HIV and the Direct Threat Defense

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> Between private, subjective perception and public, physical science there lies culture, a middle area of shared beliefs and values. . . .
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> Standing inside our own culture, we can only look at our predicament through our culturally fabricated lens.[1]

I. INTRODUCTION

Consider six professions: kickboxing instructor,[2] judge, restaurant server,[3] manicurist, medical assistant,[4] and teacher.[5] People in each of these professions are HIV-positive. Which, if any, of the six may an employer lawfully fire because of HIV-positive status?

Existing interpretations of employment discrimination law produce answers that are inconsistent and counterintuitive. One group of federal circuits has held that *any* risk of transmission of the HIV virus presents a direct threat because the result, no matter how remote its occurrence, is death.[6] Under this approach, *all* the above employees could be fired, because each employee presents a remote risk of transmission and because

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[1] MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE: AN ESSAY OF THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS 194 (1982).

[2] *See, e.g.*, Montalvo v. Radcliffe, 167 F.3d 873 (4th Cir. 1999).

[3] *See, e.g.*, Equal Employment Opportunity Comm'n v. Prevo's Family Mkt., Inc., 135 F.3d 1089 (6th Cir. 1998).

[4] *See, e.g.*, Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995).

[5] *See, e.g.*, Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (1988).

[6] *See Med. Sys. Corp.*, 50 F.3d at 1266 (citing that regardless of the precautionary tactics, some measure of risk will always exist because of the activities of surgery).

the impact of transmission is severe should it occur.[7] A second group of federal circuits has held that an employee cannot present a direct threat to others unless there has been a documented case of transmission by an employee in that profession.[8] Under this approach, the kickboxing instructor, manicurist, and (until recently) medical assistant would be protected from discharge because there are no documented cases of transmission from employees in these professions.[9] Yet, the results defy common sense because contact with a kickboxing instructor or manicurist is much more intimate and physical than contact with a judge or professor.

Inconsistency in applying employment discrimination law to HIV-positive employees results from the failure of Congress to provide direction on how to evaluate the risks that disabled individuals pose to others in the workplace. Congress passed the Americans with Disabilities Act of 1990 ("ADA") to prevent discrimination against individuals with disabilities.[10] The direct threat provision of the ADA, denying protections to disabled individuals who present a direct threat to the health or safety of others in the workplace, was intended to strike a balance between the interest of employers and the rights of the disabled.[11]

The current standard defines "direct threat" as a "significant risk to the health or safety of others" in the workplace.[12] Essentially, the provision places decisions regarding the safety of interacting with HIV-positive individuals in the hands of the judiciary, which, in turn, relies on administrative agencies, the medical community, and, unfortunately, the public perception of HIV and AIDS.[13] Since perception of risk is largely subjective, whether a risk is "significant" is less a factual question than a social construct.[14] Thus, whether ADA protections extend to HIV-positive

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[7] *Id.*

[8] *See Chalk*, 840 F.2d at 701. The Supreme Court recognized the legitimate concern of risk of transmission and that this risk could justify exclusion if it could not be eliminated through reasonable accommodation. The court said exclusion could not, however, be justified solely on the basis of irrational fear of transmission. *Id.*

[9] *Id.*

[10] *See* Matthew E. Turowski, *AIDS in the Workplace: Perceptions, Prejudices and Policy Solutions*, 20 OHIO N.U. L. REV. 139, 144 (1993).

[11] *See* 42 U.S.C. § 12111 (2002).

[12] *Id.* § 12111(3).

[13] *See* Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 Nw. U. L. REV. 1279, 1281 (2001) ("Too often . . . judges' personal perceptions of acceptable risks and medical probabilities stand in for the rigorous scrutiny demanded by the ADA.").

[14] *See* Barry Sullivan, *When the Environment is Other People: An Essay on Science, Culture, and the Authoritative Allocation of Values*, 69 NOTRE DAME L. REV. 597, 601 (1994).

individuals depends, in part, on the myths and fears of the judiciary in regard to HIV. Congress passed the ADA to prevent employers and others from discriminating against the disabled based on myths and fears. Yet, the current standard allows the judiciary to use those same myths and fears to exclude some disabled individuals from the protections Congress intended them to have.

This Article argues that the determination of whether an individual is a direct threat to the health and safety of others should adhere to congressional intent and that whether a risk is significant must be based on objective scientific knowledge—free from the subjective perceptions of the public and the judiciary. Section II of this Article provides a backdrop for discussing how the risk of HIV should be evaluated, including a review of the pathology and epidemiology of HIV, the statutory framework for analyzing contagions under the ADA, and the case law interpreting the direct threat provision. Section III illustrates the conflict among the circuits regarding the application of the direct threat provision to individuals with HIV. Section IV analyzes and compares differing approaches to risk and whether those approaches, as well as the circuit cases, comport with congressional mandates. Section V proposes a new standard for making direct threat determinations, focusing on the probability that a risk will, in fact, materialize, rather than on perceptions about specific disabilities. Section VI concludes this Article.

II. BACKGROUND

The ADA's direct threat provision requires an examination of three issues. First, the pathology and epidemiology of HIV and AIDS are discussed. Second, the effect of direct threat determinations on individuals and on society is analyzed. Third, statutes defining the rights of employers and employees are set forth.

A. HIV: The Disease and its Transmission

HIV, the Human Immunodeficiency Virus, is the virus that develops into AIDS, or Acquired Immunodeficiency Syndrome.[15] The two most relevant aspects of the disease in terms of employment discrimination are its effects on the individual and the risk of transmission of the virus to others. The effects on the individual determine whether a person is an

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[15] CTRS. FOR DISEASE CONTROL AND PREVENTION, *HIV and Its Transmission* (last updated Dec. 24, 2002), *at* http://www.cdc.gov/hiv/pubs/facts/transmission-.htm.

individual with a disability, a precondition for protection under the Americans with Disabilities Act and the Rehabilitation Act of 1973.[16] The risks to others in the workplace, through transmission, is relevant to examining whether an individual is a direct threat, and therefore, not "otherwise qualified" under the Acts.[17]

1. *HIV and its Effect on the Individual*

HIV develops in three phases: the seroconversion, asymptomatic, and symptomatic phases.[18] The first phase, seroconversion, occurs when the body begins to develop antibodies to the HIV virus.[19] It generally lasts three weeks and begins from six days to six weeks after transmission.[20] This phase presents itself through "mononucleosis-like" symptoms including muscle pain, rash, lethargy, fever, headache, neurological disorders, and enlargement of the lymph glands.[21] The second phase, the asymptomatic phase, lasting from seven to eleven years, presents enlarged lymph nodes and often skin disorders, blisters in the oral area, and bacterial infections.[22]

The third phase, symptomatic HIV, marks the point where a person is regarded in medical terms as having AIDS.[23] There are two criteria used for marking the beginning of this phase.[24] The first occurs when a person's CD4+ cell count is less than fourteen percent of the total number of

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[16] *See* 29 U.S.C. §§ 705(a) (2000); 42 U.S.C. § 12102(2) (2000) (defining impairment). *See also* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (discussing the applicability of the ADA to contagious diseases).

[17] *See* 29 U.S.C. §§ 791-96 (2000); 42 U.S.C. § 12111(8) (defining a Qualified Individual with a disability); *see also* Bragdon v. Abbott, 524 U.S. 624 (1998) (examining whether HIV is an impairment and whether it is a direct threat under the ADA).

[18] *See* Sullivan, *supra* note 14, at 598 n.8 (*citing* Helena Brett-Smith & Gerald H. Friedland, *Transmission and Treatment*, *in* AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC 21-23, 3138 (Scott Burris et al. eds., 1993); *also citing* Kenneth G. Castro et al., *1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults*, 41 MORBIDITY & MORTALITY WEEKLY REP., No. RR-17 1 (Dec. 18, 1992)).

[19] *Id.* (citing that the HIV antibody is now susceptible to detection).

[20] *Bragdon*, 524 U.S. at 635 (citing among others P.T. Cohen & Paul Volberding, *Clinical Spectrum of HIV Disease*, *in* AIDS KNOWLEDGE BASE § 4.1-7 (3d ed. 1999)).

[21] *See id.*

[22] *Id.* (citing Cohen & Volberding, *supra* note 20, §§ 4.1-4, 4.1-8).

[23] *Id.* at 636. *See* Sullivan, *supra* note 14, at 598 n.8.

[24] Sullivan, *supra* note 14, at 598 n.8.

lymphocytes, or white blood cells.[25] The second occurs when a person is diagnosed with one or more AIDS-defining diseases.[26] For example, the two primary AIDS-defining diseases are *pneumocystis carninii* pneumonia and Karposi's sarcoma, a rare form of cancer.[27] AIDS progressively destroys the immune system resulting in death from the inability to fight an illness.[28]

In addition to the physical effects on the HIV-positive individual, the disease has a pronounced social and emotional effects. These effects of HIV and AIDS play an equally important role in the status of HIV-positive individuals in the workplace and the discrimination that can occur there.[29] The most significant emotional effect on HIV-positive individuals is depression associated with impending mortality and the social stigma of AIDS.[30] Depression itself may be considered a disability.[31] The stigma of HIV and AIDS results, in part, from the fear of transmission.[32]

2. *Transmission of HIV*

The Centers for Disease Control and Prevention ("CDC") have "clearly identified" four modes of transmission of HIV.[33] First, HIV can be spread through "sexual contact with an infected person."[34] Second, HIV can be

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[25] *See Bragdon*, 524 U.S. at 636 (citing Castro et al., *supra* note 18) (recognizing that another measure is when the CD4+ count drops below 200 cells).

[26] *See* Garry G. Mathiason & Steven B. Berlin, *AIDS in the Healthcare, Business, and Governmental Workplace*, 780 A.L.I.-A.B.A. 633, 637 (1993).

[27] Sullivan, *supra* note 14, at 598 n.8 (giving a brief, yet comprehensive, description of the progression of HIV).

[28] *See* Mathiason & Berlin, *supra* note 26, at 637.

[29] *Id.* at 642-48.

[30] *See* ATTORNEY'S TEXTBOOK OF MEDICINE 46 (3d ed. 2001).

[31] *See, e.g.*, Jacques v. DiMarzio, Inc., 200 F. Supp. 2d 151 (E.D.N.Y. 2002) (denying the defendant's request for summary judgment because there was an issue of fact as to whether the plaintiff's depression was a disability under the ADA).

[32] *See* Rebecca Trapp, Note, *Medical Examination or Objective Medical Evidence: What is the Correct Procedure to Determine if an Employee Infected with the HIV Virus Presents a Direct Threat Under the Americans with Disabilities Act*—EEOC v. Prevo's Family Market, Inc., 32 CREIGHTON L. REV. 1585, 1585 (1999).

[33] *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, *HIV and Its Transmission, at* http://www.cdc.gov/hiv/pubs/facts/transmission.htm. (last updated Dec. 24, 2002).

[34] *Id.*

spread by sharing intravenous needles with an infected person.[35] Third, it can be spread from mother to child during birth or after birth, by breastfeeding, when the mother is HIV-positive.[36] Fourth, and less commonly, HIV can be transmitted through blood transfusions in which the donor was HIV-positive.[37] Although HIV can be transmitted by blood-to-blood contact, in most situations this is unlikely because HIV is a fragile virus; when the blood dries, the possibility of transmission is "essentially zero."[38]

The CDC has also examined the modes of transmission based on environment.[39] In most work environments, the risk of transmission is low or non-existent, with the exception of the healthcare worker.[40] Since there are no documented cases of HIV transmission through sweat, tears, saliva, or skin-to-skin contact, casual associations between co-workers seemingly present only a negligible risk to others.[41] Even with more intimate, nonsexual contacts, transmission is very rare.[42] As of 1999, there was only one documented case of transmission from healthcare worker to patient.[43] Despite consensus of the medical community about the low risk of HIV transmission through casual contact,[44] employers continue to rely on the direct threat exception to the ADA to justify discriminating against individuals with HIV and AIDS.

B. The Competing Interests of Employers and Others

HIV and AIDS are prevalent in the workplace.[45] Currently it is estimated that there are 800,000 to 900,000 Americans infected with the

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[35] *Id.*

[36] *Id.*

[37] *Id.* (occurring rarely now in countries where blood is screened for HIV).

[38] *Id.*

[39] *See id.* The possibility of environmental transmission is remote. *Id.*

[40] *Id.* (involving HIV transmission from one infected dentist to six patients).

[41] *Id.*

[42] *Id.* (citing the fact that casual contact through social kissing presents no risk of transmission).

[43] *Id.*

[44] *See* Turowski, *supra* note 10, at 142.

[45] *See Scope of the AIDS Problem*, EMPLOYMENT DISCRIMINATION (MB) § 170.02 (2002) (citing 12 AIDS Policy in the Law (BNA), No. 19 at 6 (Oct. 17, 1997)). Recent studies show that one of every six employers with more than 750 employees has at least one HIV-positive employee and that one in fifteen employers with 15-49 employees had at least one HIV-positive employee. *Id.*

HIV virus.[46] An additional 40,000 individuals become infected with HIV each year.[47] Over ninety percent of those infected with HIV in the United States are part of the American workforce.[48] Thus, how employers are required to treat HIV-infected workers will have a significant impact on those individuals, their co-workers, clients, and the employers themselves.

The consequences of how direct threats and risks are to be evaluated extend beyond weighing the interest of the employee in employment and the interest of the employer in protecting against transmission. The interpretation of the direct threat provision of the ADA has broad economic and social ramifications for the individuals involved and for society.

One ramification is the cost to employers who are forced to hire and retain HIV-positive employees. First, the employer incurs costs associated with the effect of the disease on HIV-positive individuals. Such costs include higher premiums for health, workers' compensation, long-term disability, and life insurance.[49] In addition, symptomatic individuals present costs to the employer through frequent absenteeism.[50] Also included are the costs of accommodating HIV-positive individuals in the performance of their jobs as required by the ADA,[51] as well as the time and expense of evaluating the risk posed by them.[52]

A second cost is the one the employer faces associated with the HIV-positive individual's interaction with others in the workplace. Such costs include reduced productivity due to co-worker fears,[53] workers' compensation claims by co-workers experiencing stress related to working with HIV-positive individuals,[54] and tort claims of co-workers. In addition, employers face costs associated with employee education to reduce the effects of co-worker fears.[55]

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[46] *See* Stephanie Armour, *Firms Juggle Stigma, Needs More Workers with HIV; Latest Drug Therapies Let More People with AIDS Go Back to Work*, USA TODAY, Sept. 7, 2002, at 1B.

[47] *Id.*

[48] *See* Trapp, *supra* note 32, at 1585 n.1.

[49] *See* Raymond Lin, *ADA in Action: HIV and AIDS in the Workplace, in The Body: An AIDS and HIV Information Resources*, 2 MID-ATLANTIC ADA 1 (1996), *at* http://www.thebody.com/ada/winter96.html (last visited Feb. 13, 2002).

[50] *See* Turowski, *supra* note 10, at 162 (stating that courts have generally regarded this employee complaint and defense with reservations).

[51] *Id.* at 162-63.

[52] *See* Hubbard, *supra* note 13, at 1297.

[53] *See Scope of the AIDS Problem*, *supra* note 45.

[54] *See* Mathiason & Berlin, *supra* note 26, at 653.

[55] *See, e.g.*, Armour, *supra* note 46 (stating that employers are increasingly focusing on education in order to improve the work environment and avoid claims of discrimination). For example, in the year 2000, Home Depot spent more than

Although one study concluded that the cost to an employer of hiring an HIV-positive worker ranged from $17,000 to $32,000 over a five-year period,[56] many of the cited costs are considered improper in the debate between employers and employees.[57] For example, many of the economic costs to employers, such as worker absenteeism, fall under reasonable accommodations.[58] However, the social and economic costs of excluding HIV-positive individuals from the protections of the ADA is unquantifiable.

First, one of the most devastating effects of discrimination against HIV-positive individuals is the effect the discrimination has on terminating the spread of the disease.[59] Giving "direct threat" a broad interpretation and removing the protections of the ADA permits employers to discriminate against people with HIV. The Presidential Commission on the Human Immunodeficiency Virus Epidemic reported:

> As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination . . . will undermine our efforts to contain the HIV epidemic . . . .[60]

$20,000 providing pamphlets to its employees and educating managers about HIV and AIDS. *Id.* Ford is another example, providing AIDS education and condoms to its employees. *Id.*

[56] *See* Lin, *supra* note 49, at 1.

[57] *See, e.g.*, Cehrs v. Ne. Ohio Alzheimer's Research Ctr., 155 F.3d 775 (6th Cir. 1998).

[58] *Id.*

[59] *See* Donald H. J. Hermann, *The Development of AIDS Federal Civil Rights Law: Anti-Discrimination Law Protection of Persons Infected with Human Immunodeficiency Virus*, 33 IND. L. REV. 783, 787 (2000).

[60] H.R. REP. NO. 101-485, pt. 2, at 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 313 (quoting Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 19 (1988)). The Report also stated:

> HIV-related discrimination is impairing this nation's ability to limit the spread of the epidemic. Crucial to this effort are epidemiological studies to track the epidemic as well as the education, testing, and counseling of those who have been exposed to the virus. Public health officials will not be able to gain the confidence and cooperation of infected individuals or those at high risk for infection if such individuals fear that they will be unable to retain their jobs and their housing, and that they will be unable to obtain the medical and support services they need because of discrimination based on a positive HIV antibody test.

The second effect of discrimination is that it results in dependency of the disabled worker and less overall productivity for employers, costing the United States billions of dollars each year.[61] The legislative history of the ADA underscores the economic and social cost of "unwanted dependency."[62] Related to the cost of dependency is the cost of depriving the labor market of willing, able, and necessary workers.[63] The Department of Labor reported that many businesses could only meet their employment needs by hiring outside of the mainstream.[64]

With regard to the individual with HIV, broad interpretations of risk result in the multiplication of the effects of HIV. First, many disabled individuals believe they are unable to obtain or to keep employment.[65] Lack of employment results in the inability to secure housing, food, treatment for the disease, and other basic needs.[66] Depression associated with the disease is compounded by discriminatory reactions and lack of employment, sometimes resulting in suicide.[67] In fact, the House of Representatives reported, regarding disabilities in general, that " 'not working' is perhaps the truest definition of what it means to be disabled in America."[68]

C. *Statutory Prohibitions Against Disability Discrimination*

The two primary statutes protecting against disability discrimination in the workplace are the Rehabilitation Act of 1973[69] and the Americans with Disabilities Act of 1990.[70]

Id. See also Hermann, *supra* note 59, at 787.

[61] H.R. REP. NO. 101-485, pt. 2, at 43 (1990).

[62] *Id.* (stating that discrimination "bind[s] many of the 36 million people into a bondage of unjust, unwanted dependency on families, charity, and social welfare. Dependency that is a major and totally unnecessary contributor to public deficits and private expenditures.").

[63] *Id.* at 44 (quoting President George H.W. Bush as stating, "The United States is now beginning to face labor shortages . . . . The disabled offer a pool of talented workers whom we simply cannot afford to ignore . . . .").

[64] *Id.* (citing testimony before House Subcommittees on Select Education and Employment Opportunities, S. REP. NO. 101-51, at 33 (Sept. 13, 1989)).

[65] *Id.* at 32 (finding that sixty-six percent of unemployed, working-age disabled Americans, or over eight million individuals, would prefer to be employed).

[66] *Id.* at 31 (stating that Americans with disabilities are generally underprivileged and disadvantaged).

[67] *Id.* at 42-43.

[68] *Id.* at 32.

[69] 29 U.S.C. §§ 791-96 (2000).

[70] 42 U.S.C. §§ 12101-12 (2000).

1. *The Rehabilitation Act of 1973*

The first major piece of legislation designed to protect individuals against discrimination in the workplace was the Rehabilitation Act of 1973.[71] Section 504 of the act was designed to prevent discrimination against persons with disabilities by the government, those contracting with the government, and those receiving federal money from the government.[72] The Act reads:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[73]

In 1974, Congress amended the Act to include the definition of disability.[74] It defined a person with a disability as a person who has a physical or mental impairment "which substantially limits one or more of such person's major life activities."[75] In addition, a person is qualified as a person with a disability if he or she had a record of impairment or was regarded as having the impairment, as defined in the previous section.[76] To promote enforcement[77] of the Act, President Gerald Ford issued an executive order requiring the Department of Health, Education and Welfare ("HEW") to issue regulations carrying out the Act.[78]

First, HEW issued a regulation defining "physical impairment"[79] as:

> Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems:

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[71] 29 U.S.C. §§ 791-96.

[72] *See id.* § 794.

[73] *Id.* § 794(a).

[74] *Id.* § 706(8)(B). *See also* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 278 (1985). Note also that Congress substituted "disability" for "handicap" subsequent to the defining amendment. *See* Pub. L. No. 102-569 § 102(p)(32) (1992), 106 Stat. 4344.

[75] 29 U.S.C. § 706(8)(B). *See also Arline*, 480 U.S. at 278.

[76] 29 U.S.C. § 706(8)(B).

[77] *See* Hermann, *supra* note 59, at 790.

[78] Exec. Order No. 11,914, 43 Fed. Reg. 2132 (1976).

[79] 45 C.F.R. § 84.3(j)(2)(i) (1997). *See also Arline*, 480 U.S. at 280; Hermann, *supra* note 59, at 790-91 (examining the development of disability law).

> neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.[80]

This regulation described the scope of mental and emotional disorders.[81] Second, HEW issued a list of diseases covered by the statute, noting that the list was instructive rather than exhaustive.[82] HEW listed the covered diseases to include impairments of the senses, cerebral palsy, epilepsy, cancer, diabetes, and alcoholism.[83]

Although the Rehabilitation Act was successful in vindicating the rights of many disabled individuals, Congress thought its limitation to federal agencies and their grantees was too narrow to serve such a broad purpose.[84] Thus, it enacted the Americans with Disabilities Act of 1990.[85] Congress' creation of the ADA to reflect the principles contained in the Rehabilitation Act was not an accident.[86] Thus, looking at the case law interpretation of the Rehabilitation Act can be helpful in interpreting the ADA. The elements for proving an employment discrimination claim on the basis of contagious disease as a disability are examined in the following section.

2. *The Americans with Disabilities Act of 1990*

To compensate for the disabled population unprotected by the Rehabilitation Act, Congress enacted the ADA.[87] One of the purposes listed in the statute is "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by

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[80] 45 C.F.R. § 84.3(j)(2)(i) (1997).

[81] *Id.*

[82] *Id.*

[83] *See Arline*, 480 U.S. at 280 (citing 45 C.F.R. § 84, App. A. (1997)).

[84] *See* Turowski, *supra* note 10, at 144-45 (citing that the ADA covers employers who do not get government funds).

[85] 42 U.S.C. § 12111 (2000).

[86] *See* 26 AM. JUR. 3D *Proof of Facts* § 9 (1999).

[87] 42 U.S.C. § 12101 (1990). *See also* 42 U.S.C. § 12101(a)(4) ("The Congress finds that . . . individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."); Turowski, *supra* note 10, at 145 (commenting on the ADA's expansive application).

people with disabilities."[88] Additionally, Congress' findings include the following statement:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[89]

Section 12112(a) of the ADA states, "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[90] To succeed, a plaintiff bringing an ADA claim must prove three elements. A plaintiff must prove that she has a disability,[91] that her employer discriminated against her because of her disability or failed to offer reasonable accommodations for her disability,[92] and that she is otherwise qualified for the employment in question.[93]

Although proof of intentional discrimination is an essential element of the plaintiff's case, it is one of the less frequently litigated issues within the context of the ADA and HIV litigation.[94] Thus, it receives only brief attention in this article. To satisfy the element, a plaintiff must show that the employer breached one of its two duties under the ADA.[95] The ADA imposes both a duty of nondiscrimination and a duty to make reasonable accommodations.[96] A plaintiff asserting discrimination under the ADA must also allege and prove that the discrimination was intentional.[97] The

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[88] 42 U.S.C. § 12101(b)(4).

[89] *Id.* § 12101(a)(7).

[90] *Id.* § 12112(a).

[91] *See* Madox v. Univ. of Tenn., 62 F.3d 843, 846 (6th Cir. 1995).

[92] *Id.*

[93] *Id.*

[94] *See, e.g.*, cases cited *supra* notes 2-5 (examining whether termination or exclusion based on communicable disease was appropriate if the subject posed a direct threat to the health and safety of others).

[95] 42 U.S.C. § 12112(a) (2000).

[96] *Id.* § 12112(b)(5)(A).

[97] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 534 (1999) (stating that a plaintiff must prove the discrimination was intentional).

elements more relevant to HIV and ADA litigation, proof of disability and that one is otherwise qualified for the employment, are examined below.

a. Proof of Disability

The ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual.[98] As demonstrated below, the inquiry is usually approached as a three-part test.[99] The current regulations define "physical or mental impairment" using identical terminology as in the Rehabilitation Act.[100]

At one time, courts were split as to whether asymptomatic HIV patients qualified as disabled under the ADA and the Rehabilitation Act.[101] In *School Board of Nassau County v. Arline*, the United States Supreme Court held that tuberculosis, as it affected the plaintiff, was a disability under the

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[98] 42 U.S.C. § 12102(2)(A) (2000). *See also* Bragdon v. Abbott, 524 U.S. 624, 630 (1998) (quoting the ADA). The ADA also provides that one has a disability if he or she has a record of such impairment or is regarded as having the impairment. 42 U.S.C. § 12102(2)(B)-(C). *See also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999) (stating that a person is disabled for purposes of the statute if the employer perceives the individual as having an impairment which she does not have or if the employer perceives an actual impairment of the individual to be limiting when it is not).

[99] *See Bragdon*, 524 U.S. at 631. To determine if it is a disability, the court considers if HIV was a physical impairment; identifies the life activity and considers if it is a major one under the ADA; and then asks whether the impairment substantially limits the major life activity. *Id.*

[100] 42 U.S.C. § 12102(2).

[101] *Compare* Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994) *with* Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 60 (4th Cir. 1995). Prior to the *Arline* and *Bragdon* decisions, advocacy for the inclusion of HIV as an impairment under the ADA was restricted to law reviews and other academic publications. *See* Hermann, *supra* note 59, at 791 (citing Arthur S. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681 (1985), as an early publication on the issue). The Department of Justice also preceded the courts in determining that HIV and AIDS are a disability warranting ADA protections; *see* Memorandum from Assistant Attorney General Cooper on Application of Section 504 of Rehabilitation Act to Persons with AIDS, DAILY LAB. REP. (BNA) NO. 122 at D-1 (June 25, 1986). There is also legislative history to the ADA evincing expressly the intent of Congress to include HIV as a protected disability. *See* Hermann, *supra* note 59, at 831-32 n.371 (citing 136 Cong. Rec. H2626-01 (1990) (Representative McDermott stating, "I am particularly pleased that this act will finally also extend necessary protection to people with HIV disease.")).

Rehabilitation Act.[102] After the *Arline* decision, several courts viewed the Rehabilitation Act, and later the ADA, as applicable to persons with HIV.[103] However, many courts did not.[104]

In 1998, the Supreme Court held that the ADA is applicable to persons infected with HIV, although HIV is not a per se disability.[105] In *Bragdon v. Abbott*, the plaintiff, Sidney Abbott, brought an ADA claim against Randon Bragdon, a dentist who refused to treat her because she was HIV-positive.[106] The Court cited the statute in defining disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual. . . ."[107] The Court examined that standard under a three-step analysis.[108] First, the Court analyzed whether HIV was a physical impairment.[109] Second, the Court considered whether the identified activity was a major life activity.[110] Third, the Court examined

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[102] *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1985).

[103] *See, e.g.*, *Gates*, 39 F.3d at 1446.

[104] *See Ennis*, 53 F.3d at 60.

[105] Bragdon v. Abbott, 524 U.S. 624 (1998). Although *Bragdon* is a case involving discrimination in the enjoyment of public accommodations, the Court's holding is applicable to employment discrimination cases for its designation of HIV as a covered disability. *See* Americans with Disabilities Act of 1990 § 302, 42 U.S.C. § 12182(a) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation."); *see also Bragdon*, 524 U.S. at 629 (citing the Americans with Disabilities Act). The statute further provides that public accommodations include the offices of health care providers. *Id.* (citing 42 U.S.C. § 12181(7)(F)).

The categorization of asymptomatic HIV as a disability under the ADA has been widely criticized. *See* Christiana M. Ajalat, Note, *Is HIV Really a "Disability"?: The Scope of the Americans with Disabilities Act after* Bragdon v. Abbott, *118 S. Ct. 2196 (1998)*, 22 HARV. J.L. & PUB. POL'Y 751, 760 (1999) (criticizing the expansive interpretation of the ADA and the designation of reproduction as a major life activity). *But see* Doe v. County of Centre, Pa., 242 F.3d 437, 447 (3d Cir. 2001) (interpreting *Bragdon* as holding that HIV is a per se disability). *See also* Hermann, *supra* note 59, at 801-02 (noting that most courts presume that HIV-infection is a disability, thus focusing litigation on whether an individual presents a direct threat to the health or safety of others).

[106] *Bragdon*, 524 U.S. at 628-29.

[107] *Id.* at 630 (citing 42 U.S.C. § 12102(2)(A) (1990)).

[108] *See id.* at 632-42.

[109] *Id.* at 632.

[110] *Id.* at 637.

whether the impairment, HIV, "substantially limited" the "major life activity" the plaintiff asserted.[111]

In determining whether HIV is a physical impairment, the Court cited the pertinent regulations.[112] After reviewing the biological progression of HIV from transmission through death,[113] the Court held that HIV is an impairment "from the moment of infection."[114] Notably, the Court termed the asymptomatic phase as a "misnomer" because "clinical features persist throughout," and held that HIV is an impairment in each phase of the disease.[115]

Second, the Court examined whether HIV affects a major life activity.[116] Although Abbott asserted, and the Court limited its examination to, reproduction as the major life activity, the Court strongly indicated that HIV would have a substantial impact on a number of major life activities.[117]

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[111] *Id.* at 639.

[112] *Id.* at 632 (citing 45 C.F.R. § 84.3(j)(2)(i) (1997)).

[113] *Id.* at 633-37.

[114] *Id.* at 637. The Supreme Court stated:

> The assault on the immune system is immediate. The victim suffers from a sudden and serious decline in the number of white blood cells. There is no latency period. Mononucleosis-like symptoms often emerge between six days and six weeks after infection, at times accompanied by fever, headache, enlargement of the lymph nodes (lymphadenopathy), muscle pain (myalgia), rash, lethargy, gastrointestinal disorders, and neurological disorders.

Id. at 635. The Court also based its decision in large part on the legislative history of the ADA. *See, e.g., id.* at 642 (citing Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 264-65 (1988), which stated that the Rehabilitation Act of 1973 "protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program"); *see also id.* at 644 (citing numerous cases where jurisdictions uniformly treated asymptomatic HIV as a handicap). The Court also noted that "Congress was well aware of the position taken by the OLC [Office of Legal Counsel] when enacting the ADA and intended to give that position its active endorsement." *Id.* at 645.

[115] *Id.* at 635.

[116] *Id.* at 637.

[117] *Id.* The Court stated:

> Given the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry. . . . it may seem legalistic to circumscribe our discussion to the activity of reproduction. We have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities.

In holding that reproduction is a major life activity, the Court noted that reproduction is "central to the life process itself," and rejected Bragdon's contention that the activity must have a public or economic character.[118]

Finally, the Court examined whether the HIV infection substantially limited the major life activity of reproduction.[119] The Court cited two reasons in support of its holding that HIV infection substantially limits the major life activity of reproduction.[120] First, the Court cited the risk of infecting one's sexual partner.[121] Second, the Court cited the risk of infecting the child.[122] In rejecting Bragdon's argument that any limitation is insubstantial due to the ability to reduce the risks through drug therapy, the Court held that a limitation need not be insurmountable and that any lessening of the limitation through alternatives would have to take cost and other inconveniences into account.[123]

b. Otherwise Qualified and the Direct Threat Exception

Finally, a plaintiff must show that she is otherwise qualified for the position.[124] A person is otherwise qualified under the ADA if she can perform the essential functions of the position with or without reasonable accommodation.[125] However, a person is not otherwise qualified for the position if she poses a direct threat to others in the workplace.[126]

. . . .

. . . It is our practice to decide cases on the grounds raised. . .

Id. at 637-38; *see also* Hermann, *supra* note 59, at 861 (stating that the Supreme Court intimated it would interpret "major life activit[y]" very broadly).

[118] *Bragdon*, 524 U.S. at 638.

[119] *Id.* at 639.

[120] *Id.* at 639-41.

[121] *Id.* at 639 (citing DENNIS H. OSMOND, AIDS KNOWLEDGE BASE (1997) and Harry W. Haverkos & Robert J. Battjes, *Female-to-Male Transmission of HIV*, 268 JAMA 1855, 1856 (1992) for the proposition that heterosexual contact presents a twenty-five percent risk of female-to-male transmission).

[122] *Id.* at 640 (citing numerous studies placing the risk of mother-to-fetus transmission between thirteen and forty-five percent).

[123] *See id.* at 640-41.

[124] *See* 42 U.S.C. § 12111(8) (2000).

[125] *Id.* Note that the statute gives broad discretion to employers in determining the essential functions of the job. *Id.*

[126] *Id.* § 12182(b)(3). *See also* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1985) (delineating the direct threat exception to the ADA and finding that an individual who poses a significant risk to others in the workplace is not "otherwise qualified" under the meaning of the statute).

The United States Supreme Court first articulated the direct threat defense[127] in *School Board of Nassau County v. Arline*.[128] Gene Arline contracted tuberculosis in 1957.[129] She began teaching for the Nassau County School District in 1966, during a twenty-year period of remission.[130] However, between the years 1977 and 1978, Arline suffered three relapses.[131] After both the second and third relapses, the School Board placed her on paid leave.[132] Subsequent to holding a hearing, the Board discharged Arline "'not because she had done anything wrong,' but because of the 'continued reoccurrence [*sic*] of tuberculosis.'"[133] Arline filed suit under the Rehabilitation Act of 1973.[134]

The district court held in favor of the School Board, reasoning that tuberculosis was not a handicap under the statute.[135] Additionally, the court held that even if tuberculosis qualified as a handicap under the Rehabilitation Act, the disease rendered Arline not otherwise qualified for the position.[136] The United States Court of Appeals for the Eleventh Circuit reversed, holding that Arline's tuberculosis was a handicap under the statute.[137] It remanded the case to determine whether Arline was otherwise qualified for the position and whether reasonable accommodations could

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[127] The term "defense" may be a misnomer because the circuits are split, and the Supreme Court has not ruled, on whether the theory is part of the plaintiff's prima facie case or whether it is an affirmative defense. *Compare* Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999) (holding that "direct threat" is an affirmative defense that the defendant bears the burden of proving), *with* Equal Employment Opportunity Comm'n v. Amego, Inc., 110 F.3d 135, 142-44 (1st Cir. 1997). The Supreme Court recently declined to decide this issue. *See* Children's World Learning Ctrs., Inc. v. Rizzo, 531 U.S. 958 (2000); *see also* Sullivan, *supra* note 14, at 599 n.10 (noting that the direct threat exception is an affirmative defense and citing 42 U.S.C. § 12113 (1988 & Supp. III 1991) and 29 C.F.R. § 1630.15 (1992)); Laurin v. Providence Hosp., 150 F.3d 52, 56 (1st Cir. 1998) (noting that the direct threat provision is part of the plaintiff's prima facie case).

[128] *Arline*, 480 U.S. at 287-89.

[129] *Id.* at 276.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *See id.* at 277.

[135] *Id.*

[136] *Id.*

[137] *Id.* (citing Arline v. Sch. Bd. of Nassau County, 772 F.2d 759, 764 (11th Cir. 1985)).

be made to allow her to continue teaching.[138] The Supreme Court granted certiorari to examine two issues.[139] The first issue was whether Arline's disease, tuberculosis, qualified as a handicap under the Rehabilitation Act.[140] The second issue was whether the disease, assuming it was a qualifying disability, rendered Arline not otherwise qualified for the position of teaching.[141]

On the first issue, whether tuberculosis rendered Arline handicapped under the Rehabilitation Act, the Supreme Court answered in the affirmative.[142] The Court held that Arline's tuberculosis was an impairment because it was a " 'physiological disorder or condition . . . affecting [her] . . . respiratory [system].' "[143] Since the disease caused Arline to be hospitalized, it "substantially limited" one or more of her major life activities.[144] Additionally, the Court held that Arline's initial hospitalization in 1957 constituted a record of impairment.[145] Thus, Arline was a handicapped individual under the statute.[146]

On the second issue, whether tuberculosis rendered Arline not otherwise qualified for the position of teaching, the Supreme Court remanded, but not before delineating a rule that would become the subject of much litigation.[147] The Court held that a person is not otherwise qualified if he or she poses a significant risk to others and reasonable accommodations will not eliminate the risk.[148] The Court adopted a four-part test for determining whether, in the context of contagious disease, a person presents a significant risk to others.[149] The test, adopted from the brief of the American Medical Association, examines:

> '[findings of] facts, based on reasonable medical judgments 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 the carrier

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[138] *Id.*

[139] *Id.*

[140] *Id.* at 280-86.

[141] *Id.* at 287-89.

[142] *Id.* at 286.

[143] *Id.* at 281 (citing 45 C.F.R. § 84.3(j)(2)(i) (1985) (alterations in original)).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 288. *See also* Hermann, *supra* note 59, at 801-02 (noting that the focus of ADA/HIV litigation is on the issue of whether an individual presents a direct threat to the health or safety of others).

[148] *Arline*, 480 U.S. at 288 n.16.

[149] *Id.* at 288.

> is 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.'[150]

The Court further held that courts should "defer to the reasonable medical judgments of public health officials."[151] Remanding the case for further findings of fact, the Supreme Court directed the district court to reexamine the facts under the tests it set forth and to then determine if a significant risk existed and whether it could be eliminated with reasonable accommodations.[152]

In 1988, one year after *Arline* was decided, Congress enacted an amendment codifying the decision in the Rehabilitation Act.[153] Under the amendment, a person is not otherwise qualified if he or she poses a "direct threat to the health or safety of other individuals."[154] Then, in 1990, Congress included the same provision when it enacted the ADA.[155] The ADA defines direct threat as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[156] However, in incorporating the defense into the ADA and Rehabilitation Act, Congress unmistakably intended to codify *Arline*.[157] The legislative history of the ADA provision contains express indications that "[t]he term 'direct threat' is meant to connote the full standard set forth in the *Arline* decision."[158] Thus, the four-part-test delineated in *Arline* is the intended standard for applying the direct threat defense under the ADA.[159] Although *Arline* and the statutes provide concrete factors to examine, it is still

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[150] *Id.* (citations omitted) (alterations in original) (quoting Brief of the Am. Med. Ass'n as *Amicus Curiae* 19).

[151] *Id.* at 288.

[152] *Id.* at 288-89.

[153] 29 U.S.C. § 706(8)(D) (1994). *See also* Hubbard, *supra* note 13, at 1304 (discussing the origins of the direct threat defense).

[154] 29 U.S.C. § 706(8)(D).

[155] 42 U.S.C. § 12113(b) (2002).

[156] *Id.* § 12111(3).

[157] Hubbard, *supra* note 13, at 1304 n.146.

[158] *Id.* (citing H.R. REP. NO. 101-485, pt. 2, at 76, *reprinted in* 1990 U.S.C.C.A.N. 303, 359). *See also* H.R. REP. NO. 101-485, pt. 3, at 45, *reprinted in* 1990 U.S.C.C.A.N. 303, 468 ("In order to determine whether an individual poses a direct threat to the health or safety of other individuals in the workplace, the Committee intends to use the same standard as articulated by the Supreme Court in School Board of Nassau County v. Arline. . . . This definition was added to clarify that the direct threat standard is a codification of the analysis in Arline.").

[159] *See supra* note 158.

unclear what level of risk is a significant risk, allowing employers to exclude individuals as direct threats to the health and safety of others.[160] This is the point of divergence for courts in determining whether an individual with HIV is a direct threat to others in the workplace.[161]

III. THE DIFFERING VIEWS OF HIV AS A DIRECT THREAT

Most courts have relied on two primary, yet distinctly opposite, approaches to whether HIV presents a direct threat to others in the workplace. The first approach, demonstrated in *Waddell v. Valley Forge Dental Associates*,[162] gives a broad reading to the principles underlying the direct threat exception. Thus, it narrows the applicability of the ADA. The ADA, by its express terms, applies only to "individuals with a disability." The issue is whether that phrase will be interpreted broadly or narrowly. The second approach, demonstrated in *Chalk v. United States District Court Central District of California*,[163] provides a narrower interpretation, broadening the applicability of the ADA. There is one additional approach taken by a few courts, demonstrated in *Doe v. County of Centre*,[164] which lies between the *Waddell* and *Chalk* approaches and rests most closely to the intent of Congress in drafting the direct threat provision. Each approach is discussed below.

A. The Eleventh Circuit Approach: Theoretical + Fatal = Direct Threat

The Eleventh Circuit Court of Appeals, in *Onishea v. Hopper*,[165] articulated a framework for determining whether the risk of transmission of a contagious disease poses a significant risk to the health and safety of

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[160] *See* Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479 (2001); *see also* Sullivan, *supra* note 14, at 617 (noting that "uncertainty exists at the most fundamental level" regarding how the significance of the risk test should be applied).

[161] *Compare* Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922, 924 (5th Cir. 1993) (holding that "[a] cognizable risk of permanent duration with lethal consequences suffices to make a surgical technician with Bradley's responsibilities" a significant risk to patients), *with* Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988) (holding that a theoretical risk of transmission is insufficient to present a significant risk under the direct threat standard).

[162] Waddell v. Valley Forge Dental Assocs., 276 F.3d 1275 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2293 (2002).

[163] *Chalk*, 840 F.2d at 701.

[164] Doe v. County of Centre, Pa., 242 F.3d 437 (3d Cir. 2001).

[165] Onishea v. Hopper, 171 F.3d 1289, 1299 (11th Cir. 1999) (holding that the segregation of HIV-positive prison inmates from the non-infected population did

others, or a direct threat, rendering the plaintiff unqualified under the ADA:[166]

> [A] showing of a specific and theoretically sound means of possible transmission [is] enough to justify summary judgment against an HIV-positive plaintiff on the ground that the infection pose[s] a "significant risk" to others in the workplace, even though reported incidents of transmission [are] few or nonexistent, and the odds of transmission [are] admittedly small.[167]

The court used the same framework, described below, in determining whether an HIV-positive dentist posed a direct threat to his patients, rendering him unqualified for the protections of the ADA.[168]

In *Waddell v. Valley Forge Dental Associates*, the United States Court of Appeals for the Eleventh Circuit held that the plaintiff hygienist, Spencer Waddell, was unqualified for protection of his employment under the ADA because his impairment, HIV, posed a direct threat to the health and safety of others.[169] Waddell was employed as a dental hygienist by Dr. Alan Witkin for nearly two years when Valley Forge Dental Association ("Valley Forge"), took over the practice.[170] Valley Forge required its employees to undergo medical testing including testing for HIV.[171] Waddell's test results indicated that he had contracted HIV.[172] Valley Forge placed Waddell on paid leave while deciding how to handle the situation.[173] After reviewing dental journals and consulting with the CDC, Valley Forge concluded that Waddell posed a threat to the safety of the practice's patients, discontinued his employment as a hygienist, and offered him a clerical position at half of his previous salary.[174] Valley Forge fired Waddell when he refused to accept the clerical position.[175]

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not violate the ADA or the Rehabilitation Act because (1) there was a theoretical risk of the transmission of the disease and (2) if the risk manifested itself, the result would inevitably be fatal).

[166] *Id.*

[167] *See Waddell*, 276 F.3d at 1282-83 (quoting *Onishea*, 171 F.3d at 1297). The court also noted that the Fourth, Fifth, and Sixth Circuits have adopted the same view. *Id.*

[168] *See id.* at 1277-78.

[169] *Id.* at 1278.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

Waddell subsequently brought claims alleging violations of the ADA and the Rehabilitation Act of 1973.[176] Both parties moved for summary judgment.[177] The major point of contention was whether Waddell posed a direct threat to his patients, since Valley Forge conceded that the sole motivation for the termination was Waddell's HIV status.[178] The district court granted summary judgment in favor of Valley Forge, finding that Waddell was unqualified under the ADA because he posed a direct threat to his patients.[179]

The Eleventh Circuit declined to determine whether HIV was a per se disability, specifically whether it will always affect a major life activity, and limited review to whether the presumed disability was a direct threat to Waddell's patients.[180] The court set forth the prima facie requirements of a discrimination case under the ADA.[181] Waddell needed to establish that he was disabled, that he was a qualified individual, and that he was "subjected to unlawful discrimination because of [his] disability."[182] The court noted that Waddell had the burden of proving that he was a qualified individual; he must prove that " 'he was not a direct threat [to his patients] or that reasonable accommodations [to eliminate that threat] were available.' "[183]

Citing *Arline*, the court noted that a person who is a direct threat to the health and safety of others is not an otherwise qualified individual under the ADA.[184] The court then defined direct threat as " 'a significant risk to the health or safety of others that cannot be eliminated by reasonable

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[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.* at 1278-79. Waddell's claim under the Rehabilitation Act was so ruled on because Waddell did not produce any evidence that Valley Forge received financial assistance from the government, thereby rendering the statute inapplicable. *Id.* at 1279 n.2. The court also noted that the Rehabilitation Act was waived because Waddell did not address the district court's rationale in his brief. *Id.* at 1279-80 n.3. It found that the waiver was irrelevant since both claims would have been disposed of using the same analysis. *Id.*

[180] *Id.* at 1280 n.4.

[181] *See id.* at 1279.

[182] *Id.* (citing Cash v. Smith, 231 F.3d 1301, 1305 (11th Cir. 2000) and 42 U.S.C. § 12112(a) (2000)).

[183] *Id.* at 1280 (citing LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 836 (11th Cir. 1998)).

[184] *Id.* (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n.16 (1987)).

accommodation.'"[185] The court listed the four factors from *Arline* for determining whether a person carrying an infectious disease is a direct threat to others.[186]

First, regarding the nature of the risk, the court noted the district court's observation that a risk would arise from "contact between Waddell's blood and an open wound or mucous membrane of a patient."[187] Second, the circuit court reiterated the district court's holding that the duration of the risk is indefinite since there is currently no cure for HIV.[188] Third, regarding the severity of the risk, the district court held that it was very severe because death is the inevitable outcome of HIV.[189] The Eleventh Circuit found the fourth element, in which the district court analyzed "the probabilities the disease will be transmitted and will cause varying degrees of harm," to be the most relevant in Waddell's case.[190]

The court cited testimony that many routine dental procedures cause bleeding in patients.[191] It also cited testimony that exposure of a hygienist's blood during procedures is a common risk.[192] Both parties conceded the theoretical possibility of exposure of a patient to a dentist's blood, which could result in transmission of HIV to a patient.[193] Although the court also cited a CDC report that dental-hand trauma is common,[194] the court did not engage in a true analysis of the fourth factor delineated by the Supreme Court:[195] "the probabilities the disease will be transmitted and will cause varying degrees of harm."[196] Rather, the court used the standard set forth in

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[185] *Id.* (citing 42 U.S.C. § 12111(3) (2000)).

[186] *Id.*

[187] *Id.* at 1281.

[188] *Id.*

[189] *Id.*

[190] *Id.* at 1280.

[191] *See id.* at 1282-84 (citing Waddell's testimony that blood is usually present with scaling and root planing procedures); *id.* (citing Brief for Appellant at 33) (admitting that "patient bleeding during a routine dental checkup is a common experience").

[192] *See id.* at 1282-84 (noting the possibility that a dentist could cut himself with the sharp instruments commonly employed and also noting that Waddell had cut himself during routine procedures).

[193] *Id.* at 1283.

[194] *Id.* (citing Centers for Disease Control and Prevention, *Update: Universal Precautions for Prevention of Transmission of Human Immunodeficiency Virus, Hepatitis B Virus, and Other Bloodborne Pathogens in Health-Care Settings*, 37 MORBIDITY & MORTALITY WEEKLY REP. 379 (June 24, 1988)).

[195] *Id.* at 1279-84.

[196] Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987).

Onishea.[197]

In sum, the Eleventh Circuit, in *Waddell*, held that " 'when transmitting a disease inevitably entails death, the evidence supports a finding of "significant risk" if it shows both (1) that a certain event can occur, and (2) that according to reliable medical opinion the event can transmit the disease.' "[198] This approach is consistent with the holdings of the Fourth,[199] Fifth[200] and

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[197] *See Waddell*, 276 F.3d at 1283 (quoting Onishea v. Hopper, 171 F.3d 1289, 1297 (11th Cir. 1999)).

[198] *Id.* at 1280-81 (quoting *Onishea*, 171 F.3d at 1299).

[199] *Id.* at 1283 (noting that the Fourth, Fifth, and Sixth Circuits entertain the same approach). *See, e.g.*, Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995). In *University of Maryland Medical System*, the plaintiff Doe, a surgical resident at the defendant institution, was stuck in the course of his work by a needle infected with HIV. *Id.* at 1262. After testing revealed that Doe was infected with the HIV virus as a result of the incident, he was suspended from performing surgical procedures. *Id.* Initially, the University of Maryland Medical System Corp. ("UMMSC") allowed him to perform reduced risk surgical procedures. *Id.* However, after further consultation and research, UMMSC permanently suspended Doe from performing any surgical procedures, offering non-surgical residencies as an alternative. *Id.* at 1263. Although the court cited the Centers for Disease Control and Prevention ("CDC") reports, Centers for Disease Control and Prevention, *Update*, *supra* note 194, at 379, stating that the chance of surgeon-to-patient transmission of HIV was 1 in 42,000 to 1 in 420,000; that the CDC identified only one exposure prone procedure; that there are no documented cases of surgeon-to-patient HIV infection; and that the Supreme Court, in *Arline*, 480 U.S. at 288, held that great deference should be given to the findings of public health officials, the court nonetheless held that Doe presented a significant risk, or direct threat, to UMMSC's patients. *Med. Sys. Corp.*, 50 F.3d at 1265-67. The court only briefly mentioned the factors in *Arline* and essentially held that the mere possibility of transmission, coupled with the definite fatality upon transmission, rendered Doe's continued practice as a surgeon a significant risk to others. *Id.*

[200] *See, e.g.*, Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922 (5th Cir. 1993). In *Bradley*, the plaintiff, a surgical assistant with the defendant medical center, announced in a newspaper that he was HIV-positive. *Id.* at 923. He was almost immediately removed from surgical duties and given an administrative position offering no client contact. *Id.* The court first outlined the *Arline* factors: nature, duration, and severity of the risk, the probabilities the disease will be transmitted, and the varying degrees of harm. *Id.* at 924 (citing *Arline*, 480 U.S. at 288). Noting that the parties did not dispute the first three factors, the court went (ostensibly) immediately to the fourth factor. *Id.* However, the court summarily stated, with little review of medical evidence, that "[a] cognizable risk of permanent duration with lethal consequences suffices to make a surgical technician with Bradley's responsibilities" a significant risk to patients. *See id.* Essentially, the court, as in *Waddell* and *University of Maryland Medical System*, held that any

Sixth Circuits.[201]

The refusal of the court to entertain any real balancing or determination of actual probabilities, and its acceptance of any theoretical risk of transmission, suggests a very broad interpretation of "significant risk."[202] While it is an open question as to how minute a risk will be considered significant, the court's analysis indicates that any person who is HIV-positive will always present a significant risk, and thus be a direct threat to others in the workplace.

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possibility of transmission, coupled with the effects should a transmission occur, made Bradley's employment as a surgical technician a direct threat to patients, therefore removing ADA protections.

[201] *See, e.g.*, Estate of Mauro v. Borgess Med. Ctr., 137 F.3d 398 (6th Cir. 1998). In *Mauro*, the plaintiff Mauro, a surgical technician employed by the defendant Borgess, was HIV-positive. *Id.* at 400. When Mauro's illness came to the attention of Borgess officials, they created a position for Mauro that involved no client contact. *Id.* Mauro refused to accept the position. *Id.* Borgess officials subsequently created a task force to investigate whether Mauro could continue in his former position without posing a direct threat to the safety of patients. *Id.* When the task force determined that Mauro could no longer serve as a surgical technician and he refused to accept the alternate position, Mauro was laid off. *Id.* The Sixth Circuit Court of Appeals affirmed the district court in awarding summary judgment to Borgess because Mauro presented a direct threat to its patients. *Id.* at 407. The court set forth the factors for determining whether Mauro's HIV-positive status was a direct threat to Borgess's patients: the nature, duration, and severity of the risk and "the probability that the disease will be transmitted." *Id.* at 401 (citing *Arline*, 480 U.S. at 288). It should be noted that the court modified the fourth factor from "the probabilities the disease will be transmitted and will cause varying degrees of harm," *Arline*, 480 U.S. at 188, to "the probability that the disease will be transmitted." *Mauro*, 137 F.3d at 400. The *Mauro* court heavily stressed that the proper inquiry is the *probability* of transmission and not the *possibility*. *Id.* at 403. However, the court relied heavily on the reasoning in *Bradley* and *University of Maryland Medical System*, deeming *Mauro* as "indistinguishable" from those cases. *Id.* at 401. Yet, *Bradley* and *University of Maryland Medical System* are already noted for their holdings that a mere possibility of transmission of HIV is a direct threat, removing ADA protections. *See supra* notes 199-200. The court cited extensive testimony looking at Mauro's actual duties and typical duties of other surgical technicians. *Mauro*, 137 F.3d at 404-07. The court also cited the same CDC information, contained in those cases, finding risk of transmission to be slight. *Id.* at 403-05. Affirming the district court's decision in favor of Borgess, the circuit court found Mauro's employment as a surgical technician to be a direct threat to patients. *Id.* at 407. The court reached this decision despite the lack of evidence that risk of transmission was more than negligible or that Mauro himself had ever been cut during a procedure. *Id.* at 406-16.

[202] *See Waddell*, 276 F.3d at 1283-84.

B. *The Ninth Circuit Approach: Only Documented Cases of Transmission Can Show a Direct Threat*

Opposite the Eleventh Circuit approach, where any theoretical and remote chance of transmission renders one a direct threat to the safety of others,[203] is the Ninth Circuit approach, where proof of a documented case of transmission is required before the protections of the Rehabilitation Act or the ADA are removed.[204] In *Chalk v. United States District Court Central District of California*, the Ninth Circuit used this approach in finding that a school department violated the Rehabilitation Act when it prohibited an HIV-positive teacher from having student contact.[205]

Orange County Department of Education employed Vincent Chalk as a teacher for hearing-impaired students for nearly six years.[206] Chalk discovered that he had HIV after developing pneumocystis carninii pneumonia.[207] Although Chalk's physician released him to resume teaching and so notified the Department, the Department placed him on administrative leave.[208] During Chalk's leave, the Department consulted epidemiological specialists and reports to discern whether Chalk presented a risk to his students.[209] The doctor performing that review also examined Chalk and cleared him to return to teaching.[210] After Chalk's agreed leave period expired, the Department offered him an administrative position involving no student contact, which he was required to accept under threat of an injunction.[211] When Chalk refused to accept the position, both parties cross-filed for injunctions.[212] Chalk also alleged violations of the Rehabilitation Act of 1973.[213]

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[203] *Id. See also supra* notes 167-202 and accompanying text (discussing *Waddell*).

[204] *See* Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (1988). For a positive review of the *Chalk* decision, see Trapp, *supra* note 32, at 1641. *See also* Turowski, *supra* note 10, at 149 (stating that the *Chalk* decision "presents a well-reasoned employment discrimination case utilizing extensive medical evidence on Chalk's behalf").

[205] *Chalk*, 840 F.2d at 701-12.

[206] *Id.* at 703.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.* at 703 n.4.

[211] *Id.* at 703.

[212] *Id.* at 703-04. The Department subsequently dropped the action in state court and counterclaimed against Chalk's claims in federal court. *Id.* at 704.

[213] *Id.* at 703.

The district court denied Chalk's motion for a preliminary injunction. The court found that his success on the merits was unlikely because although the risk that HIV would be transmitted to a student was minimal, it would suffice to defeat this claim.[214] The Department permanently assigned Chalk to administrative duties involving no student contact.[215]

On appeal, the Ninth Circuit set forth the legal standard for determining whether Chalk was a direct threat to others in the workplace.[216] In the disease context, a person is a direct threat to others in the workplace if there is a significant risk of transmitting the disease to others.[217] Then, the court cited the four *Arline* factors for determining whether a risk is significant: the nature, duration, and severity of the risk, and the probability that the disease will be transmitted balanced with the harm to be produced.[218]

The Ninth Circuit held that it was error for the district court to equate a "minimal" risk of death with the "significant" risk required by the statute, especially when the risk assessment was based on the lack of information as to actual risks in that setting.[219] The court also found that the district court did not follow the legal standard of deferring to public health officials and of relying on objective medical evidence.[220] The court reviewed the evidence presented by both parties.[221] The plaintiff Chalk cited many of the same medical authorities, such as the CDC, as did the plaintiffs in the cases discussed above, demonstrating that there is little risk of transmission.[222] The Department introduced evidence that, although the risk was very small, a risk did, in fact, exist.[223]

The Ninth Circuit held that a risk that is theoretical, because no such risk has manifested in transmission, cannot be a significant risk.[224] In other words, risk of transmission can only be significant, or a direct threat, if there is a documented case of such transmission.[225] The court looked to several

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[214] *Id.*

[215] *Id.*

[216] *Id.* at 704-05.

[217] *Id.* at 705 (citing Arline v. Sch. Bd. of Nassau County, 480 U.S. 273, 288 n.16 (1987)).

[218] *Id.* (citing *Arline*, 480 U.S. at 288).

[219] *Id.* at 707-08.

[220] *Id.* at 708 (citing *Arline*, 480 U.S. at 288).

[221] *Id.* at 706-09.

[222] *See id.* at 709.

[223] *Id.* at 707.

[224] *Id.* at 706; *see also* Doe v. County of Centre, Pa., 242 F.3d 437 (3d Cir. 2001).

[225] *See Chalk*, 840 F.2d at 706-09.

decisions of other courts that rejected the "theoretical risk" as a significant risk amounting to a direct threat.[226] Since there were no documented cases of transmission of HIV, either from teacher to student or in other casual contact settings, the Ninth Circuit found that Chalk was not a direct threat to his students and co-workers.[227] Since he was not a direct threat, Chalk was otherwise qualified and success on the merits was likely.[228] Thus, the Ninth Circuit ordered that the injunction be granted.[229]

Other courts have interpreted *Chalk* as standing for the proposition that in order for a risk to be significant, there must be a documented case of transmission.[230] This case improves upon *Waddell* in that it calls for a completely objective standard, making bias about HIV almost irrelevant.[231] However, *Chalk* departs from congressional intent by failing to give attention to the need to protect employers.[232] Essentially, the court's ruling renders the direct threat provision useless in cases where there is an obvious risk but the risk has not manifested. Thus, employers may be forced to shoulder risks that the direct threat provision was designed to protect them (and their employees and customers) against.

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[226] *Id.* at 708-09; *see, e.g.*, Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987) (holding that an HIV-positive child could not be excluded from the classroom because there was no evidence that HIV could be transmitted through biting); Ray v. Sch. Dist. of DeSoto County, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987) (holding that "future theoretical [risk of] harm" was insufficient to find that three HIV-positive brothers posed a direct threat to others in the classroom); Dist. 27 Comty. Sch. Bd. v. Bd. of Educ., 502 N.Y.S.2d 325, 337 (Sup. Ct. 1986) (holding that excluding HIV-positive students from the classroom based on a "remote theoretical possibility" of transmission violated the Rehabilitation Act); N.Y. State Ass'n of Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979) (holding that a "remote possibility" that hepatitis B would be transmitted to other children was insufficient to support excluding the infected child from the classroom).

[227] *See Chalk*, 840 F.2d at 707-09.

[228] *Id.* at 711.

[229] *Id.* at 712.

[230] *See, e.g.*, Doe v. County of Centre, Pa., 242 F.3d 437 (3d Cir. 2001). In *Doe*, the court stated: "Other appellate courts have endorsed a more exacting standard, requiring some actual risk of transmission including documented cases. *See . . . Chalk v. United States Dist. Court Cent. Dist. of Cal.*, . . ." *Id.* at 450.

[231] Waddell v. Valley Forge Dental Assocs., 276 F.3d 1275, 1283-84 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2293 (2002).

[232] *See* 42 U.S.C. § 12111(5) (2000).

C. *The Third Circuit Approach: True Analytical Engagement*

Between the approaches of the Eleventh and Ninth Circuits, is the Third Circuit approach.[233] The Third Circuit approach adheres to Congressional intent by requiring that a certain probability of HIV-transmission exist. In *Doe v. County of Centre*, the plaintiffs sought to become foster parents in Centre County, Pennsylvania.[234] The County conditioned approval of their application upon the Does signing a release allowing the birthparents of potential foster children to become aware of the HIV-positive status of the Does' already adopted son.[235] The County reasoned that foster children often commit sexual assault on other children in the home, presenting a risk of HIV transmission to the offending child.[236] The Does sued under the ADA and Rehabilitation Act for monetary and injunctive relief, including approval as foster parents and elimination of the policy.[237] Granting summary judgment in favor of the County, the district court found that the HIV-positive son posed a direct threat to foster children because of the potential that the adopted son would be sexually assaulted by the foster child.[238]

The United States Court of Appeals for the Third Circuit reversed the district court and remanded the case for trial.[239] The court reviewed the holdings of the Fourth,[240] Fifth,[241] Sixth,[242] and Eleventh Circuits,[243] that "any amount of risk through a 'specific and theoretically sound means of transmis-

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[233] *County of Centre*, 242 F.3d at 437.

[234] *Id.* at 441.

[235] *Id.* Although the Does did not themselves qualify as "handicapped" under the Rehabilitation Act or as having a "physical impairment" under the ADA, they had standing to sue, as "qualified individuals," through their association with a qualifying individual. *Id.* at 447 (quoting 42 U.S.C. § 12112(b)(4) (2000) for the proposition that "the ADA 'protects persons who associate with persons with disabilities and who are discriminated against because of that association. This may include family, friends, and persons who provide care for persons with disabilities.'").

[236] *Id.* at 441, 444-45.

[237] *Id.*

[238] *Id.* at 441, 446.

[239] *Id.* at 441.

[240] Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1265-66 (4th Cir. 1995).

[241] Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922, 924 (5th Cir. 1993).

[242] Estate of Mauro v. Borgess Med. Ctr., 137 F.3d 398, 405, 407 (6th Cir. 1998).

[243] Onishea v. Hopper, 171 F.3d 1289, 1297-99 (11th Cir. 1999).

sion' constitutes a significant risk."[244] It also reviewed the First[245] and Ninth[246] Circuit decisions stating, "[o]ther appellate courts have endorsed a more exacting standard, requiring some actual risk of transmission including documented cases."[247] However, the court did not examine the merits of the approaches because it held that a reasonable fact finder could find the risk of transmission to be so remote as to remove the case from the purview of the direct threat exception.[248]

First, the court examined *Bragdon* to determine the appropriate standard. Citing that case, the Third Circuit wrote, " 'the ADA do[es] not ask whether a risk exists, but whether it is significant.' "[249] Second, the court stated that the inquiry would require a "statistical likelihood."[250] Finally, the court discussed the four *Arline* factors for examining whether a contagious disease presents a direct threat to the health and safety of others.[251]

In applying the standard, the Third Circuit agreed with the lower court's analysis of the first three *Arline* factors. However, it disagreed with the lower court's analysis of the fourth factor—the probability of transmission.[252] The court noted the requirement of an individualized inquiry as it examined the facts of the case.[253] Two key facts were important to the court's determination. First, the Doe's son was severely physically disabled, needing assistance to feed and clothe himself.[254] Second, the Does requested that foster children placed in their home be under the age of twelve.[255] The County presented evidence that foster children perpetrate sexual abuse at a high rate.[256] However, the court found that the Doe's son was very unlikely to be able to assault another child; and a pre-pubescent child, under the age of twelve, was also unlikely to commit such acts.[257] Although there was a remote risk that

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[244] *County of Centre*, 242 F.3d at 450.

[245] Abbott v. Bragdon, 163 F.3d 87, 90 (1st Cir. 1999).

[246] Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701, 707-09 (9th Cir. 1988).

[247] *County of Centre*, 242 F.3d at 450.

[248] *Id.*

[249] *Id.* at 447 (quoting *Bragdon*, 524 U.S. at 649).

[250] *Id.* (quoting *Bragdon*, 524 U.S. at 652).

[251] *Id.* at 447-48 (quoting Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987)).

[252] *Id.* at 449.

[253] *Id.*

[254] *Id.* at 442, 449.

[255] *Id.* at 449.

[256] *Id.*

[257] *Id.* at 449-50.

such an assault could occur, the court held that there was sufficient evidence for a jury to conclude that placement of foster children in the Does' home would not present a direct threat to the health or safety of those children.[258] Thus, the court held in favor of the Does and remanded the case for a direct threat determination at trial.[259]

The opinion in *County of Centre* is important for two reasons. First, it is an acknowledgement and review of the existing approaches to HIV as a direct threat.[260] Second, it represents a middle ground between those approaches.[261] It is an example of the court acting in accordance with Supreme Court guidelines and statutory law rather than out of fear or theoretical situations.

IV. ANALYSIS

The ADA has been regarded as "mark[ing] 'the beginning of a new era for individuals with disabilities.'"[262] However, the use of stereotypes in conjunction with the direct threat provision reduces the promise of that "new era" by removing the protections of the ADA from those who need it most: HIV-positive individuals.[263] The problems associated with implementing the direct threat provision also arise from the lack of guidance in interpreting "significant risk."[264] This section examines the disparity in treatment of the direct threat defense by looking at the role of myths and stereotypes in evaluating risk.

A. The Role of Stereotypes in Implementing the Direct Threat Defense

Three aspects of HIV stereotypes are relevant to the examination of risk evaluation. The first aspect is the intent of Congress to defeat stereotypes imposed on individuals with disabilities. The second aspect is the role of

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[258] *Id.* at 450-51.

[259] *Id.* at 451.

[260] *Id.* at 450.

[261] *Compare id. with* Onishea v. Hopper, 171 F.3d 1289 (11th Cir. 1999) *and* Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988) (showing the two extreme ends of the spectrum in analyzing HIV transmission for purposes of a direct threat).

[262] Trapp, *supra* note 32, at 1596 (quoting Renee L. Cyr, Note, *The Americans with Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees*, 57 BROOK. L. REV. 1237, 1237 (1992)).

[263] *See generally* Sullivan, *supra* note 14, at 621-22.

[264] *See* Hubbard, *supra* note 13, at 1280-81.

stereotypes in public risk assessment. The third aspect is the effect of public fears on the judiciary in regard to its role as risk regulator.[265]

1. *Congressional Purpose, Agency Definition and the Supreme Court*

The legislative history of the ADA indicates that Congress sought to eliminate and provide redress against discrimination in the workplace based on stereotypes imposed on individuals with disabilities.[266] The House report, based on hearings leading to the passage of the ADA, states that discrimination against individuals with disabilities "often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies."[267] In regards to such discrimination in the workplace, the report stated, and Congress included in the statutory findings,[268] that individuals with disabilities "have been subjected to unequal and discriminatory treatment in a range of areas, based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals to participate in and contribute to society."[269] Thus, one of Congress' primary purposes in drafting the ADA was to fight the stereotypes that prevent individuals with disabilities from becoming full participants in society.[270]

The logical conclusion based on the intent of Congress in regards to the entire Act is that, in drafting the direct threat provision, Congress did not intend to allow myths and stereotypes to determine which disabled individuals are a threat to those whom they come into contact.[271] Thus, Congress did not intend to impart those mythologies into the examination of the significance

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[265] *See id.* at 1281.

[266] *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 30, 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 312, 338. *See generally* Sullivan, *supra* note 14, at 599-600 (discussing the effect of stereotypes on perceptions of risk).

[267] *See* H.R. REP. NO. 101-485, pt. 2, at 30.

[268] *See* 42 U.S.C. § 12111(a)(7) (2002).

[269] H.R. REP. NO. 101-485, pt. 2, at 40.

[270] *See* Hubbard, *supra* note 13, at 1280.

[271] *Id.*; *see* Waddell v. Valley Forge Dental Assocs., 276 F.3d 1275 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2293 (2002) (finding that a remote risk of transmitting HIV to dental patients was a significant risk under the direct threat provision of the ADA); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995) (finding that a remote and theoretical risk of transmitting HIV to the patients of a medical assistant was a significant risk under the direct threat provision of the ADA).

of the risk. In drafting the direct threat provision, Congress "sought a proper reconciliation of the legitimate interests of employers, on the one hand, and the rights of individuals with disabilities" to be free from discrimination.[272] However, as recent case law demonstrates,[273] even analysis of the most objective evidence can be laden with value judgments.[274] The lack of guidance for interpreting direct threat has left individuals open to discrimination based on stereotypes.

2. *Science, Values, and Stereotypes in Risk Evaluation*

The Supreme Court, in *Arline*, found that fears about disability are just as disabling as the physical impact of a disease,[275] and stated that "[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness."[276] This statement encapsulates the AIDS epidemic and the continuing panic of the nation.[277] In addition, people fear most what is "unfamiliar, uncontrollable, and highly publicized."[278] Although less so in recent years, this statement also accurately captures fears about HIV and AIDS.[279] Unfortunately, public fears, no matter how unfounded, often turn into governmental policy.[280]

The methods people use in everyday life to evaluate risk explain why perceptions of risks and diseases often do not reflect scientific and medical conclusions. Richard Pildes and Cass Sunstein have identified eight factors that people use in risk evaluation:

> (1) the catastrophic nature of the risk; (2) whether the risk is uncontrollable; (3) whether the risk involves irretrievable or permanent losses; (4) the social conditions under which a particular risk is generated and managed, a point that connects to issues of consent, voluntariness, and democratic control;

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[272] *See* Hubbard, *supra* note 13, at 1282.

[273] *Compare Med. Sys. Corp.*, 50 F.3d at 1261, *with* Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988).

[274] *See* Hubbard, *supra* note 13, at 1281-84.

[275] Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

[276] *Id.*

[277] *See* Padraig O'Malley, *Editor's Note* to THE AIDS EPIDEMIC: PRIVATE RIGHTS AND THE PUBLIC INTEREST 5-6 (Padraig O'Malley ed., 1996).

[278] Hubbard, *supra* note 13, at 1281; *see also* Hermann, *supra* note 59, at 787; Sullivan, *supra* note 14, at 621-22 (noting that public fear of AIDS only really began after persons infected by HIV-positive blood transfusions began to surface).

[279] Sullivan, *supra* note 14, at 621-22.

[280] *See* Bagenstos, *supra* note 160, at 1488.

> (5) how equitably distributed the danger is or how concentrated on identifiable, innocent, or traditionally disadvantaged victims, which ties to both notions of community and moral ideals; (6) how well understood the risk process in question is, a point that bears on the psychological disturbance produced by different risks; (7) whether the risk would be faced by future generations; and (8) how familiar the risk is.[281]

Application of these factors to HIV and AIDS helps explain the public's intense reaction to the disease.

HIV and AIDS are inevitably fatal diseases.[282] Although improvements in pharmaceutical and medical technologies improve life span, death is inevitable in most cases.[283] Even assuming a guaranteed life span, one cannot indulge in some of the normal life processes for fear of transmitting the disease to others.[284] Thus, the first factor, the catastrophic nature of the risk, and the third factor, whether losses resulting from the risk are permanent,[285] suggest aggravated reactions to the risk of HIV.

The second, fourth, and fifth factors, involving the controllability, distribution, and level of choice regarding risk,[286] suggest an intense reaction to the risks of HIV and AIDS. Public perception of the controllability of HIV and AIDS was not an initial concern because the disease appeared only to infect the gay male and the African-American populations.[287] That view rapidly changed when HIV began to manifest itself in the young heterosexual Caucasian population.[288]

The same aggravated reaction is also suggested by the sixth and eighth factors, the comprehension of the risk process and the familiarity of the risk.[289] HIV is a relatively new epidemic compared to how it was first defined

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[281] Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 57 (1995).

[282] *See* Mathiason & Berlin, *supra* note 26, at 637. *See also* Sullivan, *supra* note 14, at 599 n.8 (giving a brief, yet comprehensive description of the progression of HIV).

[283] *See supra* note 282.

[284] *See* Bragdon v. Abbott, 524 U.S. 624, 639-42 (1998).

[285] Pildes & Sunstein, *supra* note 281, at 57.

[286] *Id.*

[287] *See* Sullivan, *supra* note 14, at 621 (stating "the disease was thought to affect only the 'margins' of society—gay and bisexual men . . . .").

[288] *Id.* at 621-24.

[289] Pildes & Sunstein, *supra* note 281, at 57.

in 1982.[290] Although billions of dollars have funded AIDS research, and scientists almost universally agree that the modes of transmission have exhaustively been identified, the public still fears that it does not know enough to protect itself against the disease.[291] Inferentially, therefore, people take unwarranted precautions against its transmission.

The subjective risk evaluation factors discussed above have numerous implications with regard to examining the significance of the risk in HIV cases. Most of the factors above indicate that a heightened fear of HIV and AIDS, although it may be unwarranted by science, can impact judicial perceptions and methods of evaluating risks. Thus, the perceptions become key factors in gate-keeping who is protected by the ADA.

3. *The Propriety of the Judiciary as Risk Regulators*

In 1990, the Chief Justice of the West Virginia Supreme Court stated during an oral argument, "I wouldn't work within 500 yards of anyone who tested positive for HIV. I have a wife and children."[292] One might wonder how he expects to get HIV sitting behind his bench, fully covered with his robe, and fully guarded by his bailiff. One might also wonder if he has resigned, given the high rate of HIV-infection among the criminal population that sit in his courtroom. Nevertheless, the Justice's statement is illustrative of the potential bias infecting the significance of the risk evaluation.[293]

A number of commentators have urged that the task of defining the significance of the risk be abrogated from the judiciary.[294] Bias[295] is the most frequently cited reason for removal. Another reason cited is the lack of judicial expertise in the areas of science and medicine.[296]

Although concerns over judicial bias are supported by case law, removing such decisions from the judiciary cannot be rationally supported for several

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[290] Loretta McLaughlin, *Aids: An Overview*, *in* THE AIDS EPIDEMIC, *supra* note 277, at 18.

[291] *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, *HIV and its Transmission*, *at* http://www.cdc.gov/health/diseases.htm (last visited Mar. 24, 2002).

[292] *See* Sullivan, *supra* note 14, at 600 n.12 (citing *West Virginia Supreme Court Rules State's Rights Act Protects HIV-Positive*, 55 DAILY LAB. REP. (BNA) A-8 (Mar. 21, 1990)).

[293] *Id.* at 607.

[294] *See generally id. See also* Hubbard, *supra* note 13, at 1281 ("Too often . . . judges' personal perceptions of acceptable risks and medical probabilities stand in for the rigorous scrutiny demanded by the ADA.").

[295] Sullivan, *supra* note 14, at 607; *see also* Hubbard, *supra* note 13, at 1281.

[296] *See* Sullivan, *supra* note 14, at 607.

reasons. First, the legislative history of the ADA commands that a direct threat determination be made by an individualized judicial inquiry.[297] Second, the Supreme Court mandates an inquiry into the threat posed by a specific individual.[298] Blanket application of the direct threat provision would be contrary to the above mandates and the underpinnings of the ADA: to base employment decisions on the abilities of individuals and not on the perceived abilities of a class of persons with a particular disease.[299]

B. The True Meaning of Significance of the Risk

As noted above, a primary goal for Congress in enacting the ADA was to defeat the stereotypes associated with disability.[300] Yet, a number of circuits appear to have imparted such stereotypes into the meaning of direct threat, resulting in a defeat of that purpose.[301] Other circuits have also failed to give meaning to the intended balance between employer interests and the rights of the disabled by interpreting the risk too narrowly.[302] The ADA, as a valuable piece of legislation, should be interpreted with the meaning that Congress intended so that its balance of interests remains calibrated on the side of fairness.

The legislative history of the ADA and the Supreme Court opinions that give it life impose three requirements on direct threat determinations. First, the determination must be based on an individualized inquiry.[303] Second, risk

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[297] *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 338 ("[D]etermination that an individual with a disability will pose a safety threat to others must be made on a case-by-case basis . . . .").

[298] *See* Bragdon v. Abbott, 524 U.S. 624 (1998); *see also infra* Part IV.B.1 (discussing the requirement of an individualized inquiry).

[299] *See* H.R. REP. NO. 101-485, pt. 3, at 45 (stating that direct threat determinations not be predicated on "stereotypes or fear . . . speculation about the risk or harm to others . . . [or] generalizations about the disability").

[300] *See supra* notes 266-74 and accompanying text.

[301] *See, e.g.*, Waddell v. Valley Forge Dental Assocs., 276 F.3d 1275 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2293 (2002) (finding that a remote risk of transmitting HIV to dental patients was a significant risk under the direct threat provision of the ADA); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995) (finding that a remote and theoretical risk of transmitting HIV to the patients of a medical assistant was a significant risk under the direct threat provision of the ADA).

[302] *See* Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988) (requiring, at a minimum, proof of a documented case of transmission in order for risk of transmission to be significant).

[303] *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 58.

must be evaluated by objective medical evidence.[304] Third, and most importantly, the risk must, in fact, be significant.[305]

1. *The Requirement of an Individualized Inquiry*

When Congress codified the direct threat provision from the Supreme Court's opinion in *School Board of Nassau County v. Arline*,[306] it made clear that the Court's interpretation was integrated into the provision.[307] In *Arline*, the Court discussed at length the need for individualized determinations, especially with regard to contagious diseases:

> The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.' Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.[308]

In addition to expressly adopting the *Arline* framework for examining direct threat, the legislative history of the ADA evinces an intent for direct threat determinations to be based on individualized inquiries.[309] The ADA requires

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[304] *See, e.g.*, Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987) (quoting Brief of the Am. Med. Ass'n as *Amicus Curiae* at 19).

[305] *See, e.g.*, Equal Employment Opportunity Comm'n, 29 C.F.R. § 1630 (1991).

[306] *Arline*, 480 U.S. at 287 n.16.

[307] H.R. REP. NO. 101-485, pt. 2, at 76, *reprinted in* 1990 U.S.C.C.A.N. 303, 359 (citing *Arline*, 480 U.S. at 287 n.16); *see also id.* pt. 3, at 45, *reprinted in* 1990 U.S.C.C.A.N. 303, 468 ("In order to determine whether an individual poses a direct threat to the health or safety of other individuals in the workplace, the Committee intends to use the same standard as articulated by the Supreme Court in School Board of Nassau County v. Arline. . . . This definition was added to clarify that the direct threat standard is a codification of the analysis in Arline.").

[308] *Arline*, 480 U.S. at 285.

[309] *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 58; *see also* Hubbard, *supra* note 13, at 1307 ("ADA legislative reports repeatedly insist on fact-specific, case-by-case determinations, denouncing group-based assessments and reliance on generalizations about persons with a particular disability. They conclude that employment decisions based on averages and group-based predictions are incompatible with the Act's requirement of individualized assessments.").

employers to "make employment decisions based on facts applicable to individual applicants or employees, and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do."[310] Furthermore, Congress viewed risk evaluation as commanding a "fact-specific individualized inquiry."[311] The Equal Employment Opportunity Commission ("EEOC") has also promulgated regulations requiring direct threat determinations to be "based on individualized factual data . . . rather than on stereotypic or patronizing assumptions . . . ."[312]

Failure to base direct threat conclusions on individualized inquiry results in logical inconsistencies.[313] Since conclusions as to whether a person is disabled must be based on individualized inquiry,[314] conclusions as to the risk presented by that disability must also be based on individualized inquiry.[315] "To conclude otherwise would be to say to ADA plaintiffs: 'We will scrutinize you to determine whether you are entitled to coverage of the Act, but if you are, we will then generalize about you and your disability to justify the employer's decision to exclude you.' "[316]

Despite this prescription by the Supreme Court and its adoption by Congress,[317] courts have refused to give individualized treatment in HIV cases.[318] The Ninth Circuit essentially requires a documented case of transmission.[319] Such a requirement is outside the bounds of Congressional intent because it requires the lower courts to classify the rights of employers, not on actual risk, but based manifestation of risk consequences. Opposite the Ninth Circuit are the Fourth,[320] Fifth,[321] Sixth,[322] and Eleventh Cir-

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[310] H.R. REP. NO. 101-458, pt. 2, at 58.

[311] *Id.* at 57.

[312] 29 C.F.R. § 1630.2(r) (1991).

[313] *See* Hubbard, *supra* note 13, at 1308.

[314] *See supra* notes 266-74 and accompanying text.

[315] *See* Hubbard, *supra* note 13, at 1308.

[316] *Id.*

[317] H.R. REP. NO. 100-485, pt. 2, at 58, *reprinted in* 1990 U.S.C.C.A.N. 303, 340; Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 280-86 (1987).

[318] *See* Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (1988) (requiring, minimally, proof of a documented case of transmission in order for risk of transmission to be significant).

[319] *Id.*

[320] *See, e.g.*, Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1265 (4th Cir. 1995).

[321] *See, e.g.*, Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922, 924 (5th Cir. 1993).

[322] *See, e.g.*, Estate of Mauro v. Borgess Med. Ctr., 137 F.3d 398, 403-05 (6th Cir. 1998).

cuits,[323] which equate theoretical and remote risks with significant risks.[324] Again, this approach classifies the rights of individuals with disabilities with regard to public and judicial perception of risk rather than actual risk.

2. *The Requirement of Objective Medical Evidence*

The Supreme Court, again in *Arline*,[325] mandated that direct threat determinations be based on "reasonable medical judgments."[326] In addition, the Court held that, "[i]n making these findings, courts normally should defer to the reasonable medical judgments of public health officials."[327] The Supreme Court reaffirmed its stance on the requirement of objective medical evidence in *Bragdon*.[328] In that case, the Court noted that "the views of public health authorities . . . are of special weight and authority."[329] However, the Supreme Court also held that such conclusions could be refuted.[330] Some courts have interpreted the holding to require adherence to the opinions of public health authorities unless their conclusions are "medically unsupportable."[331]

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[323] *See, e.g.*, Onishea v. Hopper, 171 F.3d 1289, 1298 (11th Cir. 1999).

[324] *See* Waddell v. Valley Forge Dental Assocs., 276 F.3d 1275 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2293 (2002) (finding that a remote risk of transmitting HIV to dental patients was considered a significant risk under the direct threat provision of the ADA); *Med. Sys. Corp.*, 50 F.3d at 1261 (a remote and theoretical risk of transmitting HIV to the patients of a medical assistant was considered a significant risk under the direct threat provision of the ADA); *Bradley*, 3 F.3d at 922 (holding that the risk of death, no matter how remote, created a significant risk to others in the workplace of the HIV-petitioner surgeon); *Mauro*, 137 F.3d at 398 (finding that the severity of the risk, although remote, rendered a surgical technician a direct threat to his patients).

[325] Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).

[326] *Id.* at 288 (quoting Brief of the Am. Med. Ass'n as *Amicus Curiae* at 19).

[327] *Id.*

[328] Bragdon v. Abbott, 524 U.S. 624 (1998).

[329] *Id.* at 650 (Public health authorities include the U.S. Public Health Service, the Center for Disease Control, and the National Institutes of Health.).

[330] *Id.* at 650-51.

[331] Bagenstos, *supra* note 160, at 1491 n.48 (citing Abbott v. Bragdon, 107 F.3d 934, 935 (1st Cir. 1997), *vacated by* 524 U.S. 624 (1998)); *see also id.* at 1491 ("If public health officials say it is safe to hire or serve a particular individual with a disability, the Court has said, that individual generally may not be excluded unless the defendant shows that the judgments of those officials are 'medically unsupportable.'").

The EEOC has issued regulations governing the use of evidence in risk determinations.[332] These regulations require medical evidence to be both objective and current.[333] One of the most regarded publications on disease information, the Journal of the American Medical Association, has determined that there is no known risk of HIV transmission in places such as schools, offices, and factories.[334] In addition, the CDC has determined that "the kind of non-sexual person-to-person contact that generally occurs among workers and clients or consumers in the workplace does not pose a risk of transmission of HIV."[335]

Given the authority requiring deference to public health officials and the special expertise of bodies like the CDC,[336] the lack of deference to such officials is curious. There are a number of reasons cited for the mistrust of the scientific community and related agencies.[337] The primary reason cited is scientific pluralism.[338] Scientific pluralism, or divergent conclusions on similar sets of facts, implies two flaws with reliance on medical authorities—inaccuracy and imposition of individual values in the scientific process.[339]

Additionally, critics argue that quantifying whether a risk is significant cannot be achieved through wholly objective means because it is not exclusively a factual question.[340] Essentially, when determining whether a risk is significant, the scientist or authoritative body does two things.[341] First, it

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[332] *See, e.g.*, 29 C.F.R. § 1630.2(r) (2001).

[333] *Id.* (requiring that the direct threat "assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence").

[334] *See* JAMA, *HIV/AIDS Resource Center: Education & Support Center*, *at* http://www.ama-assn.org/special/hiv/support/risk/risk.htm (last visited Apr. 13, 2002).

[335] Centers for Disease Control and Prevention, *Update: Universal Precautions for Prevention of Transmission of Human Immunodeficiency Virus, Hepatitis B Virus, and Other Bloodborne Pathogens in Health-Care Settings*, 37 MORBIDITY & MORTALITY WEEKLY REP. 379 (June 24, 1988)).

[336] *See, e.g.*, Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (1995).

[337] *See generally* Sullivan, *supra* note 14, at 601-04 (discussing the difficulty of defining significance of the risk).

[338] *See id.* at 645-47 (citing Sheila Jasanoff, *American Exceptionalism and the Political Acknowledgment of Risk*, 119 DAEDULUS 61, 75 (1990) ("Because of scientific pluralism, the prescription to 'consult the experts and do what they say' has relatively little meaning in the context of American risk politics.")).

[339] *Id.* at 647-51.

[340] *Id.*

[341] *See generally id.*

quantifies the risk in terms of probability.[342] Second, it determines whether that level or probability of risk is acceptable.[343] Thus, the "objective evaluator" is imparting individual or public values into the concept of risk.[344]

The Supreme Court alluded to the objectivity problem in *Bragdon*.[345] The Court held that Abbott's citation of the American Dental Association's statements affirming that it was safe to treat HIV-positive patients, was evidence of the risk but not conclusive of it.[346] Classifying the American Dental Association as a professional organization, the Court held that the Association's judgments were subject to being laden with ethical and professional responsibilities toward patients.[347] Thus, its recommendations were neither objective nor based on wholly factual assessments.[348]

The Court did not view the American Dental Association as a public health authority because of its character as a professional organization.[349] The Court, however, regarded the CDC as a public health authority.[350] In addition to the Supreme Court and EEOC mandating deference to such authorities, commentators suggest political reasons supporting deference to agencies such as the CDC.[351] Such agencies relate favorably to disabled individuals and the community in three ways.[352] First, the CDC does not reflect the bias of society.[353] Second, the CDC exercises restraint in relation to public fears and tends to be responsive to disadvantaged populations.[354] Third, the CDC bases its conclusions on public health and not the individual.[355] Samuel Bagenstos offers an example of how these three factors affect conclusions about risk:

> Allowing doctors to refuse treatment to people with HIV (for example) might eliminate a (tiny) risk to the individual doctors, but only at the expense of creating greater risks to society as a whole (by, for example, depriving

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[342] *Id.*

[343] *See generally id.* at 653-67.

[344] *Id.*

[345] *See* Bragdon v. Abbott, 524 U.S. 624, 651-52 (1998).

[346] *Id.* at 652.

[347] *Id.*

[348] *Id.*

[349] *Id.*

[350] *Id.* at 650.

[351] *See* Bagenstos, *supra* note 160, at 1498-1503. For simplicity, the CDC is used in this section in place of public health authorities generally.

[352] *Id.*

[353] *Id.* at 1498-99.

[354] *Id.* at 1499-500.

[355] *Id.* at 1499.

> people with HIV of the care they need for opportunistic infections that may themselves be contagious, or by eliminating other opportunities to provide people with HIV the means to mitigate the risks they might pose to others).[356]

Thus, public health authorities often base conclusions about risk on the overall ramifications of certain practices, considering collective risk rather than individual risk. Reliance on public health authorities that examine collective risk aids in giving meaning to the significance of the risk inquiry. Since agencies like the CDC have considered broader social ramifications, the facts provided by the CDC (and used by the court) already contain validly examined, scientific concerns about public risk. Reliance on public health authorities eliminates much of the court's expressed need to impart value judgments into the significance of the risk inquiry.

3. *The Measure of Significance*

In passing the direct threat provision of the ADA, Congress chose to codify the *Arline* framework.[357] Choosing this interpretation, Congress decided that, to remove the protections of the ADA, a risk must be significant.[358] In adopting *Arline's* four-part-test, Congress mandated that the significance of the risk be based, at least in part, on the probability that the disease will be transmitted to another.[359] A remote risk is a risk that, by definition,[360] is unlikely to occur. Despite this fundamental requirement, courts continue to equate remote but severe risks with highly probable, significant risks.[361] Furthermore, the legislative history focuses on the

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[356] *Id.* at 1500.

[357] *See* H.R. REP. NO. 101-485, pt. 2, at 76 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 359; *see also* H.R. REP. NO. 101-485, pt. 3, at 45, *reprinted in* 1990 U.S.C.C.A.N. 303, 468 ("In order to determine whether an individual poses a direct threat to the health or safety of other individuals in the workplace, the Committee intends to use the same standard as articulated by the Supreme Court in School Board of Nassau County v. Arline. . . . This definition was added to clarify that the direct threat standard is a codification of the analysis in Arline.").

[358] Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287-88 (1987).

[359] *See id.* at 288.

[360] *See* BLACK'S LAW DICTIONARY 1459 (4th ed. 1968).

[361] *See, e.g.*, Waddell v. Valley Forge Dental Assocs., 276 F.3d 1275 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2293 (2002).

necessity of actual probability.[362] Committee reports of the House and Senate require the risk to be significant, not "speculative or remote."[363]

As is demonstrated by case law,[364] courts have refused to adhere to the requirements of individualized inquiry, the use of objective medical evidence and deference to public health authorities, and the true meaning of "significance" of the risk. Unfortunately, courts have seized the opportunity to impart their own value judgments into the direct threat debate by skewing the meaning of significance. The following section assesses the Supreme Court's inclination to follow suit.

C. *The Likely Direction of the Supreme Court*

The multiple opinions in *Bragdon v. Abbott*,[365] are instructive in examining the likely direction of the Supreme Court. Particularly useful are the conflicting opinions of Justices Stevens and Rehnquist.[366] Each is discussed below.

Justice Stevens joined in the majority opinion of the Court in *Bragdon*, particularly in the rationale supporting HIV as a qualifying disability.[367] However, he wrote separately, joined by Justice Breyer, to express a preference for "outright affirmance" in favor of the plaintiff.[368] Justice Stevens argued that no triable issue existed on the question of direct threat, and that Bragdon had not provided any evidence that would allow a jury to conclude that treating Abbott in his dental office posed a direct threat to his health or safety.[369] Moreover, Stevens and Breyer opined:

> There are not, however, five justices who agree that the judgment should be affirmed. Nor does it appear that there are five Justices who favor a remand for proceedings consistent with the views expressed in either JUSTICE KENNEDY'S opinion for the Court or the opinion of THE CHIEF JUSTICE. Because I am in agreement with the legal analysis in JUSTICE KENNEDY'S opinion, in order to provide a judgment supported

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[362] *See* H.R. REP. NO. 101-485, pt. 2, at 56.

[363] *Id.*

[364] *See supra* pp. 879-90.

[365] Bragdon v. Abbott, 524 U.S. 624 (1998).

[366] *Id.* at 655-56 (Stevens, J., concurring), 657-64 (Rehnquist, C.J., dissenting in part). Note that Justice Ginsburg's opinion concurred in all respects and further stated that the Court should "err[ ] . . . on the side of caution." *Id.* at 656.

[367] *Id.* at 655 (Stevens, J., concurring).

[368] *Id.* at 656.

[369] *Id.* at 655.

> by the majority, I join that opinion even though I would prefer an outright affirmance.[370]

Conversely, Chief Justice Rehnquist, joined by Justices Scalia, Thomas, and O'Connor, disagreed with all points of the majority regarding whether HIV was a disability,[371] but agreed with the majority in its remand on the direct threat question, with much favor going to the defendant Bragdon.[372] The Chief Justice strongly agreed with the majority that Bragdon raised a triable issue of fact on the issue of direct threat.[373] More significant is the following statement in the dissent:

> Given the "severity of the risk" involved here, *i.e.*, near certain death, and the fact that no public health authority had outlined a protocol for *eliminating* this risk in the context of routine dental treatment, it seems likely that [Bragdon] can establish that it was objectively reasonable for him to conclude that treating [Abbott] in his office posed a "direct threat" to his safety.[374]

The dissent's statement mirrors the analysis of the Fourth, Fifth, Sixth, and Eleventh Circuits;[375] that *any* risk, when the consequences are death, is a significant risk and a direct threat to the health and safety of others.[376] Also like the named circuits, this determination is made without regard to the remoteness of the risk.

Thus, four Justices would interpret the significance of the risk determination (within the direct threat standard) very broadly, resulting in exclusion of many HIV-positive employees from the protections of the ADA.[377] Two Justices would interpret significance of the risk narrowly, resulting in greater protections for HIV-positive individuals.[378] The likely direction of the remaining Justices is unclear, although Ginsburg would "err[ ]... on the side of caution," presumably in favor of employers.[379] Given Ginsburg's conser-

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[370] *Id.* at 656 (citations omitted).
[371] *Id.* at 657-61 (Rehnquist, C.J., dissenting in part).
[372] *Id.* at 661-66.
[373] *Id.*
[374] *Id.* at 664.
[375] *See supra* notes 198-201 and accompanying text.
[376] *See supra* note 165.
[377] *Bragdon*, 524 U.S. at 657-64 (Rehnquist, C.J., dissenting in part).
[378] *Id.* at 655 (Stevens, J., concurring).
[379] *Id.* at 656 (Ginsburg, J., concurring).

vative approach,[380] future opinions may favor employers at the expense of the disabled and the promise of the ADA.

V. PROPOSAL

The likely direction of the Supreme Court[381] warrants an examination of the direct threat standard by Congress. Moreover, it necessitates a definition from Congress regarding the meaning of "significance of the risk" and guidance in how to apply the direct threat standard.[382] To give effect to the purpose of the ADA in eliminating discrimination against the disabled,[383] particularly discrimination based on the unwarranted fear of HIV and AIDS,[384] the authors propose the following standard for determining whether an individual with a disability poses a direct threat to the health and safety of others:

> An individual poses a significant risk and a direct threat to the health and safety of others in the workplace if, after reasonable accommodations are made, there is a reasonable probability that an event will occur, causing the risk to materialize and result in significant physical harm to others in the workplace.

This proposed definition of "direct threat" and "significant risk" gives effect to the purposes of the ADA and to Congressional intent in two ways. First, the proposed standard focuses on elements external to the individual with a disability, reducing the likelihood of allowing stereotypes to influence risk assessment.[385] Second, the proposed standard is flexible enough to allow for an individualized inquiry,[386] but strict enough to prevent unwarranted fears about HIV and other disabilities to influence risk assessment.[387]

A. Focusing on the Circumstances, Not the Disability

The proposed standard requires that the court examine the activities and environment of the disabled individual to determine the probability of an

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[380] *Id.* at 656-57.

[381] *See supra* notes 365-80 and accompanying text.

[382] *See supra* note 160.

[383] *See supra* note 266.

[384] *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987); *see also generally* Sullivan, *supra* note 14 (discussing the effect of stereotypes on perceptions of risk).

[385] *See, e.g.*, H.R. REP. NO. 101-485, pt. 2, at 56.

[386] *See supra* Part IV.B.1.

[387] *See supra* note 266.

event bringing about the risk. In doing so the standard removes the focus on the disability. In the case of the HIV-positive individual, the standard requires that it be reasonably probable that others in the workplace would be exposed to the blood of the individual. Essentially, the proposed standard prevents bias about the disability because the disability requires little examination. The direct threat determination hinges on an event, not on perceptions about a disability.

B. The Benefits of an Individualized Inquiry and a Near-Bright-Line Rule

The proposed standard requires that the circumstances of the individual be examined on a case-by-case basis, looking at (1) elements of the environment that are likely to bring about the risk; (2) the probability that the risk could occur without a triggering event; and (3) characteristics of the individual that are likely to cause the risk to materialize. Thus, it treats all disabled persons as presenting a unique set of circumstances on which to base their rights.[388] However, the proposed standard approximates a bright-line rule in that it limits judicial discretion (and bias), and it mandates a particular result at a particular point on the line of probability.

In considering how the existing standard could be changed to eliminate the effect of judicial stereotypes about disabilities, the authors considered requiring that the event bringing about the risk be *more probable than not* to occur. However, such a standard would be unworkable since it would require that a surgeon be cut fifty-one percent of the time when performing surgery, or that a kickboxing instructor receive a blood-producing wound during fifty-one percent of matches or practices. Given that the result of the risk is death, fifty-one percent seems too high on the line of probability.

The proposed standard, that there be a *reasonable probability* that the event will occur, is less of a bright-line rule. Thus, it allows for more discretion than the rejected standard. Although the proposed standard allows for greater judicial discretion and bias, it also requires that there be an actual probability.[389] The use of the term "reasonable" is not to be related to the degree of harm that would result but to the actual probability that the event will occur. There may be less than a fifty-one percent chance that the event will occur, but there also must be greater than a remote or negligible chance that the event will occur.

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[388] *See* H.R. REP. NO. 101-485, pt. 2, at 56 (requiring an individualized determination).

[389] This standard complies with the legislative history of the ADA, requiring a significant, "not a speculative or remote risk." H.R. REP. NO. 101-485, pt. 2, at 56 (1990).

C. *The Kickboxer, the Judge, and the Cases of the Teacher and Hygienist*

An application of the proposed standard illustrates the benefits of removing the focus from the disability and use of a near-bright-line rule. In each of the following cases: the kickboxer,[390] judge,[391] teacher,[392] and surgeon, the inquiry is the same. What is the probability that others will be exposed to the blood of the individual?

The HIV-positive kickboxing instructor is probably a direct threat to the health and safety of others. Physical combat is likely to bring about blood-producing wounds. Since a kickboxer probably does not receive such a wound fifty-one percent of the time, it is possible that the direct threat provision will not apply. However, since the object of the sport is to bring about such wounds, there is a greater than remote chance of doing so. Because the chances of a blood-producing wound occurring are less than fifty-one percent but greater than remote, the court has discretion as to whether there is a direct threat. Given the object of the sport, the court would likely find a direct threat even in the absence of bias.

The HIV-positive judge is not a direct threat to the health and safety of others. Assuming that the most probable blood-producing event is a fall or a physical attack, the probability that such an event will occur is less than fifty-one percent. Certainly, judges do not have nasty falls or get violently attacked at work 2.5 times per week. Additionally, the risk of such an event is negligible. The judge is protected from attack by her bailiff. Falls must be considered negligible or every HIV-positive individual would have to be quarantined. Since the risk that a blood-producing event will occur is negligible, the judge is not a direct threat to the health and safety of others. Under the proposed standard, the court has no discretion to hold otherwise.

Vincent Chalk, the teacher, is not a direct threat to the health and safety of his students or co-workers.[393] The possibility of a bite was not a major factor in *Chalk*.[394] The court also found that HIV could not be transmitted through a bite.[395] Even if there were a high probability of Chalk being bitten, no harm would result. Thus, the standard would not apply. Assuming that a court, in its discretion, determined that HIV could be transmitted by bite, the focus would turn to the probability that Chalk would, in fact, be bitten.

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[390] *See supra* note 2.

[391] *See supra* p. 860.

[392] *See supra* note 5.

[393] *See* Chalk v. United States Dist. Court Cent. Dist. of Cal., 840 F.2d 701 (9th Cir. 1988).

[394] *Id.* at 708.

[395] *Id.*

It is unclear whether Spencer Waddell,[396] the hygienist, is a direct threat to the health and safety of his dental patients. The Eleventh Circuit determined that since a sharp instrument is "rarely" in the patient's mouth at the same time as the dentist's fingers, they are simultaneously in the patient's mouth only "sometimes."[397] Since "there is some risk, even if theoretical and small, that blood-to-blood contact between hygienist and patient can occur," the court determined that Waddell was a direct threat to the health and safety of his patients.[398] The proposed standard would require a remand of the case because the court did not examine the actual probability that the risk would occur.[399] Based on the Court's finding that the risk is theoretical and small, the risk would be negligible, and not a direct threat.[400] In reality, the court refrained from the probability examination because it held *any* risk of HIV transmission to qualify as significant.[401] Although the result might be that the proposed standard would not allow the court to base its ruling on a subjective fear of HIV, the determination would be based on strict probability without reference to the disease.

In each of the cases above, the inquiry was limited to the environment and activity of the individual, not on the disease. By focusing on the individual and her environment, rather than on her disease, the standard forces the court to use a more objective approach. The proposed standard removes irrational fears and myths from the legal equation.

When the Supreme Court outlined the direct threat standard in *Arline*, it expressed that the individual should pose a *significant risk* to others.[402] Congress codified those words.[403] Some members considered that there needed to be a high probability of substantial harm.[404] The proposed standard gives effect to the intent of the *Arline* Court and Congress by requiring that the risk be significant.[405] The standard forces the court to look beyond the disability of the individual, to think outside his or her "own culturally

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[396] *See* Waddell v. Valley Forge Dental Assocs., 276 F.3d 1275 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2293 (2002).

[397] *Id.* at 1282-83.

[398] *Id.* at 1284.

[399] *Id.*

[400] *Id.*

[401] *Id.*

[402] *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 288 n.16 (1987).

[403] *See* 42 U.S.C. § 12111 (2000).

[404] *See* H.R. REP. NO. 101-485, pt. 3, at 45 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303.

[405] *See Arline*, 480 U.S. at 288 n.16.

fabricated lens,"[406] and reach a result that is fair to *all* individuals. Justice requires that Congress replace the cultural lens of the judiciary with one that is clear: one that is based on science and probability rather than fear and mythology.

V. CONCLUSION

Congress, in passing the Americans with Disabilities Act, intended to eliminate discrimination against individuals with disabilities;[407] it required that they be judged in their true capacity,[408] not by a perception sewn on them by society.[409] Although the direct threat provision of the ADA was intended to strike a balance between the interests of disabled workers and their employers, many courts have used the provision in contravention of those aims. Imparting their own fears and biases about HIV and AIDS into direct threat determinations, courts have stripped many individuals of protections granted by the ADA.[410] The proposed standard guards against the threat of public and judicial bias by providing a more objective, quantifiable standard. The proposed standard mandates that courts evaluate probability and apply it meaningfully. The opinions of the Supreme Court Justices in *Bragdon* suggest that the Court is likely to rule in the same value-laden manner as the court in *Waddell*,[411] holding that *any* risk of HIV transmission is a direct threat. Congress should implement the proposed standard so that all courts must render judgments based on facts, not on fears.

Beneath the conundrum of Congress and the direct threat provision is the fact that HIV-positive individuals are living, breathing, and feeling members

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[406] DOUGLAS & WILDAVSKY, *supra* note 1, at 194.

[407] *See* 42 U.S.C. § 12101(b)(1)-(4) (2000).

[408] *See* H.R. REP. NO. 101-485, pt. 2, at 40 (stating that people with disabilities "have been subjected to unequal and discriminatory treatment in a range of areas, based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals to participate in and contribute to society.").

[409] *See supra* pp. 892-94.

[410] *See* Waddell v. Valley Forge Dental Assocs., 276 F.3d 1275 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2293 (2002) (finding that a remote risk of transmitting HIV to dental patients was a significant risk under the direct threat provision of the ADA); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995) (finding that a remote and theoretical risk of transmitting HIV to the patients of a medical assistant was a significant risk under the direct threat provision of the ADA).

[411] *See* Bragdon v. Abbott, 524 U.S. 624 (1998); *Waddell*, 275 F.3d at 1275.

of the community. As employers and co-workers, there is a moral duty to want for others what we want for ourselves. Driving a car poses a risk of death to others. Yet, we consider the risk negligible for two reasons. First, millions of people drive to work, school, and for pleasure each day without manifestation of the consequences of the risk. Thus, we determine the risk of death to be low on the line of probability. Second, driving allows us all to be productive participants in society, leading to happiness and pride. When the risk of HIV transmission is low on the line of probability, HIV-positive individuals deserve to experience the same pride in working and participating in society. Adoption of the proposed standard would provide legal justice to fill the gaps left by private discrimination.