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Civil Rights: An Examination of Non-Symptomatic HIV Infection under the Americans with Disabilities Act of 1990

James C. Parks Jr.

CIVIL RIGHTS: AN EXAMINATION OF NON-SYMPTOMATIC HIV INFECTION UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990

Bragdon v. Abbott, 118 S. Ct. 2196 (1998)

I. FACTS

In 1986, Sidney Abbott became infected with the Human Immune Deficiency Virus (HIV), the virus which causes Acquired Immune Deficiency Syndrome (AIDS).[1] On September 16, 1994, Abbott sought a dental examination from Dr. Randon Bragdon, a board-certified dentist in Bangor, Maine.[2] Before the examination, Abbott acknowledged on a patient release form that she was infected with HIV but stated that was not yet suffering from AIDS and its most dramatic effects.[3]

During the examination, Bragdon discovered that Abbott had a cavity.[4] Bragdon then informed Abbott he would only fill her cavity in a hospital setting.[5] Furthermore, he informed her that while he would charge her his regular fee, she would be responsible for any additional costs due to the hospital visit.[6] As support for this decision, Bragdon told Abbott that his infectious disease policy required him to take such precautions.[7] Abbott refused to accept the condition that she be treated in a hospital setting.[8] She then filed a complaint against Bragdon under the Maine Human Rights Act[9] and Title III of the Americans with

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1. Bragdon v. Abbott, 118 S. Ct. 2196, 2200 (1998).

2. *See id.* at 2201.

3. *See id.* At later stages, Human Immune-deficiency Virus (hereinafter HIV) infection results in outwardly noticeable clinical features such as lymphadenopathy, dermatological disorders, oral lesions and bacterial infections, with later clinical conditions such as pneumocystis carninii pneumonia, Kaposi's sarcoma and non-Hodgkins lymphoma. *See id.* at 2204. Other outward signs of HIV infection include persistent general systematic disorders, such as fever, weight loss, fatigue, lesions, nausea, and diarrhea. *Id.*

4. *See id.* at 2201.

5. *See id.*

6. *See id.*

7. *See id.* It is not clear whether the routine policy that Bragdon claimed prevented his in-office treatment of Abbott was a formal written policy. *See id.*

8. *See id.*

9. *See* 5 ME. REV. STAT. ANN. tit. 5, § 4592 (West 1989). As the First Circuit Court of Appeals stated: "Interpretation of both the ADA and the [Maine Human Rights Act (MHRA)] have 'proceeded hand in hand without distinction.'" Soileau v. Guilford of Me., Inc., 105 F.3d 12, 14 (1st Cir. 1997). Therefore, because the claims are essentially the same, the court did not discuss the MHRA further. Abbott v. Bragdon, 107 F.3d 934, 937 n.1 (1st Cir. 1997). While this appears to be the most likely scenario when ADA claims are brought in states with human rights provisions, although decisions may vary depending on the individual state's interpretation of its respective laws. *Cf. id.* (standing for the proposition that state human rights statutes may be interpreted differently than the ADA). In North Dakota, an individual who suffers a denial of public services, as Abbott did, would be able to seek a state remedy under the North Dakota Human Rights Act (NDHRA). *See* N.D. CENT. CODE § 14-02.4-15 (1997). The NDHRA expressly prohibits a public service provider from discriminating against an

Disabilities Act (ADA),[10] alleging that he had discriminated against her because of her HIV condition.[11]

After Abbott's initial filing, the United States Government and the Maine Human Rights Commission intervened as plaintiffs; both filed cross-motions for summary judgment.[12] The United States District Court of Maine granted summary judgment in favor of Abbott, finding that Bragdon violated the ADA by refusing to treat Abbott in his office.[13] In reaching this decision, the court found that Ms. Abbott established that her asymptomatic[14] HIV infection substantially limited her major life activity of reproduction, and it therefore held, as a matter of law, that Abbott was disabled under the ADA.[15] Furthermore, the court held that treating HIV-positive patients like Abbott in a dental office posed no direct threat to the health and safety of others.[16]

The First Circuit Court of Appeals affirmed the lower court's summary judgment, holding Abbott's HIV infection to be a physical impairment under Title III of the ADA.[17] The court also agreed that reproduction was a major life activity which would be substantially limited by the disease, bringing the case under the rubric of the ADA.[18]

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individual because of race, color, religion, sex, national origin, age, marital status, status as to public assistance, mental or physical disability. *See id.* The North Dakota Supreme Court has thus far construed the NDHRA in a manner consistent with federal court interpretation of federal anti-discrimination legislation where such federal legislation is analogous. *See* Birchem v. Knights of Columbus, 116 F.3d 310, 314 (8th Cir. 1997) (noting that it is the practice of the court to defer to federal court interpretations where analogous statutes are at issue). This deference to analogous federal law seems to indicate that the North Dakota Supreme Court would interpret the NDHRA to include protections for asymptomatic HIV-infected individuals who qualify as disabled. *Cf. id.* (standing for the proposition that it is likely the North Dakota Supreme Court would follow *Abbott* and construe the NDHRA analogously with the ADA with regards to state claims by HIV-infected persons).

10. Americans with Disabilities Act, 42 U.S.C § 12182(a) (1994). This provision of the Americans with Disabilities Act [hereinafter "ADA"] states that a place of public accommodation may not discriminate against an individual on the basis of a disability in the full and equal enjoyment of services. *See id.* However, a disabled individual who poses a direct threat to the health or safety of others may be denied services. *See* ADA, 42 U.S.C § 12182(b)(3) (1994).

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

12. *See* Abbott v. Bragdon, 912 F. Supp. 580, 584 (D. Me. 1995).

13. *See id.* at 595.

14. *See* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 129 (2d. ed. 1996) [hereinafter WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY] (defining "asymptomatic" as "showing no evidence of disease").

15. *See Abbott*, 912 F. Supp. at 587.

16. *See id.* at 589. Bragdon failed to present evidence that would allow him to overcome the summary judgment motion; he essentially asked the court to "infer a significant risk from a combination of his conjecture as to potential transmission and statistics which at best may place health care workers at a higher risk of contracting HIV." *Id.* at 588-89. The court found Bragdon's argument that dental health care workers faced a risk of infection because of the potential for needle stick and the exposure to the spattering of blood and bloody saliva carried little weight. *See id.* at 588. Furthermore, the court found the statistics cited by Bragdon unconvincing since there was no documented case of a dentist suffering from an occupational transmission. *See id.*

17. *See* Abbott v. Bragdon, 107 F.3d 934, 942 (1st Cir. 1998).

18. *See id.*

The court also found that Ms. Abbott's condition did not pose a direct threat to the health or safety of Bragdon.[19] The court further found that Bragdon "failed to present meaningful probative evidence that treating Abbott would have posed a medically significant risk to his health or safety."[20] Therefore, the court held that as of September 1994, treating HIV-positive patients in an office environment posed no direct threat to Bragdon's health or safety because there was no public healthcare authority indicating otherwise.[21]

Bragdon appealed to the Supreme Court of the United States.[22] The Supreme Court affirmed the two lower courts' holdings and found that asymptomatic HIV infection was a disability that significantly limited Abbott's ability to engage in the major life activity of reproduction.[23] However, the Supreme Court remanded the case to the First Circuit on the issue of whether Abbott posed a direct threat to the health and safety of Bragdon or others.[24] On remand, the First Circuit affirmed its original holding, concluding that treating Abbott in a regular office setting did not pose a direct threat to others.[25]

II. LEGAL BACKGROUND

Congress created the ADA in response to demands from disabled individuals who had previously been restricted from enjoying common rights of society.[26] While earlier federal legislation attempted to remedy the day-to-day problems faced by the disabled, the ADA was the first legislation to reach into non-governmental enterprises and provide a framework to remedy disability discrimination.[27] The findings and purposes section of the ADA clearly states the problems Congress drafted the legislation to address:

> Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a

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19. *See id.* at 948-49.

20. *Id.*

21. *See id.* The court specified September 1994 because Bragdon's actions were fairly evaluated from the standpoint of medical knowledge available when he refused service to Abbott. *See id.*

22. *See* Bragdon v. Abbott, 118 S. Ct. 2196, 2196 (1998).

23. *See id.* at 2207.

24. *See id.* at 2213.

25. *See* Abbott v. Bragdon, 163 F.3d 87 (1st Cir. 1998).

26. *See* Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 21 (1997).

27. *See* Reed L. Russell, *Arguing for More Principled Decision Making in Deciding Whether an Individual Is Substantially Limited in the Major Life Activity of Working Under the ADA*, 47 CATH. U. L. REV. 1057, 1057 (1998) (noting that while section 504 of the Rehabilitation Act used the same framework to analyze claims in federally funded entities, the ADA extended the framework to non-federally funded enterprises).

> position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[28]

The following discussion reviews the development of the ADA from the Rehabilitation Act of 1973. The discussion also summarizes the treatment of HIV and AIDS under both acts.

A. EVOLUTION OF THE ADA FROM THE REHABILITATION ACT OF 1973

In 1990, President George Bush signed the Americans with Disabilities Act (ADA) into law.[29] The ADA was generally viewed as an expansion of the Rehabilitation Act of 1973.[30] While the Rehabilitation Act prohibited discrimination against disabled individuals participating in federally-funded public sector programs or activities, the ADA extended protection to disabled individuals in the private sector.[31] The broad goal of the ADA was to end discrimination in non-federally funded entities against individuals with disabilities in employment, public services and public accommodations.[32]

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28. *See* ADA, 42 U.S.C. § 12101(a)(7) (1994). *Id.* It is highly likely that this language referring to "discrete and insular minorities" was taken from Justice Harlan Stone's famous footnote in *United States v. Carolene Products Co*. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). This often-cited language asks "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching inquiry," and it seems to capture the spirit of the ADA. *Id.*

29. *See* ADA, 42 U.S.C. §§ 12101-12213 (1994 & Supp. 1997).

30. *See* Russell, *supra* note 27, at 1057 (citing 42 U.S.C. §§ 12101-12213).

31. *See* Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 793-94 (1994 & Supp. 1997); *see also* Russell, *supra* note 27, at 1057. The Rehabilitation Act of 1973, amended in 1974, prohibits disability discrimination by any organization receiving federal money or by any executive agency against any federal employee or employees of federal contractors. *See* 29 U.S.C. §§ 791, 793-94. The ADA extended this protection against discrimination to private actors who do not directly receive federal funds. *See* Russell, *supra* note 27, at 1057 (noting that the ADA "extends to the private sector the scope of protection for disabled persons originally provided to federally funded programs or activities by the Rehabilitation Act of 1973"). The ADA has three different Titles: Title I protects the disabled from discrimination in employment, Title II protects the disabled from denial of public services, and Title III prohibits discrimination through denial of public accommodations and services provided by private entities. *See* ADA, 42 U.S.C. §§ 12111-12189 (1994 & Supp. 1997).

32. *See generally* ADA, 42 U.S.C. § 12101(b) (1994). The stated purpose of the ADA is:

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

The Rehabilitation Act sought to prevent discrimination against disabled individuals, who the Act refers to as "handicapped,"[33] by prohibiting discrimination against such individuals receiving federal assistance.[34] The Rehabilitation Act defines a person as handicapped if he or she qualifies under any of the Act's three prongs.[35] Thus, an individual is handicapped if he or she "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."[36] Scholars suggested as early as 1985 that this definition extended protection to HIV-infected individuals.[37]

Id.

33. *See* Parmet & Jackson, *supra* note 26, at 12.

34. *See* Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (1994). This section of the statute provides in part:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id.

35. *See id.*

36. *See* 29 U.S.C. § 706(8)(B) (1994) (providing the definition of "individual with a disability"). *See also* Parmet & Jackson, *supra* note 26, at 12. The Rehabilitation Act's definition of "handicapped individual" and the ADA's definition of "individual with a disability" are the same, since the later evolved from the former. *See* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 829 (4th ed. 1997). Therefore, the following definitions apply to both pieces of legislation. The term "physical or mental impairment" is defined by the Department of Health and Human Services, the agency which issues regulations for implementing the ADA, as:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i) (1998). The term "substantially limits," in reference to the impairment claimed by an individual and its affect on a major life activity, is defined as "[S]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular life activity as compared to the average person in the general population." *See* 29 C.F.R. § 1630.2(j)(i)-(ii) (1998). Furthermore, factors that should be considered in making this evaluation include: "i) The nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2) (1998). Such major life activities recognized by the ADA include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working, although this is not in exhaustion list of all such major life activities. *See* 45 C.F.R. § 84.3(j)(2)(ii) (1998).

37. *See* Arthur S. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 691 (1985); *see also* Parmet & Jackson, *supra* note 26, at 12.

B. HIV AND AIDS UNDER THE REHABILITATION ACT

In a 1985 publication, Arthur Leonard proposed two primary arguments in support of his theory that the Rehabilitation Act should protect individuals with AIDS or HIV from discrimination in employment.[38] The first argument focused on the infected individual's inability to fight infection and thereby preserve his or her health.[39] Leonard posited that the inability to fight infection came within the first prong of the Rehabilitation Act, since it substantially limited major life activities.[40] Second, Leonard argued that both symptomatic and asymptomatic individuals qualified as disabled under the third prong of the Rehabilitation Act, because both were regarded as having impairment on a major life activity.[41] Under this theory, asymptomatic HIV-infected individuals were disabled because "irrational fears and animosity toward individuals with a physical condition could cause the limitation of a major life activity."[42] However, the Department of Justice (DOJ) in 1986 exposed several shortcomings in Leonard's arguments.[43]

In June of 1986, Charles Cooper of the DOJ's Office of Legal Counsel issued a memorandum proffering the position that the Rehabilitation Act protected individuals with full-blown AIDS but offered no similar protection to individuals with asymptomatic HIV.[44] The memorandum stated that asymptomatic HIV-infected individuals did not suffer from a physical impairment.[45] Alternatively, the DOJ argued that if

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38. Leonard, *supra* note 37, at 691.

39. Leonard, *supra* note 37, at 691.

40. *See* Leonard, *supra* note 37, at 691; *see also* Parmet & Jackson, *supra* note 26, at 13. The first prong of the disability definition is triggered if an individual has a physical or mental impairment which substantially limits one or more of his or her major life activities. *See* Parmet & Jackson, *supra* note 26, at 12. The major life activities that Leonard believed were limited apparently included those of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working, as Leonard was apparently relying on that fact that such individuals were sick. *See* Parmet & Jackson, *supra* note 26, at 14. These activities appeared in the implementing regulations for the Rehabilitation Act. *See* Parmet & Jackson, *supra* note 26, at 14.

41. *See* Leonard, *supra* note 37, at 691; *see also* Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1994).

42. *See* Parmet & Jackson, *supra* note 26, at 13-14.

43. *See* Parmet & Jackson, *supra* note 26, at 13-14. (showing that Leonard's theory had some shortcomings in that: 1) discrimination against individuals with AIDS/HIV might have occurred because of social stereotypes; 2) individuals regarded with dislike because of infection might not qualify under specific statutory language as having an impairment that substantially limited a major life activity; and 3) the ability to fight infection may not have qualified as a major life activity when considered in context with the representative life activities listed in the implementation regulations for the Rehabilitation Act).

44. *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) [hereinafter Cooper Memorandum]; *see also* Parmet & Jackson, *supra* note 26, at 14.

45. *See* Cooper Memorandum, *supra* note 44, at D-1. This DOJ memorandum noted that even though society may choose not to associate with an individual with a contagious disease, it cannot be

HIV-infected individuals were physically impaired, such an impairment did not substantially limit a major life activity,[46] thereby removing them from the protection of the Rehabilitation Act.[47]

Shortly after DOJ issued its 1986 opinion, the Supreme Court heard *School Board of Nassau County v. Arline*[48] in which a schoolteacher claimed a violation of the Rehabilitation Act by her former employer school board.[49] The teacher alleged that she was terminated because of her chronic relapsing tuberculosis.[50] The Court found the plaintiff to be handicapped under the Act because she had a record of impairment for repeated hospitalizations that substantially limited several of the major life activities recognized by the statute.[51] Thus, the Court held that a person suffering from the contagious disease of tuberculosis could be classified as handicapped within the meaning of the Rehabilitation Act.[52] The Court further suggested that the "regarded as having a disability" prong of the Rehabilitation Act should include any disease that carried a high degree of negative social stigma.[53]

The *Arline* Court also considered when an otherwise-qualified handicapped person could be denied employment because his or her condition posed significant health and safety risks to others that could not be eliminated by reasonable accommodations.[54] The Court held that

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said that such an individual is handicapped, because doing so would mean many unpleasant handicaps would automatically be classified as disabilities. *See* Cooper Memorandum, *supra* note 44, at D-1.

46. *See* Cooper Memorandum, *supra* note 44, at D-1; *see also* Parmet & Jackson, *supra* note 26, at 14.

47. *See* Cooper Memorandum, *supra* note 44, at D-1; *see also* Parmet & Jackson, *supra* note 26, at 14.

48. 480 U.S. 273 (1987).

49. *See generally* School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 (1987) (holding that a person with a contagious disease such as tuberculosis was handicapped under the Rehabilitation Act of 1973).

50. *See id.* at 276.

51. *See id.* at 281. The Court defined major life activities under the Rehabilitation Act as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* at 280. Furthermore, the Court held that Arline's repeated hospitalization was "a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment." *Id; see also* Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994).

52. *See Arline*, 480 U.S. at 289.

53. *See id; see also* Parmet & Jackson, *supra* note 26, at 15 (theorizing that Justice Brennan was thinking of HIV-infected individuals when, in dicta, he stated that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment") (citing *Arline*, 480 U.S. at 281).

54. *See Arline*, 480 U.S. at 288. The Court remanded the case to determine if Arline was otherwise qualified for her job. *See id.* The Court went on to note that to prevail in an employment discrimination claim, a party must prove that he or she was otherwise qualified for the position or could be qualified with a reasonable accommodation. *See id.* at 286 n.15. "In the employment context, an otherwise qualified person is one who can perform 'the essential functions' of the job in question." *Id.* at 288 n.17 (citing 45 C.F.R. § 84.3(k) (1985)). Furthermore, "When a handicapped person is not able to perform the essential functions of the job, the Court must also consider whether any 'reasonable accommodations' by the employer would enable the handicapped person to perform those functions." *Id.* An accommodation is considered unreasonable if it imposes an undue financial and administrative burden on an employer or alters the fundamental nature of the job. *See id.*

such a denial of services or employment is permissible if a handicapped person threatens the health or safety of others.[55] Language derived from this decision was subsequently incorporated into the Rehabilitation Act and later into the ADA, eventually coming to be known as the "direct threat" provision.[56] The Court stated that employees should defer to the reasonable medical judgments of public health officials when determining the risk a handicapped person poses to the health or safety of others.[57] The *Arline* decision was groundbreaking, and it caused the DOJ to reconsider whether HIV-infected individuals who were asymptomatic qualified as disabled under the Rehabilitation Act.[58]

After *Arline*, a few courts recognized that HIV-infected persons were significantly limited in the major life activity of reproduction.[59] For example, courts in *Doe v. Dolton Elementary School District No. 148*[60] and *Thomas v. Atascadero Unified School District*[61] had no difficulty in finding that children suffering discrimination as a result of HIV infection were disabled as a matter of law.[62] Apparently, the courts were able to overlook some of the negative social stigmas associated with AIDS and HIV because the children appeared to be blameless for their condition.[63] Additionally, the court in *Dolton Elementary* noted that while the child in the case did not yet have a functioning reproductive system, the prospect of future limitation constituted a disability.[64]

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55. *See* Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994); *see also* ADA, 42 U.S.C. § 12111(3) (1994). This subsection of the ADA defines direct threat as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.*

56. *See Arline*, 480 U.S. at 288. The *Arline* Court defined the consideration of the risk, in the employment context, of a person handicapped by a contagious disease to be

> based on reasonable medical judgements given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id.

57. *See id.*

58. *See* Parmet & Jackson, *supra* note 26, at 15.

59. *See* Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988); *see also* Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987). *See also generally* Parmet & Jackson, *supra* note 26, at 19.

60. 694 F. Supp. 440 (N.D. Ill. 1988).

61. 662 F. Supp. 376 (C.D. Cal. 1987).

62. *See* Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440, 444 (N.D. Ill. 1988); *see also* Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376, 379 (C.D. Cal. 1987). *See also generally* Parmet & Jackson, *supra* note 26, at 19. In reaching this conclusion, these courts noted that the children had "abnormalities in their hemic and reproductive systems making procreation and child birth dangerous to themselves and others." Parmet & Jackson, *supra* note 26, at 19. Furthermore, the *Dolton Elementary* court noted, "The AIDS victim has a disorder of the reproductive system in that he or she cannot engage in reproductive activity without endangering the lives of both the offspring and the other parent." *See Dolton Elementary*, 694 F. Supp at 444.

63. *See generally Dolton Elementary*, 694 F. Supp. at 440; *Thomas*, 662 F. Supp. at 376.

64. *See* Dolton Elementary, 694 F. Supp at 445. "While the [s]tudent may not yet be of an age

In 1988, the DOJ reevaluated its 1986 memorandum and adopted the position that asymptomatic HIV-infected individuals were covered by the Rehabilitation Act's definition of handicapped.[65] The DOJ determined that because of the physiological impact of HIV infection, even asymptomatic infected individuals qualified for coverage.[66] However, the DOJ noted that an asymptomatic individual would still have to meet the "substantially limited in a major life activity" requirement of the Act to be classified as handicapped.[67] The DOJ explained that meeting this requirement was possible, since HIV infection has a substantially limiting effect on the ability of infected individuals to reproduce or conduct intimate relations.[68]

After this second memorandum, many state and federal courts held that HIV infection, both symptomatic and asymptomatic, was a disability under the Rehabilitation Act.[69] Further, "Every reported decision from the mid-1980s up until the passage of the ADA in 1990 determined that both AIDS and, when presented, asymptomatic HIV infection constituted disabilities within the meaning of the Rehabilitation Act or similar state statutes."[70] However, most courts avoided the DOJ's focus on the physiological impact of HIV infection and its interpretation of the

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where such [reproductive] activity is appropriate, the mere prospect of such a limitation is certain to restrict social interaction with those of the opposite sex." *Id.*

65. *See* Memorandum to Arthur B. Culvahouse Jr., Justice Department Memorandum on Application of Rehabilitation Act's Section to HIV Infected Persons, Daily Lab. Rep. (BNA) No. 195, at D-1 (Oct. 7, 1988) [hereinafter Culvahouse Memorandum]; *see also* Parmet & Jackson, *supra* note 26, at 15-16.

66. *See* Culvahouse Memorandum, *supra* note 65, at D-1. The physiological impact the DOJ referenced arose from the fact that a majority of asymptomatic HIV-infected persons suffer from immune system abnormalities. *See* Culvahouse Memorandum, *supra* note 65, at D-1; *see also* Parmet & Jackson, *supra* note 26, at 16.

67. *See* Parmet & Jackson, *supra* note 26, at 16. The DOJ did acknowledge Justice Brennan's comments in *Arline* that he believed acts of discrimination could serve to limit major life activities substantially. *See* Parmet & Jackson, *supra* note 26, at 16.

68. *See* Parmet & Jackson, *supra* note 26, at 16. The DOJ noted that since the list of major life activities included in the Rehabilitation Act was only representative, it was possible that courts could interpret the list to contain other affected matters. *See* Parmet & Jackson, *supra* note 26, at 16.

69. *See* Parmet & Jackson, *supra* note 26, at 17 n.79. (citing Chalk v. United States Dist. Ct., 840 F.2d 701 (9th Cir. 1988); Baxter v. City of Belleville, 720 F. Supp. 720 (S.D. Ill. 1989); Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988); Doe v. Centinela Hosp., No. CV 87-2514 PAR (PX), 1988 WL 81776 (C.D. Cal. June 30, 1988); Robertson v. Granite City Community Unit Sch. Dist. No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988); Martinez v. School Bd., 675 F. Supp. 1574 (M.D. Fla. 1987); Doe v. Belleville Pub. Sch. Dist., 672 F. Supp. 342 (S.D. Ill. 1987); Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524 (M.D. Fla. 1987); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987); Local 1812, Am. Fed'n of Gov't Employees v. Department of State, 662 F. Supp. 50 (D.D.C. 1987); Raytheon Co. v. California Fair Employment and Hous. Comm'n, 261 Cal. Rptr. 197 (Cal. Ct. App. 1989); Board of Educ. v. Cooperman, 209 N.J. Super. 174 (N.J. Super. App. Div. 1986), *aff'd*, 523 A.2d 655 (N.J. 1987); District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986); District 27 Community School Bd. v. Board of Ed. of New York, 502 N.Y.S.2d 325, 335-37 (N.Y. Sup. Ct. 1986)); *see also* Association of Relatives and Friends of AIDS Patients v. Regulations and Permits Admin., 740 F. Supp. 95, 103 (D. Puerto Rico 1990); Cain v. Hyatt, 734 F. Supp. 671, 679 (E.D. Pa. 1990).

70. Parmet & Jackson, *supra* note 26, at 16-17.

Rehabilitation Act's statutory language.[71] Rather, because these cases generally dealt with children who were infected with HIV or who were suffering from AIDS, courts were able to avoid the issues of social stigma related to HIV and AIDS.[72] However, these cases served to lay the groundwork for later amendments to the Rehabilitation Act and judicial interpretation of the ADA.[73]

In 1988, the Civil Rights Restoration Act amended the Rehabilitation Act.[74] This amendment introduced direct threat language very similar to that found in the *Arline* decision.[75] The language of the amendment excluded from Rehabilitation Act coverage those individuals suffering from a contagious disease and who either posed a threat to the health or safety of others or were not able to perform the required job functions.[76] While the amendment did not specifically mention HIV infection, scholars have inferred that if HIV-infection did not pose a direct threat to the health or safety of others, it should still be considered a disability.[77]

C. HIV AND AIDS UNDER THE ADA

The 1990 ADA provided protection for disabled individuals in the private sector that the Rehabilitation Act provided for similarly-situated individuals in federally-funded programs.[78] Though it borrowed heavily from the language of the Rehabilitation Act, the ADA specifically protected disabled Americans from discrimination in the private sector while in the work place, while receiving public services, and while accessing public accommodations.[79]

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71. *See* Parmet & Jackson, *supra* note 26, at 16.

72. *See* Parmet & Jackson, *supra* note 26, at 17 n.79; *see also supra* note 69.

73. *See* Parmet & Jackson, *supra* note 26, at 16-20 (showing that early HIV cases brought under the Rehabilitation Act resulted in amendments to the statute).

74. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. §§ 1681-1688 (1994)); *see also* Parmet & Jackson, *supra* note 26, at 20.

75. *See Arline*, 480 U.S. at 288. *See also* Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994).

76. *See* 29 U.S.C. § 706(8)(D) (1994). The amendments specifically read that "the term ['handicap'] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health and safety of other individuals or who, by reason of the current contagious disease or infection, is unable to perform the duties of the job." *Id. See also* Parmet & Jackson, *supra* note 26, at 20.

77. *See* Parmet & Jackson, *supra* note 26, at 20. Scholars have rationalized the logic of Congress in the amendment by pointing out "if HIV was not a disability, why limit the definition to those cases where an individual would not 'constitute a direct threat to the health or safety' of others due to their infectious disease?" Parmet & Jackson, *supra* note 26, at 20.

78. *See* ADA, 42 U.S.C. § 12101(b) (1994); *see also* Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107, 110 (1997).

79. *See* ADA, 42 U.S.C. § 12101(a)(3) (1994). Even though much of the ADA relates to employment discrimination in the private sector, it also protects the disabled from discrimination in places of public accommodation. *See* ADA, 42 U.S.C. § 12182(a) (1994). This subsection reads:

Under the ADA, discrimination that prevents a disabled person from enjoying the services of any place of public accommodation is illegal.[80] However, no place of public accommodation is prohibited from excluding a disabled person if the person poses a direct threat to the health or safety of others.[81] Furthermore, the ADA states that since it drew its definition of disability directly from the Rehabilitation Act, no provision contained within it, or regulation issued pursuant to it, shall be construed as applying a lesser standard.[82] Therefore, the ADA grants at least as much protection as the Rehabilitation Act.[83]

Prior to *Bragdon v. Abbott*,[84] some federal courts refused to find HIV infection a disability under the ADA.[85] There are two methods by which a court could do so: It could find either that asymptomatic HIV infection was not a disability that caused an impairment of a major life activity[86] or, alternatively, that reproduction was not a major life activity under the ADA.[87] The following discussion reviews a leading case for each proposition.

The first option is seen in *Runnebaum v. Nations Bank*,[88] an employment case under Title I of the ADA.[89] In *Runnebaum*, the Fourth Circuit Court of Appeals addressed whether asymptomatic HIV infection was an impairment under the ADA.[90] The court found the infection could not be a disability because it did not have a diminishing effect on the plaintiff.[91] However, the court noted that the ADA requires an in-

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"No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *Id.*

80. *See id.*

81. ADA, 42 U.S.C. § 12182(b)(3) (1994). This subsection reads:

> Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "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.

82. *See* ADA, 42 U.S.C. § 12201(a) (1994).

83. *See id.* Furthermore, the ADA states that "[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790) or the regulations issued by Federal agencies pursuant to such title." *Id.*

84. 118 S. Ct. 2196 (1998).

85. *See generally* Elizabeth A. Crawford, Comment, *The Courts' Interpretations of a Disability Under the Americans with Disabilities Act: Are They Keeping Our Promise to the Disabled?*, 35 HOUS. L. REV. 1207, 1257 (1998) (standing for the proposition that federal courts have varied widely in defining the protection provided HIV-infected individuals under the ADA).

86. *See* Runnebaum v. Nations Bank, 123 F.3d 156, 162 (4th Cir. 1997).

87. *See* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996).

88. 123 F.3d 156 (4th Cir. 1997); *see also* Crawford, *supra* note 85, at 1258.

89. *See* Runnebaum v. Nations Bank, 123 F.3d 156, 162 (4th Cir. 1997).

90. *See id.* at 167.

91. *See id.* In reaching this conclusion, the court defined "impairment" as a "decrease in

dividualized assessment when defining what constitutes an impairment, and its holding was similarly limited to the plaintiff before the court.[92]

While the court found the plaintiff did not have an impairment under the ADA, it further found that, even if his condition was an impairment, he could not show that it substantially limited a major life activity.[93] The court noted that the ADA was intended to cover only individuals whose most important major life activities were substantially impaired and concluded that only major life activities referenced by the ADA or related administrative provisions should be considered without an individualized assessment as to whether an activity is important to an individual plaintiff.[94] While the court discussed issues of reproduction and sexual relations, it refused to rule as to whether either activity was a major life activity.[95] However, the court did note that the disease does not prohibit individuals from reproducing or engaging in intimate sexual relations.[96] This was supported by the court's reasoning that it was not the disease that limited the activities, but rather the infected person's reaction and knowledge about the disease.[97] The court, therefore, required that there be a causal connection between the physical impairment and the major life activity.[98]

The second analysis by which asymptomatic HIV claims could be rejected is seen in *Krauel v. Iowa Methodist Medical Center*,[99] in which the Eighth Circuit Court of Appeals, in the context of an infertility claim that did not involve HIV infection, held that reproduction did not constitute a major life activity.[100] While there was no dispute as to whether the plaintiff's inability to reproduce was an impairment, the court found that this impairment did not substantially limit a major life activity as required by the ADA.[101] The *Krauel* court was able to reach

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strength, value, amount, or quality." *See* Crawford, *supra* note 85, at 1258. Furthermore, the court stated that to extend the ADA's coverage to "a nondiminishing nonimpairment would be contrary to Congress's intent." *Runnebaum*, 123 F.3d at 167.

92. *See* Crawford, *supra* note 85, at 1259 (citing Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995)).

93. *See Runnebaum*, 123 F.3d at 170. In defining what constituted a "major" life activity, the *Runnebaum* court defined "major" to mean "[d]emanding great attention or concern" and "greater in dignity, rank, importance, or interest." *See id.* (citing WEBSTER'S NEW RIVERSIDE UNIVERSITY DICTIONARY 10 (1986)). However, in keeping with its individualized analysis in defining a major life activity, the court noted that while working is listed by the ADA, there was no indication that working was significant to Runnebaum. *See id.*

94. *See id.*

95. *See id.* at 170-71; *see also* Crawford, *supra* note 85, at 1259-60.

96. *See* Crawford, *supra* note 85, at 1260.

97. *See* Crawford, *supra* note 85, at 1260.

98. *See* Crawford, *supra* note 85, at 1260.

99. *See* 95 F.3d 674 (8th Cir. 1996). The plaintiff claimed that her infertility "substantially limited her ability to reproduce naturally and to care for others." *See* Crawford, *supra* note 85, at 1260.

100. *See* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996).

101. *See id.* As defined under the ADA, major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1998).

this conclusion despite the fact that the ADA references the reproductive system as a body system that, if impaired, may constitute a physical impairment.[102] The court supported this conclusion by noting that the terms "impairment" and "major life activity" were distinct parts of the definition of a disability.[103] Therefore, even though the Eighth Circuit Court of Appeals found the plaintiff's inability to reproduce to be an impairment, the impairment did not substantially limit a major life activity, meaning she was not disabled for ADA purposes.[104]

As the holdings in *Runnebaum* and *Krauel* show, some courts appeared unwilling to find either that asymptomatic HIV infection was a disability that caused an impairment of a major life activity or that reproduction constituted a major life activity under the ADA at all.[105] While both cases arose under the Title I employment section of the ADA, the standards they announced also applied to the public services provisions of Title III.[106]

In conclusion, while the ADA has its foundational basis in the Rehabilitation Act, it addresses disability discrimination issues not covered by the earlier legislation.[107] Further, because much of the ADA's language was taken from the Rehabilitation Act, many cases brought under the ADA rely on Rehabilitation Act case law and statutory interpretation.[108] However, because of its relatively short history, the fact that the ADA extended discrimination coverage to the private sector, and the relative recentness of HIV litigation, many of the HIV issues addressed by courts under the ADA are matters of first impression.[109] Such was the case with the Supreme Court's recent decision in *Bragdon*, a denial of services case brought under the ADA.[110]

III. CASE ANALYSIS

Justice Kennedy, writing for the Court, affirmed part of the First Circuit Court of Appeals' decision, vacated the judgment and remanded

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102. *See Krauel*, 95 F.3d at 677.

103. *See id.* The court noted that the terms are "'separate and distinct' components of the ADA's definition of disability." *Id.*

104. *See id.*

105. *See id.; see also* Runnebaum v. Nations Bank, 123 F.3d 156, 171 (4th Cir. 1997).

106. *See Crawford, supra* note 85, at 1256-57.

107. *See generally* Parmet & Jackson, *supra* note 26, at 17-21 (standing for the proposition that the ADA addresses disability discrimination to a broader degree because it reached into the private sector).

108. *See* Parmet & Jackson, *supra* note 26, at 17-21.

109. *See* Parmet & Jackson, *supra* note 26, at 17-21. *See* Crawford, *supra* note 85, at 1257. Furthermore, it appears that the scope and parameters of the ADA continue to be defined with regards to HIV infection. *See* Crawford, *supra* note 85, at 1257.

110. *See generally* Bragdon v. Abbott, 118 S. Ct. 2196 (1998).

the case for further factual findings.[111] First, the Court affirmed the lower court's holding that HIV infection, both symptomatic and asymptomatic, is a disability under the ADA by finding that HIV infection is a physical impairment that substantially limits the major life activity of reproduction.[112] Second, in addressing application of ADA's direct threat clause, the Court remanded for further factual findings consistent with its analysis of the issue: While the significance of the risk posed by accommodation or treatment must be evaluated from the position of the person refusing service or treatment, that evaluation must be based upon medical or other objective evidence.[113] Thus, the Court vacated the lower court's decision with instructions that briefs on remand be directed at the direct threat issue.[114]

A. HIV UNDER THE AMERICANS WITH DISABILITIES ACT

Justice Kennedy, writing for the majority, first looked to the language of the Act to determine whether HIV infection constituted a disability.[115] The ADA defines a disability in three ways, but since the Court found Abbott disabled under one of them, a physical impairment that substantially limits major life activities, it did not consider the remaining two definitions.[116] The Court then laid out the three steps which it would use to evaluate Abbott's claim that HIV was a disability under the ADA.[117] First, it would consider whether Abbot's HIV infection was a physical impairment.[118] The second step was to identify the life activity Abbott claimed her disability substantially limited and then determine whether it was a "major life activity" within the definition of the ADA.[119] Third, the Court would consider whether there was a causal link between the first two questions by examining whether Abbott's

111. *See id.* at 2213.
112. *See id.* at 2209.
113. *See id.* at 2210, 2213.
114. *See id.* at 2213.
115. *See id.* at 2201. Justices Breyer, Ginsburg, Souter and Stevens joined in this analysis. *Id.* at 2213. Justices Stevens and Ginsburg filed separate concurrences, and Chief Justice Rehnquist, joined by Justices Thomas and Scalia, and in part by Justice O'Connor, dissented. *Id.*
116. *See generally id.* (defining subsection two's definition of disability, with respect to the individual as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." *See id.* at 2201 (citing ADA, 42 U.S.C. § 12102(2) (1994)).
117. *See id.* at 2202.
118. *See id.*
119. *See id.* The Court only looked to Abbott's claim that her major life activity was reproduction and child rearing, although it acknowledged that Abbott's brief and the amici briefs noted several other possible major life activities affected by her HIV-positive status. *See id.* The Court did so because of its policy to review only issues raised at the appellate level. *See id.* However, the Court did acknowledge that there were foreseeably many other major life activities affecting Abbott or others in her situation. *See id.*

impairment substantially limited her major life activity.[120] Finally, to interpret the ADA's definition of a "individual with a disability," the Court looked to the Rehabilitation Act[121] and the definition for "handicap" from the Fair Housing Amendments Act of 1988,[122] from which the ADA's definition was derived.[123] The following discussion tracks the Court's analytical framework, beginning by discussing whether HIV is a physical impairment.

1. *HIV as a Physical Impairment*

The Court began by noting that the current definition of physical impairment, as provided in Department of Health and Human Services regulations, does not contain a representative list of disorders for fear that such a list would be read as excluding any non-enumerated disorders.[124] Instead, the present definition, retained from the earliest interpretation of the Rehabilitation Act, considers a mental or physical impairment to be:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological

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120. *See id.*

121. Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1994).

122. Fair Housing Amendments Act of 1988, 42 U.S.C. § 3602(h)(i) (1994).

123. *See Bragdon*, 118 S. Ct. at 2202 (citing FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 437-38 (1986); Commissioner v. Estate of Noel, 380 U.S. 678, 681-82 (1965); ICC v. Parker, 326 U.S. 60, 65 (1945)). The Court noted that when Congress repeats a well-established term from earlier legislation in new legislation, it is presumed that the intent is for the new legislation to be construed according to earlier interpretations. *See id.* Furthermore, the Court acknowledged that in the case of the ADA, Congress adopted the specific statutory provision that "[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such titles." *Id.* (citing ADA, 42 U.S.C. § 12201(a) (1994)).

124. *See id.* However, commentary accompanying the regulation provides a non-exhaustive list that includes: "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." *Id. See also* 45 C.F.R. pt. 84, app. A, at 334 (1997) (citing legislative history supporting the contention that the Department of Health, Education & Welfare did not include a representative list out of fear that such a list would be used to limit the legislation).

> disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[125]

The Court found Abbott's condition fell under the first prong of the definition because of HIV's effects on her hemic[126] and lymphatic[127] systems.[128]

Next, the Court acknowledged that HIV infection was not included in the text of the ADA in part because HIV was not identified as the cause of AIDS until 1983.[129] The Court then described the destructive path that HIV infection takes through the human body, detailing the process in which HIV progresses to AIDS and eventually to death.[130] The Court noted that while the symptoms that each individual experiences at each stage of the disease vary to some degree in severity and type, the disease always damages a victim's white blood cells immediately.[131] The Court thus found that the immediacy with which HIV begins a severe and destructive assault on the human body's white blood cells makes HIV a physiological disorder and therefore an impairment, as defined by the ADA, from the moment of infection.[132]

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125. *Bragdon*, 118 S. Ct. at 2202 (citing 45 C.F.R. § 84.3(j)(2)(i) (1997)). The Court further noted that in 1980, after responsibility for implementation and enforcement of Section 504 shifted to the DOJ and the Attorney General, the definition of "physical or mental impairment" was adopted from the HEW regulation cited above. *See* 28 C.F.R. § 41.31(b)(1) (1998); *see also Bragdon*, 118 S. Ct. at 2203 (citing verbatim the 1977 interpretation of the Rehabilitation Act's definition).

126. The hemic system is the system of the body having to do with blood. *See* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY, *supra* note 14, at 890.

127. The lymphatic system is the process by which the fluid containing white blood cells is returned to the blood in response to inflammation or the presence of antigens. *See* WEBSTER ENCYCLOPEDIC UNABRIDGED DICTIONARY, *supra* note 14, at 1148.

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

129. *See id.*

130. *See id.* at 2203-05. The Court began by noting that the primary stage of the disease begins immediately upon exposure, lasts three months and results in a decline in the number of white blood cells. *See id.* Mononucleosis-type symptoms emerge approximately one to six weeks after infection, and HIV antibodies are detectable in the blood stream within three weeks. *See id.* The next stage of the disease is often referred to as asymptomatic, but this is misleading since clinical symptoms persist. *See id.* This stage usually lasts between seven and eleven years, with a concentration of the virus appearing in the lymph nodes where it further attacks the CD4+ (white blood cells). *See id.* These CD4+ cells decline at a rate of 5% to 10% (40 to 80 cells/mm3) per year during this stage of the disease. *See id.* The final stage is when the infection progresses to actual AIDS. *See id.* At this point, a person's CD4+ count is below 200 cells/mm3 of blood, or CD4+ cells constitute less than 14% of the total lymphocytes. *See id.* At this stage of the disease, conditions such as pneumocystis carninii pneumonia, Kaposi's sarcoma and non-Hodgkins lymphoma persist in conjunction with fever, weight loss, fatigue, lesions, nausea and diarrhea. *See id.* Death usually occurs when the CD4+ count falls below 10 cells/mm3. *See id.*

131. *See id.*

132. *See id.*

2. *Reproduction and Child Bearing as Major Life Activities*

Having found HIV to be an impairment, Justice Kennedy turned to whether Abbott's claimed disability substantially affected a major life activity, a required component of ADA claims.[133] While the Court acknowledged that Abbott made several arguments to show how HIV infection substantially limits major life activities, the Court addressed only the disease's impact on reproduction, framing the issue as whether reproduction is a major life activity under the ADA.[134]

The Court began by examining the plain meaning of the word "major."[135] The Court deferred to the First Circuit Court of Appeal's holding that "[t]he plain meaning of the word 'major' denotes comparative importance and suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance."[136] The Court then acknowledged that reproduction, which along with its accompanying sexual dynamics is at the head of the process of life, was a major life activity.[137]

In his brief, Bragdon conceded the importance of reproduction, but he attempted to distinguish it from the representative major life activities inherited by the ADA from the Rehabilitation Act.[138] Bragdon insisted that Congress listed these activities because they have a public, daily or economic character.[139] However, the Court dismissed this argument,

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

134. *See id.* at 2205.

135. *See id.* The definition of a disability in the text of the ADA is "a physical or mental impairment that substantially limits one or more major life activities of such individual." ADA, 42 U.S.C. § 12102(2)(A) (1994).

136. *Bragdon*, 118 S. Ct. at 2205 (quoting Abbott v. Bragdon, 107 F.3d 934, 939-40 (1st Cir. 1998)).

137. *See id.* Although the Court did not specifically state that this was the case, support for its conclusion might be inferred from case law defining fundamental rights. *See, e.g.*, Cary v. Population Servs. Int'l, 431 U.S. 678 (1977) (recognizing decisions regarding childbearing as a fundamental right); Eisenstadt v. Baird, 405 U.S. 438 (1972) (recognizing the freedom of the individual to be free of unwarranted government intrusion into the fundamental right to decide whether to bear a child); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating insufficiently narrowly tailored state legislation because of the fundamental nature of the right to procreation and matrimony); Skinner v. Oklahoma, 316 U.S. 535 (1942) (finding that procreation is fundamental to the existence and survival of the race).

138. Brief for Petitioner Bragdon at 14, 28, 30, 31, Bragdon v. Abbott, 118 S. Ct. 2196 (1998) (No. 97-156) *see also* 28 C.F.R. § 41.31(b)(2) (1998) (standing for the proposition that the representative and nonexclusive major life activities recognized by the ADA include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working); 45 C.F.R. § 84.3(j)(2)(ii) (1998).

139. *See Bragdon*, 118 S. Ct. at 2205 (citing Brief for Petitioner Bragdon at 14, 28, 30, 31, *Bragdon* (No. 97-156)); *see also* Brief for Petitioner Bragdon at 36-37, *Bragdon* (No. 97-156) (citing Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996)). In *Krauel*, the plaintiff claimed a violation of the ADA because her employer denied insurance coverage for fertility treatments. 95 F.3d at 676. The court held that infertility was not an impairment that substantially affected a major

pointing out that nothing in the definition of the word "major" signifies that an activity not having a public, economic or daily dimension is regarded as so much less important than other activities that it is not included within the meaning of "major."[140] The Court again referred to the Rehabilitation Act, noting that it did not provide a general principle for defining a major life activity but instead provided a representative list of possible examples.[141] The list includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.[142] The Court noted that caring for one's self and performing manual tasks, as provided in the representative list of the Rehabilitation Act, disposed of Bragdon's argument that a major life activity must have a public or economic character.[143]

Further, the Court found that the definitions in the Rehabilitation Act's regulations support the proposition that reproduction is a major life activity because it is at least as important as working and learning.[144] The Court went on to find that Bragdon had posed no credible basis for contending that a major life activity must have a public, economic or daily character.[145] Therefore the Court affirmed the First Circuit's holding that reproduction is a major life activity under the ADA.[146]

3. *HIV Infection's Substantial Effect on Reproduction*

In the final part of its analysis, the Court found Abbott's ability to reproduce was substantially affected in two ways.[147] First, an HIV-positive woman poses a significant risk of infecting her male partner in

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life activity under the ADA. *See id.* at 677. It appears that Bragdon construed the court's statement that since Krauel's infertility did not interfere with her employment to mean that the ADA covered only impairments with a public, daily or economic character. *See Bragdon*, 118 S. Ct. at 2205; *see also Krauel*, 95 F.3d at 677.

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

141. *See id.*

142. *See id.* (citing 28 C.F.R. § 41.31(b)(2) (1997); 45 C.F.R. § 84.3(j)(2)(ii) (1997)).

143. *See id.* It appears that the Court specifically rejected the argument that a major life activity had to have a public or economic character. *See id.* Instead, it appears the Court adopted a definition that related to the comparative importance, relative to the activities provided in the Rehabilitation Act, of the activity to the individual, without regard for the activities' public or economic character. *See id.*

144. *See id.* The Rehabilitation Act's representative list defined major life activities to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1998).

145. *See Bragdon*, 118 S. Ct. at 2205. Bragdon sought to equate the definition of a "major activity" to that of a "public activity." *See id.* The Court dismissed the attempt to limit this definition because the representative list of the Rehabilitation Act includes activities which are not necessarily public, such as caring for one's self and performing manual tasks. *See id.*

146. *See id.*; *see also* 45 C.F.R. § 84.3(j)(2)(ii).

147. *See Bragdon*, 118 S. Ct. at 2206. The ADA defines a major life activity to be substantially limited when it is restricted as to the condition, manner or duration under which it can be performed in comparison to most people. *See id.*

the process of conception.[148] To support this assertion, the Court cited several medical studies that consider the risk of infection to be around twenty to twenty-five percent, a statistically significant percentage.[149]

Second, an infected woman poses a risk of infecting her child through perinatal transmission.[150] In support of this contention, the Court examined knowledge of infection rates, drawn from medical information available in 1994, that established an approximately twenty-five percent risk of infection.[151] Bragdon acknowledged this risk, but he maintained that antiretroviral therapy[152] could reduce the risk to levels as low as eight percent.[153] The Court rejected this argument, however, noting that the relevant regulatory language required that the substantiality of risk be assessed without reference to the mitigating procedures available.[154] Regardless of this, however, the Court found that even an eight percent risk of infection qualified as a substantial limitation on reproduction.[155]

The Court also addressed the danger to public health caused by transmission of HIV through conception or child birth.[156] The Court

148. *See id.*

149. *See id.* (citing Osmond & Padian, *Sexual Transmission of HIV, in* AIDS KNOWLEDGE BASE 1.9-.8, and tbl. 2 (1984); *see also* Haverkos & Battjes, *Female-to-Male Transmission of HIV*, 268 JAMA 1855, 1856 tbl. (1992)).

150. *See id.* Perinatal transmission is defined as a period extending approximately from the 28th week of gestation to the 28th day after birth. *See* MOSBY'S MEDICAL, NURSING, AND ALLIED HEALTH DICTIONARY 1193 (4th ed. 1994).

151. *See Bragdon*, 118 S. Ct. at 2206 (citing Report of a Consensus Work Shop, *Maternal Factors Involved in Mother-to-Child Transmission of HIV-1*, 5 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 1019, 1020 (1992) (placing the risk of mother-to-child transmission between 14% and 40%, with most studies falling around the 25% to 30% range); Connor et al., *Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment*, 331 NEW ENG. J. MED. 1173, 1176 (1994) (finding that the risk is approximately 25.5%); *see also* STRAPENS & FEINBERG, MEDICAL MANAGEMENT OF AIDS 32 (showing that the average risk of infection is approximately 25%)).

152. Antiretroviral drug treatment is a term used to describe a multi-drug treatment program employed to combat retro viruses such as HIV. *See* Mary Mycek et al., *Lippincott's Illustrated Reviews, in* PHARMACOLOGY 368 (2d ed. 1997).

153. *See Bragdon*, 118 S. Ct. at 2206; *see also* Connor, et al., *supra* note 152, at 1176 (showing a transmission risk of 8.3%); Sperling et al., *Maternal Viral Load, Zidovudine Treatment, and the Risk of Transmission of Human Immunodeficiency Virus Type 1 from Mother to Infant*, 335 NEW ENG. J. MED. 1621, 1622 (1996) (showing a transmission risk of 7.6%).

154. *See Bragdon*, 118 S. Ct. at 2206. The requirement that the risks be assessed without reference to the mitigating procedures available are found in the applicable statutory provisions. *See* Brief for United States as Amicus Curiae at 18 n.10, *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998) (No. 97-156) (citing 28 C.F.R. pt. 36 app. B at 611 (1997); 29 C.F.R. pt. 1630 app. at 351 (1997)).

155. *See Bragdon*, 118 S. Ct. at 2206. The Court noted that the Solicitor General discounted the relevance of the 8% figure because regulatory language requires that the substantial limitation imposed by a disability be evaluated without consideration of mitigating measures. *See id.* (citing Brief for United States as Amicus Curiae at 18 n.10, *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998) (No. 97-156) (citing 28 C.F.R. pt. 36 app. B at 611 (1997); 29 C.F.R. pt. 1630, app. at 351 (1997)). The Court further stated that "[i]t cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction." *Bragdon*, 118 S. Ct. at 2206.

156. *See id.*

reasoned that this risk qualified HIV infection as a "substantial limitation" on reproduction.[157] Finally, the Court stated that the definition of substantial limitation did not require that the difficulties experienced by the infected person be insurmountable.[158] The decision of an individual suffering from a disability to engage in a particular behavior is no longer a personal choice when such an individual faces substantial limitations because of his or her condition.[159] After this analysis, the Court found no triable issue of fact and so affirmed the summary judgment holdings of the District Court and the First Circuit Court of Appeals: Abbott's HIV infection was a physical impairment that substantially limited her major life activity of reproduction and brought her within the coverage of the ADA.[160]

B. ADDITIONAL AGENCY, JUDICIAL AND JUSTICE DEPARTMENT SUPPORT FOR THE COURT'S HOLDING THAT HIV INFECTION SUBSTANTIALLY LIMITS REPRODUCTION

The Court cited additional support for its holding that asymptomatic HIV infection does significantly impair the major life activity of reproduction.[161] It derived this support from the findings of government agencies and judicial opinions under the Rehabilitation Act.[162] The Court was willing to consider these older decisions and findings because when previously defined statutory terms are incorporated into new legislation, the new legislation is to be construed in a manner consistent with prior judicial and administrative statements.[163]

First, the Court looked to the Rehabilitation Act for further support of its inclusion of HIV infection within the protections of the ADA.[164] Specifically, the Court found that every agency interpreting the Rehabil-

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157. *See id.* The Court also noted that in some states, such as Iowa, Maryland, Montana, Utah, North Dakota and Washington, it is illegal for an HIV-infected person to have sex with others. *See id.* While there are no reported North Dakota cases in which an HIV-infected individual has been charged under this statute, other states have charged and convicted persons under similar statutes. *See* Burk v. State, 478 S.E.2d 416, 417 (Ga. App. 1996) (convicting defendant of a felony under the Georgia statute). The impact *Bragdon* will have on such statutes in not clear. Georgia, South Carolina and Tennessee also have statutes making transmission of HIV a felony. *See* GA. CODE ANN. § 16-5-60 (1996); S.C. CODE ANN. § 44-29-145 (Law Co-op. Supp. 1995); TENN CODE. ANN. § 39-13-109 (Supp. 1996).

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

159. *See id.*

160. *See id.* at 2207.

161. *See id.*

162. *See generally id.* at 2207-09 (explaining that the Court's decision is supported by administrative and judicial precedent).

163. *See id.* at 2208. "[When] Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have knowledge of the interpretation given to the incorporated law." Lorillard v. Pons, 434 U.S. 575, 581 (1978).

164. *See Bragdon*, 118 S. Ct. at 2207.

itation Act found persons with asymptomatic HIV to be covered.[165] For instance, the DOJ issued an opinion in 1988 concluding that the Rehabilitation Act protected symptomatic and asymptomatic HIV-infected individuals from discrimination.[166] This opinion further found that HIV infection imposed a substantial limitation on the major life activity of reproduction.[167] The Court therefore noted that "[w]ithout exception, the other agencies to address the problem reached the same result."[168] The Court also examined judicial opinions prior to the enactment of the ADA, noting that every court which addressed the issue concluded that asymptomatic HIV infection met the definition of a handicap under the Rehabilitation Act.[169]

The Court derived additional support for its decision from administrative guidelines issued by the DOJ.[170] The DOJ drafted these guidelines for the implementation of the public accommodation provisions of Title III of the ADA.[171] The Court noted that the DOJ's definition of a disability was consistent with the Court's definition, because the regulations clearly stated that Congress intended for the ADA's definition to be construed with the same construction as the Rehabilitation Act's definition of handicap.[172]

The DOJ, however, went even further, adding symptomatic and asymptomatic HIV infection to the representative list of disorders which

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165. *See id.* at 2207-08 (citing Federal Contract Compliance Manual App. 6D, 8 FEP Manual 405:352 (Dec. 23, 1988); *In re* David Ritter, No. 03890089, 1989 WL 609697 at *10 (EEOC, Dec. 8, 1989); *see also* Comptroller General's Task Force on AIDS in the Workplace, Coping with AIDS in the GAO Workplace: Task Force Report 29 (Dec. 1987); Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 113-14, 122-23 (June 1988)). These agencies have also adhered to this conclusion since the enactment of the ADA. *See id.* (citing 5 C.F.R. § 1636.103 (1997); 7 C.F.R. § 15e.103 (1998); 22 C.F.R. § 1701.103 (1997); 24 C.F.R. § 9.103 (1997); 34 C.F.R. § 1200.103 (1997); 45 C.F.R. §§ 2301.103, 2490.103 (1997); *In re* Westchester County Med. Ctr., [1991-94 Transfer Binder] CCH Employment Practices Guide para. 5340, pp. 6110-12 (Apr. 20, 1992), *aff'd, id.* para. 5362, pp. 6249-50 at *1 (Dept. Of Health & Human Servs. Departmental Appeals Bd., Sept. 25, 1992); *In re* Rosebud Sioux Tribe, No. 93-504-1, 1994 WL 603015 (Dept. Of Health & Human Servs. Department of Appeals Bd., July 14, 1994); *In re* David T. Martin, No. 01954089, 1997 WL 151524 at *4 (EEOC, Mar. 27, 1997)).

166. *See id.* (citing Application of Section 504 of the Rehabilitation Act to HIV-infected Individuals, Surgeon General C. Everett Koop, 12 Op. Off. Legal Counsel 264, 264-265, 271 (Sept. 27, 1988) (preliminary print) (footnote omitted)).

167. *See id.*

168. *Id.*

169. *See id.; see also supra* note 69.

170. *See Bragdon*, 118 S. Ct. at 2208-09.

171. *See id.* Title III of the ADA prohibits discrimination against handicapped individuals by private entities that provide public accommodations. *See* ADA 42 U.S.C. §§ 12181, 12189 (1994). Title III specifically designates the DOJ as the agency responsible for issuing "regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court." *See Bragdon*, 118 S. Ct. at 2209 (citation omitted).

172. *See id.; see also* 28 C.F.R. § 36.103(a) (1998) (indicating that Congress intended for the ADA's definition of handicapped to be given the same construction as the Rehabilitation Act's definition).

constitute a physical impairment.[173] In addition, the Court found further support for its holding from agencies authorized to implement the other sections of the ADA, all of which had concluded that HIV infection is a physical impairment under the ADA.[174] The Court therefore concluded that holding HIV infection to be an impairment which substantially limits the major life activity of reproduction was supported by all of the regulatory authorities which had addressed the issue.[175]

C. THE DIRECT THREAT ISSUE

The Court next addressed whether a private health care provider performing an invasive procedure on an infectious patient in a traditional office setting posed a direct threat to the health or safety of others within the context of regular office treatment.[176] Additionally, the Court considered whether courts should defer to the health care provider's professional judgment when that judgment is reasonable in light of current medical knowledge.[177] Finally, the Court considered the lower courts' finding in favor of Abbott's summary judgment motion, questioning whether Bragdon could have raised a triable issue of fact regarding the direct threat issue.[178] In the final analysis, the Court remanded the case for further exploration consistent with its opinion.[179]

The Court first considered the language of the ADA and noted that Bragdon could have legally refused to treat Abbott if her HIV condition

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173. *See id.* (citing 28 C.F.R. § 36.104(1)(iii) (1997)). The DOJ apparently did this to clarify that HIV infection was considered in the implementation of Title III accommodation provisions. *See id.* Since the Department of Health and Welfare originated the definition of handicap later adopted by the Rehabilitation Act prior to the identification of HIV or AIDS, it was logical for the DOJ to recognize HIV specifically when it revisited the implementation of Title III of the ADA. *Cf. id.*

174. *See id.* at 2209 (citing 28 C.F.R. § 35.104(1)(iii) (1997)); 29 C.F.R. pt. 1630 app. at 350 (1997); 49 C.F.R. §§ 37.3, 38.3 (1997); 56 Fed. Reg. 13,858 (1991); U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIVISION, THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL 4 (Nov. 1993); EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICAN WITH DISABILITIES ACT II-3 (Jan. 1992) [hereinafter EEOC TECHNICAL ASSISTANCE MANUAL]; EEOC INTERPRETATIVE MANUAL § 902.2 (d), at 902-13 to 902-14 (reissued Mar. 14, 1995) [hereinafter EEOC INTERPRETATIVE MANUAL] *reprinted in* 2 BNA EEOC COMPLIANCE MANUAL 902:0013 (1998); EEOC INTERPRETATIVE MANUAL § 902.4(c) (1), at 902-21; § 902.2 (d), at 902-14 n.18; EEOC TECHNICAL ASSISTANCE MANUAL II-4)).

175. *See id.*

176. *See id.*

177. *See id.* at 2209-10. The case presented two additional questions for review, but the Court, without explanation, refused to grant certiorari. *See id.* The first question denied review was "[w]hat 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?" *Id.* The other question was "[d]id 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?" *Id.*

178. *See id.* at 2213.

179. *See id.*

"pose[d] a direct threat to the health or safety of others."[180] The Court noted that the direct threat provision of the ADA was derived from its decision in *Arline*, which interpreted the Rehabilitation Act and defined a direct threat to be "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."[181] This interpretation by the *Arline* Court meant that under the Rehabilitation Act, and later the ADA, an employer could refuse to hire an individual who posed a significant risk of transmitting an infectious disease to other persons.[182]

In the services provider context, the Court continued, a provider may refuse service to an individual with an infectious disease only where there is a significant risk of transmission to others.[183] The Court also noted that while the significance of such a risk must be determined from the point of view of the individual who refuses the accommodation, the risk must be evaluated using medical or other objective evidence.[184] Therefore, a court evaluating Bragdon's actions was required to assess the risk Abbott posed based on objective, scientific information available in 1994.[185] The Court also stated that Bragdon received no special deference because he was a licensed dentist.[186] Finally, the Court found that the reasonableness of Bragdon's actions should be evaluated from the viewpoint of public health authorities and could only be refuted by generally-accepted medical opinions with support from credible scientific evidence.[187] With these criteria in mind, the Court turned to a review of the lower courts' findings on the direct threat issue.[188]

The Court initially acknowledged that the First Circuit properly reviewed the district court's findings for clear error, but it expressed concern that the circuit court may have mistakenly relied upon the 1993 Centers for Disease Control (CDC) Dentistry Guidelines[189] and the 1991

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180. *Id.* at 2210 (citing ADA, 42 U.S.C. § 12182(b)(3) (1994)).

181. *See id.* (acknowledging that the ADA's direct threat language was derived from *School Bd. of Nassau County. v. Arline*, 480 U.S. 273, 287 (1987).

182. *See id.* In 1990, Congress chose to codify in the ADA the direct threat language developed in *Arline* and adopted by the Rehabilitation Act. *See id.*; *see also* ADA, 42 U.S.C. § 12182(b)(3) (1994).

183. *See Bragdon*, 118 S. Ct. at 2210.

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.* at 2210-11 (citing 28 C.F.R. pt. 36 app. B, at 626 (1997) (standing for the proposition that a healthcare professional may refute the prevailing medical consensus by proffering other credible scientific authority); School Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987); W. KEETON, ET AL., PROSSER AND KEETON ON LAW OF TORTS § 32, at 187 (5th ed. 1984) (discussing how prevailing medical opinions may be refuted)).

188. *Id.*

189. *See Bragdon*, 118 S. Ct. at 2210-11. The Center for Disease Control [hereinafter CDC]

American Dental Association Policy on HIV[190] in evaluating whether Bragdon raised a triable issue of fact on the direct threat issue.[191] In generally approving the First Circuit's standard of review, the Court pointed out that the court had correctly rejected the district court's reliance on affidavits from a CDC official that addressed risk of HIV transmission in the dental field because it was not clear that the conclusion developed in the affidavits had been published by the CDC at the time Bragdon refused to treat Abbott.[192]

The Court, however, did express concern that the CDC guidelines merely outlined the CDC's recommendations to address the risk of transmitting HIV without actually assessing the level of risk.[193] The Court was also concerned that the First Circuit assigned too much weight to the 1991 American Dental Association Policy on HIV.[194] The policy stated that there was very little risk of HIV transmission through office dental treatment when recommended procedures were followed.[195] The Court indicated that these two sources may have allowed Bragdon to raise a triable issue of fact at trial, making the circuit's summary judgment ruling a remandable error.[196]

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provided recommendations concerning every aspect of dental practice, including vaccinations for dental workers, protective attire and barrier techniques, hand care, use of sharp instruments and needles, sterilization of instruments, disinfection of the dental unit and environmental surfaces, use and care of hand pieces and other dental devices, and single-use disposable instruments. Abbott v. Bragdon, 912 F. Supp. 580, 588 n.7 (D. Me. 1995) (citing CDC, RECOMMENDED INFECTION-CONTROL PRACTICES FOR DENTISTRY).

190. *See Bragdon*, 118 S. Ct. at 2210-11. The American Dental Association's 1991 Policy on AIDS, HIV Infection and the Practice of Dentistry stated that "[c]urrent scientific and epidemiological evidence indicates that there is little risk of transmission of infectious diseases through dental treatment if recommended infection control procedures are routinely followed." Abbott v. Bragdon, 107 F.3d 934, 945-46 (1st Cir. 1997) (citing the American Dental Association's 1991 Policy on AIDS, HIV Infection and the Practice of Dentistry). Further, the court noted that "patients with HIV infection may be safely treated in private dental offices when appropriate infection control procedures are employed." *Id.*

191. *See Bragdon*, 118 S. Ct. at 2210-11.

192. *See id.* at 2211. Wayne Marianos, D.D.S., M.P.H. was a Captain in the United States Public Health Service at the CDC and served as the Director of the Division of Oral Health. *Abbott*, 912 F. Supp. at 589. "Dr. Marianos' affidavits stated that when implemented, the CDC recommendations reduce the already low risk of disease transmission in the dental environment, from either patient to dental health care worker, dental health care worker to patient, or patient to patient." *Id.* Furthermore, "Routine dental treatment to persons with HIV or AIDS requires no additional procedures beyond the CDC recommendations." *Id.*

193. *See* Bragdon, 118 S. Ct. at 2211.

194. *See id.*

195. *See id.*

196. *See id.* The Court noted that the CDC "[g]uidelines do not necessarily contain implicit assumptions conclusive of the point to be decided." *Id.* The Court also expressed concern over the American Dental Association policy, because the Association is a professional organization and not a public health authority. *See id.* It was also unclear how much of the Association's policy, which assessed the risk of transmission, was based on ethical and professional considerations rather than actual scientific data. *See id.* at 2211-12. However, the Court did acknowledge that the policy provided some evidence of objective assessment as to the risk posed by HIV infected individuals treated in a dental setting when infection control procedures are followed. *See id.*

The Court also pointed out that the circuit was correct in refusing to give deference to Bragdon's offer to treat Abbott in a hospital setting.[197] Bragdon made no factual showing to support his belief that the hospital setting would reduce the risk of infection or that he in fact had privileges at a local area hospital, and Bragdon's own expert witness testified to the lack of any scientific basis to support the theory that treatment in a hospital would reduce the risk of infection.[198] Therefore, the Court found that the First Circuit made the correct ruling on this issue.[199]

The Court then noted that Bragdon only had to establish a triable issue of fact to overcome a summary judgment motion on the direct threat issue.[200] While the Court pointed out that the record did provide information, outside of the CDC and American Dental Association reports, that indicated it is safe to treat HIV-infected individuals in dental offices, it was unclear whether the expert testimony on Abbott's behalf was based on medical facts known in 1994.[201] Further, the Court acknowledged that even discounting Abbott's expert testimony, it was questionable whether Bragdon could have raised a triable issue of fact based upon his reliance on two points.[202]

The first point was Bragdon's reliance on an inconclusive medical report which claimed that use of high-speed drills in the presence of surface cooling water created the risk of water-vapor-airborne HIV transmission.[203] The Court noted that even Bragdon's expert, who presented the medical report to the lower court, conceded on cross examination that the risk of HIV being transmitted by vapor spray was nonexistent.[204] Therefore, the Court concluded that this expert's testimony was based on mere opinion without positive data and did not have a "traceable, analytical basis in objective fact."[205]

The second point that led the Court, despite its eventual holding, to believe that Bragdon might still be unable to defeat a motion for summary judgment was Bragdon's citation to a 1994 CDC report.[206] This report proffered that as of September 1994, seven dental health care workers had possibly been infected through occupational transmis-

197. *See id.*
198. *See id.* at 2211.
199. *See id.*
200. *See id.*
201. *See id.* Bragdon's refusal to treat Abbott was evaluated within the context of medical knowledge available at the time he refused to treat her, September of 1994. *See* Abbott v. Bragdon, 107 F.3d 934, 942 (1st Cir. 1998).
202. *See Bragdon*, 118 S. Ct. at 2212
203. *See id.* (citing Johnson & Robinson, *Human Immunodeficiency Virus-1 (HIV-1) in the Vapors of Surgical Power Instruments*, 33 J. MED. VIROLOGY 47, 47 (1991)).
204. *See id.*
205. *Id.*
206. *See id.*

sion.[207] The Court pointed out that in 1994 the CDC did not know whether the health care workers became infected because of occupational exposure.[208] Further, the Court noted that while the report might have provided some support for Bragdon's position, the Court did not believe such evidence alone would justify a reversal of the summary judgment finding.[209]

Nevertheless, the Court remanded the case to the lower court.[210] The Court reached this decision because the record was unclear as to what was known, and when was it known, with relation to the CDC report and how much deference was given to the American Dental Association policy.[211] Remand would allow the lower court to make additional factual findings and to apply an analysis consistent with the Court's holding, therefore leaving open the possibility that Bragdon could present a triable issue of fact on the sufficiency of risk question.[212]

D. THE OTHER OPINIONS

A majority of the Court, consisting of Justices Breyer, Ginsburg, Souter, and Stevens, joined the opinion of Justice Kennedy.[213] Justices Stevens and Ginsburg filed separate concurrences.[214] Chief Justice Rehnquist filed an opinion, in which Justices Scalia and Thomas joined and in which Justice O'Connor joined in part, which did not find asymptomatic HIV infection to be a disability affecting a major life activity under the ADA but which concurred on the remand of the direct threat issue.[215]

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207. *See id.* (citing U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, CDC, HIV/AIDS SURVEILLANCE REPORT, VOL. 6, NO. 1, at 15 tbl. 11 (June 1994)).

208. *See id.* The workers' source of infection was unknown because they did not submit to testing at an appropriate time after their exposure, but it was unclear whether this reason was known to the CDC in 1994. *See id.*

209. *See id.* The Court's analysis was limited because it had refused to grant certiorari on whether Bragdon had presented a genuine issue of fact for trial and because the briefs it received were not directed at the issue of sufficiency of the risk. *See id.* at 2213.

210. *See id.*

211. *See id.*

212. *See id.* at 2213. In remanding the case, the Court noted that while the First Circuit might reach the same conclusion as it had initially, the remand would permit full exploration of the issue. *See id.*

213. *See id.* at 2213.

214. *See id.*

215. *See id.* at 2213.

1. *Justice Stevens, Breyer and Ginsburg Concur*

In an apparent compromise vote to assure a majority, Justice Stevens joined the opinion of Justice Kennedy.[216] Justice Stevens indicated that he believed that Abbott's condition was clearly a disability under the ADA and that Bragdon had not raised a triable issue of fact on the direct threat issue.[217] Therefore, Justice Stevens would rather have affirmed absolutely the lower court's opinions.[218] However, because he agreed with the legal reasoning of the majority on the direct threat issue, and because the lower courts may have relied upon data that was inconclusive, he opted to concur.[219]

Writing separately, Justice Ginsburg also concurred in the majority's holding.[220] Justice Ginsburg's concurrence stated her belief that the statutory definitions were correctly met and that "[n]o rational legislator, it seems to me apparent, would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible."[221] However, Justice Ginsburg indicated that she felt comfortable remanding the case on the direct threat issue, opting to err on the side of caution so as to protect health care workers.[222]

2. *Chief Justice Rehnquist, With Whom Justices Scalia and Thomas Join, and With Whom Justice O'Connor Joins as to Part Two, Concurring in the Judgment in Part, but Dissenting in Part*

Chief Justice Rehnquist's strongly-worded opinion starts by looking at the exact language of the ADA and points out that an individualized inquiry is required when determining whether an individual has a dis-

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216. *See id.* Justice Stevens noted that while he did not "believe petitioner has sustained his burden of adducing evidence sufficient to raise a triable issue of fact on the significance of the risk posed by treating respondent in his office" he was "in agreement with the legal analysis in Justice [Kennedy's] opinion." *See id.* Therefore, he noted that he joined the Kennedy opinion "in order to provide a judgment supported by a majority, . . . even though I would prefer an outright affirmance." *See id.*

217. *See id.*

218. *See id.*

219. *See id.*

220. *See id.*

221. *Id.* at 2213-14.

222. *See id.* at 2214. Justice Ginsburg stated that "in view of the 'importance [of the issue] to health care workers,' . . . it is wise to remand." *See id.* (citation omitted). She also noted that "[b]y taking this course, the Court ensures a fully informed determination whether respondent Abbott's disease posed a significant risk to the health or safety of [petitioner Bragdon] that [could not] be eliminated by a modification of policies, practices, or procedures." *See id.* (citation omitted).

ability.[223] The Chief Justice conceded that Abbott's HIV-positive status was a physical impairment, noting that Bragdon did not dispute that fact.[224] However, while the majority of the Court considered the next relevant question to be whether reproduction was a major life activity, the Chief Justice indicated that he thought the issue should have been individually directed to Abbott's own desire to conceive a child.[225]

Chief Justice Rehnquist therefore believed that the question should have been whether reproduction, prior to becoming HIV positive, was a major life activity of Abbott's.[226] He pointed out that the record provided no evidence that this was the case and further noted that Abbott testified in her deposition that her HIV status had not in any way limited her ability to carry out life functions.[227] The dissent therefore argued that reproduction was not a major life activity of Abbott's.[228]

Next, the dissent turned to the more generalized question of whether reproduction could ever be a major life activity, as insisted by the majority.[229] While the majority defined "major" as being of comparative importance to the representative list of activities, the Chief Justice sought an alternative definition.[230] He sought to define "major" as being "greater in quantity, number, or extent."[231] He considered this definition to be more indicative of the illustrative list of activities included in the statute, the link between the activities being that they are frequently within the day-to-day activities of a normally functioning person.[232]

The dissent further indicated that the majority was wrong in asserting as a general matter that reproduction is a major life activity simply because the ADA defines "physical impairment" to include physiologi-

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223. *See id.* (noting that "'major life activities' allegedly limited by an impairment must be those 'of such individual,'" and because the District Court issued summary judgment on the questions before the court, all disputed issues of material fact must be resolved against Abbott).

224. *See id.*

225. *See id.* It appears that by "individualized" the Chief Justice meant that the disability and its negative effect on a major life activity should be examined solely from the vantage point of the individual making the claim. *See id.*

226. *See id.* at 2214-15. However, the majority assumed that reproduction could be a major life activity without an individualized assessment, a point the dissent was clearly not ready to concede. *See id.*

227. *See id.* at 2215.

228. *See id.*

229. *See id.*

230. *See id.* (showing the representative list of major life activities listed within in the statute as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working") (citing 42 U.S.C. § 12201(a) (1997); 45 CFR § 84.3(j)(2)(ii) (1997)).

231. *See id.* (citing WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1994) as providing alternative definitions to the word "major"). It appears that the dissent, by choosing this definition, believed it was the frequency in which a person engaged in an action that determined whether or not it is a major life activity. *Cf. id.*

232. *See id.*

cal disorders affecting the reproductive system.[233] The dissent pointed out that many reproductive disorders affect the major life activities defined in the language of the ADA and are not mentioned specifically elsewhere in the statute.[234] Therefore, the dissent concluded that the majority had erroneously decided that reproduction was a major life activity.[235]

The dissenters next expressed their opinion that even if reproduction is considered a major life activity, asymptomatic HIV infection does not substantially limit that activity.[236] The dissent first disputed the majority's contention that an HIV-infected woman could not engage in sexual intercourse, give birth or raise a child to maturity.[237] The dissent pointed out that the ADA's definition focuses on the present tense definition of "limits" and claimed that Abbott was not limited in any way from bearing or raising a child.[238] The dissent argued that, using the majority's logic, any individual with a genetic marker for a potential future debilitating disease would be considered presently disabled.[239]

On the direct threat issue, Chief Justice Rehnquist agreed with the majority that the lower court's summary judgment should be vacated, but he did so for different reasons.[240] The dissenters' primary point of contention was the deference and weight the majority gave to the views of public health authorities.[241] The Chief Justice reasoned that he was aware of no legal practice whereby courts were required to give the scientific views of politically-appointed public health authorities special weight in litigation between private parties in federal court.[242]

The Chief Justice was also unpersuaded by the majority's reliance on a statement taken from *Arline* indicating that the risk of contagion should be evaluated by the courts in deference to the "reasonable

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233. *See id.* The majority had argued that because the Rehabilitation Act referenced reproductive disorders in an illustrative list, it was the intent of the drafters to include such disorders. *See id.* Therefore, when the ADA was created, it also received the import of the reproductive disorders. *See id.*

234. *See id.* (showing that dysmenorrhea, endometriosis and cancer limit a woman's ability to engage in major life activities and that these are not specifically referenced in the language of the ADA).

235. *See id.*

236. *See id.* at 2215-16.

237. *See id.* at 2216.

238. *See id.* The dissent supported this position by stating that "[w]hile individuals infected with HIV may choose not to engage in these activities, there is no support in language, logic, or our case law for the proposition that such voluntary choices constitute a 'limit' on one's own life activities." *See id.*

239. *See id.*

240. *See id.*

241. *See id.* The majority questioned the First Circuit's reliance on the 1993 CDC Dentistry Guidelines and the 1991 American Dental Association Policy on HIV. *See id.* at 2211.

242. *See id.* at 2217.

medical judgments of public health officials."[243] He considered this phrase to be dictum and pointed out that *Arline* had an attached footnote which seemed to indicate that the Court was stressing respect for general medical judgment, not preferring the judgment of public health authorities over their private sector counterparts.[244] The dissent therefore reasoned that if medical judgment from both the public and private sector was evaluated on its merit, Bragdon did present enough evidence to avoid summary judgment on the direct threat issue, making remand appropriate.[245]

3. *Justice O'Connor's Concurrence in the Judgment in Part, but Dissenting in Part*

Justice O'Connor was in agreement with Chief Justice Rehnquist's dissent to the extent it argued that Abbott's condition should be evaluated on an individualized basis and that Abbott had not proven a limitation upon a major life activity.[246] However, Justice O'Connor did not address the issue of whether other intimate or family relationships constituted major life activities or whether an individual's HIV-positive status could constitute a limitation on reproduction if reproduction were a major life activity.[247] Therefore, Justice O'Connor did not join the part of the Chief Justice's opinion addressing the limitation that HIV infection places on a major life activity.[248]

In conclusion, the *Bragdon* decision effectively held that asymptomatic HIV infection is a disability under the ADA that substantially limits the major life activity of reproduction.[249] However, on the issue of whether HIV infection posed a direct threat to the health of safety of others within the context of routine dental care, the Court remanded the case to the lower court for further factual findings.[250]

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243. *Id.* (citing School Bd. of Nassau County. v. Arline, 480 U.S. 273, 288 (1987)).

244. *See id.* The footnote read: "This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied." *Arline*, 480 U.S. at 288 n.18.

245. *See Bragdon*, 118 S. Ct. at 2217. In light of the view that both public and private sector scientific evidence should be evaluated equally on their merits, the dissent considered the 1994 CDC report identifying seven possible instances of HIV transmission to dental healthcare workers as providing support to overcome summary judgment. *See id.* Additionally, the dissent considered Bragdon's offer of a report documenting 42 instances of occupational transmission of HIV in healthcare workers to be persuasive. *See id.* The dissent also noted that the possibility of exposure need only be that of a risk and not certain infection. *See id.*

246. *See id.*

247. *See id.* at 2217-18.

248. *See id.*

249. *See id.* at 2213.

250. *See id.*

IV. IMPACT

Bragdon firmly established that asymptomatic HIV infection is a disability under the ADA because it substantially limits the major life activity of reproduction.[251] The Court, however, left open the possibility of whether dental treatment of the kind Abbott sought poses a direct threat to the health of others.[252] On remand, the First Circuit Court of Appeals ordered supplemental briefing and heard new oral arguments specifically directed at the question of "whether performance of the cavity-filling procedure posed a 'direct threat' to others and thereby came within an exception to the ADA's broad prohibition against discrimination;" it subsequently issued an opinion affirming its original of summary judgment for Abbott.[253]

A. THE DIRECT THREAT ISSUE ON REMAND TO THE FIRST CIRCUIT COURT OF APPEALS

On remand, the First Circuit Court of Appeals reviewed its prior grant of summary judgment, reexamining its reliance on the 1993 CDC Dentistry Guidelines ("the Guidelines") and the American Dental Association's ("the Association") Policy on AIDS, HIV Infection and the Practice of Dentistry ("the Policy").[254] First, the court reviewed the Guidelines and the Policy, evidence Abbott proffered.[255] The court noted that the Guidelines were updated from earlier editions in which text explained that universal precautions would prevent infectious diseases caused by bloodborne pathogens.[256] Next, the court reviewed the weight given the Policy by addressing the concern that the Policy might be based on ethical obligations rather than scientific information.[257] The court found that the Policy was based on scientific fact and noted that the Association's Council on Scientific Affairs drafted it while a separate Council on Ethics drafted the ethical policies.[258] Therefore, the court

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251. *See id.*

252. *See id.*

253. Abbott v. Bragdon, 163 F.3d 87, 88 (1st Cir. 1998).

254. *See id.* The court further noted that in order to reverse its prior finding of summary judgment for Abbott, it would have to find either that "(i) Ms. Abbott did not merit judgment as a matter of law even in the absence of disputed facts, or (ii) that Dr. Bragdon had submitted sufficient evidence to create a genuine issue of material fact as to his direct threat defense." *Id.*

255. *See id.* at 88-89.

256. *See id.* at 89. Specifically, the court noted that the 1986 version of the Guidelines mentioned the detailed universal precautions would prevent transmission of AIDS. *See id.* Also, the court noted that the 1987 version of the Guidelines explained that no additional precautions were required. *See id.*

257. *See id.*

258. *See id.* The court noted that the American Dental Association's Council on Scientific

concluded that it had properly relied on the documents in question and that Abbott had formulated a strong motion for summary judgment.[259]

Second, the court reviewed evidence presented by Bragdon specifically focusing on evidence of "seven cases that the CDC considered 'possible' HIV patient-to-dental workers transmission."[260] The court noted that the inquiry was directed to the definition of "possible" as defined by the CDC in 1994.[261] The court concluded that the term "possible occupational transmission" was well defined in 1994 to mean a worker who had tested positive after being exposed to the virus at work.[262] This definition was further dependent on the exposed worker being unable to demonstrate another opportunity for infection and his or her failure to present him or herself for immediate testing.[263] Therefore, the court concluded that the existence of seven possible cases did not raise genuine issue of material fact on the direct threat question.[264]

The court therefore affirmed its prior finding of summary judgment in favor of Abbott, concluding that Bragdon had not raised a genuine issue of material fact with the district court and that Abbott merited judgment as a matter of law.[265] However, the court noted that its holding was limited to the facts presented and cautioned that changing medical technology might require future courts to hear disputes between litigants to resolve similar issues differently.[266]

Affairs was comprised of 17 dentists and a staff of more than 20 professional experts and consultants. *See id.*

259. *See id.*

260. *See id.* at 89-90. The court also noted that it had previously "canvassed eight items of evidence adduced by Bragdon in an effort to demonstrate a genuine issue of material fact." *Id.* at 89.

261. *See id.* at 90.

262. *See id.*

263. *See id.* The court clarified that "if a dentist knew of seven 'possible' occupational transmissions to dental health care workers without understanding that 'possible' meant no more than that the CDC could not determine whether workers were infected occupationally, he might reasonably regard the risk of treating an HIV-infected patient to be significant." *Id.* The court supported this conclusion by noting that the definition had been defined in two academic articles prior to Bragdon's refusal to treat Abbott. *See id.* (citing John A. Molinari, *HIV, Health Care Workers and Patients: How to Ensure Safety in the Dental Office*, 124 J. AM. DENTAL ASS'N 51, 51-52 (1993); Louise J. Short & David M. Bell, *Risk of Occupational Infection with Bloodborne Pathogens in Operating and Delivery Room Settings*, 21 AM. J. INFECTION CONTROL 343, 345 (1993)).

264. *See id.*

265. *See id.*

266. *See id.* The court stated, "The state of scientific knowledge concerning this disease is evolving, and we caution future courts to consider carefully whether future litigants have been able, through scientific advances, more complete research, or special circumstances, to present facts and arguments warranting a different decision." *Id.*

B. REPRODUCTION AS A MAJOR LIFE ACTIVITY IN LIGHT OF PROGRESSING MEDICAL TECHNOLOGY

A disability does not trigger the ADA unless it substantially limits a recognized major life activity.[267] While the *Bragdon* Court acknowledged that there were other possible major life activities that could be affected by HIV infection, it focused only on reproduction, finding that Abbott's ability to reproduce was substantially limited in two ways.[268] First, the Court noted the possibility that Abbott might infect her partner during intercourse.[269] Second, the Court noted the likelihood that Abbott might infect her child during gestation or childbirth.[270] A question which remains unanswered by the *Bragdon* Court is whether an individual's HIV status will continue to be a substantial limit on reproduction in light of advancing medical technology.

This inquiry stands out because while the *Bragdon* Court examined the statistical risks associated with each way reproduction is limited by HIV infection, it did so from the standpoint of 1994 medical technology.[271] Successful medical advancements have been made in recent years, however, which can reduce the HIV transmission rate from mothers to children and can improve the standard of living for individuals infected with HIV.[272] For example, the Court in *Bragdon* held that an eight percent chance of transmitting the HIV virus to one's child constituted a substantial limitation on reproduction.[273] Assuming this risk could be reduced, the question remains at what point the individual's infection would no longer substantially limit the major life activity of reproduction.[274]

Researchers have suggested that some factors, when used in combination with drug therapy treatment,[275] may reduce the transmission rate

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267. *See* ADA, 42 U.S.C. § 12102(2)(a) (1994).

268. *See id.*

269. *See id.*

270. *See id.*

271. *See id.*

272. *See generally* Lynne M. Mofenson, *Perinatal Transmission of HIV in Women Receiving Zidovudine*, 280 JAMA 569 (1998) (showing a reduction in prenatal transmission rates from mother-to-child). *See also* David Brown, *AIDS Death Rate in '97 Down 47%; New Drug Treatments Credited; Overall U.S. Mortality Fell 3%*, WASH. POST, Oct. 8, 1998, at A1 (showing that people with AIDS/HIV are living longer because of new antiretroviral drug treatments); CNN Interactive, *Affordable Drug Reduces Mother-to-Child HIV Transmission, Study Says* (July 14, 1999) (last visited Sept. 12, 1999) <http://www.cnn.com>.

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

274. *Cf.* Mofenson, *supra* note 272, at 569 (standing for the proposition that new treatment methods could reduce the 8% risk of mother-to-child transmission rate recognized by the Court in *Bragdon* as too great).

275. One such drug is Zidovudine (3'-Azido-3'-Deoxy-Thyinidine, AZT), an antiretroviral drug

from mothers to their children.[276] Furthermore, there is some support for the hypothesis that drug treatment in combination with a cesarean delivery may also lead to a reduced risk of transmission.[277] One scholar concludes that perinatal HIV transmission rates have fallen with the use of drugs in combination with changes in related factors and posits that "[f]urther reduction in transmission for women taking [drug treatment] may be possible by reducing the incidence of other potentially modifiable risk factors."[278]

Such statistical evidence would have been inadmissible in *Bragdon,* because the Court had to consider Bragdon's refusal to treat Abbott based on medical information available from public health authorities in 1994.[279] However, the Court has reexamined prior holdings in other areas of the law within the context of practical considerations that have changed over time.[280]

This type of reevaluation could be applicable to the *Bragdon* opinion because of the advances made in HIV and AIDS research since 1994.[281] Chief Justice Rehnquist noted in *Bragdon*, that Abbott's claim that reproduction was substantially limited because an infected person would in all likelihood not live long enough to raise a child was a presumption based on the forecasting of a future event.[282] In rebutting this claim, the Chief Justice pointed out that the ADA's definition of disability is only achieved when defined in the present tense.[283] The Chief Justice also noted that Abbott's argument, "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,"[284] meaning evolving medical technology could lead to an

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commonly used in the treatment of HIV. Mary Mycek et al., *supra* note 152, at 368-71.

276. *See* Mofenson *supra* note 272, at 569 (discussing factors, such as membrane rupture, gestational age, maternal CD4+ lymphocyte count, birth weight, and antenatal and neonatal zidovudine use, that affect the rate of HIV transmission from mother to child).

277. *See* Mofenson, *supra* note 272, at 569.

278. Mofenson, *supra* note 272, at 569. The modifiable risk factors include the long duration of membrane rupture and the prematurity of the child. *See* Mofenson, *supra* note 272, at 560.

279. *See Bragdon*, 118 S. Ct. at 2206, 2212 (standing for the proposition that the proper year from which to review available medical information was 1994).

280. *See generally* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (standing for the proposition that the Court may re-examine a prior holding without overruling the opinion absolutely). In *Casey,* for example, the Supreme Court revisited the issue of whether a woman has a fundamental right to seek termination her pregnancy in its early stages. *See id.* at 834. While the Court did not specifically overrule its earlier holding in *Roe v. Wade,* 410 U.S. 113 (1973), it noted that advancements in neonatal care altered factual assumptions up on which the earlier opinion was predicated. *See Casey,* 505 U.S. at 858. Therefore, the Court was able to revisit the issue under a different framework. *See id.*

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

282. *See id.*

283. *See id.*

284. *Id.*

unmanageable framework for legal analysis because the definition of disabled would be too expansive.[285]

The *Bragdon* Court's analysis also left open the question of whether an individual with a disability is to be evaluated under the ADA with or without consideration of mitigating measures. The Supreme Court recently addressed this issue in *Sutton v. United Air Lines, Inc.*[286] In *Sutton*, twin sisters, both severely myopic, were denied employment as global airline pilots by United Air Lines because their uncorrected vision was less than 20/100, the airline's minimum requirement.[287] They sued, arguing the ADA prevented the airline from discriminating against them on the basis of their disability, severe myopia.[288] Both the district court and the Tenth Circuit rejected their claim, finding that they were not substantially limited from any life activity on the basis of their myopia because they could fully correct their impairment with either glasses or contact lenses.[289]

The plaintiffs appealed to the Supreme Court, which granted certiorari.[290] The central issue before the Court was a conflict between the EEOC's Interpretative Guidelines and the plain language of the ADA.[291] Under the EEOC Guidelines, "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[292] The EEOC Guidelines thus call for the evaluation of an impairment or be individualized and made without consideration of mitigating measures.[293] The plain language of the ADA, however, asks only whether the impairment "substantially limits a major life activity," which the lower courts in *Sutton* interpreted to require consideration of mitigating measures.[294] A

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285. *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (standing for the proposition that the Court may overrule the framework of a legal analysis if it finds it to be unworkable).

286. 119 S. Ct. 2139 (1999).

287. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2143 (1999).

288. *Id.* at 2143-44. "Specifically, petitioners alleged that due to their severe myopia they actually have a substantially limiting impairment or are regarded as having such an impairment . . . and are thus disabled under the Act." *Id.*

289. *Id.* at 2144 (reviewing lower court decisions). The Court further noted that the lower courts found the plaintiffs could not support their claim that the defendant perceived the myopia as foreclosing their ability to work generally, because the defendant only viewed it as foreclosing one particular position, that of a global pilot. *Id.*

290. *Id.*

291. *Id.* at 2144-45 (discussing the EEOC guidelines).

292. 29 C.F.R. § 1630.2(j)(2) (1997)).

293. *See id.* at 902.

294. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893, 901 (10th Cir. 1997). The court wrote that "the EEOC's Interpretative Guidance is in direct conflict with the plain language of the ADA." *Id.*

split had developed within the federal courts on this issue, with some following the EEOC Guidelines and others rejecting them.[295]

The Supreme Court, by a 7-to-2 vote, affirmed the lower courts' decisions.[296] Framing the issue as "whether disability is to be determined with or without reference to corrective measures,"[297] the Court cited three main reasons for its decision.[298] First, it noted that the verb "substantially limits" appears in the ADA in its present tense form, indicating that it requires one to be "presently—not potentially or hypothetically—substantially limited . . . ."[299] Second, the Court cited *Bragdon* for the premise that the ADA requires an individualized inquiry into whether a plaintiff is disabled.[300] To hold otherwise, the Court noted, would be to treat all plaintiffs as members of groups rather than individuals, which it found to be "contrary to both the latter and the spirit of the ADA."[301] Finally, the Court looked to legislative findings of the number of disabled individuals in the United States, a number which only made sense if it did not include those whose handicaps could be completely mitigated by corrective measures, such as the plaintiffs in this case.[302]

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295. *See Sutton*, 119 S. Ct. at 2144. Before *Sutton*, several federal district courts and the Eighth, Ninth and Eleventh Circuit Courts of Appeals followed the EEOC Guidelines and evaluated impairments substantial limiting effects on major life activities without regard to mitigating measures. *See generally* Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997); Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996); Fallacaro v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997); Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898, 902-907 (E.D. Pa. 1997); Sarsycki v. United Parcel Serv., 862 F. Supp. 336, 340 (W.D. Okla. 1994). Other federal courts had decided to defer to the specific language of the ADA and considered whether an individual's impairment actually substantially limited a major life activity in the context of mitigating measures. *See generally* Gilday v. Mecosta County, 124 F.3d 760, 767-68 (6th Cir. 1997); Cline v. Fort Howard Corp., 963 F. Supp. 1075, 1081 n.6 (E.D. Okla. 1997); Gaddy v. Four B Corp., 953 F. Supp. 331, 337 (D. Kan. 1997:); Moore v. City of Overland Park, 950 F. Supp. 1081, 1088 (D. Kan. 1996); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 881 (D. Kan. 1996); Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994).

296. *Sutton*, 119 S. Ct. at 2144. Justice O'Connor's majority opinion was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, Thomas and Ginsburg. Justice Stevens dissented, joined by Justice Breyer, who also filed a dissenting opinion.

297. *Id.* at 2146.

298. *Id.* at 2146-49.

299. *Id.* at 2146.

300. *Id.* at 2147.

301. *Id.*

302. *Id.* at 2147-2149.

> Because it is included in the ADA's text, the finding that 43 million individuals are disabled gives content to the ADA's terms, specifically the term "disability." Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures.

Id. at 2149.

It is not clear what effect the Sutton holding will have on HIV and AIDS claims under the ADA such as Abbott's. However, the Court's holding that all determinations of disability for ADA purposes require considerations of mitigating measures, together with the rule that all ADA assessments must be individualized, for which the Court cited *Bradgon*,[303] may mean that advancing medical technology[304] would void at least some such claims.[305]

C. RECENT COURT OPINIONS DEFINING PARAMETERS FOR EMPLOYMENT ISSUES AFFECTING WOMEN

Bragdon was a public accommodation case, but it is impacting ADA employment claims as well. Following *Bragdon*, two recent lower court ADA employment decisions demonstrate that courts will look very closely at women claiming that they are disabled as a matter of law because of impairments to their ability to reproduce.[306]

First, in *Berk v. Bates Advertising, USA, Inc.*,[307] the plaintiff sought a motion for summary judgment holding that she was disabled as a matter of law under *Bragdon* because she suffered from breast cancer.[308] She was dismissed from her job because of time she took off for breast cancer treatment and surgery; she filed suit under the ADA alleging disability discrimination.[309] As in *Bragdon*, she claimed that she was disabled because her impairment substantially limited her ability to reproduce.[310] While the *Berk* court acknowledged that *Bragdon* was brought under a different section of the ADA, it noted that the definitions of disability were identical under both sections and so relied on *Bragdon* in its analysis.[311]

The court noted that *Bragdon's* decision that reproduction as a major life activity was relevant in the instant case because doctors advised the plaintiff that her particular type of breast cancer would pose a risk to her life if she became pregnant.[312] She agreed to surgery to remove her

303. *Id.* at 2147.

304. *See supra* note 272.

305. *See Sutton*, 119 S. Ct. at 2144 (holding that plaintiffs whose impairment was completely corrected by mitigating measures was not disabled within meaning a ADA).

306. *See* Berk v. Bates Advertising USA, Inc., 25 F. Supp. 2d 265, 265 (S.D. N.Y. 1998). *See also* McGraw v. Sears, Roebuck & Co., 21 F. Supp. 2d 1017, 1017 (D. Minn. 1998). No courts have as of yet undertaken either an expansion or restriction in the holding of the First Circuit Court of Appeals as to the remanded direct threat issue posed from *Bragdon*.

307. 25 F. Supp. 2d 265 (S.D.N.Y. 1998).

308. *See* Berk v. Bates Advertising USA, Inc., 25 F. Supp. 2d 265, 266 (S.D. N.Y. 1998).

309. *See id.*

310. *See id.*

311. *See id.* at 268.

312. *See id.*

uterus and ovaries, ending her ability to reproduce.[313] The court held that between the time she returned to work after surgery and when she was terminated, she suffered an impairment that substantially limited her ability to engage in the major life activity of reproduction.[314]

Second, in *McGraw v. Sears, Roebuck & Co.*,[315] the plaintiff brought an action against her former employer for violation of the Age Discrimination Act,[316] the Family Leave Act,[317] the Minnesota Human Rights Act,[318] and the ADA.[319] She alleged that her early menopause constituted a disability under the ADA.[320] The court dismissed the claim that she had an impairment that significantly restricted her abilities in the workplace.[321] While the court acknowledged that *Bragdon* found an inability to have children to be a disability under the ADA,[322] it refused to read the *Bragdon* decision so broadly as to find that every woman during or after menopause is disabled under the ADA.[323] The court took judicial notice of menopause, noting that it is a normal process associated with aging.[324] Therefore, the court concluded the plaintiff had failed as a matter of law to establish her disability claim and granted summary judgment for the defendant on the issue.[325]

The *Berk* and *McGraw* decisions demonstrate that lower courts, while adhering to the Supreme Court's decision in *Bragdon,* are making individualized factual inquiries as to when reproduction is a major life activity under the ADA.[326] These decisions also demonstrate that the *Bragdon* decision is having an impact on discrimination cases brought by women.[327]

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313. *See id.*

314. *See id.* The court noted that the impairment was Bates' cancer and its accompanying possibility of return. *See id.* The court further noted that Berk was limited in her ability to reproduce in two ways: "[T]he cancer made pregnancy unduly risky for Berk; and the cancer also rendered advisable operations which would destroy any chance of reproduction." *Id.* at 268-69.

315. 21 F. Supp. 2d 1017 (D. Minn. 1998).

316. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1994).

317. *See* Family and Medical Leave Act 29 U.S.C. § 2601; 29 U.S.C. § 2615 (1994).

318. *See* MINN. STAT. § 363.01 (1998).

319. *See* McGraw v. Sears, Roebuck & Co., 21 F. Supp. 2d 1017, 1019-20 (D. Minn. 1998). The action was brought under ADA provision, 42 U.S.C. § 12112. *See id.*

320. *See McGraw,* 21 F. Supp. 2d. at 1021.

321. *See id.*

322. *See id.*

323. *See id.*

324. *See id.* The court continued by noting that menopause "is clearly distinguishable from early loss or impairment of childbearing resulting from a communicable viral illness." *Id.*

325. *See id.*

326. *See generally Berk,* 25 F. Supp. 2d 265; *McGraw,* 21 F. Supp. 2d 1017 (standing for the proposition that lower courts are making individual factual inquires in the aftermath of *Bragdon*).

327. *See generally McGraw,* 21 F. Supp. 2d 1017 (noting that because of the reproduction component of *Bragdon,* women appear to be benefiting from the decision).

V. CONCLUSION

The Supreme Court's decision in *Bragdon*, as well as the remand proceedings by the First Circuit Court of Appeals, seems to have broadened the scope and application of anti-discrimination legislation like the ADA.[328] However, as the First Circuit Court of Appeals noted, science may advance so as to undermine the premise upon which the Court's decision is based.[329] The greatest immediate impact of the decision should be felt by women bringing anti-discrimination claims in the workplace because of the *Bragdon* Court's holding that reproduction can constitute a major life activity under the ADA.[330] Additionally, individuals bringing state claims under state human rights provisions, such as the North Dakota Human Rights Act, will further benefit from the Supreme Court's broadening of ADA interpretation.[331] Therefore, it is likely that the Supreme Court's holding in *Bragdon* will provide a catalyst for continued evolution of ADA law.

James C. Parks, Jr.[332]

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328. *See* Bragdon v. Abbott, 118 S. Ct. 2196 (1998) (holding that HIV infection substantially limits the major life activity of reproduction).

329. *See* Bragdon v. Abbott, No. 96-1643, 1998 WL 887125 (1st Cir. Dec. 29,1998).

330. *See generally Berk*, 25 F. Supp. 2d at 265; McGraw, 21 F. Supp. 2d at 1017 (standing for the proposition that *Bragdon* seems to bear most directly upon women in employment cases claiming an impairment that substantially limits reproduction).

331. *See* Birchem v. Knights of Columbus, 116 F.3d 310, 314 (8th Cir. 1997), 116 F.3d at 314 (standing for the proposition the it is likely that the North Dakota Supreme Court would construe the NDHRA analogously with the ADA with regards to state claims by HIV-infected persons); *see also supra* note 9.

332. The author would like to extend his heartfelt gratitude to Professor Marcia O'Kelly and Kayce Compton for their patience and guidance.