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Recommended Citation

Jason M. Metnick, Evolving to Asymptomatic HIV as a Disability Per Se: Closing the Loophole in Judicial Precedent, 7 DePaul J. Health Care L. 69 (2003)

Available at: https://via.library.depaul.edu/jhcl/vol7/iss1/4

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EVOLVING TO ASYMPTOMATIC HIV AS A DISABILITY PER SE: CLOSING THE LOOPHOLE IN JUDICIAL PRECEDENT

Jason M. Metnick*

INTRODUCTION

As of December, 2002, the Centers for Disease Control and Prevention ("CDC&P") estimated that between 850,000 and 950,000 United States citizens were infected with the Human Immunodeficiency Virus ("HIV").1 Of these persons, roughly 212,500 to 238,500 are unaware of their HIV status.2 On a worldwide scale, the numbers are staggering.3 Of the 280 million United States residents in 2002,4 the number of persons infected with HIV represents a small, but important fraction of persons who, as a result of tortuous legal reasoning, a short history of legal understanding, and social stigma face uncertainty in

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2 Id. This figure represents about one-fourth of all HIV-infected individuals living in the United States.

3 See id. The CDC&P estimated that 42 million persons worldwide were infected with HIV by the end of 2002.

their classification as “disabled” in accordance with the Americans with Disabilities Act of 1990 ("ADA").

In application, the ADA protects most, but not all persons infected with HIV. This under-inclusive aspect applies solely to certain asymptomatic HIV-infected individuals, who are included in the group of more than half of all HIV-infected individuals in the United States. In 1998, the United States Supreme Court’s application of the ADA to asymptomatic HIV-infected individuals, in Bragdon v. Abbott, represented the largest leap forward in recognition of the debilitating effects from HIV and affirmed that asymptomatic HIV-infected individuals can be classified as disabled. However, in contravention of the hope offered after Bragdon, instances of non-application of the ADA to HIV-infected individuals remain, despite the intent and scope of the ADA as drafted by Congress and applied by the Supreme Court.

In this essay, I argue that the question of whether HIV infection substantially limits a major life activity per the ADA is answered with a resounding “yes,” and should not need to be proven by more than a person’s mere status as HIV positive. In Part II, the history and application of the ADA to asymptomatic HIV-infected individuals is discussed in order to demonstrate the trend in judicial treatment of HIV-infected individuals. In Part III, I discuss the legal, medical, and psychological underpinnings that define the status of asymptomatic HIV-infected persons. In addition, Part III reasons that all HIV-infected individuals are disabled under the ADA. In Part IV, I argue that legal treatment of asymptomatic HIV-infected individuals must catch up with the scientific and social status of asymptomatic HIV-infected individuals. In Part V, I conclude that asymptomatic HIV-infected individuals should be recognized as disabled per se under the ADA.

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6 The most recent data available at the time this article was written indicated that as of 2001, the CDC&P reported that 362,827 persons were living with AIDS in the United States. See HIV/AIDS Stats, supra note 1. Thus, the remainder of persons, when this number is subtracted from the total number of all persons infected with HIV, equals slightly more than half of all HIV-infected persons in the United States.
8 See infra notes 13-147 and accompanying text.
9 See infra notes 148-243 and accompanying text.
10 See infra notes 244-250 and accompanying text.
I. JUDICIAL INTERPRETATION OF HIV STATUS FOR DISABLED INDIVIDUALS

The precedent of cases in which courts have ruled on the status of HIV-infected individuals is varied, contradictory, and dynamic, yet, this line of reasoning has occurred rapidly over a short time. A person is statutorily disabled if he or she has a record of a physical or mental impairment that substantially limits one or more major life activities. A person with HIV is generally recognized to have a physical impairment; however, court rulings have wavered on whether to find a person with HIV to be substantially limited in a major life activity. In the cases that follow, findings for and against disability status under the ADA are presented based on differing notions of what the term “major life activity” means, and when a major life activity is “substantially limited.”

A. Bragdon v. Abbott

The seminal case determining the status of asymptomatic HIV-infected individuals is Bragdon v. Abbott. Bragdon established the disability status of asymptomatic HIV-infected individuals under the ADA. Sidney Abbott was diagnosed with HIV in 1986. In 1994, she went to her dentist, Randon Bragdon, and subsequently discovered that she had a cavity. Dr. Bragdon, aware of Ms. Abbott’s status, informed her that he maintained a policy of treating HIV-infected individuals at a hospital. Ms. Abbott declined Dr. Bragdon’s offer and instead filed a lawsuit, alleging that she was discriminated against in contravention of the ADA.
In order to determine whether an asymptomatic HIV-infected person could be defined as disabled under the ADA, the Court reviewed whether Ms. Abbott had "a physical or mental impairment that substantially limit[ed] one or more of [her] major life activities." In making its determination, the Court promulgated a tripartite test. First, the Court considered "whether [Ms. Abbott's] HIV infection was a physical impairment." Second, the Court decided whether the "life activity upon which [Ms. Abbott] relie[d] constitute[d] a major life activity under the ADA." Third, the Court established "whether the impairment substantially limited the [alleged] major life activity.

In order to determine whether asymptomatic HIV-infected individuals have a physical disability, the Court examined the application of the Health, Education, and Welfare ("HEW") regulations to the ADA. The HEW regulations contain a non-exhaustive list of conditions that satisfy the definition of "physical or mental impairment." The Court noted how HIV immediately and severely affects white blood cells following infection. In accord with the general trend of disorders listed in the HEW regulations, the Court ruled that "HIV infection [fell] well within the general definition . . . ." Specifically, the Court identified the "constant and detrimental effect on [an] infected person's hemic and lymphatic systems from the moment of infection."

Under the second factor required for classification as disabled under the ADA, the Court had to decide whether one of Ms. Abbott’s

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19 Id. at 630 (citing The Americans with Disabilities Act, 42 U.S.C. §12102(2)(A) (2000)). The ADA also includes disability categorization for persons who have "a record of such an impairment" or "being regarded as having such an impairment" See 42 U.S.C. §12102(2)(B), (C) (2000).
20 Bragdon, 524 U.S. at 631.
21 Id.
22 Id.
23 Id.
24 Id. at 632-37. The HEW regulations are controlling authority because the Court is required to provide for at least as much protection for the ADA as under Rehabilitation Act. Bragdon, 524 U.S. at 631-32; see also 42 U.S.C. 12201(a) (2000).
25 Bragdon, 524 U.S. at 632. The HEW regulations include at least twenty-two general categories of conditions that qualify as a physical or mental impairment. See 45 C.F.R. § 84.3(j)(2)(i) (1997). Additional categories of more specific ailments (i.e. cancer, epilepsy, and diabetes) are included in a final analysis and commentary of the HEW regulations. See Bragdon, 524 U.S. at 633; see also 45 C.F.R. pt. A, app. A (1997).
26 Bragdon, 524 U.S. at 633-37.
27 Id. at 633.
28 Id. at 637.
major life activities was impaired. The Court restricted its inquiry to whether reproduction qualified as a major life activity. The Court applied the definition of major life activity as used by the United States Court of Appeals for the First Circuit, affirming that "'major denotes comparative importance' and 'suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance.'" The Court held that reproduction qualified as a major life activity. As with the first factor, the Court's holding with regard to the second required factor under the ADA was consistent with the intent and construction of the Rehabilitation Act.

Under the third factor required for classification as disabled under ADA, the Court had to decide whether the physical impairment due to asymptomatic HIV infection substantially limited Ms. Abbott's ability to reproduce. The Court noted two reasons that contributed to finding HIV substantially limited Ms. Abbott's ability to reproduce. The Court cited the incidence of transmission of HIV from females to males and mothers to offspring via perinatal transmission. These acts presented risks of transmission ranging between twenty and twenty-five percent, respectively. In face of contradictory statistical evidence presented by the United States (acting as amicus curiae), the Court ruled that even an eight percent "risk of transmitting a dread and fatal disease" could support a finding of a substantial limitation on a major life activity.

In sum, the Bradgon Court found that as in Ms. Abbott's circumstance, an asymptomatic HIV-infected individual qualified for protected status as disabled under the ADA. Of importance, the Court made its finding without reaching the question of whether asymptomatic HIV-infected individuals are disabled per se, thus leaving the question open to consideration based on the specifics of each asymptomatic HIV-infected individual.

29 See supra notes 19 and 21 and accompanying text.
30 Braddon, 524 U.S. at 638.
31 Id. at 638 (citing Abbott v. Bradon, 107 F.3d 934, 939-40 (1st Cir. 1997).
32 Id. In injudicious wording, the majority opinion stated "reproduction and the sexual dynamics surrounding it are central to the life process itself." Id. (emphasis added).
33 See id at 638-39; see also 28 C.F.R. § 41.31(b)(2) (1997) for a list of illustrative major life activities.
34 Bradon, 524 U.S. at 639.
35 See infra notes 36 - 38 and accompanying text.
36 Id. at 639-40.
37 Id. The Court cited several scientific studies to make this determination.
38 Id. at 641.
39 Id. at 641-42.
B. Cases Following Bragdon

In Bragdon’s aftermath, the issue of whether asymptomatic HIV-infected individuals are disabled per se has been left unaddressed. The scope of this issue, however, entails three inquiries into an individual’s disabled status. Therefore, even though the overall issue remains undecided, the factors that constitute the issue have been addressed piecemeal, which lead to the legal conclusion that asymptomatic HIV-infected individuals should be considered disabled per se.


In a series of three cases decided on June 22, 1999, the United States Supreme Court squarely ruled on the status of various individuals with mitigating circumstances who each claimed disability status under the ADA.

a. Sutton v. United Air Lines

In Sutton, the question presented was whether an individual’s disability should be measured with reference to mitigating or corrective measures. The petitioners in Sutton suffered from “severe myopia,” when uncorrected, left them incapable of performing simple, everyday tasks. The Court held that the correct interpretation of the ADA included taking into consideration “the effects of [corrective] measures – both positive and negative . . . when judging whether [a] person is ‘substantially limited’ in a major life activity.”

To reach its conclusion, the Court cited three principles. First, the Court construed the language of the ADA to require “a physical or mental impairment that substantially limits one or more of the major life activities’ of an individual.” According to the Court, a person who can correct a physical or mental impairment is not substantially

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40See supra notes 20-23 and accompanying text.
42Sutton, 527 U.S. at 458. Justice O’Connor wrote the majority opinion, joined by Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Chief Justice Rehnquist. Justice Stevens filed a dissenting opinion, joined by Justice Breyer. In addition, Justice Breyer wrote a separate dissenting opinion.
43Id. The Court noted that the petitioners (who, incidentally are twin sisters) were unable to “ dri[e] a vehicle, watch[ ] television or shop[ ]” without corrective lenses. Id.
44Id. at 482.
45Id.
limited in a major life activity.\textsuperscript{46} Second, the court cited the "individualized inquiry" that is required, per Bragdon.\textsuperscript{47} Under this construct, it does not follow that if an individual fits within a broad category of disabled persons, then that person necessarily acquires or demonstrates all the debilitating qualities of that category.\textsuperscript{48} The Court did not consider all individuals within a group to tend toward the theoretical mean, but rather, considered one's individual merits despite such categorization.\textsuperscript{49} The Court affirmed that the ADA does not treat a diagnosis synonymously with the effect of a diagnosis; disability determinations are made based on an "individual's actual condition."\textsuperscript{50} Third, the Court noted a Congressional policy to circumscribe the scope of the reach of the ADA: "Congress did not intend to bring under the statute’s protection all those whose uncorrected conditions amount to disabilities."\textsuperscript{51} Applying these three principles, the Sutton Court concluded that the respondents were not disabled under the ADA.\textsuperscript{52}

In dissent, Justice John Paul Stevens posited that the clauses of the ADA should be read as meant to include persons who in the past or present that have "a substantially limiting impairment are covered by the Act."\textsuperscript{53} Justice Stevens proffered amputees to demonstrate his rule of thumb.\textsuperscript{54} He explained that a person with a prosthesis is not "cured."\textsuperscript{55} Such an individual remains limited in major life activities despite mitigating his or her disability. In Stevens’s view, a functional limitation on an individual does not avoid the existence of a disability, whether cured or persistent.\textsuperscript{56}

b. \textit{Murphy v. United Parcel Service}

The \textit{Murphy} Court faced the same issue as in \textit{Sutton}, except the petitioner's malady in \textit{Murphy} was not a superficial physical

\begin{itemize}
\item \textsuperscript{46}Sutton, 527 U.S. at 482-83.
\item \textsuperscript{47}Id. at 483.
\item \textsuperscript{48}See id.
\item \textsuperscript{49}The Court exemplified this theory using diabetes. Left unaided, diabetics would become severely ill, whereas diabetics who monitor their blood sugar levels live relatively normal lives. Id.
\item \textsuperscript{50}Id.
\item \textsuperscript{51}Sutton, 527 U.S. at 484.
\item \textsuperscript{52}This conclusion resolves the respondents' claim of disability under The Americans with Disabilities Act, 42 U.S.C. § 12102(2)(A). Respondents also claimed disability status under 42 U.S.C. §12102(2)(C), alleging that they were "regarded as having such an impairment." See 42 U.S.C. § 12102(2)(C); see also Sutton, 527 U.S. at 489.
\item \textsuperscript{53}Sutton, 527 U.S. at 497.
\item \textsuperscript{54}Id. at 497-98.
\item \textsuperscript{55}Id. at 498.
\item \textsuperscript{56}Id. at 499.
\end{itemize}
impairment.\textsuperscript{57} The petitioner in \textit{Murphy} sought disability status with regard to his hypertension, a condition not permitted for his job as a United Parcel Service mechanic.\textsuperscript{58} As in \textit{Sutton}, the Court had to determine whether to consider the petitioner’s condition in its treated or untreated state for disability determinations under the ADA.\textsuperscript{59} Following its decision in \textit{Sutton}, the Court held that the petitioner’s medicated condition was appropriate for ADA determinations.\textsuperscript{60} Of note, the Court did not address “whether [the] petitioner is disabled when taking medication . . . [or] . . . whether petitioner is ‘disabled’ due to limitations that persist despite his medication.”\textsuperscript{61} Rather, the Court’s inquiry was limited to whether mitigating measures are relevant when considering a disabled person’s limitation on a major life activity.\textsuperscript{62} As in \textit{Sutton}, Justice Stevens dissented, claiming that severe hypertension “in its unmedicated state” made the petitioner disabled under the ADA.\textsuperscript{63}

c. \textit{Albertson's v. Kirkingburg}

On certiorari from the United States Court of Appeals for the Ninth Circuit’s finding of disability status for an individual with uncorrectable monocular vision, the United States Supreme Court reversed the Ninth Circuit Court’s decision.\textsuperscript{64} The plaintiff in \textit{Kirkingburg} suffered from amblyopia, which left him with monocular vision.\textsuperscript{65} Albertson’s fired Mr. Kirkingburg because he could not meet the Department of Transportation’s vision standards.\textsuperscript{66}

The Supreme Court found that the Ninth Circuit’s finding of disability was flawed for three reasons.\textsuperscript{67} First, the Ninth Circuit properly reduced the “significant restriction” qualification per the ADA’s “substantial limitation” requirement to a “mere difference” standard.\textsuperscript{68} Second, the Ninth Circuit failed to account for factors that

\textsuperscript{57}\textit{Murphy}, 527 U.S. at 518.
\textsuperscript{58}\textit{Id.} at 518-19.
\textsuperscript{59}\textit{Id.} at 521.
\textsuperscript{60}\textit{Id.} Note that both \textit{Sutton} and \textit{Murphy} were cases on certiorari from the United States Court of Appeal for the Tenth Circuit. See \textit{Sutton v. United Air Lines, Inc.}, 130 F.3d 893 (10th Cir. 1997); \textit{Murphy v. United Parcel Service}, 141 F.3d 1185 (10th Cir. 1998).
\textsuperscript{61}\textit{Murphy}, 527 U.S. at 521.
\textsuperscript{62}\textit{Id.}
\textsuperscript{63}\textit{Id.} at 525.
\textsuperscript{64}\textit{Kirkingburg}, 527 U.S. at 558-78.
\textsuperscript{65}\textit{Id.} at 559. Kirkingburg’s amblyopia caused him to have 20/200 vision in his left eye, leaving him with essentially monocular vision.
\textsuperscript{66}\textit{Id.} at 561.
\textsuperscript{67} See infra notes 68-70 and accompanying text.
\textsuperscript{68}\textit{Kirkingburg}, 527 U.S. at 565.
mitigated Mr. Kirkingburg’s condition. This aspect of the Court’s analysis differed from that in both Sutton and Murphy because the compensation to Kirkingburg’s disability was a “learned . . . subconscious adjustment.” The Court made no distinction between this sort of mitigating factor and those made with physical aids or medication. Third, the Kirkingburg Court re-emphasized the necessity to examine each case of disability without regard to an individual’s classification within a group of disabled persons. The Court found that Kirkingburg, although likely disabled, still must prove his disability according to these criteria.

2. Cases Distinguishing Bragdon and Comparing the “Substantially Limits” and “Major Life Activity” Requirements

Apart from the issue of whether mitigation of a disability disqualifies a person as disabled, decisions after Bragdon have considered the activities that may qualify as a major life activity under the Bragdon Court’s rubric. Few cases have focused directly on whether asymptomatic HIV-positive individuals are disabled per se; most courts, however, distinguish or compare the facts of a case to the facts in Bragdon. The crux of the issue of whether a disability has substantially limited a major life activity necessarily depends on a court’s definition of the terms: “substantially limits” and “major life activity,” both of which are undefined in the ADA. The application of various definitions of these terms can lead to dubious results and raise questions as to the logical conclusion a court would reach based on a different set of facts using the same definitions.

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69 Id.
70 Id.
71 Id.
72 Id. at 566. The Court also restated its position from Bragdon, that “some impairments may invariably cause a substantial limitation of a major life activity.” Id.
73 Kirkingburg, 527 U.S. at 567.
74 See supra notes 40 - 73 and accompanying text.
75 See e.g., Gutwaks v. American Airlines, Inc., No. 3:98-CV-2120-BF, 1999 WL 1611328 (N.D. Tex. Sept. 2, 1999); Blanks v. Southwestern Bell Communications, Inc., 310 F.3d 398 (5th Cir. 2002), discussed infra notes 139-148 and accompanying text. United States v. Happy Time Day Care, 6 F. Supp. 2d 1073 (W.D. Wisc. 1998), is the rare example of a case where the court examined the per se application to HIV infection under the ADA. Happy Time Day Care, however, was decided before the Supreme Court decided Bragdon.
a. Applications of the term “Substantially Limits” under the ADA
i. Gonzales v. National Board of Medical Examiners
In Gonzales v. National Board of Medical Examiners,\textsuperscript{77} the appellant, Michael Gonzalez, claimed that his writing disability substantially limited his major life activities of reading, writing, and working.\textsuperscript{78} The United States Court of Appeals for the Sixth Circuit used the term “substantially limits” as used in the Department of Justice (“DOJ”) regulations.\textsuperscript{79} Per the DOJ regulations, a person is substantially limited “when the individual’s important life activities are restricted as to the condition[s], manner, or duration under which they can be performed in comparison to most people.”\textsuperscript{80} Using the DOJ and Equal Employment Opportunity Commission (“EEOC”) regulations as guidance, the court compared Mr. Gonzales’s performance to the performance of “most people.”\textsuperscript{81} Medical doctors who tested Mr. Gonzales’s performance reported the results of standardized psychological and general aptitude tests.\textsuperscript{82} Mr. Gonzales’s performance, when compared to a normal distribution of the general population, revealed that he performed in a range from average to above average.\textsuperscript{83} Of importance, the court refused to use a population of similarly situated persons (in this case, second-year medical students) as a basis for the general population with which to compare Mr. Gonzales.\textsuperscript{84} Instead, the court used the distribution of all persons within the general population against which to measure Gonzales’s limitation.\textsuperscript{85} Therefore, the court held that Mr. Gonzales’s impairments did not substantially limit his ability to read, write, or to work.\textsuperscript{86}

\textsuperscript{77}225 F.3d 620 (6th Cir. 2000).
\textsuperscript{78}Id. at 627.
\textsuperscript{79}Id. at 626-27.
\textsuperscript{80}Id. at 627 (citing 28 C.F.R., pt. 36, app. B (2000)). The court also cited the definition of “substantially limited” as defined by the Equal Employment Opportunity Commission (“EEOC”) as when a person is either:

"unable to perform a major life activity that the average person in the general population in the general population [or] significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person can perform that same major life activity.""

\textsuperscript{81}Gonzales, 225 F.3d at 627-30.
\textsuperscript{82}Id. at 627-30.
\textsuperscript{83}Id. at 627-29.
\textsuperscript{84}Id. at 631-32.
\textsuperscript{85}Id.
\textsuperscript{86}Id. at 630-32.
ii. Felix v. New York Transit Authority

In *Felix v. New York Transit Authority*, the United States District Court for the Southern District of New York explored the temporal aspect of whether a major life activity is substantially limited. The court viewed the plaintiff's, Ms. Felix's, limitation with respect to EEOC regulations, namely, "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." Ms. Felix suffered from post-traumatic stress syndrome, resulting in severe insomnia lasting for four years. Although "this condition was not permanent, it was of sufficient duration to qualify as an ADA impairment." While two of the three EEOC considerations refer to duration, the court spent little effort to explain its satisfaction with the duration and long-term effects of Ms. Felix's limitation. The four year limitation interval on a major life activity was simply described as "sufficient." Thus, while not divulging its view on the impact attributed solely to the durational effect of Ms. Felix's condition, the court held that a "chronic inability to sleep was a substantial limitation of a major life activity."

iii. Furnish v. SVI Systems, Inc.

In a review of organ function as a disability under the ADA, the United States Court of Appeals for the Seventh Circuit examined in *Furnish v. SVI Systems, Inc.* whether cirrhosis of the appellant's liver substantially limited a major life activity. The court applied a three-factored test to make its determination. The court considered "the nature and severity of the impairment; the duration of the impairment; and the permanent or long-term impact resulting from the impairment." The court found that the appellant's impairment was

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88 See id.
89 Id. at 654 (citing 29 C.F.R. §1630.2(j)(1998)).
90 Id. at 654.
91 Id.
92 Felix, 154 F. Supp. 2d at 654.
93 Id. at 654. The court wrote more extensively on the severity and nature of Ms. Felix's impairment. See id.
94 Id.
95 270 F.3d 445 (7th Cir. 2001).
96 Id. at 450.
97 Id.
98 Id. (citing Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 506 n.3 (7th Cir. 1998)).
slight, citing a doctor's diagnosis stating that Mr. Furnish’s liver functioned “as well as you can do with cirrhosis.”

The court additionally found that the appellant’s impairment was of short or limited duration because medication had caused his condition to subside. Lastly, the court found that the appellant would not likely suffer long-term effects as a result of his cirrhosis. Therefore, because these three factors tended to disprove a substantially limiting effect from an impairment, the court held that the appellant’s cirrhosis of the liver “did not substantially limit his liver function.”

iv. Contreras v. Suncast Corporation
In a variation on a claim of sexual dysfunction as a disability under the ADA, the United States Court of Appeals for the Seventh Circuit found in Contreras v. Suncast Corp. that a decrease in sexual behavior does not substantially limit a major life activity. Mr. Contreras’s claim that his decreasing ability to engage in sexual intercourse from twenty times a month to twice a month did not constitute a substantial limitation, because Mr. Contreras’s assertion was not supported with documentation. As a result of the lack of such documentation, the court held that sexual relations would need to be documented by more than “a general assertion.”

v. Toyota Motor Manufacturing v. Williams
More recently, the United States Supreme Court ruled on the correct meaning of the phrase “substantially limits” in Toyota Motor Manufacturing v. Williams. The Court declared that “‘substantially’ in the phrase ‘substantially limits’ suggests ‘considerable’ or to a large degree.” This intendment “clearly precludes impairments that interfere in only a minor way” with major life activities. The Court considered the limitation and permanence an impairment places on a person’s major life activity. The Court also noted the individualistic

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99 Id. at 451.
100 Furnish, 270 F.3d at 451.
101 Id.
102 Id.
103 237 F.3d 756 (7th Cir. 2001).
104 Id. at 764.
105 Id.
106 Id.
108 Id. at 196.
109 Id. at 197.
110 Id. at 198.
nature of a substantial limitation, and required a claimant to present more than cursory proof of a diagnosis of a condition.\footnote{Id. The Court cited \textit{Kirkingburg} for the proposition that an individual must "prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial." \textit{Toyota Motor Manufacturing}, 534 U.S. at 198; \textit{see supra} notes 64-73 and accompanying text for a full explanation of the Court's holding in \textit{Kirkingburg}.} In \textit{Toyota Motor Manufacturing}, Ms. Williams was incapable of "repetitive work with [her] hands and arms extended at or above shoulder levels for extended periods of time."\footnote{\textit{Id. at 201.}} Despite the extensive discussion of the aforementioned process to determine whether a major life activity had been "substantially limited," the Court found without explanation that the Ms. William's carpal tunnel syndrome and related manual impairments did not substantially limit her ability to engage in a major life activity.\footnote{\textit{Toyota Motor Manufacturing}, 534 U.S. at 201.} Of note, the Court did not focus on the severity or lasting effect of Ms. Williams's impairment, but rather, it commingled the substantially limiting requirement with the major life activity requirement.\footnote{See \textit{id.} at 201. Presumably, the Court emphasized the "substantially limits" requirement in \textit{Toyota Motor Manufacturing} to clarify the inapplicability of class treatment to major life activities apart from the sole exception of working as a major life activity. \textit{See id.} at 196-201.}

b. Applications of the term "Major Life Activity" under the ADA

i. \textit{Furnish v. SVI Systems, Inc.}

In addition to deciding the substantially limiting effect of the appellant's disability in \textit{Furnish v. SVI Systems, Inc.}, the Seventh Circuit court also considered whether liver function was a major life activity.\footnote{\textit{Furnish}, 270 F.3d at 449.} Although the court conceded that liver dysfunction caused by Hepatitis B and chronic cirrhosis of the liver was a physical impairment, it did not find that it impacted a major life activity.\footnote{\textit{Id.} The Seventh Circuit's court's reasoning was somewhat circuitous in this aspect.} The court cited the examples listed by the EEOC as typical of the activities considered to be major life activities, including: "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."\footnote{\textit{Id.} (citing 29 C.F.R. § 1630.2(i)(1998)).} Comparing this list with the appellant's condition, the court found that "'liver function' bears little resemblance to the major life activities enunciated in the ADA regulations."\footnote{\textit{Id.}} Extending the Court’s reasoning in \textit{Bragdon}, the \textit{Furnish} court
explained its finding based on the daily necessity of the allegedly impaired activity.\textsuperscript{119} In the court's view, "although liver function is 'integral to one's daily existence,'" in the common sense, it is not integral to one's daily existence as dictated by the Supreme Court in Bragdon.\textsuperscript{120} The Furnish court made the distinction that "[t]he activities that have been held to be major life activities under the ADA . . . are not the impairments' characteristics—they are activities that have been impacted because of the plaintiffs' impairments."\textsuperscript{121} Therefore, because the Furnish court required separation of an impairment and the affected activity, it found that liver function did not constitute a major life activity.\textsuperscript{122}

\textit{ii. Gutwaks v. American Airlines, Inc.}

In Gutwaks \textit{v. American Airlines, Inc.},\textsuperscript{123} the United States District Court for the Northern District of Texas considered whether reproduction constituted a major life activity for an unmarried man.\textsuperscript{124} Mr. Gutwaks claimed that his HIV-positive status constituted a disability under the ADA.\textsuperscript{125} Moreover, Mr. Gutwaks claimed that because he was infected with HIV that his major life activity of reproduction was substantially limited.\textsuperscript{126} The court focused on Mr. Gutwaks's willingness to reproduce.\textsuperscript{127} Citing Mr. Gutwaks's admission that "he does not currently, nor has he ever, desired to father children," the court found that reproduction did not constitute a major life activity for Mr. Gutwaks.\textsuperscript{128} Distinguishing Bragdon from the present case, the court opined that "the plaintiff in Bragdon testified that her HIV status dictated her decision not to have children" whereas Mr. Gutwaks's decision not to have children "was a personal one."\textsuperscript{129}

\begin{footnotesize}
\textsuperscript{119}ld.
\textsuperscript{120}Furnish, 270 F.3d at 449-50.
\textsuperscript{121}ld. at 450.
\textsuperscript{122}ld. The court further clarified its holding, stating, "Only when the impact of the illness substantially limits a major life activity—such as working—is an individual considered disabled within the meaning of the ADA." ld.
\textsuperscript{124}The formal opinion does not explicitly state Mr. Gutwaks's sexual orientation; rather, Mr. Gutwaks alleged "there was gossip about his sexual orientation." The court's holding, however, is not limited solely to homosexual men. ld. at *1.
\textsuperscript{125}ld. at *1.
\textsuperscript{126}ld. at *4.
\textsuperscript{127}ld.
\textsuperscript{128}ld. at *4. The court compared the facts in Gutwaks to the facts in Quails \textit{v. Lack Stores, Inc.}, No. 5:98-CV-149-C, 1999 U.S. Dist. LEXIS 5731 (N.D. Tex. 1999), a case in which a claim of reproduction as a major life activity failed for a Hepatitis C-positive man who no longer wished to conceive children with his wife. ld. at *5.
\textsuperscript{129}Gutwaks, 1999 WL 1611328, at *4.
\end{footnotesize}
Furthermore, the court refused Mr. Gutwaks claim of *per se* disability status due to his full blown AIDS status.\(^{130}\)

iii. *Toyota Motor Manufacturing v. Williams*

Following both *Furnish* and *Gutwaks*, the *Toyota Motor Manufacturing* Court further refined the definition of a major life activity.\(^{131}\) The Court declared that “‘major in the phrase ‘major life activity’ means important.”\(^{132}\) The Court also recognized that activities that are regarded as “central” to the daily life of a general population are major life activities.\(^{133}\) The issue posed in *Toyota Motor Manufacturing* was whether certain manual tasks fit within the definition of a major life activity.\(^{134}\) In order to decide whether multiple separate tasks constituted a major life activity, the Court promulgated a rule that allowed it to look at the effect in the aggregate.\(^{135}\) The Court defined the test as an inquiry: “If each of the tasks included in the major life activity of performing manual tasks does not independently qualify as a major life activity, then together they must do so.”\(^{136}\) Here, Ms. Williams claimed that she was limited in her ability in several respects, including: “manual tasks; housework; gardening; playing with her children; lifting; and working,” which thereby established her disability in the performance of manual tasks.\(^{137}\) The Court held that in the aggregate, “these changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people’s daily lives that they establish a manual task disability as a matter of law.”\(^{138}\) Per *Toyota Motor Manufacturing*, even many minor limitations might not establish the existence of a disability unless the court is persuaded that those minor limitations constitute an overall disability in a recognized major life activity.

\(^{130}\) *Id.* at *5. The court concluded that “whether Gutwaks’ alleged disability is his HIV positive status or full blown AIDS, he has failed to convince this Court that he is disabled under the ADA.” *Id.*

\(^{131}\) *Toyota Motor Manufacturing*, 534 U.S. at 197.

\(^{132}\) *Id.*

\(^{133}\) *Id.* Furthermore, the Court distinguished the tasks which are central to most people’s lives and those tasks associated with a claimant’s “specific job.” *Id.* at 200.

\(^{134}\) *Id.* The Court included basic activities in this category, such as “walking, seeing, and hearing.” *Toyota Motor Manufacturing*, 534 U.S. at 197.

\(^{135}\) *Id.*

\(^{136}\) *Id.*

\(^{137}\) *Id.* at 190.

\(^{138}\) *Id.* at 202.
3. The "Loophole" – Blanks v. Southwestern Bell
In an opinion issued by the United States Court of Appeals for the Fifth Circuit, an asymptomatic HIV-positive employee, Mr. Blanks, was denied disability status under the ADA.\(^{139}\) The Fifth Circuit court acknowledged that "asymptomatic HIV qualifies as a physical impairment from the moment of infection."\(^{140}\) In addition, the court noted that HIV infection "substantially limits the major life activity of reproduction."\(^{141}\) Using these edicts, the court posed its finding on whether "an HIV-positive person [can] show[] he or she is substantially limited in the major life activity of reproduction . . . ."\(^{142}\)

Although Mr. Blanks was HIV-positive, and thus, had a physical impairment, he did not satisfy the substantial life limitation requirement of the ADA.\(^{143}\) Of importance to the Fifth Circuit Court, Mr. Blanks testified that he and his wife did not intend to have any more children.\(^{144}\) Using its stated paradigm, the court found that Mr. Blanks did "not raise a triable issue of fact to indicate that his HIV status substantially limited his major life activity of reproduction."\(^{145}\) Although Blanks did not allege that he was disabled in any other major life activity, the court could have considered whether Blanks was limited in the major life activity of working.\(^{146}\) However, a finding of a major life activity impairment in working would likely have been unsuccessful because Blanks wanted to work and had requested to perform any job Southwestern Bell could offer him at the same salary.\(^{147}\) In sum, Mr. Blanks's inability to prove that he was substantially impaired in the major life activity of reproduction, and his likely estoppel from claiming that he was substantially impaired in the

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\(^{139}\) Blanks v. Southwestern Bell Communications, Inc., 310 F.3d 398 (5th Cir. 2002). I consider Gutwaks v. American Airlines, No. 3:98-CV-2120-BF, 1999 WL 1611328 (N.D. Tex. Sept. 2, 1999), also to be part of the "loophole," but have chosen Blanks as my primary example for both its factual clarity and its recent publication.

\(^{140}\) Id. at 401 (citing Bragdon, 524 U.S. at 637).

\(^{141}\) Id.

\(^{142}\) Id.

\(^{143}\) Id. See supra notes 19-23 and accompanying text for a discussion of the three Bragdon factors required for disability status under The Americans with Disabilities Act, 42 U.S.C § 12102(2)(A), as opposed to disability status under subsections § 12102(2)(B) and (C).

\(^{144}\) Blanks, 310 F.3d at 401. Mr. Blanks' wife was incapable of having children. Id.

\(^{145}\) Id.

\(^{146}\) Id. The court defined the major life activity of working as follows: "one must be 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.'" Id. (citing 29 C.F.R. §1630.2(j)(3)(1998)).

\(^{147}\) Blanks, 310 F.3d at 401.
major life activity of working precluded him from claiming disability status under the ADA despite his asymptomatic HIV-positive status.\textsuperscript{148}

III. ANALYSIS

The analysis that follows takes a developmental path, beginning with an examination of the “substantially limits” and “major life activity” requirements and examples of their application in the HIV context.\textsuperscript{149} The focus then shifts to a separate analysis of how medical evidence pertaining to HIV infection can support a claim for disability under the ADA.\textsuperscript{150} Finally, a third analysis demonstrates how certain psychological evidence can support a claim for disability under the ADA.\textsuperscript{151}

\textsuperscript{148}Id.

\textsuperscript{149}See infra notes 153-202 and accompanying text.

\textsuperscript{150}See infra notes 205-225 and accompanying text.

\textsuperscript{151}See infra notes 226-242 and accompanying text. Although I treat the “substantially limiting” and “major life activity” requirements separately for analytic purposes, the analyses are not entirely made by independent considerations. The United States Court of Appeals for the Seventh Circuit recognized the unclear distinction between these requirements exists in some cases because “‘substantially limited’ and ‘major life activity’ are interrelated and should not be treated as two separate criteria, particularly when the major life activity implicated encompasses a broad range of lesser activities, such as learning or working.” Knapp v. Northwestern University, 101 F.3d 473, 479-80 (7th Cir. 1996).
A. Legal Analysis: Interpretation and Application of the Substantially Limits and Major Life Activity Requirements

1. Applying the Substantially Limits Requirement: Reproduction

The factors to which a court applies facts can be diagrammed on a continuum, and then each factor is weighted individually. This would appear as follows:

Diagram 1: Plaintiff’s Scaled Deviation from a General Population

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<table>
<thead>
<tr>
<th>General Population</th>
<th>Plaintiff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nature &amp; Severity of Impairment</td>
<td>Plaintiff’s Deviation from General Population</td>
</tr>
<tr>
<td>Duration or Expected Duration of Impairment</td>
<td>Expected Long-Term Impact from Impairment</td>
</tr>
</tbody>
</table>
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Each deviation is then converted into a sum, appearing as a triangle:

Diagram 2: Summation of Deviations

Thus, the resultant sum of factors visually means that the more distorted the resultant triangle, the more severe the impairment. For example, a person with average deviation from a general population with regard to all three factors forms an equilateral triangle and represents perfect unison with a general population (Diagram 2,

152 The “substantially limits” requirement is also applied to several other major life activities in Section A.2 of this Part as well as in Sections III.B and III.C of this article.

153 These endpoints change as deviation changes on each measure.
In such an example, a substantially limiting impairment does not result.\textsuperscript{155}

The \textit{Bragdon} Court found two ways in which an HIV-infected woman was substantially limited in the activity of reproduction: first, by the risk of transmission of HIV to her sexual partner, and second, by the risk of transmission of HIV posed to her child.\textsuperscript{156} Although the \textit{Bragdon} court did not explicitly mention the factors in Diagrams 1 and 2, \textit{supra}, its analysis of the substantial limitation on reproduction predominately featured aspects of those factors.

The nature and severity of HIV on reproduction is serious and weighty, because transmission may occur despite attempts at mitigation. Following the ruling in \textit{Bragdon}, even a very low probability of transmitting HIV to others constitutes a substantial limitation on reproduction.\textsuperscript{157} The duration of a limitation on reproduction lasts as long as a person is physically capable of reproducing. Although an HIV-infected person is capable of engaging in reproduction, he or she cannot do so without posing some risk to partners or offspring, or both. The expected long-term impact from reproducing while having HIV is spreading HIV. On an individual level, the effect of transmitting HIV is illness, suffering, and death to the recipient. On a world-wide scale, the spread of HIV poses serious risks to the entire human population. Thus, it is apparent even from this cursory application of the triumvirate of factors considered for the requirement of a substantial limitation (and listed in Diagram 2, \textit{supra}) that an HIV-infected person cannot reproduce without grave consequences. It follows that these consequences deviate significantly compared to the resultant obtained by persons in a normal population who engage in reproduction.

Perhaps the divergent outcomes in \textit{Bragdon}, \textit{Gutwaks}, and \textit{Blanks} can be explained through the fiction of a presumption of a future activity. The \textit{Bragdon} Court considered the fate of a female, who, through her natural ability, retains the inherent power to carry and bear a child. From an etiological perspective, HIV would more directly

\textsuperscript{154}Of course, a person who deviates greatly, but equally, with regard to all 3 factors would also generate an equilateral triangle, but in such a case, the person would obviously be disabled. The use of summing deviations is to visualize cases that are less apparent.

\textsuperscript{155}Diagrammatically, based on the measures in Diagram 1, the triangles in Diagram 2 would be isosceles, scalene, or obtuse, reflecting a theoretical disharmony with a normal population.

\textsuperscript{156}\textit{Bragdon}, 524 U.S. at 639-40.

\textsuperscript{157}See generally \textit{Bragdon}, 524 U.S. at 641 (finding that an eight percent risk of transmission is a substantial limitation on reproduction).
affect the probability of transmission to her child. Conversely, the Gutwaks and Blanks courts had to consider the fate of an HIV-infected male, who without a female, cannot carry and bear a child. Thus, the transmission of HIV via reproduction necessarily would rely on a hypothetical third person who, in turn, could transmit the disease to offspring. That Gutwaks and Blanks would require an extension from the plaintiff claiming disability to this hypothetical third person might help to reconcile the divergent outcomes in these cases. Focusing on this difference, however, is an abstraction of the reality that neither opinion in either Gutwaks or Blank claimed that transmission to children factored into the court’s holdings.

Another aspect that cannot be overlooked is the line of reasoning standing for the proposition that mitigation of disabilities renders an individual not disabled. Of importance, the Murphy Court found that medication could reduce a condition of hypertension to the point where it no longer represented a disability. There is a distinction to be made, though, between a condition like hypertension and HIV infection: HIV infection even in its medicated state is still disabling, whereas hypertension is not. Although this distinction is slight, it is not merely convenient for this essay. Congress has recorded its intent that under the ADA, “persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.” As discussed later in this essay, HIV treatment itself is often debilitating, despite one’s asymptomatic status. Moreover, Congress hinted at the inherent line drawing that might be necessary when considering disabilities that are mitigated by medication, stating that, when mitigating measures “would result in a less-than-substantial limitation,” a disability should be assessed in its original state. Recognizing the severely impairing effect of HIV, HIV infection is arguably comparable to epilepsy and diabetes.

158 See id. at 640.
159 In Blanks, the hypothetical third person is actual, she is Mr. Blanks’s wife.
161 See supra notes 57-63 and accompanying text.
163 See infra notes 211-226 and accompanying text.
Moreover, like epilepsy and diabetes, which are both unmentioned in the language of the ADA, HIV also is not listed. The ADA was drafted to be flexible; Congress recognized that:

It [was] not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future.\textsuperscript{165}

Although it is not listed as a disabling condition, HIV infection is severely life-limiting, causing limitations in life activities.

It is worth noting, that for reasons of over-inclusiveness, life itself cannot be claimed as a major life activity, or else any activity could be a potential disability. For HIV-infected persons, reproduction, dysfunction of internal bodily functions in the aggregate, the sexual dynamics surrounding reproduction, and the ability to care for one's self are all possible major life activities. For an HIV-infected person, the substantially limiting factors pertaining to these major life activities deviate greatly when compared to most of the disabling effects of persons living with other diseases as well as to the lifestyle of a normal population. The extent to which dysfunction of internal bodily functions in the aggregate, the sexual dynamics surrounding reproduction, and the ability to care for one's self are substantially limited is addressed later in this essay in order to demonstrate the effect on each life activity in the context of HIV.

\textbf{2. Applying the Major Life Activity Requirement}

Court rulings in favor of and against certain major life activities are inconsistent. In the following sections, three different arguments for inclusion of certain activities as major life activities are recommended. The first proposed argument (which was also the main impetus for this article) is that reproduction ought to constitute a major life activity for all persons who are capable of reproducing.\textsuperscript{166} The second argument proposes that internal bodily functions contribute to a major life activity, in the aggregate, under certain circumstances.\textsuperscript{167} The third

\textsuperscript{165}Id. at 51.
\textsuperscript{166}See infra notes 173-190 and accompanying text.
\textsuperscript{167}See infra notes 191-203 and accompanying text.
argument states that the sexual dynamics surrounding reproduction are a major life activity.\textsuperscript{168}

As a primer to the discussion of major life activities, the definition of the term “major” is briefly addressed here. Under the ADA, the Supreme Court has found that the scope of “major” life activities is not limited solely to “those aspects of a person’s life which have a public, economic, or daily character.”\textsuperscript{169} Moreover, “[n]othing in the [ADA] suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word ‘major.’”\textsuperscript{170} Therefore, the ADA does not preclude activities based solely on categorization, but rather, any activity that rises to the same relative level of importance as other recognized activity is treated equably. The \textit{Toyota Motor Manufacturing} Court extended the definition of “major” in major life activity to include a pooled number of tasks that do not independently qualify as “major,” but when taken together, constitute a major life activity.\textsuperscript{171} Generally, “‘major’ means important.”\textsuperscript{172}

\textbf{a. Reproduction is a Major Life Activity for All Persons Capable of Reproducing}

\textbf{i. Reproduction is a Comparatively “Major” Life Activity}

The inclusion of reproduction as a major life activity was met with criticism by Chief Justice Rehnquist in \textit{Bragdon}.\textsuperscript{173} One commentator reduced the \textit{Bragdon} Court’s comparative analysis to a normal population, based on whether “an activity [is] performed by the majority of the population at any one time.”\textsuperscript{174} A determination of major life activities based on whether a majority of the population is engaged in such activity at any given time misses the point. Assigning parameters according to a majority rule in this instance is akin to a reconstruction of the public, economic, and daily designations that the Supreme Court explicitly overruled in \textit{Bragdon}.\textsuperscript{175} While it is true that

\textsuperscript{168} See infra notes 204-210 and accompanying text.
\textsuperscript{169} \textit{Bragdon}, 524 U.S. at 638; see \textit{id.} at 639 (equating the relative significance of reproduction to working and learning).
\textsuperscript{170} \textit{id.} at 638.
\textsuperscript{171} \textit{Toyota Motor Manufacturing}, 534 U.S. at 197; see also supra notes 107-111 and accompanying text.
\textsuperscript{172} \textit{Toyota Motor Manufacturing}, 534 U.S. at 197.
\textsuperscript{173} \textit{Bragdon}, 524 U.S. at 657–64.
\textsuperscript{175} See supra notes 169-170 and accompanying text.
a majority of the population will not experience a failure to reproduce at a given time, as proposed by the same commentator,\textsuperscript{176} one could argue that a failure of any major life activity is never experienced by an entire population at a given time. If failure of an activity were the rule, then the ADA would cover few disabling conditions; however, this is not the case.

The commentator advanced a second reason against finding HIV as part of a “major” life activity, namely, that HIV infection does not prevent an individual from participating in “mainstream American life.”\textsuperscript{177} Without delving into a lengthy diatribe on the American way of life, it is sufficient to note that reproduction has been, currently is, and will continue to be part of human life, so long as there is human life. As shown in Sections A.2.b and A.2.c of this Part as well as in Parts III.B and III.C, HIV infection does prevent individuals from enjoying life activities when compared to a normal population.\textsuperscript{178}

ii. Reproduction is a Life Activity

That courts find that some people have a major life activity of reproduction and other courts do not is circumspect.\textsuperscript{179} Comparing the facts in Bragdon to those in both Gutwaks and Blanks reveals that distinctions were made in the latter cases based on superficial differences not present in Bragdon. In Bragdon, Chief Justice Rehnquist pointed out that Ms. Abbott never posited that she was substantially limited in the major life activity of reproduction.\textsuperscript{180} Rehnquist asserted that “when asked during her deposition whether her HIV infection had in any way impaired her ability to carry out any of her life functions, [Ms. Abbott] answered ‘No.’”\textsuperscript{181} In addition, there was no evidence presented that Ms. Abbott had any inclination to have children, or that her HIV infection had forced her to make a decision not to have children.\textsuperscript{182} Nevertheless, the Court inferred from these facts that a woman with HIV infection could be substantially limited in the major life activity of reproduction, regardless of whether Ms.

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\textsuperscript{176}See Ajalat, supra note 174 at 763.
\textsuperscript{177}Id. at 763.
\textsuperscript{178}I have been careful here to use the term “normal population” to reflect both a majority and minority of a population.
\textsuperscript{179}Compare e.g. Bragdon with Blanks and Gutwaks. More precisely, people who are equally capable of engaging in reproduction have been found both to have and not to have the major life activity of reproduction.
\textsuperscript{180}Bragdon, 524 U.S. at 659. Chief Justice Rehnquist also took issue with whether Ms. Abbott was substantially limited in her ability to reproduce. See id. at 660-61.
\textsuperscript{181}Id.
\textsuperscript{182}Id.
Abbott was in fact limited. In contrast, the inference reached in Gutwaks and Blanks was that a man infected with HIV who admits that he has no intention to reproduce cannot be substantially limited in the major life activity of reproduction. If courts are to treat all plaintiffs equally, then all plaintiffs should have the same set of major life activities. Major life activities supposedly define one’s daily essential existence, and should not vary from person to person.

One way to differentiate Bragdon from Gutwaks and Blanks is to examine the courts’ reliance on the objective and subjective intent of plaintiffs. According to these cases, the objective, but unverifiable intent of a plaintiff demands the outcome of whether a major life activity exists. For example, in Gutwaks, the plaintiff admitted that he had no desire to have children. Similarly, the plaintiff in Blanks admitted that he “does not want to have any more children.” These admissions should not convince a court that a person’s desire to procreate is stagnant for a lifetime. For example, an immature, younger man who is not yet married is less inclined to have children than a more mature, older, married man, because a man is unable to bear children by himself. Yet, even a young man retains the right to desire having children, based on a change in his circumstances. That the major life activity of reproduction does not exist because a man cannot reproduce should not alone be used to extract from him an indication of his physical desire to reproduce. Thus, where reproduction is claimed as a major life activity, evidence of a limitation cannot be constrained to statements indicating an objective intent, which must concede to the logical subjective intent of humans to reproduce.

The result of the holdings in Gutwaks and Blanks is that plaintiffs are encouraged to lie about whether they intend to have children. Testimonial evidence about the plaintiff’s intention is subject to rebuttal by witnesses who might have discussed the topic with the

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183 Id at 641.
184 See Gutwaks, 1999 WL 1611328 at *4; see also Blanks, 310 F.3d at 401.
185 See Furnish, 270 F.3d at 449-50.
186 Note the difference in treatment of major life activities and whether major life activities are substantially limited. Whether a person has a major life activity is identified on an individual level whereas the substantial limitation of a major life activity is determined on a larger level – in comparison with the general population.
187 Gutwaks, 1999 WL 1611328 at *4. See also supra notes 124-130 and accompanying text.
188 Blanks, 310 F.3d at 401.
189 Reproduction has long been asserted as essential to human function. For example, Abraham Maslow identified sex as part of the physiological needs, the most basic need in his hierarchy of needs in the human experience. ABRAHAM H. MASLOW, TOWARD A PSYCHOLOGY OF BEING (3d ed. 1998).
plaintiff prior to trial. This, in turn, could open the door to litigation over matters that are less related to the plaintiff’s claim of disability, and could cause more intrusion into the Plaintiff’s personal life. Thus, a seemingly objective intent of an HIV-infected plaintiff does not lead to a useful conclusion regarding the plaintiff’s subjective intent to reproduce.

Instead of relying on statements regarding a major life activity, the identification of a major life activity should speak for itself. Since men and women are both capable of engaging in reproduction, both deserve equal treatment, and therefore, reproduction should always count as a major life activity for males and females regardless of whether an individual states a contrary intent.

b. Internal Bodily Functions Impaired by HIV Constitute a Major Life Activity

Courts have been resistant to find that a major life activity can be construed from an internal impairment. As the Furnish court proclaimed, major life activities are “not the impairments’ characteristics—they are activities that have been impacted because of the plaintiff’s impairment.” Per Furnish, even a serious illness such that affects the functioning of a major organ does not equate with a disability. This view, however, misapplies Bragdon’s use of “major” and the general understanding of “life activity.” Applied correctly, in the aggregate, HIV infection substantially limits the major life activity of caring for one’s self.

Numerous tasks are affected by HIV infection and when considered in the aggregate, constitute a major inhibition to one’s daily existence. The ability to care for oneself, perform manual tasks, walk, see, hear, speak, breathe, learn, and work are all potentially threatened by HIV infection. Justice Ruth Bader Ginsburg noted in Bragdon that HIV infection “inevitably pervades life’s choices: education, employment, family and financial undertakings.” The importance of knowing whether one’s HIV infection poses a serious threat to major

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190 This does not mean that all persons would have the major life activity of reproduction, however. For example, a man who had a vasectomy before knowing that he was infected with HIV would not have the major life activity of reproduction.

191 See, e.g., Furnish, 270 F.3d 445.

192 Id. at 450.

193 Id.

194 See generally 29 C.F.R. §1630.2(i)(1998).

195 Bragdon, 524 U.S. at 656 (J.Ginsburg, concurring).
life activities affects the vital life activity of caring for one's self. It is generally accepted knowledge that most people want to exist peaceably, without the constant intrusion and frustration of debilitating ailments. Such peace of mind is not possible for persons infected with HIV. An infected person must arrange his or her life around combating infection, and can only properly do so with the knowledge of a white blood cell count. Although abstract in comparison to easily identifiable impairments, the intrusion of HIV infection impedes daily life existence and continuation of life, which are undeniably part of caring for one's self and "central to the life process." It is the unknowingness in HIV infection that impedes one's ability to exist peaceably, combined with a real and persistent fear of contracting an infection that could result in death. Therefore, HIV infection inhibits infected persons in two ways: first, it inhibits the ability to care for one's self by placing an infected person at constant risk of immune system failure, and second, it eventually inhibits another major life activity, even if not readily apparent, which precedes and subsequently causes death. That each person is limited differently by HIV infection should not detract from one's desire to exist peaceably and to care for one's self.

The Furnish court drew a distinction between activities necessary to continue living and those that are "integral to one's daily existence" as applied in Bragdon. Recall that the Bragdon Court found that reproduction constituted a major life activity. Reproduction, though, is different from the list of examples used to determine whether a claimed life activity qualifies under the ADA as a major life activity. "Reproduction is not an activity at all, but a process." In this context, as Chief Justice Rehnquist stated, reproduction must mean "the numerous discrete activities that comprise the reproductive process ... ." Similarly, one's bodily homeostasis is comprised of several organic and life activities. If reproduction, which comprises only a

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196 The EEOC has also identified additional major life activities, including: sitting, standing, lifting, and mental and emotional processes such as thinking, concentrating, and interacting with others." Guidance on Definition of the Term "Disability", 2 EEOC Compliance Manual (CCH), § 902, No. 140.177 (1995), available at http://hr.cch.com/primesrc/bin/highwire.dll (last visited Feb. 2, 2003)(access restricted to subscribers).

197 Bragdon, 524 U.S. at 638.
198 Furnish, 270 F.3d at 449-50.
199 Bragdon, 524 U.S. at 639.
200 Id. at 659, n.2.
201 Id. Chief Justice Rehnquist argued, in dissent, that reproduction was not a major life activity.
portion of all the body’s processes is considered a major life activity, it follows then that all of the body’s processes must also constitute a major life activity. Thus, the Furnish court limitation with regard to liver function alone does not apply to HIV infection because a reduced immune system has a systemic effect. Persons infected with HIV could claim that HIV affects all of their bodily processes, which means that a court can infer that numerous major life activities (although perhaps not explicit at the time) will be either immediately or eventually affected. Although the effects of HIV infection might be latent, HIV does its bidding more deviously than obvious impairments because a person must live day-to-day without knowing exactly how or when HIV will progress to a more dangerous stage. To clarify, a person infected with HIV does not merely have a possible impairment; such impairment is eventual and certain.202 Assuming that either a physical or mental dysfunction can affect each major life activity, and reconciling the effect of HIV infection and immune system dysfunction on multiple bodily organs and processes, HIV infection should be recognized as an impediment to one’s ability to care for one’s self.203 HIV infection threatens one’s immune system, which when all the aggregate effects thereof are considered, constitutes a limitation on the ability to care for one’s self.

c. The Sexual Dynamics Surrounding Reproduction Constitute a Major Life Activity

The Bragdon Court found “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself.”204 The Bragdon Court did not define which sexual dynamics surrounding reproduction constituted a major life activity because it did not need to, and instead focused on whether reproduction was an applicable major life activity.205 Lower courts have not ventured into the query of which activities are part of the sexual dynamics of reproduction.

Congress announced in 1990, “a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term ‘disability’ because of a substantial limitation to

202 See Bragdon, 524 U.S. at 633 (stating that, “The disease follows a predictable and, as of today, an unalterable course.”).
203 Consider that an inability to walk is caused by dysfunctional legs, an inability to breathe is caused by dysfunctional lungs, and an inability to take care of oneself is caused by overwhelming physical dysfunction. Why should an inability to live a healthy life, caused by a dysfunctional immune system, not be recognized?
204 Bragdon, 524 U.S. at 638 (emphasis added).
205 Id. at 639-42.
procreation and intimate sexual relations." However, Congress also did not explain what is meant by the term "intimate sexual relations." Although intimate sexual relations would likely entail a broader scope than the sexual dynamics of reproduction, since no court or legislature has opined as to these terms, the extent of these terms is unclear. It is apparent, through Bragdon and legislative history, that whatever dynamics are part of intimate sexual relations or procreation are considered a major life activity.

The issue that must be addressed is whether the sexual dynamics surrounding procreation are substantially limited by HIV infection. This essay concludes that they are. Going through the triumvirate of factors that determine whether HIV infection substantially limits the sexual dynamics surrounding procreation is the same as if one were to go through these factors for procreation itself. It follows, then, that the sexual dynamics surrounding reproduction must be substantially limited by HIV infection. The scope of the issue can be larger, however, if one were to ask whether HIV infection substantially limits the dynamics of intimate sexual relations not intended to result in procreation. This question alters the analysis because sexual relations not intended to result in procreation do not pose a risk of transmission to offspring; rather, the risk of transmission is limited solely to sexual partners. This change does not subtract from the significance of transmission because the risk of transmission to a sexual partner can never be reduced to zero. Therefore, the three-factored approach applied to the dynamics surrounding reproduction or intimate sexual relations is substantially the same for reproduction.

Anecdotally, the dynamics surrounding intimate sexual relationships involve issues of "how to move on and meet and develop relationships with new people," and how to "form new relationships that will satisfy [one's] need for both emotional and sexual intimacy." These issues present some of the attendant long-term issues that are more pronounced for persons living with a HIV, than for a normal population. Thus, there is more than one way in which to conclude that HIV infection substantially limits the major life activity

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207 See supra notes 204-206 and accompanying text.
208 As of the time of this essay, there is no known prophylactic device that can prevent transmission to a sexual partner without failure.
209 See supra notes 156-165 and accompanying text.
of the dynamics surrounding reproduction: either by analogy to procreation, or anecdotally through examination of the lived experiences of HIV-infected individuals.

B. Medical Evidence Demonstrates HIV Substantially Limits Major Life Activities

Several courts, including the United States Supreme Court, have interpreted the "substantially limits" and "major life activity" requirements. These judicial findings, however, both for and against these requirements are often not established on scientific evidence or statistically significant data. Instead, courts regularly base their reasoning upon anecdotal or testimonial evidence because that is the evidence presented at trial. Unlike the multitude of anomalous conditions that may render individuals disabled, HIV infection is well documented and studied incessantly. Medical studies demonstrate that asymptomatic HIV infection should qualify as a disability under the ADA because the virus unavoidably substantially limits life, thus inhibiting the major life activities associated therewith.\(^{211}\)

Despite any treatment options, one conclusion remains true for all persons infected with HIV: there is no cure.\(^{212}\) Before progressing to the symptomatic phase of infection, "asymptomatic HIV infection is characterized by a period of varying length in which there is a slow deterioration of the immune system."\(^{213}\) This period can endure for more than ten years before a person enters the symptomatic phase of infection.\(^{214}\) In general, AIDS results from HIV infection.\(^{215}\) The inevitable result is the collapse of the body’s immune system, making an individual fatally susceptible "to many infections and cancers."\(^{216}\)

The United States District Court for the Middle District of Florida prophetically announced in *Hernandez v. Prudential Insurance Company of America*,\(^ {217}\) a case decided before *Bragdon*, that an HIV-positive individual "is substantially limited in his ability to care for his own health needs."\(^ {218}\)

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\(^{211}\) The major life activity used here is one’s ability to care for one’s self.


\(^{213}\) *Id.*

\(^{214}\) *Id.*


\(^{216}\) *Id.*

\(^{217}\) 977 F. Supp. 1160 (M.D. Fla. 1997).
himself, equally as unfortunate, the rest of the world is substantially limited in its ability to care for someone infected with HIV.”

Furthermore, the court declared: “The fact that plaintiff will need continual medical care demonstrates that he cannot care for himself.”

One might interpret this statement to mean that never-ending medical treatment for HIV infection substantially limits one’s major life activity of caring for one’s self. Where courts focus on a medical diagnosis, they fail to account for the long-term effects of HIV, which include latent medical deficiencies and medications that inevitably affect several aspects of an HIV-infected individual’s life. The myriad of antiretroviral agents used to treat HIV infection can cause severe toxic effects, including: pancreatitis, peripheral neuropathy, abnormal liver function, hypersensitivity reaction, impaired concentration, insomnia, kidney stones, and various others.

Indeed, HIV requires continued medical treatment, but more importantly, the effects of treating HIV substantially limit one’s ability to care for one’s self. A physician’s treatment of HIV necessarily includes a discussion of the complexity treatment poses to the infected individual. Treating physicians are advised to discuss the “[p]otential side effects, drug interactions, and impact of new medications on lifestyle . . . .” Although antiretroviral therapy as well as protease inhibitor treatment is helpful, the propensity to both cure and severely impinge on an HIV-infected person’s life presents a lesser of two evils conundrum. An individual can choose either to undergo antiretroviral therapy and risk suffering attendant side effects while possibly not gaining the expected benefits of therapy, or to forego

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218 Id. at 1165.
219 Id.
221 HEALTH CENTRAL, GENERAL ENCYCLOPEDIA (Asymptomatic HIV infection) at http://healthcentral.com/mhc/top/000682.cfm (last visited Mar. 15, 2003)(stating, “HIV is a chronic medical condition that can be treated but not yet cured.”).
224 Peter Richtig, the executive director of the AIDS Committee of Durham Region in Oshawa, Ontario has noted that while “patients are living longer because of the efficacy of the protease inhibitors . . . as a group, they are now more likely to get pancreatitis, diabetes and
antiretroviral therapy at the expense of allowing the virus to run its course, possibly in an accelerated fashion. To complicate the matter, even a choice to use antiretroviral therapy requires a high level of diligence because “[f]requently missed doses [of retroviral agents] diminish their effectiveness and increase the likelihood of the virus developing resistance.” Whether one chooses to use antiretroviral therapy or not, the choice yields the same result: continued medical treatment must go along with HIV infection. Thus, it is clear that a physician must care for a person infected with HIV.

It would be remiss to not address the contingent slippery slope argument against a per se finding of HIV as a disability based on medical evidence. The opponent would argue that several diseases require prolonged treatment, and can affect several areas of a person’s life. In rebuttal, the terms of the ADA would prohibit such an application to diseases other than those with fatal consequences. The severely limiting prong of the definition of disability under the ADA should prohibit such an argument for lesser diseases, infections, and temporary illnesses, especially those that are curable, or those without a near absolute mortality rate. The severity of HIV infection sets it apart from other disabling diseases, for with HIV, even fortunate individuals who are able to persist in the asymptomatic phase for a long period of time (“long-term non-progressors”), the treatment for HIV is not a cure.

C. Psychological Evidence Demonstrates HIV Substantially Limits Major Life Activities

The argument that a person infected with HIV is substantially limited in a major life activity rests on the ability to scientifically measure this effect and report its consequences. There are two major categories of psychological manifestations that affect an HIV-positive person’s life. The first category is comprised of an individual’s self-perception and adaptation to living with HIV infection. The second category is an amalgam of the treatment and responses from society toward an infected person. These categories can be thought of as going from the inside-out and the outside-in, respectively.227

225 Id.


227 I have separated these two aspects to reflect the two main types of studies that have been performed regarding persons with HIV infection. In reality, these categories are
Psychologists have developed coping strategies and treatments for persons living with fatal diseases. Moreover, these techniques, which seek to "facilitate hope, coping, and quality of life," have been perfected for persons living with HIV infection. Treatment is needed in order for persons living with HIV to counter the "psychological effects of opportunistic infections." An HIV-infected individual generally lives with a decreased quality of life. In a study comparing the quality of life of HIV-positive persons with both a general population and persons with other chronic conditions, this study concluded that HIV-infected persons have a lower quality of life than both groups. Specifically, the study concluded that the emotional well-being of HIV-infected persons was "significantly worse" than both persons with other morbid diseases and persons in a general population. Remarkably, the study found that although physical functioning for symptomatic persons and AIDS patients was much worse than for asymptomatic persons, when the emotional well-being of the groups was measured, asymptomatic persons measured similarly to symptomatic persons and AIDS patients. This finding suggested that "there is a substantial morbidity associated with HIV disease in adults."

The finding of this experiment fits well with the constructs used to examine the effects of a disability as intended under the ADA and explained in III.A.1, supra. To wit, the difference in quality of life for asymptomatic HIV-infected persons from the general population verifies that the nature and severity of HIV infection, its indefinite duration, and long-term effects cause a substantial limitation. The major life activities that are likely affected by this substantial limitation are those that involve personal lifestyle choices, namely, the ability to care for one's self and the sexual dynamics surrounding reproduction.

commingled to the extent that a person's self image is duly affected by interaction with society, and vice-versa.

229Id. at 3.
230Ron D. Hays et al., Health-related quality of life in patients with human immunodeficiency virus infection in the United States: results from the HIV cost and services utilization study, 108 AM. J. MED. 714, 714-22 (June 15, 2000).
231Id.
232Id. The only sub-group measuring comparable to persons with HIV infection was persons with depression.
233Id.
234Id.
235See supra notes 149-159 and accompanying text for a detailed explanation of this mechanism.
These major life activities have been linked to chronic illness quality of life modeling. Tracing the effect of HIV infection leads to a result confirming a substantial limitation on a major life activity. In sum, HIV-infected persons experience specific, identifiable psychological effects. Although multivariate, these effects result in a measurable, substantial decrease in quality of life. A substantial decrease in quality of life, in turn, affects the major life activities of caring for one’s self, as well as the sexual dynamics surrounding reproduction. Therefore, there is a pronounced psychological experience for persons living with HIV, which substantially limits a major life activity.

The other half of this argument, that society’s adverse reaction to HIV-infected individuals results in a substantial limitation on a major life activity, has been documented. Congress has recognized a similar result for disabled persons, in general. While many reports regarding the life experiences of HIV-positive persons have been anecdotal or focused on specific sub-groups, a 2001 study by Bridget Taylor put all prior theories in perspective. Taylor concluded that “the stigma experienced is unique to each individual and changes dynamically throughout the course of the HIV illness trajectory.” From a historical perspective, stigmatization of HIV-infected persons is instigating by having a disease “whose cause is uncertain and whose treatment is limited.” This stigma has been explained as making an infected person who should be treated equally, as someone who is “sinful” or “evil.” The result of this stigma can be a substantial limitation in social interaction, affecting both the ability to care for one’s self and also affecting the sexual dynamics surrounding reproduction. While asymptomatic HIV can be hidden, substantial limitations occur because where “the potential for felt stigma [exists],

See Timothy G. Heckman, The chronic illness quality of life (CIQOL) model: Explaining life satisfaction in people living with HIV disease, 22 HEALTH PSYCHOL., 140-47 (Mar. 2003) (“The chronic illness quality of life (CIQOL) model theorizes that life satisfaction in persons living with chronic illnesses such as HIV disease is a function of illness-related discrimination, barriers to health care and social services, physical well-being, social support, and coping.”).

See generally H.R. REP. No. 101-485, pt. 2, at 41 (1990) (stating: “The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability.”).

Bridget Taylor, HIV, stigma and health: integration of theoretical concepts and the lived experiences of individuals, 35 J. ADVANCED NURSING 792 (2001).

Id. at 794 (citing S. SONTAG, ILLNESS AS METAPHOR, AIDS AND ITS METAPHORS (1991)). Taylor notes that where tuberculosis once met these criteria it was later replaced by cancer and, more recently, HIV.

Id.
concealment become[s] the defence [sic] against enacted stigma.” In turn, persons who hide their HIV-positive status to avoid social rejection suffer from a fear of being doomed.

IV. IMPACT

Congress affirmed that within the intended scope of the ADA, “[a]ll persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this legislation.” Courts have not fully adhered to this intent, depriving some HIV-positive individuals of the protections of the ADA. Aside from people who do not want to have children, and homosexuals, who presumably will not have children, certain other classes of persons are likely to be denied coverage under the ADA. Additional groups who will likely be affected based on the holdings of Gutwaks and Blanks are: children, the elderly, and inmates. All of these groups share in common the unlikelihood or impossibility of having children.

The Blanks decision falls short of Congress’s intended scope of the ADA, and poses a continuing threat to all asymptomatic HIV-infected individuals. Likewise, the Blanks court attempted to transform the universal capability to bear children into a fact-specific evidentiary matter, turning on a chimeral showing that “an HIV-positive person . . . is substantially limited in the major life activity of reproduction.” As argued in this essay, such a showing is not necessary because the stated intent to not engage in reproduction is inextricably reached in light of one’s HIV status, social factors, and unknown medical factors, which override and limit several major life activities, including reproduction. Future cases that address the issue of disability status for younger persons, who do not have a clear intent, as well as homosexuals, who are not likely to have the required intent to engage in procreation, will further highlight this issue. Regardless, substantial limitations based on reproduction are not the end of the matter.

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242Id. Taylor explains that, “‘Felt’ and ‘enacted’ stigma are powerful forces in the way that society and individuals interrelate.” Taylor, supra note 238, at 797.

243Id. at 795.


245Happy Time Day Care Center found that children with HIV were disabled per se, but was a pre-Bragdon decision. See Happy Time Day Care, 6 F.Supp. 2d at 1077, 1081 (stating, in the symptomatic phase of HIV, “an inference could be drawn that HIV substantially limited [a child’s] ability to care for himself.”).

246Blanks, 310 F.3d at 401.
Future cases that face the challenge of determining whether a person in a group lacks protection of the ADA must also decide whether caring for one's self and the sexual dynamics surrounding intimate sexual relationships are valid major life activities substantially limited by HIV infection, even in its medicated state. The Supreme Court has recognized the concept of a *per se* disability, but has not ruled any specific condition to be disabling *per se*. In cases involving persons with HIV infection, the reality is that whether a disability is found in the asymptomatic or symptomatic phase is a temporal distinction. The onset of symptomatic HIV is only a matter of time. The benefits to both asymptomatic HIV-infected individuals and agencies affected by ADA regulations are apparent. If HIV infection were regarded as a disability *per se*:

> [t]his would make it easier to obtain voluntary compliance with ADA requirements by covered entities, because both the covered entity and the individual with the condition would know up front that there is no possibility that an administrative enforcement agency or a court could rule that the condition does not meet the ADA definition.

In addition to certainty, the litigation costs of determining an HIV-positive person's status would be spared.

The court system has failed to keep up with the HIV crisis in the United States, whereas scientific and social scientists have documented and reported the impact of HIV. Commentators on the evolution of the HIV epidemic conclude that the legal system fails to recognize several aspects of the effects of HIV. Similarly, courts must recognize the status of asymptomatic HIV-infected individuals as disabled in order to comport with Congress's intended scope of coverage under the ADA. Whether the major life activity of reproduction or prospectively caring for one's self or the sexual

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247 See *supra* notes 212-216 and accompanying text.


249 See *supra* notes 211-243 and accompanying text.

250 See Caroline Palmer and Lynn Mickelson, *Many Rivers to Cross: Evolving and Emerging Legal Issues in the Third Decade of the HIV/AIDS Epidemic*, 28 WM. MITCHELL L. REV. 455, 461 (2001) (stating, "despite gains through legislation, case law, public education, the expansion of HIV/AIDS service organizations, the broad range of treatment options, the increased availability of needle exchange programs, and the work of AIDS activist groups, the legal system still struggles to catch up to the crisis.").
dynamics surrounding intimate sexual relationships is asserted, HIV infection has a profound impact on one’s life.

V. CONCLUSION

Although the limitation on disability status for persons with asymptomatic HIV infection affects only a small population, it is an onerous conundrum with a possibly devastating result. Persons susceptible to preclusion from the protection of the ADA face a confounding problem: they must live with HIV while being denied the benefits of disabled status, which is granted to similarly situated persons living with HIV. As the number of persons with HIV infections increases, this problem will become more evident and courts willing to rightfully grant disability status to all asymptomatic HIV-infected persons will have to break from current precedent to realize Congress’s intent for the ADA. Hopefully, courts will either be pressured to confront the issue or will face insurmountable evidence categorizing the impact of HIV impact on all persons, whether symptomatic or asymptomatic. While the designation of HIV as a per se disability would be an extraordinary development, it should not be confused to mean that a multitude of other diseases would equally qualify for similar status. On the contrary, granting disability status per se for all persons with HIV infection would aid the legal system to reflect properly the modern scientific and social understanding of the result of living with HIV.