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Elizabeth C. Chambers

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ASYMPTOMATIC HIV AS A DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT

Elizabeth C. Chambers

Abstract: The Americans with Disabilities Act (ADA) does not state whether it prohibits discrimination against individuals who are infected with HIV but asymptomatic. Some courts have held that the language of the ADA is unambiguous and does not cover asymptomatic HIV as a disability because the virus is not an "impairment" that substantially limits a "major life activity." Other courts have looked behind the statutory language and found that Congress intended to protect asymptomatic individuals with HIV because the virus impairs one's ability to procreate and/or engage in sexual relations. This Comment argues that asymptomatic individuals with HIV are indeed protected under the ADA, but that the analytic framework thus far employed by the courts is flawed. Asymptomatic HIV is a protected disability not because it is independently debilitating, but because the prejudices and fears of others may prevent HIV-infected persons from fully participating in society. The ADA was enacted to prevent exactly this type of discrimination.

Approximately 612,000 Americans suffer from acquired immunodeficiency syndrome (AIDS).¹ Hundreds of thousands more unreported adults and children are infected with the human immunodeficiency virus (HIV), which causes AIDS.² Many individuals who test positive for HIV do not develop the infection's outward symptoms and degenerative effects for a dozen years or more.³ Asymptomatic HIV-infected persons may nonetheless endure a different debilitating side effect from their infection—discrimination. The prejudices, fears, and legacy of discrimination against HIV-infected individuals have strong roots in American society.⁴ It is not clear, however, whether and to what extent

1. Centers for Disease Control and Prevention, U.S. Dep't of Health & Human Servs., 9 *HIV/AIDS Surveillance Report*, at 3 (Midyear ed. 1997).

2. *Id.* (noting that as of June 1997, approximately 87,000 persons were infected with HIV, but not AIDS, in 29 states that conducted HIV case surveillance of adults, adolescents, and/or children, excluding persons who tested anonymously). As many as one million Americans may be infected with HIV. See Petition for Writ of Certiorari at 11, *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir.) (No. 97-156), *cert. granted*, 118 S. Ct. 554 (1997).

3. Christine Gorman, *Battling the AIDS Virus: There's Still No Cure, But Scientists and Survivors Make Striking Progress*, *Time*, Feb. 12, 1996, at 62, 64; see also Robert Steinbrook, *Battling HIV on Many Fronts*, 337 *New Eng. J. Med.* 779, 779 (1997) ("Of the estimated 650,000 to 900,000 HIV-infected people in the United States, many do not know that they are infected.") (citation omitted).

4. Steinbrook, *supra* note 3, at 780. According to a recent survey of 2000 adults, more than one in five Americans favor firing or restricting an HIV or AIDS-infected colleague, and more than 30% of workers believe their employers would fire, or place on disability, an infected colleague. Charlene

the predominant disability law, the American with Disabilities Act (ADA),⁵ protects asymptomatic HIV-infected persons from employment and public accommodation discrimination.⁶ Resolving this issue is immensely important to those who struggle to lead normal lives in the face of knowing they are infected with a fatal, incurable disease. Likewise, employers and owners of public accommodations need to know their legal obligations to such individuals.

Congress adopted the ADA to protect disabled individuals who are subjected to discriminatory treatment because of stereotypical assumptions that do not reflect their ability to participate in, and contribute to, society.⁷ The statute is silent, however, as to whether asymptomatic HIV infection qualifies as a disability. The statute defines the term disability in three ways: an actual disability, a record of an impairment, or being regarded as having an impairment.⁸ Although the statute fails to define these terms, the legislative history and implementing regulations indicate that asymptomatic persons who are infected with HIV may be considered disabled under either the "actual disability" or "regarded as" prongs of the disability definition.⁹

Laino, *AIDS a Big Concern in the Workplace* (visited Feb. 28, 1998) <<http://www.msnbc.com/news/120025.asp>>.

5. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213 (1994)).

6. *Compare* Runnebaum v. NationsBank of Maryland, 123 F.3d 156, 167–74 (4th Cir. 1997) (finding asymptomatic HIV-positive plaintiff is not disabled within meaning of ADA), *and* Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 60 (4th Cir. 1995) (holding asymptomatic HIV-positive person does not suffer limitation in major life activity and is therefore not disabled), *with* Abbott v. Bragdon, 107 F.3d 934, 949 (1st Cir.) (concluding that plaintiff is disabled because asymptomatic HIV affects major life activity of reproduction), *cert. granted*, 118 S. Ct. 554 (1997), *and* Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994) (finding asymptomatic HIV-positive person disabled for purposes of Rehabilitation Act or ADA because HIV is contagious disease).

7. See 42 U.S.C. § 12101(a)(7).

8. 42 U.S.C. § 12102(2)(A)–(C). This Comment will explore the disability definition's first prong (a physical or mental impairment that substantially limits one or more of the major life activities of such individual) and third prong (being regarded as having such an impairment). Whether an individual has a "record of such an impairment," the second prong of the definition, is not as critical to this Comment because none of the fact scenarios examined by the courts present individuals with a record of HIV. Moreover, if an individual were discriminated against because of a record of having HIV, the most likely reason would be because of a fear or prejudice of the disease, therefore placing the individual in the "regarded as" portion of the definition. See discussion *infra* Part III.B.

9. See discussion *infra* Parts I.B–C.

Early Rehabilitation Act cases presumed that HIV infection qualified as a disability,¹⁰ and the U.S. Supreme Court has implied so as well.¹¹ In the absence of conspicuous statutory guidance, however, the circuits are divided as to whether an individual who suffers from HIV, but who remains asymptomatic, is disabled within the meaning of the ADA.¹² Focusing on the “actual disability” prong of the disability definition, some courts have held that asymptomatic HIV-positive individuals are not disabled because the virus is not an “impairment” that substantially limits a “major life activity.”¹³ Other courts have found that Congress intended to protect such people because HIV infection impairs the major life activity of procreation and/or sexual relations.¹⁴ The U.S. Supreme Court recently granted a writ of certiorari to resolve this split in the circuits and to specifically answer the questions of whether, under the ADA, (1) reproduction is a major life activity, and (2) asymptomatic individuals with HIV are per se disabled.¹⁵

This Comment argues that the Court should resolve the debate among the circuits by holding that asymptomatic HIV-positive persons are protected by the ADA, but not on the grounds employed by the district and circuit courts thus far. The “actual disability” prong of the disability definition is an awkward fit as applied to asymptomatic HIV-positive individuals. If disability status is restrictively linked to the ability to procreate or have sexual relations, entire categories of persons are left

10. See Wendy E. Parnet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 Am. J.L. & Med. 7, 16–17 (1997) (listing major federal and state cases that concluded HIV-positive individuals are handicapped for purposes of Rehabilitation Act). The ADA specifically acknowledges that cases decided under the Rehabilitation Act are appropriate precedent for ADA cases because the two statutes have identical disability definitions. 42 U.S.C. § 12201(a) (1994).

11. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 282 n.7, 283 (1987) (declining to answer whether AIDS infection qualifies as disability, but stating that individuals qualify as handicapped under Rehabilitation Act if they are regarded as having impairment that substantially limits their ability to work).

12. See cases cited *supra* note 6.

13. See, e.g., *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156, 169–72 (4th Cir. 1997); *Ennis v. National Ass’n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 60 (4th Cir. 1995).

14. See, e.g., *Abbott v. Bragdon*, 107 F.3d 934, 949 (1st Cir.), *cert. granted*, 118 S. Ct. 554 (1997).

15. *Abbott v. Bragdon*, 118 S. Ct. 554 (1997). In addition, the Court will decide a third issue of whether a private health care provider under Title III must perform invasive procedures on an infectious patient in the provider’s office, and whether courts should defer to the health care provider’s professional judgment assuming it is reasonable in light of then-current medical knowledge. *Id.* This issue, however, is beyond the scope of this Comment.

unprotected. Instead, to ensure that the ADA's basic goal of preventing discrimination is met, all asymptomatic HIV-positive individuals should qualify as disabled under the "regarded as" prong of the ADA's disability definition whenever they are subjected to purposeful unequal treatment because of their HIV-positive status.¹⁶

Part I of this Comment describes the relevant statutory and regulatory provisions of the ADA. Part II discusses cases that examine whether asymptomatic HIV qualifies as a disability. Finally, Part III argues that applying the "regarded as" prong of the ADA's disability definition is necessary to protect individuals with asymptomatic HIV infection from discrimination.

I. STATUTORY AND REGULATORY FRAMEWORK

A. *Statutory Framework*

Congress passed the Rehabilitation Act¹⁷ in 1973, a decade before America had any awareness that AIDS would take the lives of hundreds of thousands of Americans.¹⁸ The Rehabilitation Act prohibits discrimination against "handicapped" individuals¹⁹ participating in federally funded programs.²⁰ The Act defines a handicapped person as one who: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."²¹ This

16. A peculiarity of the "regarded as" prong of the disability definition is that an asymptomatic HIV-positive individual will not qualify as disabled until that individual is discriminated against. This circularity is not specific to HIV-status, but is an idiosyncrasy of the statute's structure. See *infra* Part III.B (discussing "regarded as" prong generally).

17. Pub. L. No. 93-112, 87 Stat. 357 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1994)).

18. See Centers for Disease Control, *supra* note 1, at tbls. 16-18.

19. The Rehabilitation Act uses the term "handicap," 29 U.S.C. § 706(8)(B), whereas the ADA refers to "disability," 42 U.S.C. § 12102(2) (1994). Although these terms are legal equivalents, the ADA uses the word "disability" rather than "handicap" because it is the term that persons with disabilities currently prefer. See H.R. Rep. No. 101-485, pt. 2, at 50-51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332-33; H.R. Rep. No. 101-485, pt. 3, at 26-27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 448-50. In deference to modern preferences, the term "disabled" is used in this Comment.

20. 29 U.S.C. § 701.

21. 29 U.S.C. § 706(8)(B).

definition is nearly identical to that used by the Rehabilitation Act's successor, the Americans with Disabilities Act (ADA).²²

When Congress passed the ADA in 1990, it expanded protection for disabled individuals to cover employment, public services, transportation, public accommodations, and telecommunications.²³ Like the Rehabilitation Act, the ADA seeks to protect individuals faced with purposeful unequal treatment based on disabilities that are beyond their control and not indicative of their ability to participate in, and contribute to, society.²⁴ Although the statute itself does not provide any explicit guidance as to whether an asymptomatic HIV-infected person falls within its scope,²⁵ the legislative history, regulations and interpretive guidance indicate that the statute was intended to cover such individuals.²⁶

The ADA defines disability with respect to an individual as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."²⁷ Any of these three subsets of the disability definition triggers the statute's protections. Because the ADA adopted the Rehabilitation Act's disability

22. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)). For a comparison of disability definitions, see 29 U.S.C. § 706(8)(B) and 42 U.S.C. § 12102(2)(A)-(C).

23. See 42 U.S.C. § 12101(a)-(b).

24. See 42 U.S.C. § 12101(a)(7).

25. *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1319 (E.D. Pa. 1994). *But see* *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156, 168-69 (4th Cir. 1997) (recognizing that HIV is not mentioned in statute itself, but finding that plain statutory language requires that asymptomatic HIV infection is not impairment under ADA).

26. See discussion *infra* Parts I.B-C.

27. 42 U.S.C. § 12102(2)(A)-(C). Although this Comment examines only the ADA's disability definition, an individual must satisfy other requirements as well to qualify for the ADA's protection. Individuals who can perform the essential functions of a job, with or without reasonable accommodation, are considered qualified. 42 U.S.C. § 12111(8). Under Title I of the ADA, employers must provide reasonable accommodation to disabled individuals who are otherwise qualified for the job, unless the accommodation would pose an undue hardship for the employer. 42 U.S.C. § 12112(b)(5)(A). Under Title II of the Act, which prohibits discrimination in public transportation provided by public entities, no qualified individual with a disability may be discriminated against by a public entity. 42 U.S.C. § 12132. Under Title III, disabled individuals may not be discriminated against in any place of public accommodation by any person who owns, leases, or operates the public accommodation. 42 U.S.C. § 12182. However, the ADA is not applicable to any public accommodation where the disabled individual in question poses a "direct threat," or 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. 42 U.S.C. § 12182(b)(3).

definition, the ADA specifically acknowledges that case law and standards developed under the Rehabilitation Act are appropriate for interpreting the ADA.²⁸

B. Legislative History

The ADA's legislative history indicates that Congress intended to include all HIV-infected individuals within the statute's purview. The House Report on the ADA recognizes that it is impossible to list all of the conditions, diseases, or infections that qualify as impairments, but notes that "a person infected with the Human Immunodeficiency Virus is covered under the first [actual disability] prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships."²⁹ The Senate Report accompanying the legislation contains similar language.³⁰ Moreover, during floor debates surrounding the passage of the legislation, a number of legislators explicitly stated that an asymptomatic HIV-positive person is protected by the ADA.³¹

C. Interpretive Regulations

1. EEOC Regulations

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing Title I of the ADA,³² which prohibits employment discrimination on the basis of disability.³³ The EEOC has

28. 42 U.S.C. § 12201(a) (1994); *see also* *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 57 (4th Cir. 1995).

29. H.R. Rep. No. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

30. S. Rep. No. 101-116, at 22 (1990).

31. "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 . . ." 136 Cong. Rec. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens); *see also* 136 Cong. Rec. H4626 (daily ed. July 12, 1990) (statement of Rep. Waxman) (noting that individuals who fall anywhere along HIV's broad continuum of stages are covered under first prong of ADA's definition of disability); 136 Cong. Rec. 11,453 (May 22, 1990) (statement of Rep. McDermott) (same); 135 Cong. Rec. 19,867 (Sept. 7, 1989) (statement of Sen. Kennedy) (concluding that individual is protected by legislation if that individual is asymptomatic and HIV positive).

32. 42 U.S.C. § 12116 (1994).

33. 42 U.S.C. § 12112 (1994).

issued detailed regulations and interpretive guidance implementing the ADA's disability definition.³⁴

Under the "actual disability" prong of the disability definition, an individual is considered disabled if that individual has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."³⁵ The EEOC regulations provide extensive guidance to help interpret these terms. A "physical impairment" is "[a]ny 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."³⁶ Although the EEOC regulations do not mention whether HIV is a disability, the interpretive guidance provided in the appendix to the regulations specifically states that impairments such as HIV infection are inherently substantially limiting.³⁷ This language draws no distinction between asymptomatic and symptomatic HIV.³⁸ A "major life activity" is one that an average person can perform with little or no difficulty, such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."³⁹ This list, however, is intended to be illustrative rather than exclusive.⁴⁰

The "regarded as" prong of the ADA's disability definition provides that an individual qualifies as having a disability when that individual is "regarded as having such an impairment."⁴¹ The EEOC regulations provide that an individual is disabled under this prong if: (1) the impairment itself does not substantially limit a major life activity but is treated by an employer as having such a limitation; (2) the impairment substantially limits a major life activity only as a result of others' attitudes towards the impairment; or (3) the individual does not have a substantially limiting impairment but is treated by an employer as such.⁴²

34. 29 C.F.R. § 1630.1-.16 (1997).

35. 42 U.S.C. § 12102(2)(A) (1994); 29 C.F.R. § 1630.2(g)(1).

36. 29 C.F.R. § 1630.2(h).

37. 29 C.F.R. app. § 1630.2(j).

38. 29 C.F.R. app. § 1630.2(j).

39. 29 C.F.R. § 1630.2(i).

40. 29 C.F.R. app. § 1630.2(i).

41. 42 U.S.C. § 12102(2)(C) (1994).

42. 29 C.F.R. § 1630.2(l).

The appendix to the regulations notes that an individual satisfies the third part of the "regarded as" definition of disability if, for example, that individual is discharged from his or her job in response to an untrue rumor that he or she is HIV-positive.⁴³

2. Department of Justice Regulations

The Department of Justice (DOJ) is responsible for enforcing Titles II and III of the ADA,⁴⁴ which prohibit discrimination in public services, programs, and accommodations.⁴⁵ Although the majority of cases addressing asymptomatic HIV-positive individuals involves Title I of the ADA,⁴⁶ an overview of the DOJ's approach to the problem is useful because all three titles rely on the same disability definition.⁴⁷ The DOJ regulations for Titles II and III clearly state that HIV qualifies as an ADA disability.⁴⁸ The regulations explicitly and unequivocally list "HIV disease (whether symptomatic or asymptomatic)" as an impairment.⁴⁹

II. CASES EXPLORING ASYMPTOMATIC HIV AS A DISABILITY

Courts have failed to resolve definitively whether asymptomatic HIV infection is a disability under the ADA. Early cases under the Rehabilitation Act simply assumed without analysis that all forms of HIV or AIDS infection were disabilities,⁵⁰ and the U.S. Supreme Court has implied that persons with impairments such as asymptomatic HIV are handicapped under the "regarded as" prong of the Rehabilitation Act's definition.⁵¹ More recently, however, a split in the circuits has

43. 29 C.F.R. app. § 1630.2(I).

44. 42 U.S.C. §§ 12134(a), 12186(b) (1994).

45. Title II prohibits public entities from discriminating against qualified individuals with regard to services, programs, or any other activities. 42 U.S.C. § 12132 (1994). Title III prohibits owners, lessors, or operators of public accommodations from discriminating on the basis of disability with regard to the use of such accommodations. 42 U.S.C. § 12182 (1994).

46. See, e.g., *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156 (4th Cir. 1997); *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995). But see *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir.) (examining whether asymptomatic HIV-infected patient qualifies as having disability under Title III), cert. granted, 118 S. Ct. 554 (1997).

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

48. 28 C.F.R. § 35.104(1)(ii) (1997); 28 C.F.R. § 36.104(1)(iii) (1997).

49. 28 C.F.R. § 35.104(1)(ii); 28 C.F.R. § 36.104(1)(iii).

50. See *Parmet & Jackson*, *supra* note 10, at 16-17.

51. See *infra* Part II.B.

emerged. A number of courts have concluded that asymptomatic HIV-positive individuals are not disabled within the meaning of the ADA because the virus is not an “impairment” that substantially limits a “major life activity.”⁵² Other courts have held that asymptomatic HIV-positive persons are protected by the ADA because the infection impairs the major life activity of procreation and/or sexual relations.⁵³ When it decides the appeal of *Abbott v. Bragdon*, the U.S. Supreme Court has the opportunity to settle some of this disagreement by answering the questions of whether reproduction is a major life activity and whether asymptomatic individuals with HIV are per se disabled.

A. *Early Rehabilitation Act Cases*

Until the passage of the ADA, every relevant judicial decision found that both AIDS and asymptomatic or symptomatic HIV infection were disabilities under the Rehabilitation Act or comparable state statutes.⁵⁴ Many of these cases dealt with children infected with HIV who were prohibited from attending schools because of others’ fears of the disease.⁵⁵ Rather than analyzing where individuals with AIDS or HIV fit within the disability definition, many of these cases assumed without discussion that these individuals were disabled under the Rehabilitation Act without discussing the question.⁵⁶ Early ADA cases also held, without significant analysis, that asymptomatic HIV was a disability.⁵⁷

52. See, e.g., *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156, 169–72 (4th Cir. 1997); *Ennis v. National Ass’n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 60 (4th Cir. 1995).

53. See, e.g., *Abbott v. Bragdon*, 107 F.3d 934, 949 (1st Cir.), cert. granted, 118 S. Ct. 554 (1997).

54. *Parmet & Jackson*, *supra* note 10, at 16–17.

55. See, e.g., *Ray v. School Dist. of Desoto County*, 666 F. Supp. 1524, 1528–29 (M.D. Fla. 1987).

56. See, e.g., *Martinez v. School Bd. of Hillsborough County*, 675 F. Supp. 1574, 1575, 1583 (M.D. Fla. 1987) (reviewing whether under Rehabilitation Act plaintiff infected with AIDS has right to education in least restrictive environment without examining whether she was disabled under Act); *Ray*, 666 F. Supp. at 1536 (concluding as matter of law under Rehabilitation Act that plaintiff schoolchildren infected with HIV should be admitted to normal integrated classroom without questioning whether plaintiffs were actually disabled under Act).

57. *Parmet & Jackson*, *supra* note 10, at 22.

B. School Board of Nassau County v. Arline

In *School Board of Nassau County v. Arline*,⁵⁸ the U.S. Supreme Court specifically declined to reach the question of whether a person with AIDS or any other contagious disease has a physical impairment, or whether such a person could be considered disabled solely on the basis of contagiousness.⁵⁹ The *Arline* Court did state, however, that an individual qualifies as disabled under the “regarded as” prong of the Rehabilitation Act’s handicap definition if the individual is regarded as having an impairment and is therefore substantially limited in his or her major life activity.⁶⁰

Although the Court found that the plaintiff had a physical impairment that substantially limited one of her major life activities, thus rendering her disabled under the “actual disability” prong of the disability definition, Justice Brennan spent a considerable portion of the majority opinion discussing the “regarded as” language contained in the final prong of the definition.⁶¹ Relying on congressional intent in adding the “regarded as” language to the definition, the Court stated that although an impairment might not diminish a person’s physical or mental capabilities, the negative reactions of others to the impairment could nevertheless substantially limit that person’s ability to work.⁶² The Court observed that, by adding the “regarded as” prong to the disability definition, “Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”⁶³

Subsequent cases have relied on a DOJ interpretation of the U.S. Supreme Court’s decision in *Arline*.⁶⁴ Following *Arline*, the DOJ’s Office of Legal Counsel drafted a memorandum on the application of the Rehabilitation Act’s definition of disability to asymptomatic HIV-

58. 480 U.S. 273, 282 (1987) (examining whether elementary school teacher, who was fired after her third relapse of tuberculosis within two years, was handicapped within meaning of Rehabilitation Act).

59. *Id.* at 282 n.7.

60. *Id.* at 284.

61. *Id.* at 281–85.

62. *Id.* at 283.

63. *Id.* at 284.

64. *See, e.g.,* *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156, 171–72 (4th Cir. 1997).

positive individuals.⁶⁵ The DOJ first analyzed whether an asymptomatic HIV-infected individual is disabled under the “actual disability” prong of the disability definition.⁶⁶ The memorandum concluded that such an individual has a “physical impairment,” relying on findings by the Surgeon General that “from a purely scientific perspective, persons with HIV infection are clearly impaired.”⁶⁷

A harder hurdle for the DOJ was whether the impairment affected “any major life activities.”⁶⁸ In an interesting interpretation that moved away from anything explicitly stated in *Arline*, the DOJ suggested that the infected individual’s knowledge of the disease may directly affect the “major life activity” of procreation and intimate personal relations, thus qualifying such an individual as handicapped within the meaning of the Rehabilitation Act.⁶⁹ The DOJ recognized, however, that there is nothing inherent in the infection that actually prevents procreation or intimate sexual relations; rather, the asymptomatic individual’s response to the disease results in a change of behavior.⁷⁰ In cases where the individual has in fact changed his or her behavior, the DOJ opined, courts may consider this a limitation of a major life activity.⁷¹

C. *Circuits Are Divided over Whether Asymptomatic HIV Infection Is a Disability Under the ADA*

In the wake of *Arline*, courts were left with no definitive guidance as to whether the ADA protects asymptomatic HIV-infected individuals, and if so, on what grounds.⁷² Courts also began to question whether

65. Memorandum to Arthur B. Culvahouse Jr., Counsel to the President, Justice Department Application of Rehabilitation Act’s Section 504 to HIV-Infected Persons, Daily Lab. Rep. (BNA) D-1 (Oct. 7, 1988), available in Westlaw, BNA-DLR Database, 195 DLR D-1, 1988 [hereinafter Culvahouse Memorandum].

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* This appears to constitute the first suggestion that procreation and sexual relations are major life activities under disability laws as applied to asymptomatic HIV-positive persons. This approach has been adopted by some courts to find asymptomatic HIV-positive individuals are disabled within the meaning of the ADA. See, e.g., *Abbott v. Bragdon*, 107 F.3d 934 (1st Cir.), cert. granted, 118 S. Ct. 554 (1997).

70. Culvahouse Memorandum, *supra* note 65.

71. *Id.*

72. *Arline* is not necessarily controlling because: (1) the Court specifically declined to answer whether a contagious disease such as AIDS is a disability; and (2) the Court’s discussion of the

sexual relations and procreation constituted "major life activities" under the ADA for those infected with HIV as well as for persons who are infertile,⁷³ as the DOJ suggested.⁷⁴ A resulting split emerged among the circuits as to whether an HIV-infected individual is per se disabled and thus protected from discrimination under the ADA.⁷⁵

1. *First and Ninth Circuits Consider Asymptomatic HIV a Disability*

In *Gates v. Rowland*, the Ninth Circuit did not distinguish between persons with full-blown AIDS and asymptomatic persons infected with HIV.⁷⁶ The case was brought under the Rehabilitation Act by an HIV-positive prison inmate who was denied food service jobs.⁷⁷ Although this was a Rehabilitation Act case, the court relied on the regulations

"regarded as" portion of the disability definition was technically dicta and therefore not binding on lower courts. *See* *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 281–82 n.7 (1987). Therefore, while the lower courts sometimes acknowledge the discussion of this issue in *Arline*, they do not necessarily follow the U.S. Supreme Court's reasoning as applied to asymptomatic HIV-infected plaintiffs. *See, e.g.*, *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156, 173 (4th Cir. 1997) (finding no genuine issue of material fact concerning perception of plaintiff's HIV infection, but acknowledging *Arline's* conclusion that others' negative reactions could substantially limit ability to work).

73. A number of courts have concluded that reproduction is a major life activity. *See, e.g.*, *Abbott*, 107 F.3d at 939; *Bielicki v. City of Chicago*, No. 97 C 1471, 1997 WL 260595, at *3 (N.D. Ill. May 8, 1997); *Hernandez v. Prudential Ins. Co. of Am.*, 977 F. Supp. 1160, 1164 (M.D. Fla. 1997); *Anderson v. Gus Mayer Boston Store of Del.*, 924 F. Supp. 763, 774–75 (E.D. Tex. 1996); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404–05 (N.D. Ill. 1996); *Erickson v. Board of Governors of State Colleges*, 911 F. Supp. 316, 323 (N.D. Ill. 1995); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1318–20 (E.D. Pa. 1994); *Doe v. District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990); *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 444–45 (N.D. Ill. 1988). Others courts have held that reproduction does not constitute a major life activity. *See, e.g.*, *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996); *Cortes v. McDonald's Corp.*, 955 F. Supp. 541, 547 (E.D.N.C. 1996); *Farmer v. National City Corp.*, No. C-2-94-966, 1996 WL 887478, at *6 (S.D. Ohio Apr. 5, 1996); *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996).

74. *See supra* text accompanying note 69.

75. Compare *Abbott*, 107 F.3d at 949 (holding that asymptomatic woman was disabled), *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994), *Hernandez*, 977 F. Supp. at 1163, *United States v. Morvant*, 898 F. Supp. 1157, 1161 (E.D. La. 1995), *Kohn Nast & Graf*, 862 F. Supp. 1310, 1321, and *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D. Ohio 1994), with *Runnebaum*, 123 F.3d at 169–70 (finding that asymptomatic individuals infected with HIV are not disabled under ADA), *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59–60 (4th Cir. 1995), and *Cortes*, 955 F. Supp. at 547.

76. *Gates*, 39 F.3d at 1446.

77. *Id.* at 1444–45.

implementing the ADA, which include both asymptomatic and symptomatic HIV, and found that any person infected with HIV should be considered an individual with a disability.⁷⁸ For purposes of either the ADA or the Rehabilitation Act, the court found no distinction between those who have AIDS and those who remain asymptomatic with HIV; rather, the possible transmission of the virus to others is the basis of the individual's disability.⁷⁹

Similarly, in *Abbott v. Bragdon*, the First Circuit found that the asymptomatic HIV-positive plaintiff had a physical impairment that substantially interfered with her major life activity of reproduction, and therefore held that she was disabled within the meaning of the ADA.⁸⁰ The case involved an asymptomatic HIV-positive patient who sued her dentist under Title III of the ADA because he refused to treat her in his office.⁸¹

The *Abbott* court found "unhesitatingly" that HIV-positive status, including asymptomatic HIV, is a physical impairment under the ADA.⁸² However, the court had more trouble clearing the second hurdle: whether HIV affects a major life activity.⁸³ The plaintiff argued, and the court ultimately accepted, that her reproduction was a major life activity affected by the impairment.⁸⁴ Relying on congressional intent, the Court found that reproduction, and the bundle of activities it encompasses, is a major life activity because of its importance to those who engage in it.⁸⁵ Rejecting the argument that reproduction cannot be considered a major life activity because it is a lifestyle choice, the court noted that most acts

78. *Id.* at 1446 (noting that because Rehabilitation Act and ADA have identical disability definitions, ADA regulations are relevant for interpreting Rehabilitation Act); see 28 C.F.R. § 35.104(1)(ii) (1997); see also *supra* note 28 and accompanying text.

79. *Gates*, 39 F.3d at 1446. The court did not clarify which prong of the disability definition the plaintiff is covered by, and therefore did not discuss what major life activity may be affected by asymptomatic HIV, nor whether the plaintiff was regarded as impaired. The court did, however, note that HIV, whether symptomatic or asymptomatic, penetrates the chromosomes of human cells so that they cannot combat infections. *Id.* (citing *Chalk v. United States Dist. Court*, 840 F.2d 701, 706 (9th Cir. 1988)).

80. *Abbott*, 107 F.3d at 949.

81. *Id.* at 937.

82. *Id.* at 939.

83. *Id.* at 939–42.

84. *Id.* at 939, 941.

85. *Id.* at 941.

that human beings perform have elements of volition.⁸⁶ The court emphasized the plaintiff's specific decision not to have children due to her HIV status and concluded that because of this decision, the HIV impairment substantially interferes with the major life activity of procreation.⁸⁷

The *Abbott* court left open, however, the question of how it would rule in similar future cases. The court stated that it might reach a different conclusion if presented with other facts and circumstances, such as medical improvements in reducing the likelihood of transmitting HIV through reproduction.⁸⁸ The decision, the court warned, "eschews a blanket rule and instead demands a case-by-case inquiry into a service provider's responsibilities to treat HIV-positive patients."⁸⁹

2. *The Fourth Circuit Does Not Consider Asymptomatic HIV Status a Disability*

In *Ennis v. National Ass'n of Business and Educational Radio, Inc.*, the Fourth Circuit rejected asymptomatic HIV as an ADA disability.⁹⁰ The case involved a woman who brought suit under the ADA alleging she was fired because of her employer's fear that its health insurance fees would go up when she adopted an asymptomatic HIV-positive child.⁹¹ Finding that the ADA contemplates a case-by-case determination of whether a given impairment substantially limits a major life activity, or whether an individual is perceived as having a substantially limiting condition, the court warned that HIV-positive status may never be classified as a per se disability under the ADA.⁹² The court then noted, without significant discussion, that because the HIV-positive child was

86. *Id.* at 940-41. The court did not address other problems with reproduction as a major life activity, see *infra* Part III.A.2, but did note that "the question is very close" of whether reproduction is a major life activity. *Abbott*, 107 F.3d at 941.

87. *Abbott*, 107 F.3d at 942.

88. *Id.* at 949.

89. *Id.*

90. *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 55 (4th Cir. 1995).

91. *Id.* at 57. The plaintiff relied on § 12112(b)(4) of the ADA, which prohibits employers from taking adverse employment actions "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4) (1994).

92. *Ennis*, 53 F.3d at 60.

asymptomatic and therefore suffered from no conditions that affected his day-to-day life, he did not suffer a limitation on any major life activity.⁹³

In *Runnebaum v. NationsBank of Maryland*, a twelve-member panel of the Fourth Circuit split seven to five and confirmed that an asymptomatic HIV-positive plaintiff was not disabled within the meaning of the ADA under any prong of the statute's disability definition.⁹⁴ The case involved an asymptomatic man infected with HIV who was fired from his job at a bank.⁹⁵ The first question addressed by the *Runnebaum* majority was whether an individual with asymptomatic HIV has an "impairment" that substantially limits a "major life activity" under the "actual disability" prong of the disability definition.⁹⁶ Because the word "impairment" is not defined in the statute, the majority turned to the dictionary definition of the word and concluded that asymptomatic HIV infection is not an impairment because, without symptoms, there are no diminishing effects on the individual.⁹⁷ The majority refused to look behind the statute's language or to consider the ADA's legislative history, finding that the statutory meaning is "plain and unambiguous."⁹⁸ Moreover, the majority determined that even if asymptomatic HIV infection were an impairment, it would not substantially limit a "major life activity."⁹⁹ The court rejected the argument that asymptomatic HIV status substantially limits the "major life activities" of procreation and intimate sexual relations, reasoning that nothing inherent in HIV substantially limits such activities.¹⁰⁰ It is the impairment, the court reasoned, not the individual's reaction to the impairment, that must be considered.¹⁰¹ Furthermore, the court found that the plaintiff in this case

93. *Id.* Note, however, that for the purposes of the case, the court assumed that the boy was disabled because the record may not have been fully developed as to whether there were any limitations of the boy's major life activities or perceptions of any such limitation. *Id.*

94. *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156, 161 (4th Cir. 1997).

95. *Id.* at 163.

96. *Id.* at 167 (analyzing 42 U.S.C. § 12102(2)(A) (1994)).

97. *Id.* at 168–69 (citing *Webster's Ninth New Collegiate Dictionary* 603 (1986) (defining "impairment" as to "make worse by or as if by diminishing in some material respect")).

98. *Id.* at 168. The court also pointed out that the committee reports do not distinguish between asymptomatic HIV infection and symptomatic conditions, and therefore the committee reports' indication that HIV-infected individuals are covered by the ADA does not apply to asymptomatic HIV-infected persons. *Id.* at 169.

99. *Id.* at 171–72.

100. *Id.* at 172.

101. *Id.*

did not show that he abstained from intimate sexual relations or decided not to have children because of his infection.¹⁰²

The court then turned to the “regarded as” prong of the disability definition and addressed whether the plaintiff was regarded as having such an impairment.¹⁰³ The majority reasoned that the “regarded as” prong incorporates by reference the “actual disability” prong’s description of a qualifying impairment: one that substantially limits one or more of the major life activities.¹⁰⁴ It followed that the “regarded as” prong protects only those individuals who are regarded as having an impairment that itself substantially limits one or more of the major life activities.¹⁰⁵ The court found that the plaintiff was not regarded as having such a limiting impairment and therefore was not entitled to ADA protection.¹⁰⁶

The *Runnebaum* dissent argued that the majority’s opinion moved the Fourth Circuit “even further from the mainstream of ADA interpretation . . . [and] completely away from the interpretation that Congress clearly intended.”¹⁰⁷ The dissent further stated that even under the ordinary dictionary definition employed by the majority, the effects of HIV on the victim would constitute an impairment because the virus impairs the body as soon as it enters it, although it is not outwardly visible.¹⁰⁸ Therefore, the majority’s interpretation of “impairment” ignores the stark realities of asymptomatic HIV.¹⁰⁹ Moreover, the dissent found that the legislative history and implementing regulations confirm that procreation and intimate sexual relationships are major life activities that are substantially limited by asymptomatic HIV infection.¹¹⁰ Alternatively, the dissent argued that the plaintiff may be protected under the “regarded as” prong of the disability definition.¹¹¹

102. *Id.*

103. *Id.* (analyzing 42 U.S.C. § 12102(2)(C) (1994)).

104. *Id.*

105. *Id.*

106. *Id.* at 174.

107. *Id.* at 176 (Michael, J., dissenting) (contesting majority’s rejection of case-by-case contemplation of whether individual is disabled).

108. *Id.* at 180 (Michael, J., dissenting).

109. *Id.* at 183 (Michael, J., dissenting).

110. *Id.* at 184 (Michael, J., dissenting).

111. *Id.* at 186, 188 (Michael, J., dissenting) (stressing fact that plaintiff presented evidence that created issue of material fact as to whether plaintiff was “regarded as” being disabled).

The heart of the debate among the circuits has thus focused primarily upon the “actual disability” prong of the ADA’s disability definition. Those courts that have found asymptomatic HIV infection to be a protected disability have done so on the ground that HIV limits procreation and/or sexual relations.¹¹² In contrast, those courts that have reached the opposite result simply disagree, finding either that asymptomatic HIV is not an impairment or that it does not substantially limit a major life activity.¹¹³ The “regarded as” prong of the ADA’s disability definition has yet to serve as a basis for protecting asymptomatic HIV-positive individuals from discrimination.

III. ASYMPTOMATIC HIV-POSITIVE INDIVIDUALS ARE PROTECTED FROM DISCRIMINATION BY THE ADA

Individuals who have contracted HIV, but who do not yet suffer from symptoms of the virus, can and should be protected from discrimination by the ADA. The ADA’s legislative history, its interpretive regulations and guidance, and statements by the U.S. Supreme Court all indicate that this is the appropriate result. The current debate among the circuits over whether the reluctance to procreate induced by a person’s HIV status qualifies HIV as a disability under the ADA’s “actual disability” prong obfuscates the real issues. The Fourth Circuit’s approach, which fails to protect HIV-positive persons from discrimination because it reads the ADA as unambiguously calling for that result, is unsatisfactory; it disregards the ADA’s intent to protect disabled individuals who are discriminated against based on faulty assumptions that do not reflect the individuals’ actual abilities. The First Circuit’s approach, which concludes that HIV constitutes a disability because it may force some into the decision not to procreate or have sex, is equally unsatisfactory. This approach fails because it does not protect large pockets of those with HIV who do not, or cannot, engage in these “major life activities” (such as children, post-menopausal women, and celibate monks); it also awkwardly and artificially stretches the definition of the phrase “substantially limits one or more of the major life activities” to the limits of credibility.

112. See *Abbott v. Bragdon*, 107 F.3d 934, 942 (1st Cir.), *cert. granted*, 118 S. Ct. 554 (1997).

113. See *Runnebaum*, 123 F.3d at 168, 172; *Ennis v. National Ass’n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 60 (4th Cir. 1995).

Instead of employing the “actual disability” prong of the ADA, courts should rely on the “regarded as” prong of the definition. For the most part, asymptomatic HIV-positive persons lead normal and productive lives until the infection develops further. Only if the biases, misperceptions, and fears of others lead to discrimination do such individuals suffer from a disability that the ADA was meant to, and should, protect.

A. Reliance on the “Actual Disability” Prong of the ADA’s Disability Definition Is Awkward and Problematic

Although asymptomatic HIV infection does constitute an “impairment” under the ADA, it is arguable whether it significantly affects a “major life activity.” For many people with HIV, it does not. Reliance on the “actual disability” prong of the ADA’s disability definition is thus inadequate to protect everyone with asymptomatic HIV from discrimination.

1. Asymptomatic HIV Is an Impairment

To qualify as disabled under the first prong of the ADA’s disability definition, an individual must have an “impairment.”¹¹⁴ The ADA does not define “physical or mental impairment,”¹¹⁵ but EEOC regulations define the phrase as any physiological disorder affecting, among other body systems, the hemic (blood) and lymphatic systems.¹¹⁶ DOJ regulations also consider both symptomatic and asymptomatic HIV infection to be an impairment under the ADA.¹¹⁷ Even when an HIV victim remains asymptomatic, the virus infects the immune system immediately, entering the hemic and lymphatic systems and reproducing itself in the white blood cells known as CD4 cells.¹¹⁸

114. 42 U.S.C. § 12102(2)(A) (1994).

115. See 42 U.S.C. § 12102(2)(A).

116. 29 C.F.R. § 1630.2(h)(1) (1997); see also discussion *supra* Part I.C.1.

117. 28 C.F.R. § 35.104(1)(ii) (1997); see also discussion *supra* Part I.C.2.

118. *Runnebaum*, 123 F.3d at 180 (Michael, J., dissenting); see also Gorman, *supra* note 3, at 64; Christine Gorman, *The Exorcists: Applying a Potent Combination of New Treatments, Medical Researchers Are Determined to Expel the Terrible Specter of AIDS as an Invincible Disease*, *Time*, Fall 1996 (Special Edition), at 64, 65 (“The big fight occurs in the harder-to-study lymph nodes, where day after day, year after year the body battles the virus to a standstill before finally exhausting its immunological reserves.”).

Surgeon General C. Everett Koop examined the question of whether asymptomatic HIV constitutes an impairment within the meaning of the ADA and concluded that “from a purely scientific perspective, persons with HIV infection are clearly impaired. . . . [T]hey may appear outwardly healthy but are in fact seriously ill.”¹¹⁹ Koop also explained that HIV infection is the starting point for a single, progressive disease, and that early stages of the disease involve impairments but no visible signs of illness.¹²⁰ Therefore, even though the infected individual remains asymptomatic, HIV progressively deteriorates the immune system until the final stages of the disease.¹²¹ HIV’s immediate and virulent attack on the lymphatic and hemic systems, even while outwardly asymptomatic, qualifies the disease as an impairment.¹²²

The *Runnebaum* majority’s reliance on the dictionary definition of “impairment” to conclude that asymptomatic HIV infection does not meet the statutory definition¹²³ reveals an inattention to the relevant regulations¹²⁴ and interpretive guidance and a misunderstanding of the effects of the infection.¹²⁵ The *Runnebaum* majority relied on dictionary definitions of impairment such as “to make worse by or as if by diminishing in some material respect,”¹²⁶ and found that early asymptomatic stages of HIV infection involved no such impairment. This finding, however, unjustifiably ignores the diminished capability of the body’s immune system,¹²⁷ as the remarks from the EEOC,¹²⁸ the DOJ,¹²⁹ and Surgeon General Koop¹³⁰ make clear.

119. Culvahouse Memorandum, *supra* note 65 (citation omitted).

120. *Id.*; *see also* Gorman, *supra* note 3, at 63 (“[T]he body and the virus engage in mortal combat from the beginning.”).

121. *Runnebaum*, 123 F.3d at 180 (Michael, J., dissenting).

122. *Id.* at 183 (Michael, J., dissenting).

123. *Id.* at 168; *see also* discussion *supra* Part II.C.2.

124. 29 C.F.R. § 1630.2(h) (1997).

125. *See supra* notes 118–22 and accompanying text.

126. *Runnebaum*, 123 F.3d at 168 (citing *Webster's Ninth New Collegiate Dictionary* 603 (1986)).

127. *Id.* at 180 (Michael, J., dissenting).

128. 29 C.F.R. app. § 1630.2(j).

129. 28 C.F.R. § 35.104(1)(ii) (1997); 28 C.F.R. § 36.104.(1)(iii) (1997).

130. Culvahouse Memorandum, *supra* note 65.

2. *For Some Infected Persons, Asymptomatic HIV May Not Substantially Limit a Major Life Activity*

For HIV to qualify as a disability under the “actual disability” prong of the ADA’s disability definition, not only must it be an impairment, but it must also substantially limit a major life activity.¹³¹ The regulations do not provide an exclusive list of major life activities, but give examples such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and working.¹³²

Asymptomatic HIV would not appear to limit a “major life activity” because the disease at this early stage does not affect one’s day-to-day life activities. Indeed, by all outward appearances, asymptomatic HIV-positive individuals are indistinguishable from those who are not infected. The ability of infected individuals to work, care for themselves, or perform manual tasks is not directly affected by the disease. Nonetheless, proponents of including asymptomatic HIV-infected individuals within ADA’s “actual disability” definition argue that procreation and intimate sexual relations constitute major life activities that are limited by HIV.¹³³

While the argument that procreation and intimate sexual relations qualify as major life activities as contemplated by the ADA has some judicial support,¹³⁴ it is ultimately an unsatisfactory fit for asymptomatic HIV-positive individuals.¹³⁵ In cases where an individual is discriminated against because of his or her HIV-positive status, focusing on reproduction and sexual activity arbitrarily distinguishes between

131. 42 U.S.C. § 12102(2)(A) (1994).

132. 29 C.F.R. § 1630.2(i).

133. *See, e.g.,* Runnebaum v. NationsBank of Maryland, 123 F.3d 156, 170 (4th Cir. 1997) (reviewing argument by amici that procreation and sexual relations are major life activities); Abbott v. Bragdon, 107 F.3d 934, 939 (1st Cir.), *cert. granted*, 118 S. Ct. 554 (1997). In addition, early proponents for protecting asymptomatic HIV or AIDS-infected individuals under the Rehabilitation Act argued that persons with AIDS are handicapped within the statutory definition because the ability to fight infection and preserve health is logically a major life function that is substantially limited. *See, e.g.,* Arthur S. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. Dayton L. Rev. 681, 691 (1985). Despite its intuitive logic, this approach has not been seized upon by courts dealing with the issue, perhaps because neither health nor immunological functions are listed in the relevant regulations as major life activities. *See* 29 C.F.R. § 1630.2(i).

134. *See supra* note 73.

135. *See generally* Rhonda K. Jenkins, Case Note, 20 S. Ill. U. L.J. 637, 647–49 (1996) (arguing that in applying procreation as major life activity, ambiguity between statutory standard and lay perception is significant concern to HIV-infected individuals).

individuals based on circumstances (the plaintiff's fertility and reproductive intentions) that have nothing to do with the discrimination at issue.¹³⁶ Therefore, when an asymptomatic HIV-positive individual is discriminated against in blatant disregard of the ADA's underlying policy against "purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals,"¹³⁷ the fate of that individual is restrictively tied to irrelevant questions about the individual's sexual habits and plans to have children.¹³⁸ Under this line of reasoning, women who have gone through menopause, young children, infertile people, or individuals who simply do not desire to have children would not be entitled to ADA protection. This arbitrary distinction among those who suffer from discrimination based on the same characteristics (HIV positive status) is irreconcilable with the ADA's intent to halt discriminatory treatment against all disabled persons.¹³⁹

In *Abbott v. Bragdon*, the case the U.S. Supreme Court will consider,¹⁴⁰ this asymmetry is particularly clear. In holding that the plaintiff's HIV impairment substantially limited the major life activity of procreation, the First Circuit emphasized that the plaintiff decided not to have children because of the risk of transmitting the disease.¹⁴¹ If faced with different circumstances, the majority acknowledged that it might have held that the plaintiff did not qualify, implying that a plaintiff who was unable, or unwilling, to have children for reasons other than his or her HIV status might not be protected.¹⁴² The *Abbott* court also found that reproduction and the bundle of activities it encompasses are major life activities because of their singular importance to those who engage in them.¹⁴³ This haphazard distinction, however, fails to account for and

136. Parmet & Jackson, *supra* note 10, at 34–35.

137. 42 U.S.C. § 12101(a)(7) (1994).

138. An oddity of the "actual disability" prong of the disability definition, as applied to asymptomatic HIV-infected individuals, is that discrimination against infected individuals is more likely to be subjectively based on an irrational fear of the infection rather than on some irrelevant perception that the infected individual cannot, for example, have children. This discordance suggests that the "regarded as" prong of the disability definition may be a more appropriate approach for covering asymptomatic HIV-infected individuals under the ADA. See discussion *infra* Part III.B.

139. See 42 U.S.C. § 12101(a)(7).

140. 107 F.3d 934 (1st Cir. 1997), *cert. granted*, 118 S. Ct. 554 (1997).

141. *Id.* at 942.

142. *Id.* at 941–42, 949.

143. *Id.* at 941.

protect asymptomatic HIV-infected children because sexual relationships are inapplicable to a child's day-to-day existence.

Additional difficulties with the "actual disability" approach will inevitably arise as treatments for HIV infection improve. To qualify as a disability, an impairment must impose a "substantial limitation" on that major life activity.¹⁴⁴ Because infected individuals can significantly decrease the risk of infecting others by using condoms,¹⁴⁵ there may not be a substantial limitation on sexual relations. Moreover, as medical advances reduce the risk of passing on the disease to one's child¹⁴⁶ or control HIV replication-infected infants,¹⁴⁷ those persons discriminated against on the basis of HIV may lose the ADA's protection because the disease may no longer "substantially limit" procreation.¹⁴⁸ Thus, even if sexual relations and procreation are major life activities under the ADA, they might not be significantly impaired by HIV infection.

A final difficulty with the "actual disability" prong is that HIV-positive status alone does not limit sexual relations or procreation.¹⁴⁹ Rather, the normative judgment of the infected person substantially limits sexual activity or procreation.¹⁵⁰ As the *Runnebaum* majority noted, despite the knowledge of infection, some HIV-infected individuals may not change their sexual behavior.¹⁵¹ For example, if a married

144. 42 U.S.C. § 12102(2)(A) (1994); see also *Runnebaum v. NationsBank of Maryland*, 123 F.3d 156, 167 (4th Cir. 1997); *Byrne v. Board of Educ.*, 979 F.2d 560, 564 (7th Cir. 1992); *Forrisi v. Bowen*, 794 F.2d 931, 933-34 (4th Cir. 1986). Although the appendix to the regulations finds that impairments such as HIV infection are inherently substantially limiting, it does not distinguish between asymptomatic and symptomatic HIV infection. 29 C.F.R. app. § 1630.2(j) (1997). It makes sense that symptomatic HIV infection poses a significant restriction on one's life activities. This logic, however, loses its luster as applied to asymptomatic HIV-infected individuals because the infection at this stage does not yet place any outward constraints on major life activities, much less significant limitations.

145. Centers for Disease Control and Prevention, *CDC AIDS Information, Prevention of HIV Infection* (visited Feb. 7, 1998) <http://www.cdc.gov/nchstp/hiv_aids/hivinfo/vfax/260040.htm>.

146. See Catherine M. Wilfert, *Beginning to Make Progress Against HIV*, 335 *New Eng. J. Med.* 1678, 1678 (1996) (noting that research on mother-to-child transmission of HIV has advanced to where prevention of larger percentage of neonatal infection is now realistic possibility).

147. Katherine Luzuriaga et al., *Combination Treatment with Zidovudine, Didanosine, and Nevirapine in Infants with Human Immunodeficiency Virus Type 1 Infection*, 336 *New Eng. J. Med.* 1343 (1997).

148. See *Abbott*, 107 F.3d at 949.

149. *Runnebaum*, 123 F.3d at 172.

150. *Id.*; see also Culvahouse Memorandum, *supra* note 65. Note, however, that there may be a 25% risk of passing HIV on to one's children without AZT therapy and an 8% risk with such therapy. See *Abbott*, 107 F.3d at 942.

151. *Runnebaum*, 123 F.3d at 172.

couple were both HIV-positive but infertile, they would have no reason to abstain from sexual relations with one another. A strict reading of the statutory language under the first prong of the disability definition provides that the impairment itself, not one's reaction to it, must substantially limit a major life activity.¹⁵² By this interpretation, asymptomatic HIV infection cannot qualify for protection under the "actual disability" prong of the ADA's definition.

B. Asymptomatic HIV-Infected Individuals Are Protected from Discrimination Under the "Regarded As" Prong of the ADA's Disability Definition

Legislative history, interpretive regulations and guidance, and the U.S. Supreme Court's decision in *School Board of Nassau County v. Arline* all indicate that the "regarded as" prong of the ADA's disability definition is the appropriate provision for protecting asymptomatic HIV-positive persons from unjustified discrimination. Applying the "regarded as" prong is the only way to effectuate the ADA's intent to protect all HIV-infected individuals from discrimination.

1. To Fulfill Congressional Intent to Protect All HIV-Infected Individuals from Discrimination, the "Regarded As" Prong of the ADA's Disability Definition Must Apply

The ADA's legislative history shows that Congress intended to include all HIV-infected individuals within the statute's purview.¹⁵³ The House and Senate reports both unequivocally conclude that an HIV-positive person is covered by the ADA.¹⁵⁴ Several legislators who spoke on the floor also concluded that asymptomatic HIV would be protected by the legislation.¹⁵⁵

While the will of Congress to cover all HIV-infected persons under the ADA is clear, the notion that the "actual disability" prong is the appropriate way to achieve this goal, also expressed in the committee

152. 42 U.S.C. § 12102(2)(A) (1994).

153. See discussion *supra* Part I.B.

154. H.R. Rep. No. 101-485, pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334; S. Rep. No. 101-116, at 22 (1990).

155. See *supra* note 31.

reports and legislators' commentaries,¹⁵⁶ undermines the overriding intent to cover all HIV-infected persons. By inappropriately forcing these individuals to seek qualification as disabled only under the "actual disability" prong because of the effect of the disease on reproduction and sexual relations,¹⁵⁷ the ADA would effectively exclude numerous HIV-positive persons who suffer from the same discriminatory treatment based on their HIV status, but who do not plan to have children or do not have intimate sexual relations.¹⁵⁸ Thus, requiring that HIV-positive individuals' disability status be determined by the "actual disability" definition because of the virus's effect on procreation and sexual relations significantly diminishes Congress's overarching objective of protecting HIV-positive individuals from discrimination.

Another reason the "actual disability" prong may not appropriately reflect legislative intent is that those legislators who expressed their opinion that asymptomatic HIV-positive individuals would be covered under the "actual disability" prong of the disability definition failed to mention what "major life activity" would be covered by the disease.¹⁵⁹ Lawmakers' shared presumption that HIV-positive persons would be covered under the "actual disability" prong is likely no more than a vestigial anomaly that may be traced back to the DOJ's memorandum interpreting the *Arline* decision.¹⁶⁰ At any rate, the decision does not appear to be the product of reasoned policymaking, and rigid adherence to the mechanisms envisioned by Congress should not be allowed to interfere with its underlying goals.

Only by protecting asymptomatic HIV-positive individuals under the "regarded as" prong of the disability definition will the judiciary effectuate Congress's underlying public policy goal of protecting persons from purposeful unequal treatment based on stereotypes and irrational

156. See H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334 (noting that HIV-infected persons are covered under "actual disability" prong because of substantial limitation to procreation and intimate sexual relationships); S. Rep. No. 101-116, at 22 (same); *see also supra* note 31.

157. See H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22.

158. See discussion *supra* Part III.A.2. This disjunction does not alter the operation of the statute, because in theory an individual could still bring a claim under the "actual disability" prong of the ADA. 42 U.S.C. § 12102(2)(A) (1994). This construction seems ineffective, however, because it is not aligned with the most likely subjective reasons for a person to discriminate against an asymptomatic HIV-positive individual. See *infra* notes 180-81 and accompanying text.

159. See *supra* note 31.

160. Culvahouse Memorandum, *supra* note 65.

fears not truly indicative of the individual's capabilities.¹⁶¹ More specifically, this approach will universally cover all HIV-infected persons as Congress intended.¹⁶² Such protection under the "regarded as" prong will focus exclusively on those who need it—persons subject to discrimination—and will not artificially distinguish between HIV-positive individuals based on characteristics that are unrelated to the discrimination in question.

2. *Courts Should Defer to ADA Regulations That Cover HIV Under the "Regarded As" Prong of the Disability Definition*

The conclusion that the "regarded as" prong should apply whenever others misperceive an impairment, thus resulting in a limitation of a major life activity, is bolstered by the ADA's regulations¹⁶³ and interpretive guidance. For example, the *Arline* Court notes that Health and Human Services regulations list a cosmetic disfigurement as an example of a physical impairment covered by the Rehabilitation Act.¹⁶⁴ Such a cosmetic disfigurement qualifies as a disability because when an individual is discriminated against because of the disfigurement, the discrimination may limit the major life activity of working.¹⁶⁵ The EEOC regulations also provide that an individual is disabled for the purposes of the ADA if that individual has an impairment that substantially limits a major life activity only as a result of others' attitudes towards the impairment.¹⁶⁶ In fact, the appendix to the EEOC regulations notes that if a person is discharged from a job in response to an untrue rumor that he or she is HIV-positive, that person qualifies as disabled under the "regarded as" prong of the disability definition.¹⁶⁷

161. See 42 U.S.C. § 12101(a)(7) (1994).

162. See *supra* notes 29–31 and accompanying text.

163. 29 C.F.R. § 1630.2(l)(2) (1997); see also *Arline v. School Bd. of Nassau County*, 480 U.S. 273, 283 nn.9–10 (1987) (discussing Rehabilitation Act regulations).

164. *Arline*, 480 U.S. at 283 n.10.

165. *Id.*; see also 29 C.F.R. app. § 1630.2(l) ("[I]f an employer discriminates against such an individual because of the negative reactions of customers [to the cosmetic disfigurement], the employer would be regarding the individual as disabled and acting on the basis of that perceived disability.").

166. 29 C.F.R. § 1630.2(l)(2).

167. 29 C.F.R. app. § 1630.2(l).

3. *The U.S. Supreme Court's Reasoning in Arline Applies*

Applying the Court's reasoning in *Arline* to asymptomatic HIV-infected individuals requires that when others discriminate against an individual because of his or her HIV-positive status, that individual should be considered disabled under the ADA. In *Arline*, the Court stressed that even when an impairment itself does not substantially limit a major life activity, others' negative and prejudicial reactions to the impairment could.¹⁶⁸ The Court recognized that by including the "regarded as" prong in the disability definition, Congress intended to fight the effects of erroneous but nevertheless prevalent perceptions about disabled persons who may not actually be incapacitated.¹⁶⁹ Therefore, the definition encompasses those who are substantially limited in a major life activity as a result of misperceptions.¹⁷⁰ This is exactly the type of discrimination faced by asymptomatic HIV-positive individuals.¹⁷¹

This statutory construction adopted in *Arline* is particularly applicable to situations where asymptomatic HIV-positive individuals are discriminated against on the basis of their disability despite the fact that the impairment itself does not limit any major life activities. The perceived impairment need not result directly in a limitation of a major life activity, so long as the indirect effect of others' misperceptions is to limit a life activity such as working.¹⁷² Hence, "society's accumulated myths and fears" can be as debilitating as an actual impairment that limits a major life activity.¹⁷³ That is, HIV-infected individuals, even those who remain asymptomatic, may be impaired in a major life activity if they are discriminated against because of the disease.

4. *Cases Finding the "Regarded As" Prong of the Disability Definition Inapplicable Were Wrongly Decided*

In determining whether one falls under the "regarded as" prong of the disability definition, a preliminary question is what "such an

168. *Arline*, 480 U.S. at 283.

169. *Id.* at 279 (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06 n.6 (1979)).

170. *Id.* at 284.

171. It has been suggested that Justice Brennan was thinking of HIV when he wrote this portion of the opinion, despite his disclaimer to the contrary. *Parinet & Jackson*, *supra* note 10, at 15.

172. *Culvahouse Memorandum*, *supra* note 65.

173. *Arline*, 480 U.S. at 284.

impairment” means. There is a tension as to whether “being regarded as having such an impairment”¹⁷⁴ contemplates (1) literally being regarded as having an impairment that itself limits a major life activity, or (2) having an impairment that when misperceived by others limits a major life activity. Disagreement among the courts and the relevant regulations as to how to interpret the “regarded as” prong as applied to HIV-positive persons indicates that the statute is ambiguous.¹⁷⁵ Because of this ambiguity, it is appropriate to look to both the congressional intent to cover all disabled individuals and the regulations’ interpretive guidelines.

The *Runnebaum* court adopts the first literal interpretation, arguing that the “such an impairment” language incorporates by reference the qualification that one be regarded as having an impairment that substantially limits one or more of the major life activities.¹⁷⁶ There are, however, a number of problems with the *Runnebaum* interpretation of the “regarded as” prong. The majority falsely concluded that the “regarded as” prong unambiguously should be interpreted as including the requirement that one be regarded as having an impairment that limits a life activity.¹⁷⁷ In doing so, the court ignores congressional intent, as interpreted by the U.S. Supreme Court, in including the “regarded as” prong within the disability definition to protect those who have an impairment that does not diminish any physical capabilities, but still may substantially limit the ability to work as a result of others’ negative reactions.¹⁷⁸ This interpretation is also supported by the regulations, which note that an individual meets the ADA’s disability definition if that individual has an impairment that substantially limits a major life activity only as a result of others’ attitudes towards the impairment.¹⁷⁹

The *Runnebaum* court’s misreading of the statutory language renders the “regarded as” prong nugatory as applied to asymptomatic HIV-infected persons. If procreation were accepted as a major life activity,

174. 42 U.S.C. § 12102(2)(C) (1994).

175. *Compare, e.g., Runnebaum v. NationsBank of Maryland*, 123 F.3d 156, 172–74 (4th Cir. 1997) (finding that to qualify under “regarded as” prong, plaintiff must be regarded as having impairment that substantially limits major life activity), *with* 29 C.F.R. § 1630.2(l) (defining “regarded as” prong in three ways, including impairment that limits major life activities only as result of others’ attitudes).

176. *Runnebaum*, 123 F.3d at 172.

177. *Id.*

178. *Arline*, 480 U.S. at 282–83 (interpreting identical Rehabilitation Act language).

179. 29 C.F.R. § 1630.2(l)(2).

applying this interpretation would force the absurd result that for an asymptomatic HIV-positive person to be regarded as disabled, an employer would have to fire that person because the employer subjectively thought he or she was unable to have children. In fact, this is unlikely ever to be an employer's motivation for firing an individual with HIV. Rather, the decision is based most frequently on misinformation about contagiousness¹⁸⁰ or perhaps economic concerns.¹⁸¹ Protecting asymptomatic HIV-positive individuals from this type of discrimination requires using a different reading of the "regarded as" prong.

Under a proper interpretation of the "regarded as" prong as applied to this situation, one is "regarded as having such an impairment" if he or she has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment. Applying this reasoning to asymptomatic HIV-positive individuals, employees who suffer from prejudicial treatment because of their HIV-positive status (despite the fact that the disease itself does not *actually* affect any major life activities) are disabled under the ADA because they are affected in the major life activity of working as a result of the negative reactions of others to their impairment.

5. *Public Health Considerations*

Public health considerations argue strongly in favor of applying the "regarded as" prong of the ADA's disability definition.¹⁸² Public health experts have recognized that discrimination against individuals with HIV that goes unpunished by the law will deter infected persons from being tested for and counseled about the disease.¹⁸³ Protecting infected individuals under the "regarded as" prong of the ADA's disability definition will encourage infected persons not to hide their infection from co-workers or others. If infected individuals avoid testing or hide their HIV-positive status because they are worried about discriminatory treatment, the discrimination against those infected with the disease will not only harm their individual interests, but also will threaten the health of the population as a whole.¹⁸⁴

180. *See, e.g., Arline*, 480 U.S. at 284.

181. *See, e.g., Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995).

182. *Parmet & Jackson, supra* note 10, at 10-11, 42.

183. *Id.*

184. *Id.*

IV. CONCLUSION

The ADA seeks to protect disabled individuals who suffer from discriminatory treatment despite the fact that such persons can, and do, function as productive members of society. This set of legal rights and protections should cover asymptomatic HIV-infected individuals who, despite the fact the infection causes no outward symptoms, may suffer from unequal treatment because of society's accumulated myths and fears about the disease. Nonetheless courts have disagreed when confronted with the question of whether asymptomatic HIV-positive persons who are discriminated against should benefit from the ADA's protections. The debate among the circuit courts has focused on whether asymptomatic HIV qualifies as an actual disability, with some courts concluding that these individuals simply are not disabled under the ADA, and others finding that they are disabled only because the HIV impairment significantly affects the "major life activity" of procreation and sexual relations.

The circuit court debate misses the mark. Asymptomatic HIV-infected individuals are indeed protected by the ADA. Congressional intent, interpretive regulations, and case law all indicate that this is the correct result. However, the "actual disability" prong of the ADA's disability definition may be inadequate to protect many HIV-positive individuals from discrimination because it may arbitrarily exclude anyone who does not plan to have sex or have children. Thus, to fulfill the ADA's underlying goals, courts must apply the "regarded as" prong of the disability definition as well. The ADA's protection should be triggered not because asymptomatic HIV is independently debilitating, but because the negative reactions of others may lead to discrimination. The U.S. Supreme Court should take this opportunity to clarify that all asymptomatic HIV-positive persons are covered under the "regarded as" prong of the ADA's disability definition.

