

An Individualized Definition of “Handicap” and Its Application to HIV

This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS [Acquired Immune Deficiency Syndrome] could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.¹

INTRODUCTION

Historically, Western civilization has segregated² and stigmatized persons with handicaps.³ Those lacking an understanding of disease transmission have inappropriately treated individuals with handicaps as contagious.⁴ Today, some Americans regard individuals with Human Immunodeficiency Virus (HIV),⁵ the virus researchers believe causes Acquired Immune Deficiency Syndrome (AIDS),⁶ as contagious

¹ School Bd. of Nassau County v. Arline, 480 U.S. 273, 282 n.7 (1987).

² See C. SAFILIOS-ROTHSCHILD, *THE SOCIOLOGY AND SOCIAL PSYCHOLOGY OF DISABILITY AND REHABILITATION* 4-12 (1970). During the seventeenth and eighteenth centuries, European countries confined the physically and mentally disabled, the poor, and criminals to institutions. *Id.* at 5. Today, “we are more subtle, and therefore probably more effective, in segregating the disabled under the cover of humanitarianism and social welfare.” *Id.* at 11-12.

³ See Dokecki, Anderson & Strain, *Stigmatization and Labeling*, in *DEINSTITUTIONALIZATION* 40 (J. Paul, D. Stedman & R. Neufeld eds. 1977).

⁴ See D. ALTMAN, *AIDS IN THE MIND OF AMERICA* 59 (1986) (noting that some people thought persons who had cancer or schizophrenia were contagious); S. SONTAG, *AIDS AND ITS METAPHORS* (1988); S. SONTAG, *ILLNESS AS METAPHOR* 6 (1978) (illustrating how some not only treat those with cancer as contagious but also rationalize the others’ condition as morally deserved).

⁵ “HIV” stands for human immunodeficiency virus. See, e.g., *Introduction to AIDS: ETHICS AND PUBLIC POLICY* 1 (1988) (“HIV,” an international term, generally refers to the same virus as “HTLV-III” (United States) and “LAV” (France)). Although this Comment will refer to HIV in the singular, several variants to the predominant strain (HIV-1) exist. See, e.g., Marx, *The AIDS Virus Can Take On Many Guises*, 241 *SCIENCE* 1039, 1039 (1988) (noting the extreme genetic variability of HIV and its multitude of variants that may help it escape the immune system and frustrate the search for a vaccine); Marx, *Tracking Variation in the AIDS Virus Family*, 241 *SCIENCE* 659, 659 (1988) (noting a possible third variant to the predominant HIV-1, as well as a new HIV isolate that may be nonpathogenic).

⁶ See, e.g., Centers for Disease Control, *Human Immunodeficiency Virus Infection*

through casual contact; medical experts uniformly reject this assumption.⁷

In the United States, the first documented cases of acquired immune deficiency syndrome (AIDS)⁸ occurred in 1981.⁹ The number of re-

in the United States, MORBIDITY & MORTALITY WEEKLY REP. 801 (1987) [hereafter CDC, . . . MMWR]; Macher, *The Pathology of AIDS*, 103 PUB. HEALTH REP. 246, 246 (1988).

⁷ See, e.g., Koop, *Foreword to AIDS AND THE LAW* (W. Dornette ed. 1987). "AIDS is not spread by common everyday contact There is a great misunderstanding resulting in unfounded fear that AIDS can be spread by casual, non-sexual contact." *Id.* at vii; see also CDC, *Prospective Evaluation of Health-Care Workers Exposed Via Parenteral or Mucous-Membrane Routes to Blood and Body Fluids of Patients with Acquired Immunodeficiency Syndrome*, 33 MMWR 181 (1984); CDC, *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 MMWR 682 (1985) [hereafter CDC, *Recommendations*]; Friedland, *Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis*, 314 NEW ENG. J. MED. 348 (1986); Laurence, *The Immune System in AIDS*, SCI. AM., 84 (1985); Sand, *Transmission of AIDS: The Case Against Casual Contagion*, 314 NEW ENG. J. MED. 380 (1986). *But cf.* G. ANTONIO, *THE AIDS COVER-UP?* 95-124 (1986) (discussing unsubstantiated methods of transmission other than recognized blood and sexual contact, such as certain insects, intimate kissing, and food handling). Antonio admits that his evidence "does not prove that casual transmission of AIDS-virus infection is occurring However, the apparent present lack of evidence concerning non-sexual, non-blood transfusion related means of transmission is not a firm guarantee of actual or potential lack of risk." *Id.* at 123.

CDC noted that HIV had "been isolated from blood, semen, saliva, tears, breast milk, and urine and is likely to be isolated from other bodily fluids, secretions, and excretions, but epidemiologic evidence has implicated only blood and semen in transmission." CDC, *Recommendations, supra*, at 682; *cf.* CDC, *Update: Human Immunodeficiency Virus Infections in Health-Care Workers Exposed to Blood of Infected Patients*, 36 MMWR 285, 285-89 (1987) (noting three health-care workers infected with HIV after contact with blood of infected persons, without needle-stick exposure). The apparent modes of transmission were through infected blood contact with chapped hands, skin rash, and mouth. *Id.* This, as well as research finding HIV in dried blood remains infective for up to three days at room temperature, has led some researchers to speculate as to other means of transmission. See, e.g., W. MASTERS, V. JOHNSON & R. KOLODNY, *CRISIS: HETEROSEXUAL BEHAVIOR IN THE AGE OF AIDS* 93 (1988) (claiming that "if infected blood . . . or infected semen . . . is inadvertently left on a toilet seat and someone who comes in contact with this material also happens to have a break in the skin at the point of contact, the virus may enter the body and infection may occur").

⁸ CDC, *Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, 36 MMWR 1 (1987). The definition classifies AIDS into three categories, depending on the status of the laboratory evidence of HIV infection. *Id.* at 3S. In the first category, laboratory evidence of HIV either does not exist or is incon-

ported AIDS cases has grown significantly since that time.¹⁰ Authorities project 263,000 new cases of AIDS by 1991.¹¹ The total number of persons carrying HIV¹² is far greater than the number of persons with AIDS.¹³ Researchers expect the total population of HIV carriers to increase significantly by 1991.¹⁴

Some individuals carry HIV, yet display no obvious symptoms.¹⁵

clusive. *Id.* at 4S. In this category, a person has AIDS when a doctor definitely diagnoses one of the indicator diseases. *Id.* The list of definitive-method indicator diseases includes pneumocystis carinii pneumonia, Kaposi's sarcoma, HIV encephalopathy (dementia), and HIV wasting syndrome (characterized by profound involuntary weight loss, with either chronic diarrhea or chronic weakness and documented fever). *Id.* at 11S-12S. Doctors must diagnose these latter two indicator diseases by methods that rule out concurrent illnesses that may explain the situation. *Id.*

The second category of the AIDS definition allows for a presumptive diagnosis of certain indicator illnesses (such as pneumocystis carinii pneumonia, Kaposi's sarcoma, and candidiasis of the esophagus) when the patient's condition or clinical abnormalities preclude confirmatory laboratory evidence. *Id.* at 5S-6S.

The third category of the AIDS definition covers situations in which the laboratory evidence stands against an HIV infection. *Id.* at 7S-8S. In these situations, doctors rule out AIDS unless they can exclude all causes of immunodeficiency and the patient has either pneumocystis carinii pneumonia diagnosed by the definitive-method or the person has any other definitive-method indicator disease coupled with a T-helper cell count lower than 400 mm. *Id.*

The term AIDS in this Comment, unless otherwise stated, refers to the CDC definition of the condition.

⁹ See CDC, *Epidemiologic Notes and Reports*, 30 MMWR 249, 250 (1981).

¹⁰ Morgan & Curran, *Acquired Immunodeficiency Syndrome: Current and Future Trends*, 181 PUB. HEALTH REP. 459, 459 (1986). This figure might underestimate these predictions because they were based on a model before the CDC expanded its definition of AIDS in 1987. See generally *supra* note 8 (summarizing revised definition).

¹¹ See Morgan & Curran, *supra* note 10, at 461. Some researchers expect that by 1993 over a quarter of the new AIDS cases will be heterosexuals who are not intravenous drug users and by the turn of the century heterosexuals will constitute half of the new AIDS cases. W. MASTERS, V. JOHNSON & R. KOLODNY, *supra* note 7, at 90-91 (asserting that HIV "is now running rampant in the heterosexual community").

¹² This group includes both those who meet the CDC definition of AIDS and those whose blood tests positive for HIV (seropositive). See *infra* note 40 and accompanying text (discussing blood tests).

¹³ See Koop, *Surgeon General's Report on Acquired Immune Deficiency Syndrome*, 102 PUB. HEALTH REP. 1, 1 (1987) (estimating that 1.5 million people have HIV). Some have suggested that the official predictions significantly underestimate the extent of HIV infection and place the figure at 3 million HIV carriers in the United States. W. MASTERS, V. JOHNSON & R. KOLODNY, *supra* note 7, at 3-4.

¹⁴ See Leonard, *Employment Discrimination Against Persons With AIDS*, 10 DAYTON L. REV. 681, 703 (1983).

¹⁵ See Macher, *The Medical Background*, in AIDS AND THE LAW 1, 6-7 (W.

Employers and schools could identify and then discriminate against these asymptomatic individuals if blood testing becomes common practice.¹⁶ If the Rehabilitation Act of 1973 (Act)¹⁷ defines HIV infection as a handicap, the Act could provide a disincentive for HIV discrimination.¹⁸ Section 504 of the Act¹⁹ prohibits handicap discrimination by any program or activity run by recipients of federal funds.²⁰ Such pro-

Dornette ed. 1987).

¹⁶ See Hopkins, *Public Health Measures for Prevention and Control of AIDS*, 10 PUB. HEALTH REP. 463, 464 (1987) (noting possibility of discrimination through tests designed to follow the spread of the disease, not for employment); Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 12-13 (1985) (noting that some employers had used the new blood test to discriminate against seropositive individuals); Leonard, *supra* note 14, at 687. See generally *Business & AIDS*, AIDS REP., May 1988, at 4 (noting a study of 151 Fortune 500 firms in which 15% had experienced AIDS-related personnel problems and another 67% expected them).

¹⁷ Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. § 701-796 (1982)).

¹⁸ Section 505 of the Act provides, in some instances, for successful litigants to receive the same remedies as under Title VI of The Civil Rights Act of 1964, including attorneys fees. 29 U.S.C. § 794a (1982).

The handicap definition is the first element of a prima facie case of handicap discrimination under section 504 of the Act. See *Jasany v. United States*, 755 F.2d 1244, 1248 (6th Cir. 1985). Asymptomatic individuals then must demonstrate that they were otherwise qualified for the position in question. See *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1387 (10th Cir. 1981). For the third element, plaintiffs have to show that the discrimination occurred under circumstances giving rise to an inference that such discrimination was solely on the basis of handicap. *Id.* at 1385-86; see also *Jasany*, 755 F.2d at 1249-50 (adopting the *Pushkin* approach). See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (describing a flexible model for a prima facie disparate treatment case of racial discrimination). Finally, plaintiffs would have to show that the discrimination occurred in a program or activity receiving Federal funds. See *infra* notes 19-20.

Despite the apparent distinction between the second and third elements, the *Pushkin* court recognized their interrelationship and suggested that proof of qualification indicates discrimination solely on the basis of handicap. See *Pushkin*, 658 F.2d at 1385 (noting that an employer would not have discriminated solely on the basis of handicap if the individual was not otherwise qualified).

¹⁹ 29 U.S.C. § 794 (Supp. IV 1986). That section states: "No otherwise qualified individual with handicaps . . . shall, solely by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." *Id.* Section 501 applies to executive branch employees and requires affirmative action. *Id.* § 791 (1982).

²⁰ 45 C.F.R. § 84.3(f) (1987). Regulations implementing section 504 define a recipient as including any instrumentality of a state, organization, agency, or person receiving federal financial assistance, except the ultimate beneficiary of the assistance. *Id.*

Interpretations of this federal statute could influence state interpretation of their stat-

tection would encourage voluntary HIV testing and curb the virus' spread.²¹

Congress originally defined handicap²² too narrowly,²³ but expanded the definition in 1974.²⁴ Since 1974 Congress has amended the handicap definition to exclude drug addicts who pose threats.²⁵ In 1988 Congress amended the definition to exclude individuals with a contagious disease or infection who posed a direct threat or who lacked sufficient

utes prohibiting handicap discrimination. See Leonard, *supra* note 14, at 689-96 (noting that 42 states have some legislation prohibiting handicap discrimination, with widely varying language). Leonard notes that the most common terminology uses the Act's language. *Id.*

²¹ Krim, *Introduction to AIDS: PUBLIC POLICY DIMENSIONS* xxvi-xxvii (1987) (arguing that voluntary testing in conjunction with support services and total anonymity protect the individual and encourage testing); Rothstein, *Screening Workers for AIDS*, in *AIDS AND THE LAW: A GUIDE FOR THE PUBLIC* 126, 140-41 (H. Dalton & S. Burris eds. 1987) (arguing that given the motivations for testing and the potential for discrimination, the decision to test should rest with the individual). See generally Public Health Service, *Additional Public Health Service Recommendations to Reduce Sexual and Drug Abuse-Related Transmission of HTLV-III/LAV*, 35 *MMWR* 152, 153 (1986) (recommending strict confidentiality to encourage testing and supportive counseling).

²² Before the 1974 amendment, the Act defined a "handicapped individual" as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services" The Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361 (1973) (prior to 1974 amendment). Part of this original definition remains in the Act, though it does not apply to section 504 discrimination. See 29 U.S.C. § 706(8)(A) (Supp. IV 1986).

In 1986 Congress substituted "individuals with handicaps" for "handicapped individual" to avoid furthering the stigma that occurs when people attach the handicap to the person rather than the impairment. H.R. REP. NO. 571, 99th Cong., 2d Sess. 17, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3471, 3487 (discussing the reason for the amendment).

²³ See S. REP. NO. 1297, 93d Cong., 2d Sess. 38-39, reprinted in 1974 U. S. CODE CONG. & ADMIN. NEWS 6373, 6389 (defining a handicap in terms that completely excluded recovered individuals and those treated as having a handicap).

²⁴ Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (1974) (codified as amended at 29 U.S.C. § 706(8) (1982 & Supp. IV 1986)).

²⁵ Congress amended the definition again in 1978. Pub. L. No. 95-602, § 122, 92 Stat. 2955, 2984 (1978) (codified as amended at 29 U.S.C. § 706(8)(B) (1982)). The new definition did not "include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to the property or the safety of others." *Id.*

job qualifications.²⁶

²⁶ Congress amended the definition in the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 9(a), 102 Stat. 28, 31-32 (1988) (codified as amended at 29 U.S.C.A. § 706(c) (West Supp. 1988)). Section 9(a) excludes “an individual who has a currently contagious disease or infection and . . . would constitute a direct threat to the health or safety of other individuals or who . . . is unable to perform the duties of the job.” This amendment parallels the 1978 amendment relating to drug addicts. Although the amendment obviously intended to address AIDS and HIV infection, neither amendment affects the analysis of whether an individual has a handicap. They merely reassert that unqualified individuals are not covered under the Act. *See* 134 CONG. REC. H567 (daily ed. Mar. 2, 1988) (statement of Rep. Hawkins) (stating that amendment codifies the existing “otherwise qualified” standard of section 504); 134 CONG. REC. H573 (daily ed. Mar. 2, 1988) (statement of Rep. Weiss) (stating that individuals who pose a health risk are not “otherwise qualified” to remain in the particular position); 134 CONG. REC. H574 (daily ed. Mar. 2, 1988) (statement of Rep. Edwards) (stating that the amendment is essentially unnecessary and restates current law); 134 CONG. REC. H575 (daily ed. Mar. 2, 1988) (statement of Rep. Waxman) (finding that the amendment made no substantive changes in the law).

Both amendments are analytically inaccurate when they exclude particular drug addicts and those with contagious diseases from the handicap definition. Individuals with drug addictions or contagious diseases may have a handicap, but since they pose health and safety risks, they are not “otherwise qualified.” *See infra* note 27 (noting that the handicap definition does not refer to health and safety risks as a basis for exclusion from the definition). Congress has used a failure to meet the second element of the *prima facie* case (otherwise qualified) as a basis for denying the first element (a handicap). *Id.*

The practical purpose of this recent contagious disease/infection amendment was to pacify the misplaced fears of employers who thought that they would be forced to hire or retain all individuals with HIV regardless of the health risks involved. *See* 134 CONG. REC. H573 (daily ed. Mar. 2, 1988) (statement of Rep. Weiss); 134 CONG. REC. H575 (daily ed. Mar. 2, 1988) (statement of Rep. Edwards) (“This amendment is necessary solely to allay the fears of some employers . . .”).

It is also clear that certain members of Congress assumed that all HIV infections were handicaps under the Act. *See* 134 CONG. REC. H574 (daily ed. March 2, 1988) (statement of Rep. Owens); 134 CONG. REC. H575 (daily ed. March 2, 1988) (statement of Rep. Waxman) (“[S]ection 504 and the decisions that have addressed infectious diseases — such as *Arline*, *AFGE versus State*, *Thomas versus Atascadero*, and *Ray versus Desoto* — have made it clear that people with AIDS and HIV infections are protected . . .”); *see also* 134 CONG. REC. H579-80 (daily ed. March 2, 1988) (statement of Rep. Dannemeyer) (opposing amendment because it covered asymptomatic individuals).

On the basis of the wording of the amendment, a recent Department of Justice (DOJ) opinion under Attorney General Thornberg noted that the amendment made no distinction between symptomatic and asymptomatic HIV infection. Memorandum from Douglas Kmiec, Acting Assistant Attorney General, DOJ Office of Legal Counsel to Arthur Culvahouse, Jr., Counsel to the President, at 18 (Sept. 27, 1988) (concluding that all persons with HIV are covered by § 504) [hereafter Kmiec Opinion]. Kmiec stated:

The present statutory definition has three categories. The first category includes individuals with any impairment that substantially limits their major life activities.²⁷ The second category includes those persons with a history of a substantially limiting impairment.²⁸ The third category covers those who are regarded as having a substantially limiting impairment.²⁹

This Comment analyzes each category of the Act's handicap definition as applied to HIV infection.³⁰ Part I discusses HIV and its physiological effects. Part II investigates the legislative history of the Act's handicap definition and the validity of the administrative regulations implementing section 504. Part III analyzes each category of the definition in a three-step process. The first step provides the legislative definition of the category. The second step examines the judicial interpretations of that part of the definition. The third step applies these and other interpretations to asymptomatic carriers of HIV.

This Comment proposes that judges should apply an individualized approach to defining a handicap. Analyzing handicaps in light of particular plaintiffs' life situations may bring many asymptomatic carriers

It is true that the amendment is phrased in the negative in that it says who is *not* qualified rather than defining who is handicapped. Nevertheless, we believe the natural implication of this statutory exclusion is that persons who do not fall within the specified grounds for exclusion are covered by section 504 to the extent that they meet the general requirements of that section

Id. (emphasis in original).

Professor Lawson, a former clerk to Justice Scalia and a collaborator on an earlier DOJ opinion under Attorney General Meese, criticizes the Kmiec Opinion on many fronts, including this interpretation of the recent amendment. Lawson, *AIDS, Astrology, and Arline: Towards A Causal Interpretation of Section 504*, 17 HOFSTRA L. REV. — (1989) (forthcoming) (stating that both amendments “are meaningless gestures that do not affect the Rehabilitation Act's coverage”). Confining the analysis to the literal wording of the amendment, Lawson appears correct.

²⁷ A person with handicaps includes “any person who (i) has a physical or mental impairment which substantially limits one or more of such persons major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment” 29 U.S.C. § 706(8)(B) (Supp. IV 1986).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Although this Comment primarily focuses on the definition of a handicap, it will address the other elements of a prima facie cause of action under section 504 when appropriate. For a more comprehensive analysis of the “qualified” element as it relates to AIDS, see Comment, *Running from Fear Itself: Analyzing Employment Discrimination Against Persons with AIDS and Other Communicable Diseases Under Section 504 of The Rehabilitation Act of 1973*, 23 WILLAMETTE L. REV. 857 (1987).

of HIV under all three categories of the handicap definition. Section 504 provides some protection from discrimination by recipients of federal funds. Therefore, an individualized approach to the definition of handicap may protect some persons with HIV from discrimination. Part I discusses HIV's effects on the human body as background for Part II's analysis of the definition of handicap as it should apply to persons with HIV.

I. HIV AND AIDS

In addition to posing social issues (such as increasing rates of infection³¹ and the rising potential for discrimination³²), HIV permanently affects the individual.³³ On entering the body, the virus destroys particular cells (T-helper lymphocytes) and prevents the cells from facilitating the production of antibodies.³⁴

The Centers for Disease Control (CDC) defines AIDS³⁵ in terms of opportunistic infections³⁶ resulting from an HIV-suppressed immune system.³⁷ AIDS-related complex (ARC) is not as fatal as AIDS.³⁸ ARC occurs when the body exhibits particular symptoms³⁹ in conjunction with an HIV-positive blood test.⁴⁰ An HIV-positive individual's blood

³¹ See *supra* notes 10 & 14 and accompanying text.

³² See Leonard, *supra* note 16, at 11.

³³ See Hopkins, *supra* note 16, at 464 (noting that authorities seem to agree that asymptomatic individuals probably remain infectious for life).

³⁴ See Macher, *supra* note 15, at 4. B-lymphocytes and T-lymphocytes reside in the lymph nodes. *Id.* at 3-4. Following an infectious agent invasion both T and B-lymphocytes proliferate. *Id.* The T-lymphocytes, along with antibodies, attack the invading substance and help destroy the agent. *Id.*; see also Carey, *The Clinical Spectrum of Aids*, in AIDS: A HEALTH CARE MANAGEMENT RESPONSE 3-4 (K. Blanchet ed. 1988) (describing lymphocyte activity).

³⁵ See *supra* note 8.

³⁶ The term "opportunistic" applies because researchers believe that the organisms causing the infections are already present but held in check by a healthy immune system. A. FETTNER & W. CHECK, *THE TRUTH ABOUT AIDS* 22-24 (1984).

³⁷ The two most common infections appear to be Kaposi's sarcoma (a rare form of skin cancer characterized by purplish skin lesions) and pneumocystis carinii pneumonia (an uncommon lung ailment). Gold, *Infectious Complications of AIDS*, in *CLINICAL ASPECTS TO AIDS AND AIDS-RELATED COMPLEX* 93, 95-96 (M. Staquet, R. Hemmer & A. Baert eds. 1986).

³⁸ See D. ALTMAN, *supra* note 4, at 36.

³⁹ Symptoms include unexplained weight loss, fever, diarrhea, and persistent lack of energy. See Carey, *supra* note 34, at 3-4.

⁴⁰ The enzyme-linked immunosorbent assay (ELISA) detects the presence of HIV antibodies created by white blood cells in response to the virus infection. See Macher, *supra* note 15, at 6; W. MASTERS, V. JOHNSON & R. KOLODNY, *supra* note 7, at 42-

contains antibodies to HIV.⁴¹ The estimated number of HIV-positive individuals who will eventually develop ARC or AIDS has increased since earlier predictions.⁴² The overwhelming weight of authority has concluded that the virus cannot be spread through casual contact.⁴³ Accordingly, the fears of contagion that motivate discrimination against HIV carriers are medically unsubstantiated.

Most authorities agree that ARC and AIDS constitute handicaps under the Act's definition.⁴⁴ Although other commentators have concluded that HIV infection should fall within part of the handicap definition, their reasoning either provides only limited coverage⁴⁵ or, when

43. The Western Blot test provides a somewhat more accurate, though more expensive method of corroboration. *Id.* at 43; Proffitt, *The AIDS Retrovirus*, in AIDS: A HEALTH CARE MANAGEMENT RESPONSE 19, 23-24 (K. Blanchet ed. 1988). A new test for HIV, the polymerase chain reaction (PCR), can "amplify minute amounts of target genetic material in cells, making identification of the material easier." *AIDS Test*, AIDS REP. at 1-2 (Oct. 1988).

⁴¹ See Macher, *supra* note 15, at 6.

⁴² See CDC, *supra* note 9.

⁴³ See *supra* note 7.

⁴⁴ See Leonard, *supra* note 16, at 27; Wasson, *AIDS Discrimination Under Federal, State, and Local Law After Arline*, 15 FLA. ST. U.L. REV. 221, 240 (1987); Note, *AIDS: Does It Qualify as a "Handicap" Under the Rehabilitation Act of 1973?*, 61 NOTRE DAME L. REV. 572, 586 (1986) [hereafter Note, *AIDS: Does It Qualify?*]; Note, *Protection of AIDS Victims From Employment Discrimination Under the Rehabilitation Act*, 1987 U. ILL. L. REV. 355, 365-67 [hereafter Note, *Protection of AIDS Victims*]; Comment, *supra* note 30, at 895.

⁴⁵ See Leonard, *supra* note 16, at 27 (stating that seropositive individuals would only have protection under the Act when a recipient perceived them as having a handicap); Wasson, *supra* note 44, at 240-41 (including seropositive individuals "to the extent that the basis for the discrimination is the perception that the person was suffering from, or would soon suffer from, the disabling effects of AIDS"). Both Leonard's and Wasson's inclusions would apparently protect only seropositive individuals whom a recipient regarded as having AIDS, ARC, or as casually contagious. See Note, *After School Board of Nassau County v. Arline: Employees with Aids and the Concerns of the "Worried Well"*, 37 AM. U.L. REV. 867, 908 (1988) (stating that proof of an impairment may be impossible, although the Act would cover seropositive persons if a recipient perceived them as having AIDS); Note, *AIDS: Does It Qualify?*, *supra* note 44, at 586 (arguing that seropositive individuals perceived as having AIDS would have a handicap); Comment, *Are AIDS Victims Handicapped?*, 31 ST. LOUIS U.L.J. 729, 739-40 (1987) (stating that "mere carriers of . . . [HIV] or persons in the early stages of the disease usually exhibit no disabling effects" and therefore do not have a handicap); Comment, *Undoing a Lesson of Fear in the Classroom: The Legal Recourse of AIDS-Linked Children*, 135 U. PA. L. REV. 193, 201-02 (1986) (asserting that individuals with HIV are protected by section 504 because they are regarded as having such an impairment) [hereafter Comment, *Undoing a Lesson*]. Like Leonard's and Wasson's analyses, these arguments would not protect seropositive individuals from discrimination by a recipient

expansive, the analysis lacks internal validity.⁴⁶ Furthermore, none of these arguments provides a thorough analysis of the definition coupled with an individualized approach to its application. This Comment first inquires into the sources defining a handicap before applying the definition to HIV infection.

II. SOURCES FOR THE DEFINITION OF A HANDICAP

A. Congressional Intent

Congress amended the Rehabilitation Act in 1974⁴⁷ to clarify its original definition⁴⁸ of a handicap.⁴⁹ Congress stated that the new defi-

who accurately regarded them as seropositive. Another Comment argued that seropositive individuals are generally not impaired, and even if they were, they are probably not substantially limited in any major life activity. Comment, *supra* note 30, at 895-96. That Comment argued that HIV seropositivity might substantially limit the major life activity of working, but only "if the employer and others offering similar jobs in the same geographic area were *aware* of the individual's [HIV] infection . . . and adopted a policy of not employing individuals so infected." *Id.* at 895 (emphasis in original). This formulation confuses the first category (individuals with a substantially limiting impairment) with the third category (individuals who are regarded as having a substantially limiting impairment) by using an incident of the latter within the framework of the former. The key to understanding the distinction is that the impairment forms the basis of the first category while the recipient's state of mind forms the basis of the third category.

⁴⁶ See generally Note, *Asymptomatic Infection with the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563, 573-74 (1988). The Note effectively argued in favor of the implied activities of sex and procreation as a basis for a first category inclusion. *Id.* at 574. Unfortunately, the Note also fell prey to the same confusion seen above between the first and third categories. *Id.* at 573 (claiming that seropositive individuals were substantially limited in their working under the first category, "because of the reluctance of employers to hire, and others to work with, that individual"); see also Note, *Protection of AIDS Victims*, *supra* note 44, at 369-70 (asserting that asymptomatic individuals would have a handicap under the first category by stating the same arguments made by individuals with AIDS). The latter Note implied a major life activity of fighting off infections but failed to make clear why asymptomatic persons are substantially limited in fighting infection to the same extent as individuals with AIDS. See *id.* at 369-70.

⁴⁷ Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (1974) (codified as amended in scattered sections of 29 U.S.C. §§ 701-796 (1982)).

⁴⁸ See *supra* notes 22-23 (discussing the original definition).

⁴⁹ Legislative history demonstrates that Congress clearly intended that the handicap definition for both section 503 (federal contractors and affirmative action) and section 504 (recipients of federal funds and nondiscrimination) not to be narrowly limited to employment or the individual's potential benefit from vocational rehabilitation services. See S. REP. NO. 1297, 93d Cong., 2d Sess. 37, *reprinted in* 1974 U.S. CODE CONG. &

inition included handicaps previously excluded under the original definition.⁵⁰ They also clarified each category of the new definition.⁵¹ For the third category,⁵² Congress made certain that some individuals without handicaps would still fall within the new definition because of recipients' perceptions.⁵³ Nonetheless, administrative regulations and judicial interpretation were necessary to provide more distinct parameters of the definition.

B. *Administrative Regulation*

Congress intended implementing regulations for section 504 of the Act.⁵⁴ Because the Department of Health, Education, and Welfare

ADMIN. NEWS 6373, 6388. *But cf.* Note, *Administrative Action to End Discrimination Based on Handicap: HEW's Section 504 Regulation*, 16 HARV. J. ON LEGIS. 59, 63 (1979). "The complete absence of *any* legislative history for section 504 compounds the uncertainty created by the lack of statutory elaboration." *Id.* (emphasis in original). The Note's author later used the underinclusive definition as evidence of the lack of consideration Congress gave to section 504. *Id.* at 65 n.24. *See generally supra* note 22 (discussing original definition of handicap).

⁵⁰ *See* S. REP. NO. 1297, 93d Cong., 2d Sess. 38, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6388-89 (giving examples of previously excluded persons).

⁵¹ *See* S. REP. NO. 1297, 93d Cong., 2d Sess. 26, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6389-90. This report states:

The first category . . . in the new definition eliminates any reference to employment The second category . . . is intended to make clearer that the coverage . . . extends to persons who have recovered — in whole or in part — from a handicapping condition, such as a mental or neurological illness, a heart attack, or cancer and to persons who were classified as handicapped The third category . . . in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped

Id. at 6389.

⁵² The third statutory category covers any person who is regarded as having a substantially limiting impairment. 29 U.S.C. § 706(8)(A) (Supp. IV 1986).

⁵³ S. REP. NO. 1297, 93d Cong., 2d Sess. 39, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6389-90.

[The third category applies] just as title VI of the Civil Rights Act of 1964 This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities

Id.

⁵⁴ *See id.* at 39-40, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6390 (stating that although section 504 did not specifically require them, regulations were clearly mandatory in form).

(HEW)⁵⁵ had already worked with Congress on the Act,⁵⁶ Congress directed the HEW to promulgate the regulations.⁵⁷ Yet the HEW only issued the regulations⁵⁸ after legal⁵⁹ and political pressure.⁶⁰

Initially, the Supreme Court varied its level of deference to the regulations depending on the issue.⁶¹ The Court significantly deferred to provisions of the regulations that did not specifically deal with the handicap definition.⁶² Recently the Court validated the specific regulations defining a handicap.⁶³ Given congressional intent and Supreme

⁵⁵ Congress redesignated the Department of Health, Education, and Welfare as the Department of Health and Human Services. 20 U.S.C. § 3508 (1982).

⁵⁶ See S. REP. NO. 1297, 93d Cong., 2d Sess. 39-40, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6376. The staff of the Senate Committee on Labor and Public Welfare worked closely with HEW and others to ensure compliance with Congress' intent. *Id.*

⁵⁷ See *id.* at 40, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6391. Congress thought that the HEW should coordinate the section 504 enforcement because of its experience both with individuals with handicaps and the elimination of discrimination in other areas. *Id.*

⁵⁸ HEW Secretary Weinberger delegated the responsibility for drafting and enforcing the section 504 regulations to the Department's Office for Civil Rights. See Note, *supra* note 49, at 65. See generally 43 Fed. Reg. 2132 (1978) (stating the final coordinating regulations).

⁵⁹ See *Cherry v. Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976) (“[T]he Court concludes that the Secretary is required to promulgate regulations effectuating § 504.”).

⁶⁰ See Note, *supra* note 49, at 59. A crowd of individuals with handicaps camped in the reception area of HEW Secretary Califano's office in April 1977 to force him to sign the regulations. *Id.*

Although courts usually defer to administrative regulations, the HEW's early delay undermined the Department's subsequent interpretations. See *Southeastern Community College v. Davis*, 442 U.S. 397, 411-12 (1979) (holding that section 504 did not require affirmative action). The Court noted the Department's prior activities and stated that “[t]his fact *substantially diminishes* the deference to be given to HEW's *present interpretation* of the statute.” *Id.* at 411-12, n.11 (emphasis added).

⁶¹ See *Davis*, 442 U.S. at 411-12. The *Davis* Court deferred to the regulations that defined a “qualified” individual with handicaps. *Id.* at 406. However, on the issue of “affirmative action” the Court rejected the agency's interpretation of the statute, because the clear meaning of the statute constrains the deference normally afforded administrative regulations. *Id.* at 411-12. Unfortunately, the Court equated the meaning of “affirmative action” (a remedial policy for past discrimination) with “reasonable accommodation” (the removal of obstacles against those with handicaps). See *Alexander v. Choate*, 469 U.S. 287, 300-01, 300 n.20 (1985) (recognizing distinction between affirmative action and reasonable accommodation and recognizing the § 504 “reasonable accommodation” requirement).

⁶² See *Alexander*, 469 U.S. at 304 n.24 (recognizing the regulations as “an important source of guidance”); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984) (noting congressional committee involvement in formation of regulations).

⁶³ See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279-80 (1987) (noting

Court deference, judges should significantly defer to the regulations when determining whether an individual has a handicap under the Act.⁶⁴

III. THE DEFINITION OF HANDICAP

Congress included three categories in the handicap definition.⁶⁵ The first category covers a physical or mental impairment that substantially limits an individual's major life activities.⁶⁶

A. *The First Category: A Physical or Mental Impairment That Substantially Limits Major Life Activities*

1. Physical or Mental Impairment

a. *Legislative Definition*

The Act refers to "a physical or mental impairment" without defining those terms.⁶⁷ However, the regulations implementing section 504 define a physical impairment as any physiological disorder or condition affecting one of the body systems.⁶⁸ The regulations describe a mental impairment as any psychological disorder.⁶⁹

For the physical component, although no adverb modifies "affecting," the nouns "impairment," "disorder or condition," "disfigurement," and "anatomical loss" all denote negative effects on body systems.⁷⁰ The mental component's sole use of the term "disorder"

that the regulations defining a handicap were "particularly significant").

⁶⁴ See generally Comment, *supra* note 30, at 874-77 (criticizing judicial interpretation of "impairment" and "substantially limits").

⁶⁵ 29 U.S.C. § 706(8)(B) (Supp. IV 1986). An individual with handicaps includes "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment" *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 45 C.F.R. § 84.3(j)(2)(i)(A) (1987). A physical impairment results from "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic [blood system] and lymphatic; skin; and endocrine." *Id.*

⁶⁹ 45 C.F.R. § 84.3(j)(2)(i)(B) (1987). A mental impairment is "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." *Id.*

⁷⁰ The self-serving judicially created canons of construction for interpreting statutes can be used to support almost any interpretation. See Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be*

supports this conclusion.⁷¹ Therefore, section 504 regulations consistently define an impairment for judicial application.

b. Judicial Interpretation

In most section 504 litigation, parties do not question the presence of the handicap.⁷² Moreover, when the litigation does present a handicap issue, judges typically focus on whether the established impairment substantially limits a major life activity.⁷³ Nonetheless, impairment issues arise, and they often represent the outer limits of the handicap definition.⁷⁴

Construed, 3 VAND. L. REV. 395, 401 (1950) (noting how Newtonian principles apply to these canons because for every canon there appears another equal canon supporting the opposite conclusion).

⁷¹ 45 C.F.R. § 84.3(j)(2)(i)(B) (1987). Otherwise the negative effects required for a mental impairment would be greater because no "condition" appears in the mental component. The legislative history does not support a distinction in the level of adverse effects between physical and mental impairments. *See generally* 45 C.F.R. pt. 84, app. A(A)(3) (1987) (discussing the impairment regulation without drawing a distinction in the standard).

Professor Lawson criticizes the physical component of the regulatory definition because any physiological condition will affect one or more body systems thus "defin[ing] the requirement of an impairment completely out of the statute." Lawson, *supra* note 26, at — n.42 (asserting the regulation's invalidity because it would consider the array of someone's rods and cones in the eye an impairment (a physiological condition affecting her special sense organs)). Lawson concludes that "adversely" must be *implied* into the regulation to save it from violating the statute. *Id.* But even applying Lawson's literal methodology, the adverse component is easily supplied from the nouns "disorder or condition, cosmetic disfigurement or anatomical loss" already in the regulation. Lawson isolates the term "condition" to attach a different meaning than the one clearly expressed in context. *See generally* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473, (1961) (defining one of the meanings of "condition" as the physical status of the body, "usually used to indicate abnormality").

⁷² *See Tudyman v. United Airlines*, 608 F. Supp. 739, 744 (C.D. Cal. 1984) (noting that most cases do not dispute the handicap's existence). Recipients often explicitly cite the handicap as the basis for rejecting the individual. *See, e.g., Southeastern Community College v. Davis*, 442 U.S. 397, 401-02 (1979) (nursing school rejecting applicant because of hearing impairment).

⁷³ *See Elstner v. Southwestern Bell Tel. Co.*, 659 F. Supp. 1328, 1343 (S.D. Tex. 1987); *Wimbley v. Bolger*, 642 F. Supp. 481, 485 (W.D. Tenn. 1986). *See generally infra* notes 101-14 and accompanying text (discussing substantial limitation of major life activities).

⁷⁴ *See generally de la Torres v. Bolger*, 610 F. Supp. 593, 596 (N.D. Tex. 1985) (noting that left-handedness represents an individual characteristic, not an impairment), *aff'd per curiam*, 781 F.2d 1134 (5th Cir. 1986); *Tudyman*, 608 F. Supp. at 746 (acute muscle development self-imposed and not an impairment).

The federal district court judge in *E.E. Black, Ltd. v. Marshall*⁷⁵ engaged in a very extensive analysis of the handicap definition.⁷⁶ Although the employee appeared to have a physiological disorder affecting the musculo-skeletal system,⁷⁷ the judge found the individual either had an impairment or the employer regarded him as having an impairment.⁷⁸

In reaching this result the judge adopted a plain-meaning interpretation of the term "impairment."⁷⁹ This approach defines a physical or mental impairment as any condition that weakens, diminishes, restricts, or otherwise damages an individual's health, or physical and mental activity.⁸⁰ Other judges have apparently interpreted this plain-meaning approach to require obvious manifestations of the condition in a person's behavior.⁸¹ An individualized orientation would inquire whether

⁷⁵ 497 F. Supp. 1088 (D. Haw. 1980).

⁷⁶ *Id.* at 1097-102. See generally Haines, *E.E. Black, Ltd. v. Marshall: A Penetrating Interpretation of "Handicapped Individual" for Sections 503 and 504 of Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 LOY. L.A.L. REV. 527, 531 (1983) (favoring the court's opinion as a useful guideline for judicial interpretation of the handicap definition). The *E.E. Black* decision represented "the most comprehensive examination by a court to date of the . . . definition of 'handicapped.'" *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1249 (6th Cir. 1985).

⁷⁷ The employer, *E.E. Black, Ltd.*, required Mr. Crosby, a carpenter's apprentice, to take a pre-employment physical. *E.E. Black*, 497 F. Supp. at 1091. The examination revealed that Crosby had a partially sacralized transitional vertebra (a congenital back anomaly in which the vertebrae are partially fused together, thus limiting mobility). *Id.* at 1091. The examining physician concluded that Crosby was a poor risk for heavy labor. *Id.* A subsequent examination by an orthopedist found that Crosby had spina bifida occulta (an anomaly indicated by a defective closure of the encasement of the spinal cord) and mild rotoscoliosis (an anomaly characterized by a narrowed disc space resulting from a slight rotation of the spine). *Id.* at 1091-92 & 1091 n.1. Nonetheless, the orthopedist concluded that Crosby was still able to perform the job. *Id.* at 1091-92.

⁷⁸ *Id.* at 1102.

⁷⁹ The district court judge followed the administrative law judge who had adopted the definition of impairment from a dictionary. *Id.* at 1098. "Impair" means "to make worse: diminish in quantity, value, excellence, or strength: do harm to . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1131 (1961).

⁸⁰ This approach interprets the definition of "impair" to require the condition to adversely affect behavior. The use of the dictionary as authority for this conclusion is disingenuous because the dictionary meaning does direct whether the focus should be on the behavior or the body system. The individualized approach uses the same dictionary definition of "impair" but properly focuses on body systems as dictated by the regulations. See *infra* notes 84-86 and accompanying text.

⁸¹ See *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (holding that acrophobia (fear of heights) not an impairment). The court concluded that the impairment concept implies a general disadvantage to employment. *Id.* at 935. See generally *Jasany v.*

an individual's body systems are adversely affected and would not require obvious behavioral manifestations.

The regulations require that a condition adversely affect a body system.⁸² This systemic effect may or may not produce obvious manifestations in an individual's behavior.⁸³ An individualized interpretation conforms to the regulations by examining how the condition adversely affects the individual's body systems.⁸⁴

Judges have identified three situations that militate against a finding of impairment. First, judges reject arguments portraying normal individual characteristics as impairments.⁸⁵ Second, judges exclude individuals who have voluntarily chosen to maintain their conditions.⁸⁶ Fi-

United States Postal Serv., 755 F.2d 1244, 1250 (6th Cir. 1985) (holding that strabismus (crossed-eyes) did not substantially limit major life activities). The court intimated that the condition might be too minor to constitute an impairment. *Id.* at 1250 n.6. These interpretations illustrate how judges may define an individual's health from the viewpoint of behavior.

⁸² See *supra* notes 68-71 and accompanying text (discussing the impairment definition and adverse effects).

⁸³ See *supra* notes 79-82 and accompanying text (discussing the plain-meaning approach requiring behavioral manifestations).

⁸⁴ An individualized approach comports with the regulations defining physical impairment in terms of the condition's effects on a body system. See *supra* notes 68-71 and accompanying text (discussing the regulatory definition). The behavioral manifestation requirement in the plain-meaning approach narrows the class of conditions that qualify as an impairment under the regulations. This occurs by demanding the condition adversely affect a body system to such an extent as to create obvious behavioral manifestations.

Although the mental impairment definition provides examples of mental impairments and does not draw a comparable analogy to the physical impairment's "body systems," the individualized approach still applies. See *generally supra* notes 68-71 (discussing impairment definition). The individualized approach considers psychological conditions without obvious behavioral manifestations as mental impairments.

Although an individual's impairment must result in a substantial limitation, a condition need not substantially limit to be an impairment. See *generally infra* notes 101-21 and accompanying text (discussing the definition and interpretation of a substantial limitation).

⁸⁵ See *de la Torres v. Bolger*, 610 F. Supp. 593 (N.D. Tex. 1985) (holding left-handedness similar to being right-handed or ambidextrous), *aff'd*, 781 F.2d 1134, 1138 (5th Cir. 1986) (stating that "[b]eing left-handed is a physical characteristic").

⁸⁶ See *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984). United Airlines fired a male flight attendant and bodybuilder because he weighed too much. *Id.* at 740-41. The court found that the attendant's muscular development was "self-imposed and voluntary. This distinguishes the present case from one in which the plaintiff's weight was involuntary — *e.g.*, the result of a glandular problem." *Id.* at 746.

This restriction on voluntary conditions should be limited to situations in which the

nally, judges disallow transient conditions.⁸⁷ Although judges should consider all these factors, they should confine the exclusion of transient conditions. Otherwise they could nullify part of the second category of the definition, which covers individuals with a history of a substantially limiting impairment.⁸⁸

c. Applications to HIV

Judges have considered communicable diseases impairments.⁸⁹ In these instances, judges appropriately consider the recipient's concerns regarding the disease's contagiousness.⁹⁰ In the context of HIV, most of these concerns lack medical support because carriers of the virus are not casually contagious.⁹¹ Judges should consider the condition's conta-

individual's ability to choose remains a present option. Otherwise drug addicts (alcohol addicts included) who initially chose their drug would be excluded. *See, e.g., Davis v. Bucher*, 451 F. Supp. 791, 796 (E.D. Pa. 1978) (finding drug addiction a handicap and rejecting an exclusion based upon voluntariness). The present exclusion of current drug addiction from the handicap definition finds its basis not in voluntariness but in health and safety threats to others. *See supra* note 25 (discussing amendment excluding certain drug addicts from the handicap definition).

⁸⁷ *Stevens v. Stubbs*, 576 F. Supp. 1409 (N.D. Ga. 1983). The court held that the term "impairment" did not encompass "transitory illnesses with no *permanent* effect on the person's health." *Id.* at 1414 (emphasis added).

A person may have an impairment at the moment she has an injury, surgery, or lies in the hospital recovering, even though the terms "disorder," "condition," "anatomical loss," and "cosmetic disfigurement" suggest some relative permanence.

⁸⁸ *See infra* notes 122-28 and accompanying text (discussing the second category of the handicap definition).

⁸⁹ *See, e.g., School Bd. of Nassau County v. Arline*, 772 F.2d 765 (11th Cir. 1985) (teacher with tuberculosis), *aff'd*, 480 U.S. 273, 289 (1987); *New York State Ass'n for Retarded Children v. Carey*, 466 F. Supp. 479 (E.D.N.Y. 1978) (mentally retarded carriers of hepatitis B), *aff'd*, 612 F.2d 644, 649 (2d Cir. 1979); *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 502 N.Y.S.2d 325 (Sup. Ct. 1986) (child with HIV).

⁹⁰ Although medicine can now cure and, in most instances, prevent tuberculosis, the infectious bacteria is carried on airborne droplets and is therefore highly contagious. Given this level of communicability, a recipient's legitimate concerns for the health and safety of its employees might justify a refusal to hire someone with tuberculosis. *See* Brief of the American Medical Association, As Amicus Curiae on Support of Petitioners, *Arline*, 480 U.S. 273, *reprinted in* COMMUNICABLE DISEASE IN THE WORKPLACE: LEGAL, MEDICAL, ECONOMIC & HUMAN RESOURCES ISSUES 199 (R. Curiale & S. Estreicher eds. 1986).

⁹¹ The overwhelming majority of AIDS experts agree that an individual cannot transmit the HIV virus through casual contact. *See supra* note 7. CDC has addressed the legitimate concerns regarding HIV-infected health care workers and does not recommend termination from employment. *See* CDC, *Acquired Immunodeficiency Syn-*

giousness when they decide whether the individual qualifies for the job.⁹² Judges should focus on how HIV adversely affects the individual's body systems when they decide whether the person has an impairment.⁹³

Under the plain-meaning approach, asymptomatic individuals would not have an impairment because a lay observer would not see obvious manifestations of the underlying infection.⁹⁴ Under the individualized

drome (AIDS): Precautions for Health-Care Workers and Allied Professional, 32 MMWR 450 (1983); CDC, Acquired Immune Deficiency Syndrome (AIDS): Precautions for Clinical and Laboratory Staffs, 31 MMWR 577 (1982). Under other working situations, employers can take appropriate precautions that do not discriminate. See CDC, *Recommendations, supra* note 7, at 691-94.

Furthermore, "AIDS literature does not suggest that the physical exertion of working necessarily provokes a worsening of the disease . . ." Leonard, *supra* note 14, at 688.

⁹² The regulations define a "qualified" individual with handicaps as someone who, with reasonable accommodation, can perform the essential functions of the job in question. See 45 C.F.R. § 84.3(k) (1987). While the Supreme Court found tuberculosis a handicap in *Arline*, the Court remanded for the district court to determine whether the party was qualified to teach given her condition. *Arline*, 480 U.S. at 287-89. "[I]n most cases, the District Court will need to conduct an *individualized* inquiry and make appropriate findings of fact." *Id.* at 287 (emphasis added). The Court quoted the American Medical Association's recommendations:

[The findings should be] based on reasonable medical judgements *given the state of medical knowledge*, about (a) the nature of the risk [how the disease is transmitted], (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. at 288 (emphasis added).

⁹³ See *supra* notes 84 & 86 and accompanying text (discussing the focus and legitimacy of the individualized orientation toward impairment).

⁹⁴ Under this approach a judge might recognize the seropositivity yet decide that until the plaintiff demonstrates warning symptoms that affect behavior, such as ARC or AIDS, the plaintiff has no impairment. See *generally* Comment, *supra* note 30, at 891 (noting that asymptomatic individuals may not show outward manifestations of infection).

A recipient could also claim that even under the individualized approach, the HIV virus is not an impairment because no negative body system effects result from a few cell deaths. Furthermore, since the blood test only measures the presence of antibodies, seropositivity merely signifies a healthy immune system response to an infectious agent. See *generally* Macher, *supra* note 15, at 6-7 (discussing blood test measurements). These arguments fail to recognize that although "[t]he majority of those who have been infected . . . do not develop any symptoms . . . many may reveal mild to moderate immune deficiency upon clinical examination." *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 400, 502 N.Y.S.2d 325, 327 (Sup. Ct. 1986). Judges should consider mild to moderate immune deficiency a physical impairment. See

approach, asymptomatic individuals have an impairment because the HIV virus adversely affects the "hemic and lymphatic" body system.⁹⁵

Several courts have applied the impairment definition to HIV and found that the infection constitutes an impairment.⁹⁶ However, not all

id. at 401-02, 409, 502 N.Y.S.2d at 328-29, 336.

In a 1986 opinion to the Department of Health and Human Services, the Department of Justice asserted that section 504 would not cover any person with HIV (or AIDS for that matter) who was discriminated against on the basis of contagiousness. Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, to Ronald E. Robertson, General Counsel, Department of Health and Human Services Re: *Application of Section 504 of the Rehabilitation Act to Persons with AIDS, AIDS-Related Complex, or Infection with the AIDS Virus* (June 20, 1986) [hereafter Cooper Opinion], reprinted in *AIDS AND THE LAW*, app. I, at 286 (W. Dornette ed. 1987). This anomalous conclusion was premised on the assumption that "contagiousness" was not an impairment. *Id.* at 302. To reach this conclusion, DOJ used the example of an immune carrier of HIV. *Id.* It then reasoned that since asymptomatic individuals are similar to an immune carrier who suffers no disabling effects of the virus, they do not have an impairment. *Id.* at 305. This classic "some/all" fallacy fails to recognize HIV's complexities and how it can adversely affect a body system. HIV infection is a spectrum illness that can have a varying range of effects depending on the individual; AIDS merely encompasses the various manifestations of HIV infection at the most debilitating end of the spectrum. See Carey, *supra* note 34, at 1-2; Godley, *AIDS and Lymphadenopathy*, 73 BRIT. J. SURGERY 170 (1986).

Many authorities have thoroughly attacked the Cooper Opinion. See, e.g., Estreicher, *EEO LAWS: HANDICAP AND SEXUAL PREFERENCE*, in *COMMUNICABLE DISEASES IN THE WORKPLACE* 92-95 (R. Curiale & S. Estreicher eds. 1986); Leonard, *supra* note 16, at 29 (criticizing Cooper for an unjustifiably narrow interpretation of the regulations and for an opinion fundamentally inconsistent with the policy underlying § 504); Wasson, *supra* note 45, at 241-45.

⁹⁵ See Leonard, *supra* note 16, at 31-32 (claiming that HIV impairs the hemic and lymphatic system); Comment, *supra* note 30, at 896. An analysis of the way HIV destroys important lymphocytes and the compromising result on the immune system supports this conclusion. See *supra* note 34 and accompanying text (discussing lymphocyte activity).

⁹⁶ *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 382 (C.D. Cal. 1987) (holding that a school district could not automatically exclude a child with HIV, even though the child attempted to bite a classmate); *District 27*, 130 Misc. 2d at 402, 414, 502 N.Y.S.2d at 328-29, 336 (denying local school boards injunction to prohibit city officials from allowing unidentified child with HIV to attend school).

For education, the Education for All Handicapped Children Act [EAHCA] provides administrative procedures to assure free appropriate public education for children with handicaps and requires exhaustion of administrative remedies prior to civil action in a federal district court. 20 U.S.C. § 1415(e)(2) (1982). The EAHCA states that "[t]he term 'handicapped children' means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children or children with specific learning disabilities who by reason thereof require special education and related services." 20

of these cases analyzed the statutory or regulatory provisions in a coherent manner.⁹⁷ Because the behavioral manifestation requirement within the plain-meaning approach does not comport with the regulations,⁹⁸ judges should apply the individualized approach and find that asymptomatic individuals have an impairment.⁹⁹

U.S.C. § 1401(a)(1) (Supp. IV 1986) (emphasis added). Because this definition essentially focuses only on the major life activity of learning; individuals who have handicaps under the Rehabilitation Act may not have handicaps under the EAHCA. It is easy to see how an asymptomatic child with HIV (or one with AIDS or ARC) could benefit from psychological counseling. *See Comment, Undoing a Lesson, supra* note 45, at 210 n.99 (arguing that HIV infection may be a handicap under EAHCA because of the stigma and psychological burdens that may adversely affect a child's educational performance). *See generally* 34 C.F.R. § 300.13(a) (1987) (including "psychological services" within the definition of "related services"); E. KUBLER-ROSS, AIDS: THE ULTIMATE CHALLENGE 40-51 (1987) (discussing children with AIDS and documenting some of the social ostracism experienced by them and their families). Nonetheless, some cases have found children with AIDS or ARC to have handicaps under section 504 yet no handicaps under EAHCA. *Doe v. Belleville Public School Dist. No. 118*, 672 F. Supp. 342, 345 (S.D. Ill. 1987) (dealing with a child with AIDS and noting that even if the child had a handicap under the EAHCA, the procedures were inadequate for immediate relief when the child is being excluded from the classroom); *Robertson v. Granite City Community Unit School Dist. No. 9*, 684 F. Supp. 1002, 1007 (S.D. Ill. 1988) (granting a preliminary injunction for a child with ARC to return to the classroom). However, EAHCA provides some excellent procedural safeguards that children with HIV could exploit. *See, e.g.*, 34 C.F.R. § 300.513(a) & (b) (1987) (requiring the child remain in her current educational placement during the pendency of any administrative or judicial proceeding and, when dealing with a case involving initial admission, requiring that the child "must be placed in the public school program until the completion of all the proceedings").

Apparently there has been some consideration of setting up separate procedures to deal with children with HIV outside of EAHCA procedures, in part because of the belief that children with HIV do not have handicaps under the EAHCA. Telephone interview with Mary Lou Breslin, Executive Director of Disability Rights Education and Defense Fund (DREDF) Diane Lipton & Arlene Mayerson, DREDF Staff Attorneys (Jan. 27, 1989). This is precisely the type of stigmatization that people in the disability movement have been battling for years. *Id.*

⁹⁷ After finding an impairment, the *District 27* judge immediately jumped to the third category (regarded as having such an impairment) without considering the substantial limitation requirement. *District 27*, 130 Misc. 2d at 414, 502 N.Y.S.2d at 336. The judge went on to find that since HIV "destroys certain lymphocytes, a person with AIDS clearly has such a 'physical impairment.'" *Id.* The judge apparently meant to include persons with HIV within "a person with AIDS," because the virus destroys certain lymphocytes long before the onset of AIDS. *See supra* note 34 and accompanying text.

⁹⁸ *See supra* notes 79-84 and accompanying text (discussing the plain-meaning and individualized approaches).

⁹⁹ *See supra* notes 94-95 and accompanying text (discussing why judges should con-

However, even assuming HIV infection is an impairment, only impairments that substantially limit major life activities become handicaps under the first statutory category.¹⁰⁰

2. Substantially Limits Major Life Activities

a. Legislative Definition

The Department of Health and Human Services' (HHS) section 504 regulations do not define "substantially limits."¹⁰¹ However, section 503 regulations state that an individual is substantially limited if he or she "is likely to experience difficulty in securing, retaining, or advancing in employment because of a handicap."¹⁰² However, some have questioned whether judges should consider substantial limitations that might occur in the future when determining whether a present handicap exists.¹⁰³

HHS's regulations state that "[m]ajor life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹⁰⁴ The

sider HIV an impairment).

¹⁰⁰ See *supra* note 65 (quoting handicap definition).

¹⁰¹ 45 C.F.R. pt. 84, app. A(A)(3) (1987) (noting that the Department did not believe a definition of "substantially limits" possible at the time).

¹⁰² 41 C.F.R. pt. 60-741, app. A, at 205-06 (1987). This part of the definition is technically circular because the ultimate issue is whether the individual has a handicap. Therefore, "an individual with an impairment" should replace "a handicapped individual" and "because of an impairment" should replace "because of a handicap."

¹⁰³ A crucial interpretive issue is whether the future-oriented aspect of this interpretation comports with the statutory language requiring an impairment that substantially limits major life activities. See *supra* note 65 (quoting handicap definition). Given Professor Lawson's literal methodology, he reasonably concludes that only impairments that *presently* substantially limit major life activities are handicaps. Lawson, *supra* note 26. *But cf.* Note, *Asymptomatic Infection*, *supra* note 46, at 570-72 (asserting that eventual substantial limitations should be considered when determining a present handicap). However, a strong argument can be made to include future substantial limitations when such limitations are certain to result. See *infra* note 119 (discussing this issue in the context of HIV infection in children).

¹⁰⁴ 45 C.F.R. § 84.3(j)(2)(ii) (1987). The dual themes of education and employment, exhibited by the activities "learning and working," consistently reappear throughout the regulations. See, e.g., 45 C.F.R. § 84.3(k) (1987) (defining "qualified" with respect to employment and education).

The Office of Federal Contract Compliance's (OFCC) definition of major life activities in the regulations implementing section 503 provides that: "*Life activities*' may be considered to include communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing, etc. . . ." 41 C.F.R. pt. 60-741, app. A, at 205 (1987) (applying to federal contractors and requiring affirmative action). The section 501 regulations by the Equal Employment Opportunity

words "such as" clearly contemplate additional major life activities not explicitly stated.¹⁰⁵ Therefore judges should recognize implied major life activities not explicitly stated in the section 504 regulations.

b. Judicial Interpretation

A judge may encounter three issues when she determines whether an impairment substantially limits major life activities.

Initially, a judge decides whether to recognize implied activities¹⁰⁶ or only those specified in the regulations.¹⁰⁷ The Second Circuit has appropriately implied activities in addition to those stated in the regulations.¹⁰⁸

Second, a judge determines whether to adopt an individualized orientation toward the major life activity. An individualized orientation ana-

Commission (EEOC) adopts the DHHS definition of major life activities. *See* 29 C.F.R. § 1613.702 (1987) (applying to federal employers and requiring affirmative action).

Despite these differences, judges should not construe a different handicap definition for section 503 than for section 504. The Act specifically states that the definition applies to "titles IV and V." 29 U.S.C. § 706(8)(B) (1982). Title V includes both sections 503 and 504. Furthermore, the President explicitly instructed HEW to ensure congruent handicap definitions. Exec. Order No. 11,914, 41 Fed. Reg. 17,872 (1976).

¹⁰⁵ Professor Lawson asserts that because the list of activities are "principally . . . physical or cognitive, not purely social," the activity of working should not be viewed as a social act of maintaining a job. Lawson, *supra* note 26. "There are many things that common discourse would regard as major life activities that are not within the scope of Section 706(8)(B)." *Id.* (asserting that a "task-based reading appears to be commanded by the statute"). Despite Lawson's reference to the statute and purported literal methodology, there is nothing in the statute (literally or otherwise) that supports his conclusion. *See supra* note 65 (quoting statutory definition of handicap). Accordingly, major life activities should include those activities common discourse would regard as major.

Examples of implied major life activities for any person (not just asymptomatic individuals) might include: handling stress, sexual relations, eating, maintaining interpersonal relationships, sleeping, raising a family, and procreation. *See Doe v. New York Univ.*, 666 F.2d 761, 775 (2d Cir. 1981) (finding stress management a major life activity); *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 379 (C.D. Cal. 1987) (finding procreation and childbirth major life activities); *see also Note, Asymptomatic Infection, supra* note 46, at 574 (arguing in favor of the implied activities of sex and procreation).

¹⁰⁶ *See supra* note 104 and accompanying text.

¹⁰⁷ The section 504 specified activities are "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1987).

¹⁰⁸ *See Doe*, 666 F.2d at 775 (finding stress management a major life activity). For further analysis of this case, *see infra* note 111.

lyzes the activity in light of a person's life situation.¹⁰⁹ For the activity of "working," most judges have not applied an individualized orientation but have required the impairment to substantially limit "working" in general.¹¹⁰ However, some judges have applied the individualized orientation and required the impairment substantially limit an individual's career position.¹¹¹

¹⁰⁹ A judge generally begins the analysis by viewing an activity (such as working) from a general, societal standard. An individualized orientation to the activity of working would focus on the plaintiff's relationship to a particular job or career, which then may or may not qualify as a major life activity. The plaintiff would have the burden of showing the activity's importance before the judge would find it "major."

For example, a judge may individualize a specified activity (work) to consider the job of an auto mechanic a major life activity. Similarly, a judge may individualize an implied activity (stress management) to consider a physician's stress management a major life activity.

¹¹⁰ See *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986). Although the court cited *E.E. Black* as support, it concluded that "the very concept of an impairment implies a characteristic that is not common place and that poses for the particular individual *a more general disadvantage in his or her search for satisfactory employment.*" *Id.* at 934 (emphasis added); see also *Elstner v. Southwestern Bell Tel. Co.*, 659 F. Supp. 1328, 1341 (S.D. Tex. 1987); *Wimbley v. Bolger*, 642 F. Supp. 481, 485 (W.D. Tenn. 1986).

¹¹¹ See *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1099 (D. Haw. 1980) (requiring that the impairment substantially limit the individual's job as a carpenter instead of work in general); *Doe*, 666 F.2d 761. In *Doe*, New York University barred the plaintiff from readmission to medical school because she had been diagnosed by a N.Y.U. psychiatrist as having "borderline personality." *Id.* at 768-70. Evidently the plaintiff would have this serious personality disorder through adulthood, subject to modification by therapists and a lifestyle avoiding stressful situations. *Id.* at 768. Plaintiff's experts asserted that she had a treatable neurotic depression and not borderline personality. *Id.* at 769. The court found a handicap in view of "her extensive history of mental impairments requiring hospitalizations . . . all of which indicate that she has suffered from a substantial limitation on a major life activity, *the ability to handle stressful situations of the type faced in a medical training milieu.*" *Id.* at 775 (emphasis added). The court inferred the major life activity of "handling stress," since the regulations do not mention it. The court's focus on stress "of the type faced in a medical training milieu" indicates the individualized orientation. The court mischaracterized the major life activity as an ability. The activity is handling stressful situations of the type faced in a medical school. Nonetheless, the court accurately identified the "ability" as impaired. Such an impairment of ability results from an adversely affected body system and causes the substantial limitation of a major life activity.

Considering individualized activities may exclude the plaintiff from the first category if the activity is an essential function of the job. If handling the stress of medical school represents an essential job qualification, and the individual has an impairment that substantially limits that major life activity, she may have a handicap but be unqualified and not protected under the Act. See *id.* at 779 (holding plaintiff not qualified). See generally 45 C.F.R. § 84.3(k)(3) (1987) (defining a qualified person with handicaps in

Finally, judges decide how to measure the limitation. Judges may adopt a constricted approach toward such limitation by requiring that a particular impairment substantially limit a single major life activity.¹¹² Alternatively, judges may apply a holistic approach that considers all of the limitations from all impairments on all major life activities in the aggregate.¹¹³ Some judges have implicitly applied the holistic approach

postsecondary and vocational services). The qualification requirement precludes section 504 coverage for employment discrimination if the person cannot, "with reasonable accommodation . . . perform the essential functions of the job in question." 45 C.F.R. § 84.3(k)(1) (1987); see *Alexander v. Choate*, 469 U.S. 287, 301 n.20 (1985) (noting that the "regulations implementing § 504 are consistent with the view that reasonable adjustments . . . must at times be made to assure meaningful access").

A judge may not find a substantial limitation in some instances without applying an individualized orientation. Using the same facts of *Doe*, the implied activity of stress management, without an individualized orientation, remains "successful stress management." Most people do not need the ability to handle medical school stress to handle most of life's stressful situations. Therefore, if borderline personality does not substantially limit the successful management of stress in general, it is not a handicap.

The individualized orientation focuses on the particular person and realizes that the doctors require "the ability to handle stressful situations of the type faced in a medical training milieu." The distinction becomes critical if N.Y.U. had *regarded* the plaintiff as having borderline personality when she actually had no impairment or a lesser one (the third category) because she is more likely to be qualified. See *generally infra* notes 131-55 and accompanying text (discussing the third statutory category).

¹¹² Judges may constrict the limitation in two ways. The judge may look at the limitation on one particular activity (employment) and require that activity to be substantially limited by itself. A judge may also constrict the limitation by considering the effects of a single impairment on a particular activity and fail to consider other limitations from other impairments.

¹¹³ For example, if a person's single impairment moderately limited several major activities causing a substantial limitation in the aggregate, that individual would have a handicap under the first category. Likewise, consider a person who has several impairments that independently only moderately limit a particular major life activity. If these moderate limitations are collectively substantial, they too should be handicaps.

A counterargument to the holistic approach relies on a literal construction of the statutory definition that appears to require a single "impairment which substantially limits *one or more* . . . major life activities." 29 U.S.C. § 706(8)(B)(i) (Supp. IV 1986) (emphasis added). However, a functional analysis of the handicap definition supports the holistic approach by disregarding semantics and recognizing the complexities of the impairment's effects upon a person's functioning.

The holistic approach has legislative support. The 1974 amendment to the Act came from the House of Representatives's joint statement:

The Senate amendment adds . . . the following new definition of 'handicapped individual' . . . 'Any person who (A) has a physical or mental impairment which substantially limits *such person's functioning* or one or more such person's major life activities' The House bill has no comparable provision. The House recedes with an amendment deleting from

to multiple impairments.¹¹⁴ Judges should consider the impairments' aggregate effect upon all major life activities. Judges must address these three determinations when they apply the handicap definition to HIV.

c. Applications to HIV

Because HIV positivity alone rarely substantially limits the activities specified in the regulation,¹¹⁵ most commentators do not include HIV within the first category of the handicap definition.¹¹⁶ A constricted approach to measuring the limitation supports a nonhandicap conclusion because it neglects the psychological effects of HIV and fails to consider the limitations in the aggregate.¹¹⁷ Nonetheless, some courts have con-

clause (A) the language 'such person's functioning or' *as redundant*. H. R. REP. NO. 1457, 93d Cong., 2d Sess. 25 (1974) (emphasis added).

This amendment demonstrates that at least part of Congress could have equated "functioning" with "major life activities." "Functioning" is a fluid concept that includes all of an individual's major life activities. Therefore, asymptomatic individuals could have only moderate limitations in "one or more" major life activities (sexual relations, work, sleep, handling stress, maintaining interpersonal relationships, and procreation) and yet be substantially limited in their "functioning." The holistic approach aggregates the limitation on all major life activities to determine whether the limitation is substantial.

The logical extension of this deconstructive interpretation would strip the barrier between major and minor life activities and aggregate all the impairment's limitation on all activity. Nonetheless, the major/minor life activity distinction seems too thoroughly grounded in the statute and regulations.

¹¹⁴ See *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130 (D. Iowa 1984). "[P]laintiff has nocturnal epilepsy, dyslexia and cerebral palsy with left side hemiplegia. There appears to be no dispute that plaintiff . . . [has a handicap]." *Id.* at 1135; see also *Carty v. Carlin*, 623 F. Supp. 1181, 1184 (D. Md. 1985) (finding manic depression and myocardial infarction with probable artery disease a handicap).

¹¹⁵ It might be difficult for a judge to conclude that HIV seropositivity substantially limits "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1987). *But cf.* Note, *Asymptomatic Infection*, *supra* note 46, at 573 (arguing that seropositivity substantially limits the major life activity of working).

¹¹⁶ See *supra* notes 45-46.

¹¹⁷ The constricted approach fails to recognize the fact that a physical impairment like HIV can have psychological effects. See generally Barbuto, *Psychiatric Illness in Patients with AIDS*, in *AIDS AND PATIENT MANAGEMENT: THE LEGAL, ETHICAL AND SOCIAL ISSUES* 113 (M. Witt ed. 1986) (discussing how the virus infects the nervous system). "In the early stages of the infection, central nervous system complications are quite indistinguishable from depression." *Id.* at 115. *But cf.* *Mental Illness*, *AIDS REP.* at 2-3 (Sept. 1988) (summarizing a report that found no signs of distinct mental difficulties such as loss of memory or mental slowness in persons with HIV prior to physical manifestations of AIDS). Some asymptomatic individuals may experience de-

sidered HIV infection a handicap.¹¹⁸

pression from knowledge of their seropositivity. *See generally* Forstein, *Mental Health Needs of People with AIDS*, in *AIDS AND PATIENT MANAGEMENT: THE LEGAL, ETHICAL AND SOCIAL ISSUES* 117 (M. Witt ed. 1986). "In my experience some people with AIDS have fared better psychologically, than some people with AIDS-related complex (ARC) who had a much more fluctuating course. This latter group has a *very difficult time dealing with existing without a sense of what will happen to them . . .*" *Id.* at 118 (emphasis added). Some asymptomatic individuals aware of their seropositivity might experience similar difficulties. One should note that the first example of depression was directly caused by HIV's effects on the central nervous system while the second resulted from a person's awareness of the HIV infection. Evidently Professor Lawson would only recognize the former instance because of the direct medical causation between the virus and the depression. *See* Lawson, *supra* note 26. Judges should reasonably consider both instances, which may moderately limit a wide variety of major life activities, when deciding whether an impairment substantially limits.

Although this Comment argues that HIV infection could be a handicap for many asymptomatic persons, it recognizes that persons with HIV may live full and complete lives and that positive thinking, stress reduction, and social support can encourage a healthy immune response. *See* Robinson-Hayes, *Healthy Mind May Hinder AIDS*, *Sacramento Bee*, Jan. 16, 1989, at 1, col. 3 (discussing a group of scientists in the field of psychoneuroimmunology that had linked positive attitudes and assertive behavior among individuals with AIDS to a healthier immune response). *See generally* Soloman, *Psychoneuroimmunology: Interaction Between the Central Nervous System and Immune System*, 18 *J. NEUROSCI. RES.* 1 (1987) (outlining various postulates depicting possible interactions if the central nervous system influences immunologic functioning). For a further discussion of the psychological effects of AIDS, see Morin, Charles & Maylon, *The Psychological Impact of AIDS on Gay Men*, 39 *AM. PSYCHOLOGIST* 1288 (1984).

¹¹⁸ *See* *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987). "Even those who are asymptomatic have abnormalities in their hemic and reproductive systems making procreation and childbirth dangerous to themselves and others." *Id.* at 379. Other cases have referred to *Thomas* and other cases to support (for preliminary injunction purposes) that individuals with various degrees of HIV infection had handicaps under the Act. *See* *Ray v. School Dist. of Desoto County*, 666 F. Supp. 1524, 1536-38 (M.D. Fla. 1987) (granting motion for preliminary injunction to admit three hemophiliac children with HIV into regular integrated classrooms subject to guidelines). "The Court upon examination of the record and such scant legal precedent as is available, finds Plaintiffs have carried their burden at this stage of the litigation, of establishing the likelihood that they will prevail on the merits of this case." *Id.* (citing *Arline, Thomas, and District 27*); *see also* *Local 1812, Am. Fed. of Gov't Employees v. Department of State*, 662 F. Supp. 50, 55 (D.D.C. 1987) (denying union's motion for preliminary injunction to bar HIV testing of foreign service employees). Here the judge never even referred to the definition of major life activities or acknowledged the existence of regulations. *Id.* at 54. Presumably this was due to the Department of State conceding the "applicability of the Rehabilitation Act on the ground that the great majority of HIV carriers are physically impaired and handicapped . . . due to the measurable deficiencies in their immune systems even where disease symptoms have not yet developed." *Id.*; *see also* *Chalk v. United States Dist. Court*, 840 F.2d 701, 708-09

For the first inquiry, judges should consider all activities that HIV physically or psychologically affects, including implied major life activities.¹¹⁹ For the second step, judges should apply an individualized orien-

(9th Cir. 1988) (relying on *Arline, Thomas, Ray*, and *District 27* in overruling lower court's denial of preliminary injunction for a teacher with AIDS and finding "a strong probability of success on the merits").

¹¹⁹ Examples of implied major life activities would include: handling stress, sexual relations, eating, maintaining interpersonal relationships, sleeping, and procreation. See *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987). "Even those who are asymptomatic have abnormalities in their hemic and reproductive systems making procreation and childbirth dangerous to themselves and others." *Id.* at 379. The vast majority of children with the HIV virus have acquired the virus in utero. See Green, *Transmission of AIDS*, in *AIDS AND THE LAW, A GUIDE FOR PUBLIC POLICY* 32 (H. Dalton & S. Burris eds. 1987). For an analysis of section 504 as it relates to children with particular medical needs, see Snelling, *Discrimination Against Children with Special Health Care Needs: Title V Crippled Children's Services Programs and Section 504 of the Rehabilitation Act of 1973*, 18 *LOY. U. CHI. L.J.* 995, 1001-08 (1987).

Although Professor Lawson admits that "sexual and reproductive activity will be substantially limited in one sense" he still concludes that this does not satisfy the statute because "the resulting substantial limitation . . . is a product of *attitudes* towards that impairment . . ." Lawson, *supra* note 26 (emphasis in original). For sexual activity, Lawson argues that because HIV does not medically impair the sexual reproductive systems and any actual limitation requires awareness and choice, any resulting limitation is not due to the impairment and thus not a handicap. *Id.* Although a tenable distinction, even alluring for those aspiring theoretical purity, it tends to ignore reality and the many people reasonably responding to a difficult situation. Clearly there seems a sufficient causal nexus between HIV infection and some limited sexual activity (certainly "but-for" though not strict medical causation).

For the activity of procreation Lawson attacks from a more vulnerable position because the child may be born with HIV and die soon thereafter regardless of the parent's awareness of HIV's presence. To bolster this argument Lawson dismisses the notion of child rearing as a major life activity and restricts the definition of procreation to the physical act of birth, regardless of whether the child dies from HIV soon thereafter. *Id.* This restrictive interpretation is another manifestation of his limiting view of major life activities as "the performance of physical and mental operations." *Id.*; see *supra* notes 104-05 and accompanying text (discussing major life activities).

An individualized argument recognizes that for some individuals, procreation (and/or sexual relations) is not a major life activity (*i.e.*, women beyond their child bearing years, sterile or impotent men, and women and men who simply do not feel the urge to perpetuate the human race).

However, even assuming HIV substantially limits major life activity in the aggregate (*i.e.*, sexual relations, procreation, and child rearing), Lawson argues that section 504 temporally requires such limitation to exist in the present. Lawson, *supra* note 26. In *Thomas*, the court found a five-year-old child with HIV substantially limited in his major life activities of procreation and childbirth. *Thomas*, 662 F. Supp. 376. Apparently, Lawson would argue that the child could not be limited in any of these activities prior to puberty. Lawson, *supra* note 26. However, this is not the case when a judge is

tation toward activities to adequately consider the importance of the activity.¹²⁰ Finally, judges should adopt a holistic approach that aggregates all of the physical and psychological aspects of the limitation on all specified and implied activities.¹²¹ This analysis will lead judges to conclude that many asymptomatic individuals have a physical or mental impairment that substantially limits their major life activities.

B. The Second Category: Record of Such an Impairment

1. Legislative Definition and Judicial Interpretation

The second statutory category of the handicap definition applies to anyone who has a record of a substantially limiting impairment.¹²² The section 504 regulations include individuals with a history of a substantially limiting impairment¹²³ and those who have been misclassified as having such an impairment.¹²⁴ This category refers to an earlier first category handicap¹²⁵ or a past incident of being regarded as handi-

asked to speculate on the uncertain possibility of a substantial limitation developing in the future (*e.g.*, someone with high blood pressure arguing that a possible heart attack substantially limits present major life activities). Clearly in this instance, a child with HIV will have her major life activity of sexual relations, procreation, and child rearing limited *if* she lives long enough to engage in such activities. *See generally supra* note 33 (noting that those with HIV probably remain infectious for life). Furthermore, knowledge that the person will eventually be substantially limited may have profound effects on the particular individual that *presently* limit other major life activities.

¹²⁰ *See supra* notes 109-11 (discussing individualized activities).

¹²¹ For example, a judge should consider, in the aggregate, how HIV has limited the activities of working, sexual relations, procreation, child rearing, learning, stress management, and maintaining personal relationships when deciding whether HIV substantially limits.

¹²² "(ii) has a record of such an impairment . . ." 29 U.S.C. § 706(8)(B)(ii) (Supp. IV 1986).

¹²³ 45 C.F.R. § 84.3(j)(2)(iii) (1987). This category of the definition would cover "persons who have a history of a handicapping condition but no longer have the condition . . . [such as] persons with histories of mental or emotional illness, heart disease, or cancer." 45 C.F.R. pt. 84, app. A(A)(3) (1987).

¹²⁴ The second category covers "persons who have been incorrectly classified as having such a condition . . . [such as] persons who have been misclassified as mentally retarded." 45 C.F.R. pt. 84, app. A(A)(3) (1987). Recovered and misclassified individuals would not have to prove that the recipient regarded them as having such an impairment (third category) to have a handicap. *See generally* S. REP. NO. 1297, 93d Cong., 2d Sess. 38-39, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6389-90 (mentioning partially recovered individuals).

¹²⁵ Because this category contemplates temporary impairments, judges should avoid a *per se* exclusion of transitory illnesses from the definition of impairment. *But cf.* *Stevens v. Stubbs*, 576 F. Supp. 1409, 1414 (E.D. Pa. 1983) (holding that transitory ill-

capped under the third category.¹²⁶ However, this category may be unique because it may include a prior misclassification by a nonrecipient.¹²⁷ Because this category refers to either the first or third categories, it does not require a unique analysis for judicial application.¹²⁸

2. Applications to HIV

Asymptomatic individuals could have a "record of such an impairment" (second category) even without a handicap under the first category. For example, the second category covers asymptomatic individuals if they previously had ARC but are presently asymptomatic because of remission.¹²⁹ Any person (including asymptomatic HIV carriers) misclassified as having ARC or AIDS would also have a handicap under

nesses are not impairments).

¹²⁶ Neither the statute nor the regulations distinguish a prior misclassification from a past incident under the third category. *See generally* S. REP. NO. 1297, 93d Cong., 2d Sess. 38-39, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6389-90 (discussing second statutory category). The "misclassification" reference in this category may have evolved from cases in which schools misclassified children as mentally retarded. *See generally id.* at 38, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 6389 (noting "physically or mentally handicapped children who may be denied admission to federally supported school systems on the basis of their handicap"); 45 C.F.R. pt. 84, app. A(A)(3) (1987) (noting that frequent examples of the second category include "persons who have been misclassified as mentally retarded"); *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979) (African-American school children misclassified as mentally retarded through the use of culturally biased intelligence tests). In *Riles*, the judge found that the plaintiffs were regarded as handicapped (the third category). *Id.* at 967 (illustrating how misclassifications could constitute a handicap under either second or third category).

¹²⁷ For example, consider a person with a disfiguring scar who had been clearly "regarded as having such an impairment" by a prior nonrecipient employer. For any subsequent discrimination by a more subtle recipient employer, the plaintiff may not have to prove that the new employer "regarded" her as impaired to establish a handicap under the second category.

¹²⁸ *See, e.g.,* *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 280-81 (1987). The Supreme Court ruled that a teacher with a history of tuberculosis had a record of a substantially limiting impairment. *Id.* Yet the Court conducted a first-category analysis and applied it to historical evidence of the impairment. *See id.* (finding plaintiff's hospitalization in 1957 established a handicap under the second category). For a more thorough analysis of the *Arline* decision, see Note, *After Arline*, *supra* note 45, at 867; Comment, *Employment Discrimination: Tuberculosis is a Handicap Within the Meaning of Section 504 of the Rehabilitation Act of 1973*, 24 WASHBURN L.J. 207, 217-22 (1987).

¹²⁹ *See* Proffitt, *supra* note 40, at 21.

this category.¹³⁰

C. *The Third Category: Regarded as Having Such an Impairment*

1. Legislative Definition

The third category of the handicap definition includes those who have been “regarded as having such an impairment.”¹³¹ The regulations provide three methods of meeting this category.¹³² The first method applies when a recipient treats individuals with an impairment as substantially limited.¹³³ The second method includes persons who only have a substantially limiting impairment because of the attitudes of others.¹³⁴ The third method applies when a recipient treats persons

¹³⁰ The same reasoning applies to any individual who falsely tested positive for HIV, assuming HIV infection amounts to a handicap.

¹³¹ 29 U.S.C. § 706(8)(B)(iii) (Supp. IV 1986).

¹³² 45 C.F.R. § 84.3(j)(2)(iv) (1987).

“Is regarded as having an impairment” means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in . . . this section but is treated by a recipient as having such an impairment.

Id.

¹³³ *Id.* § 84.3(j)(2)(iv)(A).

¹³⁴ *Id.* § 84.3(j)(2)(iv)(B). The section 504 regulations provide no explanation of “others” under this method. *See id.* pt. 84, app. A(A)(3) (1987) (no mention of “others”). The Department of Labor adopted the same definition. 29 C.F.R. § 32.3(b)(5) (1988). A reasonable interpretation of “others” would include recipients and coworkers in employment cases, and teachers, parents, and students in education cases. These individuals could put pressure on a recipient, who may discriminate, even without sharing the attitudes of these others.

This subsection of the regulation, according to Professor Lawson, is flatly inconsistent with the statutory definition. Lawson, *supra* note 26. “The drafters obviously had in mind a person with an impairment that is neither in medical fact disabling nor wrongly regarded by others as in medical fact disabling, but which is so widely viewed as an undesirable attribute that the individual is substantially limited in his ability to find employment.” *Id.* (citing the example of a person with a disfiguring scar and drawing a distinction between “negative attitudes” toward that impairment (permitted) and regarding that impairment as medically substantially limiting major life activities (prohibited)). Lawson utilizes the example of “a person with an impairment that does not medically limit, nor is regarded by others as medically limiting, life activities may nonetheless be *disabled in fact* simply by virtue of having his employment options severely limited by the negative reactions of others.” *Id.* (emphasis in original). Lawson then asserts that arguing that this should be included within the definition “fails because it is plain as a matter of both text and structure that the causal relationship

without impairments as having a substantially limiting impairment.¹³⁵ A thorough analysis of the third category must address two important questions. First, what individual attributes may a recipient regard as substantially limiting impairments? Second, what recipient behavior constitutes regarding such attributes as substantially limiting major life activities?

A recipient might view several types of impairments. A "character impairment" results from regarding a personal characteristic as an impairment.¹³⁶ An "actual impairment" results from a recipient viewing the individual as having a real impairment, regardless of whether the

between an impairment and a substantial limitation on major life activities represented by the word "which" in Section 706(8)(B)(i) is one of *physical* or *medical* causation, not of *but-for* causation." *Id.* (emphasis in original).

This Comment's position is that if an employer has such negative attitudes toward a nonsubstantial impairment that it is willing to discriminate against the employee to such an extent that a substantial limitation results, a presumption should arise that the employer regarded that impairment as substantially limiting. *See infra* notes 150-55 and accompanying text (discussing creation of a rebuttable presumption). It seems the uniqueness to the second method is not that it allows a looser causal nexus but that it considers the attitudes of "others," not just the recipient.

¹³⁵ 45 C.F.R. § 84.3(j)(iv)(C) (1987).

¹³⁶ Left-handedness represents an individual characteristic. If a recipient perceived the characteristic of left-handedness as a physical impairment, the recipient would regard a left-handed individual as having a character impairment. Homosexuality should also be considered an individual characteristic. Additionally, a recipient who treated a person's homosexuality as a mental impairment would regard her as having a character impairment. The regulations specifically exclude homosexuality from the definition. *See* 45 C.F.R. pt. 84, app. A(A)(3) (1987). Nonetheless, it seems clear that a significant number of people continue to regard gays and lesbians as mentally ill. *See, e.g.,* VAN DEN ARDWEG, *ON THE ORIGINS AND TREATMENT OF HOMOSEXUALITY*, at xv-xvi (1986) (asserting that homosexuality was a neurosis resulting from "compulsive, involuntary self-pity"). It was not until December 1973 that the American Psychiatric Association (APA) was pressured from both inside and out to remove homosexuality from their *Diagnostic and Statistical Manual of Psychiatric Disorders*, its official list of mental diseases. BOYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY* 136-37 (1981). Despite declassifying homosexuality from psychiatric disorders, the APA placed it within a new category called "sexual orientation disturbance." *Id.* at 137. This category only included homosexuals who were either disturbed by, in conflict with, or wished to change their sexual orientation. *Id.* at 136. In 1978, the APA adopted the new category of "ego-dystonic homosexuality" that apparently shifted the focus away from distress over homosexual orientation to an impairment of heterosexual functioning desired by the individual. *Id.* at 176.

For an analysis of AIDS with respect to the regulation of sexual activity and the portrayal of AIDS as a homosexual disease, see Note, *Characterization and Disease: Homosexuals and the Threat of AIDS*, 66 N.C.L. REV. 226 (1987).

person actually has one.¹³⁷ A “fictional impairment” results from a recipient perceiving an individual as having an impairment unknown to medical science.¹³⁸ “Medical incidents” lie between individual characteristics and impairments.¹³⁹ However, classifying state of mind in theory says nothing about the recipient behavior that indicates that state of mind.

Thus, the second interpretive issue asks how a recipient treats an individual as substantially limited. An analysis of the judicial interpretation of the third category provides some insight.

2. Judicial Interpretation

Most judges have analyzed the third statutory category in a conclusory fashion without reference to the regulations.¹⁴⁰ However, the judge in *E.E. Black* gave an incisive analysis of the third category.¹⁴¹ The judge adopted an individualized orientation toward the activity of working.¹⁴²

¹³⁷ For example, if a recipient viewed either asymptomatic or uninfected persons as HIV positive, the recipient would view them as having an actual impairment. Although the uninfected individuals do not have the virus, HIV exists.

¹³⁸ If a recipient treated a lung cancer victim as contagious, that would be a fictional impairment because lung cancer is not contagious. Although a character impairment is actually a type of fictional impairment, here a fictional impairment is based upon an actual impairment or a medical incident. This distinguishes Lawson’s hypothetical of an employer firing someone on the basis of their astrological sign and analogizing it to an employer firing an individual on the basis of HIV (which he does not consider an impairment). Lawson, *supra* note 26.

¹³⁹ A medical incident represents any health-related incident that does not amount to an impairment. This may include the flu, a mild case of depression, a broken leg, a visit to a psychiatrist, or any health-related incident that a recipient could use as the basis of an actual or fictional impairment. *See generally* 41 FED. REG. 20,299 (1976). “If, for example, a nonhandicapped employee were to have a convulsion as a result of an atypical reaction to medication, any discriminatory employment practice based upon the conclusion that the person is epileptic would be prohibited” *Id.* In this case a medical incident (medication induced convulsion) forms the basis of an actual impairment (epilepsy).

¹⁴⁰ *See Forrissi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986) (finding an individual with acrophobia (fear of heights) not regarded as having a substantially limiting impairment); *Pridemore v. Legal Aid Soc’y of Dayton*, 625 F. Supp. 1171, 1174 (S.D. Ohio 1985) (holding an individual with minor cerebral palsy not regarded as having substantially limiting impairment).

¹⁴¹ *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1097-98 (D. Haw. 1980).

¹⁴² The administrative law judge had rejected the individualized orientation toward working by including “only persons with impairments impeding their ability to perform many or most jobs” *Id.* at 1094. The trial judge noted that “[a] person who is disqualified from employment in his chosen field has a substantial handicap to em-

The judge implemented a four-step analysis to determine whether the recipient's treatment resulted in a substantial limitation to the activity of working. First, the judge assumed that all employers offering the same or similar job would make like demands.¹⁴³ Second, the judge determined what types of jobs the recipient's requirements would foreclose.¹⁴⁴ Third, the judge analyzed the number of employment opportunities available to the employee in the geographical area.¹⁴⁵ Finally, the court individualized its orientation by considering the employee's job training and expectations.¹⁴⁶ The judge found the employee had a handicap under the third category.¹⁴⁷

The prospective limitation analysis developed in *E.E. Black* asks whether the employer's treatment would result in a substantial limitation if similar employers treated the employee in a similar fashion.¹⁴⁸

ployment" and that the handicap definitions were personal. *Id.* at 1099.

Some judges have not applied an individualized orientation toward working and have required a recipient's treatment to substantially limit a plaintiff's employment opportunities in general. *See, e.g.,* *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985). "An impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one." *Id.* at 1249 n.3; *de la Torres v. Bolger*, 610 F. Supp. 593, 596 (N.D. Tex. 1985) (stating that an impairment must limit an individual's ability to gain satisfactory employment), *aff'd*, 781 F.2d 1134 (5th Cir. 1986).

¹⁴³ *E.E. Black*, 497 F. Supp. at 1100.

¹⁴⁴ *Id.* at 1101.

¹⁴⁵ *Id.* "This geographical area is relevant in order to determine if there are other employers who could offer the applicant the same or a similar job, and if so how many." *Id.* The number of employment opportunities should not be relevant once it is determined that the type of job is very important from the applicant's perspective. The number of potential job opportunities becomes irrelevant if all potential employers adopt the same job requirements under the second presumption.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1102-03. However, the judge did not state whether the employee's condition was an actual impairment under the first method (when an individual has a non-substantial impairment treated as substantially limiting), or an incident under the third method (in which a nonimpaired individual is treated as having a substantially limiting impairment). "Thus he [the employee] was clearly impaired or regarded as impaired." *Id.* at 1102. The employee had a partially sacralized transitional vertebra, spina bifida occulta, and a mild rotoscoliosis. *Id.* at 1091. For further explanation of these conditions, see *supra* note 77.

The distinction between incidents and actual impairments becomes irrelevant when the recipient, on the basis of an impairment (whether actual or perceived), treats a person in a way that substantially limits major life activities. Thus, whether HIV was classified as either an impairment or a medical incident would become irrelevant if the recipient's treatment was based on HIV and would result in a substantial limitation.

¹⁴⁸ This analysis derives from the Department of Labor's definition of "substantially limits." Here, a substantial limitation occurs when a person "is likely to experience

From an affirmative conclusion the judge infers that a recipient regarded the employee as having an impairment that would result in a substantial limitation. However, this analysis assumes that the employee qualifies for the job. Otherwise, a judge could find a handicap from a *justifiable* rejection on the basis of a nonsubstantial impairment that precluded the employee from qualifying for the job.¹⁴⁹

Judges should infer that a recipient treated a nonsubstantial impairment as a handicap if the plaintiff can establish the following in her prima facie case of handicap discrimination:

- (1) the existence of a nonsubstantial impairment;¹⁵⁰
- (2) recipient knowledge of the impairment;¹⁵¹
- (3) complete qualification for the job in question;¹⁵² and
- (4) the recipient's discriminatory treatment would result in a substantial limitation.¹⁵³

Once a plaintiff establishes these elements, a rebuttable presumption should arise that the recipient regarded her as having a handicap.¹⁵⁴ A recipient could rebut this presumption with evidence that the plaintiff was not qualified or was less qualified than someone else.¹⁵⁵

difficulty in securing, retaining or advancing in employment." 41 C.F.R. pt. 60-741, app. A, 206 (1988).

¹⁴⁹ See *E.E. Black*, 497 F. Supp. at 1091-92 (assuming that the individual was qualified).

¹⁵⁰ The underlying presence of an impairment establishes a potential basis for the prohibited discrimination. Nonimpaired individuals and those with medical incidents would still have to show the state of mind of the recipient perceiving a substantially limiting actual or fictional impairment.

¹⁵¹ This requirement prevents individuals from using minor conditions, unknown to the recipient, as the basis to infer the recipient's discriminatory state of mind.

¹⁵² The reasonable accommodation provisions apply only to those individuals who already have a handicap. See 45 C.F.R. § 84.3(k) (1987). A completely qualified person with an impairment who was fired or not hired, enhances the probability that the recipient regarded her impairment as substantially limiting. See generally *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1385-86 (10th Cir. 1981) (noting that otherwise qualified individuals with handicaps being fired or not hired increased the probability that the discrimination was based solely on their handicap).

¹⁵³ Judges should adopt the modified analysis of the *E.E. Black* criteria to determine whether the treatment would result in a substantial limitation. See *supra* notes 143-47 and accompanying text (discussing and modifying the *E.E. Black* approach).

¹⁵⁴ This presumption would shift the burden of producing evidence to the recipient, who could rebut the presumption by showing her appropriate state of mind. The easiest way for a recipient to rebut the presumption would be to establish a permitted basis for rejecting or firing the plaintiff.

¹⁵⁵ This presumption would not shift the ultimate burden of proof by the preponderance of evidence to the recipient. See generally *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981). The Court found that an employer could rebut

3. Applications to HIV

Under the third category, judges should find a handicap in several situations. A handicap exists when anyone (including asymptomatic persons) proves that the recipient perceived him or her as having the "actual impairment" of ARC or AIDS.¹⁵⁶

A judge should also find HIV infection a handicap if asymptomatic individuals demonstrate that the recipient perceived them as casually contagious. Such a perception represents a "fictional impairment" because casually contagious HIV has no medical support.¹⁵⁷ If the virus were really casually contagious, it would substantially limit major life activities.¹⁵⁸

the presumption of individual disparate-treatment gender discrimination under Title VII of the Civil Rights Act of 1964 by fulfilling a burden of production through "evidence that plaintiff was rejected . . . for a legitimate, nondiscriminatory reason." *Id.* at 254. Here a presumption is used because of the difficulty of sharing an employer's specific perception of a particular impairment. *See generally* FED. R. EVID. 301. "[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof"

¹⁵⁶ This result follows from the fact that both ARC and AIDS are handicaps under the first statutory category. *See supra* note 44; *Local 1812, Am. Fed'n Gov't Employees v. Department of State*, 662 F. Supp. 50, 55 (D.D.C. 1987) (denying union's motion for preliminary injunction to bar HIV testing of foreign service employees). "In the present period of speculation and concern over the incurable and fatal nature of AIDS there is no doubt that a known carrier of the virus which causes it is perceived to be handicapped." *Id.*; *see also Doe v. Centinela Hospital*, No. 87 Civ. 2514, at 22 (C.D. Cal. July 7, 1988) (LEXIS, Genfed library, Dist. file) (finding that defendant drug rehabilitation program perceived a person with HIV as handicapped). "There is no dispute that defendant perceived plaintiff to have precisely the condition that he actually has and treated him on that account as limited in his ability to learn how to deal with a dependency problem in . . . [their] program." *Id.* at 18. The court then applied the Department of Labor's definition of "substantially limits" that means the degree that the impairment affects an individual becoming a beneficiary of a program or activity. *Id.* at 19-20.

¹⁵⁷ *See supra* note 7.

¹⁵⁸ One can easily see how individuals would be substantially limited if HIV were casually contagious (they would probably all be quarantined). The fact that these individuals would not be "otherwise qualified" if they were casually contagious is irrelevant. Otherwise, completely capable individuals could be discriminated against because their perceived handicap would have disqualified them had it existed.

The Cooper Opinion argued that since section 504 only prohibits discrimination on the basis of handicap, a recipient may permissibly discriminate due to an irrational fear of contagiousness, because contagiousness is not a handicap. Cooper Opinion, *supra* note 94, at 307. DOJ then used this imaginative distinction to conclude that even individuals with AIDS would not be protected if the recipients discriminated due to a gen-

Finally, if asymptomatic HIV carriers cannot establish a recipient perception of a specific handicap, they could show that the recipient treated them as substantially limited. They could demonstrate this by proof of their HIV impairment and recipient knowledge.¹⁵⁹ They would then have to establish that they were completely qualified for the job in question.¹⁶⁰ Finally, they would have to show that the recipient's treatment would result in a substantial limitation.¹⁶¹ Such showings should raise the presumption that the recipient employer regarded them as having a substantially limiting impairment.¹⁶²

CONCLUSION

The HIV virus and AIDS touches all aspects of our society. Asymptomatic individuals are the least affected of those with HIV and represent the clear majority of those who carry the virus. Protecting these individuals from discrimination, particularly in employment, would encourage voluntary testing and help control the spread of the virus.

Section 504 of the Rehabilitation Act of 1973 provides some protection from handicap discrimination. This Comment proposes that judges should adopt an individualized orientation to the definition of a handicap under the Act. Through this orientation, judges could find HIV seropositivity a handicap under all three categories of the handicap definition.

Stephen Sherman

uine, irrational fear of contagion. *Id.* at 308. This argument fails to recognize HIV infection as the impairment and the basis of both the contagiousness and the handicap. Because HIV is the basis of contagiousness, discrimination on the basis of contagiousness is based on the underlying HIV infection.

The Supreme Court explicitly rejected this argument stating that "[i]t would be unfair for an employer to seize upon the distinction between the effects of the disease on others and the effects of the disease on the patient and to use that distinction to justify discriminatory treatment." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 282 (1987).

The DOJ under Attorney General Thornberg has retracted this position. Kmiec Opinion, *supra* note 26, at 2 n.4. The DOJ has now concluded that "HIV infection is a physical impairment which in a given case may substantially limit a person's major life activities." *Id.* at 2 n.3.

¹⁵⁹ See *supra* notes 150-51 (discussing underlying condition and recipient knowledge).

¹⁶⁰ See *supra* note 152 (discussing complete qualification).

¹⁶¹ See *supra* note 153 (discussing determination of substantially limiting treatment).

¹⁶² See *supra* note 154 (discussing rebuttable presumption).