

Bragdon v. Abbott: A Case of HIV as a Perceived Disability Under the Americans With Disabilities Act

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COMMENTS

BRAGDON v. ABBOTT: A CASE OF HIV AS A PERCEIVED DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT

People with disabilities have faced systematic discrimination in various facets of American life.¹ Negative attitudes towards the disabled have been the basis for justifying disparate and objectionable treatment,² and for isolating and segregating the disabled from mainstream society.³ While discrimination has not been completely eradicated,⁴ both state⁵ and federal⁶ legislation

¹ See 42 U.S.C. § 12101(a)(2) (1994) (“[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem[.]”); see also, S. REP. NO. 101-116, at 7 (1989) (testimony of Judith Heumann, World Institute on Disability) (detailing life long personal accounts of discrimination experienced “because of” disability).

² See *Buck v. Bell*, 274 U.S. 200, 202 (1926) (discussing the merits of a state law that was enacted to “prevent the reproduction of mentally defective people”). Justice Holmes held that a Virginia act permitting forced sterilization of mentally disabled patients in state institutions was constitutionally valid. See *id.* at 208. Salpingectomy for the purposes of sterilization was determined to be appropriate for “those who . . . sap the strength of the State.” *Id.* at 207. He later went on to state that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” *Id.* Justice Holmes reasoned that “[t]hree generations of imbeciles are enough.” *Id.*

³ See *Maine Human Rights Comm’n v. City of South Portland*, 508 A.2d 948, 954 n.5 (Me. 1986) (describing treatment of the handicapped “as one of the country’s ‘shameful oversights,’ which caused the handicapped to live among society ‘shunted aside, hidden, and ignored.’”) (quoting *Alexander v. Choate*, 469 U.S. 287, 296 (1985)) (citations omitted).

⁴ See 42 U.S.C. § 12101(a)(3) (1994) (“[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services[.]”).

⁵ See, e.g., ME. REV. STAT. ANN. tit. 5, § 4592(1) (West Supp. 1998) (“It is unlawful public accommodations discrimination, in violation of this Act . . . [f]or any public accommodation . . . to directly or indirectly refuse . . . on account of . . . physical or

have mandated a trend toward equality. The Americans with Disabilities Act⁷ ("ADA") is among the most sweeping and comprehensive legislation designated to protect the rights of those that have a covered disability.⁸ Recently, however, the scope of the ADA has been questioned.⁹ Cases regarding its applicability to persons infected with the human immunodeficiency virus ("HIV") have been testing the limits and probing particular provisions of the Act.¹⁰ In *Abbott v. Bragdon*,¹¹ the United States

mental disability . . . any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person . . .").

⁶ See, e.g., 29 U.S.C. § 794(a) (1994) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, . . . be subjected to discrimination under any program . . . receiving Federal financial assistance . . .").

⁷ 42 U.S.C. § 12101 (1994)

⁸ See 42 U.S.C. § 12101(b)(1) (stating that the purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); see also Susan Moriarity Miltko, *The Need for Professional Discretion: Health Professionals under the Americans with Disabilities Act*, 89 NW. U. L. REV. 1731, 1744 (1995) ("Through its unprecedented specificity, scope, and affirmative requirements, the ADA provides extensive new rights to millions of disabled Americans."). See also Statement by President George Bush upon signing S. 933, 26 WEEKLY COMP. PRES. DOC. 1165 (July 30, 1990), reprinted in Signing of S.933, the Americans with Disabilities Act, PUB. L. NO. 101-336, 1990 U.S.C.C.A.N. 601 (recording comments made by President Bush stating "[t]he Americans with Disabilities Act represents the full flowering of our democratic principles, and it gives me great pleasure to sign it into law today").

⁹ See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 167-69 (4th Cir. 1997) (addressing whether asymptomatic HIV is considered a disability under the ADA); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1444-47 (W.D. Wis. 1996) (addressing whether the mere use of medicine such as insulin establishes a per se disability under the ADA); *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 800-04 (N.D. Ill. 1996) (discussing whether infertility is a physical impairment under the ADA); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243-44 (E.D. La. 1995) (discussing whether a reproductive disorder substantially limits the major life activity of working pursuant to the ADA); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1316-23 (E.D. Pa. 1994) (addressing whether diagnosis of infection of HIV for approximately one year constitutes a record of impairment within the meaning of the ADA).

¹⁰ See *Hernandez v. Prudential Ins. Co.*, 977 F. Supp. 1160, 1163-65 (M.D. Fla. 1997) (addressing whether HIV is a disability under ADA); *United States v. Morvant* 898 F. Supp. 1157, 1161 (E.D. La. 1995) (discussing whether discrimination against AIDS/HIV infected patients is a violation of the ADA); *Kohn Nast & Graf*, 862 F. Supp. at 1319-23 (deciding whether the ADA covers HIV positive individuals); *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D. Ohio 1994) (stating that HIV is a disability under the ADA). But see *Runnenbaum*, 123 F.3d at 169-70 (deciding that asymptomatic HIV is not a physical impairment under the ADA).

Court of Appeals for the First Circuit held that a plaintiff infected with HIV, while in the asymptomatic stage of the disease, is considered to have a "physical impairment that substantially limits . . . a major life activity" under the ADA.¹² On appeal, the Supreme Court employed the same rationale but declined to consider other, more applicable, definitions of disability available under the ADA.¹³

In *Bragdon*, the plaintiff was an HIV-positive woman who had been infected for approximately nine years.¹⁴ She was asymptomatic at the time the cause of action arose.¹⁵ The defendant, a dentist, diagnosed the plaintiff with a cavity that needed to be filled.¹⁶ Although he offered to perform the procedure, he refused to treat the plaintiff in his office. The defendant claimed that because the plaintiff was HIV-positive, she would have to be treated in a hospital setting.¹⁷ Abbott did not agree to this type of treatment and subsequently filed suit, claiming discrimination under the ADA.¹⁸ The district court granted Abbott's claim for summary judgment,¹⁹ and the First Circuit affirmed.²⁰ The Supreme Court granted certiorari,²¹ vacated the judgment, and remanded for further proceedings consistent with its opinion.²²

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

¹² *Id.* at 942.

¹³ *See Bragdon v. Abbott*, 118 S. Ct. 2196, 2201 (1998) (noting that, in light of the conclusion that plaintiff is disabled under subsection (A) of the Act, the Court "need not consider the applicability of subsections (B) or (C)").

¹⁴ *See id.* at 2200.

¹⁵ *See id.* at 2201.

¹⁶ *See id.*

¹⁷ *See id.* Plaintiff indicated on her patient form that she was HIV positive and defendant informed her that pursuant to his infectious disease policy, he would treat her in a hospital setting. *See id.* Defendant told plaintiff that she would be charged both the standard fee for filling a cavity, and for use of the hospital facilities. *See id.*

¹⁸ *See Abbott v. Bragdon*, 912 F. Supp. 580 (D. Me. 1995).

¹⁹ *See id.* at 595; *see also* FED. R. CIV. P. 56(c) (stating that when "there is no genuine issue as to any material fact . . . the moving party is entitled to judgment as a matter of law").

²⁰ *See Abbott v. Bragdon*, 107 F.3d 934, 949 (1st Cir. 1997).

²¹ *See Bragdon v. Abbott*, 118 S. Ct. 554 (1997). The Court granted certiorari on the following three questions:

1. Is reproduction a major life activity within the meaning of the Americans with Disabilities Act . . . ?
2. Are asymptomatic individuals infected with HIV per se disabled within the meaning of the ADA?
3. When deciding under title III of the ADA whether a private health care provider must perform invasive procedure on an infectious patient in his

The case elicited a cacophony of opinions from the Justices.²³ Writing for the Court, Justice Kennedy found that Abbott's infection was a physical impairment that substantially limited the major life activity of reproduction.²⁴ In reaching its decision, the Court relied on federal regulations defining the ADA,²⁵ as well as congressional intent exhibited through the use of identical terms in other similar legislation.²⁶ The Court found reproduction to be the affected major life activity.²⁷ In arriving at this conclusion, the Court afforded the term "major life activity" its plain meaning.²⁸

The language of the ADA requires an individualized assessment to determine whether a certain condition is a disability within the meaning of the ADA.²⁹ This issue, however, was ex-

office, should courts defer to the health care provider's professional judgment, as long as it is reasonable in light of then-current medical knowledge?

1998 WL 4676 (U.S. Pet. Brief) (Jan. 7, 1998).

²² See *Bragdon*, 118 S. Ct. at 2213 (1998).

²³ See *id.* The plurality opinion was written by Justice Kennedy. See *id.* at 2202. Justice Stevens filed a concurring opinion in which Justice Breyer joined, and Justice Ginsburg filed her own concurrence. See *id.* at 2213. The Chief Justice filed an opinion concurring in part and dissenting in part, within which he was joined by Justices Scalia and Thomas. See *id.* at 2214. Justice O'Connor joined the Chief Justice's concurrence in part and authored her own partial dissent. See *id.* at 2214, 2217.

²⁴ See *id.* at 2205-06.

²⁵ See *id.* at 2202; see also 28 C.F.R. § 36.104(1)(iii) (1998) (defining physical or mental impairment to "include [] . . . such contagious . . . diseases . . . as . . . HIV disease (whether symptomatic or asymptomatic). . .").

²⁶ See 29 U.S.C. § 706(8)(B) (1994) (defining disabled individual using the exact language that was adopted by the ADA); 42 U.S.C. § 3602(h)(1) (1994) (using a definition of handicap in the Fair Housing Amendments that is identical to the Rehabilitation Act and the ADA). The Supreme Court notes that Congress's use of identical statutory language implies that Congress intended the statutory term to be construed in accordance with pre-existing regulatory interpretation. See *Bragdon*, 118 S. Ct. at 2202.

²⁷ See *Bragdon*, 118 S. Ct. at 2205 (noting that "[w]e have little difficulty concluding that [reproduction] is [a major life activity]").

²⁸ See *id.*

²⁹ See 42 U.S.C. § 12102(2) (1994) (stating that determination of disability will be made with respect to an individual); 29 C.F.R. pt. 1630, App. § 1630.2(j) (1998) (noting the importance of the individualized inquiry since "[s]ome impairments may be disabling for particular individuals but not for others"); see also *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59 (4th Cir. 1995) (finding that the provision defining disability mandates "that a finding of disability be made on an individually-individual basis").

plored only in Chief Justice Rehnquist's dissenting opinion.³⁰ Thus, since the First Circuit also declined to rule whether personal affliction must be demonstrated in each case,³¹ the question remains without a definitive answer.

The Court recognized that the defendant would not be liable for discrimination under the ADA if the plaintiff's treatment threatened the health or safety of others.³² It further noted that Congress included the direct threat provision in the ADA to prohibit the type of discrimination that results from fear and misinformation of contagion.³³ It ultimately held that in assessing

³⁰ See *Bragdon*, 118 S. Ct. at 2214-15 (noting the failure of the Court to discuss whether reproduction was a major life activity for the plaintiff personally). Chief Justice Rehnquist stated that "the ADA's definition of a 'disability' requires that the major life activity at issue be one 'of such individual.' . . . [T]here is not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent's major life activities included reproduction . . ." *Id.*

³¹ See *Abbott v. Bragdon*, 107 F.3d 934, 941 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

³² See *Bragdon*, 118 S. Ct. at 2210. A public accommodation is not required to allow a person to "participate in or benefit from . . . services . . . of that public accommodation when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 36.208(a) (1998). "Direct threat," as understood under the ADA, means "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." 28 C.F.R. § 36.208(b) (1998) (emphasis in original).

In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

28 C.F.R. § 36.208(c) (1998).

The First Circuit held that any determination based upon medical evidence is to be confined to that evidence available at the time the service provider refuses treatment. See *Abbott*, 107 F.3d at 944. The First Circuit recognized that it was the practice for courts to defer to the reasonable medical judgments of public health officials. See *id.* at 944-45 (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 (1986)). The Supreme Court fashioned a rule whereby courts should determine the objective reasonableness of the views of health care professionals without deferring to their individual judgments. See *Bragdon*, 118 S. Ct. at 2210. The conclusions of public health authorities may be rebutted by persuasive evidence adduced from other recognized experts in a given field. See *id.* at 2211.

³³ See *Abbott*, 107 F.3d at 943. There is a strong mandate for places of public accommodation to serve all person regardless of disability. See 42 U.S.C. § 12182(a) (1994) (imposing the statute's general rule that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the . . . accommodations of any place of public accommodation . . ."). The First Circuit noted

whether there is a direct threat, "courts should . . . [judge] the objective reasonableness of the views of health care professionals without deferring to their individual judgments,"³⁴ and that a health care professional may depart from generally accepted norms by relying on a credible scientific basis for such deviation.³⁵ The Court remanded the disposition of this issue for determination in accordance with this standard. The lower court had to determine whether Dr. Bragdon raised a disputed issue of material fact with respect to a direct threat.³⁶

In deciding the case, the Supreme Court began with the language of the ADA.³⁷ The ADA gives a tripartite definition of disability,³⁸ which is designed to afford broad protection.³⁹ This Comment asserts that while the Supreme Court properly concluded that the plaintiff is an individual with a disability under the ADA,⁴⁰ it did not rely upon the correct provision of the ADA's definition of disability. The Court erred in finding that the plaintiff was disabled as defined by the first prong of the ADA; it should have more carefully considered the third prong.⁴¹ Sidney

that there are a few carefully delineated exceptions to liability when a place of public accommodation does not extend its services to all persons regardless of disability. See *Abbott*, 107 F.3d at 943 (stating a service provider is not required to serve a person who "poses a direct threat to the health or safety of others") (quoting 42 U.S.C. § 12182(b)(3) (1994)).

³⁴ *Bragdon*, 118 S. Ct. at 2210.

³⁵ See *id.* at 2211.

³⁶ See *id.* at 2213 (remanding the case on the issue of direct threat because the circuit court did not cite sufficient material in the record to determine, as a matter of law, that respondent's HIV infection posed no direct threat to the health and safety of others).

³⁷ See *id.* at 2201.

³⁸ Under the ADA, a disability can mean a "physical . . . impairment," having a "record of such an impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(2).

³⁹ See *Abbott v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998) (noting that the definition in the Act has been afforded a broad meaning in determining what in particular constitutes a disability); see also 45 C.F.R. pt. 84, app. A at 334 (1998) (explaining that the absence of "a list of specific diseases and conditions that constitute physical or mental impairments" is a result of "the difficulty of ensuring the comprehensiveness of any such list"). The Department of Health and Human Services declined to issue regulations that would narrow the definition of the word disability. See *id.*

⁴⁰ See *Bragdon*, 118 S. Ct. at 2209.

⁴¹ See *id.* at 2201 ("We hold respondent's HIV infection was a disability under subsection (A) of the definitional section of the statute. In light of this conclusion we need not consider the applicability of subsections (B) or (C).").

Abbott was refused treatment for a routine dental procedure. This refusal was not because she was unable to reproduce successfully,⁴² rather, it was premised upon the fear of her health care provider. Discrimination resulting from fear or misperception is governed by a different analysis under the ADA. Moreover, discrimination of this sort is unlawful under the Act, subject only to a narrowly tailored exception.⁴³

This Comment further contends that while the Supreme Court considered reproduction to be a major life activity, the plaintiff's substantial limitation to engage in reproduction was not the basis of the discrimination. Rather, her inability to experience full and equal treatment was the result of the dentist's perception of her condition. Thus, she was "regarded as" having an impairment and, as such, should have been deemed disabled under the third part of the ADA.

I. THE COURT RELIED UPON THE INCORRECT DEFINITION OF DISABILITY

The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."⁴⁴ Congress crafted the definition of disability to encompass a broad group of individuals who may be subject to discrimination and thus should be afforded protection under the ADA.⁴⁵ The Department of Justice addressed the implications of the ADA on asymptomatic HIV infected individuals and suggested an alternative rationale for holding HIV-positive individuals disabled under the ADA.⁴⁶

⁴² See *id.* at 2207 (noting that individuals infected with HIV cannot "engage in the act of procreation with the normal expectation of bringing forth a healthy child") (quoting 12 Op. Off. Legal Counsel 264, 273 (1988)).

⁴³ See *infra* Part II A.

⁴⁴ 42 U.S.C. § 12102(2) (1994).

⁴⁵ See H.R. REP. NO. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 332, 334-35. The legislative history suggests that the second and third provisions adopted from the Rehabilitation Act of 1973 were intended to afford broad protection. Inclusion of the second provision is designed to protect one who has recovered from a previous impairment, while the third provision is included to mitigate discriminatory effects of those affected with stigmatic conditions. See *id.*

⁴⁶ See *Justice Department Memorandum on the Application of Section 504 of the 1973 Rehabilitation Act to HIV-Infected Persons*, 8 Fair Empl. Prac. Cas. (BNA)

A. HIV Positive Status is an Impairment Under the ADA

The use of the word "impairment" is common in each of the definitions of disability. Thus, some form of impairment is a prerequisite for coverage under the ADA.⁴⁷ The statute, however, does not explicitly define impairment with regard to disability.⁴⁸ In the absence of clear Congressional intent as to whether "impairment" under the ADA includes HIV infection, the Court relied on the construction given by the administrative agency responsible for its implementation.⁴⁹ Additional support for the conclusion that "impairment" includes HIV infection may be found in the legislative history of the ADA,⁵⁰ the Department of

405:1, at 405:7 (Sept. 27, 1988) [hereinafter *Justice Department Memorandum*] (arguing that the limitation on reproduction is not based upon the physical effect of being infected with HIV, but rather upon the "conscience or normative judgment of the particular infected person"). The Justice Department observed "that there is nothing inherent in the infection which actually prevents either procreation or intimate relations." *Id.*

⁴⁷ See 42 U.S.C. § 12102(2).

⁴⁸ See *id.* Even though the statute contains no definition of impairment, the Department of Health and Human Services has construed the term, as used in the Rehabilitation Act of 1973, upon which the ADA is based, to mean:

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

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j)(2)(i) (1998).

⁴⁹ See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998) (noting that the Department of Health, Education and Welfare, the predecessor agency to the Department of Health and Human Services, issued regulations defining the term "impairment" in the context of the Rehabilitation Act of 1973, 29 U.S.C. § 701, and that the definition of disability in the ADA is "drawn almost verbatim" from a similar provision in the Rehabilitation Act); see also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f, however, the court determines Congress has not directly addressed the precise question at issue . . . [and] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnote omitted).

⁵⁰ See H.R. REP. NO. 101-485(III), at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 450. Under the ADA's first definition of disability, a person "must have a physical or mental impairment," which Congress regarded as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: . . . reproductive . . . hemic and lymphatic . . ." *Id.* The House Report gives examples of such impairment. Among these is "infection with the

Justice interpretative guidelines,⁵¹ the recommendation of United States Surgeon General,⁵² as well as medical evidence from the Center for Disease Control ("CDC").⁵³ The word "impairment," as understood by the above-mentioned sources, has a specific meaning that is different from the plain meaning of the word.⁵⁴ The use of a special meaning makes the use of legislative history acceptable.⁵⁵ The application of not only the legislative history but of other relevant contemporary governmental and medical sources is helpful in arriving at the proper conclusion in the context of the ADA.⁵⁶ The Supreme Court determined that asymptomatic HIV constitutes an impairment by focusing upon the manner and course of infection⁵⁷ and the debilitating effects

Human Immunodeficiency Virus." *Id.* at 451; *see also* S. REP. NO. 101-116, at 19 (1989) (citing the need for "omnibus civil rights legislation" that should include "[a]ll persons with symptomatic or asymptomatic HIV infection").

⁵¹ *See* 28 C.F.R. § 36.104 (1998) (listing disorders falling within the meaning of "disability" under the ADA, including "HIV disease (whether symptomatic or asymptomatic)"); *see also supra* note 39 (discussing the broad meaning given to the term "disability" under the ADA).

⁵² *See Justice Department Memorandum, supra* note 46, at 405:19 (citing a letter from U.S. Surgeon General C. Everett Koop to Douglas Kmiec, Acting Assistant Attorney General, in which Dr. Koop states that individuals in the early stage of HIV infection experience "subclinical manifestations i.e., impairments and no visible signs of illness"). The Surgeon General further stated that "from a purely scientific perspective, persons with HIV infection are clearly impaired." *Id.*

⁵³ *See* Taunya Lovell Banks, *The Americans With Disabilities Act and the Reproductive Rights of HIV-Infected Women*, 3 TEX. J. WOMEN & L. 57, 62 (1994) (stating that the Centers for Disease Control and the American College of Obstetrics and Gynecology "recommend[ed] that women infected with HIV delay or forego bearing children").

⁵⁴ *See* *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 168-69 (4th Cir. 1997) (noting that Webster's dictionary defines "impairment as 'deterioration' or 'lessening'"). *Compare id. with* 28 C.F.R. § 36.104 (1998) (defining impairment).

⁵⁵ *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 851 (1992) (stating that "[e]ven the strongest critics of the use of legislative history concede that a court should take full account of any special meaning that a statutory word may have"). *But see* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1006 (1992) (observing that Justice Scalia believes legislative history should only be consulted if "adhering to the apparent meaning of a statute produces an 'absurd' result") (footnotes omitted).

⁵⁶ *See* *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202-09 (1998).

⁵⁷ *See id.* at 2203 ("Once a person is infected with HIV, the virus invades different cells in the blood and in body tissues.").

that the disease has on various body systems,⁵⁸ even in its early stages.

B. The Use of the Definition in Subsection (A) is Erroneous in HIV Cases

"A physical or mental impairment does not constitute a disability under the first prong of the definition for purposes of the ADA unless its severity is such that it results in a 'substantial limitation of one or more major life activities.'"⁵⁹ The Supreme Court noted that while "[c]onception and childbirth are not impossible for an HIV victim,"⁶⁰ these life activities are clearly "dangerous to the public health."⁶¹ The Court, however, held that the standard for limitation under the ADA is any significant limitation, not "utter inabilit[y]."⁶² This holding invites an invasive type of discrimination that may encroach upon the rights of those who are HIV positive.⁶³ Additionally, the use of this reasoning places emphasis upon the infected individual's choice to refrain from reproduction in reaction to the affliction, rather than upon his or her actual capability.⁶⁴ While the lower courts were divided in their attempts to determine whether reproduction is

⁵⁸ See *id.* (noting that the virus compromises the body's immune system, exposing the victim to a deterioration of various body systems).

⁵⁹ H.R. REP. NO. 101-485(II), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 334.

⁶⁰ *Bragdon*, 118 S. Ct. at 2206.

⁶¹ *Id.*

⁶² *Id.* (noting that dangers of transmission of HIV to the partner of the infected individual as well as the risk of perinatal transmission impose restrictions upon victims of HIV that are significant enough to qualify for statutory coverage).

⁶³ See *Banks*, *supra* note 53, at 65. Proponents of discouraging women against reproduction are arguably violating "at least the spirit of the ADA because they impermissibly interfere with the reproductive freedom of women with a protected disability." *Id.*

⁶⁴ See *Justice Department Memorandum*, *supra* note 46, at 405:7 (asserting that the limitation of reproduction is not based upon the physical effect of the impairment but rather upon the "conscience or normative judgment of the particular infected person and life activities"). The Justice Department concluded that "it might be asserted that there is nothing inherent in the infection which actually prevents either procreation or intimate relations." *Id.* In issuing this opinion, the Department of Justice relied heavily upon the Supreme Court's opinion in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), which construed the Rehabilitation Act of 1973. See *Justice Department Memorandum*, *supra* note 46, at 405:1.

considered a major life activity,⁶⁵ the Supreme Court had "little difficulty concluding that it is."⁶⁶ In holding that reproduction is a major life activity, the Court based its inquiry upon the fact that reproduction is "central to the life process itself."⁶⁷ Reliance solely upon this rationale is a mistake, which may lead to an impermissible and unmanageable extension of the ADA.⁶⁸ Another problem with this holding is the danger of precluding coverage to prospective plaintiffs for whom reproduction is undesirable or impossible.⁶⁹

⁶⁵ See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 170-71 (4th Cir. 1997) (stating that reproduction is not a major life activity contemplated by the ADA); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995) (stating that "[r]eproduction is not an activity engaged in with the same degree of frequency as the listed activities" adopted by the regulations pursuant to the ADA). The court in *Zatarain* observed that while "[a] person is required to walk, see, learn, speak, breath, and work throughout the day, day in and day out [,] . . . a person is not called upon to reproduce throughout the day, every day." *Id.* But see *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994) (concluding that the language of the ADA "does not preclude procreating as a major life activity, but may well include it"); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994) (finding that reproduction can be a "major life activity under the ADA"); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990) (interpreting Pennsylvania state law provisions, which were taken verbatim from regulations promulgated pursuant to the ADA, and concluding that HIV infection is a "significant injury to the reproductive system [which] impedes a major life activity").

⁶⁶ *Bragdon*, 118 S. Ct. at 2205.

⁶⁷ *Id.*

⁶⁸ See *id.* at 2216 (Rehnquist, C.J., concurring). Chief Justice Rehnquist opined that while the majority focused upon the plain meaning of "major" as "comparative importance," it failed to consider the alternate definition of "major," that is, "greater in quantity, number, or extent." *Id.* at 2215 (citations omitted). The Chief Justice noted that while decisions regarding reproduction are of importance in a person's life, they are not of the sort intended to be protected under the Act, which is limited to "activities [that] are repetitively performed and essential in the day-to-day existence of a normally functioning individual." *Id.* "Respondent's argument, taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease 'disabled' here and now because of some possible future effects." *Id.* It would appear that, the Court has not precluded the interpretation that all physical body functions may constitute a major life activity, since all systems of the body, properly operative, are central to life.

⁶⁹ See Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM. J.L. & MED. 7, 35-36 (1997) ("[T]he protection for asymptomatic HIV-positive individuals might be quite haphazard at best and depends on a circumstance—the plaintiff's fertility and reproductive intentions—that really has nothing to do with the discrimination at issue."). While Ms. Abbott asserted that reproduction was an important endeavor for her prior to her diagnosis, this will not always be the case. See *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998) (noting plaintiff's tes-

II. THE THIRD PRONG OF THE ADA DEFINITION OF DISABILITY IS APPROPRIATE FOR HIV-POSITIVE INDIVIDUALS

A. The "Direct Threat" Exception to the ADA

Congress crafted the "direct threat" exception to the ADA as a public safety exception to the broad protection provided by the Act.⁷⁰ Under this provision, a public accommodation escapes liability under the ADA if it would be hazardous or similarly imprudent to deal with an infected individual.⁷¹ A significant risk, determined by "medical or other objective evidence," must exist, however, in order to justify unequal treatment.⁷² Thus, even a physician's good faith belief that an HIV-positive patient poses a risk of contagion does not excuse discriminatory treatment.⁷³ In light of these considerations the Supreme Court remanded the case to the First Circuit to determine whether filling Ms. Abbott's cavity would pose a significant risk to the "health or safety" of either Dr. Bragdon or his staff.⁷⁴

On remand the court reexamined the evidence and determined that "treatment of the kind that Ms. Abbott required [is] safe, if undertaken using universal precautions."⁷⁵ The First Circuit determined that both the dentistry guidelines formulated by

timony that "HIV ended her consideration of having a family"). It is unclear how the courts will react when an HIV infected plaintiff has no intention to reproduce, when the plaintiff chooses to reproduce with knowledge of HIV infection, or when the plaintiff is unable to reproduce regardless of HIV infection. See *Bragdon*, 118 S. Ct. at 2205 (remarking that while the discussion in the case is limited to reproduction as the major life activity that is substantially limited by asymptomatic HIV, there was "little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities").

⁷⁰ See 42 U.S.C. § 12182(b)(3) (1994) (defining direct threat 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").

⁷¹ See *id.*

⁷² *Bragdon*, 118 S. Ct. at 2210.

⁷³ See *id.* (stating that a physician "receives no special deference simply because he [or she] is a health care professional").

⁷⁴ See *id.* at 2213.

⁷⁵ *Abbott v. Bragdon*, 163 F.3d 87, 89 (1st Cir. 1998) *cert. denied*, *Bragdon v. Abbott*, 119 S.Ct. 1805 (1999).

the CDC as well as the ADA policy on AIDS submitted by the plaintiff have sufficient scientific foundation to justify the court's reliance upon them, in compliance with the Supreme Court's remand.⁷⁶ Since there has been no finding of any direct threat of transmission of HIV,⁷⁷ it becomes evident that Dr. Bragdon's "policy" regarding Ms. Abbott and those similarly situated was created and maintained out of ignorance and fear. This type of "policy" is impermissible under the third prong of the ADA definition of disability. It is this part of the definition that should control.

B. Absent a Direct Threat, the "Regarded As" Language Protects HIV Infected Individuals

The express terms of the ADA provide a sufficient basis to establish HIV infected individuals as a protected class.⁷⁸ The language crafted for the ADA definition of disability was borrowed in its entirety from the Rehabilitation Act of 1973,⁷⁹ thus implying that the same standards are applicable.⁸⁰ Federal regulations⁸¹ and legislative history⁸² expounded upon the appropriate use of the third prong of the definition of disability thereby establishing its validity in cases of HIV infected individuals.⁸³ The "regarded as" language is integral in expanding the rights of

⁷⁶ See *id.* ("[W]e are confident that we appropriately relied on the [g]uidelines and the [p]olicy.")

⁷⁷ See *id.* ("[N]o public health authority . . . had issued warnings to health care providers . . . [regarding] HIV-positive patients.")

⁷⁸ See 42 U.S.C. § 12102(2)(C) (1994) (defining disability to include "being regarded as having . . . an impairment").

⁷⁹ See *Pacourek v. Inland Steel Co.*, 916 F. Supp 797, 802 (N.D. Ill. 1996) (noting Congress's intention that general caselaw applicable to the Rehabilitation Act be applicable to the ADA by its adoption of "the definition of 'disability' from the Rehabilitation Act definition of the term 'individual with handicaps'").

⁸⁰ See 42 U.S.C. § 12201(a) (1994) ("[N]othing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title.") (citation omitted).

⁸¹ See 29 C.F.R. § 1630.2(g)(3) (1998) (defining disability with respect to an individual as, "[b]eing regarded as having . . . an impairment").

⁸² See H.R. REP. NO. 101-485(II), at 335 (1990), reprinted in *Americans with Disabilities Act*, Pub. L. No. 101-336, 1990 U.S.C.A.N 335 ("[a] person who is . . . discriminated against, because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability.")

⁸³ See *id.* (explaining that the "third prong" pertains to "individuals with stigmatic conditions that are viewed as . . . impairments").

disabled individuals, in that it includes among its protected class those who are mistreated by society based solely upon a misperception of impairment.⁸⁴ The language is particularly applicable when a person has an impairment that does not adversely affect him or her to the degree of a substantial limitation, yet the individual is treated in a manner that substantially limits his or her equal access to or enjoyment of certain covered entities or services.⁸⁵

Since Congress has not explicitly defined the "regarded as" phrase in the legislation, it is helpful to interpret the language in light of Congress's purpose.⁸⁶ While the Supreme Court declined to rule upon the "regarded as" language specifically,⁸⁷ its rationale in *School Board of Nassau County v. Arline*⁸⁸ provides a useful statutory framework.⁸⁹ In *Arline*, the Court considered the inclusion of this phrase to be a clear sign of Congress's intent to include those who fall prey to "society's accumulated myths and fears about disability and disease" within the protection of the

⁸⁴ See *id.* The Report states that the third prong includes all of the following: [A]n individual who has physical or mental impairment that does not substantially limit a major life activity, but that is treated by a covered entity as constituting such a limitation[,] . . . an individual who has a physical or mental impairment that substantially limits a major activity only as a result of the attitudes of others toward such impairment or has no physical or mental impairment but is treated by a covered entity as having such an impairment.

Id.

⁸⁵ See *id.* (protecting people who have certain conditions that "are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity"); see also *Vande Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538, 541 (7th Cir. 1995) (finding that people who suffer from impairments that are not disabling may still be shunned because others believe that they are nevertheless disabled); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1448-49 (W.D. Wis. 1996) (finding that the "regarded as disabled" test was "designed to protect against erroneous stereotypes . . . regarding certain physical or mental impairments that are not substantially limiting in fact").

⁸⁶ See Breyer, *supra* note 55, at 853 ("A court often needs to know the purpose a particular statutory word or phrase serves within the broader context of a statutory scheme in order to decide properly whether a particular circumstance falls within the scope of that word or phrase.").

⁸⁷ See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2201 (1998).

⁸⁸ 480 U.S. 273 (1987); see also *Judicial Department Memorandum*, *supra* note 46, at 405:7 ("[C]ourts may choose to pass over such factual questions since the Supreme Court has stated an alternative rationale for finding a life activity limitation based on the reaction of others to the infection.").

⁸⁹ The ADA uses the same "regarded as" test set forth in the regulations implementing § 504 of the Rehabilitation Act. See, e.g., 28 C.F.R. § 42.540(k)(2)(iv) (1998).

ADA.⁹⁰ The Court found that these individuals are thus subject to effects that are just as “handicapping as are the physical limitations that flow from actual impairment,”⁹¹ especially when the “fear and misapprehension” is of contagion.⁹²

Interpretative guidelines such as those issued by the Justice Department illustrate congressional purpose.⁹³ The Department explains that the perception of the public accommodation is a “key element of this test”⁹⁴ and may be the sole reason for the finding of a disability under the third prong of the ADA definition.⁹⁵ Likewise, the Equal Employment Opportunity Commission delineates three instances when the third prong would be applicable to impose liability on an employer for discrimination on the basis of disability.⁹⁶

⁹⁰ *Arline*, 480 U.S. at 284; see *id.* at 279 (stating that the statutory language “reflected Congress’ concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from ‘archaic attitudes and laws’ and from the ‘fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps’ ”) (alteration in original) (quoting S. REP. NO. 93-1297, at 50 (1974)).

⁹¹ *Id.* at 284. “The Nation as a whole will benefit from the removal of the attitudinal and physical barriers that now prevent . . . Americans who have physical and mental impairments from fully capitalizing on the opportunities that this great country offers . . . [I]t is time that this Nation eradicate the irrational fears and misconceptions about the disabled.” 136 CONG. REC. S9693 (daily ed. July 13, 1990) (statement of Sen. Reagle).

⁹² *Arline*, 480 U.S. at 284; see also *United States v. Happy Time Day Care Center*, 6 F. Supp.2d 1073, 1083 (W.D. Wis. 1998) (“The common theme that emerges from these allegations is that the decisions made by each defendant . . . were driven by society’s myths and fears about the contagious nature of HIV and AIDS”); *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 444 (N.D. Ill. 1988) (“Surely no physical problem has created greater public fear and misapprehension than AIDS. That fear includes a perception that a person with AIDS is substantially impaired in his ability to interact with others . . .”).

⁹³ See 28 C.F.R. § 36.103(a) (1998); see also *Arline*, 480 U.S. at 279 (noting that regulations promulgated by the Department of Health and Human Services were formulated with the “oversight and approval of Congress”). These regulations were intended to be applicable to the Rehabilitation Act of 1973. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2198 (1998). The ADA provides, in part, that the Act is intended to be construed according to at least the same standard as that of the Rehabilitation Act or “the regulations issued by Federal agencies pursuant to [the Rehabilitation Act].” 42 U.S.C. § 12201(a) (1994).

⁹⁴ 28 C.F.R. pt. 36, app. B. at 584 (1998).

⁹⁵ See *id.* (explaining that “[a] person would be covered under this test if a restaurant refused to serve that person because of a fear of ‘negative reactions’ of others to that person”).

⁹⁶ See 29 C.F.R. § 1630.2 (1)(1)-(3) (1998).

When interpreting the "regarded as" language, the lower federal courts⁹⁷ have adhered to the *Arline* rationale. In addition, at least one state court noted *Arline's* applicability concerning the coverage of the "regarded as" language.⁹⁸ Clearly, this is the most appropriate rationale to apply to HIV cases, whether symptomatic or asymptomatic. HIV infected patients may not suffer substantial physical limitations in major life activities as a result of their impairment,⁹⁹ but they are the objects of discrimination based on unsubstantiated fears of the community at large.¹⁰⁰ Their affliction leads to disparate and negative treatment by society because of its misconceptions about the origins of the disease and the class of persons infected.¹⁰¹ They tend to be isolated and shunned from the community from the begin-

⁹⁷ See *Cain v. Hyatt*, 734 F. Supp. 671, 678-80 (E.D. Pa. 1990) (resolving the issue of whether HIV is a disability under a Pennsylvania statute modeled after the Rehabilitation Act of 1973).

⁹⁸ See *Benjamin R. v. Orkin Exterminating Co.*, 390 S.E.2d 814, 817 (W. Va. 1990). The court in *Benjamin R.* listed HIV cases that could have been appropriately decided using the third prong of the definition of disability. See *id.* (citing *Baxter v. City of Belleville*, 720 F. Supp. 720, 725, 729 (S.D. Ill. 1989) (noting that HIV could be a perceived handicap "within [the] third part of the definition of 'handicap,' involving a person who is 'regarded as' having such an impairment . . . due to unfounded fear of contagion from casual contact"); *Lecklet v. Board of Comm'rs of Hosp. Dist. No. 1*, 714 F. Supp. 1377, 1385 & n.4 (E.D. La. 1989) (stating that HIV also could qualify as a perceived handicap); *Cronan v. New England Tel. Co.*, 41 Fair Empl. Prac. Cas. (BNA) 1273, 1275-76 (Mass. 1986) (noting that HIV may be a perceived handicap).

⁹⁹ See *supra* Part I; see also *Craig V. Towers, MD et al., A Bloodless Cesarean Section and Perinatal Transmission of the Human Immunodeficiency Virus*, 179 AM. J. OBSTET. GYNECOL. 708-14 (1998) (noting that the use of drugs such as Zidovudine and other antiretroviral agents can decrease risk of vertical transmission of the disease to about 5 percent). This indicates that the prospect of producing a healthy offspring is increasing through advances in medical science and that this "substantial limitation" is likewise decreasing. *Id.*

¹⁰⁰ See *Cain*, 734 F. Supp. at 680 ("Yet, despite authoritative medical evidence to the contrary, fully one-third of the American population believes 'AIDS is as contagious, or more contagious, than the common cold.'") (quoting Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1274 n.6 (1986)).

¹⁰¹ See *id.* ("The particular associations AIDS shares with sexual fault, drug use, social disorder, and with racial minorities, the poor, and other historically disenfranchised groups accentuates the tendency to visit condemnation upon its victims"); see also *Poveromo-Spring v. Exxon Corp.*, 968 F. Supp. 219, 228 (D.N.J. 1997) (describing the stigma attached to AIDS as "unparalleled by any other disease"); *Banks, supra* note 53, at 61 ("As a class, women with HIV and AIDS are seen as irresponsible women whose voluntary conduct is responsible for their condition and as inappropriate parents because of their drug use or association with drug users.").

ning of their disease until the agonizing end.¹⁰² It was precisely this type of stigmatization and isolation that Congress sought to mitigate and prevent with passage of the ADA.¹⁰³

It appears that a rationale premised on the third prong of the ADA is appropriate in the context of HIV plaintiffs. Such a rationale gives effect to both the specific language of the statute and the intention of the legislature. It is submitted that the Supreme Court should have relied upon this reasoning in its disposition of *Bragdon v. Abbott*.¹⁰⁴ The defendant's denial of service in his office, a place of public accommodation, and thus a covered entity under the ADA,¹⁰⁵ was based upon the plaintiff's "infectious disease."¹⁰⁶ This policy reflected his perception of plaintiff's condition, based upon insufficient medical evidence,¹⁰⁷ that was the impetus for his discriminatory conduct. He feared that the plaintiff "posed a medically significant risk to his health or

¹⁰² See *Cain*, 734 F. Supp. at 679 (noting that "AIDS has engendered such prejudice and apprehension that its diagnosis typically signifies a social death as concrete as the physical one which follows").

¹⁰³ See S. REP. NO. 101-116, at 7-8 (1989) ("Discrimination also includes harm affecting individuals with a history of disability, and those regarded by others as having a disability . . . [and such discrimination is often] based on false presumptions, generalizations, misperceptions, . . . irrational fears, and pernicious mythologies."). The Report goes on to cite instances of discrimination based on a person's disability and its effects on others. "For example . . . the story of a New Jersey zoo keeper who refused to admit children with Downs Syndrome because he feared they would upset the chimpanzees." *Id.* Further, they relate a case in which the court ruled that a child with cerebral palsy who was not a physical threat and was academically competitive, was excluded from public school, because his teacher claimed his physical appearance made his classmates nauseous. See *id.*

The Report concludes that the "critical goal" of the ADA is "to allow individuals with disabilities to be part of the economic mainstream of our society." *Id.* at 10.

¹⁰⁴ 118 S. Ct. 2196 (1998).

¹⁰⁵ See 42 U.S.C. § 12182(a) (1994) (stating "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the . . . services . . . of any place of public accommodation."); see also 42 U.S.C. § 12181(7)(F) (1994) (listing "professional office of a health care provider" among public accommodations).

¹⁰⁶ See *Abbott v. Bragdon*, 107 F.3d. 934, 937 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998) (informing plaintiff that due to his infectious disease policy, defendant could not treat her in his dental office and would only fill the cavity in a hospital setting).

¹⁰⁷ See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 (1987) (stating that reasonable medical judgments should be made based upon the state of medical knowledge about "the nature of the risk . . . the duration of the risk . . . the severity of the risk . . . [and] the probabilities the disease will be transmitted and will cause varying degrees of harm").

safety"¹⁰⁸ and, therefore, he restricted her equal access to health care. The third prong of the definition was created to prohibit this type of conduct.¹⁰⁹ As a result, the defendant is liable for discrimination under the ADA. The third prong of the definition is consistent with our nation's recent history of legislation aimed at reducing discrimination based upon stereotypes and misinformation.¹¹⁰ Persons infected with HIV in the asymptomatic stage have not been proven to be limited in any major life activity. The only, and by far greatest, limitation is that placed upon them by the misinformed and perhaps misguided public.

CONCLUSION

In reaching its conclusion based upon the first prong of the definition of disability, the Supreme Court engaged in precisely the type of fact-finding that the Department of Justice referred to as unnecessary and that the Court indicated in *Arline* would be phased out. A policy that treats HIV infected individuals as having a disability because of limitations will do little to help them overcome the discrimination they face as a result of their affliction. By holding the public accountable, and other covered entities liable for discrimination under the third prong of the definition of disabled, the courts will send a much needed signal that HIV-positive Americans are substantially limited only in the manner in which they are treated by the uninformed and the frightened.

Denise DeCell

¹⁰⁸ *Abbott*, 107 F.3d. at 949.

¹⁰⁹ *See generally* 28 C.F.R. § 36.104(4) (1998).

¹¹⁰ "Twenty-six years after the enactment of the Civil Rights Act of 1964, which barred discrimination based on race, religion, national origin and gender, we . . . will bar discrimination against one of the nation's largest minority groups—the Americans with disabilities." 136 CONG. REC. H66, 2625 (daily ed. May 22,1990) (statement of Mr. Morrison).