RECENT DEVELOPMENTS

ATTORNEY-CLIENT PRIVILEGE—DEAD OR ALIVE?: A POST-MORTEM ANALYSIS OF *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998)

In the movie version of John Grisham's book "The Firm," Tom Cruise's character faces a moral quandary. The young lawyer discovers that his firm is complicit in Mafia activity, but he hesitates to divulge this incriminating information because of the attorney-client privilege. Some moviegoers were baffled why an attorney, notwithstanding his ethical duty to his clients, should shield the truth from the criminal justice system.[1] Those moviegoers were not alone: many legal scholars in recent years have argued for the retrenchment of the attorney-client privilege in certain circumstances.[2] The attorney-client privilege, which originated in Sixteenth Century England as a form of the Gentlemen's code of honor,[3] has been justified by the utilitarian goal of encouraging "full and frank communication between attorneys and their clients."[4] But critics of the privilege have responded that the rule's costs are too high to justify an absolute application in all cases, while its defenders have insisted that the privilege is necessary for

1. *See, e.g.*, Leonard Orland and Sue Wise, *Pollack and Cruise Conjure a Magical Formula in 'The Firm,'* CONN. LAW TRIBUNE, July 26, 1993, at 17 (describing Cruise's character's behavior as "inexplicable" given his choices).

2. Admittedly, the "costs" of the attorney-client privilege in "The Firm" is an extreme example, but it does not vitiate the fact that many scholars have at least questioned the efficacy of the privilege. *See, e.g.*, Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 26 (1998) (calling for the abolition of the privilege); 1 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 94, at 350 (John W. Strong ed., 4th ed. 1992) (noting that a posthumous exception would not "to any substantial degree lessen the encouragement for free disclosure which is the purpose of the privilege"); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 199 at 380 (2d ed. 1994) (arguing that an exception to the privilege "would not seriously undercut [its] utilitarian basis"); 24 CHARLES WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5498, at 483-86 (1986) ("Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy.").

3. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton rev. 1961). It was assumed that a gentleman would not reveal secrets confided to him in confidentiality.

4. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

lawyers to provide competent legal advice to clients.

Last Term, the Supreme Court ruled in *Swidler & Berlin v. United States*[5] that the attorney-client privilege survives the death of the client in a criminal context. The Court based its ruling on a broad and exaggerated "chilling effect" argument. It reasoned that the risk of posthumous revelation of attorney-client conversations in criminal cases may chill client communication—even if the threat of criminal sanction disappears—because the client may fear disclosure of embarrassing information detrimental to him or to his friends and family.[6] But this argument is speculative, and empirical evidence on whether the privilege actually encourages attorney-client candor among the general population is sparse and inconclusive.[7] However, a subset population—people who expect to die soon—*will* likely be chilled by such an exception because their reputational concerns will be at their maximum then. But the difficulty of drawing a workable, bright-line distinction between this subset and the rest of the population, as well as the importance of respecting a long-standing tradition, suggests that the Court's upholding of the relatively absolute attorney-client privilege was an imperfect, but correct, ruling.

Vincent W. Foster, Jr., the Deputy White House Counsel, became embroiled in a criminal investigation over the wrongful dismissal and FBI investigation of seven career employees from the White House Travel Office in 1993.[8] The firings of the Travel Office employees had ignited a political maelstrom, prompting the White House to order an FBI

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5. 118 S. Ct. 2081 (1998).

6. *See id.* at 2086-88.

7. *See, e.g.*, Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1163 (1985) ("The conclusion that confidentiality is essential to adequate representation rests upon the premise that without it clients would not disclose all the facts that the attorney needs to know to perform competently. But that premise lacks empirical support. Little data exists, and that which does exist is at best inconclusive."); Note, *Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison*, 108 HARV. L. REV. 1697, 1702 (1995) (noting that there is little empirical evidence comparing the benefits and costs of the privilege).

8. *See Swidler & Berlin*, 118 S. Ct. at 2083. After the firing, the White House announced that the FBI was conducting a criminal investigation into the activities of the seven employees. *See* Brief for the United States at 3, Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998) (No. 97-1192).

investigation.[9] Many questions were raised about Mr. Foster's involvement in the firings.[10] In July of 1993, Mr. Foster met with James Hamilton, an attorney at Swidler & Berlin, to seek legal advice regarding the potential investigation of the firings.[11] Mr. Hamilton took three pages of notes during the two-hour meeting, and he wrote "Privileged" on the front page.[12] Nine days later, Foster shot himself to death in Fort Macy Park in Virginia.

At the request of Attorney General Janet Reno, the Special Division of the United States Court of Appeals for the District of Columbia Circuit assigned Independent Counsel Kenneth Starr to investigate whether any individuals made false statements, obstructed justice, or committed other crimes in the Travel Office matter.[13] In December of 1995, a federal grand jury issued subpoenas for Hamilton's notes of his meeting with Foster. The Independent Counsel believed that Foster might have imparted inculpatory or exculpatory information regarding the Travel Office matter.[14] Hamilton and Swidler & Berlin moved to quash the subpoenas, citing the attorney-client privilege.[15]

The District Court of the District of Columbia examined the notes in camera and ruled that they were protected by the attorney-client privilege.[16] The Court of Appeals for the District of Columbia Circuit reversed.[17] Circuit Judge Williams, writing

9. *See* Brief for the United States at 3, *Swidler & Berlin* (No. 97-1192). The ex-employees had accused the White House of firing them to reward their jobs to the political supporters of the President. *See* David Johnston, *Ex-Employees of the Travel Office Say Rumors Led to Their Ouster*, N.Y. TIMES, Jan. 25, 1996, at A15. The White House conducted its own internal investigation; it reinstated five of the employees and reproved four White House employees. Mr. Foster himself was not reprimanded, but he was involved in the firings. *See* Brief for the United States at 3, *Swidler & Berlin* (No. 97-1192).

10. *See Swidler & Berlin*, 118 S. Ct. at 2083.

11. *See id.*

12. *See id.*

13. A large impetus for the investigation came from a discovered memorandum written by White House Assistant David Watkins suggesting that the First Lady might have been involved in the Travel Office firings. The memo stated: "Foster regularly informed me that the First Lady was concerned and desired action—the action desired was the firing of the travel office staff." David Johnston, *Memo Places Hillary Clinton at Core of Travel Office Case*, N.Y. TIMES, Jan 5, 1996, at A1.

14. *See* Brief for the United States at 6, *Swidler & Berlin* (No. 97-1192).

15. *See Swidler & Berlin*, 118 S. Ct. at 2083.

16. *See id.*

17. *See* In re: Sealed Case, 124 F.3d 230 (D.C. Cir. 1997).

for a divided panel,[18] ruled that "the risk of post-death revelation will typically trouble the client less than pre-death revelation" in criminal cases because "criminal liability will have ceased altogether."[19] Thus, the chilling effect on client communication with his attorney will likely be minimized in post-mortem criminal cases. Noting the potentially high costs of protecting post-death communications, the court promulgated a case-by-case balancing test in post-mortem criminal cases.[20] If there is a pressing need in a criminal case for the privileged information, the attorney-client privilege might be pierced after the death of the client, according to the Court of Appeals.

The United States Supreme Court reversed in a six-to-three decision.[21] Writing for the majority,[22] Chief Justice Rehnquist rejected the D.C. Circuit Court of Appeals' balancing test and held that the attorney-client privilege survives the death of the client.[23] The relatively brief opinion noted that the balancing test did not provide enough predictability for clients and stressed the importance of encouraging openness between clients and their attorneys. In particular, the majority believed that posthumous disclosure of embarrassing, but noncriminal, materials could inhibit a client from fully disclosing information to his attorney.[24]

Chief Justice Rehnquist began his inquiry by assaying the common law precedent (or lack thereof) supporting the Independent Counsel's position that the privilege should expire upon the death of the client in criminal matters.[25] The Court

18. Judge Wald joined Judge William's majority opinion. Judge Tatel dissented.

19. *In re: Sealed* Case, 124 F.3d at 233.

20. *Id.* at 234.

21. *See Swidler & Berlin,* 118 S. Ct. at 2083 (1998). The Appeals Court had also ruled that the notes were not subject to the attorney work-product doctrine. The Supreme Court did not address this issue because it ruled that the application of the attorney-client privilege here rendered the work-product issue moot.

22. The majority included Chief Justice Rehnquist and Justices Breyer, Ginsburg, Souter, Stevens, and Kennedy.

23. *See Swidler & Berlin,* 118 S. Ct. at 2085-88.

24. *See id.* at 2087.

25. The standard the Court uses for interpreting the scope of confidentiality privileges is guided by the Federal Rule of Evidence 501. *See Swidler & Berlin,* 118 S. Ct. at 2084. The rule states in part that, "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501.

noted that only two opinions in all of state and federal courts have ruled that the privilege may be pierced posthumously.[26] With the exception of these two cases, virtually every single case has ruled or at least presumed that the attorney-client privilege does not expire upon the death of the client.[27]

The Court then controverted the Independent Counsel's analogy to the testamentary exception. The Independent Counsel had noted that when a testator's heirs litigate a will-contest, courts have refused to apply the attorney-client privilege because of a supposed policy judgment that accurately settling a testator's estate was more important than maintaining his confidentiality.[28] Thus, if resolving will-contest disputes can trump attorney-client confidentiality, then the exigencies of a criminal investigation should clearly trump the privilege as well, according to the Independent Counsel. The Court disagreed. The real "rationale for the testamentary exception is that it furthers the client's intent . . . . There is no reason to suppose as a general matter that grand jury testimony about confidential communications furthers the client's intent."[29]

Furthermore, the majority opinion said that posthumous disclosure in criminal cases can still chill attorney-client communication. Although the threat of criminal sanctions disappears upon the death of the client, the Court ruled that disclosure could still deter clients from speaking candidly to their attorneys because they may be concerned about personal reputation, civil liability, or embarrassing revelations about their families and friends.[30] And "posthumous disclosure of

26. *See Swidler & Berlin,* 118 S. Ct. at 2084. In *Cohen v. Jenkintown Cab Co.,* A.2d 689 (1976), the Pennsylvania Court of Appeals ruled that it could make an exception to the privilege where the interest of justice was compelling and the client's interest in preserving the privilege was minor. The other opinion recognizing such an exception was the appeals court ruling that the Court was reviewing. *See In re: Sealed Case,* 124 F.3d 230 (D.C. Cir. 1997).

27. The Court cited numerous cases to buttress its point. A sampling of them follows: Mayberry v. Indiana, 670 N.E.2d 1262 (Ind. 1996); Morris v. Cain, 39 La. Ann. 712, 1 So. 797 (1887); In re John Doe Grand Jury Investigation, 408 Mass. 480, 481-83, 562 N.E.2d 69, 70 (1990); State v. Doster, 284 S.E.2d 218, 219 (1981).

28. *See* Brief for the United States at 16-24, *Swidler & Berlin* (No. 97-1192).

29. *Swidler & Berlin,* 118 S. Ct. at 2086. The Court noted that previous cases had ruled that the testamentary exception was recognized because courts had implied a waiver to fulfill the client's testamentary intent. *See, e.g.,* Glover v. Patten, 165 U.S. 394, 407-08 (1897).

30. *See Swidler &* Berlin, 118 S. Ct. at 2086.

such communications may be as feared as disclosure during the client's lifetime."[31] Chief Justice Rehnquist remarked that the privilege serves a much broader purpose than the Fifth Amendment's protection against criminal self-incrimination and covers embarrassing non-criminal matters.[32] Indeed, if the courts did not guarantee this privilege after death, "the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real."[33]

Finally, the Court said that "[b]alancing ex post the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application."[34] The Court conceded that there are already several exceptions to the attorney-client privilege (for instance, the crime-fraud exception), but warned that "[a] 'no harm in one more exception' rationale could contribute to the general erosion of the privilege . . . ."[35] The Court acknowledged that the Independent Counsel's arguments were "by no means frivolous" but said the supposed minimal chilling effect of a posthumous exception was largely "speculation—thoughtful speculation, but speculation nonetheless . . . ."[36] The lack of empirical evidence supporting the Independent Counsel's contention meant that he had "not made a sufficient showing" in "light of reason and experience" to "overturn the common law rule embodied in the prevailing caselaw."[37]

Justice O'Connor dissented,[38] arguing that a "criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality."[39] Although Justice O'Connor agreed that a deceased client may potentially fear

31. *Id.*

32. *See id.* at 2086-87. The Independent Counsel had argued that only a client who intended to perjure himself would be chilled by disclosure because the information that the attorney would reveal to the grand jury would be only the same information that the client himself would have had to divulge if he were still alive. *See id.*

33. *Id.* at 2087.

34. *Id.*

35. *Id.*

36. *Id.* at 2088.

37. *Id.*

38. Justice O'Connor was joined in dissent by Justice Scalia and Justice Thomas.

39. *Swidler & Berlin,* 118 S. Ct. at 2088 (O'Connor, J., dissenting).

reputational harm, she insisted that "the potential that disclosure will harm the client's interests has been greatly diminished, and the risk that the client will be held criminally liable has abated altogether."[40] At the same time, the dissenting opinion said "the costs of recognizing an absolute privilege can be inordinately high," and "[e]xtreme injustice may occur, for example, where a criminal defendant seeks disclosure of a deceased client's confession to the offense."[41] Justice O'Connor offered a balancing test where "protecting an innocent defendant" or a "compelling law enforcement need for information" may trump "a deceased client's interest in preserving confidences."[42]

The dissent further explained that numerous exceptions to the attorney-client privilege already exist, suggesting that a client's expectation of confidentiality is not absolute. For example, the dissent cited the crime-fraud exception, the attorney-compensation exception, and the testamentary exception.[43] In addition, Justice O'Connor disputed the majority's contention that the attorney-client privilege was broad enough to shield the client from embarrassing but non-criminal information. The testamentary exception may be invoked to pierce the privilege in cases where the deceased client would not have chosen to waive the privilege: "[f]or example, 'a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed.'"[44]

Finally, Justice O'Connor asserted that the common law basis for an absolute application of the privilege was "not a monolithic body of precedent."[45] Most cases had just presumed the privilege, and "[o]pinions squarely addressing the posthumous force of the privilege 'are relatively rare.'"[46] In fact, the dissent noted, California's Evidence Code "provides that the attorney-client privilege continues only until the deceased

40. *Id.*
41. *Id.* at 2089 (citing State v. Macumber, 112 Ariz. 569, 571 (1976)).
42. *Id.*
43. *Id.* at 2089-90.
44. *Id.* at 2089 (quoting In re Sealed Case, 124 F.3d 230, 234 (D.C. Cir. 1997)).
45. *Id.* at 2090.
46. *Id.* (quoting *In re Sealed Case,* 124 F.3d at 232).

client's estate is finally distributed . . . ."[47] Advocating a balancing-test approach, the dissent said the Court should remand this case for the district court to balance "the harm of precluding critical evidence that is unavailable" with "the potential disincentive to forthright communication."[48]

Although the Supreme Court made the correct decision in upholding the privilege, its rationale overstated the supposed chilling effect on attorney-client communication among the general population. The majority's opinion is not thoroughly convincing as a policy matter. It relies on the questionable empirical speculation that a client—who faces very tangible and possibly imminent criminal sanctions—will be less than candid to his attorney because potentially embarrassing information may be revealed after his death. More realistically, only people who expect to die soon will likely be concerned enough about reputational harm to be chilled by a posthumous exception. But attempting to draw a bright-line rule differentiating this subset with the general population will compel courts to delve into medical and psychological issues that judges are ill-equipped to handle. In short, this approach shares the same infirmity as the Court of Appeals' balancing-test: both become unpredictable and give courts too much discretion. Furthermore, the Court's ruling may have been right in a prudential sense: although the Court overstates the chilling effect, at least logically and intuitively, actual empirical evidence is sparse and does not conclusively support either side. In light of this ambiguity, the Court was correct in maintaining the long-standing tradition of a relatively absolute attorney-client privilege until more definitive empirical evidence becomes available.

The Court implicitly concedes that the costs of maintaining an absolute application of the attorney-client can be high.[49] As a

47. *Id.* (citing CAL. EVID. CODE ANN. §954 and cmt. (West 1995)).

48. *Id.* at 2090-91.

49. *See Swidler & Berlin*, 118 S. Ct. at 2088 (admitting that the Independent Counsel's arguments "are by no means frivolous"). The Court at one point suggests that without this assurance of confidentiality, the client may never have divulged it to his attorney, and thus "the loss of evidence is more apparent than real." *Id.* at 2087. But this argument assumes that most clients will actually be chilled if a posthumous exception was recognized. The Note will argue below that for most clients, this exception may not affect clients' candor.

general principle, "privileges obstruct the search for truth,"[50] and consequently they should apply only when it is "necessary to achieve its purpose."[51] In criminal cases particularly, one crucial piece of evidence can make the difference between guilt and innocence, and privileges violate "the fundamental principle that 'the public . . . has a right to every [person's] evidence.'"[52] In extreme cases, it can mean the difference between life and death. For example, an innocent criminal defendant may be unjustly found guilty of murder because the court excludes a deceased client's confession to the crime. In other cases, the attorney-client privilege can serve to shield the guilty from the criminal justice system. In this case, the stakes were not as high as in the previously mentioned example, but Mr. Hamilton's notes nevertheless might have included information implicating or exonerating administration officials.

Yet the Court insists that clients' speech may be chilled and they may not speak candidly if the law allows the attorney-client privilege to expire upon death of the client in criminal cases. But is that really true as an empirical matter? To paraphrase the Court's opinion, this is speculation, maybe plausible speculation, but speculation nonetheless.[53] As the dissent noted, this posthumous exception would apply only in criminal cases, and thus any disclosure after death should not affect a client's candor because "the risk that the client will be held criminally liable has abated altogether."[54] A dead man can no longer be punished by the criminal justice system.

But the Court insists that reputational concern for themselves or their families and friends may deter clients from being completely forthright with their attorney. This argument seems questionable.[55] As one legal scholar opined, "to hold that in all cases death terminates privilege . . . could not to any substantial degree lessen the encouragement for free disclosure which is

50. Branzburg v. Hayes, 408 U.S. 665, 690 n.29 (1972).

51. Fisher v. United States, 425 U.S. 391, 403 (1976).

52. University of Pennsylvania v. EEOC, 493 U.S. 182, 189 (1990) (quoting Trammel v. U.S., 445 U.S. 40, 50 (1980) (quoting U.S. v. Bryan, 339 U.S. 323, 331 (1950))).

53. *See Swidler & Berlin*, 118 S. Ct. at 2088.

54. *Id.* at 2089 (O'Connor, J., dissenting).

55. *See, e.g.*, MUELLER & KIRKPATRICK, *supra* note 2. ("A rule requiring occasional disclosure in this setting would not seriously undercut the utilitarian basis of the privilege . . . .").

the purpose of the privilege."[56] For most criminal clients, the largest fear by far is likely to be the very real specter of criminal sanctions. The thought that some personal but noncriminal information may be revealed possibly decades later when the client dies is likely to be an ancillary concern. Indeed, "[i]n the sort of high-adrenalin situation likely to provoke consultation with counsel," it is doubtful that "these residual interests will be very powerful . . . ."[57] The Court's opinion presupposes that when a client is faced with the imminent threat of incarceration, he will compromise his legal case to avoid the potential revelation of embarrassing information years later. Furthermore, even if a prosecutor seeks and receives the evidence, it might never be revealed to the public because it is still subject to rules of evidence and grand jury secrecy.[58]

In other words, if we are to accept the Court's argument, we have to assume that (1) attorneys regularly inform clients of the rules of confidentiality; (2) clients understand the scope of the confidentiality;[59] (3) clients care about their post-mortem reputation; (4) clients, while facing imminent potential criminal sanctions, will think years ahead in the future and worry about possibly embarrassing information being revealed after their death; (5) this fear of reputational harm will actually compel clients to consciously decide to be less than candid to their attorneys and thus compromise their potential criminal case; and (6) clients deem that the detrimental information will likely be released to the public, despite the rules of evidence and the grand jury secrecy. For most clients, it seems highly unlikely that they will be less candid because of some remote possibility that personal information may be divulged after their death. As the American Law Institute averred, "[p]ermitting such [posthumous] disclosure would do little to inhibit clients from

56. MCCORMICK, *supra* note 2.

57. *In re Sealed Case*, 124 F.3d at 233.

58. *See id.* at 235 ("To the extent that the [district] court finds an interest in confidentiality, it can take steps to limit access to these communications in a way that is consonant with the analysis justifying relaxation of the privilege."). *See also id.* at 235 n.6 ("In considering the interest in confidentiality, the court may in appropriate circumstances protect innocent third parties from disclosure as well. Here, of course, Federal Rule of Criminal Procedure 6(e)'s provision of secrecy for grand jury proceedings gives additional protection.").

59. Studies suggest that most attorneys do not tell their clients the rules of confidentiality, and most clients do not understand the scope of the rules. *See* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 365, 382-83 (1989).

confiding in their lawyers." [60] This is not to say that some clients will not be chilled. Definitive empirical evidence is lacking, but logic and intuition at least make the Court's ominous predictions of diminished legal advocacy questionable.

Moreover, it is not even clear that non-criminal reputational concerns should warrant attorney-client privilege protection. Only clients who are planning on perjuring themselves will be chilled by disclosure; truthful clients or those invoking their Fifth Amendment privilege will not be inhibited because they would have had to reveal such personal information to the court if they were still alive. To put it another way, a truthful client will simply tell his attorney the same information that he will tell to the court under oath, and there will be no chilling effect because the truth would "be revealed anyway . . . from the client directly in discovery or testimony."[61] The Court's contention that the privilege is broader than the Fifth Amendment and protects reputational harm from disclosure is not entirely correct. For example, the testamentary exception to the attorney-client privilege could potentially allow posthumous disclosure of embarrassing information like a provision in a will for an illegitimate child or a mistress. Under current attorney-client privilege law, such posthumous disclosure would be allowed, even if it harms the reputation of the client.[62]

Finally, there are already numerous exceptions to the attorney-client privilege, yet they do not seem to have deterred candor. The privilege, for example, does not apply to clients seeking business or personal advice.[63] It also does not apply to communication involving the furtherance of crime or fraud.[64]

60. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmt. d (1996).

61. Fischel, *supra* note 2, at 26.

62. This example also rebuts the Court's attempt to distinguish the testamentary exception and the proposed posthumous disclosure exception. The Court had argued that the testamentary exception was different because its rationale was to further the client's intent, whereas the proposed posthumous disclosure is not. *See Swidler & Berlin*, 118 S. Ct. at 2086. But in the example of a will provision for an illegitimate child or mistress, the client may not have wanted such information to be disclosed, yet the law allows it.

63. *See* MCCORMICK, *supra* note 2, §88, at 322-24.

64. *See* United States v. Zolin, 491 U.S. 554, 562-63 (1989). This is the "crime-fraud exception." Similarly, ethical rules dictate that a lawyer cannot allow a client to commit perjury. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1996).

The privilege normally does not cover attorney fee information, either.[65] Additionally, an attorney may disclose confidential information as self-defense in a suit brought against him by his client or even a third party.[66] Or if a client does not pay his attorney and they become embroiled in a legal suit, the privilege also expires.[67] And, of course, there is the previously discussed testamentary exception. Furthermore, California's Evidence Code allows the attorney-client privilege to be pierced posthumously once the deceased client's estate is finally distributed, yet few people will say legal advocacy in the Golden State has been marred or diminished by this provision.[68] These exceptions have not apparently chilled client communication because clients may not place as high a premium on the privilege as lawyers do.[69] As one legal commentator put it, "[t]he privilege has intricate and unexpected limitations of which we may be certain almost no client has ever been warned."[70] In fact, one study showed "that lawyers overwhelmingly do not tell clients of confidentiality rules."[71] None of this is to suggest that the privilege does not serve its purpose; rather, it is to show that intuitively it seems that the Court may have overstated the supposed "chilling" effect for most people.

Although the posthumous exception may not likely affect the candor of most clients, such an exception can have a profound impact on people who expect to die soon, whether because of illness, old age, or suicide. This group's speech will likely be

65. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 60, § 119 cmt. g (1996).

66. *See* Erick S. Ottoson, Note, *Dead Man Talking: A New Approach to the Post-Mortem Attorney-Client Privilege*, 82 MINN. L. REV. 1329, 1343 (1998).

67. A recent example of this involved Paula Jones and her original attorneys. Her attorneys sued Ms. Jones to collect their legal fees, and revealed to the public the advice they gave to her. *See The Truth about Attorney-Client Privilege*, WASH. TIMES, June 15, 1998, at A20.

68. *See* CAL. EVID. CODE ANN. §954 and cmt. (West 1995) (explaining that "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged").

69. *See* Fischel, *supra* note 2, at 3 (arguing that the "legal profession, not clients or society as a whole, is the primary beneficiary" of the privilege); *see also* Note, *Functional Overlap Between Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1232 (1962) (noting that lawyers are more likely than non-lawyers to believe that the privilege encourages client candor).

70. Marvin Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 COLO. L. REV. 51, 59 (1982).

71. Zacharias, *supra* note 59, at 382.

chilled by the prospect of posthumous disclosure because the fear of criminal punishment is at its nadir, while reputational concerns are at their maximum. First, a person likely to die will be particularly concerned how his peers and family remember him[72] (whereas for most other people, post-mortem reputation will be too distant in the future to substantially affect their candor calculus). Second, he will also be more likely to be concerned with the reputation and well-being of his friends and family, and will fear posthumous disclosure of information detrimental to them. On the other hand, people who do not expect to die soon will be less concerned about other people's reputation and instead care more about avoiding the immediate threat of criminal punishment. Third, the specter of criminal sanctions will not likely influence a person who expects to die. In turn, this lack of fear of criminal punishment will only heighten the client's reputational interests, since that will be the client's main concern. Indeed, a person who expects to die soon will likely consult his attorney to resolve business and personal issues. All of these factors will mean that a person who expects to die will likely be chilled if the Court recognized a posthumous exception.

Vince Foster is a salient example. He seems to have been particularly concerned about his and his friends' reputation. To Foster, his "public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance."[73] Foster denied any wrongdoing in a suicide note, and lamented that "ruining people is considered sport" in Washington.[74] The note also expressed Foster's concern for others' reputations: he rued that "the public will never believe the innocence of the Clintons and their loyal staff."[75] If the attorney-client privilege did not extend beyond death for Vince Foster, he may have never even spoken to his attorney.

In short, the speech of people who expect to die will likely be chilled by a posthumous exception to the attorney-client

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72. The Western tradition has especially placed a premium on personal reputation. *See, e.g.*, *Proverbs* 22:1 ("A good name is rather to be chosen than great riches.").

73. KENNETH STARR, REPORT ON THE DEATH OF VINCENT W. FOSTER, JR., BY THE OFFICE OF INDEPENDENT COUNSEL, IN RE: MADISON GUARANTY SAVINGS & LOAN ASSOCIATION 98 (1997).

74. Peter Baker, *One Death Altered Path of Presidency; Five Years later, Clinton White House Still Facing Aftermath of Foster Suicide*, WASH. POST, July 20, 1998, at A1.

75. *Id.*

privilege, while disclosures by those who do not expect to die soon will not likely be affected by such an exception. An optimal rule would thus extend privilege beyond death for only those people who expect to die. How do we determine who will be likely to die soon? Some cases, like the facts of this case, will be relatively clear. But for most other cases, trying to answer that question will open up a Pandora's box and force the courts to engage in medical, psychological, and epidemiological issues that they are ill-equipped to handle. For example, is someone who is diagnosed with liver cancer but is undergoing chemotherapy considered "likely to die"? What if the person has been battling cancer for several years? Are certain cancers—say, lung cancer—considered more malignant than other forms? Is someone who has contracted HIV but not AIDS considered likely to die? What if he has lived with HIV for ten years without developing AIDS? And what about old age? Is a seventy year old man considered likely to die? A seventy-five year old woman? Even the seemingly clear-cut issue of suicide can often be murky as questions arise whether it was suicide or accident. In fact, Vince Foster's death, which seems to be quite obviously a suicide, has been disputed—and not by just fringe conspiracy theorists.[76]

It is very difficult legally to draw a clear, bright-line rule for whether someone should be included in the "likely to die" subset exception. Courts generally are neither trained nor equipped to make accurate and certain decisions on such issues.[77] Courts would be taking wild stabs in the dark in trying to determine medical and epidemiological issues of whether someone is "likely to die." To allow a court to determine this fact will "introduce[] substantial uncertainty into the privilege's

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76. Christopher Ruddy wrote a book with copious evidence attacking the forensic and medical evidence. *See* CHRISTOPHER RUDDY, THE STRANGE DEATH OF VINCE FOSTER (1997). What is most surprising is that it was published by a large, respectable publishing company, The Free Press. And William Sessions, the former director of the F.B.I., even offered a glowing blurb on the jacket cover: "Christopher Ruddy has detailed a significant array of facts and issues involving the death of Mr. Foster. His work is serious and compelling. While enduring great criticism, he has tenaciously argued a persuasive case that the American public has not been told the complete facts of the case . . . . His reporting raises serious concerns about the handling of the Foster case. It is legitimate to question the process employed by authorities to make their conclusions."

77. *See, e.g.*, Community Nutrition Inst. v. Young, 773 F.2d 1356, 1363 (D.C. Cir. 1985) (admitting that the "judiciary is ill-equipped" to analyze scientific data).

application"[78] and "eviscerate the effectiveness of the privilege."[79] Indeed, an "uncertain privilege is little better than no privilege at all."[80] In fact, it would be no more clear than the Court of Appeals' amorphous balancing test that the Court eschewed. It would also give each judge an inordinate amount of discretion, leading to non-uniform application. In turn, this will lead to a compendium of often conflicting privilege law. In short, a law without clear guidelines is no law at all. As unsatisfying as it may be, the Court's relatively absolute application of the privilege may have been the only way to ensure legal protection for people who are likely to die, and to avoid the thorny questions of determining who is "likely to die." The facts of this particular case powerfully demonstrate this point.

Just as important, the Court's decision was prudent in light of the inconclusive empirical evidence. The Federal Rules of Evidence state that privilege cases should be decided "by the principles of common law . . . in light of reason and experience."[81] This Note has argued that the Court overstated the chilling effect—from a logical and intuitive sense (in light of "reason"). But empirical evidence ("experience") on the actual effect of the privilege on attorney-client communication is sparse and does not decisively support one side or the other, although it does cast some doubt on the Court's flat presumption of the privilege's efficacy. It seems imprudent to overturn several hundred years of legal precedent without having any substantial, conclusive empirical evidence to the contrary. Of course, if future studies undercut the Court's presumption about the efficacy of the privilege, as this Note suggests it would, then the result might be different. But until then, the Court rightfully paid deference to the longstanding tradition of the attorney-client privilege. As Professor Wigmore noted, the attorney-client privilege is the "oldest of the privileges for confidential communications" and dates back to the reign of Elizabeth I.[82] And prior to this litigation, only one

78. *Swidler & Berlin*, 118 S. Ct. at 2087.
79. Jaffee v. Redmond, 518 U.S. 1, 17 (1996).
80. Upjohn Co. v. United States, *supra*, 449 U.S. 383, 393 (1981).
81. FED. R. EVID. 501
82. WIGMORE, *supra* note 3.

state court had recognized a posthumous exception.[83] In fact, the attorney-client privilege has been described as "the kingpin of privileges" and "the standard by which concepts of confidentiality, waiver, and general standards of fairness are measured for other privileges developing and evolving in the courts."[84] The fact that virtually all the state and federal courts had consistently ruled to maintain this privilege should not be so lightly dismissed.[85] As Justice Cardozo said, "[w]e must not throw to the winds the advantages of consistency and uniformity to do justice in the instance."[86] Instead, courts should try to abide by "the precedent and custom on the long and silent and almost indefinable practice of other judges [established] through centuries of the common law."[87]

In the final post-mortem analysis of the Court's decision, its ruling was an imperfect, but probably the best, solution.

Kenneth K. Lee

83. *See* Cohen v. Jenkintown Cab Co., 357 A.2d 689 (1976). This does not include the Court of Appeals' decision that was overturned by the Court.

84. The Evidence Project: Proposed Revisions to the Federal Rules of Evidence (Thomas C. Goldstein, ed.), 171 F.R.D. 330, 346 (1997).

85. As mentioned previously, the California Evidence Code does allow a posthumous exception to the attorney-client privilege. *See* CAL. EVID. CODE ANN. § 954 (West 1995). That does not signify, however, that the Court should thus recognize it. In fact, it may suggest quite the opposite: the Court should defer and let each state through its democratic process create an exception to the common law.

86. David A. Nelson, *The Nature of the Judicial Process Revisited*, 22 N. KY. L. REV. 563, 571-72 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 103 (1921)).

87. *Id.*

IS HIV REALLY A "DISABILITY"?: THE SCOPE OF THE AMERICANS WITH DISABILITIES ACT AFTER *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998).

Congress enacted the Americans with Disabilities Act of 1990 ("ADA")[1] to protect individuals with disabilities from discrimination in such critical areas as employment, housing, public accommodations, education, transportation, and communication.[2] The ADA defines disability as "a physical or mental impairment that substantially limits . . . [a] major life activit[y] . . . ."[3] According to this definition, suffering from a physical or mental impairment does not render an individual conclusively disabled. Rather, the individual must show that the impairment "substantially limits a major life activity."

Last term, in *Bragdon v. Abbott*,[4] the Supreme Court offered its first interpretation of the ADA's definition of "disability," an interpretation which drastically expanded the scope of what constitutes a "major life activity" under the ADA. The Court held that asymptomatic HIV infection is a "disability" under the ADA because it "substantially limit[s]" the "life activity of procreation . . . ."[5] The Court further considered whether requiring a dentist to treat an individual with HIV presents a "direct threat" to the "health and safety of others," thus qualifying the ADA's protection.[6] The Court failed to reach a conclusion on this issue, remanding the decision with

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1. 42 U.S.C. § 12101 et seq. (1994).

2. *See id.* § 12101(a)(3). Section 12101 addresses congressional findings that over 43 million Americans have physical or mental disabilities and that these individuals compose a "discrete and insular minority" who have "been faced with restrictions and limitations . . . and [who have been] relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals . . . ." *Id.* § 12101(a)(1), (7). Through the ADA, Congress sought to provide legal remedy for a group that has "often had no legal recourse to redress such discrimination." *Id.* § 12101(a)(4).

3. *Id.* § 12102(2)(A). The statute also covers individuals who have a "record of" or are "regarded as" having such an impairment. *Id.* § 12102(2)(B), (C).

4. 118 S. Ct. 2196 (1998).

5. *Id.* at 2207.

6. *Id.* at 2210 (citing 42 U.S.C. § 12182(b)(3) (1994)). If a "direct threat" is present, the dentist could refuse treatment notwithstanding the protection offered by the ADA. *See id.* The ADA defines a direct threat to be "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." 42 U.S.C. § 12182(b)(3) (1994).

instructions to the United States Court of Appeals for the First Circuit.[7] Although *Bragdon's* goal of protecting HIV-infected individuals from discrimination is laudable, the majority's reasoning unjustifiably expands the scope of the ADA and establishes a doctrine that is both over-inclusive and under-inclusive.

Sidney Abbott, a woman infected with HIV but manifesting no outward symptoms of the virus, went to dentist Randon Bragdon's office in Bangor, Maine, for a routine checkup.[8] On a patient registration form, she disclosed her HIV status.[9] After Dr. Bragdon discovered that she had a cavity, he informed her that he would not fill the cavity in his office, but instead offered to treat her at a hospital, pursuant to his infectious disease policy.[10] He stated that he would not charge an additional fee for his services, though she would have to pay any cost for using the hospital's facilities.[11] Ms. Abbott sued Dr. Bragdon under state law and Section 302 of the Americans with Disabilities Act,[12] alleging discrimination on the basis of her disability as an HIV-positive individual.[13]

The United States and the Maine Human Rights Commission intervened as plaintiffs.[14] The plaintiffs and the defendant both filed cross-motions for summary judgment, and the United States District Court for the District of Maine ruled in favor of the plaintiffs, holding that respondent's HIV infection satisfied the ADA's definition of disability and that the defendant raised no genuine issue of material fact as to whether respondent's HIV infection would have posed a direct threat to the health or safety of others during the course of

7. Because the Court did not reach a definitive ruling on this issue, this note will focus primarily on whether HIV infection should be considered a disability under the ADA and not on the "direct threat" issue in depth.

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

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.* Respondent Abbott relied on Section 302 of the ADA which provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation." 42 U.S.C. § 12182(a) (1994).

The term "public accommodation" is defined to include the "professional office of a health care provider." *Id.* § 12181(7)(F).

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

14. *See id.*

dental treatment.[15] The First Circuit affirmed on both counts.[16]

In a five-to-four opinion, the United States Supreme Court affirmed the decision that HIV infection constitutes a disability under the ADA and remanded on the issue of whether the ADA's protection in this case is qualified because its application would pose a direct threat to the health and safety of others.[17] Writing for the majority,[18] Justice Kennedy found that HIV infection satisfies the ADA's statutory definition of disability. He stated that it is (1) "a physical impairment" that (2) "substantially limits" a (3) "major life activity."[19] Justice Kennedy's opinion relied almost exclusively on regulatory and judicial interpretations of the Rehabilitation Act of 1973[20] and the Fair Housing Amendments Act of 1988,[21] statutes from which the ADA's definition of disability was drawn almost verbatim.[22] He argued that Congress's repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with these pre-existing regulatory and judicial interpretations.[23]

Examining step-by-step how HIV infection would fit under the ADA definition of disability, the Court's opinion began by inquiring whether HIV infection constitutes "a physical impairment."[24] Justice Kennedy pointed to regulations issued by the Department of Health, Education and Welfare—the regulations that interpreted the Rehabilitation Act.[25] These regulations define "physical or mental impairment" to include

> any physiological disorder or condition, cosmetic

15. *See id.* (citing Abbott v. Bragdon, 912 F. Supp. 580, 584-91 (D. Me. 1995)).

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

17. *See id.* at 2213.

18. Justice Kennedy was joined by Justices Stevens, Souter, Ginsburg, and Breyer.

19. *Bragdon*, 118 S. Ct. at 2207.

20. 29 U.S.C. § 706(8)(B) (1994).

21. 42 U.S.C. § 3602(h)(1) (1994).

22. *See Bragdon*, 118 S. Ct. at 2202.

23. *See id.* Justice Kennedy referred to an even more compelling reason to apply the Rehabilitation Act regulations to the ADA. He pointed to § 12201(a) of the ADA, which directs that "[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." *Id.* (citing 42 U.S.C. § 12201(a) (1994)).

24. *Bragdon*, 118 S. Ct. at 2202.

25. *See id.* at 2203. When the Justice Department took over responsibility for implementation and enforcement of the Rehabilitation Act in 1980, it adopted those regulations almost verbatim. *See id.*

> 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. . . .[26]

The commentary accompanying these regulations contained a list of representative disorders including cancer, heart disease, and diabetes, but failed to mention HIV infection or AIDS. Justice Kennedy explained this omission by noting that the regulation and its commentary were enacted before HIV was identified as the cause of AIDS.[27] His opinion then examined in detail the mechanics of HIV infection: how it begins to invade the body, how it progresses, and how it eventually develops into AIDS. Through this description, Justice Kennedy established that there is no latent phase to the disease.[28] In particular, his majority opinion stressed the fact that during the asymptomatic phase (which lasts on average from seven to eleven years), the virus is migrating from the circulatory system to the lymph nodes.[29] As a result of these factual findings, the Court concluded that the virus has a "constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection"[30] and thus clearly satisfies the regulatory definition of a physical impairment.[31]

The Court next addressed whether this physical impairment affects a major life activity because "[t]he statute is not operative, and the definition not satisfied, unless the impairment affects a major life activity."[32] Respondent Abbott's claim was that her HIV infection placed a substantial limitation on her ability to reproduce and that reproduction is a major life activity.[33] The Court had "little difficulty" finding that reproduction is a major life activity and cursorily explained its

26. 45 C.F.R. § 84.3(j)(2)(i) (1998), *quoted in Bragdon*, 118 S. Ct. at 2205.

27. *See Bragdon*, 118 S. Ct. at 2203. *See also infra* note 77.

28. *See id.* at 2203-04.

29. *See id.* at 2204.

30. *Id.* at 2204.

31. *See* 45 C.F.R. § 84.3(j)(2)(i) (1998).

32. *Bragdon*, 118 S. Ct. at 2204.

33. *See id.* at 2204-05. The Court limited its inquiry to respondent Abbott's claim that reproduction constitutes a major life activity although it noted, in dicta, that HIV's impact on so many phases of life could have made many major life activities relevant to its examination. *See id.*

reasoning. Relying heavily on the First Circuit's statement that "[t]he plain meaning of the word 'major' denotes comparative importance . . . ,"[34] the majority held that "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself."[35] Referring to regulations issued to implement the Rehabilitation Act, [36] the Court held that if working and learning are major life activities, reproduction should surely be as well.[37]

Having established that HIV is "a physical impairment" and that it impacts reproduction, which the decision construed as a "major life activity," Justice Kennedy turned to the final factor in the ADA definition to address whether HIV "substantially limits" the major life activity of reproduction.[38] The majority decided that, even though conception and childbirth are not impossible for an HIV victim, they are "substantially limited" by the risk of transmission of HIV to the child during pregnancy.[39] The Court thus concluded that HIV infection satisfies all three prongs of the definition of disability under the ADA: it is "a physical impairment" which "substantially limits" the "major life activity" of reproduction.[40]

The majority next presented several justifications for its decision, observing that several current agency and lower court interpretations support the *Bragdon* holding. The Court first addressed interpretations of the Rehabilitation Act and the Fair Housing Act, statutes from which Congress drew the ADA's definition of disability. The majority maintained that the ADA was enacted with this background of agency and case law in mind and that Congress therefore intended for the ADA definition to be interpreted in keeping with agency and lower court interpretations of these statutes. Quoting extensively

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34. *Id.* at 2205 (citing Abbott v. Bragdon, 107 F.3d 934, 939-40 (1997)).

35. *Id.*

36. These regulations define working and learning as illustrative major life activities. *See id.* (citing 28 C.F.R. § 84.3(j)(2)(ii) (1998)). *See also infra* pp. 12-13.

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

38. *See id.* at 2205-06.

39. *Id.* at 2206. Based on scientific and medical studies, the Court determined that the risk of transmission to the child is approximately twenty-five percent on average, but that it could be reduced to eight percent with antiretroviral therapy. The Court did not decide which of the percentages was more appropriate to consider when determining whether the major life activity of reproduction is substantially limited. *See id.* and *infra* note 93 and accompanying text.

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

from a 1988 opinion issued by the Office of Legal Counsel of the Department of Justice,[41] which maintained that the Rehabilitation Act should protect symptomatic and asymptomatic HIV-infected individuals from discrimination, the majority reasoned that Congress intended to give this position its active endorsement.[42] The Court further noted that "every [lower] court which addressed the issue [of HIV infection as a handicap] before the ADA was enacted . . . concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of a handicap."[43]

Justice Kennedy maintained that agency interpretations of the ADA, though not as thorough, also supported the majority opinion. He noted that the Justice Department, after adopting a Rehabilitation Act regulation verbatim, added "'HIV infection (symptomatic and asymptomatic)' to the list of disorders constituting a physical impairment."[44] The decision also cited an opinion of the EEOC[45] that had concluded that "an individual who has HIV infection (including asymptomatic HIV infection) is an individual with a disability."[46]

Finally, the Court turned to Dr. Bragdon's contention that, even if HIV infection is a disability under the ADA, the mandate not to discriminate might be qualified by what is referred to as the "direct threat" provision of the ADA. This ADA provision states that

> [n]othing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others.[47]

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41. *See* Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12. Op. Off. Legal Counsel 209 (1988) [hereinafter Application of Section 504].

42. *See Bragdon*, 118 S. Ct. at 2207-08.

43. *Id.* at 2208.

44. *Id.* at 2209. Note that the regulation accepts HIV infection only as a "physical impairment," which is just one part of the ADA "disability" definition. It does not establish the other requirements for a finding of disability—that HIV substantially limits a major life activity.

45. The Equal Employment Opportunity Commission is an agency authorized to administer parts of the ADA as it applies to employment. *See* 42 U.S.C. § 12111-17 (1994).

46. *Bragdon*, 118 S. Ct. at 2209 (citing EEOC Interpretive Manual § 902.4(c)(1), Definition of the Term "Disability," at 902-21 (March 1995)).

47. 42 U.S.C. § 12182(b)(3) (1994).

To find a "direct threat," there must be "a significant risk to the health or safety of others."[48] In *School Board of Nassau County v. Arline*,[49] the Court established that this risk assessment must be done from the standpoint of the person refusing the treatment or accommodation and must be based on medical or other objective evidence.[50] The *Bragdon* opinion further ruled that the assessment should not defer to individual judgments, even those of health care professionals such as Dr. Bragdon.[51] Although the majority agreed with the Court of Appeals that Dr. Bragdon did not present any objective, medical evidence showing that it would be safer to treat respondent Abbott in a hospital, it remanded on this issue because of a concern that the Court of Appeals may have placed mistaken reliance on the 1993 CDC Dentistry Guidelines and the 1991 American Dental Association Policy on HIV.[52] The Court expressed its opinion that the CDC Guidelines were meant only to recommend universal precautions as to the best way to combat the risk of HIV transmission; they do not assess the level of risk and should not be considered definitive on the present issue. Moreover, the Court warned that the American Dental Association is not a public health authority and its policy might address only the ethical obligations of dentists to treat individuals; it does not indicate the statistical likelihood of HIV transmission. The majority remanded this "direct threat" issue to the Court of Appeals, instructing them not to rely so heavily on the two reports but to focus instead on the testimony of health experts.[53]

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48. *Bragdon*, 118 S. Ct. at 2210 (citing School Board of Nassau County v. Arline, 480 U.S. 273, 287 and n.16 (1987) and 42 U.S.C. § 12182(b)(3) (1994)) ("Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists, but whether it is significant."). 42 U.S.C. § 12182(b)(3) also defines "direct threat" as a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." *Id.*

49. 480 U.S. 273 (1987).

50. *See Bragdon*, 118 S. Ct. at 2210 (citing *Arline*, 480 U.S. at 288).

51. *See id.*

52. *See id.* at 2211.

53. *See id.* at 2211-13. The Court remanded because it did not have briefs and arguments directed to the entire record of the case and believed it did not have enough evidence of this expert testimony. The Court, however, did consider briefly petitioner's main points: (1) that the use of high-speed drills and surface cooling with water creates a risk of airborne HIV transmission and (2) that CDC had identified seven dental workers with possible occupational transmission of HIV. The Court expressed its opinion that the evidence of these two claims may not be established well enough to

Justice Stevens wrote a brief concurrence, joined by Justice Breyer, stating that he agreed with the majority that HIV falls within the ADA definition of disability, but that he would prefer an outright affirmance on the direct threat issue.[54] Justice Ginsburg also wrote a brief concurrence stating that she believed that "[n]o rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible."[55]

Chief Justice Rehnquist, joined by Justices Scalia, Thomas, and O'Connor,[56] concurred in the judgment in part and dissented in part. The Chief Justice began his opinion by finding fault with the Court's failure to make an individualized inquiry as to whether HIV substantially limited respondent's decision not to reproduce.[57] The ADA could not be clearer, he reasoned, on the requirement that the disability determination must be made "with respect to an individual."[58]

Chief Justice Rehnquist also dissented from the finding that reproduction constitutes a "major life activity." He pointed to the same Rehabilitation Act regulations as did the majority—regulations which contain a representative list of several major life activities: "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[59] Agreeing with the majority that this list "is illustrative, not exhaustive," he nevertheless criticized the majority for failing to demonstrate why reproduction should be considered a major life activity in the same sense as the listed functions.[60] The dissenters disagreed

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carry Petitioner's claim that treatment would present a "direct threat" to the health and safety of others. *See id.* at 2212.

54. *See id.* at 2213 (Stevens, J., concurring).

55. *Id.* at 2213-14 (Ginsburg, J., concurring).

56. Justice O'Connor joined Chief Justice Rehnquist's opinion as to Part II only (the direct threat issue) but wrote her own dissent concerning whether HIV should be considered an ADA disability. *See id.* at 2217-18.

57. *See id.* at 2214-15. (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

58. *Id.* at 2214 (quoting 42 U.S.C. § 12102 (1994)). Chief Justice Rehnquist also pointed out that this individualized test would have been very hard to satisfy in the present case. When respondent Abbott was asked whether her HIV infection had in any way impaired her ability to carry out any of her life functions, she had answered "No." *See id.* at 2215.

59. 45 C.F.R. § 84.3(j)(2)(ii) (1998), *cited in Bragdon*, 118 S. Ct. at 2215.

60. *Bragdon*, 118 S. Ct. at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

with the majority's definition of "major" as being "central to the life process itself."[61] The Chief Justice pointed out that all the other activities that have been interpreted to be "major life activit[ies]" under the ADA are repetitively performed and essential to the day-to-day existence of an individual.[62] Reproduction is of a different nature altogether.[63]

Moreover, the Chief Justice explained that the inclusion of physiological disorders affecting the reproductive system[64] in the regulations' definition of "physical impairment" does not necessarily indicate that reproduction is a major life activity. He pointed out that there are numerous disorders of the reproductive system that are so painful that they limit a woman's ability to walk and work.[65] His opinion determined that those with HIV infection are still physically able to engage in sexual intercourse, give birth to a child, and perform the manual tasks necessary to rear a child. The dissenters therefore concluded that the respondent failed to demonstrate that any of her major life activities were substantially limited by her HIV infection.[66]

With regard to the "direct threat" issue, the Chief Justice concurred with the decision to vacate the Court of Appeal's judgment, but his decision sought to further elucidate what he saw as the Court's "cryptic direction to the lower court."[67] Pointing to the statutory "direct threat" definition,[68] he, like the majority, suggested that the Court of Appeals should readdress whether treating the infected patient would pose "a significant risk to the health or safety of others."[69] His opinion disagreed, however, with the majority's direction to give special weight and authority to the views of public health authorities and pointed out that *Arline*[70] expressly declined to distinguish between the respect that should be given to "official" medical

61. *Id.* at 2215 (quoting opinion of Kennedy, J. at 2205-06).

62. *Id.* at 2215.

63. *See infra* note 81 and accompanying text.

64. *See id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing 28 C.F.R. § 36.104 (1998)).

65. *See id.*

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

67. *Id.* at 2216.

68. *See supra* note 47 and accompanying text.

69. *Bragdon*, 118 S. Ct. at 2216 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing 42 U.S.C. § 12182(b)(3) (1994)).

70. 480 U.S. 273 (1987).

judgment and to "private" medical judgment, such as that of Dr. Bragdon.[71] The Chief Justice's opinion gave the lower court some guidance as to how he believed they should rule on the issue. His opinion stated that "it is clear" that the evidence that petitioner Bragdon offered should be "more than enough evidence to avoid summary judgment on the 'direct threat' question."[72] In fact, he expressed the opinion that, given the severity of risk involved with contracting HIV (for instance, near certain death), it is likely that petitioner Bragdon will be able to prevail on the "direct threat" claim.[73]

Justice O'Connor's brief opinion, concurring in part and dissenting in part, agreed with the Chief Justice that (1) the claim of disability should be evaluated on an individualized basis and (2) that respondent had not proven that her asymptomatic HIV status substantially limited one or more of her major life activities. Justice O'Connor argued that since reproduction is not a major life activity, there is "no need to address whether other aspects of . . . family relationships not raised in this case could constitute major life activities; nor is there reason to consider whether HIV status would impose a substantial limitation on one's ability to reproduce if reproduction were a major life activity."[74]

The Court's ruling in *Bragdon* suffers from two principal defects. First, its interpretation expands the coverage of the ADA far beyond the plain meaning and intended scope of the statute. Second, by basing its decision on the "major life activity" of reproduction, the Court creates a new category of individuals whom it will consider disabled—a category that does not adequately protect those with HIV but instead is likely to be applied in both an over-inclusive and under-inclusive manner.

When Congress enacted the ADA, it acted against a

71. *See Bragdon*, 118 S. Ct. at 2216-17 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

72. *Id.* at 2217. The evidence Chief Justice Rehnquist referred to was (1) the Centers for Disease Control and Prevention's study identifying seven instances of possible transmission of HIV from patients to dental workers and (2) forty-two documented incidents of occupational transmission of HIV to healthcare workers other than dental professionals. *See id.* at 2217.

73. *See id.*

74. *Id.* at 2217-18. (O'Connor, J., concurring in the judgment in part and dissenting in part).

background where regulations had defined the term "major life activities" to include activities such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[75] In choosing to employ the term "major life activity," Congress implicitly adopted this interpretation of the term without seeking to amend it in any manner.[76] At the time of its consideration of the ADA, Congress was aware of the devastating impact HIV infection could have on a person's life.[77] In fact, the legislative history indicates that Congress heard testimony from the Presidential Commission on HIV, which recommended that Congress draft the ADA so that "[a]ll persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities . . . ."[78] Yet Congress apparently rejected this recommendation. The fact that HIV infection is nowhere mentioned in this bill may indicate that Congress felt that the established definition of "major life activities" would be sufficient to offer protection

75. 29 C.F.R. § 1630.2(i) (1998). This was how the regulations promulgated under the Rehabilitation Act of 1976 defined "major life activities." When Congress enacted the ADA, rather than providing an illustrative list of disabilities that would be covered by the ADA (a task that would unavoidably have turned to political considerations and interest groups' arguments), it chose to use a "multi-pronged definition that would sufficiently narrow the class of protected beneficiaries without leaving some disabilities off a magic list." Erica Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability,"* 73 WASH. L. REV. 575, 581 (1998). In constructing this multi-pronged definition, Congress chose to use terms employed by the Rehabilitation Act, terms that had been refined through a series of agency regulations and court decisions interpreting this Act.

76. Although this list only purports to be illustrative and not exhaustive, there is a definite thread among the listed activities, a thread that cannot be said to suggest the inclusion of reproduction as a major life activity. *See infra* pp. 112-14. The majority ignores the absence of activities such as reproduction in these regulations and instead relies definitively on an opinion prepared by the Office of Legal Counsel of the Department of Justice, an opinion stating that "we believe that it is reasonable to conclude that the life activity of procreation . . . is substantially limited for an asymptomatic HIV-infected individual." Application of Section 504, *supra* note 41, at 209, 216, *quoted in Bragdon*, 118 S. Ct. at 2207. Congressional reliance on this informal opinion letter would seem misplaced, however, in light of the fact that Congress rejected—by virtue of refusal to include HIV as a specific disability under the ADA—a recommendation by the Presidential Commission on HIV to include "all persons with symptomatic or asymptomatic HIV infection . . . as persons with disabilities." Brief for Petitioner at 26 n.18, Bragdon v. Abbott, 118 S. Ct. 2196 (1998) (quoting S. REP. NO. 101-116, at 19 (1989)). *See also infra* note 77 and accompanying text.

77. HIV was identified as the cause of AIDS by 1983. *See* F. Barre-Sinoussi et al., *Isolation of a T-lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome (AIDS)*, 220 SCI. 868 (1983); R.C. Gallo et al., *Frequent Detection and Isolation of Cytopathic Retroviruses (HTLV-III) from Patients with AIDS and at Risk for AIDS*, 224 SCI. 500 (1984); J.A. Levy et al. *Isolation of Lymphocytopathic Retroviruses from San Francisco Patients with AIDS*, 225 SCI. 840 (1984).

78. S. REP. NO. 101-116, at 19 (1989).

for those individuals with HIV infection that Congress intended to fall within the ADA's reach—those for whom established "major life activities" are affected by their HIV infection.[79]

As Chief Justice Rehnquist stated and as several Circuit Courts have recognized, including reproduction in the definition of "major life activity" disregards the fact that all the activities mentioned in the regulations[80] are "activities [that] are repetitively performed and essential in the day-to-day existence of a normally functioning individual."[81] A failure to

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79. There is no evidence that Congress intended for HIV infection to be exempt from the analysis that all other impairments are subject to: that a physical impairment must satisfy the definition of disability to trigger the ADA's protection. Congress must have realized that the ADA might fairly be interpreted *not* to cover *asymptomatic* HIV infection, and thus its failure to include any reference to HIV infection or to reproduction as a major life activity can reasonably be said, as the petitioner argues, to indicate that Congress could not reach a consensus on the issue. The petitioner stated that

> HIV infection is nowhere mentioned in the legislation passed after extensive debate. So visible was this issue that it is unreasonable to attribute the omission to a drafting error. The more likely explanation is that the ADA would not have passed if it contained a special provision that all asymptomatic persons with HIV are disabled.

Petitioner's Brief at 26 n.18, *Bragdon* (No. 97-156). The respondent, however, argues that this omission does not indicate an intention to exclude asymptomatic HIV infection from the coverage of the ADA. Respondent reasons that Congress's extensive discussion of HIV infection indicates that Congress realized that the statute would cover this impairment. Respondent stated that

> there was an extended debate about an amendment to exempt food-handling employees who were diagnosed with an infectious or contagious disease such as HIV. The amendment was defeated, but the debate makes clear that the legislators unanimously understood that the definition of disability covered all persons with HIV, not just those with symptoms.

Respondent Abbott's Brief at 34 n.43, *Bragdon* (No. 97-156).

The fact that there was discussion about specifically excluding from coverage food-handling employees with HIV does not indicate, as the respondent's brief argues, that "the legislators unanimously understood" that the statute would cover those with asymptomatic and symptomatic HIV infection. Rather, it may indicate instead that the legislators realized that the statute could potentially be interpreted to cover *some* individuals with HIV infection (those who were substantially limited in performing "major life activities" such as walking, seeing, hearing, etc.) and they wished to limit the statute's protective reach to exclude those who would be handling food.

80. The regulations contain an illustrative list of "major life activities." *See supra* note 75 and accompanying text.

81. *Bragdon*, 118 S. Ct. at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). *See also* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996); Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240, 243 (E.D. La. 1995) (stating that unlike other activities on the regulatory list, which people engage in every day, a person is not "called upon to reproduce throughout the day, every day" and also asserting that "[t]reating reproduction as a major life activity under the ADA would be a conscious expansion of the law . . . beyond the province of this Court"), *aff'd*, 79 F.3d 1143 (5th Cir. 1996)(no published opinion).

care for one's self, perform manual tasks, walk, see, hear, speak, breathe, learn, or work[82] clearly indicates that the individual must be disabled in some manner. Failure to reproduce, however, is not an activity performed by the majority of the population at any one time. Furthermore, plenty of perfectly healthy, well-functioning people choose not to reproduce.[83] Nevertheless, in an effort to find a way to fit asymptomatic HIV infection into the ADA definition, the *Bragdon* majority disregards the thread among these activities and instead adopts a new meaning of "major." Justice Kennedy states that "the plain meaning of . . . 'major' denotes comparative importance." Following this definition, the Court holds that "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself," and thus are clearly of comparative importance.[84]

Reproduction deviates from the thread of regulatory and other established "major life activities" in a second respect. An individual's inability to participate in these major life activities is the cause of discrimination in all other instances. The goal of the ADA is to prevent these inabilities from keeping the individuals out of mainstream American life.[85] In the case of an

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82. These activities are drawn from an illustrative list contained in regulations promulgated under the Rehabilitation Act. *See supra* note 75 and accompanying text.

83. The Brief for the Petitioner points out that many people undergo voluntary sterilization and queries whether these people will be considered disabled. "A person who intentionally blinds himself is just as disabled as one who was accidentally blinded. So why would a person who was voluntarily sterilized not be disabled?" Petitioner's Brief at 36, *Bragdon* (No. 97-156). This statement underscores the fact that society as a whole does not consider inability to reproduce as a disability. Society accepts that many would choose to voluntarily sterilize themselves, but considers those who voluntarily blind themselves to be mentally unstable. This is because when an individual blinds himself, he disables himself from participating in a major life activity, but those who choose to sterilize themselves are simply making a choice not to engage in reproduction. If reproduction were a major life activity, many people would be choosing to disable themselves each year through sterilization procedures, and society would be condoning it. Certainly this is not the case. Rather, it is quite clear that society does not consider reproduction a major life activity. Nor does it consider failure to reproduce to be a disability.

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

85. The ADA provides a list of privately owned public accommodations subject to Title III protection, including: hotels, restaurants, bars, other establishments serving food and drink, motion picture houses, stadiums, lecture halls, other places of public gathering, bakeries, grocery stores, clothing stores, other sales establishments, laundromats, gas stations, travel services, shoe repair services, other service establishments, terminals, other stations used for public transportation, museums, libraries, parks, other places of recreation, schools, senior citizen centers, gymnasiums, golf courses, and other places of exercise and recreation. *See* 42 U.S.C. § 12181(7) (1994). It is difficult to imagine how those with reproductive disabilities would need the

HIV-positive individual, it is not her inability (or limitation) in reproduction that is the basis for discrimination. The reason that an HIV-positive individual experiences discrimination is because she has a deadly and infectious disease which may present a direct threat to the health and safety of others in some circumstances. By establishing reproduction as a major life activity, the Court departs from a pattern that defines all other "major life activities." Reproduction is the only major life activity that leads to discrimination unrelated to the inability to engage in the specified major life activity. Most people do not know that the individual is limited in her ability to reproduce and the cause of their discrimination stems from other sources. Thus, the Court expands the definition of "major life activity" in yet another manner in an effort to extend the statute's reach to those with asymptomatic HIV infection.

In addition to extending the statute's reach by establishing a new definition for "major life activity," the *Bragdon* Court establishes a new interpretation of the term "substantially limits." Rather than requiring the limitation to be physical in nature, the Court finds that the limitation may be based on moral and social pressures. An HIV-infected individual does not have significant trouble becoming pregnant, nor has pregnancy been shown to accelerate disease progression in an HIV-positive mother.[86] A woman is not physically limited in her ability to engage in sexual intercourse, to give birth to a child, and to perform the manual tasks necessary to rear a child to maturity;[87] it is, rather, a moral choice which inhibits the

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ADA's protection to be able to go to such places in the mainstream of American life. It seems unlikely that Congress intended to protect those whose reproductive disorders do not lead to discrimination which would keep them out of museums, places of recreation, etc. *See* Petitioner's Brief at 29-30, *Bragdon* (No. 97-156).

86. *See* Petitioner's Brief at 5, *Bragdon* (No. 97-156) (citing Rachana Kumar et al., *Impact of Pregnancy on Maternal AIDS*, 42 J. REPRO. MED. 429, 433 (1997) ("[P]regnancy does not appear to accelerate [AIDS] disease progression, except in women with symptomatic infection or low CD4 counts."); F.D. Johnstone, *HIV and Pregnancy*, 103 BRIT. J. OBSTETRICS & GYNAECOLOGY 1184, 1185 (1996) (stating that "the survival time of patients with AIDS was not affected by pregnancy in a small study")).

87. *See Bragdon*, 118 S. Ct. at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The majority shows a willingness to extend the ADA's scope far beyond protecting those with physical limitations; it even suggests that *financial* limitations weigh toward applying ADA protection. The majority states that "[t]he decision to reproduce carries economic and legal consequences as well. There are added costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child who must be examined and, tragic to think, treated for the infection." *Id.* at 2206. Note that even the majority refers to engaging in reproduction as a *decision*, acknowledging that choice is involved here, as it is not with other major life activities.

HIV-positive mother from reproducing.[88] Because there is a risk of passing a deadly disease on to her child, she voluntarily decides not to engage in reproduction. HIV, however, does not foreclose a woman from engaging in the activity of reproduction. In fact, with proper prenatal care and antiretroviral treatment, the risk of passing HIV on to the child drops to eight percent[89]—a risk much smaller than that many women face concerning passing on genetic defects to their child, some of which are as deadly as HIV.[90]

Moreover, by focusing on how HIV can *potentially* influence reproduction, rather than on how it *actually* influences reproduction in light of mitigating measures, the Supreme Court condones a trend which seeks to further expand the "substantially limits" definition. In 1997, the Equal Employment Opportunity Commission (EEOC) issued guidelines to the Code of Federal Regulations that suggest that the degree of "substantial limitation" under the ADA should be assessed without reference to possible mitigating measures.[91] Adopting the EEOC's interpretation would drastically expand the "substantially limits" definition by offering ADA protection to individuals with controlled impairments even if they do not experience a substantial limitation in *any* major life activity. For example, an individual who is legally blind but whose vision is

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See infra note 88.

88. The CDC has clearly taken the stand that HIV positive women can and should have a choice concerning reproduction. It has instructed doctors counseling HIV positive women to give only "nondirective" counseling. Pregnancy is thus a choice for HIV infected women, just as it is for any other woman. *See U.S. Public Health Service Recommendations for Human Immunodeficiency Virus Counseling and Voluntary Testing for Pregnant Women,* MMWR MORBIDITY AND MORTALITY WKLY. REP., July 7, 1995, at 10. Other authors also criticize efforts to discourage HIV-positive women from bearing children. *See, e.g.,* Taunya Lovell Banks, *The Americans With Disabilities Act and the Reproductive Rights of HIV Infected Women,* 3 TEX. J. WOMEN & L. 57, 69-70 (1994) ("Although a few women are disabled in ways that limit their reproductive choices, the choices of most disabled women are restricted for nonmedical reasons. These 'women encounter substantial legal, medical, and familial resistance to their choice of motherhood.' . . . This reaction demonstrates the public view that a disability of either the mother or her potential offspring forecloses the possibility of procreation.") (footnote omitted).

89. *See supra* note 39.

90. *See* discussion *infra* pp. 118-19.

91. The EEOC guidelines in the appendix to the Code of Federal Regulations provide that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. app. § 1630.2(j) (1998).

correctable (a "mitigating measure") would have a disability.[92] By declining to invalidate the EEOC's position,[93] the Supreme Court tolerates this expansion of the "substantially limits" definition. Thus, in addition to its outright efforts to expand the definition of disability, the *Bragdon* Court permits the EEOC's far-reaching interpretation to stand.

Finally, the *Bragdon* decision expands the reach of the ADA by dismissing the need to make an individualized inquiry as to whether HIV "substantially limits . . . major life activities . . . ."[94] The Court did not inquire whether Ms. Abbott would engage in the activity of reproduction in the absence of HIV infection. In fact, when she was asked "whether her HIV infection had in any way impaired her ability to carry out any of *her* life functions, respondent answered 'No.'"[95] Chief Justice Rehnquist points out that Ms. Abbott "studiously avoid[ed]" asserting that reproduction is a major life activity for her and expressly argued that "the major life activity inquiry should not turn on a particularized assessment of the circumstances of this or any other case."[96] The Court apparently adopted Ms. Abbott's novel approach towards interpreting the ADA and found—without

92. *See* Harris, *supra* note 75, at 580. Harris envisions several circumstances where the ADA would protect individuals who do not experience a substantial limitation in any major life activity. She points out that

> an individual who can see perfectly with corrective lenses, but is legally blind without those lenses, has a disability. Similarly, an individual with hypertension who controls his conditions with oral medication has a disability because the hypertension could cause a stroke or death if unmedicated. According to the [EEOC] guideline, such individuals have disabilities even if they do not experience, and have never experienced, any limitation from their condition.

Id. (footnotes omitted).

93. Justice Kennedy did acknowledge that HIV's effect on reproduction could be lessened, but declined the opportunity to rule on the EEOC's position, stating that "[w]e need not resolve this dispute [whether mitigating measures should be considered in evaluating whether HIV substantially limits reproduction] in order to decide this case. . . . It cannot be said as a matter of law that an eight percent risk [the risk when antiretroviral therapy is considered] does not represent a substantial limitation on reproduction." *Bragdon*, 118 S. Ct. at 2206.

94. *Id.* at 2214 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting § 12102(2)(A) (1994)). Chief Justice Rehnquist argued that

> [t]he Act could not be clearer on this point: Section 12102(2) states explicitly that the disability determination must be made 'with respect to an individual.' Were this not sufficiently clear, the Act goes on to provide that the 'major life activities' allegedly limited by an impairment must be those 'of such individual.'

Id.

95. *Id.* at 2215 (emphasis added).

96. *Id.*

conducting an individualized inquiry—that HIV infection substantially limits an individual's major life activity of reproduction.[97] This approach clearly opens up the protection of the ADA to new applications and has already been recognized and applied by lower courts as a new and valid approach for interpreting the ADA.[98] Thus, the *Bragdon* decision further augments the reach of the ADA's protection by sending a message to other courts that the statute does not mandate an individualized inquiry as to whether the "major life activity" at stake is "substantially limited."[99]

The goal of the *Bragdon* Court is certainly commendable. HIV infection is a devastating problem in this country and Congress should take action to assure that individuals with HIV have access to proper medical and dental care.[100] However, the *Bragdon* decision may fall short of assuring this protection. Because the Court confines its discussion to the effect HIV infection has on a woman's ability to reproduce, it may be logically inferred that the decision should only extend to those who would otherwise be able to reproduce—women of child-bearing age.[101] If the Court's goal was to protect all HIV-infected individuals from discrimination, the ADA protection offered by the *Bragdon* decision is *under-inclusive*. Children,

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97. *See id.* at 2206.

98. In *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635 (2d Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3484 (U.S. Jan. 13, 1999) (No. 98-1164), the Court of Appeals for the Second Circuit indicated its belief that the *Bragdon* opinion partially discharged the requirement of an individualized inquiry under the ADA:

> We do not think that such major life activities as seeing, hearing, or walking are major life activities only to the extent that they are shown to matter to a particular ADA plaintiff. Rather, they are treated by the EEOC regulations and by our precedents as major life activities *per se*.

Id. at 642 (quoting *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 151-52 (2d. Cir. 1998)). Further, the *Colwell* Court stated that "[t]he Supreme Court adopted this approach in *Bragdon* when it determined that reproduction is a major life activity without considering whether reproduction was an important part of the respondent's life." *Id.* (citing *Bragdon*, 118 S. Ct. at 2204-05).

99. *Cf.* 42 U.S.C. § 12102 (1994) (requiring that the disability determination be made with respect to the individual) and *supra* note 94.

100. Routine health care is significantly more important to an individual with a debilitated immune system. *See* Michael Glick, *Intraoral Manifestations Associated with HIV Disease*, *in* DENTAL MANAGEMENT OF PATIENTS WITH HIV 153, 154-57 (Michael Glick ed., 1994).

101. Although the decision does not make an individualized inquiry as to whether respondent Abbott is limited in reproduction, it does rely on evidence that a woman's ability to reproduce is limited by HIV infection. The Court stated that "[f]or the statistical and other reasons we have cited, of course, the limitations on reproduction may be insurmountable here." *Bragdon*, 118 S. Ct. at 2206.

homosexual men, and women past child-bearing age are unlikely or unable to reproduce regardless of their HIV status, so the fact that they have HIV infection is not substantially limiting their participation in the activity of reproduction. The *Bragdon* decision expands the role of the ADA, but its holding does not clearly illustrate that all individuals with HIV infection should be considered disabled.[102] The scope of the ADA would have to be expanded even further to bring all HIV-infected individuals within its reach. Rather than having the Court over-extend the ADA in such a fashion as to disable it and open it up to many novel claims,[103] it would be far better for Congress to pass legislation which clearly prohibits discrimination against those with HIV infection.

The *Bragdon* decision also cripples the statute by opening it up to *over-inclusive* interpretations. By defining reproduction to be a "major life activity," the Court adopts a standard that may extend coverage to many individuals who are not clearly disabled. The *Bragdon* decision raises questions about whether all individuals who have difficulty reproducing are disabled under the ADA.[104] Should the ADA protect even those whose limitations arise in the natural course of life? In the aftermath of the *Bragdon* decision, a Minnesota woman has already brought suit that her early menopause entitles her to ADA disability protection.[105] Although the District Court for the District of Minnesota refused to consider her limitation in reproduction as a limitation of a major life activity,[106] this case illustrates how

102. The Court declined to address whether having HIV is a per se disability. *See id.* at 2207. Justice Kennedy's opinion, however, indicated that the majority of the Court might have liked to extend ADA protection to all HIV-infected individuals. He stated that, "[g]iven the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry." *Id.* at 2204-05. It seems unlikely, however, that the reasoning that the Court adopts, based on the major life activity of reproduction, will be interpreted to establish such an all-encompassing rule.

103. *See* discussion *infra* pp. 118-19.

104. *See, e.g.,* Katie Cook Morgan, *Should Infertility Be a Covered Disability Under the ADA?: A Question for Congress, Not the Courts*, 65 U. CIN. L. REV. 963 (1997). This article notes that pre-*Bragdon* courts were split on the issue of whether infertility was covered by the ADA. *See id.* at 969. The Court's holding that reproduction is a major life activity is likely to tip the balance toward protection of infertility as an ADA disability.

105. *See* McGraw v. Sears, Roebuck & Co., 21 F. Supp. 2d 1017, 1019-21 (D. Minn. 1998).

106. The district court held that although *Bragdon*

> found an inability to have children to be a cognizable ADA disability in an AIDS case.... the Court does not read *Bragdon* to suggest that every woman

the *Bragdon* decision has opened up the ADA to many disputable and novel claims based on its finding that reproduction is a major life activity.

Furthermore, the applicability of the *Bragdon* decision to genetic defects will become an increasingly important question as knowledge in the field of human genetics rapidly grows. Researchers are currently pursuing an international collaborative effort to map the entire human genome.[107] With this research comes discoveries of many genes which are linked to various diseases. There are genes linked to color blindness, colon cancer, Huntington's disease, Downs Syndrome, and other conditions. Accordingly, it is becoming increasingly possible for an individual to determine what dangers he or she has of passing on various diseases to his or her child. If an HIV-infected individual is considered disabled because she has an eight percent chance[108] of passing on HIV to her child, would an individual who has a greater likelihood of having a child with a deadly genetic disease also be considered disabled?[109] What if the parent will never get the disease but only has the possibility of passing it on to his or her children (as occurs with a recessive gene)? Some genetic diseases, such as Huntington's disease, are as equally devastating and deadly to the body as HIV infection. Huntington's disease often appears in early adulthood and inevitably causes death after an extended period of dementia and loss of muscle control.[110] A woman with a Huntington's disease gene has a fifty percent chance of passing a deadly gene on to her child. Does this mean that an

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> in, during, or after menopause suffers an ADA disability because her ability to have children is impaired. The Court takes judicial notice of menopause as an entirely normal consequence of human aging. As such, it is clearly distinguishable from early loss or impairment of childbearing resulting from a communicable viral illness.

Id.

107. *See, e.g.*, Paul Jacobs, *The Race to Crack the Gene Code*, L. A. TIMES, Oct. 29, 1998, at A1, *available in* 1998 WL 18888238.

108. *See supra* note 39.

109. Current debate indicates that it is likely that ADA coverage will be expanded in this direction. The EEOC has issued a policy statement validating the proposition that genetic discrimination falls under the term disability as defined in the ADA. *See* EEOC Compliance Manual § 902.4(c)(2), Definition of the Term "Disability," at 902-45 (March 1995). *See also* Mark A. Rothstein, *Genetic Discrimination in Employment and the Americans with Disabilities Act*, 29 HOUS. L. REV. 23, 33 (1992); Lynda M. Fox & Sherman G. Finesilver, *Genetics and the Workplace: ADA Applicability to Genetic Information*, COLO. LAW., April 1997, at 75, 76.

110. *See* Brian R. Gin, *Genetic Discrimination: Huntington's Disease and the Americans with Disabilities Act*, 97 COLUM. L. REV. 1406, 1406 (1997).

individual with Huntington's disease is clearly disabled, or should we interpret Justice Kennedy's discussion regarding the detrimental effect of HIV on the body's immune system even during the course of the asymptomatic phase[111] to mean that a disease must be already at work in the body in order for it to constitute a disability? If the Court intends to distinguish HIV infection from genetic abnormalities on this basis, the scope of ADA coverage could thus depend on whether scientific knowledge of a disease has reached a point where scientists know the mechanics of the disease's progression.[112]

The *Bragdon* decision leaves many such questions unanswered. By establishing reproduction as a new "major life activity," broadly construing the term "substantially limits," and dismissing the need to make an individualized inquiry, the Court greatly expands the ADA's definition of disability. The Court's first attempt to clarify this definition drastically departs from the traditional interpretation of this statute and creates great uncertainty by opening up the ADA to many novel claims. Further, its interpretation most likely does not adequately protect those with HIV from discrimination. Rather than actively expanding the reach of this statute, the Court would have done far better to encourage Congress to pass specific legislation protecting those with HIV.

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111. *See Bragdon,* 118 S. Ct. at 2203-04.

112. Under this theory, if a disease is already operating within the mother's body, then it leads to ADA disability coverage. If, however, it is just a genetic defect that may be passed on to future children, but will not affect the mother's health, it is outside the scope of the ADA.