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RE-EXAMINING REASONABLENESS: NEGLIGENCE LIABILITY IN ADULT DEFENDANTS WITH COGNITIVE DISABILITIES

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I. INTRODUCTION: RECOGNIZING THE PROBLEM

For over a century in America, objective reasonableness has been a cornerstone of negligence analysis.² This standard establishes the tort obligation “owed by all people generally” to act as a “reasonable and prudent person under the same or similar circumstances to avoid or minimize risks of

2. DAN B. DOBBS, *THE LAW OF TORTS* § 117, 277 (2000) (recognizing that “the objective reasonable person standard” developed in the “latter half of the 19th century” and required “all persons to exercise ordinary care, meaning the care of a reasonable person, for the benefit of other persons”); *RESTATEMENT (FIRST) OF TORTS* § 283 (AM. LAW INST. 1934) (recognizing the universal negligence standard as that of an objectively “reasonable man under like circumstances” but acknowledging in a caveat that the authors express “no opinion as to whether insane persons are required to conform to the standard of behavior which society demands of sane persons”); *RESTATEMENT (SECOND) OF TORTS* § 283 (AM. LAW INST. 1965) (recognizing again the universal negligence standard as that of an objectively “reasonable man under like circumstances” without making any caveat for individuals with cognitive disabilities); *RESTATEMENT (THIRD) OF TORTS* § 11(c) (AM. LAW INST. 2010) (recognizing again the universal negligence standard does not consider cognitive disability). American courts trace this rule to an early English case involving battery, not negligence. See *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616) (stating in *dictum* in a battery action that “in trespass, which tends to give damages according to hurt or loss . . . no [lunatic] shall be excused . . . except it may be judged utterly without his fault”). England also imposes an objective reasonableness standard, likewise traced to *Weaver v. Ward*, upon individuals with cognitive disabilities to determine their liability in negligence. See *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837).

harm to others.”³ Despite its long-standing dominance in negligence doctrine, the objective reasonableness standard has a critical shortcoming.⁴

This standard disproportionately burdens adult⁵ negligence defendants⁶

3. DOBBS, *supra* note 2, at § 117, 277. Beyond its application to individuals with cognitive disabilities, a discussion of the many nuances involved in application of this standard is beyond the scope of this article.

4. The problem with the objective reasonableness standard as applied to individuals with cognitive disabilities that is addressed in this article historically posed a problem for other groups as well. For example, the standard originally measured children’s behavioral choices against those of a reasonable and prudent adult and permitted a child’s liability when the child failed to act as a reasonable adult under the circumstances. *See* *Bullock v. Babcock*, 3 Wend. 391, 394 (N.Y. Sup. Ct. 1829) (“Infants, in the same manner adults, are liable for trespass, slander, assault & [etc.]”); *Conway v. Reed*, 66 Mo. 346, 350 (Mo. 1877) (“An infant is liable for a tort in the same manner as an adult.”), overruled on other grounds by *McLaughlin v. Marlatt*, 246 S.W. 548 (Mo. 1922). Similarly, the standard originally measured the conduct of individuals with physical disabilities against that of a reasonable and prudent physically-able person, and permitted liability when a person with a physical disability failed to act as a person without one. *See, e.g., Roberts v. Ring*, 173 N.W. 437, 438 (Minn. 1919) (holding defendant’s defective hearing and sight were not to be considered when determining negligence, applying the standard of care that “[w]hen one by his acts or omissions, causes injury to others, his negligence is to be judged by the standard of care usually exercised by the ordinary prudent normal man.”). The objective reasonableness standard has evolved over the last century to take into account the reality of childhood and physical disability. *See* RESTATEMENT (THIRD) OF TORTS § 11(a),(c) (AM. LAW INST. 2010). It has not evolved to take into account the cognitive disabilities of negligence defendants, and this shortcoming is the focus of this article. For a further discussion of the evolution of the objective reasonableness standard for children, individuals with physical disabilities, and others, see *infra* notes 30-55 and accompanying text.

5. This article focuses on *adult* defendants in negligence actions because courts have created exceptions to the objective reasonableness standard that allow a child-specific standard of care that *does* recognize cognitive disabilities in *children* defendants. McKnite, *infra* note 14, at 1390, 1399-1400 (citing, *e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 10 cmt. c (AM. LAW INST. 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.”). “[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.” *Id.* at 1390, n.4; *see also, e.g.,* Kristen Harlow, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 OHIO ST. L.

who have cognitive disabilities.⁷ It does so by treating these disabilities as if they do not exist in two key places:⁸ in the minds of defendants who have them and in the awareness of most plaintiffs who do not.

The objective reasonableness standard treats cognitive disabilities as nonexistent in adult negligence *defendants* by evaluating their conduct as if

J. 1733 (2007) (discussing the irrationality in making allowances for cognitive disabilities with some defendants, but not others).

6. This article focuses on adult negligence *defendants* with cognitive disabilities because courts in many jurisdictions have created exceptions to the objective reasonableness standard to take cognitive disability into account when *plaintiffs* are alleged to have been contributorily or comparatively negligent. *See, e.g.*, Noel v. McCraig, 258 P.2d 234, 240 (Kan. 1953) (holding that a negligence *plaintiff* who “is so absolutely devoid of intelligence as to be unable to apprehend danger and to avoid exposure to it cannot be said to be guilty of negligence” and is not subject to the “objective reasonableness” standard for his own protection); Snider v. Callahan, 250 F. Supp. 1022, 1022 (W.D. Mo. 1966) (stating that a plaintiff with a “mental deficiency may avoid what would otherwise be contributory negligence in a normal person”). Courts’ willingness to recognize and accommodate cognitive disability in plaintiffs, but not defendants, makes the failure to acknowledge cognitive disabilities in negligence defendants even more perplexing. *See infra* notes 49-60 and accompanying text (demonstrating that courts originally limited the applicability of the subjective standard to children and physically disabled *plaintiffs*, but eventually expanded its applicability to children and physically disabled *defendants* as well).

7. It is worth emphasizing from the outset that this article uses the comprehensive, generic phrase “cognitive disability” to refer to disabilities that affect not only an individual’s ability to develop and retain knowledge or intellectual skill, but also an individual’s rationality. This is not to suggest that the many and varied disabilities encompassed within this phrase are the same. *They are not*. Instead, this comprehensive phrase is used here simply because the cognitive-disability disadvantage addressed in this article equally burdens all with such disabilities when they adversely impact an adult defendant’s ability to appreciate a risk of harm in the same manner as an individual without such a disability.

8. *See, e.g.*, Creasy v. Rusk, 730 N.E. 2d 659, 666-67 (Ind. 2000) (holding 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.”); Wright v. Tate, 295, 156 S.E.2d 562, 565 (Va. 1967) (“[A]n adult who is of low mentality . . . is held to the same standard of care as a person of greater intellect. If the rule were otherwise, there would be a different standard for each level of intelligence resulting in confusion and uncertainty in the law.”). *See also* RESTATEMENT (THIRD) OF TORTS § 11(c) (“An actor’s mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child.”).

they have no cognitive disability, even when they do.⁹ Courts assert, “an adult who is of low mentality ... is held to the same standard of care as a person of greater intellect.”¹⁰

9. Williams v. Hayes, 38 N.E. 449, 453 (N.Y. 1894) (reversing a jury verdict in favor of a defendant in a negligence action who had asserted a defense of temporary insanity because the case was submitted to the jury with a subjective standard allowing that if the defendant was insane, he was not responsible for the loss at issue, and holding that “[t]he standard man is no individual man, but an abstract or ideal man of ordinary mental and physical capacity and ordinary prudence [and] [t]he particular man whose duty of care is to be measured does not furnish the standard[;] [h]e may fall below it in capacity and prudence, yet the law takes no account of that, but requires that he should come up to the standard and his duty be measured thereby.”); Bashi v. Wodarz, 53 Cal. Rptr. 2d 635 (Cal. Ct. App. 1996); Delahanty v. Hinckley, 799 F. Supp. 184, 187 (D.D.C. 1992) (“While the Court acknowledges that commentators have criticized the common law rule, the fact remains that ‘courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts.’”); Mujica v. Turner, 582 So.2d 24 (Fla. Dist. Ct. App. 1991) (same); Okianer Christian Dark, *Tort Liability and the “Unquiet Mind”: A Proposal to Incorporate Mental Disabilities into the Standard of Care*, 30 T. MARSHALL L. REV. 169, 169-70 (2004) (stating that the “rule of law for evaluating the negligent conduct of the mentally disabled person” requires “[a] person with a mental disability [be] treated as though there is no mental disability present”).

10. Wright v. Tate, 156 S.E.2d 562, 565 (Va. 1967). It warrants noting that not all countries apply an objective reasonableness standard to individuals with cognitive disabilities; some offer an exception to the standard for these defendants. See Eri Osaka, *Reevaluating the Role of Tort Liability Systems in Japan*, 26 ARIZ. J. INT’L & COMP. L. 393-94 (2009) (citing the Japanese Civil Code, Part III Claims, Chapter V Torts, Article 713); 民法 [MINPŌ] [CIV. C.] art. 713, para. 1 (Japan), http://www.ishioroshi.com/english/japanese_civil_code_pt3ch2to5.html#en_pt3ch5 (providing that “A person who has inflicted damages on others while he/she lacks the capacity to appreciate his/her liability for his/her own act due to mental disability shall not be liable to compensate for the same; provided, however, that this shall not apply if he/she has temporarily invited that condition, intentionally or negligently.”) (unofficial English translation); SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [Civil Code] December 10, 1907, SR 101, SR 272, as amended by Gesetz, Jan. 1, 2013, AS 725 (2011), art. 16 (Switz.) (“A person who has the capacity to act has the capacity to create rights and obligations through his actions. A person who is of age [18] and is capable of judgement has the capacity to act. A person is capable of judgement within the meaning of the law if he or she does not lack the capacity to act rationally by virtue of being under age or because of a mental disability, mental disorder, intoxication, or similar circumstances. A person who is incapable of judgement cannot create legal effect by his or her actions, unless the law provides

The objective reasonableness standard also treats cognitive disabilities as invisible to most negligence *plaintiffs* who seek relief from adults with such disabilities. It does so by indulging plaintiffs' presumptive ignorance about the appearance and manifestation of cognitive disabilities in general and in particular defendants.¹¹ Courts declare that unlike "caretakers," who have experience with cognitive disabilities, "a member of the public at large [would be] unable to anticipate or safeguard against the harm she encountered" through a person with cognitive disabilities.¹²

For nearly as long as American courts have applied negligence's objective reasonableness standard in this manner, academics have decried the "inherent unreasonableness"¹³ of its effect in cases involving defendants with cognitive disabilities.¹⁴ For over one hundred years, commentators have lamented that the

otherwise."), available at <http://www.admin.ch/ch/e/rs/2/210.en.pdf> (last visited July 29, 2014).

11. See, e.g., *Colman v. Notre Dame Convalescent Home, Inc.*, 968 F. Supp. 809, 813 (D. Conn. 1997) (distinguishing the plaintiff, employed as a caretaker of a defendant who "suffered from mental illness and/or w[as] incapable of caring for themselves," from "a stranger unable to anticipate or safeguard" against the conduct of a defendant with a mental disability); *Creasy*, 730 N.E.2d 659, 667 (distinguishing the plaintiff, a paid caregiver with specific knowledge about the cognitive disabilities in the defendant, from "a member of the public at large [who would be] unable to anticipate or safeguard against the harm she encountered"); *Gould v. Am. Family Mut. Ins. Co.*, 543 N.W.2d 282, 286 (Wis. 1996) (characterizing "the public" as "innocent" and "unable to appreciate or safeguard the harm" risked when encountering "dementia patients"); *Vaughan v. Menlove*, 132 Eng. Rep. 490, 492 (1837) (rejecting the argument that "liability for negligence should be co-extensive with the judgment of each individual" because individual judgment is "as variable as the length of the foot of each individual").

12. *Creasy*, 730 N.E.2d at 667.

13. Nikki Bromberger, *Negligence and Inherent Unreasonableness*, 32 SYDNEY L. REV. 411, 435 (2010) (emphasis added) (characterizing the application of the present standard of care to individuals with cognitive disabilities as inherently unreasonable).

14. See, e.g., William H. Hornblower, *Insanity and the Law of Negligence*, 5 COLUMBIA L. REV. 278, 282 (1905) (stating that "[t]he reasons assigned by the text-writers for the rule that an insane person can be held liable civilly for damages for tort . . . are based entirely on expediency. . . [and] [i]t is questionable whether any one of these reasons is logically satisfactory" before concluding that "[t]he true rule and the only rule consistent with justice and reason . . . is that a person who is *non compos mentis* cannot be held liable for negligence"); W.G.H. Cook, *Mental Deficiency in Relation to Tort*, 21 COLUM. L. REV. 333, 337-44 (1921) (arguing contrary to then-controlling doctrine that "a lunatic whose mind has, through disease or accident, become defective would not seem to be liable for actionable negligence inasmuch as he has no capacity for acting as a prudent man"); Francis H. Bohlen, *Liability in Tort*

of Infants and Insane Persons, 23 MICH. L. REV. 9, 31 (1924) (critiquing precedent holding individuals with cognitive disabilities liable in the same manner as a non-disabled person and stating “that where a liability . . . is imposed upon persons capable of fault only if they have been guilty of fault, immaturity of age or mental deficiency, which destroys the capacity for fault should preclude the possibility of liability”); William J. Wilkinson, *Mental Incompetency as Defense to Tort Liability*, 17 ROCKY MTN. L. REV. 38, 57 (1944) (arguing that “[i]f fault is the crux of negligence it is, indeed, hard to make a logical case for holding a mentally incompetent person liable for negligence, for where can the fault be found?”); Robert M. Ague, Jr., *The Liability of Insane Persons in Tort Actions*, 60 DICK. L. REV. 211 (1956) (concluding that a standard of conduct for insane persons ought be “something less than the reasonable man standard”); William J. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52, 65 (1960) (asserting that application of the “objective reasonable man standard” to the “mentally ill or mentally deficient” “is in effect imposing strict liability upon the mentally ill and mentally deficient” and arguing that this makes the distinction between negligence and other torts meaningless); William R. Casto, *The Tort Liability of Insane Persons for Negligence: A Critique*, 39 TENN. L. REV. 705 (1971) (criticizing the rule that the “insane” are subject to the “reasonable man” standard); James W. Ellis, *Tort Responsibility of Mentally Disabled Persons*, 1981 AM. B. FOUND. RES. J. 1079, 1109 (1981) (arguing that, in light of changes in understandings about individuals with cognitive disabilities, tort liability standards ought be reconsidered and concluding that a subjective standard of care in negligence, as opposed to the objective “reasonable man” standard, “may be seen as a modest step toward equitable treatment of the mentally handicapped before the law”); 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, 46 (1981) (concluding that the “reasonable person” standard should be abandoned in favor of a subjective standard for individuals who are “mentally incompetent” in all cases and for individuals who have “low mental capacity” when this would not frustrate the other party’s reasonable expectations); Elizabeth J. Goldstein, *Asking the Impossible, The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL’Y 67, 92 (1995) (critiquing the universal application of the objective reasonableness standard in negligence and arguing that “a subjective standard should be applied to mentally ill individuals who cannot avoid causing negligent harm due to their mental illness”); Dark, *supra* note 9, at 214 (2004) (critiquing application of the objective reasonableness standard against those with mental disabilities and concluding that “[n]ow is the time . . . to replace a seventeenth-century rule steeped in prejudice, fear and ignorance . . . with a more just approach to the mentally disabled in the twenty-first century”); Harlow, *supra* note 5, at 1733, 1760 (dismantling the justifications for imposition of the traditional rule of ordinary reasonableness against individuals with cognitive disabilities and arguing that a “fairer result, in keeping with our fault-based system of tort, would be to temper the objective reasonable person

application of negligence's ordinary reasonableness standard in this manner¹⁵ transforms this fault-based tort into one of strict liability for this singular class of people.¹⁶

Consider this example: A defendant, while walking down the street, injures a plaintiff under such circumstances that the injury could have been avoided if the defendant had comprehended a sign posted nearby. This adult defendant, however, has a cognitive disability that rendered it impossible for

standard with a test for mental capacity to determine liability"); Bromberger, *supra* note 13, at 435 (acknowledging criticisms of the application of objective reasonableness to individuals with cognitive disabilities, canvassing alternatives, and concluding that "an approach which would hold mentally ill defendants to an attenuated standard of care," except in a compulsory insurance situation, is best); Jacob E. McKnite, *When Reasonable Care is Unreasonable, Rethinking the Negligence Liability of Adults with Mental Retardation*, 38 WM. MITCHELL L. REV. 1375, 1378 (2012) (offering a survey of the objective standard's development and proposing policy changes). *But see* George J. Alexander & Thomas S. Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME L. REV. 24 (1967) (endorsing an objective standard as applied to individuals with cognitive disabilities based upon an outmoded understanding of those disabilities); Stephanie I. Splane, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153, 153-54 (1983) (acknowledging that the "consensus of recent opinion" is that the objective reasonableness standard is no longer appropriate for individuals with cognitive disabilities, but asserting a contrary view that the objective standard remains appropriate to support integration of "mental patients" into the community); Patrick Kelley, *Infancy, Insanity, and Infirmary in the Law of Torts*, 48 AM. J. JURIS. 179, 231 (2003) (recognizing that despite "unrelenting criticism for over one hundred years, courts in the United States have continued to apply the rule that mental illness or deficiency is not a defense" to negligence); *id.* at 252 (concluding that this reality was justifiable under the original negligence doctrines of the 19th century, but that adoption of proportionate negligence principles "makes it harder" to accomplish the goals of tort liability when an objective reasonableness standard is applied to the cognitively disabled).

15. *See, e.g.*, Bromberger, *supra* note 13, at 412 ("The test of objective reasonableness, which is at the heart of negligence, sometimes requires people to reach a standard of care which they are inherently unable to meet."); Dark, *supra* note 9, at 169-70 (stating that the "rule of law for evaluating the negligent conduct of the mentally disabled person" requires "[a] person with a mental disability [be] treated as though there is no mental disability present").

16. *See, e.g.*, Curran, *supra* note 14, at 65 (stating that the application of the objective reasonableness standard to negligence defendants "in effect impos[es] strict liability upon the mentally ill and mentally deficient").

him to comprehend the sign.¹⁷

The adult defendant with a cognitive disability did not choose to ignore the sign and take a risk. He never received the sign's communication due to his disability. He thus acted with innocence regarding the consequences of his acts.

Negligence's objective standard nonetheless allows courts to assign responsibility to this defendant because negligence's hypothetical "objective" and "reasonable" person, unlike this particular defendant, could have read the sign, acted accordingly, and avoided a risk of harm.¹⁸

Of course, if the defendant had been a child who could not read, the law allows an exception to the objective standard.¹⁹ A child is not assigned responsibility in this circumstance if a reasonably prudent *child of like age, ability, and experience* also could not have comprehended the sign.²⁰ Negligence doctrine does not measure a child's "wrongfulness" against an

17. As noted *supra* note 7, this article uses the comprehensive phrase "cognitive disability" to refer to disabilities that affect not only an individual's ability to develop and retain knowledge or intellectual skill (as in this example) but also an individual's rationality. Again, this is not to suggest that the many and varied disabilities encompassed within this phrase are the same. They are not. Instead, this comprehensive phrase is used here simply because the cognitive-disability disadvantage addressed in this article equally burdens all those with such disabilities when they negate an adult defendant's ability to appreciate a risk of harm.

18. See, e.g., *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837) (recognizing that while the defendant made an honest mistake due to his "misfortune of not possessing the highest order of intelligence," he remains at fault for the consequences of a hayrick fire "as if he had himself put a candle to [the hay]" because to objectively reasonable people "it is well known that hay will ferment and take fire if it be not so carefully stacked"); *Ramey v. Knorr*, 124 P.3d 314, 317 (Wash. Ct. App. 2005) (discussing Washington's adherence to the majority rule that "insanity or other mental deficiencies generally are not recognized as defenses to negligence," and holding an individual with mental illness to "the standard of a reasonable person under like circumstances").

19. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 10 cmt. c (AM. LAW INST. 2010) (recognizing that although an adult's mental or emotional disability is not generally taken into account, evidence of a child's mental or emotional deficit can be considered).

20. See, e.g., *Patterson v. Central Mills, Inc.*, 112 F. Supp. 2d 681, 685 (N.D. Ohio 2000) (noting that Ohio law goes even farther than this to protect children against a finding of fault and presumes children under fourteen are incapable of negligence); *Roth v. Union Depot Co.*, 43 P. 641, 647 (Wash. 1896) (holding that a "child is held . . . only to the exercise of such degree of care and discretion as is reasonably to be expected from children his age").

“ordinary” objectively reasonable person.²¹

Similarly, if the defendant had been an adult with substantial vision impairment precluding her ability to read the sign, the law allows an exception to the objective standard.²² The adult with substantial vision impairment is not assigned responsibility in this circumstance if a reasonably prudent *visually impaired* person also could not have read or comprehended the sign.²³ Negligence doctrine does not measure the “wrongfulness” of a person who has a relevant physical disability against an “ordinary” objectively reasonable person without the relevant physical disability.

Though all three negligence defendants—the adult with cognitive disabilities, the child, and the defendant with visual impairments—are innocent in their inability to comprehend and respond to the sign, only the defendant with cognitive disabilities will be measured against a hypothetical “ordinary” person without existing developmental differences.²⁴ Thus only the adult defendant with cognitive disabilities will be characterized as at “fault” and liable for plaintiff’s harm.

This article undertakes to confront this cognitive-disability disadvantage anew, propose fresh solutions, and inspire invigorated dialogue to resolve negligence’s inequitable treatment of adult defendants with cognitive disabilities.

Part II of this article contextualizes the cognitive disability disadvantage and demonstrates its singularity.²⁵ This section also evaluates three proposed responses to this demonstrated disadvantage. As background it first considers the long-recommended, but judicially rejected, “exception” from the objective

21. *But see* Robinson v. Lindsay, 598 P. 2d 392 (Wash. 1979) (recognizing an exception to the general rule that “a child is held only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age” when the child is engaged in certain dangerous activities “normally . . . for adults only”) (internal quotations and citations omitted); RESTATEMENT (SECOND) OF TORTS § 283A (AM. LAW INST. 1965) (taking the position that the special rule for children should not be applied when the child engages in “an activity which is normally undertaken only by adults, and for which adult qualifications are required”).

22. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11(a), (c) (AM. LAW INST. 2010).

23. *See, e.g.*, Roberts v. State, 396 So.2d 566, 567-68 (La. App. 3 Cir. 1981) (holding that defendant acted as a reasonably prudent blind person would under those particular circumstances and thus was not at fault or liable for negligence).

24. Harlow, *supra* note 5, at 1739 (“as broad theory of tort actions w[ere] being developed, scholars and courts began to carve out exceptions to the harsh strict liability standard” and consider morality or fault as an important factor in determining liability).

25. *See infra* notes 31-56 and accompanying text.

standard for those with cognitive disabilities.²⁶ Next, it examines two new approaches offered as alternatives to the previously proposed “exception:” (1) a reckoning of the negligence classification in these cases and re-designation of the basis for liability as strict liability,²⁷ and (2) a re-examination of the objective standard as applied to the typical *plaintiff* in a manner that might relieve some cognitively disabled *defendants* from liability.²⁸

Part III concludes that the third alternative explored holds its own as an incremental approach worthy of continued consideration under the circumstances as advocates seek equitable outcomes for these negligence defendants. It also recognizes that this incremental solution does not fully resolve concerns with the status quo and may remain impractical in a society still plagued with fear of and discrimination against the cognitively disabled.²⁹

II. ESTABLISHING THE SINGULARITY OF THE PROBLEM AND EVALUATING THREE PROPOSED SOLUTIONS

Application of negligence’s objective reasonableness standard to adult defendants with relevant cognitive disabilities faces considerable criticism. The consensus of scholars has been that the rationales offered to justify it are “straw men . . . unable to bear the weight of even the most perfunctory analysis.”³⁰

In exploring solutions to the illogic arising through this application of the objective reasonableness standard, this section considers three alternative approaches. As background for each, it first illustrates the singularity of the standard’s shortfall in cases with adult defendants who have cognitive disabilities.

26. See *infra* note 65-139 and accompanying text.

27. See *infra* notes 136-247 and accompanying text.

28. See *infra* notes 223-291 and accompanying text.

29. Some scholarship on this subject distinguishes between cognitive disabilities that impact rationality and those that impact aptitude. This distinction is not critical to the broad premise addressed here—that adult defendants with either type of cognitive disability are disadvantaged and treated inequitably under the existing objective standard of care in negligence actions.

30. Grant M. Morris, *Requiring Sound Judgments of Unsound Minds: Tort Liability and the Limits of Therapeutic Jurisprudence*, 47 S.M.U. L. REV. 1837, 1841-42 (1994). *But see* Splane, *supra* note 14, at 154 (arguing that “current mental health policy, treatment, and research indicate that an objective standard is more appropriate for the mentally ill . . . and should be used for both mentally ill plaintiffs and defendants to obtain consistency in the law and fairness in policy”).

A. The Singularity of the Problem

At its origins, negligence doctrine allowed no exception to its objective, “reasonable person,”³¹ standard to take into account differences in parties’ individual physical or cognitive abilities.³² Thus, for a time, this objective standard burdened all with developmental differences impacting their inherent ability to satisfy the unwavering standard. It did not take long, however, for exceptions to this once-universal standard to emerge.

By the late 1800’s courts had begun to acknowledge the injustice in uniform application of a single objective standard to determine individual responsibility in diverse groups of individuals.³³ As a result, exceptions developed. Three exceptions are particularly relevant here: the exception for children, the exception for individuals with physical disabilities, and the exception for adults with cognitive disabilities when they are *plaintiffs*, but not when they are *defendants*.

This section examines the evolution of these exceptions to negligence’s objective standard. In doing so, it highlights the reality that adult defendants with cognitive disabilities remain the only group with disabilities or

31. In fact, this reasonable “person” was historically a man, but this gendered characterization has largely disappeared in favor of the gender-neutral language used in this article. See generally Pat K. Chew & Lauren K. Kelley-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643, 663 (2007) (explaining that the legal debate regarding sexist language brought the legal community’s attention to the implications of the term “reasonable man” and noting a forty percent drop in the usage of “reasonable man” between the respective periods of 1974-76 and 1984-86).

32. Harlow, *supra* note 5, at 1733, 1738-39; Kelley, *supra* note 14, at 183-184.

33. Harlow, *supra* note 5, at 1740. See also *Kunz v. Troy*, 10 N.E. 442, 444 (N.Y. 1887) (“We understand the rule to be that in an action for an injury founded on negligence, contributory personal negligence cannot be attributed to a child of very tender years, who from his age cannot be supposed capable of exercising judgment or discretion, although the injury would not have happened without his concurring act, and although that act if committed by an adult would be a negligent one.”); *Houston & T. C. R. Co. v. Boozer*, 8 S.W. 119, 121 (Tex. 1888) (finding no contributory negligence and affirming the jury verdict in favor of the twelve year old child because “the jury were in position to determine whether the acts of the appellee were, in one of his age, the exercise of such care as such a person should exercise”); *City of Roanoke v. Shull*, 34 S.E. 34, 36 (Va. 1899) (citations omitted) (“[T]he law presumes that a person between seven and fourteen years of age cannot be guilty of contributory negligence, and that in order to establish that a child of such age is capable of contributory negligence, such presumption must be rebutted by evidence, and circumstances establishing her maturity and capacity.”).

developmental differences without accommodation in the standard.³⁴

The first exception to the objective reasonableness standard of care recognized by courts came on behalf of children.³⁵ Courts acknowledged that children and adults do not have the same capacity to appreciate risk and determined that children's relative incapacity must be taken into account. Initially, courts allowed a child's age and subjective capacity to be taken into account only in instances in which a child sought relief as a *plaintiff*, preventing a contributory negligence analysis from barring the child's recovery.³⁶ Courts originally declined to apply this exception on behalf of a child *defendant* in the primary negligence analysis.³⁷

34. *Gould v. American Family Mut. Ins. Co.*, 543 N.W.2d 282, 284 (Wis. 1998) (“When fault-based liability replaced strict liability, American courts in common law jurisdictions identified the matter as a question of public policy and maintained the rule imposing liability on the mentally disabled.”); *Sforza v. Green Bus Lines, Inc.*, 268 N.Y.S. 446, 448 (N.Y. Civ. Ct. 1934) (acknowledging the inherent unfairness with expecting a cognitively disabled defendant to conform to the objective standard, but explaining that “[t]he question of liability in these cases, as well as others, is a question of policy and is to be disposed of as would the question whether the incompetent person is to be supported at the expense of the public, or of his neighbors, or at the expense of his own estate”) (citations and internal quotation marks omitted).

35. *Supra* note 33 and authorities cited therein.

36. *See, e.g., Roth v. Union Depot Co.*, 13 Wash. 43 P. 641, 647 (Was. 1896) (holding that a plaintiff child is “held . . . only to the exercise of such degree of care and discretion as is reasonably to be expected from children his age” for purposes of determining the plaintiff child's contributory negligence). At this time in the 1800s and early 1900s, comparative negligence had not yet established its foothold in negligence jurisprudence, and all jurisdictions employed principles of contributory negligence as a bar to plaintiff's ability to recover damages resulting from another's negligence. *See DOBBS, supra* note 2, at § 199, 494 (explaining that contributory negligence was the traditional rule); *Butterfield v. Forrester*, 11 East. 59, 103 Eng. Rep. 926 (1809) (applying contributory negligence and holding that the defendant was not negligent at all because he could not foresee the plaintiff's conduct and the risks of that conduct).

37. *Kelley, supra* note 14, at 191 (2003) (describing how most negligence cases involved child plaintiffs and where child defendants were involved, courts traditionally invoked the general rule that “infants, like the insane, were liable for their torts like everyone else and refused to take the defendant's infancy into account in applying the ordinary negligence standard”). *See also, e.g., Conway v. Reed*, 66 Mo. 346, 350 (Mo. 1877) (“An infant is liable for a tort in the same manner as an adult.”); *Bullock v. Babcock*, 3 Wend. 391, 394 (N.Y. Sup. Ct. 1829) (“Infants, in the same manner adults, are liable for trespass, slander, assault & [etc.]”).

By 1911, however, the first state supreme court applied an exception to the objective standard of care on behalf of a child *defendant* in the primary negligence analysis.³⁸ Other courts followed soon thereafter.³⁹ Today, courts apply a subjective standard of care with children, whether the children are plaintiffs or defendants in the negligence action.⁴⁰

Courts make clear that in determining the negligence of a child, either in the primary negligence analysis or in the contributory or comparative negligence analysis, decision-makers must consider how a child of “like age, intelligence, capacity, and experience” would have acted in similar circumstances to determine if the child acted reasonably under the circumstances at issue.⁴¹ Thus, the doctrine accommodates children’s unique

38. *Briese v. Maechtle*, 130 N.W. 893, 893 (Wis. 1911).

39. *See, e.g., Patterson v. Central Mills, Inc.*, 112 F. Supp.2d 681, 685 (N.D. Ohio 2000) (noting that Ohio law presumes children under fourteen are incapable of negligence); *Horton v. Hinely*, 413 S.E.2d 199, 200 (Ga. 1992) (relating how two nine-year-olds poured gasoline on a seven-year-old, set him afire, and were not liable).

40. *See generally* DOBBS, *supra* note 2, at § 124, 294 (affirming that while most cases articulating the subjective child standard of care concern child plaintiffs, the “negligence of a defendant and contributory negligence of a plaintiff are normally judged under the same standard”); *Kelley*, *supra* note 14, at 187 (affirming that a child, “in cases where he is the plaintiff, an infant of very tender years is only bound to take the precautions of which an infant is capable; the same principle may be cautiously applied where he is defendant”). *Compare* *Bragan v. Symanzik*, 687 N.W.2d 881, 884-85 (Mich. App. 2004) (holding that the company and its owners owed a heightened standard of care to a child invitee who fell from a company ladder because the child had less appreciation for the risk than an adult) *with* *Alston v. Baltimore & O. R. Co.*, 433 F. Supp. 553, 565-69 (D.D.C. 1997)(ruling in favor of defendant railroad when a nine-year old child “unquestionably understood and appreciated that risk as fully—and perhaps even more fully—than most persons twice or several times his age”).

41. *Rogers v. Dallas R. & T. Co.*, 214 S.W.2d 160, 162-64 (Tex. Civ. App. 1948) (citing *Houston & T. C. R. Co. v. Boozer*, 8 S.W. 119, 121 (Tex. 1888)) (holding that an eleven-year-old who sustained injuries at a railroad station was not negligent because she was “only required to use that degree of care a child of like age, intelligence, capacity, and experience would have used under the same or similar circumstances”). *See also* *Cleveland Rolling-Mill Co. v. Corrigan*, 20 N.E. 466, 466 (Ohio 1889) (instructing the jury to consider the “care and prudence as a boy of his age, of ordinary care and prudence, would use under like or similar circumstances”); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 10 (AM. LAW INST. 2010); *Harlow*, *supra* note 5, at 1733, 1741. *But see* *Robinson v. Lindsay*, 598 P. 2d 392 (Wash. 1979) (recognizing an exception to the general rule that “a child is held only to the exercise of such degree of care and discretion as is reasonably to be expected from children of his age” when the child is engaged in

development through a subjective rather than objective standard.

Just as an exception to the once-universal negligence standard developed for children, an exception developed for individuals with physical disabilities.⁴² Initially, individuals with physical disabilities faced negligence liability if they did not act as a reasonable person *without* their disability would have acted under the same or similar circumstances.⁴³ In other words, originally, “reasonably prudent people” were expected to be equally physically able.

Just as with children, courts acknowledged the injustice in the doctrine’s expectation that a person without sight, for example, act as if she could see. Following the same pattern as with children, courts first recognized this injustice and crafted exception to the application of an objective reasonableness standard when adults with physical disabilities were *plaintiffs* and the question of the wrongfulness of their conduct arose in the contributory negligence analysis, not in a primary negligence analysis.⁴⁴ Courts declined to permit a person with a physical disability to lose his or her relief in a contributory negligence analysis without moral culpability.

Eventually, as with children, this exception for adult plaintiffs with physical disabilities expanded to include all adults with physical disabilities,

certain dangerous activities “normally . . . for adults only”) (internal quotations and citations omitted); RESTATEMENT (SECOND) OF TORTS § 283A (AM. LAW INST. 1965) (taking the position that the special rule for children should not be applied when the child engages in “an activity which is normally undertaken only by adults, and for which adult qualifications are required”).

42. Harlow, *supra* note 5, at 1742.

43. See *Roberts v. Ring*, 173 N.W. 437, 438 (Minn. 1919) (holding that defendant’s blindness did not “relieve him from the charge of negligence” and that his negligence “is to be judged by the standard of care exercised by the ordinarily prudent normal man”). See also *Kelley*, *supra* note 14, at 226 (recognizing that in early negligence cases, “courts . . . held that the only effect, if any, of defendant’s physical disability making it harder for him to act with ordinary care is to require him to exercise more care than a physically normal person, so that his conduct would be the same as a physically normal person’s”); *McKnite*, *supra* note 14, at 1379-80 (recognizing that, in the nineteenth century when tort law began developing a “general basis for liability based on fault,” the physically or mentally disabled person, though they may be unable to exercise the ordinary care of a “reasonable person,” was “still held to the standard of the reasonably prudent, non-disabled adult”).

44. *Kelley*, *supra* note 14, at 192 (2003) (explaining how “[i]n cases raising the question of contributory negligence by a physically disabled plaintiff . . . the courts recognized that the physical disability of the plaintiff should be taken into account, and the applicable standard should be what was reasonable to expect from a person with that disability”).

whether plaintiffs or defendants and even in the primary negligence analysis.⁴⁵ Today, to determine whether an adult with a physical disability acted negligently, a court or jury must determine whether the adult, plaintiff or defendant, acted as a reasonable person *with the same disability* would have acted in the particular circumstances at issue.⁴⁶

In other words, the negligence standard now takes into account the *subjective* physical ability of negligence defendants. Liability requires an individual with a significant visual impairment, for example, to act as a reasonably prudent person *with a significant visual impairment*, rather than as a reasonably prudent sighted person, to avoid negligence liability.⁴⁷ A person without sight is not negligent when he walks into another and injures him if a reasonable person *without sight* would have similarly traveled under the circumstances.⁴⁸ Accordingly, the person with a physical disability may not be liable for the same act for which a person without a physical disability *may* be liable.

Courts also have begun to grapple with adults' *cognitive* disabilities and

45. *Id.* See also *Hill v. Glenwood*, 100 N.W. 522, 523 (Iowa 1904) (asserting that “the streets are for the use of the general public, without discrimination; for the weak, the lame, the halt, and the blind, as well as for those possessing perfect health, strength and vision,” and the law casts upon one no greater burden of care than upon the other” and making no distinction between the blind defendant or plaintiff); Harry J.F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 LAW & PSYCHOL. REV. 1, 22 (1995) (recognizing that courts qualify the blind application of the reasonable person standard and require only conformity to a standard of conduct to which it is reasonable to expect him to conform, given his impairment.)

46. See *Roberts v. State*, 396 So. 2d 566, 567 (La. Ct. App. 1981) (holding a defendant with blindness to the standard of reasonably prudent blind person under the particular circumstances); *Traphagan v. Mid-America Traffic Marking*, 555 N.W.2d 778, 787 (Neb. 1996) (holding that “a person's disability is one of the circumstances to be considered in determining whether such person exercised ordinary care”); *Storjohn v. Fay*, 519 N.W.2d 521, 530 (Neb. 1994) (holding that one who suffers from epileptic seizures “must conform to the standard of a reasonable person under a like disability”); *Traphagan v. Mid-America Traffic Marking*, 555 N.W.2d 778, 787 (Neb. 1996) (holding that “a person's disability is one of the circumstances to be considered in determining whether such person exercised ordinary care”); *Smith v. Sneller*, 124 A.2d 61, 63, *aff'd*, 26 A.2d 452 (Pa. 1942) (“A blind man may not rely wholly upon his other senses to warn him of danger, but must use the devices usually employed, to compensate for his blindness.”).

47. See, e.g., *Roberts v. State*, 396 So. 2d at 567 (quoting W. PROSSER, THE LAW OF TORTS: § 32, pp. 151-52 (4th ed. 1971) and stating that “the conduct of the handicapped individual must be reasonable in the light of his knowledge of his infirmity, which is treated merely as one of the circumstances under which he acts”).

48. *Id.*

the impact of negligence's objective standard on *plaintiffs* who have them. Many courts now recognize the impact of adult plaintiff's cognitive disabilities by allowing a slightly subjective standard of care for these individuals when the question of negligence arises in the contributory or comparative negligence analysis and when their eggshell-skull status increases their harm.⁴⁹

By accommodating the plaintiff with a cognitive disability in the contributory negligence analysis, courts preserve the plaintiff's opportunity to recover from a negligent actor.⁵⁰ Further, under the eggshell-skull principle, courts protect a plaintiff's ability to recover losses even in cases where those losses are significantly greater than "typical" given the party's cognitive disability.⁵¹

Unlike in cases involving children and adults with physical disabilities, however, courts have been unwilling to extend this exception for the benefit of *defendants* who have cognitive disabilities for determination of primary

49. See, e.g., *Noel v. McCraig*, 258 P.2d 234, 240 (Kan. 1953) (holding that a negligence *plaintiff* who "is so absolutely devoid of intelligence as to be unable to apprehend danger and to avoid exposure to it cannot be said to be guilty of negligence" and is not subject to the "objective reasonableness" standard for his own protection); *Seattle Elec. Co. v. Hovden*, 190 F. 7 (9th Cir. 1911), *aff'g*, *Hovden v. Seattle Elec. Co.* 180 F. 487 (C.C.W.C. Wash. 1910); *Worthington v. Mencer*, 11 So. 72 (Ala. 1892); *Riesbeck Drug Co. v. Wray*, 39 N.E.2d 776 (Ind. 1942); *Johnson v. St. Paul City Ry.*, 69 N.W. 900 (Minn. 1887); *Zajackowski v. State*, 71 N.Y.S.2d 261 (Ct. Cl. 1947); *Mochen v. State*, 352 N.Y.S.2d 290, 294 (Ct. Cl. 1974) (affirming that a plaintiff who suffers from a cognitive disability "should not have his conduct measured by external standards applicable to a reasonable normal adult anymore than a physically disabled plaintiff is held to the same standards of activity as a plaintiff without such a disability"); *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619, 625 (Wis. 1970) (allowing full damages in a case where plaintiff sought damages for psychotic break from reality following minor bump when defendant rear-ended plaintiff despite defendant's argument that plaintiff's insanity caused those damages, not the minor car accident).

50. See, e.g., *Noel v. McCraig*, 258 P.2d 234, 240 (Kan. 1953) (holding that a negligence *plaintiff* who "is so absolutely devoid of intelligence as to be unable to apprehend danger and to avoid exposure to it cannot be said to be guilty of negligence" and is not subject to the "objective reasonableness" standard for his own protection).

51. See, e.g., *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619, 625 (Wis. 1970) (allowing the plaintiff full recovery in a case where plaintiff sought extensive damages flowing from a psychotic break from reality following minor traffic bump when defendant rear-ended plaintiff, despite defendant's argument that plaintiff's psychotic break caused those damages, not the minor car accident).

negligence liability.⁵² Thus, as illustrated by the example offered in the introduction, an adult defendant with a cognitive disability remains “negligent” for conduct that may be treated as “innocent” in others with disabilities or developmental differences who engaged in similar conduct.⁵³

This reality means that in the United States,⁵⁴ adult defendants with cognitive disabilities are alone without accommodation under the negligence liability standard in most cases.⁵⁵

52. *See, e.g.*, *Delahanty v. Hinckley*, 799 F. Supp. 184, 187 (D.D.C. 1992) (“While the Court acknowledges that commentators have criticized the common law rule, the fact remains that ‘courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts.’”)

53. *Supra* notes 16-23 and accompanying text.

54. *Supra* note 10 (providing authority that in some countries liability standards *do* accommodate adult defendants with cognitive disabilities).

55. Significantly, however, courts have begun to incorporate some knowledge of cognitive disabilities in typically functioning *plaintiff* caregivers when they seek relief from their patients with cognitive disabilities. *See, e.g.*, *Colman v. Notre Dame Convalescent Home*, 968 F. Supp. 809, 813 (D. Conn. 1997) (holding defendant is not liable because defendant is a dementia patient and the plaintiff is a paid caregiver); *Herrle v. Estate of Marshall*, 45 Cal. App. 4th 1761, 1765-66, 53 Cal. Rptr. 2d 713, 716 (Ca. Dist. Ct. App. 1996) (holding defendant not liable because defendant is an Alzheimer’s patient and the plaintiff is a paid caregiver); *Creasy v. Rusk*, 730 N.E.2d 659, 670 (Ind. 2000) (same); *Gould v. Am. Family Mut. Ins. Co.*, 543 N.W.2d 282, 287 (Wis. 1996). While this does not acknowledge the impact of the cognitive disability on *defendants’* abilities to satisfy an objective standard of care, it does provide some relief for those defendants. *See infra* notes 219-221 and accompanying text (discussing a new proposal to embrace within plaintiffs’ “knowledge common to the community” an appreciation of the presence and manifestation of cognitive disabilities as in modern law and contemporary life in American society). *See also Hofflander v. St. Catherine's Hosp., Inc.*, 664 N.W.2d 545, 559 (Wis. 2002) (affirming the modern applicability of an objective standard for cognitively disabled defendants, yet explaining the “custody and care exception”); *Id.* at 561 (“The custody and control rule is an exception to standard negligence law because it contemplates the possibility of a heightened duty of care for a defendant and a lowered duty of self-care for a plaintiff.”); *Id.* at 561 (explaining the basis of liability under that exception as follows: “[A] special relationship exists when a defendant caregiver assumes, voluntarily or otherwise, an enhanced responsibility to protect a vulnerable, mentally disabled person from foreseeable harms. The defendant in these circumstances is empowered with custody and an extra measure of control over the person. The heightened duty of care reflects the enhanced responsibility that attends this custody and control. However, if a defendant in these circumstances were held liable for not protecting a person from unforeseeable harms, the defendant would effectively become an insurer.”); *Id.* at 563 (concluding that “[a] mentally disabled plaintiff who seeks to rely on a defendant’s

This article agrees with those who argue that it is past time for courts to take the next step toward equality for individuals with cognitive disabilities in this context.⁵⁶ It also concurs that the historically proposed exception offers a viable solution to the standard's shortcoming with respect to adult defendants with cognitive disabilities.⁵⁷ Recognizing, however, that courts reject this exception,⁵⁸ this article also examines alternatives to it after reviewing the

heightened duty of care must establish, among other things, that the defendant caregiver knew or should have foreseen the particular risk of harm that led to the plaintiff's injury") (citations and internal quotations omitted).

56. See *supra* note 14 and authorities cited therein (offering examples of academics over a century who have proposed excepting some or all individuals with certain cognitive disabilities in a variety of ways from the traditional objective reasonableness standard); Dark, *supra* note 9, at 214 (concluding that "now is the time for the courts to replace a . . . rule seeped in prejudice, fear and ignorance . . . with a more just approach [of] mov[ing] some mental disabilities into the physical disability rule of law based on scientific research"); Harlow, *supra* note 5, at 1735-36 (suggesting that, "mentally ill defendants should have a subjective standard for determining liability that is consistent with their particular disability, just as a subjective standard is available for defendants with physical disabilities"). *But cf.* Splane, *supra* note 14, at 154 (acknowledging that "current mental health policy, treatment, and research indicate that an objective standard is more appropriate for the mentally ill," but arguing that an "objective standard should be used for both mentally ill plaintiffs and defendants to obtain consistency in the law and fairness in policy").

57. Compare *supra* note 52 and accompanying text (explaining the subjective standard for cognitively disabled defendants) with *infra* note 60 and accompanying text and *infra* notes 218-219 and accompanying text (proposing a shift from the cognitively disabled defendant to the objectively reasonable plaintiff). The proposed shift presented in this article does not resolve the logic problem inherent in the imposition of an ordinary reasonableness standard against adult defendants with cognitive disabilities, but it does mitigate the effect of that illogic.

58. See, e.g., *Delahanty v. Hinckley*, 799 F. Supp. 184, 187 (D.D.C. 1992) (stating that "[w]hile the Court acknowledges that commentators have criticized the common law rule, the fact remains that courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts"); *Bashi v. Wodarz*, 53 Cal. Rptr. 2d 635, 641 (Cal. Ct. App. 1996) (concluding that though respondent suffered "a sudden and unanticipated mental illness which rendered it impossible for her to control her vehicle at the time of the alleged tort does not, as a matter of law, preclude her liability for negligence"); *Turner v. Caldwell*, 421 A.2d 876, 877 (Conn. Super. Ct. 1980) (affirming that the weight of authority holds the insane liable for their torts); *Wagner v. Utah Dep't of Human Servs.*, 122 P.3d 533, 608 (Utah 2005) (acknowledging that "though the majority rule is not without its critics, 'the fact

“exception” as background.

*B. Three Proposed Solutions: Looking Back
before Moving Forward*

Unlike children, individuals with physical disabilities, and adult *plaintiffs* with cognitive disabilities, adult negligence defendants with cognitive disabilities face liability (in most cases)⁵⁹ without accommodation under an objective standard that may be impossible for them to satisfy.⁶⁰ This section of this article considers three alternative paths to resolve, at least in part, the inequity and impossibility imposed.

This section begins by offering as background a consideration of the previously proposed “exception” from the standard for those with cognitive disabilities.⁶¹ Next, it considers a reckoning of the negligence classification in these cases and a re-designation of it as strict liability.⁶² Finally, it offers a novel re-examination of the objective standard as applied to the typical *plaintiff* in a manner that might relieve some cognitively disabled *defendants* from liability.⁶³

*1. Background: Allowing an “Exception” with a Slightly
Subjective Standard*

This Subpart considers the prevailing recommendation to mitigate negligence’s cognitive-disability disadvantage:⁶⁴ that courts or legislatures

remains that courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts”).

59. In claims brought by their caregivers, adult defendants with cognitive disabilities have successfully asserted defenses of contributory and comparative negligence to avoid liability. *See supra* note 55 and authority cited therein.

60. Of course, just because a person has a cognitive disability does not mean he or she cannot satisfy the objective reasonableness standard in a particular circumstance. Sometimes, a party’s cognitive disability will not be relevant to a negligence analysis. Other times, it may be. This holds true with age (childhood) and physical disabilities as well. This paper is concerned only with those cognitive disabilities that do, in fact, adversely impact an adult defendant’s ability to satisfy an objective standard of care in a particular set of circumstances.

61. *See infra* notes 65-133 and accompanying text.

62. *See infra* notes 136-144 and accompanying text.

63. *See infra* notes 184-185 and accompanying text.

64. *See supra* notes 13-24 and accompanying text (offering an example to illustrate the inherent inequity referenced here). *See also* Harlow, *supra* note 5, at 1760; Korrell, *supra* note 45, at 34 (explaining that a blind person is not required to step

carve an exception to the objective reasonableness standard, rendering it slightly subjective when applied to adult defendants with relevant cognitive impairments in claims of primary negligence.

The scholarship advancing this “exception” runs deep.⁶⁵ It

outside at his own peril, therefore “[t]o require that the [cognitively] disabled live in our communities at their peril requires some justification beyond cost effectiveness”). 65. See, e.g., Ague, *supra* note 14, at 211 (concluding that a standard of conduct for insane persons ought be “something less than the reasonable man standard”); Bohlen, *supra* note 14, at 9, 31 (critiquing precedent holding individuals with cognitive disabilities liable in the same manner as a non-disabled person and stating “that where a liability . . . is imposed upon persons capable of fault only if they have been guilty of fault, immaturity of age or mental deficiency, which destroys the capacity for fault should preclude the possibility of liability”); Bromberger, *supra* note 13, at 435 (acknowledging criticisms of the application of objective reasonableness to individuals with cognitive disabilities, canvassing alternatives, and concluding that “an approach which would hold mentally ill defendants to an attenuated standard of care,” except in a compulsory insurance situation, is best); Casto, *supra* note 14, at 705 (criticizing the rule that the “insane” are subject to the “reasonable man” standard); Cook, *supra* note 14, at 333, 337, 344 (arguing contrary to then-controlling doctrine that “a lunatic whose mind has, through disease or accident, become defective would not seem to be liable for actionable negligence inasmuch as he has no capacity for acting as a prudent man”); Curran, *supra* note 14, at 52, 65 (asserting that application of the “objective reasonable man standard” to the “mentally ill or mentally deficient” “is in effect imposing strict liability upon the mentally ill and mentally deficient” and arguing that this makes the distinction between negligence and other torts meaningless); Dark, *supra* note 9, at 214 (critiquing application of the objective reasonableness standard against those with mental disabilities and concluding that “[n]ow is the time . . . to replace a seventeenth-century rule steeped in prejudice, fear and ignorance . . . with a more just approach to the mentally disabled in the twenty-first century”); Ellis, *supra* note 14, at 1079, 1109 (arguing that, in light of changes in understandings about individuals with cognitive disabilities, tort liability standards ought be reconsidered and concluding that a subjective standard of care in negligence, as opposed to the objective “reasonable man” standard, “may be seen as a modest step toward equitable treatment of the mentally handicapped before the law”); Goldstein, *supra* note 14, at 67, 92 (critiquing the universal application of the objective reasonableness standard in negligence and arguing that “a subjective standard should be applied to mentally ill individuals who cannot avoid causing negligent harm due to their mental illness”); Harlow, *supra* note 5, at 1733, 1760 (dismantling the justifications for imposition of the traditional rule of ordinary reasonableness against individuals with cognitive disabilities and arguing that a “fairer result, in keeping with our fault-based system of tort, would be to temper the objective reasonable person standard with a test for mental capacity to determine liability”); Hornblower, *supra* note 14, at 278, 282 (stating that

comprehensively covers the benefits of a slightly subjective standard of care. This Subpart thus reviews only briefly the most significant advantages of the proposed exception to the otherwise objective standard in primary negligence analysis before confronting several prominent critiques of this proposed solution.

a. Advantages of the Proposed Exception

Proponents of an exception to the objective standard of care to accommodate defendants' cognitive disabilities when determining negligence offer five principle justifications to support it. They assert that the exception would: (1) serve the interests of justice and equality,⁶⁶ (2) satisfy the "fault"

"[t]he reasons assigned by the text-writers for the rule that an insane person can be held liable civilly for damages for tort . . . are based entirely on expediency. . . [and] [i]t is questionable whether any one of these reasons is logically satisfactory" before concluding that "[t]he true rule and the only rule consistent with justice and reason . . . is that a person who is *non compos mentis* cannot be held liable for negligence"); McKnite, *supra* note 14, at 1375 (offering a survey of the objective standard's development and proposing policy changes); Seidelson, *supra* note 14, at 7, 46 (concluding that the "reasonable person" standard should be abandoned in favor of a subjective standard for individuals who are "mentally incompetent" in all cases and for individuals who have "low mental capacity" when this would not frustrate the other party's reasonable expectations); Wilkinson, *supra* note 14, at 38, 57 (arguing that "[i]f fault is the crux of negligence it is, indeed, hard to make a logical case for holding a mentally incompetent person liable for negligence, for where can the fault be found?"). *But see* George J. Alexander & Thomas S. Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME L. REV. 24 (1967) (endorsing an objective standard as applied to individuals with cognitive disabilities based upon an outmoded understanding of those disabilities); Kelley, *supra* note 14, at 231 (recognizing that despite "unrelenting criticism for over one hundred years, courts in the United States have continued to apply the rule that mental illness or deficiency is not a defense" to negligence); *id.* at 252 (concluding that this reality was justifiable under the original negligence doctrines of the 19th century, but that adoption of proportionate negligence principles "makes it harder" to accomplish the goals of tort liability when an objective reasonableness standard is applied to the cognitively disabled); Splane, *supra* note 14, at 153-54 (acknowledging that the "consensus of recent opinion" is that the objective reasonableness standard is no longer appropriate for individuals with cognitive disabilities, but asserting a contrary view that the objective standard remains appropriate to support integration of "mental patients" into the community).

66. Dark, *supra* note 9, at 171-72 (advocating that "this proposal is an effort to remedy some of the fundamental unfairness to the defendant with a mental disability and still achieve tort objectives of fairness, justice, and accountability"); Kelley, *supra* note 14, at 215 (recognizing that courts' use of the slightly subjective standard for individuals

principle at the foundation of negligence,⁶⁷ (3) reflect modern expectations about the place of individuals with cognitive disabilities in society today,⁶⁸ (4) conform to the pattern of evolution in the standard over time with respect to the creation of exceptions for children, those with physical disabilities, and *plaintiffs* with cognitive disabilities for purposes of determining contributory or comparative negligence,⁶⁹ and (5) align with courts' willingness to consider

with cognitive disabilities will "vindicate those innocent of a wrong and require those guilty of a wrong to act justly to redress it" and concluding that "[t]herefore, the community [] both promotes and achieves justice through its judicial institutions").

67. *See, e.g.*, Bomberger, *supra* note 13, at 412 (suggesting that "these commentators argue that to require people to act in a way that is beyond them is to turn fault based liability into strict liability"); Dark, *supra* note 9, at 183 (recognizing that courts' application of an objective standard to defendants with relevant cognitive disabilities is analogous to strict liability but also recognizing that "the basis of tort liability in the twenty-first century is fault," not strict liability); Harlow, *supra* note 5, at 1735 (recognizing that the majority rule of objective reasonableness does not effectively ameliorate the paradox of imposing liability on an actor for actions caused by a disability or illness, rather than free will, in a fault-based tort system); Korrell, *supra* note 45, at 13 (discussing how "[courts'] blind adherence to such a rule is problematic at best" and that "[t]he integrity of our fault-based regime would be better served by renewed judicial examination of the awkward fit of this antiquated rule in our modern tort system").

68. *See, e.g.*, Bomberger, *supra* note 13, at 431 (asserting, "this proposal suggests that, in light of current medical knowledge which recognizes the physiological basis for the majority of mental illnesses, those with a mental illness could easily be classified with those who have what are traditionally known as physical illnesses"); Dark, *supra* note 9, at 200 (acknowledging the advance of modern medicine and science recognize that cognitive disabilities have physical foundations but that courts "have based the traditional rule on an unproved assumption that mental disabilities are somehow unconnected to and unrelated to physical disabilities or limitations").

69. Kelley, *supra* note 14, at 180 ("Surely some forms of mental illness, just like infancy and physical disability, may make it practically impossible for the actor to conform his conduct to the ordinarily required standard. The different treatment of the mentally ill seems to be an unjustifiable anomaly in the law."); *Snider v. Callahan*, 250 F. Supp. 1022, 1022 (W.D. Mo. 1966) (a plaintiff with a "mental deficiency may avoid what would otherwise be contributory negligence in a normal person"); Best, *supra* note 67, at 1745 ("Although there is still strict liability with regards to mentally ill defendants, the law has shifted to allow mental illness as a defense to contributory negligence."); Splane, *supra* note 14, at 157 (citing, *e.g.*, *Baltimore & P. R. Co. v. Cumberland*, 176 U.S. 232 (1900) (explaining that the majority of jurisdictions have long considered plaintiff's mental competence in determining contributory negligence). *See Baltimore & P. R. Co. v. Cumberland*, 176 U.S. at 238-39 ("In

plaintiffs with cognitive disabilities for purposes of determining their damages under the eggshell-skull principle.⁷⁰ Because others have effectively addressed these advantages, this article does not elaborate further.⁷¹

Despite the documented advantages of a slightly subjective standard of care for adult defendants with cognitive disabilities, there has been much practical and judicial resistance to it. No court has embraced this exception,⁷² but many have rejected it.⁷³

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, but only to hold him to the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger.”).

70. *See, e.g.*, *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619, 625 (Wis. 1970) (allowing the plaintiff full recovery in a case where plaintiff sought extensive damages flowing from a psychotic break from reality following minor traffic bump when defendant rear-ended plaintiff, despite defendant’s argument that plaintiff’s psychotic break caused those damages, not the minor car accident).

71. *See supra* note 14 (offering citations to numerous articles demonstrating the advantages of recognition of a slightly subjective standard of care in negligence actions against individuals with cognitive disabilities). *See also* Dark, *supra* note 9, at 207-08 (offering a particularly robust analysis of the advantages of this solution to inequities inherent in the application of negligence’s objective standard against adult defendants with cognitive disabilities).

72. *See, e.g.*, *Johnson v. Lambotte*, 363 P.2d 165, 166 (Colo. 1961) (suggesting that in determining an insane person’s liability for negligence, “he is held to the same degree of care and diligence as a person of sound mind”); *Ellis v. Fixico*, 174 Okla. 116, 117 (1935) (determining that the courts hold “a minor, or a person of unsound mind, of whatever degree, is civilly liable for a wrong done by him, in like manner as any other person”); *Crossv. Kent*, 32 Md. 581, 583 (1870) (explaining the majority rule that “[t]he distinction between the liability of a lunatic or insane person . . . is well defined, and it has always been held, and upon sound reason, that . . . he is liable to a civil action for any *tort* he may commit”); *Ramey v. Knorr*, 124 P.3d 314, 317 (Wash. Ct. App. 2005) (recognizing that “both for historical and other reasons, insanity or other mental deficiencies generally are not recognized as defenses to negligence [and that] Washington, along with the majority of states, holds the mentally ill to the standard of a reasonable person under like circumstances”).

73. *See, e.g.*, *Johnson v. Lambotte*, 363 P.2d 165, 166 (Colo. 1961); *C.T.W. v. B.C.G. & D.T.G.*, 809 S.W.2d 788 (Tex. App. 1991) (holding that “an ordinary prudent person with the mental illness of pedophilia” must be held to an objectively reasonable standard); *Breunig v. American Family Ins. Co.*, 173 N.W.2d 619, 625 (Wis. 1970); *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837). *See also* Kelley, *supra* note 14, at 179 (recognizing that despite “unrelenting criticism for over one hundred years, courts in the United States have continued to apply the rule that mental illness or

b. Disadvantages of the Proposed Exception

Critiques of a subjective standard of care that would take adults' cognitive disabilities into account in determining negligence fall in three principle categories: (1) application of a subjective standard of care risks leaving an injured plaintiff without compensation;⁷⁴ (2) application of a subjective standard of care would require courts to employ an administratively impracticable standard;⁷⁵ and (3) application of a subjective standard of care risks incentivizing social rejection, and potentially re-institutionalization, of those with cognitive disabilities.⁷⁶

deficiency is not a defense" to negligence); *id.* at 252 (concluding that this reality was justifiable under the original negligence doctrines of the 19th century, but the adoption of proportionate negligence principles "makes it harder" to accomplish the goals of tort liability when an objective reasonableness standard is applied to the cognitively disabled).

74. *See, e.g.*, Splane, *supra* note 14, at 167 (arguing that "if the mentally ill were allowed to escape tort liability, there is a risk that the public might become outraged by the perceived injustice of denying compensation to innocent victims"); Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 S.M.U. L. REV. 409, 418 (acknowledging that "others have noted as reasons advanced in favor of the rule that as between the plaintiff and defendant, the party who caused the loss should be required to compensate for the resulting harm"); Eli K Best, *Atypical Actors and Tort Law's Expressive Function*, 96 MARQ. L. REV. 451, 494 (2012) (citing George J. Alexander and Thomas S. Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME L. REV. 24 (1967) and explaining that some critics have argued that "applying the objective reasonable person standard to people with cognitive disabilities avoids "creat[ing] (sic) a class of irresponsible persons," who will be "shut off from society and desocialized," "dehumanized and friendless").

75. *See, e.g.*, Ellis, *supra* note 14, at 1087-89 (arguing that "[a] subjective rule would be unmanageable because of the subtle variations of intelligence, temperament, and emotional balance which are common to all people and thus to all tort defendants" and that the abandonment of the objective standard would "produce the same immense difficulties encountered by the criminal law in the administration of the insanity defense").

76. *See, e.g.*, Morris, *supra* note 30, at 1852 (suggesting that the "use of a subjective standard has other anti-therapeutic consequences for people with mental or emotional problems" and that "[b]y refusing to hold them accountable as ordinary persons, society denies their status as full-fledged human beings . . . [and p]ressure to institutionalize them, or reinstitutionalize them is inevitable"); Splane, *supra* note 14, at 165 (cautioning that "allowing a defense of mental illness to tort liability may increase public resistance to having the mentally ill in the community").

This article next addresses each of these critiques in turn. It also recognizes that modern realities have reduced or eliminated the strength of each concern.

i. Risk of Uncompensated Plaintiffs

Critics of the proposed subjective standard of care in cases involving adult negligence defendants with cognitive disabilities worry that these defendants will create uncompensated losses. They emphasize that, under a subjective standard of care, these defendants may avoid liability even when their behavior has played a role in creating plaintiffs' injuries. As a result, some injured plaintiffs may find themselves uncompensated for losses. While this concern may have had historic merit, modern insurance practices reduce the strength of this claim today.⁷⁷

Historically, courts emphasized that defendants with cognitive disabilities should remain liable for their harms because as "between two innocent people, the one who caused the injury and is mentally ill should bear the burden."⁷⁸ Courts have justified this conclusion because "[the awkward man's] slips are no less troublesome to his neighbors than if they sprang from guilty neglect."⁷⁹

The Restatement Second of Torts captured this essential rationale bluntly: "if mental defectives are to live in the world they should pay for the damage they do, and that it is better that their wealth, if any, should be used to compensate innocent victims than that it should remain in their hands."⁸⁰

77. "Insurance is a common mechanism for spreading losses, and helps at the same time to protect plaintiff's claim to compensation." Tony Honore, *The Morality of Tort Law – Questions and Answers*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 73, 89 (David G. Owen, ed. 1995). Further, insurance helps ensure that "tort damages are . . . not grossly disproportionate to the fault of the defendant who has caused the harm." *Id.* at 90. In this manner, insurance is particularly significant in the cases at issue here, where the defendant with a cognitive disability is "innocent" and lacks moral blameworthiness when causing plaintiff's harm. To avoid liability that is "grossly disproportionate to the fault of the[se] defendant[s]" who are blameless while also allowing compensation to injured persons, insurance fills the gap.

78. Harlow, *supra* note 5, at 1748. See *Vosnos v. Perry*, 357 N.E.2d 614, 615 (Ill. App. Ct. 1976); *Kuhn v. Zabotsky*, 224 N.E.2d 137, 141 (Ohio 1967); *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619, 624 (Wis. 1970).

79. *Jolley v. Powell*, 299 So.2d 647, 648 (Fla. Dist. Ct. App. 1974).

80. RESTATEMENT (SECOND) OF TORTS § 283B (1965). See also RESTATEMENT (THIRD) OF TORTS: Apportionment of Liability § 3 (2000) ("Plaintiff's negligence is defined by the applicable standard for a defendant's negligence."); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11(c)

This historic prioritization of compensation for plaintiffs over protection of the integrity of the tort by limiting liability to those who have moral culpability for harm has become less valid over time. Today, plaintiffs have ample opportunity to find compensation for their injuries, at least for many quantifiable monetary losses that would otherwise constitute special damages, even if defendants with cognitive disabilities are not liable under negligence principles.⁸¹ In fact, it is quite unlikely that recognizing an “exception” to the objective reasonableness standard in this context will lead to the harsh result—innocent uncompensated plaintiffs—feared by courts and critics.

To avoid uncompensated losses, modern potential plaintiffs will either actively seek to prevent the harm in the first instance or find another source of compensation for any “innocent” harms incurred, such as a first-party insurance provider.⁸² Society has successfully dealt with the exceptions to the objective standard for children and those with physical disabilities through these precautions.⁸³ There is no reason to believe the same will not be true for the

(2010)(“An actor's mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child.”).

81. The Patient Protection and Affordable Care Act, for example, incentivizes all nonexempt citizens to purchase some health care coverage that would be available for the injured plaintiff’s medical expenses. *See* Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A(a) (2010). Further, disability insurance might be available to compensate the plaintiff for lost wages, worker’s compensation insurance for medical expenses and lost wages (where the injury was also work-related), and first-party property insurance for damage to property. Thus, where the plaintiff and the defendant with a cognitive disability are both insured by otherwise applicable policies, relieving the faultless defendant of liability results in the shift of risk from a third-party liability insurance carrier to a first-party insurance carrier. Where the defendant is uninsured and judgment-proof, there would likely be no change to the current outcome as the plaintiff’s only recovery would likely come from first-party carriers.

82. Korrell, *supra* note 45, at 33.

83. While the specific phrasing of policies varies, first-party insurance policies such as accident, health and property insurance generally provide compensation for harm to person or to property where the harm was caused by accident. Whether the harm was caused by “accident” is determined from the perspective of the insured. Thus, assuming the plaintiff was injured by accident from his perspective, and assuming there are no other applicable policy exclusions, first-party coverage should compensate the plaintiff whether the party causing the harm acted intentionally or negligently, or where, due to his age or physical disability, he is deemed to be without liability. *See* ROBERT E. KEETON AND ALAN I. WIDISS, *INSURANCE LAW* § 5.4, 511 (1988) (“For most types of insurance coverages, appellate court resolutions of issues about the perspective from which to assess whether a loss is fortuitous (or not intended) are

cognitively disabled.

In the context of children, courts readily recognize that “members of society must accept the damage done by very young children to be no more subject to legal action than some force of nature or act of God.”⁸⁴ Recall the introductory example considering harm caused by a defendant’s inability to read a sign due to age (childhood), visual impairment (physical disability), or cognitive disability.⁸⁵ Through this example, one recognizes that harm caused by an adult with a cognitive disability preventing her from comprehending a written message⁸⁶ may be equally as innocent as that caused by a child (or an adult with a significant visual impairment) whose developmental differences prevent her ability to read. To be consistent, society at large “must accept” the risk of harm in all three cases as “no more subject to legal action than some force of nature or act of God.”

Under our fault-based negligence system in cases where both parties are “innocent,” one due to limitations imposed by a cognitive disability and the other for other reasons, they ought equally share the risk of loss. It should not be placed disproportionately on the one whose innocence is due to a cognitive disability.⁸⁷

Ultimately, while some injured plaintiffs may go uncompensated should courts recognize an exception to the objective standard of care for adult defendants with cognitive disabilities, this under-compensation will not be as

consistent with the proposition that the determination should be made from the point of view of the person whose economic interest is protected by the insurance policy. In a great many instances, the insured is that person. For example, in the case of property insurance ordinarily the insured is a person who sustains an economic loss as the result of damage to an insured property – that is, a person who is an owner or a mortgagee has arranged to protect that interest by the insurance policy. Similarly, in the case of accident and health insurance, the insured is frequently the person who actually sustains the physical injury that causes the economic harm which the insurance is designed to compensate. Consequently, when this type of situation exists it is the insured whose actions and state of mind should be considered in relation to the requirement that the loss be fortuitous.”).

84. *Deluca v. Bowden*, 329 N.E.2d 109, 111 (Ohio 1975).

85. *Supra* notes 13-24 and accompanying text (illustrating that while a child or physically disabled defendant is entitled to a subjective standard in determining whether they may be excused from liability for failure to appreciate risk resulting in harm, a defendant who lacks the cognitive ability to appreciate risk is expected to conform to the objective standard).

86. Of course not all cognitive disabilities would prevent a defendant from reading a sign. If the defendant’s cognitive disability was not relevant to the act forming the basis of a negligence action, it would not be relevant to the analysis.

87. *See Harlow, supra* note 5, at 1748.

great as courts fear. Instead, potential plaintiffs will actively seek other remedies through insurance. And no logic allows imposition of liability without moral wrongfulness on defendants with cognitive disabilities, as opposed to any other defendant with developmental differences, simply to compensate plaintiffs.

ii. Risk of Administrative Challenges

In addition to concern about plaintiffs' compensation, courts have persistently applied the objective standard to defendants with cognitive disabilities because courts fear an exception in these cases would be difficult to administer.⁸⁸ Courts and critics of a subjective standard in this context raise two types of administrative concerns.

First, courts worry that they are ill equipped to answer the question of whether a person has a relevant cognitive impairment or is merely making a false claim to avoid liability. Second, courts question their ability to draw a clear line between cognitive disabilities so severe they render a person blameless under an objective standard and cognitive disabilities only mildly impacting that do not render a person incapable of satisfying an objective measure.⁸⁹

Just as concerns about uncompensated plaintiffs have diminished over time, these administrative concerns have diminished over time. Modern developments in law, science, and medicine should increase judicial efficiency in resolving these fundamental questions.

Courts have long feared that an accommodation within the objective standard for individuals with cognitive disabilities would suggest to all defendants that proof of a cognitive disability would offer a “get out of [liability] free card” and tempt them to falsely assert cognitive disabilities.⁹⁰ One court explained that it must hold “the mentally disabled accountable for their torts to prevent defendants from simulating or pretending insanity to

88. *Id.*

89. Korrell, *supra* note 45, at 35. *But see infra* note 105 (explaining that, in North Carolina, magistrates are not required to be learned in the law and are statutorily prescribed the authority to determine whether an individual should be involuntarily committed).

90. Harlow, *supra* note 5, at 1751. *See also Sforza*, 268 N.Y.S. at 447 (holding that adopting a subjective standard for cognitively disabled defendants “would readily induce an influx of simulated or pretended insanity, predicated upon a great variety of anomalous situations, which would work fraud and injustice”) (citations omitted).

defend their wrongful acts.”⁹¹

It is possible that a typically functioning individual might assert cognitive impairments in an effort to avoid negligence liability. In the twenty-first century, however, distinguishing legitimate from non-legitimate claims of cognitive disability is a task with which courts are familiar. Courts already determine cognitive capability in the areas of contract,⁹² probate,⁹³ health care,⁹⁴ family law,⁹⁵ criminal law,⁹⁶ and even in primary negligence cases involving children.⁹⁷ With children in primary negligence claims, courts must

91. *Jankee v. Clark*, 612 N.W.2d 297, 316-17 (Wis. 2000) (explaining different jurisdictional approaches); *Sforza*, 268 N.Y.S at 448.

92. *See, e.g., Lloyd v. Jordan*, 544 So. 2d 957, 959 (Ala. 1989) (citations and internal quotation marks omitted) (distinguishing that “a contract cannot be avoided on ground[s] of mental incapacity or weakness unless it is shown that the incapacity was of such a character that, at the time of execution, the person had no reasonable perception or understanding of the nature and terms of the contract . . . or the incapacity was accompanied by . . . undue influence”). *See also* 17 C.J.S. *Contracts* § 133(1), at 855-57 (1963) (reiterating the well-established rule that “to make a valid contract, each party must be of sufficient mental capacity to appreciate the effect of what he is doing, and must also be able to exercise his will with reference thereto”).

93. *See, e.g., Forehand v. Sawyer*, 136 S.E. 683, 689 (Va. 1927) (discussing the importance of expert testimony, namely the family physician of the testator, “on the question of capacity to make a will”). *See also* Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 26 (2006) (discussing that “the legal standard requires a testator to know the nature and extent of his or her property, the natural objects of his or her bounty and the contents of his or her estate plan”).

94. *See, e.g., Wall v. Astrue*, 561 F.3d 1048, 1051-52 (10th Cir. Colo. 2009) (citing 20 C.F.R. § 416.905(a) and describing the five-step framework the Social Security Administration uses to determine if a claimant is disabled and therefore unable to do any “substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . can be expected to last for a continuous period of not less than 12 months”).

95. *See, e.g., In re Adoption/Guardianship of Harold H.*, 911 A.2d 464, 471 (Md. 2006) (recognizing that in matters of child custody, for example, the presumption that a child's best interests are served while in the custody of his natural parents can be rebutted by “evidence of unfitness”) (quoting *In re Caya B.*, 834 A.2d 997 (Md. Ct. Spec. App. 2003)).

96. Korrell, *supra* note 45, at 35. *See also infra* note 105 and accompanying text.

97. *See, e.g., In re William G.*, 963 P.2d 287, 293 (Ariz. Ct. App. 1997) (holding that “riding a shopping cart in a parking lot when done by a fifteen year old is an activity that must be judged by the standard of fifteen year olds of like age, intelligence and experience”); *First Nat’l Bank of Arizona v. Dupree*, 665 P.2d 1018, 1022 (Ariz. Ct. App. 1983) (citations omitted) (holding that “children are not liable for

consider difficult factual questions to determine a child's actual intelligence and maturity.⁹⁸

To support the work of the courts, many states provide judicial officials with expert-approved manuals to facilitate efficient and accurate determination of cognitive ability.⁹⁹ Specialists often offer testimony to assist in accurately establishing the presence and severity of cognitive disability. Scientists are between ninety-two and ninety-five percent likely to identify excessive disability when it is faked.¹⁰⁰

Today, in contrast to a century ago, with the assistance of manuals and medical experts and with experience from other contexts, courts are capable of separating those persons who experience a relevant cognitive disability from those only claiming to experience one.

Not only can courts make effective determinations about relevant cognitive disabilities, but also they are likely to confront such questions in fewer cases than feared. In the criminal context, “[a]ccording to the Virginia Department of Mental Health, Mental Retardation, and Substance Abuse Services, only one percent of felony defendants nationwide raise the insanity defense[;] [t]he rate of these defendants successfully pleading the insanity defense is even lower--less than 0.002%.”¹⁰¹ Similarly, in the civil context, while some feared that parents would seek diagnoses of cognitive disabilities in their children in order to secure special accommodations in school under the Individuals with Disabilities Education Act,¹⁰² that fear has not panned out.¹⁰³

injuries arising from their conduct while participating in children's games if the games are customarily played by children and are not inherently unreasonably dangerous”); *Rogers v. Dallas R. & T. Co.*, 214 S.W.2d 160, 162-64 (Tex. Civ. App. 1948) (holding that an eleven-year-old who sustained injuries at a railroad station was not liable because the daughter was “only required to use that degree of care a child of like age, intelligence, capacity, and experience would have used under the same or similar circumstances”).

98. Korrell, *supra* note 45, at 37.

99. Harlow, *supra* note 5, at 1751; Therese Roe Lund and Jennifer Renne, *Child Safety: A Guide for Judges and Attorneys*, THE AMERICAN BAR ASSOCIATION p. 13-18 (2009), available at http://nrccps.org/documents/2009/pdf/The_Guide.pdf (last visited July 11, 2014).

100. Julie E. Grachek, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1487-88 (2006).

101. *Id.*

102. Lisa Lukasik, *Asperger's Syndrome and Eligibility Under the IDEA: Eliminating the Emerging "Failure First" Requirement to Prevent a Good Idea From*

There remains considerable social stigma and risk associated with a claim of cognitive disability.¹⁰⁴ Individuals who claim cognitive disability also face the reality that any evidence used to support their claim of cognitive disability may be used against them later in a proceeding for involuntary commitment to a mental institution.¹⁰⁵ For these reasons, defendants remain unlikely to make false claims.¹⁰⁶

Given modern sophistication in courts and among scientists regarding cognitive disabilities, evidence that defendants have not asserted false claims in other contexts, and the risks associated with making them, the feared onslaught of false claims appears unlikely to become a reality.

In addition to a fear of false claims, courts and critics of the proposed “exception” to the objective standard of care for adult defendants with cognitive disabilities worry about accurate line drawing.¹⁰⁷ Critics fret that

Going Bad, 19 V.A. J. SOC. POL’Y & L. 252, 269 (2011) (demonstrating that “there is ample evidence contrary to the fears of special education critics that parents affirmatively resist diagnosis in their children and grieve when a child receives a disability diagnosis”).

103. *Id.*

104. Curran, *supra* note 14, at 52, 65 (recognizing that attorneys of defendants may decline to raise evidence of cognitive disability because “the use of such a defense, even if successful, may hold relatively worse social consequences for the defendant than paying a tort verdict”).

105. *Id.* See also, e.g., N.C. Gen. Stat. § 122C-343 (“If the clerk or *magistrate* finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill and either (i) dangerous to self . . . or dangerous to others, . . . , or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness, the clerk or magistrate shall issue an order to a law enforcement officer or any other person authorized under G.S. 122C-251 [Part 6] to take the respondent into custody for examination by a physician or eligible psychologist.”) (emphasis added). In North Carolina, “[t]o be eligible for nomination as a magistrate, an individual shall have at least eight years’ experience as the clerk of superior court in a county of this State or shall have a four-year degree from an accredited senior institution of higher education or shall have a two-year associate degree and four years of work experience in a related field, including teaching, social services, law enforcement, arbitration or mediation, the court system, or counseling.” N.C. Gen. Stat. § 7A-171.2 (2013). In contrast, Florida allows for appointment of “general magistrates” only “from among the members of The Florida Bar.” Fla. R. Fam. Law R. Proc. § 12.490(a). And, in determining whether an individual is incompetent due to mental illness, pursuant to Fla. Stat. § 916.13 (2013), “[t]he court may appoint a general or special magistrate to preside at the hearing.” Fla. Stat. § 394.467(6)(a).

106. Goldstein, *supra* note 14, at 76.

107. *Supra* notes 89 and 105 and accompanying text.

courts cannot consistently draw a satisfactory line beyond which a person is sufficiently disabled to warrant application of the exception and before which one does not warrant application of the exception.

Courts may be so generous in applying the exception that it overcomes the rule.¹⁰⁸ In cases in which adult defendants in negligence actions have legitimate, confirmed cognitive disabilities, how will courts determine whether the recognized disability is one of relevance to the tort? As one commentator explained, “[i]f defendants were able to use their individual characteristics or shortcomings” to avoid liability, “there would be unlimited defenses for tort actions because every defendant could show some clumsiness, or slightly lower intelligence, or lesser ability to pay attention, than others.”¹⁰⁹

As noted above, however, courts already engage in similar line drawing in a number of legal contexts, including in the context of determining the primary negligence of children subject to an analogous exception to the objective standard of care.¹¹⁰ This precedent offers guidance in drawing this line with adult defendants.¹¹¹ Moreover, as in so many contexts, parties must rely on the judiciary to use sound judgment and make well-reasoned determinations in making difficult discretionary decisions as part of their role in administering justice.¹¹²

Returning again to consider the analogous example of an adult defendant without sight, another author explained:

A blind person is generally excused for not seeing, and if he were to bump a fellow pedestrian, he would likely not be liable[;] [y]et, in *Masters v. Alexander*, a man with poor eyesight who did not wear his glasses was held liable for an automobile accident caused by his inability to see danger that other motorists could see. The defendant in *Masters* should have worn his glasses or had his cataract corrected

108. Korrell, *supra* note 45, at 39.

109. Harlow, *supra* note 5, at 1738.

110. *See supra* notes 97-98 and accompanying text.

111. Korrell, *supra* note 45, at 56. *See also infra* note 113 and accompanying text.

112. *See In re Small*, 689 S.E.2d 482, 484 (N. C. Ct. App. 2009) (“All courts are vested with inherent authority to do all things that are reasonably necessary for the proper administration of justice.”); *Williams v. United States*, 859 A.2d 130, 136 (D.C. Ct. App. 2004) (explaining that courts have “inherent authority” to ensure that “all parties are treated fairly, and that justice is done”).

before he drove.¹¹³

This example highlights courts' aptitude to determine when to apply an exception to the objective standard and when to stick with the traditional rules, even in cases where a meritorious disability is undisputedly present.¹¹⁴

In fact, some courts are beginning to recognize that "[c]onsidering the present state of medical knowledge, it is possible and practical to evaluate the degrees of mental acuity and correlate them with legal responsibility."¹¹⁵ And "courts are merely shying away from a difficult factual inquiry when they refuse to consider a defendant's mental disability."¹¹⁶

In the end, while these administrative concerns had historic merit, modern medical and judicial sophistication reduce their significance. The fear that courts will be overrun and unable to weed out false claims of cognitive disability seems factually unwarranted. And the limited invocation of the insanity defense in the criminal context¹¹⁷ and lack of claims in the civil

113. Korrell, *supra* note 45, at 39. *See also* Masters v. Alexander, 225 A.2d 905, 908 (Penn. 1967).

114. As illustrated by the Masters case, the courts recognize that a defendant with a physical disability may retain ordinary mental attributes such as judgment. Accordingly, the blind defendant who bumps into another pedestrian may be excused from liability under a subjective standard of care when assessing the defendant's physical conduct. However, the defendant who chooses to operate a vehicle while suffering from a vision impairment may be liable under an objective standard of care when assessing the defendant's unimpaired judgment. Courts could, no doubt, also discern instances where the defendant with a cognitive disability did not have awareness of the disability and, therefore, apply a subjective standard to the defendant's judgment. For example, the defendant suffering from Alzheimer's may not be aware of his disability and, therefore, his decision to engage in certain conduct should, under the argument here, be assessed under a subjective standard.

115. Korrell, *supra* note 45, at 36; Masters v. Alexander, 225 A.2d 905, 911 (Penn. 1967) ("There is substantial medical evidence as to the effect of the destruction of a portion of the plaintiff's brain.").

116. Korrell, *supra* note 45, at 36.

117. *See* Lisa A. Callahan et. al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & LAW 331, 334 (1991) (determining in an eight-state study that "[t]he insanity defense was raised in approximately one percent of all felony cases" and acquittal was reached in only twenty-six percent of such cases); Cynthia G. Hawkins-Leon, "Literature as law": *The History of the Insanity Plea and a Fictional Application Within the Law & Literature Canon*, 72 TEMP. L. REV. 381, 409 (1999) (summarizing Callahan's findings and explaining that there are "[a] number of factually false (mis)perceptions that the public generally holds . . . regarding the substance and results of a [not guilty for reasons of insanity] NGRI verdict").

context¹¹⁸ may provide some bases for believing, though not guaranteeing, false claims of cognitive disability will be few and far between.

Moreover, while difficulty establishing a baseline level of disability sufficient to justify the application of an exception remains a challenge, it is one that courts can overcome. They have done just that in other instances.¹¹⁹

iii. Risk of Backlash and Re-institutionalization

While modern advances have minimized concerns over uncompensated losses and scientific uncertainty, they also have raised a new concern. Contemporary authors identified a third potential problem resulting from the introduction of a slightly subjective standard for cognitively disabled adult defendants: backlash and re-institutionalization.¹²⁰

Over the last fifty years, disability rights advocates have made great progress in freeing individuals with cognitive disabilities from institutions, affording them an opportunity to become equal and integrated members of their communities.¹²¹ This equality and integration brought increased interaction

118. McKnite, *supra* note 14, at 1390 (noting that “disability is already assessed in other civil contexts without disastrous administrative consequences, including guardianship, commitment, and testamentary capacity proceedings”); Seidelson, *supra* note 14, at 38-39 (arguing that cognitively disabled defendants have a heavy burden to overcome and are unlikely to expose their differences for fear of labeling); Mario Rizzo, *Law Amid Flux: The Economics of Negligence and Strict Liability in Tort*, 9.2 J. LEGAL STUD. 291, 317 (1980) (arguing that the plaintiff and defendant would be more likely to expect a certain outcome, thereby actually decreasing the amount and subsequent scope of litigation). *See also infra* notes 90-91 and accompanying text.

119. *Supra* notes 110-112 and accompanying text.

120. Splane, *supra* note 14, at 166.

121. ADA Amendments Act of 2008, Pub. L. 110-325, 110th Cong. (amending 42 U.S.C.S. §§ 12101 et seq.); *id.* at § 2 (providing that, “in enacting the ADA [of 1990], Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers”); Individuals With Disabilities Education Improvement Act of 2004, 20 U.S.C.S. §§ 1400 et seq. (2005) (amending the Education for All Handicapped Children Act, Pub. L. 94-142, 94th Cong.); Section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, 93rd Cong. (1977) (amending 29 U.S.C.S. § 701 et seq.). *See also* *Olmstead v. L. C.* by Zimring, 527 U.S. 581, 609, 119 S. Ct. 2176, 2191 (1999) (Breyer, J., concurring) (“The so-called ‘deinstitutionalization’ has permitted a substantial number of mentally

with nondisabled peers.

Some critics argue that this civil rights achievement raises two concerns. First, to avoid the risk of uncompensated loss (or heightened insurance premiums), some segments of society may reject and seek to isolate those who are perceived (based upon potentially false stereotypes) to have cognitive disabilities.¹²² Second, a subjective standard of care may eliminate incentive for individuals with cognitive disabilities to work toward learning appropriate and acceptable behavior in an integrated society.¹²³

Misconceptions in public opinion regarding individuals with cognitive disabilities already creates ostracism, and some scholars fear that a subjective tort standard would only exacerbate the discriminatory treatment. One commentator noted, “The public's attitudes toward the mentally ill vacillate capriciously and it takes only a few well-publicized cases absolving the mentally ill from tort liability to start a public outcry.”¹²⁴

If no tort liability exists for the damage done by those with cognitive disabilities, discrimination may arise in two ways. First, segments of society may attempt to restrict opportunities for such individuals to participate in society. They may, for example, work with legislators or other policy makers to limit the ability of those believed to have relevant cognitive disabilities to secure licenses or employment opportunities.¹²⁵ They may even seek to repeal legislation that has thus far generated meaningful progress in favor of securing the civil rights of citizens with disabilities.

Second, they may view the *law* as the problem preventing them from fair compensation for loss. This may lead some in society to take justice into their own hands.¹²⁶ These potential outcomes could be both regressive and dangerous.

Concerns about discrimination and backlash against those with cognitive disabilities following a change in the objective reasonableness standard beg the question. As one author explained,

[t]his rationalization for the current rule does no more than reinforce the stereotypes and prejudice that appear to be behind the rule to begin with[;] [i]t legitimizes the public's fears and misconceptions that the mentally disabled are more dangerous than others, that they are more likely to

disabled persons to receive needed treatment with greater freedom and dignity.”).

122. Splane, *supra* note 14, at 153, 161.

123. *Id.* at 164.

124. *Id.* at 165.

125. *Id.*

126. Kelley, *supra* note 14, at 215.

commit torts and crimes than the rest of the population.¹²⁷

Furthermore, these fears of discriminatory backlash are the result of unfounded assumptions. They assume that people will engage with individuals who have cognitive disabilities only if they know they will be compensated should they suffer an injury.¹²⁸ Practically speaking, however, many community members refuse to interact with individuals who have cognitive disabilities even today, suggesting that it is not the liability standard that determines whether one is willing to interact with a person who has a cognitive disability.¹²⁹

More significantly, however, these fears of a subjective standard of care assume that society would treat the cognitively disabled adult defendant differently from cognitively disabled adult plaintiffs, children, or individuals with physical disabilities who are already held to a subjective standard.¹³⁰ With other groups of people, society has accepted the subjective standard along with the reality that some injuries may go uncompensated (in the absence of insurance). Why then should treatment of the cognitively disabled be any different?

An alternative and nondiscriminatory social outcome remains equally possible under the same circumstances. If courts recognize a subjective standard for the cognitively disabled, members of society will have incentive to become familiar with those disabilities, to appreciate their presence and effect in a typical community, and to take steps to reduce any associated risks of loss. As a result, the subjective standard could facilitate society's education about and interest in cognitive disabilities, which would in turn help dismiss many of the common misconceptions regarding cognitive disabilities that lead to individuals' exclusion from society in the first instance. In this manner, a subjective standard creates potential to increase community acceptance of the cognitively disabled and reduce discrimination.

In addition to concern about discriminatory backlash, critics also worry that abandoning the objective standard of care eliminates any deterrent to poor conduct (and incentive to develop better behaviors).

It is true that "[t]he mentally ill are not by definition incapable of

127. Korrell, *supra* note 45, at 40-41.

128. Goldstein, *supra* note 14, at 88.

129. *Id.* at 89.

130. Harlow, *supra* note 5, at 1753.

conforming to a reasonable person standard.”¹³¹ Some thus contend that holding them to an objective standard makes them more conscious of their actions and decreases the number of torts they commit.¹³²

Responding to this argument, others emphasize that “just like defendants with physical disabilities, only those mentally disabled defendants who can show that they could not conform to the law—that they were incapable of conforming to a reasonable person standard because of their affliction—could benefit from a disability defense if courts were to reject the current rule.”¹³³ Even if a subjective standard is put in place, the objective standard will still hold accountable, and serve as a deterrent, for those persons of sufficient cognitive capacity to conform their conduct to that of an objectively reasonable person.

In the end, while concerns about backlash and re-institutionalization warrant careful consideration, they remain speculative. It may be the case that a subjective standard provides the incentive society needs to improve its general understanding and awareness of cognitive disabilities, providing for even better integration.

Thus, in America in the twenty-first century, just as concerns about uncompensated plaintiffs and administrative challenges should not justify imposition of disproportionate liability on adult defendants with cognitive disabilities, fears of backlash also require close scrutiny before they may justify continued unequal treatment.

This article next suggests that if courts continue to reject the proposed subjective standard in this context, they ought to call the resulting liability what it is: strict liability, not negligence. This alternative to the subjective standard of care does not resolve the inequity¹³⁴ that results from imposition of strict liability. But it would require courts to honestly confront those critiques rather than ignoring them and falsely fantasizing defendants who have such disabilities as people without them.

131. Korrell, *supra* note 45, at 41. These authors agree with this observation, but do not believe that it changes the analysis regarding whether a subjective standard of care is appropriate in cases when an individual’s cognitive disabilities *do* render them incapable of conforming to an objective standard of care.

132. Goldstein, *supra* note 14, at 89.

133. Korrell, *supra* note 45, at 41.

134. *See infra* note 164 (noting possible Americans with Disability Act and Equal Protection concerns associated with singling out individuals with cognitive disabilities for liability without fault).

2. *A New Alternative Approach: Redefining the Basis for Liability in the Defendant*

Negligence's prevailing objective standard, when applied against negligence defendants with relevant cognitive disabilities, requires these defendants to behave as if they do not have disabilities to avoid liability.¹³⁵ When these defendants behave as they are, rather than as the law imagines them to be, negligence doctrine allows their liability despite their inability to have prevented the harm at issue.¹³⁶ Courts currently accept this outcome.¹³⁷

Judicial retention of this status quo raises significant legal and policy concerns and should not be perpetuated as a default without analysis. As Oliver Wendell Holmes Jr. recognized over a century ago, "the law does, in general, determine liability by blameworthiness,"¹³⁸ and "if 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."¹³⁹

135. *Supra* notes 16, 62, 141 and accompanying text.

136. Naturally, of course, many individuals with cognitive disabilities *can* satisfy negligence's objective standard in many instances. Those cases are not at issue here. This article is concerned only with the minority of cases in which a cognitive disability is relevant to the defendant's ability to make a conscious choice regarding the risk created by her actions. In other words, this article is concerned only with those cases in which a defendant's disability limits her functioning in a relevant way and prevents her ability to satisfy the objective standard of care. *See* RESTATEMENT (SECOND) OF TORTS § 283 (1965); *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616). It appears that *Weaver*, although not a negligence case, was the source of the application of the rule later in the United States. *See* *Campbell v. Bradbury*, 176 P. 685 (Cal. 1918); *Seals v. Snow*, 254 P. 348 (Kan. 1927).

137. Most jurisdictions have yet to venture past the status quo when addressing the liability of the cognitively disabled. *But see* *Williams v. Hays*, 52 N.E. 589, 592 (N.Y. 1899) (citations omitted) (reversing its earlier decision holding that "an insane person is just as responsible for his torts as a sane person," the court later observed that "[i]mpossibility is an excuse in law, and there is no obligation to perform impossible things").

138. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108 (1881).

139. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 109 (1881) ("There is no doubt that in many cases a man may be insane, and yet perfectly capable of taking the precautions, and of being influenced by the motives, which the circumstances demand. But if 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."); *see also* *Kelley*, *supra* note 14, at 187.

In most negligence cases today, it remains true that “[i]n determining liability for a harm, our regime considers not only a defendant’s deviation from an established standard of conduct but also his ability to comply with that standard.”¹⁴⁰ Under this typical measure, a person would be liable for a loss only if he failed to conform to a standard he was capable of satisfying.¹⁴¹

Allowing negligence liability against individuals with relevant cognitive disabilities who are unable, due to their disabilities, to meet the tort’s objective standard stands in contrast to traditional fault-based foundations for negligence liability.¹⁴² Yet “the rule that mentally disabled adults are liable is currently so entrenched in case law that modern courts often apply the rule without discussion of its rationales.”¹⁴³

This article suggests that courts should make decisions about liability in these cases only after consciously confronting the liability for what it is, faultless,¹⁴⁴ and after arriving at the further conclusion, if it is possible, that

140. Korrell, *supra* note 45, at 20; *see also* David G. Owen, *Philosophical Foundations of Fault in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 201, 201, 228 (David G. Owen ed., 1995) (demonstrating that “[f]ault is the basic cement of the law of torts” and “accidental harm may be considered faulty only if it results from a choice to violate another person’s vested rights or the community’s interests in utility”).

141. When a person can be held liable for harm caused without fault, the theory of liability is not negligence, but rather strict liability. Strict liability, as discussed *supra* notes 16, 65, 67, 70 and accompanying text and *infra* notes 144, 152, 201, 295 and accompanying text, arises following application of the objective standard to defendants with relevant cognitive impairments. As one commentator colorfully explained, the objective standard when applied to the cognitively disabled “is nothing more than strict (or absolute) liability dressed up in Sunday-go-to-meetin’ garb.” Goldstein, *supra* note 14, at 75 (quoting Robert M. Ague, Jr., *The Liability of Insane Persons in Tort Actions*, 60 *DICK. L. REV.* 211, 222 (1956)). Another scholar expressed several reasons (all of which are [in] accord with typical reasons for imposing strict liability) that this is not an appropriate area for imposition of negligence saying, “An insane man has not voluntarily created his insanity; therefore he should not be required to conform to the ‘reasonable man’ standard. Nor is there a better allocation of costs, for insane persons are not likely to be wealthier than the persons they injure; moreover, they have no way of distributing their loss evenly on the public.” Casto, *supra* note 14, at 716-17.

142. Owen, *supra* note 140, at 201 (“Fault is the basic cement of the law of torts. Fault permeates the structure of tort law doctrine, providing both definition and justification for the great majority of rules governing private responsibility for causing harm.”).

143. Korrell, *supra* note 45, at 13.

144. *See id.* (“In spite of its crudity, the rule that mentally disabled adults are liable is currently so entrenched in case law that modern courts often apply the rule without

strict liability is desirable and appropriate under the circumstances.

This sub-section examines an approach to negligence's cognitive-disability disadvantage that would allow courts to perpetuate the status quo only after recognizing the resulting liability accurately. This approach would permit faultless liability in "negligence" actions against defendants with cognitive disabilities whose disabilities impact their abilities to appreciate risk, but it would also require courts to acknowledge this liability as strict rather than fault-based. This approach, like the others considered in this article, has both advantages and disadvantages.

a. Advantages of Re-Designating as Strict Liability

Characterizing liability in negligence cases involving adult defendants with relevant cognitive disabilities as strict liability, not fault-based negligence, produces several advantages over permitting the status quo as it operates today. Among its advantages, this approach: (1) is substantively accurate; (2) incentivizes courts to directly confront the moral and policy implications of their decisions; (3) maximizes the likelihood that injured plaintiffs will receive compensation for harms; and (4) is relatively easy to implement and avoids administrative difficulties.

First, re-designating liability as strict rather than fault-based in these cases is substantively more precise than the existing characterization of liability as negligent.

The critical difference between negligence and strict liability is that negligence requires that the defendant be at "fault," and strict liability does not.¹⁴⁵ While legal philosophers have debated the nature of the fault at issue,¹⁴⁶

discussion of its rationales."); Harlow, *supra* note 5, at 1733, 1735 ("By effectively requiring a strict liability standard for defendants who have a mental (as opposed to a physical) illness precluding fault, the common law and the Restatement are perpetuating stereotypes and misunderstanding about the mentally ill population.").

145. See, e.g., JULES COLEMAN, RISKS AND WRONGS 220 ("put[ting] the difference between fault and strict liability in terms of the distinction between fault in the doing and fault in the doer" and concluding that "[s]trict liability requires neither," but negligence requires at least "fault in the doing"); Robert E. Keeton, *Conditional Fault in the Law of Torts*, 71 HARV. L. REV. 401, 427 (1959) ("Though it appears that the community sense of morality finds blameworthiness in the nonnegligent, risky conduct as to which courts have imposed [strict] liability, yet this is distinctly different from the blameworthiness found in most cases of negligence or intentional tort."); Seidelson, *supra* note 14, at 37 ("there cannot be negligence without culpability").

the most consistent view is that fault in modern negligence actions requires moral blameworthiness based on risk-taking choices.¹⁴⁷

Recall the introductory example in which a defendant with a cognitive disability, while taking a walk, injures a plaintiff under such circumstances that the injury could have been avoided if the defendant had comprehended a sign posted nearby. This defendant's disability prevented him from comprehending the sign. He did not choose to take a risk. This defendant was unaware, due to his disability, of the presence of any risk. Although he made reasonable choices

146. See *infra* notes 156-78 and accompanying text (addressing the "fault" principle in the context of the liability at issue here). Although all agree that negligence requires "fault," legal philosophers disagree about the type of "fault" required in negligence actions. Some insist that negligence requires moral blameworthiness (a conscious choice to be wrongful), and others contend that negligence requires only legal responsibility. Cf. Owen, *supra* note 140, at 228 (concluding that negligent "conduct resulting in accidental harm may be considered faulty only if it results from a choice to violate another person's vested rights or the community's interests in utility"); COLEMAN, *supra* note 145 at 218-19 (explaining the author's view that negligence is "conduct, not a state of mind," and that fault in negligence may result in "liability without blame").

147. This has remained true over centuries. In the late 1800s, Oliver Wendell Holmes, Jr., confidently declared "the law does, in general, determine liability based on blameworthiness." HOLMES, *supra* note 138, at 108. In the early 1900s, Harvard Law School Dean, James Barr Ames, approvingly recognized that "[t]he *ethical* standard of reasonable conduct has replaced the *unmoral* standard of acting at one's peril." James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908) (emphasis added). While some in the 1950s challenged the fault-based nature of negligence, see ALBERT A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), courts never strayed far from the requirement of moral fault as a foundation for negligence liability. See *supra* notes 32-55 and *infra* notes 156-78 and accompanying text (demonstrating the evolution in negligence doctrine that protects the tort's foundation in fault based upon blameworthy choice). "To understand just why the concept of fault has proved so durable . . . one must inquire into the concept of wrongdoing that underlies the law of torts." Owen, *supra* note 140, at 202. Full consideration of the philosophical underpinnings of wrongdoing is beyond the scope of this article. *But see* COLEMAN, *supra* note 145, at 218-19 (explaining the author's view that negligence is "conduct, not a state of mind," and that fault in negligence may result in "liability without blame" so long as the conduct fails to satisfy a legal standard); *see also* Richard W. Wright, *The Standards of Care in Negligence Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 249, 258, 274 (recognizing that under a utilitarian theory of tort law, "the relevant question is the defendant's moral *responsibility*," not his "moral *blameworthiness or merit* of the . . . conduct," but concluding that this theory "is a complete failure" and even "fails to explain or justify any of the various aspects of tort law").

given his cognitive disability, he made unreasonable choices compared to a person without his cognitive disability. The defendant thus is held liable without fault or moral blameworthiness.¹⁴⁸ And the outcome yields the same moral effect as strict liability.¹⁴⁹

To render an adult with a cognitive disability “negligent” or “at fault” for failing to conform to an objective standard of care, courts pretend that such a defendant is “in the full possession of his faculties”¹⁵⁰ and can make risk-averse choices in conformance with that standard. This is a legal fiction that undermines the moral integrity of the tort. Because the defendant cannot accurately be deemed “morally blameworthy,”¹⁵¹ his liability, perhaps uncomfortably, ought be recognized accurately as strict.¹⁵²

148. DOBBS, *supra* note 2, § 1, 2 (“[T]orts are traditionally associated with wrongdoing in some moral sense.” Such wrongdoing or “legal fault in the law of torts is usually sorted in two categories: (1) intentional wrongs or (2) negligent wrongs.”); Seidelson, *supra* note 14, at 37 (“there cannot be negligence without culpability”).

149. Harlow, *supra* note 5, at 1733. *See e.g.*, *supra* notes 141 and 131 and accompanying text.

150. *Sforza*, 268 N.Y.S. at 448 (“It is unfortunate . . . that one should be compelled to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties.”) (citations and internal quotation marks omitted); WIS. DEPT. OF PUB. INSPECTION, *ADULTS WITH SPECIAL NEEDS: A RESOURCE AND PLANNING GUIDE FOR WISCONSIN'S PUBLIC LIBRARIES*, 23, available at <http://pld.dpi.wi.gov/files/pld/pdf/sn04.pdf> (last visited August 13, 2014) (explaining that individuals working with cognitively disabled individuals must be flexible “and understanding in regard to behaviors that may be distracting but unintentional, or not within their ability to control”); *supra* note 29 (distinguishing between different types of cognitive disability is not critical to the larger point advanced by this article); *supra* notes 140-141 and accompanying text.

151. For purposes of this analysis, fault, or “moral blameworthiness,” is understood to require “a choice to violate another person’s vested rights or the community’s interests in utility.” Owen, *supra* note 142, at 228. *But see* COLEMAN, *supra* note 145, at, 218-19 (explaining the author’s view that negligence is “conduct, not a state of mind,” and that fault in negligence may result in “liability without blame” so long as the conduct fails to satisfy a legal standard).

152. *See* McKnite, *supra* note 14, at 1388 (explaining that the focus on compensating an injured plaintiff subjects a cognitively disabled defendant to strict liability because a such a defendant is not capable of adhering her conduct to that of a reasonably prudent person); *see also* Goldstein, *supra* note 14, at 75 (commenting that “it is unfair to require only the mentally ill to meet a strict liability standard while the average

The second advantage of an approach inviting courts to recognize liability in this context as strict, rather than negligent, is that this designation should incentivize courts to re-consider the policy consequences of liability against adult negligence defendants with relevant cognitive disabilities. While courts consistently have imposed liability, they have not meaningfully developed the underlying rationales or justifications for it.¹⁵³

Modern tort law rarely strays from the requirement of moral blameworthiness, found in fault-based negligence law, to impose strict liability.¹⁵⁴ Fault-based negligence has established itself as “the guiding principle of the law of torts,” while strict liability has “proved . . . frail, [and] incapable of making lasting inroads into the heart of tort doctrine.”¹⁵⁵

Recognizing that liability in this context amounts to disfavored strict liability creates incentive for courts to justify this unusual outcome. Practically speaking, however, courts will be hard pressed to do this for two reasons.

First, modern negligence doctrine embodies a “moral blame-worthiness,” rather than a “legal responsibility,” understanding of the “fault” justifying negligence liability.

Moral blameworthiness requires consideration of “the broad ideals that give moral character to a person’s actions: freedom, equality, and community or common good.”¹⁵⁶ These ideals collectively “shape significantly the moral quality of human behavior.”¹⁵⁷ Taken together, they require that “an actor fairly may be held accountable for making good on the harm **only** if he was *at fault* in causing it, **only** if his **choices** that resulted in the harm fairly may be blamed.”¹⁵⁸ Although any “harm alone in some abstract sense may be viewed as a ‘wrong’ to the person suffering it,” harm alone, without moral blameworthiness, does not justify negligence liability under this theory of

defendant is only liable when she is at fault”). *See also infra* note 206 and accompanying text.

153. *See* Korrell, *supra* note 45, at 13.

154. *See supra* note 148 and accompanying text; *see also* Apodaca v. AAA Gas Co., 73 P.3d 215, 228 (N. M. Ct. App. 2003) (citing Restatement (Second), § 520 cmt. k) (“Even though the activity involves a serious risk of harm that cannot be eliminated with reasonable care and it is not a matter of common usage, its value to the community may be such that the danger will not be regarded as an abnormal one.”).

155. Owen, *supra* note 140, at 202.

156. Owen, *supra* note 140 at 202. Full discussion of these principles is beyond the scope of this article. *See generally*, PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995) (offering a collection of essays on these and similar philosophical considerations).

157. *Id.*

158. *Id.* at 228 (italics in original; boldface added).

liability.¹⁵⁹

Legal responsibility, on the other hand, cares not about whether the actor had subjective blameworthiness or *chose* wrongful or harmful conduct.¹⁶⁰ Legal responsibility theory distinguishes “two aspects of a situation that might” create fault; “[o]n the one hand, the *action* might be at fault; on the other, the *actor* may be at fault for having done it.”¹⁶¹ Legal responsibility theory would, if embraced, allow liability based upon fault in the *action*, even in the absence of fault in the *actor*.¹⁶²

Modern courts require more than legal responsibility, and they embrace moral blameworthiness as the foundation for liability in most cases. While courts apply an objective standard (characteristic of a legal responsibility theory)¹⁶³ to individuals who are capable of meeting that standard, they decline to apply an objective standard in *most* cases where actors cannot satisfy it through no choice of their own.¹⁶⁴ Thus, they have appropriately established exceptions to the objective standard over time to protect a “moral blameworthiness” understanding of fault at the heart of negligence liability.¹⁶⁵

Consider courts’ treatment of children and adults with physical disabilities, for example. Courts decline to hold children to an objective standard (as a legal

159. *Id.*

160. Richard W. Wright, *The Standards of Care in Negligence Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249, 258-59 (David G. Owen ed., 1995).

161. COLEMAN, *supra* note 145 at 217 (emphasis added).

162. *See* Wright, *supra* note 160, at 258-59 (discussing the rule of moral blameworthiness versus legal responsibility in negligence standards of care before ultimately concluding that only moral blameworthiness can fully justify the tort); *see also* COLEMAN, *supra* note 147 at 219-20 (asserting that “[f]ault, especially negligence, liability requires fault in the doing, but not in the doer” without taking into account the exceptions in negligence doctrine for children and adults with physical disabilities, but mistakenly asserting that it does not matter “whether or not one is capable of” meeting the standard of care).

163. *See* Wright, *supra* note 160, at 258-59 (explaining that “an objective standard of legal fault” characterizes legal responsibility in the author’s view and that “a subjective standard of moral *fault*” characterizes moral blameworthiness).

164. *See supra* notes 32-55 and accompanying text (demonstrating the process by which courts have crafted exceptions to the objective standard to ensure that individuals who cannot meet that standard will not be liable without moral blameworthiness based upon a choice to take a risk that they were able to avoid). It is significant to recall, however, that courts have not applied a subjective standard in cases involving defendants with relevant cognitive disabilities.

165. *See id.*

responsibility approach would require).¹⁶⁶ Instead courts tailor the standard and limit liability to those instances in which a child fails to satisfy a subjective standard she was capable of meeting, taking a moral blameworthiness approach.¹⁶⁷ Similarly, they decline to hold individuals with physical disabilities responsible for outcomes beyond their physical capacities, rejecting a legal responsibility approach.¹⁶⁸ Instead they limit liability to those cases in which these defendants fail to act as a reasonable person *with their physical disabilities*.¹⁶⁹

In light of this approach to negligence in situations analogous to the one considered here, courts confront a challenge to justify a different approach in cases involving adult defendants with relevant cognitive disabilities.

The second reason that it will be difficult for courts to justify effective imposition of strict liability in negligence actions against adult defendants with cognitive disabilities is that strict liability, like negligence, has been justified in large part through the defendant's affirmative choice to engage in liability-risking conduct.¹⁷⁰ Adult negligence defendants with relevant cognitive disabilities do not choose the risk-taking conduct, as their disabilities prevent them from appreciating the risk at hand.¹⁷¹ Thus, the choice rationale justifying strict liability in other cases cannot justify it here.

166. See Wright, *supra* note 160, at 258-59 (explaining that “an objective standard of legal fault” characterizes legal responsibility in the author’s view and that “a subjective standard of moral *fault*” characterizes moral blameworthiness without recognizing the exceptions to the objective standard that exist in modern negligence doctrine).

167. See *id.*

168. See COLEMAN, *supra* note 145 at 221 (explaining that “[a]ll liability in torts is fundamentally strict liability in the sense that it is imposed whether or not the agent is to blame for her conduct” without recognizing that this is not true with children, adults with physical disabilities, and others who cannot satisfy without accommodation an objective standard, which suggests a moral blameworthiness requirement, not a legal responsibility one).

169. See Wright, *supra* note 160, at 258-59 (explaining that “an objective standard of legal fault” characterizes legal responsibility in the author’s view and that “a subjective standard of moral *fault*” characterizes moral blameworthiness without recognizing the exceptions to the objective standard that exist in modern negligence doctrine).

170. See Owen, *supra* note 140, at 228.

171. As previously noted, the authors recognize that many individuals with cognitive disabilities can choose risk-taking behavior. Those individuals are not the subjects of this article. This article is instead concerned with individuals whose cognitive disabilities are so significant they prevent an ability to satisfy an objective standard of care in the circumstances at issue.

“The two best-known instances of common law strict liability are cases in which the defendant engages in some abnormally dangerous activity and those in which the defendant manufactures a defective product.”¹⁷² With the application of strict liability to products liability cases declining,¹⁷³ this doctrine applies largely to the limited instances where a defendant has chosen to engage in an abnormally dangerous activity that subjects others to an uncommon risk of serious harm.¹⁷⁴ The defendant may have chosen to harbor wild or otherwise dangerous animals,¹⁷⁵ to use explosives,¹⁷⁶ or to use toxins or

172. DOBBS, *supra* note 2, § 1, 3. 86 C.J.S. *Torts* § 176 n.1 (1997) (citing T&E Industries, Inc. v. Safety Light Corp., 123 N.J. 371, 587 A.2d 1249 (1991)) (defects in instrumentalities); *See also* 86 C.J.S. TORTS § 177 n.5 (citing Cadena v. Chicago Fireworks Mfg. Co., 697 N.E.2d 802 (Ill. Ct. App. 1998)) (abnormally or inherently dangerous activities).

173. *See* DOBBS, *supra* note 2, § 354, 977 (citing, e.g., 44 Fed. Reg. 62714 (1979)); N.C. Gen. Stat. § 99-B (prohibiting strict liability in product liability actions).

174. 86 CJS TORTS § 177 n.1 (1) existence of a high degree of risk of some harm to the person, land, or chattels of others; (2) likelihood that the probable harm will be great; (3) inability to eliminate the risk by exercising reasonable care; (4) extent to which the activity is not a matter of common usage; (5) appropriateness of the activity in lieu of the place and context; and, (6) extent to which the value of the activity or event is valuable to the community at large, such that it may be outweighed by the dangerous attributes (citing Selwyn v. Ward, 879 A.2d 882 (R.I. 2005); Collins v. Olin Corp., 418 F. Supp. 2d 34 (D. Conn. 2006); Gallagher v. H.V. Pierhomes, LLC, 957 A.2d 628 (Md. Ct. Spec. App. 2008); Bonnieview Homeowners Ass’n v. Woodmont Builders, L.L.C., 2009 WL 2999355 (D.N.J. 2009); Chambers v. Village of Moreauville, 85 So.3d 593 (La. 2012) (balancing the gravity and risk of harm against individual and societal utility and the cost and feasibility of repair); *see also* RESTATEMENT SECOND, TORTS § 520; RESTATEMENT THIRD, TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20(b).

175. Albert H. Putney, *Popular Law Library*, 85 (Vol. 4. Cree Publ’g Co. 1908) (according to the “experience of mankind,” the court must determine whether the animal is “dangerous to man.”). *See also* Keenan v. Percha & Rubber Mfg. Co., 120 N.Y. 627 (N.Y. 1890); Moss v. Partridge, 9 Ill. App. 490 (Ill. Ct. App. 1881).

176. *See* Dyer v. Me. Drilling & Blasting, Inc., 984 A.2d 210, 218 (Me. 2009) (adopting the Second Restatement and applying strict liability, the court explained that “[t]he Legislature has also been increasingly willing to apply strict liability in certain cases, imposing liability for explosions of natural gas, 14 M.R.S. § 165 (2008); for defective products, 14 M.R.S. § 221 (2008); and for oil spills and hazardous waste, 38 M.R.S. §§ 552(2), 1319-J (2008).”). *See also* Putney, *supra* note 175, at 89 (citing Hazard Powder Co. v. Volger (C.C.A.), 58 Fed. Rep. 152) (8th Cir 1893)); McKnite, *supra* note 14, at 955.

poisons.¹⁷⁷

Whether the defendant's choice to engage in such conduct is viewed as a substitute for moral blameworthiness¹⁷⁸ or is, in itself, a form of moral blameworthiness,¹⁷⁹ the point is that the defendant made the choice.¹⁸⁰ This capacity to choose is fundamental.¹⁸¹

Defendants with cognitive disabilities do not make such choices (to engage in abnormally dangerous conduct) any more frequently than defendants without them. But if they do, then traditional strict liability remains appropriate. In the context considered here, however, rather than facing strict liability for choosing to use explosives, for example, a defendant may be subjected to strict liability for making a common and otherwise harmless choice.

Recall the introductory example of the defendant with a cognitive disability who, while taking a walk, injured the plaintiff because the defendant was not able to comprehend a sign posted nearby.¹⁸² The example illustrates the point that such a defendant may be strictly liable for the unremarkable choice to leave his home unaware that an unintelligible-to-him sign containing safety information has been posted nearby. This choice is not abnormally dangerous

177. See Putney, *supra* note 5, at 90 (citing *Thomas v. Winchester*, 6 N.Y. 397,409 (1852)). See also JOSEPH H. KOFFLER & ALISON REPPY, *HANDBOOK OF COMMON LAW PLEADING*, 176-81 (1969); Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 913 (2004) ("Prosser and Keaton found that as of 1984, strict liability had been applied to water collected in large quantities in a dangerous place, explosives, inflammable liquids stored in a city, blasting, pile driving, crop dusting, fumigation with cyanide gas, drilling oil wells, operating refineries in densely populated communities, factories emitting smoke, and dust or noxious gases in the middle of a town, among others."); see also McKnite, *supra* note 14, at 957.

178. See *supra* note 148 and accompanying text.

179. Putney, *supra* note 175, at 86 (citing, e.g., *Reed v. Southern Express Co.*, 22 S.E. 133 (Ga. 1894); *Losee v. Buckanan*, 51 N.Y. 476 (1873)). See also *Klenberg v. Russell*, 25 N.E. 596 (Ind. 1890) (stating fencing in was a duty on the owner and if owner failed to exercise due care and the animal escaped and caused damage, the owner would be liable).

180. *Whittaker v. Stangvick*, 111 N.W. 295 (Minn. 1907) (a hazard may be such as to impose on a person the responsibility of an insurer of another's safety). See also *Korrell*, *supra* note 44, at 44 ("Strict liability does not violate the fault principle because the actors subject to strict liability choose to act for their own profit in a way that increases risk of harm to others.").

181. *Owen*, *supra* note 142, at 203 and 228.

182. *Supra* notes 13-24 and accompanying text.

or analogous to one to use explosives.¹⁸³

Before imposing strict liability against a defendant here, courts should recognize that they would be abandoning the source of blameworthiness (a choice to engage in abnormally dangerous conduct, for example) solely for this group of defendants. They should justify, if they can, why strict liability is appropriate for ordinary choices, short of those that create an abnormal risk of harm to others.

Courts will be hard pressed to justify this new strain of strict liability that, like no other form of strict liability, applies to a class of individuals, not to a type of conduct. While these recognitions may make courts and parties uncomfortable, and may raise new legal concerns,¹⁸⁴ they should be addressed and resolved, not avoided.

Alternatively, if courts persist in imposing liability, effectively characterizing these negligence defendants as blameworthy, they should recognize that they assign blameworthiness *because* the adult with a cognitive disability was born with, or later developed, the incapacity to conform to the standards of the imaginary reasonably prudent person, *not* because this adult made a blameworthy choice.¹⁸⁵ While this again may create discomfort, it

183. *Supra* note 174 and accompanying text. Further, the defendant's moral blamelessness for purposes of negligence analysis is reflected in the law's recognition that a child and an adult with vision impairment who similarly walked outdoors and could not read the sign would both avoid negligence liability because other reasonable children or adults with vision impairments would also have chosen to embark upon the same endeavor under the circumstances. *See supra* notes 12-22 and accompanying text (illustrating this point).

184. Some might argue that imposition of strict liability upon a singular class of individuals, those with cognitive disabilities, raises Equal Protection Clause or Americans with Disabilities Act concerns. Comprehensive treatment of those concerns is beyond the scope of this article. However, to the extent that Equal Protection and/or ADA concerns exist when liability is re-labeled as strict, rather than negligent, they ought already exist when this liability is characterized as negligent. The differential treatment of this singular class of individuals remains the same in both instances; it is merely re-labeled. One advantage of the re-labeling, however, is that it draws attention to this singular treatment in a manner that might require courts to more directly confront its inequity. And this might inspire advocates to look more closely at whether its justifications can withstand scrutiny on a variety of bases, including under the Equal Protection Clause and the Americans with Disabilities Act.

185. *Fitzgerald v. Lawhorn*, 294 A.2d 338, 338-39 (Conn. C.P. 1972) (criticizing the majority view "that an insane person should be liable for torts of negligence" and explaining that such a view is intrinsically unfair); *Sforza*, 268 N.Y.S. at 448 ("It is unfortunate . . . that one should be compelled to respond for that which, for want of the

should be confronted, not avoided.

In directly confronting the basis for liability in this context, courts would better maintain the integrity of the tort and advance an honest dialogue about society's treatment of adults with cognitive disabilities.

The third advantage of advocating that courts recognize that liability in this context is strict, while continuing imposition of liability on morally innocent adult defendants with cognitive disabilities, is that it maximizes the plaintiff's potential for recovery. Indeed, this advantage has been a favorite justification for continuing the status quo.¹⁸⁶

If compensating the injured plaintiff were the *only* consideration in negligence, then liability would be justified in these cases.¹⁸⁷ However, justifying liability solely because it compensates injured plaintiffs is problematic.¹⁸⁸ The same reasoning would also justify holding *all* defendants strictly liable for *all* harms they cause, regardless of moral fault. This practice is not consistent with traditional notions of tort law.¹⁸⁹

control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties.”). *See also supra* note 150 and accompanying text. 186. *See supra* notes 80-93 and accompanying text (discussing the compensation justification in greater detail); Harlow, *supra* note 5, at 1747-48; Fitzgerald v. Lawhorn, 294 A.2d 338, 339 (Conn. Supp. 1972) (criticizing the majority rule who often relies on the reasoning that “where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it”); McGuire v. Almy, 8 N.E.2d 760, 761 (Mass. 1937) (“[A] lunatic is civilly liable to make compensation in damages to persons injured by his acts, although, being incapable of criminal intent, he is not liable to indictment and punishment.”); Morris S. Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth-Century Law of Torts*, 128 U. PA. L. REV. 361, 371 (1979) (explaining that at common law, the “primary aim in pleading a lack of wrongful intention [] was not to escape the duty to compensate, but to avoid imprisonment and its attendant fine” because the duty to compensate an injured plaintiff was absolute).

187. Korrell, *supra* note 45, at 20. (“Two of the goals of the tort system are to minimize dangerous conduct and to provide compensation for those that suffer damages. These two goals, however, are held in check in a fault-based regime by the equally important aim of shifting the financial burden of an injury (from where it falls to the one who caused it) only if the one to whom the loss is to be shifted was at fault.”).

188. *Id.* at 43. (“The inclination to shift a loss cannot stand alone as a justification for doing so.”).

189. DOBBS, *supra* note 2, § 1, at 3. (“In a few instances tort law imposes strict liability. Strict liability is liability without fault. Apart from these few instances, an

The simple fact is that not all tort plaintiffs recover. Some injured plaintiffs may be unable to prove that the defendant was liable in the first instance. For example, it may be the case that a defendant, acting reasonably, injures plaintiff. Under this circumstance, plaintiff is injured, but she cannot recover for her harm from the defendant.¹⁹⁰

Similarly, in some cases, even where plaintiff proves that defendant acted negligently to cause her harm, the defendant may demonstrate the existence of a defense that precludes plaintiff's recovery.¹⁹¹

In other words, tort law traditionally compensates the plaintiff when the plaintiff is *legally entitled* to compensation. Tort law does not compensate the plaintiff *every time* she suffers harm. Loosely speaking, the plaintiff is entitled to compensation only where the defendant acted with fault¹⁹² or where the defendant engaged in conduct to which strict liability applies,¹⁹³ assuming no defenses are present.

The current legal analysis, in the cases considered by this article, compensates the plaintiff where the defendant was not at fault. It also effectively holds the defendant strictly liable though the defendant did not engage in conduct to which strict liability traditionally has been applied. This approach thus works to the plaintiff's advantage in that it maximizes the potential for compensation in situations where she is not morally entitled to it.

Of course, as noted,¹⁹⁴ this ostensible advantage lacks the strength today that it enjoyed when it was first articulated over a century ago. In modern American society, even if plaintiffs could not secure compensation from defendants under the unique circumstances addressed in this article, the plaintiff would not necessarily be without a remedy. Various forms of first-party insurance are available to alleviate the financial suffering of the plaintiff.¹⁹⁵

accidentally caused harm is ordinarily not a tort at all; there is no general strict liability.”).

190. *See Blyth v. Lubitz v. Wells*, 113 A.2d 147, 147 (Conn.1955) (no recovery in the absence of negligence).

191. *See Alvis v. Ribar*, 421 N.E.2d 886, 887-893 (Ill. 1981) (providing a generous discussion of contributory negligence, modified comparative negligence and pure comparative negligence).

192. Korrell, *supra* note 45, at 43 (“A general principle of our tort law is that, absent fault (negligence, recklessness, or intention) justifying a shift, loss from an accident must lie where it falls.”).

193. *See supra* notes 172-177 and accompanying text.

194. *See supra* notes 82, 122 and accompanying text.

195. *See supra* note 81 and accompanying text.

A fourth advantage of allowing liability to flow against adult defendants with relevant cognitive disabilities, but also advocating that courts recognize this liability as blameless and strict in nature, is that it is simple to implement. It avoids the administrative problems sometimes associated with the proposed application of a subjective standard of care.¹⁹⁶

Of the three responses to negligence's cognitive-disability disadvantage considered here, this approach is the easiest to implement. Because this approach retains the status quo to the extent that it allows imposition of liability against morally innocent defendants with cognitive disabilities, it requires no change in substance, either as to the current rules of law or the current form of analysis. However, where the defendant's liability is a product of the defendant's inability to meet a negligence standard of care due to a cognitive disability, the court would, under this proposal, be called upon to accurately recognize and justify liability as strict.¹⁹⁷

If courts could not justify imposition of strict liability, they would be incentivized to re-consider whether liability ought to flow in the first instance.¹⁹⁸ Should a court overcome this analytic challenge, however, execution of this approach is simple. It requires nothing more than changing the characterization of liability from negligent to strict.

This approach also avoids the administrative concerns raised in opposition to adoption of a subjective standard of care in this context.¹⁹⁹ As noted, some oppose consideration of a subjective standard of care because they fear it will be difficult to determine whether the defendant truly has a relevant disability or simply acted with bad judgment and is faking a disability.²⁰⁰ Though the merit of this argument is questionable today,²⁰¹ by allowing liability under this

196. *See supra* notes 75, 88-103 and accompanying text.

197. *See supra* notes 149-152 and accompanying text.

198. *See supra* notes 154-187 and accompanying text.

199. *See supra* notes 75, 88-103 and accompanying text.

200. Harlow, *supra* note 5, at 1751.

201. *Johnson v. Insurance Co. of North America*, 350 S.E.2d 616, 620 (Va. 1986) (“In effect, the victim argues that, legally, one mind may not simultaneously be partly normal and substantially abnormal. But *we have already* confronted a similar dichotomy *in the criminal context* in *Price v. Commonwealth*, 323 S.E.2d 106 (Va. 1984)”) (emphasis added). *See also* Harlow, *supra* note 5, at 1751-1752 (noting that, while difficulty of judicial administration with a subjective standard is advanced as a reason to retain an objective (strict liability) standard for defendants with cognitive disabilities, such disabilities are taken into account in criminal law, contract law, probate, health care and family law, and further noting modern advances in psychiatry); McKnite, *supra* note 14, at 1390 (explaining that “disability is already assessed in other civil contexts without disastrous administrative consequences, including guardianship, commitment, and testamentary capacity proceedings”).

approach, courts avoid this administrative concern entirely.

In summary, this approach, allowing negligence liability to flow to morally innocent defendants with cognitive disabilities while recognizing the outcome as strict liability, is attractive in its simplicity. Further, by re-designating the defendant's liability as strict rather than fault-based courts would bring some (though not all) integrity back to the tort, permit compensation to the plaintiff, and ultimately hold the defendant liable without clothing him in moral blameworthiness that does not factually exist.

b. Disadvantages of Re-Designating as Strict Liability

Allowing strict liability through negligence for harms caused by defendants with relevant cognitive disabilities enjoys a few advantages, but three substantial disadvantages should give courts pause as they consider this nominally accurate embrace of the status quo: (1) strict liability is generally disfavored in the law; (2) this re-designation creates a novel, hybrid tort that begins as negligence and ends in strict liability; and (3) this approach perpetuates significant moral and justice concerns that exist under the status quo.

The first disadvantage of this approach is that it promotes a form of liability, absolute liability, that is generally disfavored in today's otherwise fault-based regime of tort liability.²⁰²

Over the years since its recognition in the United States, strict liability has rarely escaped its confines in application to abnormally dangerous activities and conditions.²⁰³ Broadening its application to otherwise innocent defendants with cognitive disabilities raises significant moral justice concerns. Courts have recognized as much, stating:

It is unfortunate . . . that one should be compelled to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law

202. DOBBS, *supra* note 2, § 1, at 3 (discussing the fault-based regime of liability and noting that “[i]n a few instances tort law imposes strict liability”).

203. *Id.* at 3 (“The two best-known instances of common law strict liability are cases in which the defendant engages in some abnormally dangerous activity and those in which the defendant manufactures a defective product”).

demands of one in the full possession of his faculties.²⁰⁴

In light of strict liability's historically limited utility and moral vulnerability, relabeling these defendants' liability as grounded in strict liability rather than negligence creates uncomfortable tension. It is at odds with the general trend toward reliance on fault as a basis for liability.²⁰⁵

The second disadvantage to this approach is that it requires an awkward analytical framework that is not wholly a matter of either negligence or strict liability principles. It creates a novel hybrid that begins in negligence and may end in strict liability.²⁰⁶

In most negligence cases, strict liability is never an issue. For example, where a defendant injures a plaintiff, other than intentionally, the analysis begins and ends in negligence. The standard of reasonable care under the circumstances, as personified by the reasonably prudent person, is applied. If the defendant, regardless of any cognitive disability, acted as a reasonably prudent person under the circumstances or if he has a full defense to liability, the defendant is not liable under principles of negligence, and the plaintiff cannot recover from the defendant for harms caused. The case ends, and strict liability is not implicated.

Likewise, where the defendant with cognitive disabilities injures a plaintiff, other than intentionally, under such circumstances in which his disability is irrelevant to his ability to appreciate the risk causing the harm, ordinary principles of negligence apply, and the defendant may be liable if he fails to satisfy its objective standard. Strict liability, again, is not implicated, although the plaintiff could recover in negligence based on the defendant's blameworthy choice.

In the rare case, however, where a defendant with cognitive disabilities injures a plaintiff, other than intentionally, *and* his cognitive disability

204. *Sforza*, 268 N.Y.S. at 448. *See also* *Yancey v. Maestri*, 155 So. 509, 515 (La. Ct. App. 1934) (holding that "an insane person is not liable in damages for his tortious acts").

205. *Supra* note 144 and accompanying text.

206. *See, e.g.*, Jeffrey J. Rachlinski, *Responsibility and Blame: Psychological and Legal Perspectives: Misunderstanding Ability, Misallocating Responsibility*, 68 BROOKLYN L. REV. 1055, 1077 (2003) (noting that, even in the absence of cognitive disability, juries occasionally overestimate the capabilities of the reasonably prudent person and thus hold the defendant strictly liable and stating "[s]trict liability that results from a bias in the negligence determination has other undesirable effects. Inasmuch as the scheme is not straightforward strict liability, it still requires that a court assess reasonableness. Thus, a biased negligence system produces results similar to strict liability, but without saving litigation costs.").

prevented him from appreciating the risk of harm before it occurred, the analysis begins in negligence but concludes with imposition of strict liability. In this circumstance, negligence's objective standard applies at the outset; the defendant fails to meet it, establishing a breach of the objective standard of care and negligence. But the defendant could not have prevented the harm due to his disability. The defendant experiences liability without fault²⁰⁷ or blameworthiness.²⁰⁸ Thus, this liability becomes a hybrid of negligence and strict liability principles.

Courts wisely have chosen to avoid the creation of such a hybrid tort where other defendants are concerned. The reasonably prudent person against whom children²⁰⁹ are compared, and against whom adults with physical disabilities²¹⁰ are compared, is adjusted subjectively to reflect the child's age, intelligence and experience and the adult's physical ability. While various rationales might be offered for these adjustments, they originate in a common concern. It is morally unfair to compare the defendant to a standard he is incapable²¹¹ of meeting because to do so would be to hold the defendant

207. DOBBS, *supra* note 2, § 342, at 941 (“Strict liability is liability without fault.”).

208. There is at least a suggestion that fault and blameworthiness are present where the defendant is held strictly liable for engaging in an abnormally dangerous activity because he has consciously chosen to engage in an activity knowing that others may be harmed regardless of the exercise of reasonable care. *See* DOBBS, *supra* note 2, at 950 (“The idea [of strict liability] is not necessarily to deter such activities altogether but to make them ‘pay their way’ by charging them with liability for harms that are more or less inevitably associated with the activity.”). However, to the extent there exists any fault or blameworthiness in such instances, it is inapplicable to the cognitively disabled defendant in any event. Such a defendant does not “choose” to engage in conduct while knowing he may cause harm to others, or while knowing others may be harmed even if he exercises all due care of which he is capable.

209. DOBBS, *supra* note 2, § 124, at 293 (explaining that a child's age, experience and intelligence is taken into consideration).

210. *Id.* § 119, at 281 (explaining the standard as that “of a reasonable person having such a disability, [and] not to a standard of some ideal normal physical capacity”).

211. *Fitzgerald v. Lawhorn*, 294 A.2d 338, 338-39 (Conn. 1972) (criticizing the majority view “that an insane person should be liable for torts of negligence” and explaining that such a view is intrinsically unfair). It is important to distinguish between “failing” to comply with a standard of care and being “incapable” of complying with a standard of care. Even physically able adults with full cognitive aptitude occasionally fall short of negligence's objective standard, perhaps because they become inattentive, tired or simply lazy. However, as used here, those incapable of complying with the objective standard include only those who cannot comply with the standard even while exercising their greatest care in a given instance.

responsible without blameworthiness. While children and adults with physical disabilities are protected against faultless liability by subjective standards, adults with cognitive disabilities have been uniquely abandoned in this hybrid of negligence and strict liability.²¹²

The third disadvantage of retaining the status quo, while accurately re-designating the outcome in these cases as strict liability, is that it perpetuates the significant moral and justice concerns raised against the status quo for over a century.²¹³

Perhaps Oliver Wendell Holmes, Jr. criticized the current rule applied to those with cognitive disabilities most succinctly. After noting the more subjective standard of care applied to children and to adults with physical disabilities, Holmes wrote, “[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.”²¹⁴

The bedrock of modern tort liability is fault as evidenced by some form of moral blameworthiness, whether the defendant acted intentionally or negligently, or otherwise elected to engage in some uncommonly dangerous activity to which strict liability applies.²¹⁵ Nonetheless, courts continue to overlook the necessity of fault, at least in certain instances, when considering the liability of defendants with cognitive disabilities,²¹⁶ even while noting

212. See *supra* note 152 and accompanying text (the defendant with a cognitive disability may be held liable where a child and an adult with a physical disability may avoid liability for the same conduct); Korrell, *supra* note 45, at 13 (“Courts refuse to consider evidence of mental disability even in those cases in which a disability can be shown to have deprived the sufferer of his ability to comply with the prescribed standards and thus of his ability to be at fault.”).

213. See *supra* notes 55-58 and accompanying text.

214. HOLMES, *supra* note 143, at 109.

215. Harlow, *supra* note 5, at 1744 (“Courts continue to follow the precedent of disregarding a defendant’s mental illness in determining liability, even in the face of modern tort law’s emphasis on fault and the development of subjective standards for children and adults with physical disabilities.”); See also Korrell, *supra* note 45 at 43-44.

216. Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 761-62 (2002) (“If there exists a community of mentally disabled actors, then, this community has a status in negligence law that is shakier than that of physically disabled actors or children. This denial has proved hard to defend, especially in post-1991 writings that must take into account the American with Disabilities Act: a federal statute, said to reign ‘supreme’ above the common law, has deemed disabling mental conditions no less real than other kind of disability.”); McKnite, *supra*, note 14, at 1385 (“While this line of reasoning has continued among

discomfort with the rule.²¹⁷

In summary, perpetuating the status quo, even when accurately designating the outcome as strict liability, allows liability in adults with relevant cognitive disabilities who are morally blameless for the harm at issue. This realization invites consideration of whether such a result is desirable and appropriate. Should courts determine that it is, they ought to justify the outcome as a new form of strict liability.

3. A New Alternative Approach: Reconsidering the Awareness of the Reasonably Prudent Plaintiff

Because courts have rejected the long-advanced subjective standard of care for adult negligence defendants with cognitive disabilities,²¹⁸ and because imposition of strict liability in this context implicates significant moral and justice concerns,²¹⁹ this article introduces a third proposal: a compromise to mitigate the injustice inherent in negligence's objective reasonableness standard.

This proposal offers a shift in emphasis away from the limiting impact of cognitive disabilities in defendants who have them. It instead focuses on the awareness of those disabilities in the common knowledge of typically functioning plaintiffs.

This new alternative begins with this premise: in modern American society, typical plaintiffs know of and appreciate the presence of cognitive diversity in society's membership.²²⁰ This common knowledge and

legal commentators, it has held little sway over courts, which have overwhelmingly treated mentally disabled defendants under the objective standard of care.”).

217. Korrell, *supra* note 45, at 26 (“Judges are aware that holding mentally disabled defendants liable for conduct they could not have changed does not fit well into a system of negligence.”).

218. *See supra* notes 4-10 and accompanying text (discussing the long-standing recommendation that courts or legislatures adopt a slightly subjective standard of care applicable in negligence actions against adult defendants with cognitive disabilities). *See also, e.g.*, Delahanty v. Hinckley, 799 F. Supp. 184, 187 (D.D.C. 1992) (stating that “[w]hile the Court acknowledges that commentators have criticized the common law rule, the fact remains that courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts”).

219. *See supra* notes 66, 69, 152 and accompanying text (discussing the moral and fairness objections to imposition of strict liability in this context).

220. J.D. LEE & BARRY A. LINDAHL, 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 3:7 (2d ed. 1990) (“Considering modern means for disseminating

appreciation may fairly be incorporated into the objective reasonableness standard as part of the knowledge common to the community and inherent in objectively reasonable people.

Once courts recognize that objectively reasonable people have knowledge of cognitive diversity, it becomes more difficult to conclude that “a member of the public at large” *with such knowledge* is “unable to anticipate or safeguard against the harm she encountered” by it.²²¹ Recognizing that objectively reasonable people ought to hold such information should impact the analysis of typical plaintiffs’ comparative or contributory negligence when injuries arise in their interactions with individuals who have cognitive disabilities.

These authors recognize that this proposal, potentially barring recovery for injured plaintiffs when they fail to act on common knowledge about cognitive diversity and its manifestation in community life to ensure their own safety, seems broad and far-reaching at first blush. But this approach’s impact would be, in fact, quite narrow.

This approach leaves in place, for example, liability for harms resulting from intentional acts. In other words, in cases in which a person acts purposefully or with knowledge to a substantial certainty that harm will result from their actions, liability flows, even if the defendant inflicted that harm under a mistake induced by a cognitive disability.²²² If a defendant with a

knowledge, principally the audio-visual media and especially television, the reasonable person of today is charged with greater knowledge than ever before.”). Television in recent years has embraced and reflected the cognitive diversity in society today. *See, e.g., American Idol Season 10* (Fox 2010) (introducing James Durbin, a contestant with Asperger’s Syndrome and Tourette’s Syndrome, and promoting him throughout the season on multiple individual episodes); *Hannibal* (NBC 2013-present) (featuring an FBI investigator with Asperger’s Syndrome); *Life Goes On* (ABC 1989-1993) (featuring a major character with Downs Syndrome); *Parenthood* (NBC 2010 - present) (highlighting a character with autism and his family’s understanding of his disability as a theme of the program throughout the season); *TEMPLE GRANDIN* (HBO 2010) (relaying the life story of Temple Grandin, a woman with autism).

221. *See, e.g., Creasy v. Rusk*, 730 N.E.2d 659, 667 (Ind. 2000) (distinguishing plaintiff, a paid caregiver with specific knowledge of the defendant’s cognitive disabilities, from “a member of the public at large” who would be “unable to anticipate or safeguard against the harm she encountered”).

222. *See, e.g., McGuire v. Almy*, 8 N.E.2d 760 (Mass. 1937) (recognizing in outdated and insensitive language that “where an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable”); *Delahanty v. Hinckley*, 799 F. Supp. 184 (D.D.C. 1992) (rejecting an argument that liability should not flow for battery because defendant was in a “deluded and psychotic state of mind” at the time

cognitive disability deliberately strikes the plaintiff with an object due to a misperception resulting from a cognitive disability, for example, the approach considered here would have no impact on the defendant's liability for the resulting harm.²²³

This approach also leaves in place liability in negligence actions in which the plaintiff has no opportunity under the circumstances to appreciate and avoid the risk posed, despite the plaintiff's general appreciation of cognitive diversity in society.

Consider, for example, an instance in which damages result when a defendant with a cognitive disability allows her grocery cart to roll unattended into plaintiff's car in a parking lot, causing damage to the car. Imagine that the defendant allowed the cart to roll in this manner because she did not appreciate, due to her cognitive disability, the impact of gravity on a fully loaded cart on wheels when left unattended on a downward sloping surface.

If the owner of the car, the plaintiff, was not present in the parking lot when the defendant released the cart to roll downhill, plaintiff would face no barrier to relief under the "updated" contributory or comparative negligence analysis presented here.²²⁴ And ordinary negligence liability would permissibly be imposed upon the "innocent" defendant whose inability to appreciate the risk of harm resulted in damage to plaintiff.

Ultimately, the approach considered in this section would impact only those negligence claims in which the defendant has a relevant cognitive disability *and* the plaintiff is present to appreciate the circumstances creating the risk of harm and to act on her knowledge of cognitive diversity in her community. Recognizing the narrow scope of this approach, introducing and considering it becomes manageable. And the time has come.

he inflicted the intentional harm); *White v. Muniz*, 999 P.2d 814 (Colo. 2000) (same); RESTATEMENT (SECOND) OF TORTS § 895J (1965).

223. *McGuire*, 8 N.E.2d at 760.

224. On the other hand, if the plaintiff stood in the lot by her car, observed the defendant release the cart to roll downhill without awareness, and turned her back, assuming that the defendant would realize what was happening and grab the cart, then this approach might apply. Under these circumstances, the plaintiff should recognize that she lives in a cognitively diverse society, and should not expect all people to behave identically or be equally appreciative of risks. Once plaintiff identifies a risk of harm to her property, she ought to take steps to avoid her own harm by grabbing the cart before it hits her car. If she fails to take this step to avoid her own harm, her claim may be reduced under the approach considered here which would require her to take into account cognitive diversity in society in determining her risk under the circumstances.

It has been over four decades since Section 504 of the Rehabilitation Act prohibited discrimination against individuals with disabilities in any program receiving federal funds.²²⁵

It has been nearly four decades since the Education of All Handicapped Children Act,²²⁶ now re-named the Individuals with Disabilities Education Act,²²⁷ required public schools to “mainstream” children with disabilities, educating them to the maximum extent possible with their non-disabled peers.

It has been nearly twenty-five years since the Americans with Disabilities Act prohibited private employers with fifteen or more employees, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other privileges or conditions of employment.²²⁸

Objective reasonableness has always required parties to appreciate and act upon knowledge common to the community and to perceive fully their circumstances. Today, after a generation of experience with federally mandated inclusion and accommodation of individuals with cognitive disabilities within the fabric of society—in schools, public spaces, and places of employment—objective reasonableness could expect inclusion and accommodation of cognitive variance throughout society’s membership as knowledge common to the community and as part of the ordinary circumstances of life.²²⁹

Twenty-first century Americans may no longer presume that individuals with cognitive disabilities are hidden from public or kept in homes or institutions.

To establish this modern reality within the century-old negligence standard, the third proposal introduced here focuses where the scholars of the last century did not. It concentrates on the second of the two sources of

225. Rehabilitation Act of 1973, PUB. L. NO. 93–112, § 504, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794) (1973) (prohibiting discrimination against people with disabilities in programs receiving federal funding).

226. Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773 (codified as amended as Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1445) (1975) (requiring all schools receiving federal funds to provide equal access to education for children with disabilities).

227. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101–476, § 901(a)(1), 104 Stat. 1103 (“Section 601(a) (20 U.S.C. 1400(a)) is amended by striking ‘This title’ and all that follows and inserting in lieu thereof the following: ‘This title may be cited as the ‘Individuals with Disabilities Education Act.’”).

228. Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (codified as amended at 42 U.S.C §§ 12101–12213) (1990) (effective date July 26, 1992) (prohibiting discrimination against individuals with disabilities).

229. See *infra* notes 257-266 and accompanying text.

disability disadvantage inherent in the objective reasonableness standard: the standard's presumption that typical plaintiffs are "unable to anticipate or safeguard against" the presence and manifestation of cognitive disabilities in society's members.²³⁰

Just as the two previously considered alternatives embody both advantages and disadvantages, this proposal also has both advantages and disadvantages. Questions remain, of course, about whether societal appreciation and acceptance of cognitive differences have advanced sufficiently to render this alternative viable.²³¹ The remainder of this section develops this proposal and begins a discussion of its advantages and disadvantages.

a. Advantages of the Shift in Focus

As noted, in focusing on negligence's objective reasonableness standard as applied to *plaintiffs* with *or without* cognitive disabilities rather than on the standard as applied to defendants with cognitive disabilities, this approach considers its application in determining contributory negligence, comparative negligence, or assumption of risk. This approach suggests an update to the hypothetical reasonably prudent person's assumed knowledge about cognitive disabilities when evaluating plaintiffs' behavior in the context of their claims against adult defendants with those disabilities.²³²

This section identifies three benefits to this new approach: (1) modern legal and factual realities logically lead to it; (2) well-established negligence doctrine, ready to be applied, readily incorporates it; and (3) underlying expectations inherent in this approach encourage continued progress toward greater understanding and inclusion of individuals with cognitive disabilities into the mainstream of society.

230. *Creasy v. Rusk*, 730 N.E.2d 659 (Ind. 2000). *Compare supra* notes 263-264 and accompanying text (discussing the reality that the law of negligence accepts that the general population does not recognize or appreciate the existence or symptomology of cognitive disability, even though the law presumes otherwise in other contexts) *with infra* note 270 and accompanying text (discussing instances in other places within tort law (eggshell skull principle, contributory negligence, apportionment of fault, and assumption of risk) and elsewhere (judicial notice, expert witness requirements, proof of discriminatory intent in disability discrimination claims) in which the court recognizes cognitive disabilities and takes them into account). *See also supra* notes 92-97, 118 and accompanying text (delineating other areas of substantive law where courts consider cognitive disabilities).

231. *See infra* note 300 and accompanying text.

232. *See infra* notes 257-266 and accompanying text.

*i. Legal and Factual Realities Logically
Lead to this New Approach*

Several legal and factual realities encourage a shift in advocacy toward modernization of the present standard's application toward plaintiffs with *or without* cognitive disabilities (rather than creation of an exception to the present standard on behalf of defendants with such disabilities).

First, as previously noted, courts have rejected any exception to the objective reasonableness standard as applied against adult *defendants* in claims by non-caregiving plaintiffs.²³³ Simultaneously, however, courts have recognized that caregiver *plaintiffs* cannot recover from their patients because caregivers are presumed to have the knowledge necessary to appreciate and avoid harm at the hands of their patients.²³⁴ This judicial reality invites invigorated dialogue about the standard's application in considering *other* plaintiffs' responsibility to act on knowledge of their environments in avoiding harm to themselves.

Further, the recently published Third Restatement of Torts also rejects any exception to the objective reasonableness standard to accommodate adult

233. *See supra* note 55 and authorities cited therein. *See also, e.g.*, *Bashi v. Wodarz*, 53 Ca. Rptr. 2d 635, 642 (N.Y. Civ. Ct. 1996) (reversing entry of summary judgment for defendant after ruling that sudden and unanticipated onset of mental illness is not a defense to negligence); *Gould v. Am. Family Mut. Ins. Co.*, 543 N.W.2d 282, 286 (Wis. 1996) (acknowledging scholarship urging an exception to the objective reasonableness standard as applied against one with a mental impairment, but refusing to adopt one).

234. *See, e.g.*, *Colman v. Notre Dame Convalescent Home*, 968 F. Supp. 809, 813 (D. Conn. 1997) (holding defendant is not liable because defendant is a dementia patient and the plaintiff is a paid caregiver); *Herrle v. Estate of Marshall*, 45 Cal. App. 4th 1761, 1765-66, 53 Cal. Rptr. 2d 713, 716 (Cal. Ct. App. 1996) (holding defendant not liable because defendant is an Alzheimer's patient and the plaintiff is a paid caregiver); *Gould v. Am. Family Mut. Ins. Co.*, 543 N.W.2d 282, 287 (Wis. 1996) (reasoning "[w]hen a mentally disabled person injures an employed caretaker, the injured party can reasonably foresee the danger and is not 'innocent' of the risk involved"); *Creasy v. Rusk*, 730 N.E.2d 659, 670 (Ind. 2000) (holding plaintiff assumed the risks created by caring for people with Alzheimer's disease when she chose to work in the nursing home); *Hofflander v. St. Catherine's Hosp., Inc.*, 664 N.W.2d 545, 558 (Wis. 2003) (holding that "if a special relationship did exist, the particular risk of harm was foreseeable, and there is some evidence that the defendant caregiver failed to exercise the duty of care that was required under these circumstances, the finder of fact should compare the defendant's negligence to the plaintiff's contributory negligence using a subjective standard to evaluate the mentally disabled plaintiff's duty of self care").

defendants with cognitive disabilities. The Third Restatement asserts: “An actor’s mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child.”²³⁵

Although the First Restatement of Torts expressed no position on whether negligence doctrine should apply a subjective standard of care in claims against adult defendants with cognitive disabilities,²³⁶ the Second Restatement took an adverse position in 1965.²³⁷ The Second Restatement of Torts acknowledged and embraced negligence’s cognitive-disability disadvantage. It explained that “no allowance is made” for cognitive disabilities, and “the actor is held to the standard of a reasonable man who is not mentally deficient, even though it is in fact beyond his capacity to conform to it.”²³⁸ With the Third Restatement recently reiterating this problematic position, the time is ripe for consideration of another approach toward equality.

Additionally, the number of negligence cases involving an adult party with

235. RESTATEMENT (THIRD) OF TORTS § 11(c) (2010).

236. RESTATEMENT (FIRST) OF TORTS § 283 (1934). While the First Restatement of Torts provided in 1934 that “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,” *id.*, it also included a caveat in the comments that “the institute expresses no opinion as to whether insane persons are required to conform to the standard of behavior which society demands of sane persons for the protection or interests of others.”

237. RESTATEMENT (SECOND) OF TORTS § 283B (1965) (stating that “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 the reasonable man under like circumstances”). In fact, a supplement to the First Restatement, issued in 1948, also withdrew its initial support for this exception, citing only one case: *Sforza*, 268 N.Y.S. at 447 (holding that a defendant who became suddenly insane while driving a bus and struck a parked car was liable for the resulting damage because “[t]he authorities establish that an insane person is civilly liable for his torts”).

238. RESTATEMENT (SECOND) OF TORTS § 283B; *Sforza*, 268 N.Y.S. at 448 (“It is unfortunate . . . that one should be compelled to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties.”) (citations and internal quotation marks omitted); *id.* “But . . . [t]he question of liability in these cases, as well as others, is a question of policy and is to be disposed of as would the question whether the incompetent person is to be supported at the expense of the public, or of his neighbors, or at the expense of his own estate.”) (citations and internal quotation marks omitted).

a cognitive disability is expected to increase²³⁹ as our population ages,²⁴⁰ as incidents of dementia rise,²⁴¹ and as recognition of various cognitive disabilities improves and rates of diagnoses increase.²⁴² In fact, projections indicate that, by the year 2030, all Baby Boomers will have advanced into the population of those aged 65 years and beyond.²⁴³ “In 2056, for the first time, the older population, age 65 and over, is projected to outnumber the young, age under 18.”²⁴⁴ And, by 2060 the number of Americans over the age of 65 will make up more than 20% of the total population.²⁴⁵ “[O]lder age [has been] consistently

239. See, e.g., Bomberger, *supra* note 13, at 411 (recognizing that although “only a handful of mentally ill defendants have come before the courts in negligence claims . . . with the aging population, the growing number of people with dementia, and the universal policy of deinstitutionalisation, . . . it is likely that areas of law, including tort law, will come to deal more often with defendants suffering from reduced mental capacity”).

240. The median age in America has increased from 29.5 years in 1960 to 37.2 years in 2010, and during the same period the population over the age of 65 increased from nine percent in 1960 to thirteen percent in 2010. Lindsay M. Howden and Julie M. Meyer, U.S. CENSUS BUREAU, *Age and Sex Composition: 2010*, at 6 (May 2011) <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

241. Between ages 65 and 90 dementia rates increase exponentially with rates doubling approximately every five years. Maria M. Corrada et al. *Dementia Incidence Continues to Increase with Age in the Oldest Old The 90+ Study*, ANN. NEUROLOGY, 1, 1, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3385995/pdf/nihms382712.pdf> (January 2012). As the population ages, the incidences of dementia thus will increase.

242. Lukasik, *supra* note 102, at 277-279.

243. JENNIFER M. ORTMAN AND CHRISTINE E. GUARNERI, U.S. CENSUS BUREAU, *United States Population Projections: 2000 to 2050*, available at <http://www.census.gov/population/projections/files/analytical-document09.pdf> (last visited July 28, 2014); U.S. CENSUS BUREAU, POPULATION DIVISION, *Annual Estimates of the Resident Population by Single Year of Age and Sex for the United States: April 1, 2010 to July 1, 2013*, (June 2014), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2013_PEPSYASEXN&prodType=table

244. Press Release, U.S. Census Bureau, Public Information Office, U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now (December 12, 2012), <http://www.census.gov/newsroom/releases/archives/population/cb12-243.html> (“Baby boomers, defined as persons born between 1946 and 1964, number 76.4 million in 2012 and account for about one-quarter of the population. In 2060, when the youngest of them would be 96 years old, they are projected to number around 2.4 million and represent 0.6 percent of the total population.”).

245. PRESS RELEASE, U.S. CENSUS BUREAU, PUBLIC INFORMATION OFFICE,, INTERNATIONAL MIGRATION IS PROJECTED TO BECOME PRIMARY DRIVER OF U.S.

associated with risk of dementia.”²⁴⁶ In fact, almost 5% of individuals 71-79 years old, 24% of individuals 80-89 years old, and 37% of individuals over 90 years old experience some form of dementia.²⁴⁷

Of course, it is not just Americans over the age of 65 who experience cognitive disabilities, including dementia. Almost one in four Americans over the age of 18 experiences some form of cognitive disability or disorder in a given year.²⁴⁸ A 2008 United States Census Bureau report published that individuals with cognitive, emotional, or mental disabilities accounted for seven percent of the population fifteen years or older and included approximately sixteen million people.²⁴⁹ Almost half that group reported that their cognitive, emotional, or mental disability interfered with daily life.²⁵⁰

Taken together, what do these realities offer? Neither the courts nor the American Law Institute show interest in an accommodation for adult defendants with cognitive disabilities within negligence’s objective reasonableness standard. No exception to the objective reasonableness standard has been recognized in this context despite over a century of advocacy. The raw number of Americans with cognitive disabilities is on the rise. Together, this collection of realities inspires invigorated consideration of alternative means to resolve the cognitive-disability disadvantage within the existing

POPULATION GROWTH FOR FIRST TIME IN NEARLY TWO CENTURIES (May 15, 2013), <http://www.census.gov/newsroom/releases/archives/population/cb13-89.html>.

246. B.L. Plassman et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 *NEUROEPIDEMIOLOGY*, 125, 128 (2007), http://sitemaker.umich.edu/klanga/files/plassman_adams_dementia_prev_neuroepi.pdf.

247. *Id.* at 128.

248. U.S. DEP’T. OF HEALTH & HUMAN SERVS., NAT’L INST. OF MENTAL HEALTH, *2014 Budget* (2014), available at <http://www.nimh.nih.gov/about/budget/cj2014.pdf> (last visited July 28, 2014) (“In a given year, an estimated 11.4 million American adults (approximately five percent of all adults) suffer from a seriously disabling mental illness. Illness such as “[s]chizophrenia, bipolar disorder, depression, post-traumatic stress disorder, anxiety disorders, autism spectrum disorder, eating disorders, borderline personality disorder, and other disorders are seriously disabling, life-threatening illnesses.” And, while “a cautious estimate places the direct and indirect financial costs associated with mental illness in the U.S. at well over \$300 billion annually” . . . the “burden of illness for mental disorders is projected to sharply increase over the next 20 years.”).

249. MATTHEW W. BRAULT, U.S. CENSUS BUREAU, *Americans with Disabilities: 2005*, at 7 (Dec. 2008), <http://www.census.gov/prod/2008pubs/p70-117.pdf>.

250. *Id.*

standard. This third approach is one such alternative.²⁵¹

While courts have been reluctant to modify the traditional standard of care with a new exception, they may offer less resistance to an argument that well-established negligence principles incorporate modern realities. In twenty-first century America, all citizens, not only those individuals with cognitive disabilities and their caregivers, share some understanding and experience with the reality of cognitive difference.

*ii. Existing Understandings of the Negligence Standard
Support the New Approach*

Existing negligence principles invite incorporation of updated understandings of cognitive difference in society. Negligence doctrine imposes, and has always imposed, an obligation on all members of society to act in a manner consistent with societal expectations.²⁵²

Accordingly, the objective-reasonableness standard naturally incorporates progress in social understandings over time. This has been the case with respect to the standard's evolution regarding many formerly segregated or subordinated groups of individuals, including women,²⁵³ children,²⁵⁴ and individuals with disabilities, both physical²⁵⁵ and cognitive.²⁵⁶

251. Of course, this dialogue need not supplant discussion about other proposals to eliminate (or mitigate) the cognitive-disability disadvantage inherent in the objective-reasonableness standard, but it ought to be added to such discussions.

252. Oliver Wendell Holmes Jr. reportedly said that “the law requires [men] at their peril to know the teachings of common experience, just as it requires them to know the law.” Warren A. Seavey, *Negligence – Subjective or Objective?*, 41 HARV. L. REV. 1, 28 (1927).

253. See generally Pat K. Chew & Lauren K. Kelley-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643, 663 (2007) (explaining that the legal debate regarding sexist language brought the legal community's attention to the implications of the term “reasonable man” and noting a forty percent drop in the usage of “reasonable man” to a term inclusive of women between the respective periods of 1974-76 and 1984-86).

254. RESTATEMENT (SECOND) OF TORTS § 290 cmt. k (1965) (asserting that “[t]he actor as a reasonable man should also know the peculiar habits, traits, and tendencies which are known to be characteristic of certain well-defined classes of human beings[, including, for example], [h]e should realize that the inexperience and immaturity of young children may lead them to act innocently in a way which an adult would recognize as culpably careless”).

255. E.g., *Hill v. Glenwood*, 100 N.W. 522, 523 (Iowa 1904) (emphasis added) (reasoning that “the streets are for the use of the general public, without discrimination; for the weak, the lame, the halt, and the blind, as well as for those

The Restatement (Second) of Torts explained that the “reasonable man should know the qualities, capacities, and tendencies of human beings, in so far as they are generally recognized at the time and in the community”²⁵⁷ as well as “the peculiar habits, traits, and tendencies which are known to be characteristic of certain well-defined classes of human beings.”²⁵⁸ The Restatement (Third) of Torts retains this view.²⁵⁹

In 2015 over four decades after American civil rights legislation required equality for and inclusion of individuals with cognitive disabilities in society, objective reasonableness as applied to all individuals should no longer indulge presumptive ignorance regarding the presence and nature of cognitive disabilities. Instead, three well-established negligence principles ought to expect all individuals to recognize the presence of those with cognitive disabilities in their communities and to act on this awareness.

First, as noted, ordinary reasonableness presumes, and has always presumed, that ordinary, reasonable people possess knowledge common in the community, including characteristics of humans and the effect of the law on society.²⁶⁰

possessing perfect health, strength and vision,” and explaining that “[t]he evidence shows without dispute that he was blind, and this fact should be considered by you in determining *what ordinary care on his part would require when he was attempting to pass over one of the sidewalks of this city*”).

256. *See, e.g.,* Mochen v. State, 43 A.D.2d 484, 487-88, 352 N.Y.S.2d 290, 294 (Cal. Ct. App. 1974) (affirming that a *plaintiff* who suffers from a cognitive disability “should not have his conduct measured by external standards applicable to a reasonable normal adult anymore than a physically disabled plaintiff is held to the same standards of activity as a plaintiff without such a disability”); Noel v. McCraig, 174 Kan. 677, 685, 258 P.2d 234, 240 (Kan. 1953) (holding that a negligence *plaintiff* who “is so absolutely devoid of intelligence as to be unable to apprehend danger and to avoid exposure to it cannot be said to be guilty of negligence” and is not subject to the “objective reasonableness” standard for his own protection).

257. RESTATEMENT (SECOND) OF TORTS § 290 cmt. j (1965).

258. RESTATEMENT (SECOND) OF TORTS § 290 cmt. k (1965).

259. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, § 3, cmt. a (2010).

260. *See* RESTATEMENT (SECOND) OF TORTS § 290 cmt. j and k(1965); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7, cmt. h (2010) (recognizing that “ordinarily language makes it awkward to speak of a person having a duty of care to himself or herself [but that] the rules of comparative responsibility ordinarily diminish the recovery of a plaintiff who has failed to exercise reasonable care to avoid harm to himself or herself”); Cervelli v. Graves, 661 P.2d 1032, 1037 (Wyo. 1983) (citing HOLMES, THE COMMON LAW 57 and PROSSER, LAW

For purposes of determining whether the actor should recognize his conduct involves a risk, he is required to know: (a) the qualities and habits of human beings . . . in the community; and (b) the common law, legislative enactments, and general customs in so far as they are likely to affect the conduct of the other or third persons.²⁶¹

After decades of legislated deinstitutionalization and integration in schools, public spaces, workplaces, and elsewhere in our communities,²⁶² ordinary Americans now enjoy experience-based knowledge of individuals with cognitive disabilities in their communities.²⁶³ At this time in American communities, courts should not easily accept the notion that “a member of the public at large [would be] unable to anticipate or safeguard against” a potential risk encountered through the reality of cognitive diversity in society.²⁶⁴

Second, ordinary reasonableness requires, and has always required, consideration of the circumstances in which the alleged negligence occurs.²⁶⁵

OF TORTS § 32, 159-160 (4th ed. 1971) (“the reasonable man is required to know what every person in the community knows”).

261. RESTATEMENT (SECOND) OF TORTS § 290 (1965); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7, cmt. h (2010) (recognizing that “ordinarily language makes it awkward to speak of a person having a duty of care to himself or herself [but that] the rules of comparative responsibility ordinarily diminish the recovery of a plaintiff who has failed to exercise reasonable care to avoid harm to himself or herself”).

262. *See supra* note 228-229, and accompanying text.

263. In fact, in 2006 “95 percent of students ages 6 through 21 served under IDEA [on the basis of diagnosed and eligible disabilities] were educated in regular classrooms for at least some portion of the school day” integrating with their non-disabled peers and offering to them an opportunity to gain experience with successfully participating in a fully integrated group, including individuals with cognitive disabilities. U.S. DEP’T OF EDUC. OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, *30th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2008*, at xxi (2011), <http://www2.ed.gov/about/reports/annual/osep/2008/parts-b-c/30th-idea-arc.pdf>.

264. *Creasy v. Rusk*, 730 N.E.2d 659, 667 (Ind. 2000).

265. DOBBS, *supra* note 2, § 118, at 281 (explaining that the circumstances “tell[ing] us what counts as reasonable care will vary with the risks presented [and recognizing that] [t]he reasonable person will exercise care commensurate with the danger” such that, for example, the reasonable person might slow down while driving near a group of children playing); *Coburn v. City of Tucson*, 691 P.2d 1078, 1080 (Ariz. 1984) (observing the problematic tendency of courts to create rules to replace the general

When a community is integrated to include individuals with cognitive disabilities, this reality becomes a circumstance that must be taken into account in determining how an objectively reasonable person ought to behave.

While this circumstance would not lead individuals to recognize a particular cognitive disability and its diagnostic symptoms or characteristics, it should lead members of American society to appreciate that they operate in a diverse population of individuals with varying cognitive capacities. With this awareness, reasonable people should not remain entitled to presume that those around her function at a uniform baseline standard with equal capacity. Reasonable people making behavioral choices must take mainstreamed cognitive diversity into account.

Finally, negligence analysis has always required individuals to take action to protect their own interests.²⁶⁶ A failure to do so has precluded recovery for any loss under doctrines of contributory negligence,²⁶⁷ implied assumption of risk,²⁶⁸ last clear chance,²⁶⁹ and more recently comparative negligence.²⁷⁰ If one

duty of care, and noting that “the duty remains constant, while the conduct necessary to fulfill it varies with the circumstances”).

266. *Peters v. Menard*, 589 N.W.2d 395, 404 (Wis. 1999) (quoting a state statute that provides “every person in all situations has a duty to exercise ordinary care for his or her own safety”); *Memorial Hospital of South Bend, Inc. v. Scott*, 300 N.E.2d 50, 56 (Ind. 1973) (citations omitted) (noting in a contributory negligence context that such negligence is defined as conduct on the part of the plaintiff “which falls below the standard to which he is required to conform for his own protection”); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7, cmt. h (2010) (recognizing that “ordinarily language makes it awkward to speak of a person having a duty of care to himself or herself [but that] the rules of comparative responsibility ordinarily diminish the recovery of a plaintiff who has failed to exercise reasonable care to avoid harm to himself or herself”).

267. *See infra* note 266. *See also* *Dennison v. Klotz*, 532 A.2d 1311, 1317 (Conn. Ct. App. 1978) (“A passenger has, of course a legal duty to use care for his own safety, and his contributory negligence will bar or diminish his own claim.”); *Earle v. Salt Lake & U.R. Corp.*, 165 P.2d 877, 879 (Utah 1946) (“If, by exerc[ising] [] such care, he could avoid injury to himself, but fails to do so, he cannot recover, regardless of the fact that he had no control or direction of the vehicle in which he was riding at the time of the accident and injury.”).

268. *See* *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 13-14 (Wash. 1992) (reasoning that “[a] number of Washington cases are in agreement, . . . that primary implied assumption of the risk remains a complete bar to recovery” and offering sports as an example where “[a] defendant simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport”); *Sinai v. Polinger Co.*, 498 A.2d 520 (D.C. 1985) (distinguishing known from unknown danger,

elects to ignore circumstances in which a reasonably prudent person with knowledge common in the community would identify a risk of harm, she acts unreasonably under well-established principles of negligence. She failed to protect against a foreseeable risk of injury and should not recover from another when the foreseeable risk materializes.

A handful of academics have begun to make an argument based on these principles in negligence claims against adult defendants with cognitive disabilities. They hint that reasonably prudent *plaintiffs* may share responsibility for their own harms under traditional negligence standards when they ignore knowledge that diverse communities include individuals with a range of cognitive functioning.

For example, David Seidelson, while arguing in favor of a subjective standard of care for defendants with cognitive disabilities, considered this approach. He explained that it “would not be unfair to impute to the plaintiff knowledge” of the unique, limiting characteristics of a defendant when the “plaintiff ha[s] no reasonable expectation” that the defendant would act in a particular manner.²⁷¹

the court observes that where the plaintiff “elects to proceed in the face of a known danger, the plaintiff is regarded as having consciously relieved the defendant of any duty which he otherwise owed the plaintiff”); *Berberian v. Lynn*, 845 A.2d 122, 123 (N. J. 2004) (holding that the professional caregiver may not recover for the conduct of a patient when this conduct is, in part, the reason for the caregiver’s role). *See also* *DOBBS*, *supra* note 2, § 214, at 545-46 (suggesting that “[i]n the absence of special reasons to hold otherwise, the plaintiff’s apparent consent is by itself ample ground for concluding that the defendant’s duty is limited or that the defendant is simply not negligent at all”).

269. *See* *Brandelius v. San Francisco*, 306 P.2d 432, 436-37 (Cal. 1957) (holding that the trial court gave a proper instruction on the last clear chance doctrine because the deceased had a reasonable chance to get away before being struck by the train); *Bowden v. Bell*, 446 S.E.2d 816, 820 (N. C. Ct. App. 1994) (affirming that the trial court did not err in its jury instruction of the “last clear chance” when the facts showed that the driver of an automobile had the last clear chance to avoid hitting the decedent as evidenced by the skid marks in the road).

270. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7, cmt. h (2010) (recognizing that “ordinarily language makes it awkward to speak of a person having a duty of care to himself or herself [but that] the rules of comparative responsibility ordinarily diminish the recovery of a plaintiff who has failed to exercise reasonable care to avoid harm to himself or herself”).

271. 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, 24 (1981) (considering an analogous example involving a minor teenager).

Seidelson did not, however, argue in 1981 that the objective standard should therefore impute general knowledge of the existence and operation of cognitive disabilities. Instead, he emphasized:

a litigant should be permitted to supplant the reasonable person standard with another less demanding standard that incorporates some subjective characteristic of the litigant only if the subjective characteristic makes it uniquely difficult for the litigant to comply with the reasonable person standard, *and if judicial cognizance of the characteristic does not frustrate the other litigant's reasonable expectations.*²⁷²

Today, recognizing that the subjective standard has not earned the approval of the courts, advocates may shift attention to plaintiffs' contributory or comparative negligence based on expected knowledge and experience with cognitive diversity.

In the end, well-established negligence principles invite advocates to focus on the plaintiffs' knowledge common to the community, circumstances in a diverse society, and obligations to take action to protect themselves from harm rather than upon the perceived or actual limitations of potential defendants.

Should plaintiffs ignore this common knowledge and decades-old circumstance of mainstreamed cognitive diversity, they do so at their own risk. Should they risk their own safety knowing that they live in an integrated society, this risk-taking behavior may bar their recovery for resulting harms in a negligence action against an adult with relevant cognitive disabilities (in a contributory negligence jurisdiction, for example) or it may minimize their recovery (in a comparative negligence jurisdiction, for example).

*iii. Consistent Principles Aligned with Progress
Support a New Approach*

Just as well-established negligence principles support reconsideration of the doctrine's indulgence of plaintiffs' presumed ignorance of cognitive differences, progressive underlying expectations of this reconsideration also justify giving it thoughtful attention.

As individuals with disabilities integrate into mainstream society, disability rights advocates encourage all members of society engage in an open-

272. *Id.* at 17, 20 (emphasis added).

mindful, judgment-free, and frank dialogue about the continuum of abilities throughout society. Discussion of this sort should increase tolerance and understanding.²⁷³ An increase in tolerance and understanding should increase society's ability to appropriately accommodate the full spectrum of abilities throughout society, maximizing the likelihood that all will enjoy success as a community working together. Such cooperation and accommodation should further increase the likelihood that individuals will mindfully reduce their own risks of harm rather than ignore apparent risks in privileged ignorance about those around them.²⁷⁴

An updated standard of care in negligence actions that imputes knowledge of cognitive diversity incentivizes greater learning about those cognitive differences. If the applicable standard of care requires this knowledge, reasonable people should take steps to develop it if they don't have it.

This standard-driven incentive can offer the same benefits as disability-awareness campaigns. Both provide potential to increase general understanding and mindfulness about cognitive disabilities in individuals in our communities, maximizing the likelihood that all individuals work together in supportive communities with awareness about the diversity of ability in their members.

However, this recommendation is not without risks. Having recognized three advantages, supporting increased consideration of this new proposal to minimize the effect of negligence's cognitive-disability disadvantage, this article next addresses several disadvantages associated with it.

a. Disadvantages of the Shift in Focus

Three notable disadvantages of the proposed update to the objective reasonableness standard as applied to plaintiffs with or without cognitive

273. See, e.g., Peter Blanck, *The Right to Live in the World: Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. C.L. & C.R. 2, 367, 385-86 (2008) (using as an example the tens of thousands of Civil War veterans who lived with disabilities following the war and the resulting pension scheme that occurred "at a time when social norms about disability had not developed and advocacy for disability rights and social justice was non-existent, but [these events] led to disability advocacy and "contributed to broader social and political understandings of what it means to be 'disabled'").

274. See Anne Bloom and Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 738 (2011) (describing how "[l]egal actors in tort litigation can minimize the effects of blindsight by learning more about how people with disabilities perceive their lives" and emphasizing that "[w]hile people without disabilities may never fully understand the experience of living with a disability, they can increase their cognitive understanding by interacting with people who do have personal experience").

disabilities are introduced here. They are: (1) a risk of stereotyping and backlash, (2) a concern that updating the objective-reasonableness standard as applied to plaintiffs, without more, ignores and accepts the standard's illogical application against defendants with cognitive disabilities, and (3) the potential for uncompensated losses.

First, like the creation of a subjective standard of care for adult defendants with cognitive disabilities, this proposal may invite stereotyping, backlash, and re-institutionalization efforts. The same analysis of this risk offered in Part II-B-1(iii) above applies equally in this context.²⁷⁵

Some may critique this approach, as they have the proposed subjective standard of care,²⁷⁶ as incentivizing potential plaintiffs to act on stereotypes rather than substance in attempts to avoid harms at the hands of a person presumed to have a cognitive disability. Likewise, critics of this approach, like critics of the subjective standard of care,²⁷⁷ may raise concerns that this proposal will incentivize plaintiffs to avoid interaction with anyone perceived to have a cognitive disability, effectively increasing their isolation, rather than promoting their integration.

In other words, plaintiffs may overreact in fear to an understanding that negligence recovery may be barred (or restricted) under contributory (or comparative) negligence principles should plaintiffs fail to act in their own interest to avoid harm in interactions with persons who have relevant cognitive disabilities. These "typical" potential plaintiffs may act on stereotypes of disability, shunning individuals perceived as having any type of cognitive disability at all to avoid the risk of uncompensated loss.

Worse, as critics of the long-proposed subjective standard of care have warned,²⁷⁸ plaintiffs might re-mobilize and seek repeal of civil rights legislation such as Section 504 of the Rehabilitation Act, the Individuals with Disabilities

275. *See supra* notes 120-133 and accompanying text (discussing this disadvantage in greater detail).

276. *See supra* notes 122-126 and accompanying text (discussing this concern in the context of the proposed subjective standard of care). *But see, e.g., supra* note 127 and accompanying text (criticizing this position).

277. *Id.*

278. *See supra* notes 125-126 and accompanying text (discussing this concern in the context of the proposed subjective standard of care). *See also* Splane, *supra* note 14, at 165 (cautioning that "[a]llowing a defense of mental illness to tort liability may increase public resistance to having the mentally ill in the community" and explaining that "[t]he public's attitudes toward the mentally ill vacillate capriciously and it takes only a few well-publicized cases absolving the mentally ill from tort liability to start a public outcry.").

in Education Act, or the Americans with Disabilities Act to encourage re-institutionalization of individuals with cognitive disabilities to avoid the risk of uncompensated loss.

Just as these authors responded to such concerns with greater optimism than naysayers in their treatment of the proposed subjective standard of care,²⁷⁹ they respond with greater optimism here.

Concerns about discrimination and backlash against those with cognitive disabilities following a change in the objective reasonableness standard accept the validity of the challenged assumptions. As noted above, accepting this concern as a reason to retain the status quo reinforces the stereotypes and prejudice that created the injustice in the rule in the first instance.²⁸⁰ It also suggests that the public's fears that individuals with cognitive disabilities are more dangerous than others is legitimate, which is wrong.²⁸¹

Additionally, as also noted above,²⁸² an alternative and nondiscriminatory social outcome remains equally possible under the same circumstances. If courts expect some measure of understanding and accommodation of the cognitively disabled in all members of society, they incentivize the public to become familiar with those disabilities in order to satisfy their standard of care and reduce risk of harm. As a result, this change, like the proposed subjective standard of care, could facilitate greater interest in and education about cognitive differences. This interest and education could in turn begin to dispel many of the common misconceptions regarding cognitive disabilities that led to exclusion from society in the first instance.

Furthermore, fears of discriminatory backlash are the result of unfounded assumptions. As noted above, they assume that people will engage with individuals who have cognitive disabilities only if they know they will be compensated should they suffer an injury.²⁸³ Practically speaking, however,

279. See *supra* notes 78-87 (addressing uncompensated plaintiffs); *supra* notes 88-119 (addressing administrative concerns); *supra* notes 121-133 and accompanying text (addressing backlash and re-institutionalization).

280. See *supra* note 127 and accompanying text (citing Korrell, *supra* note 45, at 40-41) (explaining that concerns about discrimination and backlash against those with cognitive disabilities as a “rationalization for the current rule does no more than reinforce the stereotypes and prejudice that appear to be behind the rule to begin with” and “legitimizes the public's fears and misconceptions that the mentally disabled are more dangerous than others, that they are more likely to commit torts and crimes than the rest of the population”).

281. Korrell, *supra* note 45, at 40-41.

282. See *supra* notes 273-274 and accompanying text (discussing this alternative outcome in the context of the proposed subjective standard of care).

283. Goldstein, *supra* note 14, at 88.

many community members refuse to interact with individuals who have cognitive disabilities even today, while negligence compensation remains available, suggesting that it is not the liability standard that determines whether one is willing to interact with a person who has a cognitive disability.²⁸⁴

A second disadvantage of this novel approach is similar to one raised in the context of the strict liability proposal previously considered.²⁸⁵ Both approaches would continue to apply an objective standard to individuals who are not capable of satisfying that standard due to a disability. As such, like the second proposal considered in this article, this “solution” does not resolve the logical or moral problem of allowing a determination of negligence without blameworthiness for a single class of negligence defendants.²⁸⁶

However, unlike the re-naming recommendation that would continue to impose full liability without blameworthiness, this proposal limits (or eliminates, depending upon the jurisdiction and circumstances) liability despite the finding of negligence. Thus, this proposal minimizes the practical effects of the inequity in the application of negligence’s objective-reasonableness standard in this circumstance.

Finally, like the long-proposed subjective standard of care, this proposal opens the door (though not quite as wide as with the subjective standard of care) to a risk of uncompensated losses.²⁸⁷ Plaintiffs who are not effective at appreciating cognitive diversity may find themselves unable to fully recover for losses incurred in interactions with individuals who have relevant cognitive disabilities under contributory or comparative negligence principles.

Plaintiffs without cognitive disabilities comprise the majority of plaintiffs, and this majority may resist a possibility that their recovery may be limited in this manner. A desire to protect the majority’s privilege to remain uninformed without consequence does not justify a standard that indulges ignorance at a time when children go to school in integrated environments, participate in integrated community activities, and ultimately work in integrated employment environments. But concern about how the majority may mobilize to resist this possibility does warrant thoughtful consideration.

In that context, it is worth recalling the inherent limitations, discussed

284. Goldstein, *supra* note 14, at 89.

285. *See supra* notes 136-144 and accompanying text (discussing this concern in the context of a proposed re-designation of liability in this context as strict, rather than fault-based).

286. *See supra* notes 149-148, 154 and accompanying text.

287. *See supra* notes 78-80 and accompanying text (discussing this concern in the context of the proposed subjective standard of care).

above, of this third approach.²⁸⁸ While its underlying principles are comprehensive, the number of cases to which it would apply is relatively narrow.²⁸⁹

The negligence standard may, at this point in history, fairly expect typical plaintiffs to open their eyes and minds to the spectrum of individuals in their integrated environments. And it may hold them responsible for developing knowledge of and experience with the diverse cognitive capacities common in their communities.

Ultimately, while acknowledging that this recommendation is not perfect, these authors hold hope that negligence's standard of objective reasonableness might successfully embrace the progressive reality in the United States and celebrate, rather than subordinate, members of our increasingly integrated and diverse society.

III. CONCLUSION: ENCOURAGING CONTINUED CONVERSATION ABOUT EQUALITY AND NEGLIGENCE LIABILITY IN ADULTS WITH COGNITIVE DISABILITIES

In the end, despite the century-old critique of the objective reasonableness standard as applied to adult defendants with cognitive disabilities, and despite academic development of a ready solution to the recognized injustice, courts have retained application of the rule as originally established.²⁹⁰ They have

288. See *supra* notes 224-226 and accompanying text (illustrating instances in which this approach would have no effect on the liability of an individual with a cognitive disability for harms caused by their conduct).

289. *Id.*

290. *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. Co.*, 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.”). *But see Snider v. Callahan*, 250 F. Supp. 1022, 1022 (W.D. Mo. 1966) (a plaintiff with a “mental deficiency may avoid what would otherwise be contributory negligence in a normal person.”). DOBBS, *supra* note 2, § 120, 285 (citations omitted) (describing how in a contributory negligence jurisdiction, the defendant may be under a duty to protect the plaintiff from his own fault, and offering, for example, that “some judges have resisted applying the objective standard of the reasonably prudent person and instead prefer to apply a subjective standard to *plaintiffs* who suffer mental limitations” and explaining that “[a] mental institution cannot subject its impaired patients to unreasonable risks of harm and then escape liability on the ground that they foolishly failed to avoid the risk”).

consistently imposed negligence's objective reasonableness standard upon adult defendants with cognitive disabilities.²⁹¹ Courts have adhered to this objective standard with respect to these defendants even as they have recognized exceptions to it for children,²⁹² individuals with physical disabilities,²⁹³ those with heightened cognitive capacity,²⁹⁴ and even *plaintiffs*

291. *See* Ramey, v. Knorr, 124 P.3d 314, 317 (Wash. Ct. App. 2005) (discussing Washington's adherence to the majority rule and holding an individual with mental illness to "the standard of a reasonable person under like circumstances"); Creasy v. Rusk, 730 N.E.2d 659 (Ind. 2000). *See* DOBBS, *supra* note 2, § 120, 284 (stating that "the rule that mentally impaired persons are liable for their torts seems to be rather fully accepted"). *But see* Hofflander v. St. Catherine's Hosp., Inc., 664 N.W.2d 545, 560 (Wis. 2003) (citations omitted) (emphasizing that "the assertion that a mentally disabled person can never be negligent is simply wrong," and acknowledging that since 1971 Wisconsin has followed a pattern jury instruction, entitled "Negligence of Mentally Disturbed," that expressly states that "A person who is mentally disabled is held to the same standard of care as one who has normal mentality, and in your determination of the question of negligence, you will give no consideration to the defendant's mental condition").

292. *See generally* DOBBS, *supra* note 2, § 124, at 293 (recognizing and discussing that "children are not subjected to the reasonable person standard but are instead held to a standard that is largely subjective"); *id.* ("The minor is . . . required to conduct himself only with the care of a minor of his own age, intelligence, and experience in similar circumstances.").

293. The ordinary reasonableness standard becomes slightly subjective when it comes to physical disabilities. A person with physical disabilities is "held to the standard of a reasonable person having such disability, not to a standard of some ideal normal physical capacity." DOBBS, *supra* note 2, § 119, 282. Thus, for example, a person who is deaf is not expected to hear approaching dangers. *See, e.g.*, Fink v. City of New York, 132 N.Y.S.2d 172 (N.Y. Sup. Ct. 1954). He is, however, expected to act as a reasonable person with those physical disabilities in mind and "must adjust for limitations by using other senses or by alerting conduct to minimize the risks created by the disability." DOBBS, *supra* note 2, § 119, at 283; *see also* Rosser v. Smith, 133 S.E.2d 499 (N.C.1963); Mackie v. McGraw, 191 P.2d 403 (Ore. 1948).

294. *See, e.g.*, Jackson v. Axelrad, 221 S.W.3d 650, 657 (Tex. 2007) (citing RESTATEMENT (SECOND) OF TORTS § 289(b) cmt. a) (holding that if a person asserts herself as having superior skills or expertise such as a physician would, then the jury should consider the defendant's superior knowledge in evaluating their conduct to determine negligence); Levi v. Southwest Louisiana Electric Membership Cooperative (SLEMCO), 542 So. 2d 1081, 1085 (La. 1989) (holding that "the power company, particularly with its superior knowledge, skill and experience in electrical safety, should have recognized that its conduct under these circumstances involved a risk of harm to oil field workers"); Foley v. Entergy La., Inc., 946 So. 2d 144, 153-54 (La.

with cognitive disabilities.²⁹⁵

After considering three alternative responses to this problem, this article ultimately recognizes reluctantly that yet today, over forty years after passage of Section 504 of the Rehabilitation Act,²⁹⁶ a quarter century after passage of

2006) (establishing that an electric company is held to the standard of a reasonable person with superior attributes, and is required to recognize that there will be a certain amount of negligence that must be anticipated). *See also* RESTATEMENT (THIRD) OF TORTS § 12 (2010) (suggesting that “[i]f an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person”); RESTATEMENT (SECOND) OF TORTS § 290 cmt. f (“If the actor has special knowledge, he is required to use it, but he is not required to possess such knowledge, unless he holds himself out as possessing it or undertakes a course of conduct which a reasonable man would recognize as requiring it.”); *id.* at § 289 (similar); *id.* at § 299 cmt. f (similar).

295. *Mochen v. State*, 352 N.Y.S.2d 290, 294 (N.Y. Sup. Ct. 1974) (affirming that a plaintiff who suffers from a cognitive disability “should not have his conduct measured by external standards applicable to a reasonable normal adult anymore than a physically disabled plaintiff is held to the same standards of activity as a plaintiff without such a disability”); *Snider v. Callahan*, 250 F. Supp. 1022, 1022 (W.D. Mo. 1966) (stating that a plaintiff with a “mental deficiency may avoid what would otherwise be contributory negligence in a normal person.”); *Noel v. McCaig*, 258 P.2d 234, 240 (Kan. 1953) (holding that a negligence plaintiff who “is so absolutely devoid of intelligence as to be unable to apprehend danger and to avoid exposure to it cannot be said to be guilty of negligence” and is not subject to the “objective reasonableness” standard for his own protection); *Best*, *supra* note 65, at 1745 (“Although there is still strict liability with regards to mentally ill defendants, the law has shifted to allow mental illness as a defense to contributory negligence.”); *Splane*, *supra* note 14, at 157 (explaining that the majority of jurisdictions have long considered plaintiff’s mental competence in determining contributory negligence). In contrast, the Restatement (Third) of Torts rejects these holdings and asserts that plaintiffs in negligence actions should be evaluated by the same standard as defendants in those actions. *See* RESTATEMENT (THIRD) OF TORTS § 3 (2010) (“Plaintiff’s negligence is defined by the applicable standard for a defendant’s negligence. Special ameliorative doctrines for defining plaintiff’s negligence are abolished.”). It recognizes that courts historically have created “certain ameliorative doctrines” to “avoid the harsh effects of contributory negligence as a bar to a plaintiff’s recovery.” RESTATEMENT (THIRD) OF TORTS § 3 cmt. a. It concludes, however, that “[t]hese doctrines are no longer appropriate when, under comparative responsibility, a plaintiff’s negligence only reduces his or her recovery.” *Id.*

296. Rehabilitation Act of 1973, PUB. L. NO. 93–112, § 504, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794) (1973) (prohibiting discrimination against people with disabilities in programs receiving federal funding).

the Americans with Disabilities Act,²⁹⁷ and thirty-nine years after passage of the Education of All Handicapped Children Act²⁹⁸ (now re-named the Individuals with Disabilities Education Act),²⁹⁹ questions remain about whether society accepts, embraces, and accommodates individuals with cognitive disabilities as required by law. And it acknowledges that risks of stigma and backlash against individuals with cognitive disabilities may be so great that both the long-advocated subjective standard of care and the new approach introduced in this article, analytically *de-emphasizing disability* and focusing on *ability*, ought to be considered with caution.³⁰⁰

Given that scholars anticipate, based upon modern demographic data, that all “areas of law, including tort law, will come to deal more often with defendants suffering from reduced mental capacity” in coming years,³⁰¹ it is

297. Americans with Disabilities Act of 1990, PUB. L. NO. 101–336, 104 Stat. 327 (codified as amended at 42 U.S.C §§ 12101–12213) (1990) (effective date July, 26 1992) (prohibiting discrimination against individuals with disabilities).

298. Education for All Handicapped Children Act of 1975, PUB. L. NO. 94–142, 89 Stat. 773 (codified as amended as Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1445) (1975) (generally effective on date of enactment) (requiring all schools receiving federal funds to provide equal access to education for children with disabilities).

299. Education of the Handicapped Act Amendments of 1990, PUB. L. No. 101–476, § 901(a)(1), 104 Stat. 1103 (“Section 601(a) (20 U.S.C. 1400(a)) is amended by striking ‘This title’ and all that follows and inserting in lieu thereof the following: ‘This title may be cited as the ‘Individuals with Disabilities Education Act.’”).

300. *Supra* notes 29, 225 and accompanying text.

301. Bromberger, *supra* note 13, at 411. As society becomes more familiar with cognitive disabilities, more individuals may be diagnosed with them. *See* Lukasik, *supra* note 102, at 263 (recognizing that 13.4% of school aged children attending public schools have been determined to be eligible as “children with disabilities” under IDEA). And as medical science improves the health of our population and our longevity increases, the number of individuals with various forms of dementia, particularly with Alzheimer’s Disease, has increased. *Supra* notes 241-243. These realities increase the likelihood that litigants and lawyers will confront cognitive disabilities in their cases and will present this information with increasing frequency to courts. *See* MODEL RULES OF PROF’L CONDUCT, R. 1.14(a) (2013) (emphasis added) (“When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, *mental impairment* or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”); *id.* 1.14(b) (“When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s

time to re-invigorate consideration of both options. The status quo (liability without blameworthiness for individuals with cognitive disabilities), even if recognized as absolute liability, raises equitable and moral concerns that cannot be justified given today's medical and scientific understanding of cognitive disabilities.³⁰²

Appreciating these realities, and the historically advocated exception, the article invites discussion of its alternative proposals, and others not yet conceived, to find fairness for all individuals, including those with cognitive disabilities, within the existing negligence framework.

own interest, the lawyer may take reasonably necessary protective action, including . . . in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.”). With increasing recognition of all types of cognitive disabilities and with increasing incidents of dementia, it becomes increasingly likely that courts will be dealing more often with individuals with known cognitive disabilities in all contexts, including in negligence cases.

302. See, e.g., *supra* note 115.