

## A NEW SEXUAL REVOLUTION?: VIAGRA AS PANDORA'S BOX FOR THE ELDERLY

Christopher A. Julka

*The recent introduction of the impotence drug Viagra has been hailed by some as an event as significant as the advent of the birth control pill. In the following note, Christopher Julka examines parallels that are emerging between these two wonder drugs, as well as the ways in which the comparison appears to fail. Like the pill, Viagra appears to hold the potential for a "sexual revolution." Unlike the pill, Viagra is poised to have its greatest impact on older men. Mr. Julka surveys the current controversies surrounding this new drug, which include its possible hazard to men with heart problems, other problems usually associated with a sexually active population, namely the spread of sexually transmitted diseases, unintended pregnancies, and AIDS, as well as whether insurance companies or the government should be obliged to pay for the drug. In the long run, Mr. Julka argues, the most important issue will be the latter. Already bringing this issue to the fore are various recent developments, including a U.S. Supreme Court's opinion finding that reproduction is a major life activity within the scope of the Americans with Disabilities Act (ADA), and activities by the Clinton administration, including a mandate for Viagra coverage by Medicaid, as well as a proposal that Medicare cover the cost of prescriptions. Mr. Julka argues that the government has yet to take the steps that would logically commit itself to providing Viagra as an entitlement of older*

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Americans. He advises against doing so, contending that Viagra raises a number of public policy concerns which, if not visible now, could have an impact as immense in future decades as the pill has had in recent memory.

## I. Introduction

“Sexy Seniors,” a “column about love and sexuality aimed at the over-50 age group,”<sup>1</sup> may be an indication that the world has come a long way since *Dear Abby*. Its various topics include the following predicament:

I'm a 70-something widower living in a retirement complex. I'm outnumbered by single women by something like eight-to-one. Through no fault of my own, my female neighbors are making repeated overtures, and now that Viagra is out there, I'm anxious to give it a spin. My question is, given the close quarters, how can I be discreet?<sup>2</sup>

Viagra became available in the market little more than a year ago.<sup>3</sup> Already there are signs that it is ushering in a brave new world of sexuality among the elderly, a new trend in behavior and mores that may be as profound as the “sexual revolution” of the 1960s.

The above advice column may not exactly comport with the popular view of the golden years. Yet the prevalent asexual image appears to be a myth. For example, old age is now correlated with the most rapid increase in the spread of Acquired Immune Deficiency Syndrome (AIDS).<sup>4</sup> One sixty-five-year-old woman with AIDS, who recently created a program funded by the state of Florida to warn people older than fifty of the contagion, put matters this way: “Yes, there is sex after 50. After 60. After 70. People think after 50 we die from the neck down. People look at you like you're crazy. What? You mean, Grandma and Grandpa are still having sex?”<sup>5</sup>

A recent study sponsored by a group calling itself the National Council on the Aging purports to debunk the myth of elderly asexuality.<sup>6</sup> According to the study, older Americans engage in sex

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1. Betty Morris, *Couple Considers Threesome with Their Widowed Neighbor*, FLA. TODAY, Aug. 6, 1998, at 05G.

2. *Id.*

3. See *infra* text accompanying note 86.

4. See Morris, *supra* note 1, at 05G.

5. Pat Leisner, Associated Press, *Senior with AIDS Says Elderly as Much at Risk for Disease*, DETROIT NEWS, Oct. 22, 1998, at A13.

6. See *Sex Remains Vital to Americans over 60*, LANCASTER NEW ERA

more often than their children might want to imagine.<sup>7</sup> About half of seniors older than sixty say they have sex at least once a month.<sup>8</sup> Among men, seventy percent of those older than sixty-five and fifteen percent of those older than eighty partake in regular sexual intercourse.<sup>9</sup> More than seventy percent of those sexually active older people said that sex was at least as emotionally satisfying as when they were in their forties, according to the study, which consisted of a mail survey of 1292 seniors in their sixties, seventies, and eighties.<sup>10</sup> Among people with sexual partners, eighty percent said they were sexually active—meaning they have sex at least once a month.<sup>11</sup> Among those sexually active, seventy-nine percent of men and sixty-six percent of women said an active sex life was an important part of their relationship.<sup>12</sup> According to James P. Firman, President and Chief Executive Officer of The National Council on the Aging, the study demonstrates that “sexuality remains a vital element in the lives of older people.”<sup>13</sup> Sources of funding for the study included Pfizer, Inc., the New York pharmaceutical company that developed and manufactures Viagra.<sup>14</sup> The Council insists it conducted the study independently and only asked Pfizer for the grant.<sup>15</sup>

Whether one lends the Council credence or not, many other authorities, mindful of the impact of the birth control pill, are predicting that Viagra is launching an emerging sexual revolution among the elderly.<sup>16</sup> Even so, the idea of a sexual revolution among the elderly has yet to take hold of the consciousness of the public at large. Hence, the older population is rarely a target of AIDS prevention campaigns,<sup>17</sup> and physicians often are reluctant or uneasy about discussing AIDS and sex with them.<sup>18</sup>

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(Lancaster, Pa.), Sept. 29, 1998, at C20 [hereinafter *Sex Remains Vital*].

7. *See id.*

8. *See id.*

9. *See* Barbara Hooks,  *Holding Back the Years*, BUS. REV. WKLY., Sept. 28, 1998, at 94.

10. *See Sex Remains Vital*, *supra* note 6, at C20.

11. *See id.*

12. *See id.*

13. *Id.*

14. *See id.*

15. *See id.*

16. *See infra* note 43 and accompanying text.

17. *See* Leisner, *supra* note 5.

18. *See id.*

This note takes elder sexuality seriously. Part I examines evidence that the introduction of Viagra in 1998 is giving rise to a revolution in sexual behavior comparable to, though in many ways distinguishable from, the much hyped sexual revolution largely attributed to the advent of the birth control pill in 1960. Part II examines legal issues that have already emerged, as well as broader implications for public policy. Part III presents a case that Viagra may be a Pandora's Box for the elderly and for society at large.

## II. A New Sexual Revolution?

### A. The Sexual Revolution of 1960

Popular culture as well as historians have characterized the decade of the 1960s as a period of "sexual revolution."<sup>19</sup> In the words of one contemporary social critic, "Sex is the politics of the Sixties."<sup>20</sup> In November 1967, *Newsweek* declared that the Western world's morals and manners had "changed more dramatically in the past year than in the preceding fifty."<sup>21</sup>

The prime ingredient of this revolution is often identified as the birth control pill,<sup>22</sup> which the U.S. Food and Drug Administration (FDA) approved as a means of inducing temporary sterility for countering gynecological disorders in 1957<sup>23</sup> and for use as a contraceptive in 1960.<sup>24</sup> By the end of the decade, nearly ten million women were taking the pill, making it America's contraceptive of choice.<sup>25</sup>

Popular culture generally has hailed the advent of the pill as nothing less than revolutionary. *The Ladies Home Journal* celebrated the thirtieth anniversary of the pill's approval by the FDA with the following evaluation: "Nothing else in this century—perhaps not even winning the right to vote—made such an immediate difference in women's lives. Overnight, the Pill gave women control of their reproductive systems; no longer was biology our absolute destiny."<sup>26</sup>

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19. See, e.g., BERNARD ASBELL, *THE PILL* 184 (1995).

20. *Id.* at 183.

21. *Id.*

22. See generally *infra* text accompanying note 25, *infra* note 38.

23. See ASBELL, *supra* note 19, at 159, 163.

24. See *id.* at 167.

25. See Ann Marie Cunningham, *Celebration of 30 Years of the Pill*, *LADIES' HOME J.*, June 1993, at 123.

26. *Id.*

Some scholarly observers have resisted this popular conception of the pill as the source of a revolution.<sup>27</sup> In an article which appeared in the *National Education Association Journal* in 1965, Stanford psychologist Nevitt Sanford reported “no revolutionary change in the status of premarital intercourse since the 1920s.”<sup>28</sup> Instead of “The Sexual Revolution,” some commentators speak of “The Sexual Evolution.”<sup>29</sup> Evidence of increasing sexual activity predates the introduction of the pill.<sup>30</sup> By some measures, the greatest change in sexual behavior occurred during the 1920s rather than the 1960s.<sup>31</sup>

Nevertheless, the general consensus is that the pill has had a titanic effect. “Most experts agree that the Pill contributed mightily to the sexual revolution. Effective forms of birth control—notably condoms—were already available, and sexual mores had begun to change in the postwar era; however, the Pill made it easier for women to engage in sex more frequently.”<sup>32</sup> This view has statistical support. One 1965 study of married women who used oral contraceptives found that they had sex up to thirty-nine percent more often than women using other methods of contraception.<sup>33</sup> Moreover, evidence exists that an upsurge in sexual activity followed the advent of the pill, even if not immediately. According to one study, in 1971, among unmarried teenage women (ages fifteen to nineteen) residing in

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27. See, e.g., *id.* at 123.

28. ASBELL, *supra* note 19, at 197. Based on reports of 12 years of sexual activity among students, which he tabulated from three colleges, Sanford found that only 20-30% of women in his samples were not virgins at the time of their graduation, about the same percentage that was the case 40 years earlier.

29. See BEN J. WATTENBERG, *THE GOOD NEWS IS THE BAD NEWS IS WRONG* 290 (1984).

30. See Stephanie Coontz, *Unrealistic Family Myths*, *USA TODAY* (Magazine), Dec. 1, 1997, at 1 (“The sharpest rate of increase in unwed motherhood occurred between 1940 and 1958, when it tripled from 7.1 births per 1,000 unmarried women to 21.2. The rate leveled off from 1960 to 1975, then started to climb again, doubling to 45.2 unwed births per 1,000 unmarried women in 1992. This obviously is a long-term trend that predated the sexual revolution.”).

31. See ASBELL, *supra* note 19, at 200 (“Girls who became sexually mature in the years up to 1920 were not likely to have had premarital intercourse; only fourteen percent of these women informed Kinsey’s researchers that they had not been virgins when they were married. But after World War I, a sharp and dramatic change occurred. Among girls who became sexually mature during the period from 1920 through 1950, thirty-six percent—roughly four out of every eleven women—experienced premarital intercourse. It is a sobering thought that if there has been a sex revolution in recent times it was made, in fact not by today’s teenagers but by their grandmothers who are now past sixty years of age.”).

32. Cunningham, *supra* note 25, at 185.

33. See *id.*

metropolitan areas, thirty percent had experienced sexual intercourse prior to marriage; by 1979, that rate had increased to fifty percent.<sup>34</sup> Opinion changed commensurately, with one survey reporting that forty-nine percent viewed premarital sex as “always wrong” or “almost always wrong” in 1972, compared to thirty-eight percent in 1982.<sup>35</sup> It is possible to view the delayed or evolutionary trend in national sexual behavior as the result of an interplay between the availability of the pill and social attitudes.<sup>36</sup> Acceptance of the pill as a rite of passage appears to have occurred over the span of two generations.<sup>37</sup>

If debate exists among academics and experts as to the effect of the pill, there seems to be little doubt in the popular imagination that it had a shattering effect on society on a broad level.

It spurred sexual frankness and experimentation. It allowed women to think seriously about careers because they could postpone childbirth. And it sparked the feminist and pro-choice movements; once women felt they were in charge of their own bodies, they began to question the authority of their husbands, their bosses, their doctors and their churches.<sup>38</sup>

Although frequently taking a less sanguine view, social conservatives also trace the origin of the same or similar trends to the 1960s.<sup>39</sup>

In declaring the birth of a “new, more permissive society” in 1967, *Newsweek* opined that “the revolution in manners that has produced a climate of candor is very real and unlikely to reverse itself.”<sup>40</sup> That assessment appears to have been prescient. Although there is some indication that the sexual revolution has cooled amid the

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34. See WATTENBERG, *supra* note 29, at 294.

35. See *id.*

36. See ASBELL, *supra* note 19, at 199.

37. See *id.* at 200 (“If a truly discernible revolution took place as a companion to the Pill, it was among the second generation of Pill users. Unlike their baby boomer elders, they adopted it as a rite of passage, like a driver’s license.”).

38. Cunningham, *supra* note 25, at 123.

39. See WILLIAM J. BENNETT, 1993 INDEX OF LEADING CULTURAL INDICATORS, *cited in* Richard Nadler, *Social Conservatives Must Learn to Accentuate the Positive*, NAT’L REV., Sept. 28, 1998, at 26. According to Bennett, “Over the past three decades we have experienced substantial social regression. Today the forces of social decomposition are challenging and in some instances overtaking the forces of social composition.” During this period, according to Bennett, the rates of divorce doubled, teen-age suicide tripled, illegitimate births quadrupled, and violent crime quintupled. “Unless these exploding social pathologies are reversed, they will lead to the decline and perhaps even to the fall of the American Republic.”

40. *Anything Goes: Taboos in Twilight*, NEWSWEEK, Nov. 13, 1967, at 75.

emergence of the AIDS epidemic and certain conservative tendencies among the children of the “baby boom” generation,<sup>41</sup> there is also ample evidence that the shedding of sexual mores that attracted attention during the 1960s has permanently reshaped the social landscape and continues to do so.<sup>42</sup>

## B. The Sexual Revolution of 1998?

### 1. THE MAGIC BULLET FOR IMPOTENCE: VIAGRA

Just as the appearance of the birth control pill as a federally approved oral contraceptive in 1960 arguably precipitated a sexual revolution, so many are predicting that the latest wonder drug, the potency pill Viagra, is launching another.<sup>43</sup>

Viagra has been acclaimed as a true “magic bullet” for male impotence, the “politically correct” term for which today is “erectile dysfunction,”<sup>44</sup> often abbreviated as “ED.”<sup>45</sup> Causes of male impotence include diabetes mellitus, antihypertensive medications,

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41. See, e.g., Nadler, *supra* note 39, at 26 (concluding that recent trends in divorce, marriage, illegitimate births, and abortion constitute a “small but significant moral advance” and a “retreat from the sexual revolution”); see also WATTENBERG, *supra* note 29, at 300 (“Not only are youth sometimes more conservative than their older siblings today, they are also more conservative than their counterparts one decade ago on certain issues.”).

42. See Shervett H. Frazier, *Psychotrends: Taking Stock of Tomorrow’s Family and Sexuality*, PSYCHOL. TODAY, Jan. 1, 1994, at 32, available in 1994 WL 13539733 (excerpt from *Psychotrends: What Kind of People Are We Becoming?*).

43. See, e.g., *Viagra: How Wonderful as Wonder Drug?*, DAILY YOMIURI, Oct. 28, 1998, available in 1998 WL 21955857 [hereinafter *Wonder Drug*] (“Viagra may end up the hit product of the year. It appears destined to spark a second sexual revolution, following the one launched by the birth control pill.”); John Leland, *A Pill for Impotence?*, NEWSWEEK, Nov. 17, 1997, at 62 (“New drugs awaiting approval from the FDA could be a boon to millions of men with erectile dysfunction . . . . And if they make enough boomer guys feel like virile teenagers again, they could trigger another sexual revolution.”); Maureen Dowd, *Viagra Fans Aren’t Likely to be Female*, ARIZ. REPUBLIC, Apr. 29, 1998, at B5 (“Tom Brokaw predicted a senior sexual revolution.”); Lawrence Hall, *At Last, Sexual Liberation for the Geritol Generation*, THE STAR-LEDGER (Newark, N.J.), June 3, 1998, at 021; Ruth Larson, *From Affairs of the Heart to Heart Attacks Viagra Successful, but Can be Hazardous*, WASH. TIMES, June 1, 1998, at A1, (“Cultural observers suggest Viagra may have sparked a sexual revolution as profound as the one that arrived with the introduction of birth-control pills in 1960.”); Thom Walker, *Viagra Spells Virility*, ARIZ. DAILY STAR, Apr. 24, 1998, at 1A (discussing physician’s comment about the heavy demand for Viagra: “I think the sexual revolution of the ‘60s is back in full force with our senior citizens.”).

44. See Gwendolyn Washington, *Viagra: A Look into Pandora’s Box?*, MICH. CHRON., July 14, 1998, at 1A, available in 1998 WL 11378643.

45. See generally Mukdawan Sakboon, *Three Million Suffer Sex Problems*, NATION, May 20, 1999.

peripheral vascular disease, and cardiac disease.<sup>46</sup> Also implicated are alcoholism and cigarette smoking.<sup>47</sup>

Impotence, whose incidence increases with age, is predominantly an affliction of the elderly. Of the estimated thirty million<sup>48</sup> American men who suffer from the condition, approximately half are older than sixty-five years.<sup>49</sup> At age forty, two men in five have problems in sustaining an erection; at age seventy, nearly seven in ten do.<sup>50</sup>

Prior to the discovery of Viagra, many men found sexual potency to be an elusive quest. For thousands of years remedies consisted of grinding rhinoceros horns, chopping bear gall bladders, and dicing ginseng.<sup>51</sup> Success came with modern methods, but many seemed barbaric.<sup>52</sup> These included injection of medication into the base of the penis prior to sexual intercourse, vacuum pumps, and penile implants.<sup>53</sup> Faced with these options, many men chose to remain impotent.<sup>54</sup>

When Pfizer concocted an impotence cure that actually worked, it was by accident.<sup>55</sup> The original goal was to develop a drug for angina, a disease marked by painful spasms to the throat and chest that occurred because of reduced oxygen to the heart.<sup>56</sup> A series of clinical tests failed to attain this goal, yet participants in the tests were reluctant to return unused pills.<sup>57</sup> Eventually the company learned that while the drug was a disappointment with respect to heart problems, it was effective in counteracting impotence.<sup>58</sup>

Pfizer lost no time in giving the drug a name, coining "Viagra" by combining the words "vigor" and "Niagara."<sup>59</sup> The drug, whose

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46. *See id.*

47. *See id.*

48. Estimates of the total number of Americans afflicted with impotence also have been as low as 10 million to 15 million. *See Walker, supra* note 43, at 1A.

49. *See Washington, supra* note 44, at 1A.

50. *See Walker, supra* note 43, at 1A.

51. *See Carlos Santos, End to Impotence? Will Drug That Rejuvenates Men Spell Bliss or Trouble?*, RICHMOND TIMES-DISPATCH, Apr. 9, 1998 at E1, available in 1998 WL 2031956.

52. *See id.*

53. *See id.*

54. *See id.*

55. *See Wonder Drug, supra* note 43, at \*1.

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*



generic name is sildenafil citrate, is not an aphrodisiac, i.e., it does not increase sexual desire.<sup>60</sup> Instead of a pharmaceutical Spanish fly, Viagra is a vaso dilator:<sup>61</sup> it works by improving blood flow.<sup>62</sup> What makes Viagra unique is that its effect is confined to the tissues of the penis; were it otherwise, its use might be impractical.<sup>63</sup> Sexual arousal stimulates the production of cyclic GMP, a chemical that promotes penile erection.<sup>64</sup> An enzyme can diminish the erection by breaking down cyclic GMP.<sup>65</sup> Viagra counteracts impotency by blocking the enzyme.<sup>66</sup> Contrary to the popular belief that the drug is capable of creating a "super stud," it will not enhance the erection of males with normal cyclic GMP levels.<sup>67</sup>

Viagra is to be taken about one hour prior to sex.<sup>68</sup> Recommended dosage is one pill per day, during which the drug has a beneficial lingering effect on the ability to sustain an erection.<sup>69</sup> The wholesale price is \$7 per pill, with the cost to patients at about \$10 per pill.<sup>70</sup> About seventy percent of men who take the pill experience improvement in sexual function.<sup>71</sup> For a small number of users, there are a few minor side effects such as headaches or a flushed face.<sup>72</sup> Also, men have complained of a sensitivity to light or of objects taking on a blue tinge.<sup>73</sup> There is a risk that men with sickle-cell anemia who take the drug could experience priapism, a pathological condition in which an erection lasts four hours or more and which, if left untreated, could cause tissue damage.<sup>74</sup> Likewise, certain types of leukemia may warrant denial of a Viagra prescription.<sup>75</sup>

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60. See Santos, *supra* note 51, at \*2.

61. See Joel Lang, *Is Sex Necessary? Viagra Challenges Our Notions About the Difference Between Health and Disease, Between Sex and Self-Indulgence*, HARTFORD COURANT, July 19, 1998, at 10, available in 1998 WL 20775058.

62. See *id.*

63. See *id.*

64. See Santos, *supra* note 51, at \*1.

65. See *id.*

66. See *id.*

67. See Washington, *supra* note 44, at \*2.

68. See Santos, *supra* note 51, at \*1.

69. See *id.*

70. See *id.*

71. See *id.*

72. See *id.*

73. See *Wonder Drug*, *supra* note 43, at \*3.

74. See Walter Leavy, *Brothers (and Sisters) and the New Sex Pill*, EBONY, July 1, 1998, at 154.

75. See Washington, *supra* note 44, at \*2.

On November 24, 1998, Pfizer, in consultation with the U.S. Food and Drug Administration, updated its labels and package inserts to include warnings of a potential cardiac risk to users with preexisting heart disease.<sup>76</sup> As of November 1998, 132 men in the United States died after using Viagra.<sup>77</sup> For the most part, the deaths seem to have occurred in men with low blood pressure or heart problems, or in those who used Viagra with nitrate medications, or with “poppers,” illegal nitrates sometimes used to enhance sex.<sup>78</sup> Pfizer has said its product is “safe and effective when used properly.”<sup>79</sup>

Nicknamed the “Pfizer riser,”<sup>80</sup> Viagra garnered \$788 million in U.S. sales in its first year on the market.<sup>81</sup> “Gangbuster sales” of the drug boosted Pfizer’s second quarter earnings for 1998 by thirty-seven percent over the previous year.<sup>82</sup> Subsequently, sales cooled off, dropping to 180,000 prescriptions per week in May 1999, from a high of 275,000.<sup>83</sup> Analysts attribute the decrease to the dawning awareness of the drug’s side effects and its death toll.<sup>84</sup> Nevertheless, the United States and North America in general remain enchanted with the drug.<sup>85</sup>

More than four million people worldwide have used Viagra since its approval for sale by the U.S. Food and Drug Administration on March 27, 1998.<sup>86</sup> There is anecdotal evidence that the drug has

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76. See *New FDA Caution About Viagra*, DAYTON DAILY NEWS, Nov. 26, 1998, at 9A.

77. See Kathleen Kerr, *Viagra Still Going Strong*, BALTIMORE SUN, May 9, 1999, at 9M.

78. See *id.*; see also Emma-Lou Montgomery, *69 Die in US After Taking Viagra*, EVENING STANDARD - LONDON, Aug. 26, 1998, at 14, available in 1998 WL 18171534 (stating that of 69 deaths reported in the United States within months of the drug’s release on the market, 12 were taking nitroglycerin or nitrate medication. Among the deceased, 46 were linked to cardiovascular complications, including 17 to heart attacks and two to strokes. The cause of death of the remaining 21 is unknown. The average age of those who died was 64 years, based on ages provided for 55 patients.).

79. Montgomery, *supra* note 78, at \*1.

80. Abi Berger, *The Rise and Fall of Viagra*, BRIT. MED. J., Sept. 19, 1998, at 824.

81. See Phil Galewitz, *Viagra Rival Has Disappointing Tests*, ASSOCIATED PRESS, May 11, 1999, available in 1999 WL 17802246.

82. See *Inside the Industry Viagra: Still Creating Quite a Stir*, AM. POL. NETWORK, July 10, 1998, at 11.

83. See Kerr, *supra* note 77, at 914.

84. See *id.*; see also Edward R. Silverman, *Drug Stocks Down, Not Out*, KNIGHT RIDDER TRIB. BUS. NEWS, May 16, 1999.

85. See Kerr, *supra* note 77, at 914; see also text accompanying notes 331-33.

86. See Kerr, *supra* note 77, at 914.

prompted an increase in sexual activity in its users.<sup>87</sup> Some analysts estimate potential annual sales in excess of \$1 billion.<sup>88</sup> This projection may be conservative for a number of reasons. It appears to correspond roughly to the two to three million men, which Pfizer believes are seeking treatment for impotence,<sup>89</sup> ingesting a Viagra pill at the recommended dosage of one pill per day. However, the total number of impotent Americans is presently estimated at thirty million.<sup>90</sup> Moreover, the elderly population, the group most disposed to impotency,<sup>91</sup> is increasing.<sup>92</sup> In addition, the drug has lured sexually potent males who believe that the drug not only cures impotency but also enhances sexual performance, even though this view holds, at best, tenuous scientific support.<sup>93</sup>

Finally, it is possible that women may also benefit from Viagra and thereby constitute an additional market.<sup>94</sup> Clinical trials are under way to test the drug's effectiveness in increasing lubrication for post-menopausal women.<sup>95</sup> A British urologist has predicted that Viagra will prompt a sexual revolution among women to rival the one prompted by the birth control pill.<sup>96</sup> Although Pfizer maintains that Viagra is not designed for females, in one limited study a group of women between the ages of twenty-five and forty-one who had undergone hysterectomies—so selected to avoid possible effects on

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87. See *id.* (stating that a Nevada brothel owner reported increased business from patrons on Viagra).

88. See Santos, *supra* note 51, at \*5.

89. See Lang, *supra* note 61, at \*12.

90. See *supra* note 48 and accompanying text.

91. See *supra* text accompanying notes 48-50.

92. See U.S. Census Bureau, *Sixty-Five Plus in the United States* (last modified Feb. 8, 1999) <<http://www.census.gov/socdemo/www/agebrief.html>> (stating that the number of elderly Americans, tabulated at 33.2 million in 1994, is expected to grow to 80 million by the year 2050).

93. See, e.g., Leavy, *supra* note 74, at 154 (There are unexplained anecdotes surrounding the effects of the drug, such as its apparent ability, according to some reports, to induce an erection without erotic stimulation even though such stimulation is regarded as a necessary for the drug to take effect. "Although representatives of Pfizer Inc., the maker of Viagra, repeatedly and emphatically say the pill will only help impotent men and only help them to the extent they describe, cases like Johnson's—the unknowns that surround the drug's capabilities—have men who experience no sexual dysfunction clamoring for the drug as well to see if it will boost their sexual performance.").

94. See Chad Skelton, *Viagra Arouses Interest in Pfizer*, GLOBE & MAIL [Toronto, Can.], June 9, 1998, at B19.

95. See *id.*

96. See Sarah Boseley, *Doctor Sees Women's Viagra "Revolution,"* CHI. SUN-TIMES, July 10, 1998, at 44, available in 1998 WL 5588834.

fetuses<sup>97</sup>—experienced less difficulty in achieving orgasm.<sup>98</sup> Pfizer is conducting additional tests of the safety and efficacy of Viagra and related drugs on women in Europe, the results of which are not expected for at least two years.<sup>99</sup> Surveys suggest that about one in three sexually active females is dissatisfied with her sex life.<sup>100</sup> Possible culprits include progesterone (a hormone in some birth control pills), fertility drugs, and hormone replacement therapy, which can also dampen desire.<sup>101</sup> For most women, sexual dysfunction is not a physical problem.<sup>102</sup> Viagra generally requires sexual stimulation to counteract impotence and thus only helps produce an orgasm if there is sexual desire.<sup>103</sup> However, there are a few cases where erections reportedly occurred without erotic stimulation.<sup>104</sup>

Protected by a patent through the year 2011, Viagra is expected to continue its market dominance at least until the advent of a new class of stronger, more efficacious drugs, expected to hit the market within the next four years.<sup>105</sup> A rival product, Vasomax, a drug under development by Schering-Plough Corp., and Zonagen, which already has been approved for use in Mexico,<sup>106</sup> take effect more quickly, but have been shown to be less effective.<sup>107</sup>

## 2. NEVER TOO OLD: THE SHAPE OF THE SECOND SEXUAL REVOLUTION

Youth was a distinctive feature of the sexual revolution of the 1960s. During the mid-1960s, forty percent of the American population was twenty-four years old or less.<sup>108</sup> This wave of young people constituted the widely noticed “baby boom” generation that

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97. See Randi Hutter Epstein, *The New Sexual Revolution*, LADIES HOME J., Sept. 1, 1998, at 188, available in 1998 WL 8049685.

98. See *id.*; see also Leavy, *supra* note 74, at 154.

99. See Epstein, *supra* note 97, at \*11.

100. See *id.* at \*2.

101. See *id.*

102. See Boseley, *supra* note 96, at \*1. According to one specialist in psychosexual therapy, 55% of her female sexual therapy clients have disorders of desire and arousal. “They may be able to get aroused, but they can’t let go and tip over into orgasm. That is very much a psychological thing.” *Id.* at \*3.

103. See *id.*

104. See Leavy, *supra* note 74, at 154.

105. See *Pfizer Now Takes Viagra Hoopla to Other Countries*, ADVERTISING AGE, May 3, 1999, at 24.

106. See Galewitz, *supra* note 81, at \*1.

107. See *id.*

108. See ASBELL, *supra* note 19, at 181.

arose with the return home of G.I.s from World War II.<sup>109</sup> Lacking a comparable contingent of older role models, the members of this generation conformed to its own youth-oriented culture, noted for its dressed-down look, including long hair for men and blue jeans as the uniform of both sexes.<sup>110</sup>

By contrast, the emerging new sexual revolution appears as if it is distinctive in being primarily an elder phenomenon. Just as the birth control pill and various sociological factors appeared to converge to bring about a sexual revolution during the 1960s<sup>111</sup> that was most evident in a change in the mores and lifestyle of young women, so today Viagra has emerged with a constellation of other forces that together suggest the onset of a sexual revolution to be spearheaded by elderly men. Viagra appears to benefit primarily older males.<sup>112</sup> Other apparent ingredients of a new era of increased sexuality for people in their golden years include a vast array of developments in modern surgery and pharmacology, such as complete joint and hip replacements, facelifts and other cosmetic surgeries, and a myriad of herbal and beauty treatments to bolster a sense of well-being and self-confidence.<sup>113</sup> Also of note is the present preoccupation with exercise and nutrition, a relatively recent cultural development that holds the promise not only of prolonging lifespan, but also of sustaining the vigor of youth.<sup>114</sup> Coupled with the likelihood of longer, healthier lives is the unprecedented prosperity and ample leisure time that the elderly as a whole currently enjoy.<sup>115</sup> In addition, the computer, in some eyes, is doing as much today to promote sexual liberty as the automobile did during the 1960s.<sup>116</sup> In this respect, it is noteworthy that the computer may be more “user

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109. *See id.*

110. *See id.* at 182.

111. Feminist Betty Friedan has remarked: “In the mysterious way of history, there was this convergence of technology that occurred just as women were ready to explode into personhood.” *Id.* at 180.

112. *See supra* text accompanying notes 49-51.

113. *See* Barbara Hooks,  *Holding Back the Years*, BUS. REV. WKLY., Sept. 28, 1998, at 94, available in 1998 WL 11773094 at \*1.

114. *See id.* at \*1.

115. *See generally* Christina Duff,  *Profiling the Aged: Fat Cats or Hungry Victims*, WALL ST. J., Sept. 28, 1995, at B1. Overall, today’s elderly have higher living standards than any 65-plus generation in U.S. history. They are also better educated and healthier than ever. Nearly one of three golfers is over 65, as are 60% of cruise vacationers. *See id.*

116. *See* Frazier, *supra* note 42, at \*2.

friendly” to the elderly than the automobile in that use of a computer requires no physical expeditions out of doors.

Another factor that presages the onset of an elder sexual revolution is the historical importance of the baby boom generation. The baby boom consists of those Americans born within the years 1946 and 1964.<sup>117</sup> This generation was at the forefront of the first sexual revolution and appears poised to lead the second. The seventy-seven million members of this group have dominated every other generation in every market in the United States for the past fifty years.<sup>118</sup> “The rule of thumb has been that the Boomers have doubled the demand for all goods and services that have come within their reach—prenatal products, elementary schools, high schools, colleges, and starter homes.”<sup>119</sup> At the time of the introduction of Viagra in 1998, Boomers ranged in age from thirty-four to fifty-two. Thus, the vanguard of this generation is well within the classification of forty years and older which federal law recognizes as potential victims of age discrimination.<sup>120</sup> The age range of the baby boomers also correlates with the onset of a heightened risk of impotence,<sup>121</sup> an indication that members of this generation stand to be substantial beneficiaries of Viagra at the present, and for some time into the future.<sup>122</sup>

### 3. IS THE SECOND SEXUAL REVOLUTION ALREADY AT HAND?

Within months of the FDA’s approval of Viagra, the blue diamond-shaped tablet attained the status of a social phenomenon on a worldwide scale.<sup>123</sup> “Not since *sputnik* has a new word entered so many languages so quickly.”<sup>124</sup> A black market extends into seemingly every corner of the globe, including Ho Chi Minh City,

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117. See, e.g., Darnell Little, *Who Will Drive Future Demand?*, J. PROP. MGMT., Jan. 1, 1998, at 15.

118. See *id.*

119. *Id.*

120. See The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621, 631(a) (1994).

121. See *supra* text accompanying notes 48-50.

122. The numerical preponderance and economic dominance of the boomers suggests that the demand for Viagra may crest around the year 2029. Then, that entire generation would be 65 years old or older, the age group which currently accounts for half of all cases of impotency. See *supra* text accompanying note 49.

123. See Russell Watson, *The Globe Is Gaga for Viagra*, NEWSWEEK, June 22, 1998, at 44.

124. *Id.*

Vietnam<sup>125</sup> and Latin America, where black-market prices have been reported as high as \$175 per pill.<sup>126</sup> A condom maker claimed that the people of Poland, which recently approved the sale of Viagra, are in the midst of a sexual revolution, having sex more often and with more partners than at any other time in history.<sup>127</sup>

The public reaction in many respects seems outlandish, ranging from a marketing gimmick in Italy featuring nonmedicinal “pizza Viagra,” to various glowing, albeit unscientific endorsements.<sup>128</sup> Some have reacted to the frenzy with skepticism.<sup>129</sup> From the beginning, some experts have discounted the view that Viagra will have an effect comparable to that of the birth control pill and have predicted a subsidence in the public fervor.<sup>130</sup>

On the other hand, the birth control pill itself also elicited initial skepticism from experts as to its impact.<sup>131</sup> So far, Viagra’s financial success has been spectacular, and its efficacy on its avowed target market, impotent men, unchallenged, even if the hopes of younger potent males are fallacious. There are already reports of a new interest in sex among the elderly, the largest part of Viagra’s target market.<sup>132</sup> Among the early adopters and eager proselytizers of the new therapy is the former presidential candidate and septuagenarian Bob Dole.<sup>133</sup> “Viagra parties” thrown by septuagenarians have attracted media attention.<sup>134</sup>

A graver indication of a new elder sexual revolution has preceded the entry of Viagra. Advanced age now correlates with a high risk of AIDS.<sup>135</sup> Between 1991 and 1996, the incidence of AIDS among people older than fifty years increased twenty percent; by

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125. See Hall, *supra* note 43.

126. See Watson, *supra* note 123, at 44.

127. See *Sexual Tide*, WALL ST. J. EUR., Sept. 28, 1998, at 6.

128. See, e.g., Watson, *supra* note 123, at 44.

129. See, e.g., Elizabeth Neus, *Sex-Crazed Boomers on Viagra? Probably Not, Medical Experts Say*, FLA. TODAY, Apr. 30, 1998, at 02D (noting that the drug can cause headaches and that its efficacy is established only as a cure for impotence).

130. See *id.*

131. See *supra* notes 27-30 and accompanying text; see also ASBELL, *supra* note 19, at 198-201.

132. See generally Sharon Green, *Talk of the Nation* (National Public Radio, Inc. broadcast, May 28, 1998) available in 1998 WL 2933681, at \*1.

133. See, e.g., Hilary Mackenzie, *Happy Days Are Here Again*, SCOTSMAN, July 28, 1998, at 11.

134. See Giles Whittell, *Good-time Gumdrops*, TIMES OF LONDON, July 11, 1998, at 2.

135. See Associated Press, *Older AIDS Patients in Study*, CAPITAL TIMES/WIS. ST. J., Sept. 8, 1998, at 6A.

contrast, the number of AIDS cases in the younger population during the same period grew by only nine percent.<sup>136</sup> Currently, ten percent of all AIDS cases in the United States are people older than fifty years.<sup>137</sup>

Reports suggest that Viagra may merely fan the flames of the elder AIDS epidemic.<sup>138</sup> For example, in Florida, where one of eight people with AIDS is age fifty or older, the Florida Department of Elder Affairs has arranged for \$170,000 in funding for the Senior HIV Intervention Project (SHIP), a program in Fort Lauderdale to educate seniors about the risk of contracting AIDS.<sup>139</sup> A spokesman for the department stated that health care systems are often reluctant to discuss AIDS because of “rampant ageism,” adding, “Just who do they think is buying all this Viagra?”<sup>140</sup>

### III. Current Legal and Policy Problems: The Right to Sex?

#### A. Do Insurance Companies Have a Duty to Cover Viagra?

Viagra has given rise to numerous lawsuits against insurance companies that have refused to cover the expense of the drug, some of them within months of approval by the FDA. They include:

1. A class action lawsuit, filed on May 18, 1998, in the U.S. District Court for the Eastern District of New York, which claims that group health insurance plans have wrongfully denied coverage for Viagra.<sup>141</sup> The suit alleges that Oxford Health Plans (NY) Inc. denied to plaintiff Paul Sibley-Schreiber, “a diabetic who claims Viagra restored sexual function after six years of physician-diagnosed organic impotence,”<sup>142</sup> insurance coverage of a prescription for Viagra written for him by his physician in April 1998.<sup>143</sup> Sibley-Schreiber filed the

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136. *See id.*

137. *See id.*

138. *See* Leisner, *supra* note 5, at A13.

139. *See id.*

140. *Id.*

141. *See* Paul Sibley-Schreiber v. Oxford Health Plans (N.Y.) Inc., 62 F. Supp.2d 979, 979 (1999).

142. *NY Class Action Seeks Full Coverage for Viagra Treatments*, ANDREWS PHARMACEUTICAL LITIG. REP., June 1998, vol. 14, No. 1, at 3 [hereinafter *NY Class Action*], available in 14 No. 1 . ANDREWS PHARMACEUTICAL LITIG. REP. 3., at \*1.

143. *See Class Action Complaint Filed in N.Y. Federal Court on Behalf of Viagra Users*, MEALEY'S LITIG. REP.: INS., May 19, 1998, No. 27, at 12 [hereinafter *Class Action Complaint Filed*] available in 12 No. 27 MEALEY'S LITIG. REP.: INS. 12, at \*1.



class action “on behalf of himself and all other persons similarly situated”—estimated at one million men.<sup>144</sup> The complaint seeks “declaratory and injunctive relief, and to recover damages resulting from [the group insurance plans’] common course of conduct, which wrongfully denies [the class] insurance coverage for Viagra.”<sup>145</sup>

The suit claims that Oxford, “along with other unnamed ‘John Doe’ health insurance providers and their plan administrators,<sup>146</sup> are employee welfare benefit plans as defined by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001(3).”<sup>147</sup> The suit alleges that the plans have violated ERISA in that they “wrongfully refused” to provide coverage for Viagra which had been prescribed for them “as medically necessary, by a physician following FDA approval.”<sup>148</sup> According to the complaint, pursuant to ERISA, 29 U.S.C. § 1104, the plans owe the class “a duty of loyalty and care, and a duty not to act in a discriminatory, arbitrary or capricious manner toward any participant in the plans.”<sup>149</sup> The class has demanded that the federal court declare that the plans have a duty to reimburse class members for costs incurred in filling their Viagra prescriptions, minus their contractual obligations; that the court bar the plans from refusing future reimbursement for costs incurred in filling such prescriptions; and that the “recovery of the amounts [the class] ha[s] incurred in paying for filling Viagra prescriptions up to the time of judgment” be in excess of \$10 million plus attorneys’ fees and interest.<sup>150</sup>

2. A class action suit, filed on May 21, 1998, in federal court in New Jersey, which alleges a breach of contract by the Prudential Insurance Co. of America when Prudential denied the plaintiffs reimbursement for Viagra, although its policy states it covers all drugs prescribed by a participating physician and obtained at a participating pharmacy.<sup>151</sup> Like Sibley-Schreiber, Stanley Harrow suffers erectile dysfunction as the result of diabetes.<sup>152</sup> Nevertheless, the suit also

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144. *Id.*

145. *Id.*

146. See *NY Class Action*, *supra* note 142, at \*2.

147. *Class Action Complaint Filed*, *supra* note 143, at \*2.

148. *Id.* (internal quotation marks omitted).

149. *Id.*

150. *Id.*

151. See *Harrow v. Prudential Ins. Co. of Am.*, No. 98-2464 (N.J. Dist. Ct. filed May 21, 1998), *cited in* Rebecca Porter, *Insurance Companies Dispute Duty to Reimburse for Viagra*, TRIAL, Aug. 1998, at 84.

152. See *Pennsylvania Man Files Viagra Lawsuit, Targets Prudential in New Jersey Federal Court*, MEALEY’S EMERGING INS. DISP., June 18, 1998, at 22.

seeks class action status for all of the approximately thirty million impotent men in the United States who are insured by Prudential and have been denied insurance coverage for Viagra, not merely those afflicted with diabetes.<sup>153</sup> Plaintiff's attorney Kenneth Jacobson said licensed physicians should decide what is medically necessary.<sup>154</sup> "It is time to get the insurance companies out of the bedrooms of the public and let the physicians decide what medical treatments are appropriate," he said.<sup>155</sup>

3. A class action suit, filed on July 8, 1998, in Los Angeles Superior Court, against Kaiser Foundation Health Plan Inc. after the HMO denied a plan participant coverage for Viagra even though, according to its disclosure form, it provides specific coverage for prescription drugs and "does not contain any exclusion to prescription drugs generally," nor "any specific provision excluding coverage for Viagra."<sup>156</sup> The plaintiff, Louis Marcil, age seventy-seven, was diagnosed and treated for prostate cancer two years previously and, as a result, has been unable to perform sexually.<sup>157</sup> He is suing on his own behalf and on behalf of the general public of California.<sup>158</sup> The suit seeks injunctive relief, attorneys' fees, interest, and punitive and treble damages from Kaiser for refusing to cover Viagra, which the plaintiff's Kaiser plan urologist prescribed as medically necessary.<sup>159</sup>

These suits have come in response to a large-scale retreat in the insurance industry from the coverage of Viagra as the massive cost of such a commitment became apparent.<sup>160</sup> Kaiser Permanente, the nation's largest health maintenance organization,<sup>161</sup> announced on June 21, 1998, that it would exclude coverage of the drug, saying that it is costing the company too much money.<sup>162</sup> By early August,

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153. *See id.*

154. *See id.*

155. *Id.*

156. *California Man Sues Kaiser Permanente Health Plan for Refusal to Cover Viagra Prescription*, MEALEY'S INS. L. WKLY., July 13, 1998, available in 2 No. 18 MEALEY'S INS. L. WKLY., at \*2.

157. *See id.*

158. *See id.*

159. *See id.*

160. *See, e.g., Special Report: Viagra or Bust: Is Pharmacy Cost Crisis Unraveling HMO Utilization Strategy?*, MED. UTILIZATION MGMT., Aug. 6, 1998 [hereinafter *Special Report*], available in 1998 WL 10321912, at \*1.

161. *See id.*

162. *See Bruce Japsen, Largest HMO Stops Covering Impotence Drug*, CHI. TRIB., June 20, 1998, at 1.

numerous other health insurance providers, including Aetna/U.S. Healthcare, Humana Inc., Prudential Insurance Co. of America, and United HealthCare Corp., also had shied away from coverage of the drug.<sup>163</sup> Prudential is not covering Viagra, pending a final decision by its pharmacy and therapeutics committee, while United HealthCare, with six million members, has an interim policy that pays for up to eight pills a month.<sup>164</sup> Kaiser and Aetna say they will provide coverage through a special rider contract but will not make it part of their normal benefit packages.<sup>165</sup>

Prudential and Humana cited reports of complications for cardiac patients using Viagra as a safety reason for denying coverage of the drug.<sup>166</sup> Prudential has denied that cost was a consideration, saying in the past it has denied coverage of other approved drugs because of safety concerns.<sup>167</sup> Nevertheless, insurers might be using safety as an excuse, according to Hemant Shah, an independent drug industry analyst based in Warren, New Jersey.<sup>168</sup> "Insurance companies should have the guts to say they can't afford it, and that's the problem . . . . They should come and say, 'Listen, there is no free lunch.'"<sup>169</sup>

Aetna maintains that Viagra is an optional medication rather than a medical necessity.<sup>170</sup> It estimated that covering Viagra would have added \$50 million a year to its costs.<sup>171</sup> Likewise, Kaiser said allowing patients ten pills a month would have cost the company more than \$100 million.<sup>172</sup> That figure eclipses the \$59 million which Kaiser spent in 1997 for all antiviral drugs, including protease inhibitors for treatment of HIV, the virus which causes AIDS.<sup>173</sup> Current estimates of the annual sales potential for Viagra in the United States are at \$1 billion.<sup>174</sup>

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163. See Porter, *supra* note 151; see also *Special Report*, *supra* note 160.

164. See Porter, *supra* note 151, at \*3-4.

165. See *Special Report*, *supra* note 160, at \*2.

166. See *id.*

167. See *Pfizer Blasts Insurers for Lack of Viagra Coverage*, BEST'S INS. NEWS, July 8, 1998, at 1.

168. See *id.* at 2.

169. *Id.*

170. See *id.* at 1.

171. See Stephanie Overman, *Warning: Viagra May Cause Headaches for Health Insurers*, HR MAG., Sept. 1, 1998, at 104.

172. See *id.*

173. See *Pfizer Blasts Insurers for Lack of Viagra Coverage*, *supra* note 167.

174. See Mackenzie, *supra* note 133, at 11.

However, consumers are looking at their own pocket books. They include David Scholl, a federal bankruptcy judge who, in September 1998, sued his health plan, QualMed, so that it would cover Viagra.<sup>175</sup> In the subsequent December, QualMed changed its policy to cover four Viagra pills per month, but that did not satisfy Scholl.<sup>176</sup> "Nine dollars a pill is expensive," Scholl said.<sup>177</sup> "There's something about having to pay to have sex that doesn't seem quite right. At least not to pay that much."<sup>178</sup>

Pfizer estimates that forty percent of American health plans cover at least some Viagra pills.<sup>179</sup> According to a poll by the Kaiser Family Foundation, forty-nine percent of Americans believe that health plans should cover the drug.<sup>180</sup>

## B. Government Health Insurance Coverage

Apparently destined to pay for Viagra is the U.S. taxpayer. On July 2, 1998, the Clinton administration directed states to cover Viagra when medically necessary under Medicaid, the federal health insurance program serving the poor and disabled.<sup>181</sup> Previously, state Medicaid programs had to cover a list of federally approved drugs that did not include Viagra.<sup>182</sup> The directive has spawned resistance from numerous states, that contend the requirement would cost them \$100 million per year in additional expenses.<sup>183</sup> Although states are free not to participate in Medicaid, every state, as well as the District of Columbia, has elected to do so.<sup>184</sup> The states bear from fifty to eighty percent of Medicaid's costs.<sup>185</sup>

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175. See Michael Grunwald, *U.S. Judge Asserts Need for More Viagra Coverage; Huge Sums at Stake over 'Lifestyle Drug' Claims*, WASH. POST, Mar. 27, 1999, at A03.

176. See *id.*

177. Associated Press, *More Men Suing to Get Health Plans to Cover Viagra*, SEATTLE TIMES, Mar. 21, 1999, at A11.

178. *Id.*

179. See Grunwald, *supra* note 175, at A03.

180. See *id.*

181. See Associated Press, *States Told to Ignore Viagra Directive*, BATON ROUGE SUNDAY ADVOC., Aug. 9, 1998, at 12A.

182. See *Medicaid; States Question Feds About Viagra*, DAYTON DAILY NEWS, July 4, 1998, at 4A.

183. See *id.*

184. See LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* 101 (2d ed. 1999).

185. *Id.*

Nancy-Ann DeParle, Administrator of the Health Care Financing Administration (HCFA), outlined the new federal policy in a letter to Governors Lawton Chiles of Florida and Michael Leavitt of Utah in response to a May 1998 letter from the governors, which had argued that the states should decide whether Medicaid covered the high-priced impotence drug.<sup>186</sup> DeParle told the governors that, with few exceptions, federal law requires that Medicaid cover federally approved drugs prescribed for medically approved uses.<sup>187</sup> She said the law allows federal officials to exempt certain drugs after determining, based on evidence from the states, that the medications are being abused or improperly used.<sup>188</sup> Because Health and Human Services Secretary Donna Shalala is “greatly concerned about the potential for clinical or financial abuse of Viagra,”<sup>189</sup> HCFA will set up a “rigorous system,”<sup>190</sup> which will include state officials, physicians, and consumer advocates to monitor Viagra’s use, said DeParle.<sup>191</sup>

The controversy in health care finance spurred by Viagra is not unique to the United States. Britain, which approved the sale of Viagra in September 1998,<sup>192</sup> has nevertheless excluded the drug from coverage under its state health system, the National Health Service (NHS), until more is known about the costs involved.<sup>193</sup> Under the British health plan, drugs are dispensed free of charge.<sup>194</sup> With Viagra priced at £6 to £7 per pill, it is estimated that the British government, if it were to lift its ban on prescriptions under the NHS, “could end up spending an additional £1 billion (\$1.6 billion) per year on the drug, which would impose a heavy burden on the system.”<sup>195</sup> Other European Community countries like Germany,<sup>196</sup> as well as Japan, face a similar problem.<sup>197</sup>

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186. See Laurie McGinley, *Medicaid Programs Are Told to Pay for Viagra but Monitoring Continues*, WALL ST. J., July 2, 1998, at B5.

187. See *id.*

188. See *id.*

189. *Id.*

190. *Id.*

191. See *id.*

192. See *Wonder Drug*, *supra* note 43, at \*2.

193. See *Britain Worried About Cost of Viagra*, AGENCE FRANCE-PRESSE, Sept. 14, 1998, available in 1998 WL 16598857, at \*1.

194. See *Wonder Drug*, *supra* note 43, at \*2.

195. *Id.*

196. See *Britain Worried About Cost of Viagra*, *supra* note 193.

197. See *Wonder Drug*, *supra* note 43.

## C. Recognition of Sex in Federal Jurisprudence

### 1. STATUTORY BASIS

a. *Bragdon v. Abbott: Reproduction as a Major Life Activity Under the Americans with Disabilities Act* The Supreme Court of the United States has come close to opening the floodgates for litigation relating to the financing of Viagra if it has not actually done so already. In *Bragdon v. Abbott*,<sup>198</sup> Justice Kennedy declared for the majority of the Court that, for purposes of construing the Americans with Disabilities Act of 1990 (ADA), “reproduction is a major life activity.”<sup>199</sup>

In *Bragdon*, the Court considered whether an infection with HIV, the virus which causes AIDS, is a disability under the ADA when the infection has not yet progressed to the “so-called symptomatic phase.”<sup>200</sup> At issue was a complaint brought by an HIV patient against her dentist when he refused to treat her in his office.<sup>201</sup> The Court vacated a summary judgment in favor of the plaintiff, remanding the case to the First Circuit Court of Appeals for further consideration of its decision that the dentist had failed to present objective evidence of a triable issue of fact on the question of risk.<sup>202</sup> Nevertheless, it concluded that an HIV infection is a disability under the ADA.<sup>203</sup>

Section 302 of the ADA<sup>204</sup> provides:

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.<sup>205</sup>

“The term ‘public accommodation’ is defined to include the ‘professional office of a health care provider.’”<sup>206</sup> The statute defines disability in part as “a physical or mental impairment that substantially limits one or more of the major life activities of such

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198. 524 U.S. 624 (1998).

199. *Id.* at 638.

200. *Id.* at 628.

201. *See id.* at 628-29.

202. *See id.* at 655.

203. *See id.*

204. 42 U.S.C. § 12182 (1994).

205. *Id.* § 12182(a), *cited in Bragdon*, 524 U.S. at 629.

206. *Id.* § 12181(7)(F), *cited in Bragdon*, 524 U.S. at 629.

individual.”<sup>207</sup> The Court decided that the above provisions applied to a person with HIV.<sup>208</sup>

Moreover, the Court stated that “[r]eproduction falls well within the phrase ‘major life activity.’ Reproduction and the sexual dynamics surrounding it are central to the life process itself.”<sup>209</sup> Such language would seem to translate readily into a mandate to make accommodations for sexual potency, thereby supporting the use of Viagra. Arguably, sexual potency is not the precise equivalent of reproduction, given the possibility of recreational sex. Nevertheless, sexual potency is an indispensable element in reproduction and clearly is part of the sexual dynamics that surround reproduction. Furthermore, the Court concluded that the ADA “addresses substantial limitations on major activities, not utter inabilities.”<sup>210</sup>

In *Bragdon*, the Court rejected a claim by the dentist that in using the term “major life activity,” Congress intended the ADA to cover only those aspects of a person’s life which have a “public, economic, or daily dimension.”<sup>211</sup> Justice Kennedy articulated no limits to the breadth of the term.<sup>212</sup> Rather, he held that the ADA must be construed in a manner consistent with regulations issued to implement the Rehabilitation Act of 1973,<sup>213</sup> from which, along with the Fair Housing Amendments Act of 1988,<sup>214</sup> the ADA draws its definition of “handicapped individual” almost verbatim.<sup>215</sup>

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207. *Id.* § 12102(2)(A), cited in *Bragdon*, 524 U.S. at 629.

208. *See Bragdon*, 524 U.S. 628.

209. *Id.* at 638.

210. *Id.* at 641.

211. *Id.* at 638. According to Justice Kennedy in *Bragdon*, the argument to the contrary “founders on the statutory language [of the ADA]. Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word ‘major.’ The breadth of the term confounds the attempt to limit its construction in this manner.” *Id.*

212. *See id.*

213. 29 U.S.C. § 706(8)(B) (1994).

214. 42 U.S.C. § 3602(h)(1) (1994).

215. *See Bragdon*, 524 U.S. at 638 (citing 42 U.S.C. § 12201(a)). Said Justice Kennedy:

Rather than enunciating a general principle for determining what is and is not a major life activity, the Rehabilitation Act regulations instead provide a representative list, defining term[s] to include “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” As the use of the term “such as” confirms, the list is illustrative, not exhaustive. These regulations are contrary to the petitioner’s attempt to limit the meaning of the term “major” to public activities. The

The decision appears to be but a small step short of requiring employers to rewrite health insurance plans to cover prescriptions for Viagra, in addition to fertility treatments and contraceptives.<sup>216</sup> Dozens of lawsuits are expected to emerge that will press for an interpretation of the Court's decision and its impact on employee health plans.<sup>217</sup> Not everyone agrees that *Bragdon* translates into a mandate for the coverage of contraceptives, fertility treatments, and Viagra.<sup>218</sup> According to Paul Fronstin, a senior research associate with the Employee Benefits Research Institute in Washington, D.C., "What they're saying is [the inability to reproduce] has to be treated as a disability. . . . How are disabilities treated in the workplace? Employers have to accommodate them. They don't have to pay [to fix] them."<sup>219</sup> Nevertheless, groups representing infertile couples hope the Court's ruling will be construed to include fertility treatments.<sup>220</sup>

b. *McGraw v. Sears, Roebuck & Co.: A Potential Limit to Bragdon?* In declaring that the ADA's mandate of accommodation for the disabled extends to reproduction, the Supreme Court in *Bragdon* did not actually say that its holding translates into a mandate to accommodate the use of Viagra. There is reason to suppose that the latter proposition is not a corollary of the former.

Potentially instructive is *McGraw v. Sears, Roebuck & Co.*,<sup>221</sup> where a federal district court held, as a matter of law, that menopause does not constitute a disability within the meaning of the ADA.<sup>222</sup> The plaintiff, Linda A. McGraw, age forty-seven at the time the case was under consideration, filed a complaint alleging age discrimination in

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inclusion of activities such as caring for one's self and performing manual tasks belies the suggestion that a task must have a public or economic character in order to be a major life activity for the purposes of the ADA. On the contrary, the Rehabilitation Act regulations support the inclusion of reproduction as a major life activity, since reproduction could not be regarded as any less important than working and learning.

*Id.* at 638-39 (citations omitted).

216. See Sarah Kellogg, Newhouse News Serv., *Reproductive Problems Become Insurance Problem; Supreme Court's Ruling Could Lead to Increased Cost for Benefit Plans*, STAR-TRIB., Oct. 26, 1998, at 06D.

217. See *id.*

218. See *id.*

219. *Id.*

220. See *id.*

221. 21 F. Supp. 2d 1017 (D. Minn. 1998).

222. See *id.* at 1021.



violation of the Age Discrimination in Employment Act (ADEA)<sup>223</sup> against defendant Sears, Roebuck & Co., from whom she accepted an opportunity to resign with a severance package after sixteen years of employment.<sup>224</sup> Among her claims was that the early phase of menopause, apart from any professional or medical evidence that this condition affected her workplace ability, constituted a disability under the ADA.<sup>225</sup> The court dismissed the charge in a summary judgment.<sup>226</sup> Recognizing that the Supreme Court in *Bragdon* had found an inability to have children to be a cognizable ADA disability in an AIDS case,<sup>227</sup> the court did not read *Bragdon* to suggest that every woman in, during, or after menopause suffers from an ADA disability because her ability to have children is impaired.<sup>228</sup> Instead, it took judicial notice of menopause “as an entirely normal consequence of human aging.”<sup>229</sup> The court held that as such, menopause is “clearly distinguishable from early loss or impairment of childbearing resulting from communicable viral illness.”<sup>230</sup>

Menopause is an exclusively female phenomenon. Nevertheless, the high correlation of impotency with advanced age arguably constitutes a sort of male counterpart to menopause. Thus, if *McGraw* were upheld, reason would exist to exclude sexual potency from the ambit of “major life activity” when applied to the aged. Arguably, upholding *McGraw*, while asserting that sexual potency is a major life activity, would amount to discrimination against women. It is noteworthy that the swift approval which Viagra has received in the United States and other countries has raised an outcry among women who have noted the comparatively slower acceptance of the birth control pill.<sup>231</sup>

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223. 29 U.S.C. §§ 621-634 (1994).

224. See *McGraw*, 21 F. Supp. 2d at 1017.

225. See *id.* at 1021.

226. See *id.*

227. See *id.*

228. See *id.*

229. *Id.*

230. *Id.*

231. See, e.g., *Editorial: Pill Approved*, MAINICHI DAILY NEWS (Tokyo), June 6, 1999, at 2 (Japan lifted a ban on low-dose oral contraceptives (higher dose varieties, which already had been approved, are more dangerous and exist ostensibly only to treat menstrual problems, even though women actually use them as contraceptives) last June. This was nine years after a group of pharmaceutical companies had applied to Japan's Central Pharmaceutical Affairs Council for such approval. It also was subsequent to approval by the Council of the sale of Viagra, which the drug received just six months after an application

c. *Threshold Issue: To What Extent Does the ADA Apply to Insurance Policies?* The various suits against insurance companies alleging the right to the coverage of Viagra prescriptions<sup>232</sup> presuppose that the ADA applies to such insurance policies. U.S. courts are divided on this point. The Sixth Circuit Court of Appeals in *Parker v. Metropolitan Life*<sup>233</sup> and the Third Circuit Court of Appeals in *Ford v. Schering-Plough Corp.* have said no.<sup>234</sup> The First Circuit Court of Appeals in *Carparts v. Automotive Wholesalers*<sup>235</sup> has said yes.

In *Parker*, the issue was whether the ADA prohibited an employer from providing its employees with a long-term disability plan issued by an insurance company that contained benefits of a longer duration for employees who become disabled due to a physical illness than for those who become disabled due to a mental illness.<sup>236</sup> In a five-to-four decision, the court held that an insurance benefit plan offered by an employer is not a good offered by a place of accommodation, which is invariably a physical place and to which Title III of the ADA is restricted.<sup>237</sup> Further, it determined that Title III does not govern the contents of goods and services offered by a public accommodation under a long-term disability policy offered by an

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was filed for this purpose. Women's groups decried this as sex discrimination.); *Japan Approves Viagra, but Dawdles on Birth-Control Pill*, GLOBE & MAIL SCI. (Tokyo), Apr. 30, 1999 (stating that observers of the different approaches exhibited by the Japanese government toward Viagra and the birth control pill see this as an illustration of the need to empower women in a male-dominated society); see also David S. Broder, *New Boost for the Pill: Contraceptive Coverage Gets Look in Congress*, SACRAMENTO BEE, July 29, 1998, at B7 (asserting that a need for greater coverage of contraceptives (currently, only 15% of group health plans cover all five of the most widely used devices) received adequate attention only in the wake of the furor provoked by media reports on the availability of coverage for Viagra); *Insurance Coverage Inequity Is a Bitter Pill to Swallow*, FLA. TODAY, June 4, 1998, 16A (A 1994 study found that only a third of health insurance plans pay for prescriptive drugs. According to one female health care provider, requiring insurance coverage of Viagra, but not of birth control pills, would be "clear sexual hypocrisy."); DeWayne Wickham, *If Health Insurers Cover Viagra, They Should Cover the Pill*, GANNETT NEWS SERVICE, May 21, 1998 (Asserting that many insurance plans cover Viagra, but not birth control pills. Insurers defend such policies on grounds that Viagra treats a disease, namely, impotence, whereas the same cannot be said of contraceptives because pregnancy is not a disease. Congress and numerous state legislatures have introduced measures to compel health insurers to treat contraceptives the same as they do drugs like Viagra.).

232. See *supra* text accompanying notes 141-80.

233. 121 F.3d 1006 (6th Cir. 1997).

234. See *id.* at 1008.

235. 37 F.3d 12 (1st Cir. 1994).

236. See *Parker*, 121 F.3d at 1008.

237. See *id.* at 1010.

employer, but only the availability of these goods and services.<sup>238</sup> As an illustration, the court stated that a “bookstore must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Braille[d] or large-print books.”<sup>239</sup> In addition, it held that the ADA does not prohibit a disparity in benefits because the statute does not mandate equality between individuals with different disabilities, but rather only between disabled and nondisabled.<sup>240</sup> Under this last principle, courts have upheld limitations on, and lesser degrees of, certain types of coverage versus others within the same plan.<sup>241</sup> As a result, advocates of Viagra coverage would presumably still have grounds for a claim given that they are seeking mere coverage and not haggling over the degree of coverage.

In *Carparts*, the issue was whether a self-funded medical reimbursement plan could provide lifetime benefits of \$1 million for each plan member but limit benefits for AIDS-related illnesses to \$25,000.<sup>242</sup> A member of the plan with AIDS complained that this constituted illegal discrimination on the basis of a disability.<sup>243</sup> A unanimous court vacated a district court’s dismissal of the complaint and held that “public accommodation” in Title III of the ADA is not limited to actual physical structures.<sup>244</sup> The court looked to the definition of “public accommodation” in Title III and noted that an illustrative list therein included a “travel service,” a “shoe repair service,” an “office of an accountant, or lawyer,” an “insurance office,” a “professional office of a healthcare provider,” and “other service establishment[s].”<sup>245</sup> According to the court, by including “travel service,” Congress clearly contemplated that “service establishments include providers of services which do not require a person to physically enter an actual physical structure.”<sup>246</sup> The court noted that “many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in

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238. *See id.* at 1012.

239. *Id.*

240. *See id.* at 1015.

241. *See id.* at 1016-20.

242. *See Carparts v. Automotive Wholesalers*, 37 F.3d 12, 14 (1st Cir. 1994).

243. *See id.*

244. *See id.* at 18-19.

245. *Id.* at 18 (citing 42 U.S.C. § 12181(7)(F) (1994)).

246. *Id.* at 19.

order to obtain their services.”<sup>247</sup> Likewise, the “existence of other service establishments conducting business by mail and telephone without providing facilities for their customers to enter in order to utilize their services” was easy for the court to imagine.<sup>248</sup> This reflection caused the court to find, at the very least, ambiguity in the definition, which, considered together with legislative history and public policy, suggested that the phrase was not limited to physical structures.<sup>249</sup> To this court, it would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not.<sup>250</sup>

Yet the supposed absurdity of such a distinction was ultimately no obstacle to the majority in *Parker*, which merely declined to express an opinion on the issue.<sup>251</sup> In holding that “public accommodations” refers to a physical place only,<sup>252</sup> the *Parker* majority registered their specific disagreement with the interpretation of the *Carparts* court.<sup>253</sup> The basis for its disagreement was that the First Circuit had disregarded the statutory canon of construction, *noscitur a sociis*.<sup>254</sup> Under this doctrine, the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it in order to “avoid the giving of unintended breadth to the Acts of Congress.”<sup>255</sup> It found that every term listed under the definition of “public accommodations” was a physical place open to public access and that the terms cited by *Carparts* did not suggest otherwise.<sup>256</sup> Rather than

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247. *Id.*

248. *Id.*

249. *See id.*

250. *See id.*

251. *See Parker v. Metropolitan Life*, 121 F.3d 1006, 1011, n.3 (6th Cir. 1997).

252. *See id.* at 1010-11.

253. *See id.*

254. *See id.* at 1014.

255. *Id.* (internal quotation marks omitted).

256. *See id.* The complete list of terms in the statute is as follows:

(A) an inn, hotel, motel or other place of lodging . . . ; (B) a restaurant, bar, or other establishment serving food or drink; (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment; (D) an auditorium, convention center, lecture hall, or other place of public gathering; (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office,

suggesting that Title III includes within its purview entities other than physical places, it was more likely to the *Parker* court that “Congress simply had no better term than ‘service’ to describe an office where travel agents provide travel services and a place where shoes are repaired.”<sup>257</sup>

In *Ford v. Schering-Plough Corp.*,<sup>258</sup> the Third Circuit Court of Appeals followed *Parker* and broke from *Carparts*.<sup>259</sup> As in *Parker*, *Ford* concerned the issue of whether a disparity between mental and physical disabilities in disability benefits violates the Americans with Disabilities Act.<sup>260</sup> In *Lenox v. Healthwise of Kentucky, Ltd.*,<sup>261</sup> the Sixth Circuit reiterated its “physical access only” interpretation,<sup>262</sup> affirming the district court’s dismissal of an employee’s Title III claim against her insurer for discriminating by not providing coverage for heart transplants while providing coverage for other transplants.<sup>263</sup>

The district courts also are divided. In the Sixth Circuit, district courts are consistent with the opinion of the court of appeals in *Parker*. In *Pappas v. Bethesda*,<sup>264</sup> the District Court for the Southern District of Ohio held that “references throughout Title III make it clear that its scope is limited to discrimination in the provision of goods, services, facilities, privileges, advantages, or accommodations based on a disabled person’s physical ability to make use of those goods, services, etc.”<sup>265</sup> However, outside the Sixth Circuit, district courts have taken the opposite view.<sup>266</sup> In the First Circuit, *Carparts* has

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professional office of a health care provider, hospital, or other service establishment; (G) a terminal, depot, or other station used for specified public transportation; (H) a museum, library, gallery, or other place of public display or collection; (I) a park, zoo, amusement park, or other place of recreation; (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education; (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

*Id.* (citing 42 U.S.C. § 12181(7)).

257. *Id.*

258. 145 F.3d 601 (3d. Cir. 1998).

259. *See id.* at 613-14.

260. *See id.* at 603.

261. 149 F.3d 453 (6th Cir. 1998).

262. *See id.* at 457.

263. *See id.* at 454-55.

264. 861 F. Supp. 616 (S.D. Ohio 1994).

265. *Id.* at 620.

266. *See Cloutier v. Prudential Ins. Co. of Am.*, 964 F. Supp. 299, 302 (N.D. Cal. 1997).

prevailed. In *Doukas v. Metropolitan Life Insurance Co.*,<sup>267</sup> an insurance company denied the plaintiff mortgage disability insurance because the plaintiff had admitted in her application that she was receiving drug treatment for depression.<sup>268</sup> Taking its cue from *Carparts*, the New Hampshire District Court denied the insurer's motion to dismiss and ruled that Title III of the ADA encompasses insurance policies.<sup>269</sup> In addition, the court went beyond *Carparts*, holding that the Act extends to the substance or contents of an insurance policy on grounds that an insurance company is a public accommodation and its insurance policies are "goods" or "services" under Title III.<sup>270</sup> In another case in the First Circuit, *Conners v. Maine Medical Center & Unum*,<sup>271</sup> a district court followed *Carparts* and *Doukas* in holding that Title III applies to the substance of, rather than merely the access to, employee benefit plans.<sup>272</sup> On the other hand, it also held that there is nothing in the ADA requiring a health insurance policy to provide the same benefits for mental disabilities as for physical disabilities, granting summary dismissal of a complaint brought by an employee suffering from psychological problems in the wake of his tour of duty in Vietnam.<sup>273</sup> Courts outside of the First Circuit have adhered to this view. In *Cloutier v. Prudential*,<sup>274</sup> an insurer refused to provide a life insurance policy to the plaintiff because he had a sexual partner with HIV.<sup>275</sup> The Court of the Northern District of California denied the insurer's motion to dismiss the action, relying on *Carparts* and *Doukas* in support of its holding that Title III applied.<sup>276</sup> While *Doukas* and *Cloutier* concerned denial of coverage, *Doe v. Mutual of Omaha Insurance*,<sup>277</sup> like *Conners*, dealt with terms of coverage. At issue were two health insurance policies that provided \$1 million in lifetime benefits for medical care, except for AIDS treatment, where caps of \$100,000 and \$25,000 existed.<sup>278</sup> The court denied motions by the

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267. 950 F. Supp. 422 (D. N.H. 1996).

268. *See id.* at 424.

269. *See id.* at 427.

270. *See id.* at 425-26.

271. 42 F. Supp.2d 34 (D. Me. 1999).

272. *See id.* at 11.

273. *See id.* at 19.

274. 964 F. Supp. 299 (N.D. Cal. 1997).

275. *See id.* at 300.

276. *See id.* at 302.

277. 999 F. Supp. 1188 (N.D. Ill. 1998).

278. *See id.* at 1190.

insurers for summary judgment in their favor, disagreeing with *Parker* and following *Doukas*.<sup>279</sup>

The division among the courts illustrates that, at the very least, liability under the ADA for disparate coverage in insurance policies remains a real possibility.

## 2. CONSTITUTIONAL BASIS

The words “procreation,” “reproduction,” and “sex” do not appear in the Constitution. Yet the Supreme Court of the United States has found therein rights involving such terms.<sup>280</sup> A seminal case in this respect is *Skinner v. Oklahoma*.<sup>281</sup> It marks the onset not only of the Court’s recognition of rights related to sexual matters but also of its “fundamental rights” analysis of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution, which still prevails today.<sup>282</sup> In *Skinner*, the Court struck down an Oklahoma statute that authorized sterilization of any “habitual criminal.”<sup>283</sup> In an opinion delivered by Justice Douglas, the Court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment because it exempted anyone convicted of “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses.”<sup>284</sup> Strict scrutiny of such classifications was appropriate because the statute involved:

one of the basic civil rights of man . . . . Marriage and procreation are fundamental to the very existence and survival of the race . . . . When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.<sup>285</sup>

Because Viagra can facilitate procreation, its mere existence would appear to have special constitutional significance under *Skinner*. The Court’s concern over sterilization suggests the possibility

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279. *See id.* at 1193.

280. *See, e.g.,* *Carey v. Population Serv. Int’l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

281. 316 U.S. 535.

282. *See, e.g.,* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 797 (5th ed. 1995).

283. *Skinner*, 316 U.S. at 536.

284. *Id.* at 537.

285. *Id.* at 537-39.

of similar argument with respect to Viagra, i.e., that a government health care system that does not provide funding to make the drug universally available violates equal protection by effectively depriving the indigent of a substance that may be essential to their ability to procreate.

Conceivably, a distinction exists between sterilization, an active measure that is an irreversible procedure to deprive a person of reproductive capacity, and the government's reversible and passive refusal to finance a drug. It also bears mention that in *Skinner*, the Supreme Court did not rule that involuntary sterilization is per se unconstitutional, but only that the Oklahoma statute, as it existed, offended equal protection concerns.<sup>286</sup> Thus, the decision left *Buck v. Bell*<sup>287</sup> intact, in which the Supreme Court upheld a Virginia statute that provided for the sterilization of "mental defectives."<sup>288</sup> This suggests that the capacity to procreate, and thereby the right to Viagra, is not immune to governmental regulation, particularly if it satisfies the compelling interest test that has arisen in the wake of *Skinner*.<sup>289</sup>

Yet doubt exists that *Buck* would survive a revisit by the Supreme Court under such analysis.<sup>290</sup> Certain lower courts appear to have assumed that, with respect to its permission for sterilization, *Buck* is already a dead letter.<sup>291</sup> It is noteworthy that the only recognized compelling interest for the regulation of abortion, a

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286. See NOWAK & ROTUNDA, *supra* note 282, at 797.

287. 274 U.S. 200 (1927).

288. See *id.* at 205.

289. See NOWAK & ROTUNDA, *supra* note 282, at 797.

290. See *id.* at 798. The opinion certainly has attained the status of notoriety if only for the following remark by Justice Oliver Wendell Holmes:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped by incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting Fallopian tubes. Three generations of imbeciles are enough.

*Buck*, 274 U.S. at 207.

291. See, e.g., *Fieger v. Thomas*, 74 F.3d 740 (6th Cir. 1996). The Court of Appeals for the Sixth Circuit stated that the only part of *Buck* that remains unrepudiated is the Justice Holmes's comment that an argument that an equal protection violation occurred because of selective enforcement "is the usual last resort of constitutional arguments." *Id.* at 750.



procedure related to reproduction declared by the Court to fall within a fundamental constitutional right of privacy,<sup>292</sup> is the preservation of the health or life of the mother.<sup>293</sup> Nevertheless, certain other lower courts have followed *Buck* subsequent to *Skinner*.<sup>294</sup>

For its part, the Supreme Court has upheld rights involving sex subsequent to *Skinner*, but on a different basis. In *Skinner*, the Court justified its strict scrutiny of the sterilization law on grounds that it affected a “right which is basic to the perpetuation of the race—the right to have offspring.”<sup>295</sup> The Court’s approach stemmed from general prudential and ethical considerations rather than any particular principles of law.<sup>296</sup> By contrast, in subsequent jurisprudence, the Court attempted to give more of a legalistic foundation to rights involving sex in the form of an implied right to privacy. In *Griswold v. Connecticut*,<sup>297</sup> the Court overturned a Connecticut ban on the use of artificial contraceptives by married couples, finding the right to privacy in the penumbras of the Bill of Rights<sup>298</sup> as well as in the Ninth Amendment.<sup>299</sup> Under the same rationale, the Court invalidated a Massachusetts statute that outlawed

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292. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

293. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992), wherein the Court replaced the “rigid trimester framework” of *Roe* with the “undue burden standard,” to wit,

an undue burden exists, and therefore a provision is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability . . . . The State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right . . . .

*Id.* at 878. The Court reaffirmed its holding in *Roe* that “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion.” *Id.* at 879 (quoting *Roe*, 410 U.S. at 164-65). However, to avoid a “profound chilling effect on the willingness of physicians to perform abortion near the point of viability,” the Court has held that the point of viability is to be determined by the attending physician, not the legislatures or the courts. *Colautti v. Franklin*, 439 U.S. 379, 396 (1979).

294. See, e.g., *In re Cavitt*, 182 Neb. 712 (1968) (upholding a state statute providing for the sterilization of mental defectives and citing *Buck* for support).

295. *Skinner v. Oklahoma*, 316 U.S. at 535, 536 (1942).

296. See *id.* at 541 (“Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.”).

297. 381 U.S. 479 (1965).

298. See *id.* at 484-85.

299. See *id.* at 486 (Goldberg, J., concurring).

the distribution of contraceptive materials to married couples unless by prescription.<sup>300</sup> It also found the implied right to privacy to be broad enough to include a decision to have an abortion.<sup>301</sup>

By itself, the right to privacy would seem to offer no support for the contention that impotent males are entitled to Viagra. The sterilization, contraception, and abortion cases stand for the “right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>302</sup> These cases stand *against* government action, namely, intrusion, rather than *for* government action, such as a mandate for health insurance coverage of Viagra. Conceivably, a more expansive interpretation is possible given that the Court located this right in the Due Process Clause of the Fourteenth Amendment,<sup>303</sup> the scope of which is not defined. However, abortion jurisprudence suggests that the scope of the liberty protected by the Fourteenth Amendment is not so broad as to include entitlement to Viagra. In *Harris v. McRae*,<sup>304</sup> the Supreme Court upheld a 1976 amendment to Title XIX of the Social Security Act by U.S. Representative Henry Hyde that severely limited the use of any federal funds to reimburse the cost of abortions under the Medicaid program.<sup>305</sup> The Court held that a woman’s freedom of choice carries with it no “constitutional entitlement to financial resources to avail herself of the full range of protected choices.”<sup>306</sup> The Court reasoned that “although [the] government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those [obstacles] not of its own creation,” a category which includes indigency.<sup>307</sup> Under *McRae*, there would also seem to be no constitutional entitlement to financial resources to obtain Viagra, even if Viagra were regarded as essential to a right to procreate protected by the Fourteenth Amendment. On the other hand, the outcome in *McRae* rested on a thin consensus: the Court’s

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300. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

301. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

302. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (citing *Eisenstadt*, 405 U.S. at 453).

303. See *id.* at 846, 851.

304. 448 U.S. 297 (1980).

305. See *id.* at 326.

306. *Id.* at 316.

307. *Id.*

opinion drew four dissents and one concurrence.<sup>308</sup> It also elicited criticism from many other quarters.<sup>309</sup> Thus, a slight shift in the composition of the Court or in the tectonics of national politics might suffice for a reversal of the holding in *McRae*, at least with respect to implications for *Viagra*.

Oddly, a potential argument for a broader conception of the constitutional right to sex exists in a case in which the Supreme Court announced a limit to this conception. In *Bowers v. Hardwick*,<sup>310</sup> the Court upheld a Georgia statute criminalizing sodomy, holding that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy.<sup>311</sup> In reaching this decision, the Court rejected an argument that constitutional protection exists for homosexual conduct in the privacy of the home.<sup>312</sup> Presumably, no argument would exist for an entitlement to *Viagra* if the sole constitutional protection for sexual activity were an implied right to privacy, for, as noted, such a right seems to guard against government action rather than inaction.<sup>313</sup> However, the Court also rejected contentions that sodomy falls within more basic and sweeping formulations of constitutional law.<sup>314</sup> To this end, the Court has

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308. See *id.* at 327-57.

309. See, e.g., Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 96, 102-05 (1980) ("The refusal to fund medically necessary abortions can only be validated if a permissible basis for discriminating between medically necessary services exists. The Court's analysis rested on its view that the classification was premised on a permissible criterion: the state's interest in potential life. [But *Wade*, as made clearer by its progeny] held that abortion involves the kind of judgment that the Constitution reserves not for institutions, but for individuals intimately affected. [Thus,] the classification created by the [Hyde Amendment] was an impermissible one. It rested on a choice that is in a protected zone of individual of autonomy and therefore beyond the power of the state to make."); see also CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 100-01, cited in WILLIAM B. LOCKHART, *CONSTITUTIONAL LAW* 439 (6th ed. 1996) ("The logic of the court's response resembles the logic by which women are supposed to consent to sex. Preclude the alternatives, then call the sole remaining option 'her choice.' The point is that the alternatives are precluded *prior* to the reach of the chosen legal doctrine. They are precluded by conditions of sex, race, and class—the very conditions the privacy frame not only leaves tacit, but which it exists to *guarantee*.").

310. 478 U.S. 186 (1986).

311. See *id.* at 195.

312. See *id.* at 190, 195.

313. See *supra* text accompanying notes 301-03.

314. "Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection." *Hardwick*, 478 U.S. at 191.

developed two descriptions of the nature of these rights: those that are “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [they] were sacrificed,”<sup>315</sup> and those liberties that are “deeply rooted in this Nation’s history and tradition.”<sup>316</sup> In *Hardwick*, the Court held that neither of these formulations extends to a right of homosexuals to engage in acts of consensual sodomy.<sup>317</sup> However, it is open to question whether the reasoning which the Court applied to homosexual sodomy would yield the same conclusion in application to heterosexual copulation. In applying the notions of “ordered liberty” and deeply rooted tradition, the Court in *Hardwick* found decisive the fact that proscriptions against homosexual conduct have ancient roots.<sup>318</sup> The Court noted that sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen states when they ratified the Bill of Rights.<sup>319</sup> It noted further that in 1868, when the Fourteenth Amendment was ratified, all but five of thirty-seven states in the Union had criminal sodomy laws; that until 1961, all fifty states outlawed sodomy; and that, at the time of the Court’s decision, twenty-four states and the District of Columbia continued to provide criminal penalties for sodomy performed in private and between consenting adults.<sup>320</sup> Against this background, the Court concluded, “[T]o claim that a right to engage in consensual sodomy is deeply rooted in this nation’s history and tradition or implicit in the concept of ordered liberty is, at best, facetious.”<sup>321</sup>

However, history and tradition do not appear to support such a conclusion with respect to heterosexual activity. The Court observed that the government has prosecuted certain sexual crimes that frequently are heterosexual acts, such as adultery and incest.<sup>322</sup> In contrast, government has not only tolerated but also sanctioned other forms of heterosexual activity, notably within the bonds of matrimony.<sup>323</sup> In *Griswold v. Connecticut*,<sup>324</sup> the Supreme Court struck

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315. *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319 (1937)).

316. *Id.* at 192 (citing *Moore v. East Cleveland*, 431 U.S. 494 (1977)).

317. *See Hardwick*, 478 U.S. at 191-92.

318. *See id.* at 191.

319. *See id.* at 192.

320. *See id.*

321. *Id.*

322. *See id.* at 196.

323. *See id.* at 191.

324. 381 U.S. 479 (1965).

down a Connecticut statutory ban against the use of artificial contraceptives by married couples.<sup>325</sup> Yet it did not limit its support of heterosexual relations to the marital relationship.<sup>326</sup> In *Eisenstadt v. Baird*,<sup>327</sup> the Court subsequently struck down a Massachusetts law making it a felony to distribute contraceptive materials to people other than married couples.<sup>328</sup> Moreover, the right to an abortion exists irrespective of whether the woman is married.<sup>329</sup> The Court in *Hardwick* commented that “none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.”<sup>330</sup> This is not true of heterosexual copulation, which, if it has no connection to family or marriage, does have a direct link to procreation. Thus, under the reasoning of *Hardwick*, the right to heterosexual activity, even outside of marriage, arguably stands within the liberty protected by the Due Process Clause of the Fourteenth Amendment. Moreover, in its discussion of liberty “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty,” the Court made no reference to these liberties necessarily having the nature of a right of privacy.<sup>331</sup> To the contrary, *Palko v. Connecticut*,<sup>332</sup> the case which the Court in *Hardwick* cited for authority in its exposition of fundamental rights as “implicit in the concept of ordered liberty,” concerned not an issue of privacy or government intrusion, but rather whether the Fourteenth Amendment encompassed certain aspects of the prohibition against double jeopardy in the Fifth Amendment.<sup>333</sup> The Court in *Palko* held that such was not the case.<sup>334</sup> Yet in *Benton v. Maryland*,<sup>335</sup> the Court reversed itself, holding that the validity of the state conviction “must be judged not by the watered-down standard enumerated in *Palko* but

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325. See *supra* notes 297-99 and accompanying text.

326. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

327. *Id.*

328. See *supra* note 300 and accompanying text.

329. See, e.g., *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 151 (1973).

330. *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986).

331. *Id.* at 191-94.

332. 302 U.S. 319 (1937).

333. *Id.* at 321.

334. See *id.* at 325.

335. 395 U.S. 784 (1969).

under this Court's interpretation of the Fifth Amendment double jeopardy provision."<sup>336</sup> In *Benton*, the Court held that the double jeopardy prohibition of the Fifth Amendment "represents a fundamental ideal in our constitutional heritage," and that it should apply to the states through the Fourteenth Amendment.<sup>337</sup> It found that this right had arisen from an ancient and pervasive tradition, an analysis that resonates with the respect in *Hardwick* for fundamental rights "deeply rooted in this Nation's history and tradition."<sup>338</sup> On the other hand, *Hardwick* derived its formulation of fundamental rights from *Moore v. East Cleveland*,<sup>339</sup> which involved the issue of privacy. Here the Court struck down a housing ordinance that limited occupancy to single families and defined "family" so as to forbid the appellant from having her two grandsons live with her.<sup>340</sup> The Court objected to the ordinance as "intrusive."<sup>341</sup>

Regardless of the precise limits of fundamental rights, an absolute right to consensual heterosexual sex has never received judicial recognition, as evidenced by the survival of laws against adultery and incest.<sup>342</sup> A possible justification for this discrepancy is the Court's adoption of the principle that a fundamental right must be "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty."<sup>343</sup> Clearly, a right to sex facilitated by a drug like Viagra has no roots in this nation's history and tradition, if only because of the very novelty and revolutionary nature of the drug. At a more abstract level, there is no tradition of constitutional protection of sex sustained by artificial means. The very concept of sex among the elderly, the primary likely beneficiaries of Viagra, also breaks with traditional notions concerning the aged.<sup>344</sup>

Thus, although the Supreme Court appears to have come close to recognizing a constitutional right to sex in the abstract, it has not done so; on the contrary, it has relied on principles which suggest that sex induced by Viagra is not constitutionally protected.

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336. *Id.* at 796.

337. *Id.* at 794.

338. *Id.* at 795.

339. 431 U.S. 494 (1977).

340. *See id.* at 495.

341. *See id.* at 499.

342. *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1985).

343. *Id.* at 194.

344. *See supra* text accompanying notes 3-5.

#### IV. Prospects: A Look into Pandora's Box

The discussion within the government to date, as it makes its apparently headlong march toward the legal and financial support of Viagra, has only scratched the surface of what appears to be a nearly bottomless range of issues.

##### A. Is Viagra Safe?

At last count, more than 170 people worldwide have died after taking Viagra.<sup>345</sup> Although the cause of death has not been ascertained in all of these cases, numerous experts, including the FDA, have attributed the fatalities to complications with heart disease that contraindicate a Viagra prescription.<sup>346</sup>

Given the lack of explanation for numerous Viagra-related deaths, the verdict on the safety of the drug may still be out. Such casualties alone, however, do not necessarily amount to a significant impact on Viagra's overall sales prospects. It is worth remembering that concerns and controversy over safety also enshrouded the birth control pill, prompting a Senate hearing in 1970.<sup>347</sup> Even today's birth control pill, which is considerably safer than its counterpart of 1960, poses a risk of serious illness and death to certain groups.<sup>348</sup>

As discussed next, however, greater dangers to public health loom precisely because Viagra is probably safe when used according to directions.

##### B. AIDS

The epidemic of AIDS is widely believed to have chilled the sexual revolution that began in the 1960s.<sup>349</sup> It may also be a reason to put the brakes on a new sexual revolution fueled by Viagra.

Although the biological origin of HIV remains a mystery, scientists recognize the sexual revolution of the past decades as a

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345. See Leslie Papp, *Ontario Men Claim 40% of Prescriptions*, TORONTO STAR, May 14, 1999, available in 1999 WL 17635910, at \*2.

346. See FDA, *Pfizer Alter [sic] Viagra Warnings, Report 130 U.S. Deaths of Those Taking Drug*, MEALEY'S LITIG. REP.: DRUGS & MED. DEVICES, Dec. 4, 1998, available in 3 No. 23 MEALEY'S LITIG. REP.: DRUGS & MED. DEVICES, at \*1-2.

347. See ASBELL, *supra* note 19, at 305.

348. See *id.* at 309-10.

349. See, e.g., Steven D. Pinkerton & Paul R. Abramson, *Condoms and the Prevention of AIDS*, AM. SCIENTIST, July 17, 1997, at 364.

social and cultural factor in the rise of the AIDS epidemic.<sup>350</sup> Thus indications of a new sexual revolution among the elderly, combined with evidence that advanced age bears a high correlation with the incidence of AIDS,<sup>351</sup> warrants concern. Such concern would appear to be particularly appropriate in connection with Viagra, given that it is intended exclusively to relieve male impotence, an affliction largely of the elderly.

The epidemic among the elderly appears to receive little attention because of the popular stereotype that AIDS is the disease of the young because of its associations with homosexuality and intravenous drug use.<sup>352</sup> Also, AIDS mortality has sharply declined in the United States in recent years.<sup>353</sup> At the same time, the number of HIV infections each year has remained essentially stable.<sup>354</sup> An estimated 700,000 Americans are infected with HIV.<sup>355</sup> Patients older than fifty account for more than ten percent of AIDS cases in the United States.<sup>356</sup>

The industrialized world's arsenal of expensive pharmaceuticals may be its main line of defense against a national AIDS disaster. Some African nations without access to these medications are expected to lose as much as a quarter of their adult populations to the AIDS epidemic.<sup>357</sup> Thus a sound system of health care finance appears to be of particular importance.

### C. Octogenarian Fathers and Senescent Sperm

About seventy percent of men older than seventy years old are impotent.<sup>358</sup> Thus, as a cure for impotence, Viagra radically increases

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350. *See id.*

351. *See supra* text accompanying notes 135-40.

352. *See, e.g.,* New York Times News Serv., *Fla. Program to Educate Elderly About HIV and AIDS*, BALTIMORE SUN, Aug. 2, 1998, at 17A.

353. AIDS mortality fell by nearly half in 1997. *See* David Brown, *AIDS Death Rate in '97 Down 47 Percent; New Drug Treatment Credited; Overall U.S. Mortality Fell 3%*, WASH. POST, Oct. 8, 1998, at A01. The availability of powerful new drug treatments appears largely responsible for this reduction. *See id.*

354. *See id.*

355. *See id.*

356. *See Older AIDS Patients in Study*, CAP. TIMES (Madison, Wis.), Sept. 8, 1998, at 6A.

357. *See* Joby Warrick, *The World Population Forecast Lowered Because of AIDS*, CINCINNATI ENQUIRER, Oct. 28, 1998, at A10. Currently, in nine African countries, HIV infects 10% of the population or more; in Botswana the figure already is greater than 25%. *See id.*

358. *See Wonder Drug, supra* note 43, at \*2.



the probability of the emergence of sex-, sept- and octogenarian fathers.<sup>359</sup> This prospect suggests numerous questions: Who will raise the children? Who will support them when their fathers die?<sup>360</sup>

Moreover, Viagra raises the possibility of elderly men depositing senescent and genetically deformed sperm into childbearing women.<sup>361</sup> The aging process involves transformations in deoxyribonucleic acid (DNA), the molecule responsible for the transmission of genetically encoded hereditary traits, which renders the geriatric patient more prone to diseases associated with old age, i.e., prostate and lung cancer, diabetes mellitus, and Alzheimer's and Parkinson's diseases.<sup>362</sup> The impotence endemic in old age had prevented the transmission of such defects.<sup>363</sup>

#### D. Sociological Impact: Will Viagra Reinforce a Trend Toward Sexual Conservatism?

The sexual revolution of the 1960s is often portrayed as a leap toward liberalism, marked, for example, by the emancipation of females from a reproductive role,<sup>364</sup> the celebration of youth,<sup>365</sup> and a fashion for dressing down in the blue jeans of the laborer and the farmer.<sup>366</sup> By contrast, the emerging sexual revolution appears as if it may be a force for conservatism, given that it is impelled by a drug whose main effect will be to empower elder males. Curiously, whereas Viagra appears likely to cause a resurgence in sexuality among the elderly, certain measures of sexual activity among the young are in decline.<sup>367</sup>

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359. See Washington, *supra* note 44, at \*3.

360. See *id.*

361. See *id.*

362. See *id.*

363. See *id.*

364. See generally *supra* text accompanying note 26.

365. See generally *supra* text accompanying notes 108-10.

366. See ASBELL, *supra* note 19, at 182.

367. See generally Associated Press, *Less Teen Pregnancy/Abortion Statistics Also Decline in 1990s*, NEWSDAY, Apr. 29, 1999, at A30 (stating that during the 1990s teen pregnancy plummeted 17% to the lowest level since 1973, and that teen abortion rates also have decreased, due to a variety of reasons, including more reliable contraception, fear of AIDS, a new focus on abstinence, and a strong economy); see also Associated Press, *Teen Pregnancies Have Declined in '90s Rate Is Lowest Since 1973, Data Show*, OMAHA WORLD-HERALD, Apr. 29, 1999, at 9 (stating that researchers say most of the decline in pregnancies is attributable to increased use of birth control); Bill Briggs, *Sexual Abstinence Among Teens Is Gaining Popularity. But Who Is Responsible?*, DENVER POST, Mar. 7, 1999, at EO1. Factors in declining

### E. Health Care: A Cost/Benefit Analysis of the Right to Sex

The right to reproduction articulated by the Supreme Court in *Bragdon* suggests the existence of a right to health insurance coverage of Viagra.<sup>368</sup> The financial burden of providing coverage for Viagra is expected to be considerable.<sup>369</sup> The Clinton mandate for coverage by Medicaid will run an annual tab for the program of \$100 million, according to states opposing the mandate.<sup>370</sup> The Clinton administration has expressed skepticism of this estimate, though it has produced no projection of its own.<sup>371</sup> There are justifications for such skepticism. Of the thirty-seven million people enrolled in Medicaid, only about four million are men, and only a small subset would be interested in the drug.<sup>372</sup> On the other hand, even if the states are crying wolf about the impact of the Viagra mandate on Medicaid, taxpayers may find themselves paying for the drug on a more massive scale in another program that is aimed directly at the main sufferers of impotence,<sup>373</sup> the elderly. Medicaid is designed primarily to be a medical safety net for the poor.<sup>374</sup> By contrast, Medicare is a health insurance program that specifically targets persons sixty-five years of age or older.<sup>375</sup> Covering thirty-nine million elderly and disabled, Medicare does not currently cover prescription drugs.<sup>376</sup>

However, a year after mandating state Medicaid coverage of Viagra, the Clinton administration proposed extending Medicare coverage to medical prescriptions.<sup>377</sup> The benefit would be voluntary,

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sexual activity among youth include a new teenage backlash against the loose bedroom mores, high divorce rates, and HIV epidemic that accompanied their parents' "sexual revolution." *See id.* About 52% of high school students say they have never had sex, whereas just seven years ago, teen virgins were in the distinct minority. *See id.* Although the change in behavior has been characterized as "modest," polls indicate that young people's social attitudes are becoming increasingly conservative. *See Irene Sege, Saving Themselves: More Condoms, Less Sex, or Just Waiting; STD Fears Are Changing Life for Teen Boys, BOSTON GLOBE, Mar. 11, 1999, at E1.*

368. *See supra* text accompanying notes 198-99.

369. *See supra* text accompanying notes 170-74.

370. *See supra* note 183.

371. *See generally supra* note 183.

372. *See McGinley, supra* note 186, at B5.

373. *See supra* text accompanying notes 48-50.

374. *See FROLIK & KAPLAN, supra* note 184, at 101.

375. *See id.* at 56.

376. *See, e.g.,* Robert Pear, *Reluctant States Advised That Viagra Will Go Under Medicaid*, N.Y. TIMES, May 28, 1998, at A6.

377. *See, e.g.,* Robert Pear, *Clinton Lays Out Plan to Overhaul Medicare System*,

but Clinton officials say it would be such a bargain that everyone would want to take advantage of it.<sup>378</sup> A patient could participate in the program as soon as the year 2002, the program's proposed inception, by paying a monthly premium of \$24, or a total of \$288 a year.<sup>379</sup> Medicare in that year would start picking up half of the cost of prescription drugs worth up to \$2,000 a year, i.e.: it would provide a subsidy for prescription drugs of up to \$1,000 a year.<sup>380</sup> At full implementation in the year 2008, the monthly premium would be \$44 and the limit on cost of drugs covered would be \$5,000.<sup>381</sup> Prior to the President's proposal, Democrats in Congress had advanced a similar plan of their own that would cover annual drug expenses up to \$1,700.<sup>382</sup> Under the White House proposal, which Clinton floated last June, Medicare beneficiaries would pay a total of \$110 billion in premiums for drug coverage over ten years, and the government would put up \$118 billion.<sup>383</sup> Overall, Clinton's plan to "shore up" Medicare is expected to consume an eighth of budget surpluses totaling \$3 trillion projected for the next decade.<sup>384</sup> Meanwhile, doubts exist as to the administration's projections of drug costs, which fall below recent reports of drug spending by private insurers.<sup>385</sup>

The President's proposal makes no mention of Viagra.<sup>386</sup> On the contrary, it delimits coverage in terms of "therapeutic classes of drugs" and all "off-formulary drugs when medically necessary."<sup>387</sup> Typically, health insurance policies provide coverage for "medically necessary" drugs while excluding drugs that are "solely for convenience."<sup>388</sup> Thus, the conventional usage of these terms would suggest that the Clinton administration has not contemplated the

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N.Y. TIMES, June 30, 1999, at A1.

378. See *id.*

379. See THE PRESIDENT'S PLAN TO MODERNIZE AND STRENGTHEN MEDICARE FOR THE 21ST CENTURY, DETAILED DESCRIPTION, July 2, 1999, at 19 [hereinafter THE PRESIDENT'S PLAN]; see also Amy Goldstein, *Clinton to Seek Modest Medicare Drug Benefit; \$2,000 in Annual Prescriptions Covered*, WASH. POST, June 29, 1999, at A01.

380. See THE PRESIDENT'S PLAN, *supra* note 379, at 19-20.

381. See *id.* at 19.

382. See William M. Welch, *Dems' Medicare Proposal Would Help Cover Prescription Drug Costs*, USA TODAY, Apr. 21, 1999, at 12A.

383. See Pear, *supra* note 377, at A1.

384. See *id.*

385. See *id.*

386. See THE PRESIDENT'S PLAN, *supra* note 379, at 20.

387. See *id.*

388. See, e.g., *NY Class Action*, *supra* note 142, at \*3.

coverage of widespread or recreational use of Viagra in its Medicare proposal or in its attendant cost projections. In fact, the proposal specifically excludes from coverage drugs “promoting fertility.”<sup>389</sup>

Yet the meaning of the term “medically necessary” is precisely what is at issue in the *Sibley-Schreiber* lawsuit<sup>390</sup> contesting the exclusion of Viagra coverage from a private insurance plan.<sup>391</sup> Indeed, debate exists whether sex is “necessary,” even “medically necessary.”<sup>392</sup> Sexual function has received recognition from one insurer as an “important part of both mental and physical health.”<sup>393</sup> Some insurers that cover Viagra pay only if the patient is diagnosed with “organically, not psychologically, caused impotence;”<sup>394</sup> however, one panel of medical experts has concluded that it is difficult, if not impossible, to determine when Viagra is necessary and that there is no “clear bright line” separating psychological and physical causes in this area.<sup>395</sup> Moreover, the Clinton administration has set a precedent for the mandate of Viagra coverage under the Medicaid program.<sup>396</sup> Providing prescription coverage under Medicare would abolish a distinction between Medicare and Medicaid that has lent credence to the Clinton administration’s past dismissive assessment of the likely cost of Viagra to the taxpayers.<sup>397</sup>

Since its inception in 1965, Medicare has never covered drug prescriptions, even though many Western nations have long provided such coverage for the elderly.<sup>398</sup> One reason is the implacable opposition of drug companies, which fear that price controls will inevitably result.<sup>399</sup> Nevertheless, cracks are appearing in the formerly unified front put forward by these companies in their massive

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389. See THE PRESIDENT’S PLAN, *supra* note 379, at 20.

390. See *supra* text accompanying notes 141-50.

391. See, e.g., *Class Action Complaint Filed*, *supra* note 143, at \*11; see also Grunwald, *supra* note 175, at A03.

392. See generally M.L. Lyke, *Viagra’s Bitter Pill Many Insurer’s Don’t Pay for Drug, While Others Limit Monthly Supply*, SEATTLE POST-INTELLIGENCER, May 14, 1998, at A1. See also Grunwald, *supra* note 175, at A03.

393. Ben Sullivan, *HMOs Declare Viagra Support*, L.A. DAILY NEWS, June 20, 1998, at B1.

394. Porter, *supra* note 151, at 1.

395. See *Special Report*, *supra* note 160.

396. See *supra* text accompanying notes 181-91.

397. See generally McGinley, *supra* note 186, at B5.

398. See *id.*

399. See Lucette Lagnado et al., *Dose of Reality: Idea of Having Medicare Pay for Elderly’s Drugs Is Roiling the Industry*, WALL ST. J., Feb. 19, 1999, at A1.

lobbying efforts.<sup>400</sup> Many top drug executives have recently come to believe that companies can no longer block all Medicare coverage of outpatient drugs without provoking the ire of the American public.<sup>401</sup> At least four million Medicare recipients are not destitute enough to qualify for Medicaid, yet are so poor that they do not have other insurance and cannot afford to pay for medicines of their own.<sup>402</sup> Altogether, thirty-five percent of the nation's Medicare recipients lack drug coverage.<sup>403</sup> Trends toward increasing spending on drugs suggest that the problem will grow.<sup>404</sup>

Historically, the budgets for both Medicaid and Medicare have greatly exceeded their projections.<sup>405</sup> One cause appears to be "moral hazard," a tendency of government programs like Medicaid and Medicare to eliminate the incentive of consumers to economize.<sup>406</sup> Hence, it is not unreasonable to suppose that the use of Viagra would increase markedly if consumers no longer had to pay \$10 per pill. As it is, bleak forecasts for the financial viability of Medicare and Medicaid have dominated the debates in Congress over fiscal planning.<sup>407</sup> The nation's total spending for health care is projected to increase from \$1 trillion in 1996 to \$2.1 trillion in 2007, which translates into an increase in health care spending as a share of gross domestic product from 13.6% to 16.6%.<sup>408</sup> Spending is expected to accelerate during this period at an annual growth of 6.5%, up from a rate of 5% during the period from 1993 to 1996.<sup>409</sup>

## V. Recommendation

Viagra, whose efficacy against impotency was discovered by accident, seems to have caught the world largely unprepared for a

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400. *See id.*

401. *See id.*

402. *See generally* Lucette Lagnado, *Healthcare: Proposal's Aim: Help 'Near Poor' Pay for Medicine*, WALL ST. J., Mar. 4, 1999, at B1.

403. *See id.*; *see also* Lagnado et al., *supra* note 399.

404. *See* Lagnado, *supra* note 402.

405. *See generally* MARK A. HALL & IRA MARK ELLMAN, *HEALTH CARE LAW AND ETHICS IN A NUTSHELL* 19 (1990).

406. *See generally id.* at 8.

407. *See generally* Charles Tiefer, *Treatment for Medicare's Budget: Quick Operation or Long-Term Care*, 16 ST. LOUIS U. PUB. L. REV. 27 (1996).

408. *See* Health Care Fin. Admin., *Highlights of the National Health Expenditure Projections, 1997-2007*, (last visited Sept. 14, 1998) <<http://www.hcfa.gov/stats/NHE-Proj/hilites.htm>>.

409. *See id.*

vast range of potential long-range consequences for which there appear to be more questions than answers. In such a state of affairs, a cautious approach seems advisable. Policy makers and the courts should take note that the appearance of Viagra potentially marks the onset of major new medical, sociological, and economic developments that could spawn a host of imposing new problems, some unprecedented.

At present, latitude exists to exercise such caution and accommodate such concerns without resort to a legal revolution. First, it is noteworthy that the Supreme Court's declaration in *Bragdon* that reproduction warrants consideration as a major life activity occurred as an interpretation of a statute, the Americans with Disabilities Act.<sup>410</sup> In fact, Justice Kennedy argued that the declaration was nothing but an articulation of the ADA's language.<sup>411</sup> Thus the Court in *Bragdon* has recognized an interest in reproduction only per statute, not per the Constitution. As such, the right recognized in *Bragdon* is distinct from rights related to procreation, the basis for which the Court has found not in any statute, but in the Constitution. Consequently, Congress would infringe no announced constitutional right if it withdrew potential recognition of a right to reproduction by amending the ADA.

Limiting or eliminating the obligation of financial support for Viagra would seem to require such an amendment, given that the Supreme Court has laid the foundation for an argument in favor of such coverage with its broad pronouncement in *Bragdon* that the ADA's mandate against discrimination in "major life activities" is not confined to activities in the "public, economic or daily" sense.<sup>412</sup> On the other hand, the courts have the means of applying the ADA in its current form without embracing a right to use Viagra, as seen in this note's discussion of *McGraw v. Sears, Roebuck & Co.*<sup>413</sup> *Bragdon* seems to imply that employer coverage of Viagra should be mandatory because it cures impotence, and this affliction, perhaps more than an HIV infection, fits the definition of "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."<sup>414</sup> However, a possible distinction is that impotence, in

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410. See *supra* text accompanying note 199.

411. See *Bragdon v. Abbott*, 524 U.S. 624 (1998).

412. See *id.* at 638.

413. See *supra* text accompanying notes 221-30.

414. *Id.* (citing 42 U.S.C. § 12102(2)(a) (1994)).

contrast to the onset of AIDS, is an impairment to sexual function that appears to be a natural consequence of the aging process. Arguably, then, the right to sexual potency is akin to the right to grow hair, and as such is distinct from the right to reproduction. The same rationale would seem to justify limiting government coverage of Viagra to Medicaid programs.

Above all, prudential considerations seem to dictate that the Supreme Court should tread carefully in its pronouncements that various forms of sexual liberty are protected by the Constitution. The Court appears to be aware of the dangerous line it has already walked in this area.<sup>415</sup> In addition to the possibility that the Court could compromise its credibility,<sup>416</sup> a declaration by the Court that the Constitution confers an implied substantive right renders it largely immune to federal and state regulation.<sup>417</sup> Hence, a lack of circumspection on the Court's part could deprive Congress of the legal authority to pass statutes to regulate Viagra. There appears to be ample grounds by which the Court may avoid such a problem. First, the legality of the Hyde amendment restricting funding for abortions suggests that there is no entitlement to funding for Viagra, even if sex were a constitutional right.<sup>418</sup> Second, although the Court has recognized certain consensual sexual activity as a constitutionally protected liberty,<sup>419</sup> this has not prevented it from upholding certain regulations of consensual sexual conduct, such as laws against adultery and incest.<sup>420</sup> Admittedly, such judicial caution may be unsatisfying to those inclined to demand free access to Viagra, especially the elderly poor.

## VI. Conclusion

Viagra seems poised to launch a new sexual revolution just as the birth control pill did in 1960. Unlike the fabled sexual revolution

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415. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 194 (1985) ("Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

416. See *id.* at 194-95.

417. See *id.* at 191.

418. See *supra* notes 305-09 and accompanying text.

419. See *supra* notes 322-44 and accompanying text.

420. See *supra* note 322 and accompanying text.

of the 1960s, the new sexual revolution appears as if it will be largely an elderly phenomenon, which, along with the AIDS epidemic, poses distinctive and unprecedented problems. The potential for such problems suggests that caution is appropriate in setting policy concerning claims of entitlement to Viagra under private and public health care plans. Although it is possible to make a case to the contrary, the law as it presently exists allows latitude for such caution.