

2012

When Reasonable Care Is Unreasonable: Rethinking the Negligence Liability of Adults with Mental Retardation

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McKnite, Jacob E. (2012) "When Reasonable Care Is Unreasonable: Rethinking the Negligence Liability of Adults with Mental Retardation," *William Mitchell Law Review*: Vol. 38: Iss. 4, Article 6.
Available at: <http://open.mitchellhamline.edu/wmlr/vol38/iss4/6>

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**WHEN REASONABLE CARE IS UNREASONABLE:
RETHINKING THE NEGLIGENCE LIABILITY OF
ADULTS WITH MENTAL RETARDATION**

Jacob E. McKnite[†]

I.	INTRODUCTION.....	1376
II.	HISTORY.....	1378
	A. <i>Origins of the Objective Standard of Care</i>	1378
	B. <i>Development of Exceptions to the Objective Standard for Children and Physically Disabled Adults</i>	1380
	C. <i>No Exception for Mentally Disabled Adults</i>	1384
III.	ASSESSING THE OBJECTIVE STANDARD FOR MENTALLY DISABLED ADULTS.....	1385
IV.	COURTS SHOULD ADOPT A SUBJECTIVE STANDARD FOR MENTALLY DISABLED ADULTS	1394
	A. <i>Public Policy and Modern Science Support a Subjective Mental Disability Standard</i>	1394
	B. <i>A Subjective Mental Disability Standard Is Feasible</i>	1396
	1. <i>Articulating a Subjective Standard</i>	1396
	2. <i>Borrowing from Other Contexts</i>	1397
	3. <i>Easy and Hard Cases</i>	1400
V.	IN THE ALTERNATIVE, COURTS SHOULD ADOPT A SUBJECTIVE STANDARD FOR ADULTS WITH MENTAL RETARDATION	1401
	A. <i>Mental Retardation and Other Mental Disabilities Have Been Considered Together with Mental Illness Under the Broad Category, "Mental Disability"</i>	1402
	B. <i>Even if All Mentally Disabled Adults Are Not Granted a Subjective Standard, Mentally Retarded Adults Should Be</i>	1402
VI.	CONCLUSION	1404

“It is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”¹

I. INTRODUCTION

In the United States today, an adult with a mental disability² is held to the standard of care of a nondisabled, reasonably prudent person.³ That is, a mentally retarded⁴ adult is held to the standard

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1. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. The term “mental disability”

represents a convenient, conceptual shorthand for a group of impairments that affect emotional, developmental, social, or cognitive functioning, and that frequently are treated similarly within the framework of the law. Included within “mental disability” are mental illness, mental retardation and certain other developmental disabilities, cognitive impairments, traumatic brain injury, learning disabilities, certain communication disorders, and alcoholism and other drug dependencies.

JOHN PARRY, CIVIL MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY 55 (2010). “Mental disability” is a relatively recent term. Legal terminology for this group of people has changed over time. Well into the twentieth century, “insane” was still used to refer to persons with mental illness, mental retardation, and other mental disabilities. *E.g.*, William J. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52, 52, 61 (1960) (considering “the mentally ill and mentally deficient” in turn, yet at times referring to members of both groups as “insane persons”). Mental disability is analogous to the American Psychiatric Association’s (APA) usage of “mental disorder.” *See* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxx–xxxii (4th ed., text rev. 2000) [hereinafter DSM-IV-TR].

3. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11(c) (2010) (“An actor’s mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child.”); *e.g.*, *Bashi v. Wodarz*, 53 Cal. Rptr. 2d 635, 639–41 (Ct. App. 1996) (citing CAL. CIV. CODE § 41 (West 2007)); *Johnson v. Lambotte*, 363 P.2d 165, 166 (Colo. 1961); *Jolley v. Powell*, 299 So. 2d 647, 648–49 (Fla. Dist. Ct. App. 1974); *Creasy v. Rusk*, 730 N.E.2d 659, 666–67 (Ind. 2000); *Schumann v. Crofoot*, 602 P.2d 298, 300–01 (Or. Ct. App. 1979); RESTATEMENT (SECOND) OF TORTS § 283B (1965); DAN B. DOBBS, THE LAW OF TORTS § 120 (2000).

4. The law has a history, mirroring society at large, of using demeaning language to describe individuals with mental retardation: “idiot,” “imbecile,” and “feeble-minded” were once regularly used. James W. Ellis, *Tort Responsibility of Mentally Disabled Persons*, 1981 AM. B. FOUND. RES. J. 1079, 1082 n.16. This note uses the clinical term “mental retardation,” as defined by the APA, because the APA’s

of care of a reasonably prudent person of average intelligence, and a mentally ill⁵ adult is held to the standard of care of a reasonably prudent person of sound mind. Adults with other mental disabilities, no matter how severe, are held to the objective, reasonably prudent person standard as well.⁶

At first blush, this rule may not seem fair. In fact, for over 150 years, legal commentators have decried this long-standing rule as unjust and violative of the fault principle inherent in modern tort law.⁷ Yet, despite the vocal criticism, American courts have shown remarkable uniformity in their adherence to the traditional rule,⁸ basing their stance on various policy rationales.⁹ As a result, adults with a mental disability are held to the objective¹⁰ standard of care.

classification of mental disorders “is recognized in courts as an accepted standard for diagnosing mental conditions.” PARRY, *supra* note 2, at 544. According to the APA:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B).

The onset must occur before age 18 years (Criterion C).

DSM-IV-TR, *supra* note 2, at 41. This note does not use the term “developmental disability,” as defined by federal statute, because that term includes not only mental retardation but also such mental disabilities as autism and epilepsy, which are not addressed here in an individual capacity. See 42 U.S.C. § 15002(8) (2006). The author is aware of the stigma that has been associated with the term mental retardation, in particular the usage of “retarded.” However, the term continues to be medically accurate and remains relevant in describing the individuals this note aims to address.

5. People with mental illness have also faced stigma in society and by what courts have called them; “mad,” “lunatic,” “insane,” and “crazy” have all been employed. Ellis, *supra* note 4, at 1082 n.16. The term “mental illness” is used by such advocacy groups as the National Alliance on Mental Illness and will be used in this note. NAT’L ALLIANCE ON MENTAL ILLNESS, <http://www.nami.org> (last visited Apr. 3, 2012). For the purposes of this note, mental illness is “a broad category of conditions that can include behavioral and emotional disorders, as well as cognitive and organic disorders related to neurological and medical conditions that affect the brain.” PARRY, *supra* note 2, at 55–56.

6. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11(c) (2010). The objective standard of care is described by the Restatement: “A person acts negligently if the person does not exercise reasonable care under all the circumstances.” *Id.* § 3.

7. See *infra* notes 73–74 and accompanying text.

8. See *infra* note 71 and accompanying text.

9. See *infra* notes 75–129 and accompanying text.

10. The standard is “objective” because it assesses an actor’s conduct against the ideal of a “reasonably prudent person,” rather than against the subjective qualities of the actor herself. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR

This note begins by examining the history of the objective standard of care and its application to children, physically disabled adults, and mentally disabled adults.¹¹ Part III takes a closer look at the objective mental disability standard,¹² and Part IV argues that a subjective mental disability standard is appropriate and feasible.¹³ Part V contends that, in the alternative, courts should apply a subjective standard with mentally retarded adults.¹⁴ The note concludes that a much-needed policy change may be achieved if courts consider individual types of mental disabilities separately.¹⁵

II. HISTORY

A. *Origins of the Objective Standard of Care*

Early tort law, through the writ of trespass, was by and large a system of strict liability.¹⁶ While a breach of the King's peace would be punished only if a defendant's conduct was morally blameworthy,¹⁷ an action in trespass could succeed regardless of the moral culpability of the defendant.¹⁸ An initial aim of both criminal law and tort law was to discourage violence and revenge.¹⁹ Over time the purpose of tort law shifted from punishing a

PHYSICAL & EMOTIONAL HARM § 3 cmt. a (2010). This note will employ the shorthand terms "subjective standard" and "objective standard" to denote, respectively, a standard of care that does or does not take into account certain qualities of a given actor—specifically, childhood, physical disability, and mental disability—in deciding whether the actor is liable for negligence. (At times, this note uses such variants as "subjective childhood standard" and "objective mental disability standard" to denote the application of these shorthand terms to a specific group.) This usage follows the Restatement's: "With physical disabilities, then—just as with childhood—tort law tailors the negligence standard to acknowledge the individual situation of the actor. To this extent, tort law employs what can be called a subjective rather than a fully objective standard of care." *Id.* § 11 cmt. b.

11. See *infra* Part II.

12. See *infra* Part III.

13. See *infra* Part IV.

14. See *infra* Part V.

15. See *infra* Part VI.

16. DOBBS, *supra* note 3, § 14, at 26 ("[A]t least according to the dominant view, *trespass* was initially a kind of strict liability tort."); Francis H. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9, 16–17 (1925).

17. E.g., *Weaver v. Ward*, (1616) 80 Eng. Rep. 284 (K.B.) 284 ("[F]elony must be done *animo felonico* . . .").

18. See DOBBS, *supra* note 3, § 14, at 26 (stating that "[t]he writ of *trespass* was based on direct force," not moral fault).

19. *Id.* § 8, at 12.

wrongdoer to providing redress to a private party.²⁰ The historical distinction between trespass and case²¹ eventually precipitated the introduction of the fault principle into English and American tort law.²²

In the nineteenth century, tort law began to develop a general basis for liability based on fault.²³ To govern negligence law, courts established a fault-based standard of care based on the notion of the “reasonable man,” against which tortfeasors would be judged.²⁴ According to this standard, an actor was required to exercise the care that a hypothetical “reasonably prudent man” would exercise under the circumstances to avoid “unreasonable risks of foreseeable harm.”²⁵ The “reasonable man”²⁶ was a person of ordinary intelligence, experience, and judgment.²⁷ He was expected to exercise ordinary care, not extraordinary care.²⁸

20. *E.g.*, DOBBS, *supra* note 3, § 2, at 4; Patrick Kelley, *Infancy, Insanity, and Infirmity in the Law of Torts*, 48 AM. J. JURIS. 179, 185 (2003); *see, e.g.*, McIntyre v. Sholty, 13 N.E. 239, 240 (Ill. 1887) (“There certainly can be nothing wrong or unjust in a verdict which merely gives compensation for the actual loss resulting from an injury inflicted.”).

21. The writ of case covered indirect injuries and “was associated with fault such as intent or negligence on the part of the defendant.” DOBBS, *supra* note 3, § 14, at 26.

22. *See id.* § 14, at 27 (noting that, by 1850, “courts tended to assume that some kind of fault—negligence or intentional wrong—was required to establish tort liability in most cases” (citing *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850))); Kelley, *supra* note 20, at 182–83. Today, “the great majority of tort cases turn on some kind of perception that the defendant is at fault in a significant way.” DOBBS, *supra* note 3, § 9, at 16.

23. DOBBS, *supra* note 3, §§ 112–113 (tracing this development).

24. *Id.* § 117, at 277. Professor Dobbs notes that courts have used different language to express the same idea: “The standard is often described as the standard of ordinary care, due care, or reasonable care. It may also be referred to as the reasonable person or prudent person standard.” *Id.* § 117, at 278 (citation omitted); *e.g.*, *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490 (P.C.) 492; 3 Bing. (N.C.) 468, 472 (“[T]here were no means of estimating the defendant’s negligence, except by taking as a standard, the conduct of a man of ordinary prudence . . .”).

25. DOBBS, *supra* note 3, § 116, at 275 (citing Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915)). *See supra* note 6 for the current Restatement formulation of the objective standard of care.

26. This is now more commonly referred to as the gender-neutral “reasonably prudent person.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. a (2010); DOBBS, *supra* note 3, § 117, at 277 n.4.

27. Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 47 (1915) (“A [reasonably prudent man] does not mean an ideal or perfect man, but an ordinary member of the community. He is usually spoken of as an ordinarily reasonable, careful, and prudent man.”).

28. *Id.*

Sometimes, though, the exercise of ordinary care was an extraordinary requirement. That is, it was sometimes impossible for a physically or mentally disabled person, or a child, to meet the reasonable man standard. Still, that actor was held to the standard of conduct of a reasonably prudent, non-disabled adult.²⁹ At the end of the nineteenth century, no disability—including the “disability” of childhood³⁰—was taken into account in assessing an actor’s conduct, even though her disability made it impossible for her to conform to the objective standard.³¹ Despite the general shift to a fault-based negligence system,³² disability—physical disability, mental disability, and childhood—was still governed by a strict liability rule because the members of each class were held to a standard that they often could not meet and were liable for harms that they often could not avoid.³³

B. Development of Exceptions to the Objective Standard for Children and Physically Disabled Adults

At early common law under the objective standard of care, children³⁴ and adults with physical disabilities³⁵ were held liable for the harm they negligently caused, even when they could not avoid that harm. By the early twentieth century, scholars began calling for a subjective standard for children “who had no capacity to avoid the conduct causing the harm.”³⁶ The Restatement (First) of Torts

29. Ellis, *supra* note 4, at 1082.

30. Because children generally have less capacity to avoid risks than a reasonably prudent adult does, this note will refer to childhood as a “disability” to introduce a rough analogy to physical and mental disabilities. In the past, the tort liability of children and mentally disabled people was analogized because members of both groups often failed to measure up to the reasonable man standard. See, e.g., Bohlen, *supra* note 16, at 12 (discussing “cases which hold an infant or insane person liable for a violation of another’s” personal or property integrity).

31. Kelley, *supra* note 20, at 183–95.

32. See David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 703–05 (1992); see Ellis, *supra* note 4, at 1082–83; *supra* note 22 and accompanying text.

33. E.g., Curran, *supra* note 2, at 65 (“To impose liability for negligence [on a mentally disabled person], . . . the court must blindly apply the objective reasonable man standard. [This] is in effect strict liability . . .”).

34. See Bohlen, *supra* note 16, at 9–10; Kelley, *supra* note 20, at 188.

35. See Terry, *supra* note 27, at 47.

36. Kelley, *supra* note 20, at 188, 193 (“These authors argued, simply, that it was unfair to hold someone civilly liable for conduct he could not have avoided because of his age . . .”).

exempted children from the objective standard of care,³⁷ famously stating that a child's "conduct is to be judged by the standard of behaviour to be expected from a child of like age, intelligence and experience."³⁸ This exemption continues to this day.³⁹

Given their immaturity and lack of experience, children are thought to need special protection.⁴⁰ Young children in particular are often incapable of taking necessary precautions to avoid harm to themselves and others.⁴¹ Due to their size, young children generally have less ability to cause harm than adults, which may account in part for the subjective childhood standard.⁴² Even older children are granted the benefit of a subjective standard, perhaps because most children eventually grow into fully functioning, reasonable adults.⁴³ In other words, the "disability" of childhood,

37. RESTATEMENT (FIRST) OF TORTS § 283 (1934) ("Unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."). While this section also appears to exempt "insane" persons, a Caveat states, "The [American Law] Institute expresses no opinion as to whether insane persons are required to conform to the standard of behaviour which society demands of sane persons for the protection of the interests of others." *Id.* at Caveat. The ALI's neutrality did not last long: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances." RESTATEMENT (SECOND) OF TORTS § 283B (1965).

38. RESTATEMENT (FIRST) OF TORTS § 283 cmt. e (1934).

39. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 10(a) (2010) ("A child's conduct is negligent if it does not conform to that of a reasonably careful person of the same age, intelligence, and experience . . .").

40. DOBBS, *supra* note 3, § 125; Kelley, *supra* note 20, at 196–203. A modern version of this sentiment is stated in RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 10 cmt. b (2010):

Children are less able than adults to maintain an attitude of attentiveness toward the risks their conduct may occasion and the risks to which they may be exposed. Similarly, children are less able than adults to understand risks, to appreciate alternative courses of conduct with respect to risks, and to make appropriate choices from among those alternatives.

41. See DOBBS, *supra* note 3, § 126.

42. At the same time, it is well established that children engaged in "adult" or "inherently dangerous" activities are held to the reasonably prudent person (adult) standard. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 10(c) (2010). When engaged in an inherently dangerous activity, a child has the potential to cause as much harm as an adult, which may explain tort law's departure from the usual subjective child standard.

43. However, the older a child gets, the less likely her age will shield her from being liable for negligence. *Id.* § 10 cmt. b. A child of seventeen can avoid risks of harm as well as an adult in many situations, and thus the precautions that a seventeen-year-old of "like . . . intelligence and experience" would take are often

and the special legal treatment children receive, is temporary. Furthermore, childhood is a universal fact of human experience, which may explain why the law takes it into account in assessing liability for negligence.⁴⁴

While the subjective standard for children gained traction, commentators began calling for a subjective standard for physically disabled adults.⁴⁵ The original hypothetical “reasonable man” was able-bodied,⁴⁶ but it was thought unjust to require a physically disabled person to take precautions that he was physically incapable of taking.⁴⁷

Physical disabilities are often fairly easy to diagnose,⁴⁸ which allows courts to expediently determine their nature and extent. The fact that many physical disabilities are readily observable makes them more difficult to falsify.⁴⁹ In addition, persons with physical disabilities are often able to advocate for themselves, which may partly explain the law’s allowance⁵⁰ of a subjective standard.

Unlike the subjective childhood standard, though, the subjective physical disability standard is often said to demand both less and more of a physically disabled person.⁵¹ While a physically

identical to the precautions that a reasonably prudent adult would take. *Id.*

44. Courts have articulated a policy of letting children be children, allowing them to explore and learn, and not quashing their curiosity via a constant threat of liability. *DOBBS*, *supra* note 3, § 125, at 296. A similar policy seems to justify the attractive nuisance doctrine. *See id.* § 236, at 614.

45. *Kelley*, *supra* note 20, at 195; Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 *HARV. L. REV.* 1, 13 (1927) (“In physical characteristics, the standard man appears to be identical with the actor. Unless we are to have a completely objective standard and eliminate all connotation of fault . . ., we cannot require that a person . . . shall do that . . . which it is physically impossible for him to do.”).

46. *See Kelley*, *supra* note 20, at 192; *Terry*, *supra* note 27, at 47 (“Every man, whether he is a standard man or not, is required to act as a standard man would.”).

47. *See Seavey*, *supra* note 45, at 13; *see also* W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 32, at 175–76 (5th ed. 1984) [hereinafter *PROSSER AND KEETON ON TORTS*] (“The person who is . . . physically disabled, is entitled to live in the world and to have allowance made by others for his disability, and the person cannot be required to do the impossible by conforming to physical standards which he cannot meet.”).

48. For example, deafness, blindness, or amputation.

49. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11 cmt. a (2010) (“The physical disabilities this Section takes into account generally need to be significant and objectively verifiable.”).

50. *Id.* § 11(a) (“The conduct of an actor with a physical disability is negligent only if the conduct does not conform to that of a reasonably careful person with the same disability.”).

51. *See id.* § 11 cmt. b; *DOBBS*, *supra* note 3, § 119, at 283.

disabled adult is not required to do what she is physically incapable of doing,⁵² she may be required to take additional precautions if the circumstances demand it.⁵³ For example, to exercise reasonable care, a blind person may be required to use a cane or some other assistance while crossing a busy street, and a wheelchair-bound person may be required not to operate her wheelchair on uneven terrain.⁵⁴ As such, the standard sometimes requires physically disabled people to offset the effects of their disability by anticipating certain risks and taking certain precautions.⁵⁵

In the mid-twentieth century, Dean Prosser crystallized⁵⁶ the subjective childhood and physical disability standards through his influential treatise⁵⁷ and his role as Reporter for the Restatement (Second) of Torts.⁵⁸ Prosser's argument for a subjective standard for both groups exerted a strong influence on courts and legal commentators.⁵⁹ While the limitations of both groups are taken into account, children have the most subjective standard.⁶⁰

52. *E.g.*, Ellis, *supra* note 4, at 1098 (“[T]he physically [disabled] are not required to take what would be for them impossible measures for their own protection or for the protection of others.”).

53. *Id.*

54. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11 cmt. b (2010).

55. See Ellis, *supra* note 4, at 1100 (“[T]he form of the subjective standard for the physically disabled incorporates the individual’s knowledge of his own handicap.”).

56. Kelley, *supra* note 20, at 199–201.

57. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 227–31 (1941).

58. RESTATEMENT (SECOND) OF TORTS § 283A (1965) (holding a child to the conduct reasonably expected of a child of “like age, intelligence, and experience”); *id.* § 283C (holding a physically disabled person to the standard of conduct “of a reasonable man under like disability”).

59. Kelley, *supra* note 20, at 200–01, 203 (“Prosser influenced the development of the law . . . by describing the law generally in a way that led lawyers and judges to assume that was what the law was.”).

60. The conduct of a physically disabled adult is compared to that of a reasonable adult with the same disability, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11(a) (2010), but the conduct of a child is compared to that of a reasonable child “of the same age, intelligence, and experience,” *id.* § 10(a). The childhood standard is more subjective because it takes into account several characteristics of the child, while the physical disability standard only considers the person’s disability. See DOBBS, *supra* note 3, § 119, at 281 (noting that the standard of care for physically disabled actors is “partly subjective”).

C. *No Exception for Mentally Disabled Adults*

While the law exempted children and physically disabled adults from the objective standard of care, it did not do so for mentally disabled adults. The objective mental disability standard is traced⁶¹ to dicta in *Weaver v. Ward*: “[I]f a lunatic hurt a man, he shall be answerable in trespass: and therefore no man shall be excused of a trespass . . . except it may be judged utterly without his fault.”⁶² Because the law of trespass in early seventeenth-century England was by and large a system of strict liability,⁶³ the statement in *Weaver* is consistent with the law of that time.⁶⁴

As early as the mid-nineteenth century, scholars began critiquing this standard.⁶⁵ In 1881, Justice Holmes, emphasizing the deterrence purpose of tort liability,⁶⁶ stated: “[I]f insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.”⁶⁷ Holmes reasoned that an actor who simply cannot comport his conduct to that of a reasonable man cannot be deterred from violating the reasonable

61. *E.g.*, Bohlen, *supra* note 16, at 13; Ellis, *supra* note 4, at 1082.

62. *Weaver v. Ward*, (1616) 80 Eng. Rep. 284 (K.B.) 284.

63. *See supra* note 16 and accompanying text.

64. Ellis, *supra* note 4, at 1082 (“Within the context of strict liability, the rule [that mentally disabled adults are held responsible for the torts they commit] made sense . . .”).

65. *See* THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 455–56 (1847) (“In the case of the *compos mentis*, . . . the act punished is that of a party competent to foresee and guard against the consequences of his conduct; and inevitable accident has always been held an excuse. In the case of the lunatic it may be urged, both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accidents.”), *quoted in* Kelley, *supra* note 20, at 184; *see also* Bohlen, *supra* note 16, at 18 n.15 (calling the objective mental disability standard “a curious recurrence to the early objective attitude of the law which looked to the objective wrongfulness of the act rather than the subjective culpability of the actor”).

66. Kelley describes Justice Holmes’s emphasis on deterrence: “Since the object and ultimately sole justification for tort liability is deterrence, liability should not be imposed on those who are undeterrable, either because they are incapable of foreseeing danger from their conduct or because the threat of liability can have no impact on their conduct.” Kelley, *supra* note 20, at 186.

67. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 109 (1881). While Justice Holmes appears to advance an *affirmative defense* for “pronounced” types of mental disability rather than a *subjective standard of care* that takes an actor’s mental disability into account to determine whether she was negligent in the first place, his criticism of the objective standard is apparent. *See infra* notes 150–51 and accompanying text, which address the difference between a subjective standard and an affirmative defense for mental disability.

man standard by the threat of tort liability.⁶⁸ Professor Francis H. Bohlen, writing in 1925, argued that holding mentally disabled people to the objective standard should yield to “the modern concept that liability must be founded on fault.”⁶⁹

While this line of reasoning has continued among legal commentators,⁷⁰ it has held little sway over courts, which have overwhelmingly treated mentally disabled defendants under the objective standard of care.⁷¹ According to the Restatement (Third) of Torts, “An actor’s mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child.”⁷²

III. ASSESSING THE OBJECTIVE STANDARD FOR MENTALLY DISABLED ADULTS

Because a mentally disabled person who negligently injured someone yet was incapable of avoiding her conduct is not morally at fault,⁷³ the objective mental disability standard does not accord with modern fault-based tort liability.⁷⁴ As a result, “American courts in common law jurisdictions identified [this issue] as a

68. See HOLMES, *supra* note 67, at 109.

69. Bohlen, *supra* note 16, at 31–32.

70. *E.g.*, Curran, *supra* note 2, at 65; Ellis, *supra* note 4, at 1082; Harry J.F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 LAW & PSYCHOL. REV. 1, 20 (1995).

71. *E.g.*, *Creasy v. Rusk*, 730 N.E.2d 659, 666–67 (Ind. 2000) (“We hold that a person with mental disabilities is generally held to the same standard of care as that of a reasonable person under the same circumstances without regard to the alleged tortfeasor’s capacity to control or understand the consequences of his or her actions.”); *Gould v. Am. Family Mut. Ins.*, 543 N.W.2d 282, 286 (Wis. 1996) (“We remain hesitant to abandon the long-standing rule in favor of a broad rule adopting the subjective standard for all mentally disabled persons.”). Mentally disabled *plaintiffs*, on the other hand, were historically treated under a subjective negligence standard. *E.g.*, Terry, *supra* note 27, at 47 (“In the case of contributory negligence there is an exception to [the reasonably prudent person] rule in the case of . . . persons of unsound mind.”). See *infra* notes 152–60 and accompanying text for a discussion of contributory negligence and the law’s historical dual treatment of mentally disabled plaintiffs and defendants.

72. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11(c) (2010). In line with the courts and with the previous Restatements, section 11(c) covers both mental retardation and mental illness, among other “mental or emotional disabilit[ies].” See *id.*

73. See, *e.g.*, Bohlen, *supra* note 16, at 31 (“[Where liability] is imposed upon persons capable of fault only if they have been guilty of fault, [mental disability], which destroys the capacity for fault, should preclude the possibility of liability.”).

74. Curran, *supra* note 2, at 65; see Owen, *supra* note 32, at 703–05.

question of public policy and unanimously chose to retain the [objective standard].”⁷⁵ The policy rationales that courts developed can be organized into five categories: (1) incentive, (2) strict liability, (3) administrative difficulty, (4) integration, and (5) counterbalancing. Upon examination, the rationales for the current rule are inadequate to justify the law’s treatment of adults with mental disabilities.⁷⁶

According to the incentive rationale, if mentally disabled adults are held liable for their torts, their guardians or heirs will be economically motivated to ensure that their charges do not cause harm.⁷⁷ This rationale has been roundly criticized⁷⁸ because an heir or guardian would be more motivated to ensure his charge does no harm if he were *directly* liable for the mentally disabled person’s actions.⁷⁹ Furthermore, this rationale incentivizes guardians and caretakers to confine their charges rather than risk

75. Ellis, *supra* note 4, at 1083.

76. See *id.* at 1090; Korrell, *supra* note 70, at 45.

77. McIntyre v. Sholty, 13 N.E. 239, 240 (Ill. 1887); Schumann v. Crofoot, 602 P.2d 298, 300–01 (Or. Ct. App. 1979); RESTATEMENT (SECOND) OF TORTS § 283B cmt. b(4) (1965).

78. Korrell notes that the incentive rationale all but died before it was resuscitated by law and economics scholars. Korrell, *supra* note 70, at 28 (citing WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 85 (1987)). The economic incentive theory contends that holding mentally disabled people to a strict liability standard expends fewer judicial resources and better incentivizes safe conduct. *Id.* at 30–32. However, the same could be said for children or physically disabled people, and “under our fault-based negligence regime, the fact that it may be more efficient to hold a mentally disabled defendant to a standard he cannot meet is of no consequence.” *Id.* at 31–32. Korrell also rejects Landes and Posner’s comparison of mental disability and abnormally dangerous activities. *Id.* at 32–33. See *infra* note 93 for a comparison between the objective mental disability standard and other instances of strict liability in modern tort law.

79. Korrell, *supra* note 70, at 29; David E. Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 GEO. WASH. L. REV. 17, 38 (1981). Along the same lines, Professor Bohlen argued:

It would seem that if the security of the public demanded that the family of insane persons should be required to prevent them from becoming a menace . . . the proper way to effect this would be by imposing upon them the duty to restrain the insane person and by making [the family] responsible for his insane acts It is neither effective nor just to impose upon the family the indirect incentive of self-interest at the price of making the insane person answerable for the faults of those who should be his guardians.

Bohlen, *supra* note 16, at 35 n.38. Even Kelley, who opposes a subjective standard for mental disability, rejects the incentive rationale. Kelley, *supra* note 20, at 206.

liability,⁸⁰ which is contrary to modern public policy.⁸¹

The strict liability rationale has three main expressions: (1) “where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it”;⁸² (2) if a mentally disabled person has money, it is only fair to require her to compensate someone she injures;⁸³ and (3) the primary purpose of tort law is compensation.⁸⁴ The first expression is simply a statement of strict liability.⁸⁵ It accurately *describes* an objective standard for mental disability, but it does not *explain* or support that standard. Professor Bohlen called this principle “a mere restatement of the old concept of liability without fault dressed up in a new form so as to appear modern and just.”⁸⁶ The second expression is a subset of the first, addressing mentally disabled persons who are financially able to compensate others, but it similarly does not explain *why* they should be required to do so.

The third expression, that compensation is the primary purpose of tort law, presents a more substantive argument for the objective mental disability standard. At the end of the nineteenth century, Judge Thomas M. Cooley explained that the compensation goal of tort law, unlike the punishment goal of criminal law, supports tort liability for mentally disabled people.⁸⁷ Cooley’s

80. Ellis, *supra* note 4, at 1085–86.

81. See 42 U.S.C. § 12101(a)(8)(2006), *amended by* 42 U.S.C. § 12101(a)(7) (Supp. III 2009) (“The Congress finds that . . . the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . .”). While the Americans With Disabilities Act does not directly address the tort liability of people with mental disabilities, its principles of equality are relevant to the present inquiry.

82. *Seals v. Snow*, 254 P. 348, 349 (Kan. 1927); *see also Jolley v. Powell*, 299 So. 2d 647, 649 (Fla. Dist. Ct. App. 1974); *Williams v. Kearby*, 775 P.2d 670, 672 (Kan. Ct. App. 1989); *Williams v. Hays*, 38 N.E. 449, 449–50 (N.Y. 1894); *Beals v. See*, 10 Pa. 56 (1848).

83. RESTATEMENT (SECOND) OF TORTS § 283B cmt. b(3) (1965).

84. *Delahanty v. Hinkley*, 799 F. Supp. 184, 186 (D.D.C. 1992); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 56 (Callaghan & Co. 1907) (1878) (“There is no distinction as to liability between torts of nonfeasance and of misfeasance, because the ground of liability is the damage caused by the tort.” (citing *Williams v. Hays*, 38 N.E. 449, 451–52 (N.Y. 1894))).

85. Ellis, *supra* note 4, at 1084; *see Seidelson, supra* note 79, at 37–38.

86. Bohlen, *supra* note 16, at 17.

87. COOLEY, *supra* note 84, at 54–56. Judge Cooley contrasted the role of compensation in criminal law and tort law: “[C]ompensation in the case of public wrongs is usually a subordinate purpose, while in the case of private wrongs it is the substantial purpose of the law.” *Id.* at 10.

theory is described by Kelley:

In the criminal law, where the object is to punish wrongful acts done with evil intent, we do not punish . . . [mentally disabled people] who lack the capacity to form an evil intent. . . . The purpose of civil liability for a tortious injury, on the other hand, is not to punish one who acted with evil intent but to compensate a wrong suffered⁸⁸

This is, in essence, a strict liability approach because the emphasis is not on whether the defendant was at fault but on whether the plaintiff suffered harm. A mentally disabled defendant who was incapable of adhering her conduct to that of a reasonably prudent person is more accurately characterized as “innocent” than at fault.⁸⁹

In contrast to Judge Cooley, Justice Holmes argued that the basic purpose of tort law is to deter undesirable behavior, which cannot be accomplished by holding a mentally disabled person to a standard of conduct she is incapable of meeting.⁹⁰ In other words, some mentally disabled people cannot be deterred from engaging in certain risky conduct because of their disability.⁹¹

The debate about the “primary” purpose of tort law continues to this day.⁹² However, compensation and deterrence are dual

88. Kelley, *supra* note 20, at 185.

89. See SEDGWICK, *supra* note 65, at 456.

90. See *supra* notes 66–68 and accompanying text.

91. Some argue that mentally disabled people who cannot control their conduct to such an extent that they present a high risk of injuring others in the community should not be allowed to live in the community. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11 cmt. e (2010). While such a policy may be justified for severely mentally disabled people who present the highest risk of injuring others, it does not extend to other mentally disabled people who do not present an unreasonable risk to others in the community. Society has made a deliberate decision to integrate mentally disabled people into the community, whenever possible, which is incongruent with a policy of confinement. 42 U.S.C. § 12101(a)(7) (Supp. III 2009); see *infra* note 115.

92. *E.g.*, Kelley, *supra* note 20, at 211–19. Kelley argues that the purpose of the tort system is “to redress private injustices, defined as objectively wrongful breaches of the community’s safety conventions.” *Id.* at 181. For example, if a plaintiff had no reason to know of a defendant’s mental disability and thus had “reasonable expectations” that the defendant would follow a safety convention of the community, but the defendant did not follow it and as a result the plaintiff was injured, the plaintiff was objectively wronged and should be compensated. See *id.* at 208 (citing Seidelson, *supra* note 79, at 19–20), 213–19. On the other hand, if the plaintiff did not have reasonable expectations that the defendant would follow the safety convention because she knew of the defendant’s mental disability, the plaintiff was not objectively wronged and should not be compensated. See *id.* at 213–19. However, why should a plaintiff’s “reasonable expectations” outweigh a

purposes that should both be present before liability is imposed.⁹³ Deterrence without compensable injury does not give rise to tort liability;⁹⁴ absent compelling policy reasons,⁹⁵ neither should compensable injury without deterrence. In either case, the foundation of modern tort liability is half missing.

The administrative difficulty rationale has three basic expressions as well: (1) if mentally disabled people are granted a subjective standard, unscrupulous tortfeasors will feign a mental disability;⁹⁶ (2) a subjective mental disability standard would result in severe and costly evidentiary problems, as seen with the insanity defense in criminal law;⁹⁷ and (3) it is too difficult to draw a line between mental disability and mere “variations of temperament, intellect, and emotional balance which cannot, as a practical matter, be taken into account in imposing liability for damage done.”⁹⁸ Each argument will be considered in turn.

As to the first administrative difficulty argument—that people will affect a mental disability to avoid liability—modern psychology

defendant’s actual ability to conform to a community’s safety convention? See *infra* notes 173–76 and accompanying text for a discussion of the role of notice in a subjective mental disability standard.

93. DOBBS, *supra* note 3, § 8, at 12 (“The most commonly mentioned aims of tort law are (1) compensation of injured persons and (2) deterrence of undesirable behavior.”). In general, there must be sufficient policy reasons for allowing the tension to break in favor of compensation. Besides the objective mental disability rule, other pockets of strict liability in modern tort law involve vicarious liability, products liability, abnormally dangerous activities, wandering farm animals, and exotic pets. *Id.* §§ 333, 342–348, 352. With abnormally dangerous activities, exotic pets, and products liability, there is a high likelihood of severe harm despite the actor exercising every reasonable precaution. *See id.* §§ 351, 353. The average mentally disabled person living in the world does not pose a comparable risk. Moreover, a defendant *chooses* to engage in each of the above activities that give rise to strict liability, while a mentally disabled person does not choose to be mentally disabled. And, with vicarious liability, products liability, and some abnormally dangerous activities, the defendant engages in the activity for her own pecuniary benefit, which can hardly be said of a mentally disabled person living in the world. Korrell, *supra* note 70, at 44. Korrell notes that, unlike employers or manufacturers of defective products, mentally disabled people are not good risk distributors. *Id.*

94. *See* DOBBS, *supra* note 3, § 377, at 1047.

95. *See supra* note 93.

96. *See* McIntyre v. Sholty, 13 N.E. 239, 240 (Ill. 1887); Williams v. Kearbey, 775 P.2d 670, 672 (Kan. Ct. App. 1989) (quoting RESTATEMENT (SECOND) OF TORTS § 895J cmt. a (1977)); RESTATEMENT (SECOND) OF TORTS § 283B cmt. b(2) (1965).

97. *See* Jolley v. Powell, 299 So. 2d 647, 649 (Fla. Dist. Ct. App. 1974); Schumann v. Crofoot, 602 P.2d 298, 300 (Or. Ct. App. 1979) (quoting RESTATEMENT (SECOND) OF TORTS § 283B cmt. b(2) (1965)).

98. RESTATEMENT (SECOND) OF TORTS § 283B cmt. b(1) (1965).

has advanced to such an extent that diagnostic criteria are readily available for virtually any mental disability, making it difficult to falsify one.⁹⁹ Courts regularly rely on these criteria.¹⁰⁰ Moreover, unlike an accused, a tort defendant is unlikely to feign a mental disability in order to avoid *civil* liability.¹⁰¹

The next administrative difficulty argument, that a subjective mental disability standard would wreak havoc in tort law, is a specter for two reasons. First, mental disability is already assessed in other civil contexts without disastrous administrative consequences, including guardianship, commitment, and testamentary capacity proceedings.¹⁰² When evaluating a plaintiff's or defendant's mental disability, triers can rely on expert opinion as well as their own experience and common sense.¹⁰³ What's more, courts already take mental disability into account in the case of children,¹⁰⁴ apparently without undue difficulty. Second, unlike the insanity defense, a subjective standard would not be all-or-nothing but would assess a mentally disabled adult's conduct against the standard of a reasonably prudent person with the same mental disability.¹⁰⁵ Under a subjective standard, the same mentally

99. See generally DSM-IV-TR, *supra* note 2 (providing diagnostic criteria for all mental disabilities recognized at the time of publication).

100. See *supra* note 4; see, e.g., Fuller v. J.P. Morgan Chase, 423 F.3d 104, 107 (2d Cir. 2005) (describing the DSM-IV as an "objective authority on the subject of mental disorders"); *In re Mohawk Valley Psychiatric Ctr.*, 818 N.Y.S.2d 766, 770–71 (N.Y. Sup. Ct. 2006) ("[B]y law, to determine if [a] patient has a mental disorder, [this] court must take judicial notice of and apply the DSM-IV.").

101. Bohlen, *supra* note 16, at 36 n.38 ("[W]hile a [criminal] defendant may [feign insanity] . . . to escape imprisonment or death, it seems improbable that he would so discredit himself to escape the payment of money damages."); Ellis, *supra* note 4, at 1087 (doubting that tort defendants would be "willing to assume the stigmatizing effects" of mental disability "when money damages are the only penalty at issue"); Seidelson, *supra* note 79, at 39.

102. Ellis, *supra* note 4, at 1089.

103. *Id.*; see Seidelson, *supra* note 79, at 38–39.

104. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 10 cmt. c (2010) ("Although [an adult's] . . . mental or emotional disability is . . . not generally taken into account, under the more flexible rules applicable to children[,] any evidence of mental or emotional deficit can be considered."); Ellis, *supra* note 4, at 1103. Thus, a child with a mental disability has the benefit of a subjective standard until the day she turns eighteen, at which point she is treated like an adult with no mental disability.

105. Ellis, *supra* note 4, at 1108 ("[A] subjective standard . . . [would] not immunize mentally disabled people from responsibility for their torts, but [would] relieve them of liability] . . . when they can show that they did their best to avoid the accident and that further preventive measures were beyond their ability."). See *infra* Part IV.B.1 for a full description of the author's proposed subjective

disabled defendant could be found negligent under one set of facts but not negligent under another, even when she accidentally caused someone harm in both circumstances.¹⁰⁶

The advances of modern psychology and medicine dispose of the third administrative difficulty argument as well: that it is too difficult to draw a line between mental disability and legally insignificant variations in temperament, emotions, and intellect. Courts using a subjective mental disability standard would likely require a sufficient magnitude of mental disability in order for it to be relevant.¹⁰⁷ Some cases may be close calls. Yet, the fact that the administration of a subjective mental disability standard would require skill and care does not justify eschewing it altogether.¹⁰⁸

Similar to the administrative difficulty rationale, it may be argued that, if an adult's mental disability is taken into consideration in determining her standard of care, so too should an adult's accident proneness, clumsiness, or ineptitude.¹⁰⁹ In response, a clumsy or inept person with no mental disability can probably adjust his conduct to avoid certain situations where his clumsiness or ineptitude bears a high risk of injuring others, based on prior experience. In contrast, a mentally disabled person may not be able to do so because her disability impairs her ability to adjust her conduct, at least to some degree. Thus, it would seem that an accident-prone adult without a mental disability is, on average, better able to anticipate and avoid risks than an adult with a mental disability, and only the latter should receive the benefit of a subjective standard of care.

The integration rationale¹¹⁰ has been formulated in two basic

mental disability standard.

106. For example, an adult with mild mental retardation could be found liable for driving into a pedestrian yet not liable for bumping into and knocking over an elderly person. A factual inquiry into either set of circumstances would determine her fault, not an inflexible rule.

107. See Ellis, *supra* note 4, at 1089; *infra* note 143 and accompanying text.

108. Seidelson, *supra* note 79, at 40. Our legal system asks juries to use skill and care in deciding questions of fact in challenging cases all the time. Why should this area of law be different? Cf. Dillon v. Legg, 441 P.2d 912, 918 (Cal. 1968) ("Indubitably juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach some erroneous results. But such fallibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible [rule].").

109. DOBBS, *supra* note 3, § 121, at 286–87.

110. For reasons soon to be apparent, this could more aptly be called the "anti-integration" rationale. See *infra* notes 117–22 and accompanying text.

ways: (1) “if mental defectives are to live in the world they should pay for the damage they do;”¹¹¹ and (2) “deinstitutionalization [of mentally disabled people] becomes more socially acceptable if innocent victims are at least assured of [the] opportunity for compensation when they suffer injury.”¹¹² Considered in light of deinstitutionalization,¹¹³ these rationales are unsound. The era of institutionalizing mentally disabled people mars this nation’s history.¹¹⁴ As institutions for the mentally disabled were closed and the former residents began integrating¹¹⁵ into the community, they were “unevenly and grudgingly” received.¹¹⁶ The two expressions of the integration rationale reveal a begrudging attitude toward integration.¹¹⁷

The first expression is blatantly hostile to the notion of people with mental disabilities living in the world because it makes them insurers of their neighbors.¹¹⁸ Such hostility goes against society’s decision to integrate people with mental disabilities.¹¹⁹ Thinly

111. RESTATEMENT (SECOND) OF TORTS § 283B cmt. b(3) (1965).

112. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11 cmt. e (2010).

113. Deinstitutionalization refers to the closure of large treatment facilities for people with mental disabilities, allowing the former residents to live in the community and receive more humane treatment. *See* *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 609 (1999) (Kennedy, J., concurring) (“[D]einstitutionalization’ has permitted a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity.”).

114. *See* *Ellis*, *supra* note 4, at 1085 (describing “an era when numerous laws were passed to sterilize the mentally [disabled] and to isolate them for life in institutions”). Specifically addressing the institutionalization of mentally retarded individuals, Justice Marshall wrote: “[T]he mentally retarded have been subject to a ‘lengthy and tragic history’ . . . of segregation and discrimination that can only be called grotesque.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 461 (1985) (Marshall, J., concurring) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 303 (1978)).

115. Integration is “a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so” Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 843 (1966). While Professor tenBroek championed integration (“integrationism”) for people with physical disabilities, the concept is applicable to people with mental disabilities.

116. *Ellis*, *supra* note 4, at 1107.

117. *Id.* at 1085 (“The tone of [the Restatement (Second)’s expression] betrays, at best, a grudging acceptance of the fact that mentally disabled people do, in fact, live in the world.”).

118. *See* *Bohlen*, *supra* note 16, at 31–32 (contrasting mentally disabled defendants with actual insurers and with those who engage in abnormally dangerous activities).

119. *See, e.g.*, Developmental Disabilities Assistance and Bill of Rights Act of

disguised, this rationale is yet another iteration of strict liability: mentally disabled people should pay regardless of fault.

The second expression is less openly hostile to people with mental disabilities and even purports to help them, and it is less obviously a strict liability rationale. It begs the question, though: Why should deinstitutionalization be borne on the backs of those who were wrongly¹²⁰ institutionalized in the first place? The integration movement seeks to correct a wrong from the past. How does holding mentally disabled people living in the community to an objective standard of care—that is, imposing strict liability—accord with the policies behind the Americans with Disabilities Act and other mental disability legislation?¹²¹ While an injured party may be innocent, a mentally disabled injuring party who could not meet the standard of a reasonably prudent person through no fault of his own is also innocent.¹²²

Finally, the counterbalancing rationale holds that, since people with mental disabilities are often unable to make up for their disability, extending a subjective standard would be unjustly one-sided.¹²³ Unlike physically disabled people,¹²⁴ mentally disabled people often cannot compensate for their deficiencies.¹²⁵ For mentally disabled people, their mind—and hence their ability to avoid risky conduct—is directly affected by their disability.¹²⁶

Admittedly, a subjective mental disability standard would be more one-sided than the subjective physical disability standard.

2000, Pub. L. No. 106-402, § 101(a)(1), 114 Stat. 1677, 1678 (codified at 42 U.S.C. § 15001(a)(1) (2006)) (“Congress finds that . . . disability is a natural part of the human experience that does not diminish the right of individuals with developmental disabilities to live independently . . . and to fully participate in and contribute to their communities . . .”).

120. See *supra* note 114.

121. See 42 U.S.C. § 12101(a)(7) (Supp. III 2009); 42 U.S.C. § 15001(a)(1) (2006).

122. See SEDGWICK, *supra* note 65, at 456.

123. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11 cmt. e (2010).

124. See *supra* notes 51–55 and accompanying text.

125. Ellis, *supra* note 4, at 1100–01 (“The ability to plan ‘around’ the disability will be available less frequently for mentally disabled persons. The fact that it is the individual’s mind that is affected will reduce the occasions when the person can identify that his disability is likely to create [risks] for himself or others.”); Korrell, *supra* note 70, at 47 (“When the faculties impaired are the defendant’s cognitive ones, his other abilities will not be of much help in avoiding the creation of risk.”).

126. See *infra* Part V.B for a discussion of this point vis-à-vis mentally retarded adults.

Yet, the childhood standard is similarly one-sided—i.e., children are not expected to “make up for” their childhood.¹²⁷ Given the absence of other compelling reasons for the objective standard,¹²⁸ as well as federal mandates to treat mentally disabled people with parity,¹²⁹ the balance tips in favor of not requiring a counterbalancing effect as part of a subjective mental disability standard.

IV. COURTS SHOULD ADOPT A SUBJECTIVE STANDARD FOR MENTALLY DISABLED ADULTS

Neither reason nor policy supports the objective mental disability standard, and accordingly courts should adopt a subjective standard for adults with mental disabilities. This is not a novel conclusion,¹³⁰ but it is one worth repeating.

A. *Public Policy and Modern Science Support a Subjective Mental Disability Standard*

Public policy favors a subjective mental disability standard. Adopting a subjective standard may not impact a large number of cases,¹³¹ but it would bring the negligence liability of mentally disabled adults in line with the full citizenship status that society has carved out for them.¹³² Though not articulated as a “rationale,” another likely reason for the objective standard is the public’s historical lack of familiarity with, fear of, and hostility toward mentally disabled people as compared to physically disabled people.¹³³ As stigma against people with mental disabilities

127. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 10(a) (2010).

128. See *supra* notes 77–122 and accompanying text.

129. E.g., 42 U.S.C. § 12101(a)(7) (Supp. III 2009); 42 U.S.C. § 15001 (2006).

130. E.g., Bohlen, *supra* note 16, at 31; Curran, *supra* note 2, at 65; Ellis, *supra* note 4, at 1108; Korrell, *supra* note 70, at 56.

131. Ellis, *supra* note 4, at 1109.

132. See 42 U.S.C. § 12101(a)(7) (Supp. III 2009); 42 U.S.C. § 15001(a)(1) (2006); Ellis, *supra* note 4, at 1109 (“[O]n balance, [adoption of a subjective standard] may be seen as a modest step toward equitable treatment of the mentally handicapped . . .”).

133. Curran, *supra* note 2, at 65; Korrell, *supra* note 70, at 46 (“Though the era of fear and of misunderstanding the nature of mental disability has largely passed, it has left us with a legacy of laws designed to restrict the lives of the mentally [disabled] . . .”). Ellis notes that “mentally disabled people were thought to be a major threat to society in the early years of [the twentieth century],” which left a “legacy [of] residual fear and discomfort about the mentally disabled.” Ellis, *supra*

decreases and mental disabilities come to be better understood and managed, this rationale loses force.¹³⁴ Prejudice against a historically persecuted class of citizens does not justify the objective standard. As integration increases society's exposure to people with mental disabilities,¹³⁵ one barrier to a subjective standard is decreasing: ignorance.¹³⁶

In addition, modern medical and psychological advances have broken down the stark distinction between physical and mental disease,¹³⁷ which undermines tort law's sharp divide between physical and mental disabilities, and further bolsters the argument for a subjective mental disability standard.¹³⁸ Modern science has shown that there is a physical aspect to—if not a physical origin of—many instances of mental disability.¹³⁹ And as discussed above,¹⁴⁰ modern psychology allows courts to better identify the presence and severity of a host of mental disabilities, which makes a subjective mental disability standard more manageable today than in the past.

note 4, at 1099. “This negative side of society's current ambivalence toward the mentally [disabled] may be what the American Law Institute has in mind when it refers to the public's ‘greater familiarity’ with physical [disabilities].” *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 283C cmt. b (1965)).

134. See Korrell, *supra* note 70, at 46.

135. Ellis, *supra* note 4, at 1107.

136. Still, as society has become more familiar with mental disabilities over the past fifty years, the mental disability rule has not changed. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11(c) (2010) (stating essentially the same rule for mental disability as that stated in section 283B of the Restatement (Second) of Torts, published in 1965).

137. *E.g.*, George L. Engel, *The Need for a New Medical Model: A Challenge for Biomedicine*, 196 SCIENCE 129, 130–31 (1977) (arguing that the biomedical model of disease inappropriately emphasizes the biological (somatic) factors of disease and excludes the psychosocial factors of disease). Dr. Engel examined diabetes as a representative of “somatic disease” and schizophrenia as a representative of “mental disease” and concluded that both somatic and psychosocial factors are critical to each: “[V]irtually each of the symptoms classically associated with diabetes may also be expressions of or reactions to psychological distress, just as ketoacidosis and hypoglycemia may induce psychiatric manifestations, including some considered characteristic of schizophrenia.” *Id.* at 131–32.

138. Korrell, *supra* note 70, at 14–19 (“[The objective mental disability standard] makes distinctions between mental and physical problems which modern medicine does not.”).

139. *E.g.*, PARRY, *supra* note 2, at 56 (noting that current research suggests that “at least some [mental illnesses] have a genetic or biochemical component”); DEBORAH ZUCKERMAN & MARC CHARMAZ, *MENTAL DISABILITY LAW: A PRIMER* 5–6 (John Parry & Deborah Zuckerman eds., 4th ed. 1992) (describing several biological and organic causes of mental retardation).

140. See *supra* notes 99–100 and accompanying text.

B. A Subjective Mental Disability Standard Is Feasible

1. Articulating a Subjective Standard

Not only is a subjective mental disability standard appropriate, it is feasible. To borrow from the Restatement (Third) of Torts, the expression of a subjective mental disability standard can parallel the subjective physical disability standard: *The conduct of an actor with a mental disability is negligent only if the conduct does not conform to that of a reasonably careful person with the same mental disability.*¹⁴¹ While some may object that such a formulation is contradictory,¹⁴² such an objection obscures the fact that mentally disabled adults have a range of functioning levels and abilities, and that many of them have the capacity to avoid some, if not many, risks. Similar to the subjective physical disability standard, the mental disabilities taken into account would “generally need to be significant and objectively verifiable.”¹⁴³

Examining a case that applies the subjective physical disability standard helps illustrate how a subjective mental disability standard would function. In *Roberts v. State*,¹⁴⁴ Burson, a blind concession stand operator, bumped into and injured the plaintiff while walking from his stand to the men’s bathroom in the lobby of a U.S. Post Office building.¹⁴⁵ Burson had worked at the stand for over three years and did not use a cane when making short trips inside the building, instead relying on his “facial sense.”¹⁴⁶ The court found that Burson was familiar with the building and cited expert testimony that blind people often rely on techniques other than a cane when walking in a familiar setting.¹⁴⁷ One expert noted that, in a busy environment, a “cane can be more of a hazard than an asset.”¹⁴⁸ The court concluded:

141. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11(a) (2010) (“The conduct of an actor with a physical disability is negligent only if the conduct does not conform to that of a reasonably careful person with the same disability.”).

142. Ellis is sensitive to this concern: “[T]he reasonable person with similar mental [disability]’ is a formulation that is at least initially confusing for courts and juries . . .” Ellis, *supra* note 4, at 1101.

143. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11 cmt. a (2010).

144. 396 So. 2d 566 (La. Ct. App. 1981).

145. *Id.* at 566–67.

146. *Id.* at 567–68.

147. *Id.* at 568.

148. *Id.*

Upon our review of the record, we feel that plaintiff has failed to show that Burson was negligent. Burson testified that he was very familiar with his surroundings He had special mobility training and his reports introduced into evidence indicate good mobility skills. He explained his decision to rely on his facial sense instead of his cane for these short trips in a manner which convinces us that it was a reasoned decision.¹⁴⁹

The court assessed Burson's conduct by examining all the circumstances, in light of Burson's physical disability and with the aid of expert testimony. A subjective mental disability standard would involve the same type of analysis.

Courts could take an adult's mental disability into account either as a subjective standard of care or as an affirmative defense.¹⁵⁰ While both approaches would bring about greater parity for adults with mental disabilities, a subjective standard of care is preferable. A child or physically disabled defendant has the benefit of a subjective standard, where the plaintiff has the burden of proof to establish that the defendant's conduct did not meet the relevant standard.¹⁵¹ While an affirmative defense for mentally disabled defendants is better than the current rule, there is no credible reason why mentally disabled defendants should have a greater burden of proof than children and physically disabled defendants.

2. *Borrowing from Other Contexts*

A subjective mental disability standard is further supported by courts' former experience¹⁵² of taking a *plaintiff's* mental disability

149. *Id.* at 569.

150. After his critique of the objective mental disability standard, Korrell articulates an affirmative defense for mental disability as a four-part test:

If the defendant, because of his [mental] disability, (1) could not appreciate the consequences of or the risks posed by his conduct, or (2) could not comprehend the circumstances under which he acted, or (3) lacked the capacity to act differently or to refrain [from acting], and (4) thus could not conform his conduct to the standard required, his failure to conform to the law will be excused.

Korrell, *supra* note 70, at 49.

151. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 10(a), 11(a) (2010).

152. See, e.g., *Seattle Elec. Co. v. Hovden*, 190 F. 7, 9 (9th Cir. 1911) (“In determining the existence of [contributory] negligence, we are not to hold the plaintiff liable for faults which arise from inherent physical or mental defects or want of capacity to appreciate what is and what is not negligence”) (quoting

into account when determining contributory negligence.¹⁵³ In the past, a majority of jurisdictions held that an adult plaintiff with a mental disability had the benefit of a subjective contributory negligence standard.¹⁵⁴ For decades, mentally disabled adults encountered a dual negligence standard: a defendant faced an objective standard while a plaintiff faced a subjective standard.¹⁵⁵

The dual standard may stem from the difference in public sentiment toward mentally disabled plaintiffs and defendants.¹⁵⁶ While the threat of mentally disabled defendants injuring others was long imbedded in the social imagination,¹⁵⁷ mentally disabled plaintiffs who were unable to adequately defend themselves from being injured were likely seen in a more sympathetic light.¹⁵⁸ Another explanation for the dual standard is that at least two rationales—incentive and integration—“lose much of their force” when applied to mentally disabled plaintiffs.¹⁵⁹ Whatever the reasons, courts throughout the country successfully administered a subjective standard for mentally disabled plaintiffs,¹⁶⁰ which indicates that courts are capable of administering a subjective

Balt. & Potomac R.R. Co. v. Cumberland, 176 U.S. 232, 238 (1900)); Noel v. McCaig, 258 P.2d 234, 241 (Kan. 1953) (“Since knowledge and appreciation of the peril are essential elements of contributory negligence, it is obvious that an inquiry into the age, experience, and mental capacity of the plaintiff is material where contributory negligence is invoked as a defense.” (internal quotation marks omitted)). Korrell cites courts’ experience of taking a plaintiff’s mental disability into account as support for his mental disability defense. Korrell, *supra* note 70, at 47–49.

153. The contributory negligence doctrine is “[t]he principle that completely bars a plaintiff’s recovery if the damage suffered is partly the plaintiff’s own fault.” BLACK’S LAW DICTIONARY 378 (9th ed. 2009).

154. See Bohlen, *supra* note 16, at 29–30; Ellis, *supra* note 4, at 1090–91; Korell, *supra* note 70, at 48–55; see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11 cmt. e (2010).

155. Ellis, *supra* note 4, at 1090–92; Terry, *supra* note 27, at 47.

156. Ellis, *supra* note 4, at 1091–92.

157. *Id.* at 1085 (“By the late nineteenth century[,] . . . mentally disabled people were seen as a threat to society, both through their own wicked actions and through the likelihood that they would ‘swamp’ society with their ‘incompetence’ if allowed to reproduce.” (citing WOLF WOLFENSBERGER, THE ORIGIN AND NATURE OF OUR INSTITUTIONAL MODELS (1975))). Perception of this threat continued into the twentieth century. *Id.*

158. *Id.* at 1091. Courts were also likely sensitive to the harshness of the all-or-nothing contributory negligence system, where a plaintiff lost all his recovery if he was deemed contributorily negligent. See *id.*

159. PROSSER AND KEETON ON TORTS, *supra* note 47, § 32, at 178 (noting that both rationales are based on the risk of mentally disabled people injuring others, not the risk of mentally disabled people being injured by others).

160. See Korrell, *supra* note 70, at 48.

standard for mentally disabled defendants as well.

With the shift to comparative negligence,¹⁶¹ neither an adult plaintiff's nor an adult defendant's mental disability is taken into account when determining whether she is negligent.¹⁶² Instead, a party's mental disability is taken into account only when responsibility for an injury is apportioned,¹⁶³ if at all.¹⁶⁴ Under the modern comparative negligence and apportionment system, a mentally disabled plaintiff's recovery is reduced if she is deemed comparatively negligent,¹⁶⁵ regardless of whether she was actually capable of protecting herself.

Jurisdictions do not need to return to a contributory negligence regime¹⁶⁶ to adopt a subjective standard of care for mentally disabled adults. In addition to courts' past experience of taking mental disability into account through the contributory negligence system, they have that experience in several other contexts: in civil proceedings such as guardianship, commitment, and testamentary capacity;¹⁶⁷ where children's mental disabilities are at issue;¹⁶⁸ and, more recently, in apportionment of

161. See DOBBS, *supra* note 3, § 201, at 503–04. The comparative negligence doctrine is the “principle that reduces a plaintiff’s recovery proportionally to the plaintiff’s degree of fault in causing the damage, rather than barring recovery completely.” BLACK’S LAW DICTIONARY 321 (9th ed. 2009).

162. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 3 (2000) (“Plaintiff’s negligence is defined by the applicable standard for a defendant’s negligence.”). The Restatement explicitly rejects the dual standard: “Special ameliorative doctrines for defining plaintiff’s negligence are abolished.” *Id.*

163. *Id.* § 8 cmt. c (“The relevant factors for assigning percentages of responsibility include . . . each person’s abilities and disabilities . . .”).

164. *Id.* § 8 cmt. c, illus. 7 (“The court has discretion, where appropriate, to limit inquiry into [an actor’s mental disability] on the ground that it would be too prejudicial, confusing, or misleading or would cause undue delay.”).

165. If the injury occurred in a modified comparative negligence jurisdiction and the plaintiff is deemed fifty percent or fifty-one percent negligent, depending on the jurisdiction, she is denied recovery altogether. *Id.* § 7 cmt. n. This shows how an arguably unjust result may occur based on the difference of only a few percentage points of responsibility. If a person’s mental disability compromises her capacity to anticipate, perceive, or avoid risks, a more equitable approach would be to take that characteristic into account at the outset. See *supra* notes 144–49 and accompanying text.

166. In general, the all-or-nothing nature of contributory negligence should probably not be resurrected. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 10 cmt. e (2010) (“[C]omparative negligence renders much less severe the impact of many findings of contributory negligence: under comparative negligence, such a finding may merely diminish the [plaintiff’s] recovery.”); DOBBS, *supra* note 3, § 199.

167. See *supra* note 102 and accompanying text.

168. See *supra* note 104 and accompanying text.

responsibility.¹⁶⁹ This experience demonstrates that courts can adequately manage a subjective standard for mental disability.

3. *Easy and Hard Cases*

Granted, some applications of a subjective mental disability standard would be more straightforward than others. The easiest cases involve caretakers who are injured by their mentally disabled charges, and these cases are already decided under something like a subjective standard.¹⁷⁰ When a mentally disabled defendant injures a caretaker, as in a nursing home or other institutional setting, the defendant may not be held liable for the harm caused.¹⁷¹ This is because the caretaker is paid to confront the risk of being injured by the charge.¹⁷²

The easier cases involve a plaintiff who was put on notice of a defendant's mental disability or a defendant who was put on notice of a plaintiff's mental disability.¹⁷³ In these situations, the non-disabled actor's "reasonable expectations" are not frustrated by the mentally disabled actor's inability to avoid or minimize the risk of

169. See *supra* note 161–65 and accompanying text.

170. E.g., *Creasy v. Rusk*, 730 N.E.2d 659 (Ind. 2000) (holding that a patient with Alzheimer's disease who kicked and injured his nursing assistant did not owe a duty of care to the assistant). In *Creasy*, the Supreme Court of Indiana first adopted the objective mental disability standard articulated in the Restatement (Second) of Torts, *id.* at 661–67, but then held that the Restatement's policy rationales did not apply given the relationship of the parties. *Id.* at 667–68.

171. *Id.* at 667.

172. *Id.* (“Rusk’s inability to comprehend the circumstances of his relationship with Creasy . . . was the very reason Creasy was employed to support Rusk. . . . Creasy . . . [was] ‘employed to encounter, and knowingly did encounter, just the dangers which injured’ Creasy.” (quoting *Anicet v. Gant*, 580 So. 2d 273, 276 (Fla. Dist. Ct. App. 1991))). The fact that a mentally disabled person is entrusted to an institution’s care may serve as a proxy for determining the severity of the disability, which otherwise would require the assistance of expert testimony. *Id.* at 668–69. According to Kelley, “[A] custodial institution charged with the care of a mentally [disabled charge] . . . has notice of the” charge’s mental disability. Kelley, *supra* note 20, at 234.

173. E.g., *Lynch v. Rosenthal*, 396 S.W.2d 272 (Mo. Ct. App. 1965). In *Lynch*, plaintiff was a twenty-four year old mentally retarded man who was taken in at the age of twelve by defendant farmer’s wife. *Id.* at 274. Plaintiff, who had a mental age of about ten, assisted defendant with his farm. *Id.* at 274–75. Plaintiff severely injured his right arm in defendant’s corn picker and sued defendant, alleging negligence. *Id.* at 274. Defendant claimed that plaintiff was contributorily negligent as a matter of law. *Id.* at 277. Because defendant knew of plaintiff’s mental disability and defendant had not instructed him to stay away from the corn picker, the court held that the question of plaintiff’s contributory negligence was properly submitted to the jury. *Id.* at 278.

harm.¹⁷⁴ For example, someone interacting with a person with Down's syndrome, whose facial characteristics are well known and readily identifiable, may be put on notice of that person's mental disability.

The harder cases involve a non-disabled party that did not have notice of the other party's mental disability. This may occur where an individual's mental disability is not obvious or where she is doing something that may not give notice of her disability.¹⁷⁵ Some argue that a lack of notice is dispositive against application of a subjective mental disability standard.¹⁷⁶ However, the same critique could be leveled at the subjective physical disability and childhood standards. Some physical disabilities (e.g., partial hearing or vision loss, or mild cerebral palsy) present a lack of notice, and, while younger children often spontaneously give notice of their childhood, the same cannot be said of older children. Similar to the physical disability and childhood standards, notice should not be a requirement of a subjective mental disability standard.

V. IN THE ALTERNATIVE, COURTS SHOULD ADOPT A SUBJECTIVE STANDARD FOR ADULTS WITH MENTAL RETARDATION

Because courts have declined to adopt a subjective standard of care for all mentally disabled adults, they should consider treating individual types of mental disabilities under a subjective standard. The characteristics of mental retardation may make a subjective standard particularly appropriate for individuals with this mental disability.

174. Seidelson, *supra* note 79, at 46.

175. *E.g.*, *Johnson v. Lambotte*, 363 P.2d 165, 166 (Colo. 1961) (holding defendant with schizophrenia liable for negligence when she walked out of a psychiatric hospital unattended, got into an idling car, and drove into plaintiff's car). In *Johnson*, plaintiff had no notice of defendant's mental disability. *See id.* It should be noted that a mentally disabled person who knows that she should not participate in certain activities, such as driving, but does so anyway would not receive the benefit of a subjective mental disability standard.

176. *See Kelley*, *supra* note 20, at 223–52; Seidelson, *supra* note 79, at 46. In addition to challenging a subjective mental disability standard of care, both Seidelson and Kelley criticize the physical disability and childhood standards, arguing that an actor should be held to an objective standard of care any time the other party lacked notice of the actor's disability, thus frustrating the nondisabled party's "reasonable expectations." Kelley, *supra* note 20, at 223–52; Seidelson, *supra* note 79, at 46.

A. *Mental Retardation and Other Mental Disabilities Have Been Considered Together with Mental Illness Under the Broad Category, “Mental Disability”*

Courts have made little, if any, attempt to differentiate between various mental disabilities for purposes of tort liability.¹⁷⁷ The Restatement rules make no distinction.¹⁷⁸ Historically, the same terminology was used regardless of the type of disability.¹⁷⁹ As negligence law developed, the differences between mental retardation and mental illness¹⁸⁰ seem to have been overlooked, as the two groups were combined under the umbrella term “insanity” and, later, “mental disability.”¹⁸¹ Compared to mental illness, there are few cases addressing the negligence liability of mentally retarded adults. This is true at least in part because there are far fewer mentally retarded people than mentally ill people,¹⁸² and thus far fewer injuries produced by mentally retarded adults.

B. *Even if All Mentally Disabled Adults Are Not Granted a Subjective Standard, Mentally Retarded Adults Should Be*

Mental retardation is a distinct class with readily identifiable characteristics,¹⁸³ and courts should distinguish it from mental

177. Ellis, *supra* note 4, at 1081 n.10.

178. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11(c) (2010) (addressing “[a]n actor’s mental or emotional disability”); RESTATEMENT (SECOND) OF TORTS § 283B (1965) (addressing an actor’s “insanity or other mental deficiency”).

179. W.C. Crais III, Annotation, *Contributory Negligence of Mentally Incompetent or Mentally or Emotionally Disturbed Person*, 91 A.L.R.2d 392, 392 n.1 (1963) (noting that the term “insane” referred to “[o]utright insanity as well as the less severe forms of mental and emotional aberration”). See *supra* note 2 for further discussion of this point.

180. Because the vast majority of mental disability negligence cases involve individuals with mental illness, this section at times discusses mental illness as a paradigm mental disability.

181. This author has not found any case or article that questions the grouping of mental disabilities into one class for purposes of tort liability. See Curran, *supra* note 2, at 61.

182. According to the APA, the prevalence of mental retardation is approximately one percent. DSM-IV-TR, *supra* note 2, at 46. In contrast, the prevalence of schizophrenia (a mental illness) alone is approximately one percent. *Id.* at 308.

183. See *infra* note 188 and accompanying text. Mental retardation does share some characteristics with other mental disabilities, in particular other developmental disabilities. PARRY, *supra* note 2, at 56 (stating that mental retardation and autism are both developmental disabilities, which are “pervasive, lifelong disabilities . . . typically identified at birth or during childhood”). Yet

disability in general by granting adults with mental retardation a subjective standard of care. Such an approach is justified by the nature of mental retardation, the relative administrative ease of a subjective standard for mentally retarded adults, and a limited comparison between children and mentally retarded adults.

Unlike adults with mental illness, adults with mental retardation categorically lack the “attention, knowledge, intelligence, and judgment”¹⁸⁴ of a reasonably prudent person. The distinguishing features of mental retardation are diminished intelligence and compromised adaptive functioning.¹⁸⁵ While the mental functioning of an individual with any significant mental disability is compromised to some extent, a signature trait of mental retardation is decreased cognitive and intellectual functioning—and this trait is *primary* in a mentally retarded person. While a mentally ill person’s intellectual functioning—and hence ability to anticipate, perceive, and respond to risks—may be diminished by her mental illness, this diminishment is often a *secondary* trait of her primary mental illness.

A subjective standard for mentally retarded adults would be easier to administer than one for mentally disabled adults generally. Some mental disabilities are harder to diagnose and classify than others, but their myriad nature cannot be denied.¹⁸⁶ While mental retardation has a range of severities, it is concisely defined¹⁸⁷ and manageably classified.¹⁸⁸ The presence and severity of mental retardation may be contested in a given individual, yet the American Psychiatric Association (APA) has defined four degrees of the disability.¹⁸⁹ The APA’s classification system would allow courts to determine what would constitute reasonable

mental retardation remains distinct. *E.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (“[T]he mentally retarded as a group are indeed different from others not sharing their misfortune . . .”).

184. RESTATEMENT (SECOND) OF TORTS § 283 cmt. b (1965).

185. Mental retardation “is characterized by significantly subaverage intellectual functioning . . . with onset before age 18 years and concurrent deficits or impairments in adaptive functioning.” DSM-IV-TR, *supra* note 2, at 39.

186. *See id.* at 49–729 (classifying all mental disabilities besides mental retardation in 681 pages).

187. *See supra* note 4.

188. *See* DSM-IV-TR, *supra* note 2, at 41–49 (classifying mental retardation in nine pages).

189. The four degrees of mental retardation are: mild (IQ level 50–55 to approximately 70); moderate (IQ level 35–40 to 50–55); severe (IQ level 20–25 to 35–40), and profound (IQ level below 20 or 25). *Id.* at 42.

conduct for an adult with a particular degree of mental retardation.¹⁹⁰ In addition, mental retardation is often observable, even in individuals in the “mild” range, which would further aid courts in administering a subjective standard for mentally retarded adults. While some other mental disabilities are also observable, many are not.

In addition to administrative considerations, mental retardation is more analogous to the “disability” of childhood than are other mental disabilities, which further supports a subjective standard of care.¹⁹¹ Adults with mental retardation are commonly described as having a childhood “mental age” that approximates their level of cognitive functioning.¹⁹² While a minor cannot help his immaturity, neither can a mentally retarded adult help his mental age.¹⁹³ This comparison has its limits,¹⁹⁴ but it could give a court or a jury helpful context in assessing a mentally retarded adult’s conduct.¹⁹⁵

VI. CONCLUSION

This note does not advocate that an adult with mental retardation or another mental disability who carelessly causes harm to another should never be held liable for her conduct. Rather, it argues that her disability should be factored into whether or not she is held liable for negligence. People carelessly injured by others often deserve compensation. But that compensation should

190. See *supra* notes 99–100 and accompanying text.

191. See *supra* Part II.B for a discussion of the subjective childhood standard.

192. Ellis, *supra* note 4, at 1105; e.g., *Lynch v. Rosenthal*, 396 S.W.2d 272, 274–75 (Mo. App. 1965) (concerning a twenty-four-year-old man with the mental age of a nine-and-a-half- to ten-and-a-half-year-old); *Schmidt v. Schmidt*, 459 A.2d 421, 422 (Pa. Super. Ct. 1983) (concerning a twenty-six-year-old woman with the mental age of a four-and-a-half- to eight-year-old).

193. See Bohlen, *supra* note 16, at 29 (“In the case of infants there is, of course, no room for a liability based upon the infant’s responsibility for his immaturity, for an infant cannot be held responsible for the date of his birth.”).

194. Ellis, *supra* note 4, at 1105–06 (noting that the functioning level of a mentally retarded adult is not based solely on his IQ, but also on his many years of experience in the world, and that “mental age” alone does not give a full picture of an individual).

195. Admittedly, children grow up, so their special treatment by negligence law is temporary. See *supra* note 43 and accompanying text. On the other hand, a subjective standard for adults with mental retardation would apply for their entire lives. It is worth noting that the physical disability standard also applies lifelong. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11 (a) (2010).

not come at the expense of the fundamental basis of modern tort liability: fault.

A likely critique of granting a subjective standard of care to mentally retarded adults is that doing so would open the floodgates to granting it to adults with other mental disabilities. This note addresses mental retardation because this mental disability is the author's area of expertise.¹⁹⁶ That similar arguments could, perhaps, be made for granting a subjective standard to adults with other mental disabilities does not undermine the argument for granting one to adults with mental retardation. An argument for extending a subjective standard to adults with a different type of mental disability would need to stand on its own merits.

American negligence law has tenaciously adhered to its treatment of mentally disabled adults.¹⁹⁷ A leading rationale for the objective standard is that a subjective standard would be too difficult to administer. Ironically, the force of this argument largely comes from the law's combining of such diverse mental disabilities as Alzheimer's disease and borderline personality disorder, autism and schizophrenia.¹⁹⁸ Considering individual types of mental disabilities, as this note considers mental retardation, could offer courts a means of altering their long-standing and rigid approach to mental disability.

196. The author took undergraduate coursework in mental retardation and other developmental disabilities. His knowledge of adults with mental retardation is largely informed by his professional experience working in group homes and other settings since 2000.

197. While endorsing the principle of *stare decisis*, Professor Edgar Bodenheimer noted: "In the United States, *stare decisis* has never been considered an inexorable command, and the duty to follow precedent is held to be qualified by the right to overrule prior decisions." EDGAR BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 429 (rev. ed. 1974).

198. *E.g.*, *Gould v. Am. Family Mut. Ins. Co.*, 543 N.W.2d 282, 286 (Wis. 1996) (noting that "[m]ental impairments and emotional disorders come in infinite types and degrees," and refusing to take mental disability into account "given the complexities of the various mental illnesses and the increasing rate at which new illnesses are discovered").