ARTICLES

The Consequences and Implications of a Case-By-Case Analysis Under the Americans with Disabilities Act for Asymptomatic HIV-Positive Gay Men and Lesbians Post *Bragdon*

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> "With this measure [the ADA], we call for an end to finger pointing and fear mongering about AIDS. We know with great certainty how this disease is and is not transmitted. There is no scientific or medical reason to shun people with AIDS o[r] HIV disease"[1]

* University of Massachusetts, B.A., 1995 (magna cum laude); Widener University School of Law, J.D., 1999; Bluebook Editor, DELAWARE JOURNAL OF CORPORATE LAW 1998-99. I would like to dedicate this article to the memory of my high school friend, Kenny Spencer, who educated me about the human side of the AIDS crisis.

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1. 135 Cong. Rec. S10789 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy).

I. INTRODUCTION

Cases of acquired immune deficiency syndrome (AIDS) were first reported in 1981.[2] AIDS is caused by the human immunodeficiency virus (HIV).[3] HIV infects and kills white blood cells (called CD4 or T4 cells) which normally function in the immune system to fight infections.[4] The loss of these CD4 cells creates the immune deficiency associated with AIDS.[5] HIV is primarily transmitted through blood and semen,[6] and transmission occurs in three principal ways: (1) sexual contact, which includes male-to-male anal intercourse, as well as male-to-female intercourse;[7] (2) direct exposure to blood products, either by "the sharing of needles or drug related paraphernalia," or through receipt of HIV-infected blood via a blood transfusion;[8] or (3) perinatally from mother to fetus/newborn during pregnancy, delivery, or breast-feeding.[9]

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2. James W. Curran, et al., *The Epidemiology of AIDS: Current Status and Future Prospects*, *in* AIDS: PAPERS FROM SCIENCE, 1982-1985, at 605, 605 (Ruth Kulstad ed., 1986). The first five patients were all gay men who had pneumocystis carinii pneumonia (PCP), a condition which was previously only associated with severely immunosupressed patients. *See id*. *See also* Peter D. Walzer et al., *Pneumocystis Carinii Pneumonia in the United States: Epidemiologic, Diagnostic, and Clinical* Features, 80 ANNULS INTERNAL MED. 83 (1974) (generally describing PCP). Initially, the highest incidence of AIDS was seen in white gay males and intravenous drug users. *See id*. As of June 1998, the group of men statistically categorized as "men who have sex with men," constituted 75% of AIDS cases among white males, while only nine percent of AIDS cases among white males was attributed to intravenous drug use. *See* Centers for Disease Control and Prevention, 10 HIV/AIDS SURVEILLANCE REPORT 1, 6 (1998) (The HIV/AIDS surveillance report can be downloaded from <http://www.cdc.gov/nchstp/hiv_aids/stats/hasrlink.htm>). The statistics, however, are dramatically different for black males, where 38% of AIDS cases fall within the category of "men who have sex with men," and 35% of the cases are attributed to intravenous drug use. *See id*.

3. *See* PAUL HARDING DOUGLAS & LAURA PINSKY, THE ESSENTIAL AIDS FACT BOOK 2 (1996).

4. *See id*.

5. *See id.* The Centers for Disease Control characterizes AIDS as a group of clinical manifestations that include either: (1) "[f]ewer than 200 CD4 cells per microliter of blood . . . or [l]ess than 14% of all lymphocytes are CD4 cells;" or (2) any number of opportunistic diseases, including but not limited to, toxoplasmosis of the brain, HIV-related encephalopathy, or Kaposi's sarcoma. LYN R. FRUMKIN & JOHN M. LEONARD, QUESTIONS & ANSWERS ON AIDS 17-18 (3d ed. 1997) (listing the types of medical conditions associated with AIDS). Opportunistic infections occur when the immune system cannot properly respond to a bacteria or virus within the system. *See id.* at 8. The infection is termed opportunistic because "it has taken advantage of decreased immunity." *Id*.

6. *See id.* at 59.

7. *See* James W. Curran et. al., *Epidemiology of HIV Infection and AIDS in the United States*, 239 SCIENCE 610, 612-14 (1988). The male-to-female category includes transmission from either partner. *See id*. HIV infection may also occur in female-to-female sexual contact and in orogenital sexual contact, although the transmission rate is extremely low for these categories. *See id*.

8. *Id*. Direct exposure to blood products may also occur in the health care setting, although notably few health care workers have been exposed in this manner. *See* Centers for

HIV disease generally occurs in three stages. The first stage (acute infection) develops two to four weeks after exposure[10] to an HIV-infected individual and usually lasts one to three weeks.[11] During this stage, the exposed individual may develop flu-like symptoms which may include fever, swollen glands, a sore throat, aches and pains, or a rash.[12] The second stage (asymptomatic infection) is best characterized by its long latency period which may last many years.[13] During this latent period,[14] persons infected with HIV generally have no clinical manifestations of the disease; however, viral replication continues to occur.[15] The last stage (advanced, symptomatic infection) is characterized by a CD4 cell count of less than 200, and is often referred to as "full-blown AIDS" because of the risk of developing, opportunistic infections.[16]

Disease Control & Prevention, 10 HIV/AIDS SURVEILLANCE REPORT 1, 24 (1998). The CDC reports that there have been only 54 documented cases of HIV transmission from patient to health care workers as of June, 1998. *See id*.

9. *See* FRUMKIN & LEONARD, *supra* note 5, at 59.

10. *See* J. Michael Howe & Peter C. Jensen, *An Introduction to the Medical Aspects of HIV Disease*, *in* AIDS AND THE LAW 1, 45 (David W. Webber 3d ed., 1997). Not all individuals exposed to the virus become HIV positive. *See id.* 16-17. The risk of transmission is related to a variety of factors including: (1) number of exposures; (2) the type of sexual contact (anal intercourse is the most frequently reported mode of transmission); (3) the changing degrees of infectiousness of the HIV-infected individual; and (4) the varying susceptibility of the exposed person. *See id.* at 16-18.

11. *See id*. at 45.

12. *See id*.

13. *See id.* at 46. This latency period may increase as the class of drugs known as protease inhibitors becomes available to HIV-infected individuals. Protease inhibitors work at the final stage of the virus' cycle by preventing the immature new HIV copies from maturing into virus particles that can kill CD4 cells. *See The Rationale for Combination Therapy*, (last modified Dec. 1996) <http://www.thebody.com/hivnews/newsline/dec96/pullout.html>. Protease inhibitors are of great importance. Clinically, protease inhibitors increase the CD4 cell count in patients receiving the drug, and may reduce the amount of virus in the blood (viral load) by 99%, which seems to indicate some infected cells become "dormant" or nonreplicating. *See* Martin Markowitz, M.D., *Protease Inhibitors: A New Family of Drugs for the Treatment of HIV Infection*, AIDS REFERENCE GUIDE § 1312, at 1 (April 1996). Unfortunately, protease inhibitors "have failed to durably suppress HIV viral load in about 50%" of patients who receive the drug. John S. James, *Long-Term Strategies: Should Some Patients Wait to Start Protease Inhibitors? Interview with Keith Henry, M.D.*, AIDS TREATMENT NEWS (visited Jan. 31, 1999) <http://www.thebody.com/atn/281.html>. Many treatments fail because of lack of compliance by patients, which may be attributed to the serious side effects caused by the drugs and dietary conditions. *See* Jon Cohen, *The Daunting Challenge of Keeping HIV Suppressed*, 227. SCIENCE, 32, 32.

14. The term "latent period" should not be construed to indicate a true latency, because immunosuppression develops and a decline in CD4 cell counts occur at this time, indicating the progression of the disease. *See* Howe & Jensen, *supra* note 10, at 46. *See also* Bragdon v. Abbott, 118 S. Ct. 2196, 2204 (1998) (noting that the term "asymptomatic" is a misnomer because clinical features persist throughout the entire life of the disease).

15. *See* Howe & Jensen, *supra* note 10, at 46.

16. *See id*. at 47.

Typically, patients with CD4 cell counts below 50 have a life expectancy of 12 to 18 months.[17]

The number of people affected by HIV/AIDS in the United States is astounding.[18] The epidemic has created a host of legal and public health issues for people who are infected with HIV. These problems are not only manifested in the physical and psychological health implications for those infected with HIV,[19] but are also evident in a much larger social context.[20] The initially unknown etiology and fatality of the virus exacerbated public hysteria around the disease.[21] The linking of the virus to homosexual men and IV drug users has further stigmatized individuals who are infected with HIV, as well as individuals in suspect groups.[22] These individuals are often denied employment, housing, health insurance, and/or access to adequate health care.[23] This type of invidious discrimination poses emotional and economic hardship, as well as severe health problems for people who are HIV positive.

As a result, state and federal legislative bodies have either amended current statutes or enacted new legislation that specifically provides protection from discrimination for people who are HIV positive.[24] The Americans with Disabilities Act of 1990 (ADA or the

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17. *See id*.

18. Through June 1998, a cumulative total of 665,357 persons with AIDS were reported to the CDC by state and local health departments. *See* Centers for Disease Control & Prevention, 10 HIV/AIDS SURVEILLANCE REPORT 1, 6 (1998). A total of 401,028 deaths attributable to AIDS were reported from 1991-1998, constituting a death rate of 60%. *See id*. at 27. There were 98,904 new cases of HIV infection reported between June 1995 and June 1998. *See id*. at 26. The statistics for HIV, however, may not accurately reflect the total number of new HIV cases, because most states do not require HIV reporting. *See id.* at 37-40. Therefore, the number of people affected by HIV/AIDS in the United States may be even higher than these numbers indicate.

19. *See* Mauro A. Montoya, *If I Tell You, Will You Treat Me?*, 27 J. MARSHALL L. REV. 363 (1994) (describing generally the fear of HIV-positive patients that health care will be denied).

20. *See generally* 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 (1997) (describing the social construction of HIV).

21. *See* Arthur S. Leonard, *Discrimination*, *in* AIDS LAW TODAY: A New GUIDE FOR THE PUBLIC 297, 297 (Scott Burris et al. eds., 1993) (stating that "[f]rom the earliest reports of a serious new illness spread through an infectious agent, a secondary epidemic of fear has accompanied the epidemic of illness and death, generating a wave of discrimination against those identified with the disease").

22. *See* SUSAN SONTAG, AIDS AND ITS METAPHORS 24-28, 64 (1989).

23. *See* Leonard, *supra* note 21, at 297 (describing generally the types of discrimination faced by people who are infected with HIV).

24. *See* D.C. CODE ANN. § 35-223(c)-(d) (1998) (stating that no health, disability or life insurance shall contain exclusionary provisions relating to AIDS or HIV); KAN. STAT. ANN. § 65-6002(d) (1998) (stating that information regarding the AIDS or HIV status of an individual, which must be mandatorily reported to the Secretary of Health and Environment, shall not be used in any manner that will result in discrimination against the individual in employment,

Act),[25] although not specifically enacted to cover only HIV-infected individuals, was undoubtedly drafted by legislators who were mindful of the emerging HIV epidemic and its potential discriminatory effects.[26]

In interpreting the ADA, courts have been faced with deciphering the plain language and legislative history of the Act in order to determine its statutory limitations.[27] Specifically, courts have been called upon to resolve whether asymptomatic HIV infection constitutes a disability within the meaning of the ADA.[28] The landmark Supreme Court decision in *Bragdon v. Abbott* resolved an existing circuit split as to this issue.[29] In *Bragdon*, the Supreme Court examined whether asymptomatic HIV-positive status qualifies as a disability under the public accommodation title of the ADA.[30]

This Article focuses on asymptomatic HIV infection as a covered disability under the ADA by analyzing the Supreme Court's decision in *Bragdon*. Specifically, it contends that HIV infection should constitute a *per se* disability[31] under the ADA, and that the case-by-

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housing, medical care, or education); KY. REV. STAT. ANN. § 207.135 (Banks-Baldwin 1998) (stating that persons with AIDS or HIV shall be afforded all of the protections made available to individuals under Kentucky's state disability act, and that mandatory HIV testing is prohibited absent a showing that an employee must be HIV negative in order to fulfill an occupational qualification); ME. REV. STAT. ANN. tit. 24A, § 2159 (West 1998) (declaring that it is an "unfair trade practice" to discriminate against any person who is HIV positive or who has AIDS in any health or life insurance policy); N.J. STAT. ANN. § 10:5-5 (West 1998) (expanding the New Jersey "Law against Discrimination" to cover persons who have AIDS or HIV); N.Y. PUB. HEALTH LAW § 2781 (McKinney 1998) (prohibiting persons from ordering the performance of an HIV test without the written, informed consent of the individual being tested); R.I. GEN. LAWS § 23-6-10 (1998) (stating that the purpose of the statute was to "protect persons who are infected with the AIDS virus from discrimination").

25. 42 U.S.C. §§ 12101-12213 (1997).

26. *See infra* notes 33-49 and accompanying text for discussion on the legislative history of the act.

27. *Compare* Runnebaum v. Nationsbank of Maryland, N.A., 123 F.3d 156, 165-72 (4th Cir. 1997) (taking a plain meaning approach to the ADA) *with* Abbott v. Bragdon, 107 F.3d 934, 940 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998) (relying on the legislative history for guidance).

28. *See* Doe v. Kohn, Nast, & Graf, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994) (holding that HIV is a disability under the ADA).

29. 118 S. Ct. 2196 (1998). *Compare Abbott*, 107 F.3d at 937-39 (1st Cir. 1997) (holding that HIV is a disability within the meaning of the ADA), *with* Runnebaum, 123 F.3d at 156, 167-70 (4th Cir. 1997), *and* Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 60 (4th Cir. 1995) (both finding that asymptomatic HIV is not a *per se* disability under the ADA).

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

31. *Per se* is defined as "inherently;. . .in its own nature without reference to its relation." BLACK'S LAW DICTIONARY 1142 (6th ed. 1990). Therefore, a *per se* disability is one which is, by its very nature a disability, and is "presumptively covered." *See* Catherine J. Lanctot, *Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 VILL. L. REV. 327, 329 (1997).

case analysis utilized in *Bragdon* is neither consistent with the congressional intent of the ADA nor beneficial from a public policy standpoint.[32] It further argues that the *Bragdon* decision, in failing to define HIV as a *per se* disability, may have significant negative consequences for asymptomatic HIV-positive gay men and lesbians. Part II provides an analysis of the ADA, including legislative history and governmental guidelines. Part III examines the Supreme Court's decision in *Bragdon* through an evaluation of the case-by-case analysis utilized by the Court. Part IV discusses the potential consequences of the Supreme Court's decision for gay men and lesbians. Finally, Part V evaluates additional options available to HIV-positive members of the gay and lesbian community who seek redress under the ADA post *Bragdon.*

II. THE AMERICANS WITH DISABILITIES ACT

The ADA was enacted by Congress in order to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[33] Congress justified the ADA on the "continuing existence of unfair and unnecessary discrimination and prejudice [that] denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous."[34] The ADA prohibits discrimination against persons with disabilities in employment,[35] public services,[36] and public accommodations.[37] In regard to public accommodations, the ADA mandates that "[n]o 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

32. *See Bragdon*, 118 S. Ct. at 2201-09. This method consists of sequentially examining each of the requirements for a disability found in the first prong of the definition. *See id.* In each case, the individual must affirmatively show how his or her condition falls within the definition. *See id.*

33. 42 U.S.C. § 12101(b)(1) (1997).

34. *Id.* § 12101(a)(9).

35. *See id.* §§ 12111-12117. Title I, the subchapter prohibiting discrimination in employment, states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a).

36. *See id.* §§ 12131-12165. Title II, which deals with public services, states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* § 12132.

37. *Id.* §§ 12181-12189. This subchapter will be referred to as title III throughout this comment.

accommodation."[38] The Act defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such impairment."[39] A plaintiff is disabled if he or she meets the requirements of any of the three prongs. The express language of the ADA does not mention HIV, or any other specific disabilities, as falling within the statutory limitations of the Act.[40]

In drafting the new anti-discrimination legislation, Congress modeled the ADA after the Rehabilitation Act of 1973.[41] However, the plain language of the Rehabilitation Act was also devoid of any reference to HIV.[42] Nevertheless, the overwhelming majority of cases scrutinizing whether HIV is covered under the Rehabilitation Act have held that HIV is indeed a disability.[43] When Congress re-adopts sections of a prior law, it is presumed to have incorporated the prior judicial interpretations of the earlier law.[44] Following this theory,

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38. *Id.* § 12182(a). Title III applies to state and local governments, as well as private entities, such as the professional office of a health care provider, if the "operations of such entities affect interstate commerce." *Id.* § 12181(7).

39. *Id.* § 12102(2).

40. *See id.* §§ 12101-12213.

41. *See id.* §§ 701-797 (1997). *See also* Karen S. Lovitch, *State AIDS-Related Legislation in the 1990's: Adopting a Language of Hope Which Affirms Life*, 20 NOVA L. REV. 1187, 1195 (1996) (stating that the ADA modeled many of its provisions after the Rehabilitation Act); Leonard, *supra* note 21, at 301 (noting that the language of the ADA and the Rehabilitation Act is essentially identical). The Rehabilitation Act proscribes discrimination against "qualified individual[s] with a disability" by recipients of federal funds. 29 U.S.C. § 706(8) (1997). The definition of "individual with a disability" under the Rehabilitation Act is similar to the definition of "disability" found within the ADA. *Compare* 29 U.S.C. § 705(9)(B) (1997) (defining one type of disability as "a physical or mental impairment that substantially limits one or more major life activities."), *with* 42 U.S.C. § 12102(2) (1997) (defining one type of disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual").

42. *See* 29 U.S.C. §§ 701-797 (1997). When the Rehabilitation Act was enacted in 1973, HIV was not an identified disease. *See supra* text accompanying note 2.

43. *See* Harris v. Thigpen, 941 F.2d 1495, 1522-24 (11th Cir. 1991) (finding that individuals infected with HIV, whether symptomatic or not, were disabled under the Act); Chalk v. United States Dist. Ct., 840 F.2d 701, 704-09 (9th Cir. 1988) (finding that HIV is a handicap); Rivera v. Heyman, 982 F. Supp. 932, 936 (S.D.N.Y. 1997) (holding that employee with HIV infection was covered under the Rehabilitation Act); Robinson v. Henry Ford Health Sys., 892 F. Supp. 176, 198 (E.D. Mich. 1994) (finding that individuals with HIV are handicapped under the Rehabilitation Act); Glanz v. Vernick, 756 F. Supp. 632, 635 (D. Mass. 1991) (stating that the defendants did not dispute that HIV infection is a disability under the Act); Doe v. Dolton Elementary Sch. Dist., 694 F. Supp. 440, 444 (N.D. Ill. 1988) (holding that student with AIDS was entitled to a preliminary injunction allowing him to attend school because he was probably handicapped under the Act); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376, 381-82 (C.D. Cal. 1987) (holding that a student with AIDS was handicapped within the meaning of the Act).

44. *See* Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

courts have found that the "standards of the Rehabilitation Act are applicable to cases under the ADA."[45] These court decisions give validity to the rationale that: (1) the standards for determining a disability under the ADA are expressly similar to those of the Rehabilitation Act; and (2) HIV should be a covered disability under the ADA. Furthermore, drafters of the ADA exhibited an express intent that the standards for interpreting the ADA be comparable to those of the Rehabilitation Act by enacting a provision stating: "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant to such title."[46]

Congress, in enacting the ADA, intended to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[47] Nevertheless, judicial interpretation of HIV as a disability under the ADA, unlike interpretation under the Rehabilitation Act, has been anything but consistent.[48] This lack of consistency is likely due to the insufficiency of specific statutory language to define types of diseases, such as HIV, as a disability. In particular, the unique characteristics of asymptomatic HIV infection creates an issue of whether the disease is a disability, which lends itself to ambiguous judicial interpretations. Nevertheless, the Court's decision in *Bragdon* has seemingly settled some of the ambiguities surrounding asymptomatic HIV as a disability.[49]

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45. Dean v. Knowles, 912 F. Supp. 519, 521 (S.D. Fla. 1996). *See also* Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 57 (4th Cir. 1995) (stating that "[t]o the extent possible, we adjudicate ADA claims in a manner consistent with decisions interpreting the Rehabilitation Act").

46. 42 U.S.C. § 12201(a) (1997) (citation omitted).

47. *Id.* § 12101(b)(2).

48. *Compare* Abbott v. Bragdon, 107 F.3d 934, 939 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998); Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763, 778 n.42 (E.D. Tex. 1996); Hoepfl v. Barlow, 906 F. Supp. 317, 319 n.7 (E.D. Va. 1995); D.B. v. Bloom, 896 F. Supp. 166, 170 (D.N.J. 1995); Howe v. Hull, 873 F. Supp. 72, 78 (N.D. Ohio 1994) (all finding that the plaintiff was disabled within the meaning of the ADA), *with* Runnebaum v. Nationsbank of Maryland, N.A., 123 F.3d 156, 169-70 (4th Cir. 1997) (en banc) (holding that asymptomatic HIV infection is not a disability under the ADA); Reichle v. Walsh Offshore, Inc., No. 97-2309, 1997 WL 728104, at *2 (E.D. La. Nov. 20, 1997) (same); Cortes v. McDonald's Corp., 955 F. Supp. 541, 546-47 (E.D.N.C. 1996) (finding that plaintiff infected with HIV failed to establish that he had a disability under the ADA).

49. *See supra* notes 13-15 and accompanying text.

III. *BRAGDON V. ABBOTT* AND THE CASE-BY-CASE METHOD OF ANALYSIS

A. Facts

Sidney Abbott went to the office of Randon Bragdon, a licensed dentist, for a scheduled dental examination on September 16, 1994.[50] When filling out her patient registration form, Ms. Abbott indicated that she was HIV positive.[51] Dr. Bragdon performed a routine exam and determined that Ms. Abbott had a cavity which required further dental work.[52] He informed Ms. Abbott that due to his HIV policy, he would not fill her cavity in his office, but rather would perform the services in a hospital setting.[53] Dr. Bragdon further informed Ms. Abbott that while he would only charge her the usual fees for his services, she would have to absorb any additional costs that the hospital would charge for use of its facilities.[54] Ms. Abbott declined to have her cavity filled at the hospital and filed a complaint under both the ADA and the Maine Human Rights Act (MHRA).[55]

The United States District Court for the District of Maine granted summary judgment for Ms. Abbott on all federal and state claims.[56] The court held that Ms. Abbott's asymptomatic HIV was a physical impairment which substantially limited her major life activity of reproduction; and therefore, she was disabled as a matter of law under the ADA.[57] The First Circuit Court of Appeals affirmed the lower court's decision.[58] The appellate court stated that HIV-positive status, whether symptomatic or asymptomatic, comprises a physical

50. *See* Bragdon v. Abbott, 118 S. Ct. 2196, 2201 (1998).
51. *See id*.
52. *See id*.
53. *See id*. Dr. Bragdon alleges that treating Ms. Abbott in his office would pose a "direct threat" to him. *See id.* at 2210. Title III provides an exception to the general rule that an "individual shall not be discriminated against in the enjoyment of goods and services in cases were the individual poses a direct threat to the health or safety of others." 42 U.S.C. § 12182(b)(3). Direct threat is defined as 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*.
54. *See Bragdon*, 118 S. Ct. at 2201.
55. *See* Abbott v. Bragdon, 912 F. Supp. 580, 584 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).
56. *See id.* at 595.
57. *See id*. at 587.
58. *See* Abbott v. Bragdon, 107 F.3d 934, 937, 942 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

impairment under the ADA."[59] Dr. Bragdon appealed the decision to the United States Supreme Court, and the Court granted certiorari.[60]

B. The Supreme Court Decision

The Supreme Court addressed three questions in granting the writ of certiorari: (1) whether asymptomatic HIV is a disability within the statutory limitations of the ADA; (2) whether HIV infection is a *per se* disability under the ADA; and (3) whether the respondent's HIV infection posed a direct threat to the health and safety of Bragdon and his staff.[61] In answering the first question in the affirmative, the Court relied on a case-by-case method of analysis.[62]

The case-by-case method employed in *Bragdon* requires an individualized assessment of the plaintiff's condition in relation to the ADA's definition of disability.[63] Under the first prong, the term disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[64] A plaintiff who alleges an ADA violation under the first prong must first overcome the obstacle of proving that he or she has a "physical or mental impairment."[65] In the case of HIV-infected individuals, this is often the easiest factor to prove, and in some cases,

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59. *Id*. at 939. The court further concluded that the risk of Ms. Abbott passing HIV on to a potential child was a substantial restriction on her reproductive activity, and thus held that HIV was a disability under the ADA. *See id*. at 941.

60. Bragdon v. Abbott, 118 S. Ct. 2196, 2201-02 (1998).

61. *See Bragdon*, 118 S. Ct. at 2200, 2207. The third issue is outside of the scope of this paper, and will not be discussed.

62. *See id.* at 2201-07. While neither explicitly stating an intention to proceed in this direction, nor stating that a case-by-case analysis was required, the Court's opinion advanced in this manner. *See id.*

63. *See id.* at 2201-07. The first appellate court case that relied on this method of analysis under the ADA was *Ennis v. National Ass'n of Business & Education Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995). In *Ennis*, the plaintiff, whose son was HIV positive, alleged that she was fired from her job "because of her known association with her disabled son." *Id*. at 56-57. Specifically, the plaintiff claimed that she was fired to avoid a major increase in her employer's insurance rates due to her son's illness. *See id*. at 57. The Fourth Circuit Court of Appeals found that the plain language of the ADA required that a finding of disability be determined on a case-by-case basis. *See id*. at 59. The court concluded that in order to support a finding that the plaintiff's son was disabled under the ADA, it would have to determine that HIV infection is a *per se* disability. *See id*. at 60. In declining to hold HIV infection a *per se* disability, court stated:

> The plain language of the statute, which contemplates case-by-case determinations of whether a given impairment substantially limits a major life activity, whether an individual has a record of such a substantially limiting impairment, or whether an individual is being perceived as having such a substantially limiting impairment, simply would not permit this a [sic] conclusion.

Id.

64. 42 U.S.C. § 12102(2)(A) (1997).

65. *See id*.

defendants offer little opposition on this issue.[66] The Supreme Court, in holding that asymptomatic HIV infection is an "impairment from the moment of infection," discussed the debilitating effects that HIV has on an infected person's physical health.[67] The Court noted that HIV causes significant changes in the infected person's hemic and lymphatic systems from the onset of infection, and thus falls within the statutory definition of a physical impairment during all three stages of the disease.[68] The Court, in interpreting the ADA, cited several agency guidelines[69] and judicial decisions,[70] to support its determination that asymptomatic HIV constitutes a physical impairment.[71]

Once the plaintiff has cleared the "physical or mental impairment" hurdle, he or she must also show that the impairment "substantially limits . . . [a] major life activit[y]."[72] In the case of HIV infection, plaintiffs may argue that their major life activity of reproduction is substantially limited.[73] Prior to *Bragdon*, the issue of whether reproduction constituted a major life activity was a much debated issue.[74] The Supreme Court, however, resolved this question by explicitly finding that reproduction is a major life activity.[75] Specifically, the Court stated that "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself."[76] The Court cited the Rehabilitation Act's regulation defining "major life activity" as "functions such as caring for one's self, performing

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66. *See* Abbott v. Bragdon, 107 F.3d 934, 939 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998) (stating that the defendant, Dr. Bragdon did not seriously advocate the view that HIV is not a physical impairment).

67. Bragdon v. Abbott, 118 S. Ct. 2196, 2203-04 (1998).

68. *See id.*

69. *See id.* at 2207-09.

70. *See id.*

71. *See id.*

72. 42 U.S.C. § 12102(2) (1997).

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

74. *Compare* Bielicki v. City of Chicago, No. 95-C-1471, 1997 WL 260595, at *3 (N.D. Ill. 1997); Soodman v. Wildman, Harrold, Allen & Dixon, No. 95-C-3834, 1997 WL 106257, at *5 (N.D. Ill. 1997); Pacourek v. Inland Steel Co., Inc., 916 F. Supp. 797, 802 (N.D. Ill. 1996); Erickson v. Northeastern Ill. Univ., 911 F. Supp. 316, 323 (N.D. Ill. 1995) (all holding that reproduction is a major life activity under the ADA), *with* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996); Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240, 243 (E.D. La. 1995) (both holding that reproduction is not a major life activity).

75. *See Bragdon*, 118 S. Ct. at 2205. The Court affirmed the trial court's conclusion that reproduction constituted a major life activity. *See id.* The lower court stated that reproduction was "one of the most fundamental of human activities" and "[a]s a matter of common sense . . . must constitute a major life activity." Abbott v. Bragdon, 912 F. Supp., 586, *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196.

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

manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," as an illustrative, rather than an exhaustive example of a major life activity.[77] The Court rebuffed the Petitioner's argument that the definition of major life activity should be limited to those activities which affect a person's public, economic, or daily life.[78] The Court concluded that absent any evidence that Congress intended such a narrow definition of "major life activity," "reproduction could not be regarded as any less important than working and learning."[79]

The Supreme Court's decision finding that reproduction is a "major life activity" is further supported by the Equal Employment Opportunity Commission (EEOC)[80] regulations for title I, which state that a physical or mental impairment is "[a]ny physiological disorder, or condition, . . . affecting any one or more of [a number of listed body systems]."[81] The link between physical and mental impairment and major life activity was noted by the court in *Pacourek v. Inland Steel Co., Inc.*[82] The court reasoned that:

> If a physiological disorder affecting the reproductive system constitutes an impairment under the ADA, then "it logically flows from that instruction that reproduction is a covered major life activity. Otherwise, it would make no sense to include the reproductive system among the systems that can have an ADA physical impairment."[83]

This argument lends additional judicial insight into the regulations established for the ADA and bolsters the Supreme Court's decision that reproduction is a "major life activity."

Although reproduction is a major life activity, under the case-by-case analysis applied in *Bragdon*, it is also imperative that the plaintiff demonstrate that his or her reproduction is substantially limited.[84] It is clear from the interpretive ADA regulations that "substantially limits"

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77. *Id.* (citations and internal quotation marks omitted).

78. *See id.*

79. *Id.*

80. The EEOC is a Governmental agency that bears the responsibility of issuing interpretive guidelines for title I. *See* 29 C.F.R. §§ 1630.1(a) and 1630.2(a) (1997).

81. 29 C.F.R. § 1630.2 (h)(1) (1997). The reproductive system is one of the listed systems. *See id.*

82. 916 F. Supp. 797 (N.D. Ill. 1996).

83. *Id.* at 801 (quoting Pacoureck v. Inland Steel Co., 858 F. Supp. 1393, 1404 (N.D. Ill. 1994)).

84. *See* 118 S. Ct. at 2205. Under the case-by-case analysis, it is imperative for the individual plaintiff to show that his or her major life activity be substantially limited. *See id.*; Abbott v. Bragdon, 107 F.3d 934, 942 (1st. Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998). The Court of Appeals for the First Circuit noted that Ms. Abbott's claim survived a motion for summary judgment by the defendant, partially because of an absence of discrediting evidence put forth by the defendant to show that Ms. Abbott's major life activity of reproduction was *not* substantially limited. *See Abbott*, 107 F.3d at 942.

should not be defined so narrowly as to require that the disabled individual be precluded from a particular major life activity.[85] This is exemplified in the guidelines for title III issued by the Department of Justice which define "substantially limits" as "[u]nable to perform a major life activity that the average person in the general population can perform" or "*[s]ignificantly restricted* as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the average person in the general population."[86] Likewise, the plain meaning of the word "limits" is: "to *restrict*; to set bounds or limits."[87]

Despite the apparent clarity of the phrase "substantially limits," at least one court prior to *Bragdon* found that asymptomatic HIV infection is not substantially limiting because the individual is not *precluded* from engaging in reproduction.[88] The Supreme Court, however, unequivocally resolved the issue by stating that "[t]he Act addresses substantial limitations on major life activities, not utter inabilities."[89] The Court further noted that "[c]onception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health."[90]

The *Bragdon* Court found that the plaintiff's HIV infection was substantially limiting in two separate ways.[91] First, the Court cited

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85. *See* 29 C.F.R. § 1630.2(j)(1)(i-ii) (1998).

86. *Id*. (emphasis added).

87. WEBSTER'S NEW COLLEGIATE DICTIONARY 667 (1974).

88. *See* Runnebaum v. Nationsbank of Maryland, N.A., 123 F.3d 156, 171-72 (4th Cir. 1997) (en banc).

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

90. *Id.*

91. *See id.* In addition to the limitations cited by the Court in *Bragdon*, there are other significant short and long term risks that may be imposed on children conceived from an HIV-positive parent. *See* Daniel V. Landers & Maureen T. Shannon, *Management of Pregnant Women with HIV Infection*, *in* THE MEDICAL MANAGEMENT OF AIDS 459, 459-61 (5th ed.) (noting that pregnant women who are HIV-positive are more likely to have complications during pregnancy and that infants born to HIV-positive women are less likely to survive after birth); Cynthia B. Cohen, *HIV, AIDS and Childbearing*, 277 JAMA 1480 (1997) (reviewing HIV, AIDS AND CHILDBEARING (Ruth R. Faden & Nancy E. Kass eds., 1996) (relating that the "psychosocial effects of parental loss, stigma, chronic illness, anticipation of premature death, and need for services will continue to present these children and their families 'with a constellation of challenges not found previously in any single condition'").

Additionally, courts have recognized that the term "reproduction" is not limited to the physical act required for conceiving a child, but rather it extends to the "process of caring for and raising a child." Abbott v. Bragdon, 912 F. Supp. 580, 586-87 (D. Me 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998). Due to the fatality of HIV, women who are infected often choose not to reproduce for fear that their child will lose her parent and become an orphan. *See id.* at 587. These fears are well founded. The Centers for Disease Control has predicted that by the year 2000, over 80,000 children will be orphaned by AIDS in the United States alone. *See* Hobart Swann, *Orphaned by AIDS*, HOSP. & HEALTH NETWORKS, Apr. 5, 1997,

medical literature finding that HIV-positive persons impose a significant risk of infection on their partners when they engage in sexual relations while attempting to conceive.[92] Secondly, the Court determined that there was a significant risk of a pregnant woman transmitting HIV perinatally to her offspring during gestation and childbirth.[93] Although there is a discrepancy as to whether the risk of transmission should be quantified as 25%, or 8%,[94] the Court noted that the actual percentage was irrelevant: "It 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."[95] The Court cited an opinion issued by the Justice Department to support its holding that HIV-positive individuals are "substantially limited" in reproduction.[96] The report stated that:

> Based on the medical knowledge available to us, we believe that it is reasonable to conclude that the life activity of procreation . . . is substantially limited for an asymptomatic HIV-infected individual. In light of the significant risk that the AIDS virus may be transmitted to a baby during pregnancy, HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child.[97]

Despite this finding, questions exist as to whether the decision of HIV-positive individuals to forego reproduction is simply "a responsibly self-imposed limitation," rather than a disability.[98] While

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at 88; David Michaels & Carol Levine, *Estimates of the Number of Motherless Youth Orphaned by AIDS in the United States*, 268 JAMA 3456, 3458-59 (1992). The effect of HIV on reproduction has been compared with the effect of Huntington's Disease on reproduction. *See* Brian R. Gin, *Genetic Discrimination: Huntington's Disease and the Americans with Disabilities Act*, 97 COLUM. L. REV. 1406, 1429 (1997).

Gin notes that "[b]oth classes of persons are effectively prevented from having children primarily because they cannot in good conscience bring a child into the world when the child will likely suffer a devastating, fatal disease. In addition . . . individuals may be reluctant to have a child because they are almost certain that they will die within a certain number of years after the birth of the child." *Id.*

92. *See Bragdon*, 118 S. Ct. at 2206 (citing studies that indicate a 20% to 25% chance that male partners of HIV-positive women will become infected).

93. *See id*. (citing studies that indicate a 13% to 45% risk of HIV-positive women infecting their children during gestation and childbirth.)

94. *See* 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) (estimating that the risk of transmission from mother to child is between 8.3% and 25.5% depending on the medical treatment used).

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

96. *See id*. at 2207.

97. *Id*. (quoting Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 273 (Sept. 27, 1988) (preliminary print)).

98. Transcript of Respondents' Oral Argument, Bragdon v. Abbott, No. 97-156, 1998 WL 141165, at *28-32 (March 30, 1998) (No. 97-156) (questioning by the Court suggesting that HIV-

this argument may have some merit, it may also be said that some choices are so limited in their nature as to be effectively hollow.[99] This is undoubtedly the case for individuals who are HIV positive. The choice of whether to conceive a child who has a significant risk of contracting an incurable and almost certainly fatal disease, or who will ultimately lose one or both parents to the disease, hardly seems like a true choice. This very philosophy was resounded by the Court when it stated that, "[i]n the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable."[100]

Although the Supreme Court's decision in *Bragdon* should be lauded as groundbreaking, it is nonetheless imperative to discuss the consequences and implications raised by this opinion. In particular, while the *Bragdon* decision is exemplary for ultimately finding asymptomatic HIV a disability under the ADA, the Court failed to address whether HIV infection is a *per se* disability.[101] In declining to address this issue, the Court severely limited the scope of the ADA. This may effectively exclude groups of people who are discriminated against because of their HIV status.

IV. CONSEQUENCES OF THE CASE-BY-CASE ANALYSIS FOR GAY MEN AND LESBIANS

The *Bragdon* Court, in determining that HIV constitutes a disability, focused its analysis of "major life activity" solely on

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positive individuals are not "substantially limited" in their reproductive options, rather they are faced with a moral choice concerning reproduction); *Bragdon*, 118 S. Ct. at 2216 (Rehnquist, J., dissenting) (stating that reproduction is not "substantially limited" for HIV-positive individuals because "[w]hile [they] 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 also* Theresa Schneider, *Stretching the Limits of the ADA: Asymptomatic HIV-Positive Status as a Disability in* Bragdon v. Abbott, 77 NEB. L. REV. 206, 222-223 (1998) (arguing that asymptomatic HIV-positive individuals are not disabled because it is the person's reaction to the infection, rather than the infection itself, that substantially limits reproduction).

99. Some HIV-positive individuals, for example, must decided whether to participate in experimental trials. This choice has been called a "sham" when the illness is fatal, as with AIDS. *See* GEORGE J. ANNAS, JR., STANDARD OF CARE 133-140 (1993). Similarly, some AIDS activists argue that until more information is provided about the correct use and efficacy of certain AIDS drugs, the choice to use a new drug remains "fairly empty." *See* David Brown, *Speedy Release of AIDS Drugs Challenged on Lack of Follow-Through*, WASH. POST, Sept. 11, 1994, at A3.

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

101. *See id.* at 2207. ("In view of our holding, we need not address the second question presented, *i.e.*, whether HIV infection is a *per se* disability.").

reproduction.[102] Thus, in order to benefit from the Court's definition of "disability," an HIV-infected individual must show that his or her major life activity of reproduction is substantially limited. This may be particularly problematic for gay men and lesbians on multiple levels. First, reproduction is generally regarded as a heterosexual activity. While it is increasingly true that gay men and lesbians are participating in reproduction and parenting,[103] courts and commentators alike have expressly excluded gay men and lesbians from the class of people who procreate.[104] One commentator, for example, argued that it is "absurd" and "clearly unreasonable" for homosexual men to profess reproduction as a major life activity, further asserting that their "sexual orientation . . . not their infection, has precluded reproduction."[105] This narrow-minded approach, while not based on reality, may have significant negative consequences for gay men and lesbians if adopted by courts. The current composition of the federal judiciary offers little promise for a liberal interpretation of this issue.[106]

In addition, the case-by-case analysis employed by the *Bragdon* Court places a burden on the plaintiff to affirmatively show how HIV infection substantially limits *his* or *her* ability to reproduce. To that end, individual plaintiffs must demonstrate an *intention* to reproduce, because it would be logically difficult to demonstrate that one's major life activity of reproduction is substantially limited if the individual had no intention of reproducing.[107] The case-by-case analysis,

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102. The Court stated that it was judicial practice to answer only those questions raised in the appellate court. Thus, because the Respondent's only claim was that HIV presented a substantial limitation on her ability to reproduce, the Court was limited in its ability to determine a broader definition of "major life activity." *See id*. at 2204-05.

103. *See* Dolores W. Maney & Richard E. Cain, *Preservice Elementary Teachers' Attitudes Toward Gay and Lesbian Parenting*, 67 J. SCH. HEALTH 236 (1997) (describing generally the growing number of gay men and lesbians who are choosing to parent).

104. *See* Runnebaum v. Nationsbank of Md., N.A., 123 F.3d 156, 172 (4th Cir. 1997) (en banc) (questioning the importance of reproduction in the homosexual plaintiff's life, and as such reproduction as a major life activity).

105. Schneider, *supra* note 98, at 221. While the author specifically singled out gay men, the argument could easily be applied to exclude lesbians as well.

106. *See e.g.*, Thomas B. Stoddard, *Lesbian and Gay Rights Litigation Before a Hostile Federal Judiciary: Extracting Benefit from Peril*, 27 HARV. C.R.-C.L. L. REV. 555, 556-58 (1992) (arguing that lesbians and gay men have been denied civil rights because the federal judiciary, comprised largely of Republican appointed judges, has failed to expand federal statutes to include this group).

107. However, one court found that even though the plaintiff, a gay man, was not at the time actively seeking to reproduce, he was not precluded from making a claim that his major life activity of reproduction was substantially limited by his HIV-positive status. *See* Hernandez v. Prudential Ins. Co., 977 F. Supp. 1160, 1164 (M.D. Fla. 1997). This may also be true for individuals who are not yet of reproductive age. *See* Doe v. Dolton Elementary Sch. Dist., 694 F.

therefore, burdens the plaintiff with proving those intentions. Failure to affirmatively show an intention of reproducing could, accordingly, result in dismissal of ADA claims. Demonstrating an intention to reproduce could be arduous for gay men and lesbians, particularly given the proclivity of courts to find to the contrary.[108]

The court's decision in *Runnebaum v. Nationsbank of Maryland, N.A.* is indicative of the difficulties that may be encountered by gay men and lesbians attempting to show an intention to reproduce.[109] In *Runnebaum*, the Fourth Circuit Court of Appeals examined whether an asymptomatic HIV-positive employee was fired in violation of the ADA.[110] The court, utilizing the case-by-case analysis, determined that Runnebaum was not disabled under the ADA.[111] In holding that Runnebaum's HIV infection did not substantially limit his ability to procreate, the court noted that nothing in the record indicated that Runnebaum, as a gay man, "was at all interested in fathering a child."[112] This type of blatant stereotypical reaction by courts may ultimately deny gay men and lesbians protections offered under the ADA. This is particularly distressing for gay men, a group who still compromise the largest percentage of people infected with HIV.[113] Furthermore, if the goal of the ADA is to curtail discrimination against individuals with disabilities, "it is a public policy folly of the first degree to say that the prohibition of discrimination will depend on whether gay men can show that a prior desire to have or to raise children was limited by their HIV infection."[114] Courts, strictly interpreting the definition of "disability," may nevertheless restrict gay men and lesbians in their efforts to benefit from this anti-discrimination measure by requiring them to demonstrate an intent to reproduce.

Supp. 440, 445 (N.D. Ill. 1988) (stating that "[w]hile the Student may not yet be of an age 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").

108. *See* Parmet & Jackson, *supra* note 20, at 35 n.264 (stating that it is questionable if gay men can truthfully assert their intentions to reproduce).

109. 123 F.3d 156 (4th Cir. 1997) (en banc).

110. *See id.* at 163-75.

111. *See id.* at 172.

112. *Id.* The majority of the *Runnebaum* court was comprised of judges appointed by a Republican President, all but one of whom joined the court's opinion. *See* Allison A. Satchwill, *Asymptomatic HIV and the Americans with Disabilities Act: Runnebaum v. Nationsbank of Maryland, N.A.*, 66 U. CIN. L. REV. 1387, 1403 (1998) (arguing that "political motivation" may have played a role in the court's decision).

113. *See* Curran, *supra* note 2.

114. Parmet & Jackson, *supra* note 20, at 36 n.264.

If a plaintiff can demonstrate that reproduction is a major life activity, he or she must still illustrate how that activity is substantially limited. As mentioned above, the Court in *Bragdon* specifically found that HIV infection places substantial limitations on reproduction in two primary ways, the significant likelihood of HIV transmission during the sexual relations which occur during the process of procreation and the risk of perinatal transmission of HIV from mother to child.[115] It should be noted, however, that when stating that the "sexual dynamics surrounding" reproductive activity are "central to the life process itself," the court placed express emphasis on the traditional method of conception and procreation.[116] Gay men and lesbians will, in all likelihood, not benefit from this defined limitation. When choosing to parent a child, gay men and lesbians most often pursue pregnancy through artificial insemination or surrogacy, rather than traditional methods.[117] There are no sexual relations or dynamics involved in this process.[118] Because sexual contact is not required to reproduce, there is no risk of transmission from one partner to another, and ultimately minimal limitation on reproduction based upon this factor.[119] A narrow interpretation of "reproductive activity" could, therefore, exclude gay men and lesbians from ADA protection. Furthermore, while an HIV-positive lesbian may demonstrate that the risk of perinatal HIV transmission from mother to child substantially limits her ability to reproduce, this is not a viable claim for gay men.[120]

The detailed findings made by the Court regarding the substantially limiting effects of HIV on reproduction may pose potential roadblocks for HIV-positive gay men and lesbians seeking

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115. *See* Bragdon v. Abbott, 118 S. Ct. 2196, 2205-06 (1998).

116. *Id*. at 2205.

117. *See* Maney & Cain, *supra* note 103, at 236. *See also* Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 178 (1996) (stating that in 1987 alone, approximately 1,700 lesbians used artificial insemination as a method of reproduction). *But see* APRIL MARTIN, LESBIAN AND GAY PARENTING HANDBOOK 47 (1993) (stating that some lesbians conceive children through heterosexual sex).

118. Artificial insemination does not necessitate sexual relations in order for impregnation to occur. LISA SAFFRON, CHALLENGING CONCEPTIONS: PREGNANCY AND PARENTING BEYOND THE TRADITIONAL FAMILY 1 (1994).

119. Gay men who wish to reproduce may still be able to demonstrate a substantial limitation. Although sexual relations may not occur, the pregnancy process would require that the HIV-infected male's sperm be introduced into a surrogate in order for impregnation to occur. This could result in transmission of the virus to that woman. Thus, the likelihood of finding a willing surrogate will be very tenuous, resulting in a substantial limitation in reproduction. However, it is unlikely that this is the type of limitation envisioned by the Supreme Court.

120. This is simply a matter of biology, as a man cannot carry a fetus.

protection under the ADA. While the Court implied that the substantially limiting factors were "independent" of each other,[121] some commentators have linked the two factors,[122] which may ultimately require plaintiffs to demonstrate a risk of sexual *and* perinatal transmission in order to show a substantial limitation on reproduction. Failure to demonstrate the specific limitations articulated by the Court may preclude plaintiffs from successfully showing that they have a disability.

Gay men and lesbians who do not qualify as disabled under the first prong of the definition, because they cannot demonstrate either an intention to reproduce or that their reproduction is substantially limited, must seek alternative options as a means of gaining protection under the ADA. The Supreme Court in *Bragdon* declined to address several ancillary questions regarding asymptomatic HIV infection as a covered disability under the ADA, including: whether asymptomatic HIV is a *per se* disability;[123] what activities, other than reproduction, fall within the statutory rubric of "major life activity;"[124] and whether asymptotic HIV-positive individuals qualify for ADA protection under the third prong of the disability definition.[125] The failure to address these issues provides lower courts with minimal guidance, leaving the door open for future ambiguous interpretation. This ambiguity, however, may ultimately aid gay men and lesbians by providing diverse options, thereby allowing courts to liberally interpret the definition of disability.

V. ALTERNATIVE OPTIONS FOR GAY MEN AND LESBIANS

A. HIV as a per se Disability under the ADA

HIV-positive plaintiffs who are unable to benefit from the *Bragdon* Court's definition of reproduction as a "major life activity," may argue that HIV infection, at any stage, constitutes a *per se* disability. The argument that HIV is a *per se* disability circumvents the problematic case-by-case analysis and provides gay men and lesbians with full protection under the ADA. The Supreme Court's failure to address whether HIV constitutes a *per se* disability provides plaintiffs with the opportunity to raise this issue in future cases.

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

122. *See,* Schneider, *supra* note 98, at 221 ("Abbott's HIV-positive status served as such a limitation because of the risk of sexual transmission *and* perinatal transmission.") (emphasis added).

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

124. *Id*. at 2205.

125. This issue was not raised by the plaintiff.

Congress' impetus to include HIV as a disability under the ADA was twofold. First, the Supreme Court in *School Board v. Arline*,[126] recognized that discrimination against individuals with transmittable diseases would thwart public health efforts to curtail the disease.[127] The court stated:

> [B]ecause the [Rehabilitation] Act requires employers to respond rationally to those handicapped by a contagious disease, the Act will assist local health officials by helping remove an important obstacle to preventing the spread of infectious diseases: the individual's reluctance to report his or her condition.[128]

This is of particular importance with regard to the HIV epidemic, because education and counseling are vital factors that can inevitably lead to a decline in the spread of HIV.[129] Fear of discrimination[130] stymies public health efforts because it provides a disincentive to undergo HIV testing, seek counseling, and solicit necessary medical treatment.[131] Congress clearly understood the necessity of eliminating HIV discrimination when it drafted the ADA:

> As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination . . . will undermine our efforts to contain the [HIV] epidemic and will leave HIV infected individuals isolated and alone.[132]

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126. 480 U.S. 273 (1987).

127. *See id.* at 286 n.15.

128. *Id.*

129. *See* Lynda S. Doll & Beth A. Dillon, *Counseling Persons Seropositive for Human Immunodeficiency Virus Infection and Their Families*, *in* AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION 533, 536-38 (Vincent T. DeVita, Jr. et al. eds., 4th ed. 1997) (describing the type of counseling that is given to people with HIV). It is important that people with HIV seek counseling, because HIV, unlike some other diseases, can be effectively eliminated if people avoid certain risky behaviors or take precautionary measures to make these behaviors safer. *See id.*

130. This fear is not unfounded. In *Bragdon*, for example, the Respondents cited studies showing that 40% of dentists, and 48% of primary care physicians have stated that they would not treat an HIV-positive patient. *See* Brief for Respondent Maine Human Rights Commission at 3, Bragdon v. Abbott, 118 S. Ct. 2196 (1998). Specifically, by refusing to fill Ms. Abbott's cavity in his office, Dr. Bragdon would have forced Ms. Abbott to travel to Machias, Maine (a round trip of over 100 miles) in order to have her cavity filled. *See id.*

131. *See* H.R. REP. NO. 101-485, pt. II, at 31 (1990) (testimony of Admiral James Watkins, Chairperson of the President's Commission on the Human Immunodeficiency Virus Epidemic). Admiral Watkins stated that "discrimination against individuals with HIV infection is widespread and has serious repercussions for both the individual who experiences it and this for this nation's efforts to control the epidemic." *Id.*

132. *Id.*

It is apparent that Congress recognized the interplay between public health efforts to curtail the spread of HIV and discrimination faced by people who are infected with HIV. As a result, Congress drafted the Act broadly to encompass asymptomatic HIV under the statutory limitations.[133]

Secondly, discrimination faced by people who are infected with HIV, or who are perceived to be infected with HIV, significantly hinders their ability to lead a normal existence. For instance, school boards have attempted to exclude HIV-infected children from school,[134] employers often attempt to fire or demote HIV-infected individuals,[135] HIV-positive people are denied housing,[136] and some HIV-infected individuals have difficulty obtaining or cannot obtain health or life insurance.[137] The committee hearings and floor debates for the ADA are replete with testimony on discrimination faced by HIV-infected persons.[138] Awareness of this discrimination induced Congress to draft the ADA so as to include HIV as a disability under the ADA.

Although the explicit language of the ADA does not list asymptomatic HIV as a disability,[139] this should not be seen as an intention to exclude asymptomatic HIV from the statutory definition. The regulations for the ADA established by the Department of Health and Human Services (HHS) clearly mirror the approach taken by the Rehabilitation Act, which rejected listing specific conditions because

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133. In fact, critics of the ADA cast the Act as overly broad. *See e.g.*, Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provision of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 346 (1997) (describing how some detractors view the ADA).

134. *See* Martinez v. School Bd., 861 F.2d 1502, 1503 (11th Cir. 1988) (attempting to confine a disabled child, who was HIV positive, to homebound instruction); Doe v. Dolton Elementary Sch. Dist., 694 F. Supp. 440, 442 (N.D. Ill. 1988) (attempting to exclude a student, who had AIDS, from regular classes and extracurricular activities); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376, 380-81 (C.D. Cal. 1987) (same).

135. *See* Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1314-1321 (E.D. Pa. 1994) (failing to renew contract of a HIV-positive lawyer).

136. *See* Baxter v. Belleville, 720 F. Supp. 720, 721-24 (S.D. Ill. 1989) (denying special use permit to plaintiff who wanted to open a housing facility for people who were infected with HIV).

137. *See* Life Ins. Ass'n v. Commission of Ins., 530 N.E.2d 168, 169-70 (Mass. 1989) (holding that a ban on HIV testing for the purpose of insurance underwriting was invalid).

138. *See* S. Hrg. 101-156 on S.933, 102-03. The parents of a small child who had died of AIDS, for example, testified that they had trouble finding an undertaker to bury their child. *See id*. In addition, members of Congress were particularly aware of the plight of Ryan White, an HIV-infected child from Indiana, who became the poster child for kids with AIDS and the discrimination they faced. *See* 136 CONG. REC. H2479 (daily ed. May 17, 1990) (statement of Rep. McCloskey); 136 CONG. REC. S7438 (daily ed. June 6, 1990) (statement of Sen. Harkin).

139. *See* 42 U.S.C. §§ 12101-12213 (1997).

of the "difficulty of ensuring the comprehensiveness of any such list."[140] Furthermore, while Congress did not list conditions that would qualify as a disability, they did exclude certain conditions as not falling within the statutory requirements for a disability.[141] Homosexuals,[142] transvestites,[143] and drug abusers,[144] for example, are not disabled within the meaning of the ADA, based on this status alone. This can be seen as a specific indication that Congress did not intend to exclude asymptomatic HIV as a disability under the ADA. In the absence of plain language to define statutory limitations, the legislative intent and interpretive guidelines must be scrutinized to determine whether a particular condition is a disability.[145]

The legislative intent of those drafting the ADA is well documented.[146] Senator Ted Kennedy, a primary author of the ADA stated:

> People with HIV disease are individuals who have any condition along the full spectrum of HIV infection-asymptomatic HIV infection, symptomatic HIV infection or full-blown AIDS. These individuals are covered under the first prong of the definition of disability in the ADA, as individuals who have a physical impairment that substantially limits a major life activity. Although the major life activity that is affected at any point in the spectrum

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140. 45 C.F.R. pt. 84 App. A., at 334 (1997). This approach is clearly legitimate, for when the Rehabilitation Act was enacted, the drafters had no way of predicting the impending HIV epidemic (or any other potential disease that has similar disabling and discriminatory effects on those afflicted), and the social ramifications for people with this disease.

141. *See* 42 U.S.C. §§ 12208, 12211 (a-b) (1997).

142. *See id*. § 12211(a). *See* John Douglas, *HIV Disease and Disparate Impact Under the Americans with Disabilities Act: A Federal Prohibition of Discrimination on the Basis of Sexual Orientation*, 16 BERKELEY J. EMP. & LAB. L. 288, 310-313 (1995) (discussing the contradiction of including HIV-positive status as a covered disability while expressly excluding homosexuality, because of the high percentage of HIV-positive individuals who are homosexual men).

143. *See* 42 U.S.C. § 12208 (1997). *See* Adrienne L. Hiegel, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1472-75 (1994) (arguing generally that ADA provisions may wrongly exclude HIV-positive individuals such as homosexuals, drug users and transvestites because they are "morally culpable," while providing "full protection" for "innocent victims" of HIV infection).

144. *See* 42 U.S.C. § 12210 (1997).

145. *See* Blum v. Stenson, 465 U.S. 886, 896 (1984). *See also* Bragdon v. Abbott, 118 S. Ct. 2196, 2207 (1998) (stating that the Department's views are entitled to deference) (citing Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)); Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1319 (E.D. Pa. 1994) (stating that substantial deference must be given to the agency regulating the statute).

146. Congressional debates of the ADA clearly indicate that the drafters intended that HIV be considered a disability within the meaning of the Act. *See* 135 CONG. REC. S10765-01 (daily ed. Sept. 7, 1989) (statement of Sen. Harkins). Senator Harkins stated in response to a question by Senator Helms: "It is people who have AIDS and HIV infection who are covered on the basis of those disabilities. . . . Because they are HIV-positive, I point that out, that makes them covered." *Id*. at S10767.

> by the HIV infection may be different, there is a substantial limitation of some major life activity from the onset of the HIV infection.[147]

Similarly, the House Report for the ADA concluded that "a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term 'disability' because of the substantial limitation to procreation and intimate sexual relationship."[148] Even the Act's opponents conceded this point.[149] In addition, the EEOC's regulations explicitly state that "an individual who has HIV infection (including asymptomatic HIV infection) is an individual with a disability."[150] The EEOC further stated that "[o]ther impairments . . . such as HIV infection, are *inherently substantially limiting.*"[151]

Moreover, lower courts have recognized HIV as a *per se* disability under the ADA.[152] These decisions reflect a judicial willingness to recognize the substantially limiting effects of HIV as a matter of law.[153] In *Anderson v. Gus Mayer Boston Store*, the court explicitly labeled HIV as a *per se* disability by concluding:

> Conditions such as AIDS, HIV, blindness, and deafness, *inter alia*, have been determined by the courts to be *per se* disabilities. In other words, it has been established both that these conditions impact a major life activity and that this impact is substantially impairing of a given activity. Other conditions that are *not* on these lists must be resolved on a case-by-case basis.[154]

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147. 136 Cong Rec. S9696 (daily ed. July 13, 1990) (statement of Sen. Kennedy).

148. H.R. REP. NO. 101-485. pt. II, at 52 (1990). Similar language exists in the Senate version of the Report. *See* S. REP. NO. 101-116, at 22 (1989). HIV, therefore, would qualify as a disability even in cases where the individual may otherwise be physically unable to reproduce, i.e. post-menopausal women, or when they have no intention to reproduce. *See Bragdon*, 118 S. Ct. at 2201-09.

149. *See* Parmet & Jackson, *supra* note 20, at 21 (noting that Senator Jessie Helms, a staunch critic of the Act, stated his belief that HIV would be covered under the ADA).

150. *Bragdon*, 118 S. Ct. at 2209 (citing *EEOC Interpretive Manual* § 902.4(c)(1), at 902-21).

151. 29 C.F.R. 1630.2(j) (1997) (emphasis added).

152. *See* Hoepfl v. Barlow, 906 F. Supp. 317, 319 n.7 (E.D. Va. 1995) (stating that "[i]t is now settled law that HIV-positive individuals are 'disabled' within the meaning of the ADA"); Howe v. Hull, 873 F. Supp. 72, 78 (N.D. Ohio 1994) (concluding that "AIDS and HIV infection are both disabilities within the meaning of the ADA"); D.B. v. Bloom, 896 F. Supp. 166, 170 n.4 (D.N.J. 1995) (citing the Department of Justice's interpretive guidelines for title II in finding that an individual, by virtue of their HIV status, is disabled under the ADA).

153. *See* Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763, 774 n.24 (E.D. Tex. 1996) ("Because of the substantial limitations placed upon a person with [HIV] (ability to procreate and engage in intimate sexual relationships) major life activities are hampered.").

154. *Id.* at 774-75. *See also* Lanctot, *supra* note 31, at 337-38 (arguing that the case-by-case approach should be abandoned for HIV). Lanctot noted that "prejudice against people with certain disabilities does not rest on a fact-specific inquiry," because prejudice is "[a]n adverse

Despite clear Congressional intent that HIV be treated as a *per se* disability, and in disregard of prior judicial opinions finding that HIV is a *per se* disability under both the Rehabilitation Act[155] and the ADA,[156] some courts have been reluctant to define HIV as *per se* disability, and have instead elected the case-by-case method of analysis.[157] The reluctance by courts to find HIV as a *per se* disability may stem from a general disinclination to interpret the language of the ADA in an overly broad manner.[158] The unwillingness to expand the scope of the ADA was articulated by the United States District Court for the Northern District of Alabama in *Patrick v. Southern Company Services*,[159] when the court stated:

> The initial story of [the] ADA has been the attempt of persons to stretch the intent of [the] ADA with regard to alleged "disabilities." Much of the criticism of the ADA in practice has come from the truly disabled who recognize that such attempted stretches can cause negative reaction to the Act and perhaps undermine its true purposes.[160]

The Supreme Court in *Bragdon*, though not bound by any prior judicial precedent, opted for the case-by-case analysis. The Court, however, stopped significantly short of replicating the rationale of the district court which explicitly stated that "the ADA classifies neither HIV, nor any other disease or condition, as a *per se* disability. Instead, application of the statute to a given individual depends on whether that individual has a physical or mental impairment, and whether that impairment substantially limits a major life activity of that individual."[161] The Supreme Court's decision in *Bragdon,* therefore, does not preclude future courts from determining that HIV infection is in fact a *per se* disability, as the Court's opinion does not

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judgment or opinion formed beforehand or without knowledge or examination of the facts." *Id*. at 337 n.50 (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 977 (2d ed. 1982).

155. *See* Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994) (holding that HIV is a *per se* disability under the Rehabilitation Act).

156. *See* Anderson, 924 F. Supp. at 774-75 (holding that HIV is a *per se* disability under the ADA).

157. *See* Runnebaum v. Nationsbank of Md., N.A., 123 F.3d 156, 165 n.4 (4th Cir. 1997) (en banc); Reichle v. Walsh Offshore, Inc., No. Civ.A. 97-2309, 1997 WL 728104, at *2 (E.D. La. 1997); Hernandez v. Prudential Ins. Co., 977 F. Supp. 1160, 1163-64 (M.D. Fla. 1997); Doe v. Kohn, Nast & Graf, P.C., 862 F. Supp. 1310, 1319 (E.D. Pa. 1994).

158. *See* Lanctot, *supra* note 31, at 332-333 (stating that there is a "palpable reluctance by many judges to recognize even the most deadly of diseases . . . as being presumptively within the protection of the ADA.").

159. 910 F. Supp. 566 (N.D. Ala. 1996), *aff'd*, 103 F.3d 149 (11th Cir. 1996).

160. *Id*. at 567.

161. Abbott v. Bragdon, 912 F. Supp. 580, 585 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st. Cir.1997), *vacated*, 118 S. Ct. 2196 (1998).

hold to the contrary. The Court's indecision as to this issue enables other courts to emulate the reasoning set forth by the district courts in *Anderson* and other cases, and find that asymptomatic HIV constitutes a *per se* disability.

It is imperative from a public health and policy perspective that future judiciary give credence to the well documented intent of the drafters of the ADA. Courts must interpret asymptomatic HIV as a *per se* disability under the ADA, especially given the paucity of other anti-discrimination measures to prevent discrimination against persons infected with HIV. Finding that HIV is a *per se* disability is particularly important for gay men and lesbians as this provides the best option for inclusion under the ADA for these groups.

B. Sexual Relations as a "Major Life Activity"

HIV-positive gay men or lesbians who fail to establish that reproduction constitutes a "major life activity" for that individual may cite intimate sexual activity as a major life activity in order to fall within the first prong of the disability definition.[162]

Justice Blackmun stated in *Bowers v. Hardwick* that "[o]nly the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'" [163] Congress, moreover, recognized the importance of sexual intimacy by specifying that the term "major life activity" includes intimate sexual relations.[164] Similarly, courts have recognized that intimate sexual relationships constitute a "major life activity."[165] However, in states where sodomy is still considered illegal,[166] judges may be particularly reluctant to label intimate sexual activity by gay men and lesbians a major life activity when the activity is in fact illegal.[167] Even in states

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162. *C.f.* Runnebaum v. Nationsbank of Md., N.A., 123 F.3d 156, 170-71 (4th Cir. 1997) (failing to address whether intimate sexual activity is a major life activity).

163. 478 U.S. 186, 205 (1986) (Blackmun, J. , dissenting).

164. *See* H. REP. NO. 101-485, pt. II, at 52 (1990).

165. Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763, 774 n.24 (E.D. Tex. 1996).

166. In May, 1998, there were sodomy laws on the books in twenty states. *See* Dorothy Foley, *Sodomy Laws and You*, THE ADVOCATE, Mar. 17, 1998, at 9. Between April and November, 1998, however, courts in Maryland, Rhode Island, and Georgia found the sodomy laws in those states unconstitutional. *See Year in, Year out*, THE ADVOCATE, Jan. 19, 1999, at 10, 12, 16.

167. Federal courts that hear claims concerning violations of the ADA, of course, are not bound by state sodomy laws. A federal court, however, may elect to adopt an applicable state sodomy law in part of its analysis, particularly in light of the Supreme Court's decision in *Bowers v. Hardwick*, which held that there is no fundamental right to homosexual sodomy. 478 U.S. 186, 192-96 (1986).

where this activity is not considered illegal, homophobic courts may be averse to the concept of expanding the definition of major life activity to include homosexual relations.

An HIV-infected individual who can successfully aver that intimate sexual relations qualify as a major life activity must also demonstrate that he or she is substantially limited in that major life activity. The Department of Justice issued a memorandum of law in 1988 which stated that "[t]he life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus."[168] This view, while not regulatory in nature, has been reverberated by courts, health officials and scholars nationwide.[169] The First Circuit Court of Appeals in *Bragdon* made its tenet apparent by stating that "it is clear . . . HIV-positive status has a profound impact upon [the] ability to engage in intimate sexual activity."[170] Individuals who are infected with HIV may choose to completely forego sexual activity. However, for those who do not choose this option, sexual intimacy carries the potential risk of infecting the sexual partner of the HIV-positive person.[171] Unprotected sex not only endangers the sexual partner of the HIV-positive individual, but may also subject the infected person to other diseases which are particularly dangerous for him or her, or may subject him or her to new strains of the virus.[172] The potential for transmitting HIV disease exists even where a condom or another form of protection has been used as a method of preventing infection.[173] Certainly knowledge that a potential exists to infect one's partner with an incurable, and most often fatal disease, renders the individual "[*s*]*ignificantly restricted* as to the condition, manner, or duration to which they can perform" the major life activity of sexual relations.[174]

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168. *Memorandum to Arthur B. Culverhouse Jr., Justice Department Memorandum on Application of Rehabilitation Act's Section 504 to HIV Infected Persons*, (Sept. 27, 1988) *reprinted in Americans with Disabilities Act of 1989: Hearings Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess., 348 (1989).

169. *See Anderson*, 924 F. Supp. at 774 n.24 (finding that HIV inhibits the ability to engage in intimate sexual activity); Amicus Brief for the Infectious Diseases Society of America at 12, Bragdon v. Abbott, (U.S. 1998) (No. 97-156) (describing the limiting effects of HIV on an infected individual's intimate sexual relations); Parmet & Jackson, *supra* note 20, at 41 (stating that "many individuals with HIV infection . . . find that the virus limits their sexual lives").

170. 107 F.3d 934, 939 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

171. *See* Curran, *supra* note 7 (describing modes of transmission).

172. Laura A. Worth & Jeffrey H. Burack, *Outpatient Management of HIV Infection*, *in* THE AIDS KNOWLEDGE BASE 4.3-18 (2d ed. 1994).

173. *See* Christine Gorman, *If the Condom Breaks A Morning After Treatment for Exposure to HIV Might Protect You from AIDS. But Don't Count on it*, TIME, June 23, 1997, at 48.

174. 29 C.F.R. § 1630.2(j)(l)(ii) (1998).

Furthermore, as the Supreme Court noted in *Bragdon*, "[t]he laws of some States . . . forbid persons infected with HIV from having sex with others, regardless of consent."[175] These laws may be a deterrent, and certainly "significantly restrict" an individual in the condition or manner in which he or she can pursue intimate sexual relations. Under the case-by-case analysis, nevertheless, the infected individual must affirmatively show that his or her sexual relations are substantially limited. Courts who strictly apply the case-by-case method of analysis, therefore, may require individual plaintiffs to specifically demonstrate how HIV infection substantially limits his or her sexual relations.[176] Gay men and lesbians may be hesitant to raise this issue knowing that their intimate sexual lives will be so strictly scrutinized.[177]

C. "Regarded as" Having a Disability

If courts fail to acknowledge that HIV constitutes a *per se* disability under the ADA, or if an individual plaintiff fails to establish that he or she is disabled under the first prong of the definition, a court may, nonetheless, find that the plaintiff has a disability under the third prong of the definition. The third prong provides that an individual is disabled if he or she is "regarded as having such an impairment."[178] In enacting the ADA, Congress adopted the regulatory definition of "regarded as" from the Rehabilitation Act.[179] The regulations promulgated for the Rehabilitation Act define "regarded as" to include:

> "(1) Ha[ving] a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) Ha[ving] a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or (3) Ha[ving] none of the impairments

175. 118 S. Ct. 2196, 2206 (1998).

176. The court in *Runnebaum* noted that there was no proof in the record to indicate that the plaintiff abstained from sexual relations, because Runnebaum did not inform his lover that he was HIV positive. *See* Runnenbaum v. Nationsbank of Md., N.A., 123 F.3d 156, 172 (4th Cir. 1997).

177. Ultimately, this may be difficult to prove as some reports indicate that unsafe sex among gay men is on the upswing. *See* John Gallagher, *Risky Business*, THE ADVOCATE, March 17, 1998, at 46. *See also* Lou Kilzer, *Many too Optimistic About War on AIDS*, THE SAN DIEGO UNION & TRIB., May 3, 1998, at A25 (stating that the belief that the AIDS crisis is over has led to an increase in unprotected sex among gay men).

178. 42 U.S.C. § 12102(2)(C) (1997).

179. *See* 29 U.S.C. § 706(20)(B)(iii) (1997).

> defined . . . but is treated by a covered entity as having a substantially limiting impairment."[180]

Despite this seemingly clear language, the definition of "regarded as" has succumbed to the same ambiguous interpretation that has befallen other definitions within the ADA. The legislative history of the ADA, for example, states that an individual is covered under the third prong if he or she is excluded from any "basic life activity, or is otherwise discriminated against, because of a covered entity's negative attitudes towards that person's impairment."[181] Courts have interpreted this history as indicating that the discrimination itself creates a disability.[182] For instance, in *School Board v. Arline,* Justice Brennan 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."[183] Justice Brennan also noted that "[s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."[184]

In the HIV context, some courts are willing to give credence to the theory that discrimination itself creates the disability. The United States District Court for the Southern District of Florida in *Dean v. Knowles*, for example, stated that "[b]oth the ADA and the Rehabilitation Act provide that a person who is regarded as disabled by a public entity is protected as if he were *in fact* disabled."[185] Conversely, the Fourth Circuit Court of Appeals in *Runnebaum v. Nationsbank of Maryland, N.A.* found that the "'such an impairment' language [of the third prong of the ADA's definition of disability] incorporates by reference . . . 'a physical or mental impairment that

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180. 21 C.F.R. § 1630.2 (*l*)(l). This situation is best exemplified in the *Bragdon* case, where the defendant dentist had a blanket policy of not providing specific types of dental treatment to HIV-positive patients outside a hospital. *See* Abbott v. Bragdon, 912 F. Supp. 580, 584 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998). Dr. Bragdon was a critic of national AIDS policy, and had leaflets in his office encouraging his patients to contemplate "'the irresponsibility that causes AIDS.'" Andrew Brownstein, *Supreme Court to Hear Bangor Dentist's Case: Hearing May Change Focus of Disabilities Law on HIV*, BANGOR DAILY NEWS, March 28, 1998, *available in* 1998 WL 3121969. Dr. Bragdon was sued prior to the action by Ms. Abbott for refusing to treat another HIV-positive individual. *Id*.

181. H.R. Rep. No. 101-485, pt. II, at 53 (1990).

182. Commentators have similarly interpreted the "regarded as" language. *See* Parmet & Jackson, *supra* note 20, at 15 (stating that the regulatory language gives support to the theory that the "discriminator's actions and beliefs" actually give rise to the "substantial limitation on the major life activity of working").

183. 480 U.S. 273, 284 (1987).

184. *Id.* at 283.

185. 912 F. Supp. 519, 522 (S.D. Fla. 1996) (emphasis added).

substantially limits one or more of the major life activities of such individual.'"[186] This narrow interpretation of the third prong mandates that plaintiffs always face the often insurmountable task of affirmatively demonstrating that they have a "physical or mental impairment that substantially limits . . . [a] major life activit[y]" in order to seek remedy for the discrimination that is imposed upon them.[187] The *Runnebaum* decision, however, has been strongly criticized for its "misreading of the statutory language."[188]

Notwithstanding the *Runnebaum* court's interpretation of "regarded as," the third prong provides a feasible option for gay men and lesbians who do not otherwise qualify as disabled under the ADA.[189]

V. CONCLUSION

Initially, courts hearing claims by HIV positive individuals under the ADA appeared willing to find that HIV was a *per se* disability.[190] However, the recent trend has been to favor the method of case-by-case analysis.[191]

Congress, however, intended to "provide a . . . national mandate for the elimination of discrimination against individuals with disabilities,"[192] thus, the language and legislative intent of the Act must be interpreted broadly in order to encompass all people, including gay men and lesbians, who face discrimination based on their HIV status. Individuals infected with HIV suffer discrimination in numerous aspects of their lives. Congress, perhaps in response to an enormous amount of testimony from HIV-positive individuals, enacted the ADA to include HIV as a *per se* disability. Some judicial decisions, interpreting claims made under the ADA, however, have stymied Congressional efforts to eliminate discrimination against individuals who are infected with HIV. The case-by-case analysis employed by the Supreme Court unavoidably excludes a vast number

186. 123 F.3d 156, 172 (4th Cir. 1997) (en banc) (quoting 42 U.S.C. § 12102(2) (1997)).

187. 42 U.S.C. § 12102(2)(A) (1997).

188. Elizabeth C. Chambers, *Asymptomatic HIV as a Disability Under the Americans with Disabilities Act*, 73 WASH. L. REV. 403, 429 (1998).

189. *See id*. at 419-20.

190. *See* D.B. v. Bloom, 896 F. Supp. 166, 170 n.4 (D.N.J. 1995) (finding that HIV is *per se* disability); *accord* Hoepfl v. Barlow, 906 F. Supp. 317, 319 n.7 (E.D. Va. 1995); Howe v. Hull, 873 F. Supp. 72, 78 (N.D. Ohio 1994).

191. *See* Bragdon v. Abbott, 118 S. Ct. 2196, 2201-02 (1998) (utilizing a case-by-case analysis); Runnebaum v. Nationsbank of Md., N.A., 123 F.3d 156, 166 (holding that determination of a disability must be made on an "individualized basis").

192. 42 U.S.C. § 12101(b)(1) (1997).

of people that the legislators, in drafting the Act, clearly intended to include. Furthermore, the Court's indecisiveness concerning whether HIV is a *per se* disability may have profound negative consequences for gay men and lesbians, and thus must be cautiously received by members of this community. The only viable remedy to ensure that HIV is firmly established as a disability under the ADA, therefore, is for lower courts to take the *Bragdon* analysis one step further and find that HIV is in fact a *per se* disability under the ADA. Decisions of this nature, while not contrary to the current ruling by the Supreme Court, may ultimately force the Court to revisit this important issue.