. Chambers fails to note that the *Arline* Court considered application of the "regarded as" prong only when the plaintiff was regarded as being substantially limited in the major life activity of working. See *School Bd. v. Arline*, 480 U.S. 273, 283 (1987). The *Arline* Court's analysis is not so broad as Ms. Chambers suggests but instead is faithful to the statutory requirements. See *id.* at 282-84; see also *Parmet & Jackson*, *supra* note 82, at 15 (interpreting *Arline* to suggest that social prejudices against HIV could result in the substantial limitation of the major life activity of working).

262. Urging the Court to decide *Bragdon* under the "regarded as" prong, Ms. Chambers has proposed the broadest of interpretations of "regarded as": "HIV infected individuals, even those who remain asymptomatic, may be impaired in a major life activity if they are discriminated against because of the disease." Chambers, *supra* note 167, at 428.

263. See 42 U.S.C. § 12102(2)(A) (1994).

264. Certainly discrimination in the provision of health care is a serious issue for individuals with HIV infection, and denial of treatment is not the only means of discrimination; HIV-infected individuals may also receive negligent care based on prejudice about the disease. See Mark Jackson & Nan D. Hunter, "The Very Fabric of Health Care": The Duty of Health Care Providers to Treat People Infected with HIV, in



the ability to receive health care is a major life activity and that an action such as Bragdon took in refusing to fill Abbott's cavity in his office constitutes a substantial limitation of that activity.<sup>265</sup> The Court did not consider whether the ability to receive health care is a major life activity, but it seems no less significant than working or reproduction, the two major life activities expressly recognized by the Court.<sup>266</sup> Although Justice Ginsburg's construction seems consistent with the ADA, the Court avoided the inherent circularity of the "regarded as" prong of the disability definition as it applies in a public accommodations case by holding that Abbott was actually disabled. With the actual disability analysis, the Court recognized Abbott's HIV infection as a present disability defined not by the reactions of others but by the actual effects of the disease. The "regarded as" prong, nevertheless, remains available to future HIV-infected plaintiffs who are unable to prove actual substantial limitation of a major life activity.<sup>267</sup>

*Bragdon* is perhaps most significant for its holding that reproduction is a major life activity and for its suggestion by way of dicta that "substantial limitation" may include non-physical limitations.<sup>268</sup> The Court's opinion also appears to require an individualized inquiry at the "substantially limits" stage of the three-step analysis.<sup>269</sup> Although this solution is consistent with the statutory language and forestalls dangerous per se exclusions, the burden remains on future asymptomatic HIV-infected plaintiffs to prove that they are substantially limited in a major life activity. Fortunately, however, the next asymptomatic HIV plaintiff who is discriminated against in the provision of health care or other public

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AIDS AGENDA: EMERGING ISSUES IN CIVIL RIGHTS 123, 124 (Nan D. Hunter & William B. Rubenstein eds., 1992).

265. See *Bragdon*, 118 S. Ct. at 2213-14 (Ginsburg, J., concurring). Justice Ginsburg was clearly receptive to the idea that Abbott was disabled because she was regarded as being disabled and noted that HIV "has been regarded as a disease limiting life itself." *Id.* at 2213 (Ginsburg, J., concurring); see also Transcript of Oral Argument, *Bragdon* (No. 97-156), available in 1998 WL 141165, at \*16 (suggesting in questions to petitioner that limitations on access to health care constitute a substantial limitation of a major life activity).

266. See *Bragdon*, 118 S. Ct. at 2205; *Arline*, 480 U.S. at 283 n.10.

267. See 42 U.S.C. § 12102(2)(C).

268. See *Bragdon*, 118 S. Ct. at 2205-06.

269. See *id.* at 2207 (analyzing "substantial limitation" in terms of the substantial limitation on the respondent's reproduction).

service will not have to prove that HIV is a physical impairment or that reproduction is a major life activity.<sup>270</sup>

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270. *See id.* at 2204-05.