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Eli K. Best, *Atypical Actors and Tort Law's Expressive Function*, 96 Marq. L. Rev. 461 (2012).

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ATYPICAL ACTORS AND TORT LAW'S EXPRESSIVE FUNCTION

ELI K. BEST*

The longstanding rule that tort law ignores a person's cognitive disability in determining whether the person's conduct was negligent has been consistently criticized as unfair and illogical. This Article challenges those common criticisms. Focusing on the law's expressive function and the goals of the disability rights movement, the Article argues that the current rule is potentially more progressive than the alternative. However, the rule's articulated justifications may inadvertently perpetuate stereotypes about cognitive disability. Thus, the Article suggests ways in which courts can retain the current rule without causing expressive harm.

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* Law Clerk for the Honorable Shirley S. Abrahamson, Chief Justice, Wisconsin Supreme Court. Thanks to Professors Scott Hershovitz, Doug Kysar, Laura Rovner, and Ralph Savarese for thoughtful feedback. Thanks to the editors of the *Marquette Law Review* for careful editing and helpful suggestions.

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I. INTRODUCTION

For at least a century, tort law has used a special standard of care to evaluate the conduct of people with physical disabilities and has rejected that kind of special standard for people with cognitive disabilities.¹ Although scholars have criticized this pattern,² courts and the *Restatements of Torts* have maintained it based on a variety of rationales.³ This Article suggests that rejecting the special standard is justifiable on fairness and doctrinal grounds, but that the discourse

1. See *infra* Part II. The term “cognitive disability” is notoriously difficult to define and encompasses a broad range of conditions. See, e.g., *Cognitive Disabilities*, DISABLED WORLD, <http://www.disabled-world.com/disability/types/cognitive/> (last visited Oct. 14, 2012) [hereinafter DISABLED WORLD]; *Cognitive Disabilities*, WEBAIM, <http://webaim.org/articles/cognitive/> (last visited Oct. 14, 2012). It is broader than “intellectual disability,” which replaced “mental retardation” in the United States Code when President Obama signed Rosa’s Law. See Rosa’s Law, Pub. L. No. 111-256, 124 Stat. 2643 (codified as amended at 20 U.S.C. § 1400 (Supp. IV 2011)). For example, a person with autism or schizophrenia with a high IQ would not fall within “intellectual disability,” but would be included in “cognitive disability.” The *Restatements* have used different language over the years. Compare RESTATEMENT (FIRST) OF TORTS § 283 (1934) (using “insane person”), with RESTATEMENT (SECOND) OF TORTS § 283B (1965) (using “insanity or other mental deficiency”), and RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11(c) (2010) (using “mental or emotional disability”).

2. See, e.g., James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); W.G.H. Cook, *Mental Deficiency in Relation to Tort*, 21 COLUM. L. REV. 333 (1921); William J. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52 (1960); 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 (2004); Elizabeth J. Goldstein, *Asking the Impossible: The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL’Y 67 (1995); John V. Jacobi, *Fakers, Nuts, and Federalism: Common Law in the Shadow of the ADA*, 33 U.C. DAVIS L. REV. 95 (1999); Harry J.F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 LAW & PSYCHOL. REV. 1 (1995); 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 (1981); Kristin Harlow, Note, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 OHIO ST. L.J. 1733 (2007). Articles in support of the current rule are few and far between. See, e.g., George J. Alexander & Thomas S. Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME LAW. 24 (1967); Stephanie I. Splane, Note, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153 (1983). At least one article offers brief support for the rule on doctrinal grounds. See Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 760–63 (2002). Another argues that the objective standard could be used as a tool to motivate people with cognitive disabilities to seek treatment if a relaxed standard were offered to those that did so before they became involved in torts suits. See Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409 (1992).

3. See *infra* Part II, III, and VI.

through which the doctrine has developed may be a source of inadvertent societal harm. Thus, we should maintain the doctrine but pay careful attention to the social messages embedded in its current rationales and explore additional rationales. By considering expressive effects, the heterogeneity that exists under the umbrella of cognitive disability, and the goals of the disability rights movement, this Article seeks to illuminate some complicating factors that neither opponents nor supporters of the current rule have thoroughly explored. The Article also identifies a new rationale courts could emphasize in appropriate cases to bring the current doctrine into harmony with the goals of the disability rights movement.

The tort system faces a difficult task in trying to craft and apply rules to people with various cognitive disabilities while balancing fairness, institutional limitations, and expressive consequences. Neither the current rule that favors ignoring a person's cognitive disability nor the alternative rule that would apply a relaxed standard of care is free from criticism. This article suggests that the best course of action is to retain the current rule but to frame it differently. Specifically, courts should avoid unnecessarily labeling a person as incompetent and incapable of acting with greater care. Under the current rule, courts need not determine a person's actual, subjective capabilities because they apply an objective standard. If courts do discuss a person's actual capabilities, which they do not need to, courts should recognize our uncertainty about the capabilities of many people with cognitive disabilities. In these discussions, courts could explain that the current rule keeps open the possibility that a person is competent rather than labeling them as incompetent. In the same vein, courts should present all accidental harms, whether caused by someone labeled as cognitively disabled or not, as potentially deterrable, as opposed to inevitable. By making these subtle changes, courts will stop perpetuating the stereotype that all people with cognitive disabilities are incompetent and dangerous and soften the stigma associated with cognitive disability.

Part II reviews the development of the common law rule and summarizes the past century's academic debate. Part III defends the current rule on fairness and doctrinal grounds—"first order" justifications. Part IV introduces the concept of expressive consequences and presents some of the goals of the disability rights movement, setting the stage for Parts V and VI, which consider the expressive consequences of the oft-proposed relaxed standard and the expressive consequences of the current rule, as it is currently discussed and deployed, respectively. Part VI goes on to suggest how courts could

discuss and justify the current rule to capitalize on its potential for expressive benefits. Part VII addresses some potential counter-arguments.

II. HISTORY OF THE DOCTRINE AND THE DEBATE

The rule that a person's cognitive disability is not taken into account when a court determines liability for negligence has a long history. Nearly 400 years ago, in *Weaver v. Ward*, the King's Bench stated in dictum that "if a lunatick hurt a man, he shall be answerable in trespass."⁴ In 1874, an American court confronted the issue in *Ward v. Conaster*.⁵ The evidence showed that Ward was insane when he shot Conaster, but the court held that "insanity cannot be looked to as a justification."⁶ Twenty years later, the rule was extended to negligence cases in *Williams v. Hays*.⁷ The court found that a ship captain had been rendered insane by a two-day struggle to save his ship, but held that he was still liable for negligently refusing offers of assistance from passing ships.⁸

Although courts embraced the rule, commentators expressed reservation during the late nineteenth and early twentieth centuries.⁹ The first *Restatement* explicitly left the issue undecided by including, as a caveat, that "[t]he Institute expresses no opinion as to whether insane persons are required to conform to the standard of behaviour which society demands of sane persons for the protection of the interests of others."¹⁰ Similarly, after endorsing a relaxed standard of care for people with physical disabilities, Oliver Wendell Holmes wrote:

Insanity is a more difficult matter to deal with, and no general rule can be laid down about it. 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

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

5. *Ward v. Conaster*, 63 Tenn. 64 (1874).

6. *Id.* at 65–66 (quoting the judge's charge to the jury).

7. *Williams v. Hays*, 38 N.E. 449 (N.Y. 1894).

8. *Id.*

9. See Splane, *supra* note 2, at 158–59.

10. RESTATEMENT (FIRST) OF TORTS § 283 caveat (1934).

admitted as an excuse.¹¹

Given the uncertainty expressed in the *Restatement* and by prominent scholars, it might have appeared that the rule would soon give way, but that was not to be.

When the second *Restatement* was published in 1965, the Reporters' doubts appeared to have disappeared.¹² The second *Restatement* unequivocally states that "[u]nless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."¹³ Yet, in a section on immunities later in the second *Restatement*, the Reporters add the seemingly contradictory comment that "in the case of negligence, the mental condition may rob the individual of all capacity to understand and appreciate the risk involved in his conduct or to take the proper precautions against that risk, so that there is no negligence to be found."¹⁴ Thus, although the rule appeared unequivocal on its face, there may still have been doubts when the second *Restatement* was published.

The third *Restatement* commits even more strongly to the rule by announcing that it applies with equal force whether the actor is a plaintiff or a defendant,¹⁵ an issue the second *Restatement* had left undecided.¹⁶ However, Comment (e) in the third *Restatement* notes that "even though the plaintiff's mental disability is ignored in considering whether the plaintiff is contributorily negligent at all . . . disability can be considered in the course of the more open-ended process of apportioning percentages of responsibility between the plaintiff and the defendant."¹⁷ The comment suggests that the Reporters may still be

11. O.W. HOLMES, JR., *THE COMMON LAW* 109 (1881).

12. *See* RESTATEMENT (SECOND) OF TORTS § 283B (1965).

13. *Id.*

14. *Id.* § 895J cmt. c.

15. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11(c) (2010) ("An actor's mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child."); *id.* § 11 cmt. e ("[T]he rule . . . that an actor's mental disabilities shall be disregarded applies in the context of the actor's contributory negligence as well as the context of the actor's negligence.").

16. *See* RESTATEMENT (SECOND) OF TORTS § 464 caveat ("The Institute expresses no opinion as to whether insane persons are or are not required to conform *for their own protection* to the standard of conduct which society demands of sane persons." (emphasis added)).

17. RESTATEMENT (THIRD) OF TORTS § 11 cmt. e.

wavering on the question of contributory negligence, but less explicitly.¹⁸

Since the second *Restatement*, courts have almost universally applied the reasonable person standard to defendants with cognitive disabilities and appear to consider the matter quite settled.¹⁹ The Kansas Court of Appeals stated that “American courts have unanimously chosen to impose liability on an insane person.”²⁰ The Florida Court of Appeals similarly said “[i]t has become well-settled in Florida and elsewhere that, as a rule, a lunatic is liable in the same generalized way as is an ordinary person for both ‘intentional’ acts and ‘negligent’ ones.”²¹

While courts’ commitment to the rule has been firm, academic commentators have regularly argued that the rule is unjust, illogical, and outdated.²² The proposed reforms vary slightly, but essentially they call for the tort system to adopt a relaxed or modified objective standard. Critics take issue with each of the four explanations for the rule offered by the second *Restatement*.

The second *Restatement*’s four explanations are: (1) it is difficult to draw lines between cognitive disabilities for which a relaxed standard might be desirable and general variations in intelligence, emotion, and ability for which offering a relaxed standard would eviscerate the

18. As Part VII.B.1 will discuss below, courts tend to treat contributory negligence differently than primary negligence and apply a relaxed standard. As such, it is questionable whether the third *Restatement* has faithfully restated the law by announcing that the reasonable person standard applies across the board.

19. See, e.g., *Johnson v. Lambotte*, 363 P.2d 165, 166 (Colo. 1961); *Creasy v. Rusk*, 730 N.E.2d 659, 661, 663 (Ind. 2000); *Jankee v. Clark Cnty.*, 2000 WI 64, ¶ 54, 235 Wis. 2d 700, 612 N.W.2d 297; *Burch v. Am. Fam. Mut. Ins. Co.*, 198 Wis. 2d 465, 473–74, 543 N.W.2d 277, 280 (1996). Some courts have carved out narrow exceptions to the rule. See, e.g., *Gould v. Am. Fam. Mut. Ins. Co.*, 198 Wis.2d 450, 453, 543 N.W.2d 282, 283 (1996) (holding that an individual who is institutionalized with a mental disability, who does not have the capacity to control or appreciate their conduct, is not liable for injuries caused to caretakers who are paid employees); *Breunig v. Am. Fam. Ins. Co.*, 45 Wis. 2d 536, 539, 543–45, 173 N.W.2d 619, 624–25 (1970) (recognizing sudden hallucinations while driving as a possible exception). But I have located only one case that explicitly rejects the *Restatement*. See *Fitzgerald v. Lawhorn*, 294 A.2d 338, 339 (Conn. C.P. 1972) (declaring that authority on the issue is scant and that the majority view is “outdated”). *Fitzgerald* is a clear aberration and has since been overruled *sub silentio* in Connecticut. See *Polmatier v. Russ*, 537 A.2d 468, 470–71 (Conn. 1988) (expressing Connecticut’s agreement with the majority view). The third *Restatement* provides that disregarding cognitive disability in considering whether a person has exercised reasonable care is “supported by a consistent line of modern cases” and the comment does not provide a counterexample. RESTATEMENT (THIRD) OF TORTS § 11 cmt. e.

20. *Williams v. Kearbey*, 775 P.2d 670, 672 (Kan. Ct. App. 1989).

21. *Anicet v. Gant*, 580 So. 2d 273, 275 (Fla. Dist. Ct. App. 1991).

22. See *supra* note 2.

objective standard entirely (“line-drawing”); (2) the evidence that would be presented about cognitive disability is scientifically uncertain and there is a risk of people faking disabilities to avoid liability (“risk of fakery”); (3) if people with cognitive disabilities are living outside of institutions, they should compensate their innocent victims (“between two innocents”); and (4) a rule of liability will give caretakers an incentive to look after people with cognitive disabilities more carefully (“keepers’ incentives”).²³

The critics typically respond that (1) courts are often faced with difficult line-drawing problems and ease of adjudication should not trump quality of results; (2) advances in our understanding of cognitive disability will lead to better evidence and there is little risk of fakery due to the stigma associated with cognitive disability; (3) tort law is fundamentally based on the notion that there should generally be no liability without fault and it is unfair to introduce a pocket of strict liability for people with cognitive disabilities; and (4) many people with cognitive disabilities do not live with caretakers, and for those that do, direct liability for caretakers would be a better way to incentivize careful caretaking.²⁴

Although this Article supports applying the objective standard, it is only partially influenced by the *Restatement’s* explanations. Counterarguments (2) and (4) are certainly more persuasive than the explanations they respond to. In fact, the third *Restatement* has removed “risk of fakery” and “keepers’ incentives” from its list of explanations for the current rule, but added the additional explanation that unlike people with physical disabilities, who can be “expected to adopt extra precautions to respond to the extra level of risk that the person creates,” people with cognitive disabilities “frequently” cannot “wisely and appropriately . . . moderate conduct choices.”²⁵ As the next Part argues, one of the third *Restatement’s* justifications (“between two innocents”) is persuasive.²⁶ And another (“line-drawing”) is persuasive in its concern with undermining the objective standard. But the way they are put into operation by the courts leaves something to be

23. See RESTATEMENT (SECOND) OF TORTS § 283B cmt. b (1965).

24. See Jacobi, *supra* note 2, at 112–13 (compiling the historical use of these arguments in the literature).

25. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11 cmt. e (2010).

26. See *infra* Part III.

desired.²⁷

III. FIRST ORDER JUSTIFICATIONS

This Article is largely concerned with the potential expressive effects²⁸ of the current rule and a relaxed standard. I argue that a relaxed standard would be undesirable on expressive grounds because it would carry the message that people with cognitive disabilities are incompetent and dangerous. I then argue that the current rule unfortunately and unnecessarily sends a similar message. I finally explain ways in which the current rule could be discussed and justified to avoid such expressive consequences.

But before analyzing expressive consequences, the Article suggests that the current rule is preferable to a relaxed standard on fairness and doctrinal grounds, independent of expressive consequences.

According to the third *Restatement*, “deinstitutionalization becomes more socially acceptable if innocent victims are at least assured of opportunity for compensation when they suffer injury.”²⁹ Despite being a bit brusque and offensive in its presentation of injuries as inevitable, this comment embodies a simple and sound notion. Between two innocent actors, the actor who caused the harm should pay. Critics respond by arguing that applying the objective standard to people with cognitive disabilities is an unwarranted departure from the fault standard,³⁰ that it unfairly creates a pocket of strict liability,³¹ and that “[t]here cannot be negligence without culpability,”³² But there are problems with each of these arguments.

The argument that the current rule departs from the fault standard and creates an unjustifiable island of strict liability misconceives the fault principle, which is actually a legal fiction. A person who is not “disabled” may lack the ability to conform to the reasonable person standard, but the tort system ignores this.³³ In his classic defense of the objective standard, Holmes wrote:

27. See *infra* Part VI.A.

28. For background on the concept of expressive effects, see *infra* Part IV.A.

29. RESTATEMENT (THIRD) OF TORTS § 11 cmt. e.

30. See, e.g., Jacobi, *supra* note 2, at 103–04.

31. See, e.g., Goldstein, *supra* note 2, at 75.

32. See, e.g., Seidelson, *supra* note 2, at 37.

33. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283B cmt. c (1965); see also RESTATEMENT (THIRD) OF TORTS § 11 cmt. e.

If . . . a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard³⁴

Applying the reasonable person standard to a “hasty and awkward” person is no more or less like strict liability than applying it to a person with a cognitive disability if neither person has the ability to conform their conduct.³⁵ It is the nature of the objective standard that it ignores whether an individual could have done better and only asks whether a reasonably prudent person would have done better.³⁶ Individual cognitive capabilities of an actor are ignored, regardless of the labels attached to the actor.³⁷

Unless we abandon the objective, reasonable person standard altogether, there will always be cases in which a person is held liable despite the fact that he or she was incapable of acting with greater care. Thus, it is not sufficient to criticize the current rule simply because it creates “strict liability” in certain cases, unless the critic urges adopting a subjective standard for all actors in all cases.

The argument that there can be no negligence without moral culpability is also contestable. In negligence suits where the defendant truly could not have done any better, the court must decide who should bear the cost of the misfortune.³⁸ Arthur Ripstein’s explanation of *Vaughan v. Menlove*, a seminal English case in which the court applied

34. HOLMES, *supra* note 11, at 108. As noted above, Holmes gave passing support to allowing a relaxed standard for “insanity,” though. See *supra* text accompanying note 11. In contrast to this Article, he believed it was categorically different to apply the reasonable person standard to someone who cannot meet it because of cognitive disability than it is to apply the standard to someone who cannot meet it because of inherent traits that are not labeled as disabilities. HOLMES, *supra* note 11, at 109.

35. See Splane, *supra* note 2, at 168 (“The objective standard is no more unjust to the mentally ill than it is to numerous other persons whose individual capacities do not quite match up to the capacities of the ‘ideal prudent person.’”).

36. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283B cmt. c; see also RESTATEMENT (THIRD) OF TORTS § 11 cmt. e.

37. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283B cmt. c; see also RESTATEMENT (THIRD) OF TORTS § 11 cmt. e.

38. See ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 84 (1999) (“Because of the binary structure of adjudication—because it had to be somebody’s bad luck—the court had to decide whose it was.”).

the reasonable person standard over the defendant's contention that he had honestly acted to the best of his judgment,³⁹ is helpful:

Had the court relieved Menlove of responsibility . . . they would have been treating Menlove himself as a mere natural thing rather than as an agent. . . .

Put slightly differently, although we hesitate to blame Menlove for his incapacity, we hold him liable because the risk that he imposed on Vaughan was rightly his. We hold him liable *without supposing him to be morally tainted* because a fair distribution of risks requires that the risk lie with him.⁴⁰

Ripstein is not alone in rejecting the notion that tort liability requires moral culpability. Jules Coleman similarly argues that “[f]ault liability in torts, especially liability for negligence . . . does not require culpability or moral blameworthiness.”⁴¹ For these theorists, tort law is concerned with losses, not wrongs—it hinges on “moral responsibility for a loss one has caused, rather than responsibility for having committed a wrong.”⁴² While it still may seem unfortunate for a person who truly could not have done any better to face liability, this “does not lead to the conclusion that [the other party] should not be allowed to recover.”⁴³

For these reasons, the criticisms of the *Restatement's* “between two innocents” justification are largely unpersuasive. As a matter of fairness and doctrinal coherence, it seems appropriate for the person who caused harm to bear responsibility for the harm regardless of whether the person actually could have acted differently.

The third *Restatement* also justifies the current rule by expressing concern about courts' ability to sensibly draw lines between cognitive disabilities that are causally connected to unreasonable conduct and those that are “not especially important as an explanation for conduct.”⁴⁴ There are two traditional critiques of this justification: first,

39. *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490 (C.P.), 3 Bing. (N.C.) 468.

40. RIPSTEIN, *supra* note 38, at 85 (emphasis added).

41. JULES L. COLEMAN, *RISKS AND WRONGS* 219 (1992).

42. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 926 (2010) (original emphasis omitted) (emphasis added) (discussing corrective justice theorists' distinction between losses and wrongs).

43. RIPSTEIN, *supra* note 38, at 87. For more on the practical effects of financial liability, see *infra* Part VII.C.

44. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11 cmt. e (2010).

improved scientific understandings of cognitive disability make it possible to draw lines coherently, and second, courts draw difficult lines all the time and more appropriate results should not be sacrificed in the name of administrability.⁴⁵

The first of these critiques has some appeal. Courts, with the assistance of expert witnesses, are now capable of assessing the relationship between a person's cognitive abilities and their conduct.⁴⁶ The *Restatement* therefore probably overstates the difficulty courts would have determining whether a cognitive disability caused a person's conduct. The second critique, however, hinges on the assumption that a relaxed standard would lead to appropriate results because it is unacceptable to impose liability on a person who could not have done any better. As alluded to earlier in this Part accepting this critique would pose a fundamental problem for the tort system, alluded to above.

The problem is that it is difficult to defend allowing a relaxed standard for people of certain cognitive ability levels while maintaining the objective reasonable person standard for others. Disability rights activists stress that “[a]s a ‘natural’ matter, abilities lie on a spectrum.”⁴⁷ If a relaxed standard were warranted because a person's cognitive disability prevented him or her from exercising adequate care, why would a relaxed standard not be warranted when a person is simply “hasty or awkward” and incapable of exercising adequate care for that reason? In other words, if courts were to allow a relaxed standard, the standard should not be available only in cases where an actor's disability rendered the conduct unavoidable. It should be available any time an actor's cognitive abilities, whether earning the label “disability” or not, rendered the person incapable of exercising adequate care.

The tort system has long expressed a preference against considering the subjective capabilities of individual actors.⁴⁸ Allowing a relaxed standard for people with cognitive disabilities would conflict with this fundamental principle. If courts made a subtle inquiry into whether an

45. See Jacobi, *supra* note 2, at 112.

46. In other contexts, such as criminal law and contract law, courts regularly make such determinations. See *infra* Part VII.B.2.

47. See, e.g., Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 779 (2007).

48. See, e.g., *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490, 492 (C.P.), 3 Bing. (N.C.) 468 (holding the defendant liable for damages caused by a fire despite his arguments that he was subjectively unable to exercise better judgment or more caution).

individual's cognitive disability prevented the person from exercising adequate care in a particular circumstance, it would be difficult to justify not making the same inquiry for all parties that claim they could not have done better, whether they have a disability or not. Thus, even though the *Restatement's* concern about courts' capacity to draw lines may be overstated, it does not follow that it would be desirable for courts to draw the proposed lines.

Some readers may push back against the contention that everyone's ability levels lie on a spectrum and argue that a person either has or does not have a cognitive disability. This article does not intend to deny the existence of disability. Whether cognitive disabilities are physiologically discernable or not, there is no doubt that they are real conditions, with real effects.⁴⁹ Nonetheless, if the tort system were to allow a relaxed standard based on a party's cognitive abilities, a party's access to it should not necessarily hinge on whether he or she is classified as "disabled."⁵⁰

Despite plausible counter-arguments, considerations of fairness and doctrinal coherence both support the current rule. The rest of this Article addresses another variable, expressive effects, which should not be overlooked in this context.

IV. EXPRESSIVISM AND THE GOALS OF THE DISABILITY RIGHTS MOVEMENT

Before discussing the expressive effects of the current rule and the often-proposed relaxed standard, there are two more preliminary tasks. First, I briefly summarize expressivist scholarship, a body of scholarship

49. Even strong supporters of the social model of disability acknowledge that disability and difference are real. See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 111 (1990) ("A focus on social relations casts doubt on the notion that difference is located *solely* in the person who is different." (emphasis added)); Bagenstos & Schlanger, *supra* note 47, at 779 ("Although impairments plainly impose limits, it is not the impairment alone that has disabled her . . ."); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 430–31 (2000) ("[T]he disability rights argument is not that disability is *entirely* a social creation . . .").

50. The torts system does allow a relaxed standard for some groups of people—notably, people with physical disabilities and children. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 10, 11 (2010). It is beyond the scope of this Article to explore whether these apparent inconsistencies are justifiable, and if not, whether the rule for these other categories should mirror the rule for cognitive disabilities. An interesting aspect of such discussion would be to consider whether the risks of expressive harm outlined in Parts V and VI, below, apply in similar ways to people with physical disabilities.

that focuses on the social messages that are conveyed by laws. Second, I examine the goals of the disability rights movement, in order to set forth some of the messages that courts would ideally convey when they apply tort doctrines.

A. *Expressivism*

In recent decades, a growing body of legal scholarship has analyzed the expressive function of law.⁵¹ These articles explain “the function of law in ‘making statements’ as opposed to controlling behavior directly”⁵² and explore ways in which “law affects behavior other than through sanctions.”⁵³ Dan Kahan has argued that society should conceive of criminal punishment as a language.⁵⁴ In other words, we should be aware that punishments do more than dictate the literal, concrete consequences for defendants.⁵⁵ They also express meaning and convey specific messages about society’s values and norms.⁵⁶ To separate the consequences from the embedded meaning is to ignore an important aspect of a punishment.⁵⁷ Richard Pildes has made similar arguments with respect to social insurance programs.⁵⁸ Expressive theories have been applied to a range of laws, from those requiring motorcycle users to wear helmets,⁵⁹ to the Americans with Disabilities Act.⁶⁰

51. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 40 (2002); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 341 (2000); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 938 (1991); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996). This line of scholarship has not been received positively by everyone. See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

52. Sunstein, *supra* note 51, at 2024.

53. Geisinger, *supra* note 51, at 40.

54. See Kahan, *supra* note 51, at 594.

55. See *id.* at 597.

56. See *id.*

57. See *id.* at 653.

58. See Pildes, *supra* note 51, at 942 (“Public programs . . . do not just *do* things in the sense of providing benefits or offering services. They also *mean* something . . .”).

59. See Lessig, *supra* note 51, at 964–65.

60. See Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 2009 UTAH L. REV. 845, 848–59.

While expressivist scholarship tends to focus on how laws encourage or discourage particular behaviors by changing the public's beliefs about that behavior,⁶¹ the expressive function of law could also change the public's beliefs about a group of people. Further, it is not merely the substantive rules of law that can alter public beliefs about a group of people, but also the ways in which the substantive rules of law are discussed and justified. Alex Geisinger has highlighted the importance of looking beyond the mere existence of a law to find its true expressive meaning:

Law can more directly affect the certainty with which a belief is held by providing information or by influencing the inferential reasoning process. Note, however, that, in terms of its ability to provide information, the passage of a law itself may not be the main source of information. Rather, publicity about the reasons for the passage of a law will be the main source of information provision.⁶²

In a recent article, Samuel Bagenstos and Margo Schlanger analyzed the expressive effects of providing compensatory damages for disabling injuries.⁶³ They argue persuasively that the way in which damages for disabling injuries are framed and discussed can have a powerful impact on societal perceptions of disability.⁶⁴ Awards of equal size can carry different meanings. On the one hand, “[a]warding damages for the out-of-pocket costs of medical care, rehabilitation, assistive technology, and personal assistance . . . merely recognize[s] concrete obstacles . . . that money can overcome.”⁶⁵ On the other hand, “[a]warding damages for the supposed hedonic loss inherent in disability sends the opposite message, that disability . . . makes one's life less happy, and that there is nothing society can do but take pity on those who are disabled and throw some charity their way.”⁶⁶

The expressive effects of applying the objective reasonable person standard to people with cognitive disabilities are not explicitly considered in any of the *Restatements'* comments and have not been

61. See *supra* note 51.

62. Geisinger, *supra* note 51, at 63.

63. See Bagenstos & Schlanger, *supra* note 47, at 752–60.

64. *Id.* at 778–84.

65. *Id.* at 784.

66. *Id.*

thoroughly addressed in the literature.⁶⁷ Like Bagenstos and Schlanger, I argue that changes in discourse that do not affect how much money changes hands can have powerful effects by conveying more progressive messages about disability. Instead of just focusing on the existence of a law on the books, I consider how the law is discussed, justified, and deployed. On the topic of applying the objective standard to people with cognitive disabilities, publicity about the reasons for the doctrinal choice will come from judges in their opinions, from jury instructions, from the *Restatement's* reporters, and from academics.

B. *The Goals of the Disability Rights Movement*

Compared to the civil rights movements of women and African-Americans, the disability rights movement is young and much less visible.⁶⁸ “The nation has heard the arguments and learned the ideology of rights as applied to blacks, [and] to women,” but disability rights are dramatically less present in the public consciousness.⁶⁹ Less than one hundred years ago, the Supreme Court confidently ruled eight to one in favor of involuntary sterilization of the “feeble-minded.”⁷⁰ Justice Holmes declared: “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.”⁷¹ It was not until 1990, decades after the passage the Civil Rights Act of 1964, that the law recognized that “people with disabilities are . . . equal citizens” with the passage of the Americans with Disabilities Act.⁷² And many contend that this landmark legislation has failed to achieve its

67. Two pieces lend support to the objective standard on somewhat similar grounds, and this article builds on those pieces. See Alexander & Szasz, *supra* note 2; Splane, *supra* note 2.

68. See MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 23 (2003) (“There was a disability rights movement. But it was hard to find it Unlike [Jesse] Jackson or [Ms. Magazine’s Gloria] Steinem, there was no ‘name’ anyone knew and associated with disability rights; no NOW; no N.A.A.C.P.”); see also DORIS ZAMES FLEISCHER & FRIEDA ZAMES, THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION xvi (2001); RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 5–7 (2d ed. 2001).

69. See JOHNSON, *supra* note 68, at 43.

70. See *Buck v. Bell*, 274 U.S. 200 (1927).

71. *Id.* at 207 (citation omitted).

72. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 1 (2009).

goals.⁷³ In a sense, disability rights are just beginning to emerge.⁷⁴ They are vulnerable to being undermined by outright antagonism or unconscious ignorance. Because of the relative youth and lack of prominence of the disability rights movement, judges may be more likely to inadvertently engage in discourse that is damaging to its goals.

The Part above, discussing expressivism, argued that laws send messages about people with cognitive disabilities and have an impact on societal perceptions. It explained that changing substantive laws is one way to send different messages, but that judges and commentators can also change the practical impact of a law without changing the law itself by discussing the law with different language and justifying it with different rationales. Recognizing this power, the next step is to determine exactly what messages the law should send with respect to people with cognitive disabilities. In the specific case of applying the objective standard (or a relaxed standard) of care to people with cognitive disabilities, this preliminary matter is more complicated than it might seem because the goals of the disability rights movement are multifaceted and not universally embraced, even among people with disabilities.

In a recent book, Bagenstos writes the following regarding the goals of the disability rights movement:

[I]t is an oversimplification to speak of the ‘goals of the disability rights movement’ as if the term referred to some stable and uncontroversially defined category. It makes more sense . . . to speak of the disability rights movement as having various *projects*—projects that are interconnected, though sometimes in tension, and that are emphasized in different ways and to different degrees by different movement participants at different times.⁷⁵

A few of these projects are particularly relevant to determining what standard the tort system should apply to people with cognitive disabilities and how it should be implemented and justified.

73. See, e.g., RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 6–8* (2005); see also BAGENSTOS, *supra* note 72, at 1 (“ADA plaintiffs lose their cases at astounding rates—the only litigants less successful than ADA employment plaintiffs are prisoner plaintiffs . . .”).

74. See BAGENSTOS, *supra* note 72, at 13–18 (describing the beginnings of the disability rights movement).

75. *Id.* at 12. For an overview of many “projects” of the disability rights movement, see *id.* at 12–33.

1. A Social Model

The desire to shift social perceptions of disability from a “medical model” to a “social model” is the “one position that approaches consensus within the [disability rights] movement.”⁷⁶ The once-dominant medical model of disability treats disability as “an inherent personal characteristic that should ideally be fixed,” “encourages dependence on doctors . . . and charity[,]” and “stigmatizes people with disabilities, by defining them as something less than normal[.]”⁷⁷ On the other hand, a social model of disability sees disability as “a condition that results from the interaction between some physical or mental characteristic labeled as an ‘impairment’ and the contingent decisions that have made physical and social structures inaccessible to people with that condition.”⁷⁸ The social model does not ignore the social choices that lead to the exclusion of people with disabilities. It “treats existing institutional arrangements as a conceivable source of the problem . . . rather than as an unproblematic background.”⁷⁹

As Bagenstos and Schlanger put it, “[a]s a ‘natural’ matter, abilities lie on a spectrum; it is social choices that make some limitations on some abilities ‘disabling’ and others not.”⁸⁰ For example, “[a] person who uses a wheelchair . . . is disabled only because so many buildings, sidewalks, and modes of transportation are inaccessible, and because so many people have negative attitudes toward people who use wheelchairs.”⁸¹

That being said, it is crucial to make clear that the social model does not deny that disabilities impose limitations.⁸² The social model simply highlights that the extent to which these limitations are actually disabling is not inherent to the person with the disability, but is created by the interaction between the physical or mental limitations and societal choices and attitudes.⁸³

76. *Id.* at 13. For additional discussions of the history of the medical model and the development of the social model, see, for example, Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 649–65 (1999); and Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1047–58 (2004).

77. BAGENSTOS, *supra* note 72, at 18.

78. *Id.*; see also Harlan Hahn, *Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?*, 21 BERKELEY J. EMP. & LAB. L. 166, 173 (2000).

79. MINOW, *supra* note 49, at 112.

80. Bagenstos & Schlanger, *supra* note 47, at 779.

81. *Id.*

82. See *supra* note 49.

83. See Bagenstos, *supra* note 49, at 426.

2. Inclusion, Integration, and Independence

Another important project, or group of projects, of the disability rights movement is for people with disabilities to be included and integrated into general society⁸⁴ and for people with disabilities to live independent, autonomous lives.⁸⁵ On inclusion and integration, Joseph Shapiro writes:

[I]n a society where disabled people are remote, we have not understood the need to adjust attitudes, programs, and laws to fit the changing reality of disabled people who now seek independence.

As a result, integration—into the work force, the classroom, the community—has become a primary goal of today’s disability movement.⁸⁶

Independence and autonomy are complicated goals within the disability rights movement, primarily because they are in tension with the need for assistance that is a reality in the lives of many people with disabilities.⁸⁷ However, it is possible to both live an autonomous, independent life and receive required assistance.⁸⁸ Bagenstos explains:

Even if people with disabilities require assistance in personal hygiene, transportation, or other activities in order to live in the community[,] . . . that need not compromise their independence. Rather, independent living advocates believe that such assistance actually promotes independence, so long as those who provide the assistance are subject to the control and direction of the individuals with disabilities who receive it.⁸⁹

The ideals of inclusion, integration, independence, and autonomy are closely linked and complex. While we consider the expressive effects of an objective or relaxed standard, we should keep these goals in mind.

84. See JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 142–83 (1993).

85. See BAGENSTOS, *supra* note 72, at 22–33.

86. SHAPIRO, *supra* note 84, at 144.

87. BAGENSTOS, *supra* note 72, at 22–33 (discussing the history of the independence goal within the disability rights movement). The assistance required obviously differs from person to person, but it covers broad territory, from assistance with activities like getting dressed, to financial assistance in the form of government benefits.

88. *Id.* at 25.

89. *Id.*

3. Presuming Competence

There is substantial uncertainty about the capabilities of people with cognitive disabilities. For example, consider our developing understanding of autism. It was long believed that people with “classical” or “severe” autism were incapable of communication, interaction, or introspection.⁹⁰ However, using various methods of facilitated communication⁹¹ some people who were presumed illiterate have gained literacy and even become advocates—raising awareness of their abilities and their struggles.⁹²

Acknowledging this uncertainty, disability rights activists urge society to adopt a presumption of competence in situations where science and experience leave us in doubt about a person’s capabilities.⁹³ The notion is simply that there is less harm in presuming potential competence in the face of uncertain capabilities than presuming incompetence.⁹⁴ A presumption of competence leads to more sincere efforts to foster the capabilities of people with cognitive disabilities.⁹⁵ The opposite presumption allows people to write off these efforts as useless.⁹⁶

Ralph Savarese argues that “[p]erhaps there’s just a subset of people with ‘classical’ autism who can communicate, but let’s find this out after we’ve adopted different assumptions and devoted ourselves to the task

90. See RALPH JAMES SAVARESE, *REASONABLE PEOPLE: A MEMOIR OF AUTISM & ADOPTION* xii–xiv (2007).

91. Traditionally, facilitated communication is a technique where a facilitator supports or holds the hand of a person who cannot speak and struggles to communicate to help them type. The technique has been shrouded in controversy, but is gaining acceptance. See *id.* at xx–xxiii.

92. For a discussion of traditional conceptions of autism and some of the people with autism who have gained literacy, see *id.* at xi–xxxi.

93. See Douglas Biklen & Jamie Burke, *Presuming Competence*, 39 *EQUITY & EXCELLENCE IN EDUC.* 166, 166 (2006) (discussing “the importance of *presuming competence* of students with disabilities”).

94. See *id.* (“Yet with children classified as autistic, it is not uncommon to link early expressive difficulties to a presumption of incompetence.”).

95. See *id.* at 167 (“[Presuming competence] is actually the more conservative choice. It refuses to limit opportunity; by presuming competence, it casts the teachers, parents, and others in the role of finding ways to support the person to demonstrate his or her agency.”).

96. See *id.* (“The very student who has difficulties with performance, including speech, will often be caught in the diagnostic category of severely retarded, not because of any proof about thinking ability, but because of an absence of evidence about his or her thinking ability. Hence the student may be defined as unable to benefit from inclusion.”).

of developing potential.”⁹⁷

Some might think that a strong presumption of competence sounds like denial of difference, which could be detrimental to people with cognitive disabilities. But there seems to be less harm in erring on the side of presuming competence than in foreclosing the possibility. This concept will prove central to analyzing the expressive effects of the legal standard we choose.

4. The Universal Model and the Minority Group Model

The general consensus that a social model is preferable to a medical model, discussed above, has “masked some significant tensions that remain within the [disability rights] movement.”⁹⁸ One of those tensions is between a universal model and a minority group model of disability and disability policy.⁹⁹ Adherents to a universal model “declare that the disability label is arbitrary and useless.”¹⁰⁰ As Bagenstos explains:

[The universalist position] might see people with socially identified disabilities as canaries in the coal mine, whose incompatibility with existing physical or social structures calls our attention to problems that all individuals can face But the proper response would not be disability specific—it would be the universal design of the built environment to embrace the largest variety of potential users¹⁰¹

On the other hand, the minority group model accepts the socially defined category of disability and supports policies that “direct resources and accommodations at that group” because, while the boundaries may be arbitrary and socially constructed, only the group that is labeled disabled is targeted with “prejudice, stereotypes, and neglect.”¹⁰² Both of these models help explain and justify the current doctrine.

Before continuing, an important caveat is in order regarding the various projects of the disability rights movement.

There is substantial heterogeneity enveloped in the term “cognitive

97. SAVARESE, *supra* note 90, at xx.

98. BAGENSTOS, *supra* note 72, at 20.

99. *Id.* at 20–21.

100. *Id.* at 21.

101. *Id.*

102. *Id.* at 20–21.

disability.”¹⁰³ Even within a particular disability, there is substantial heterogeneity in ability levels, attitudes, and goals.¹⁰⁴ As a result, none of the above-mentioned projects are universally embraced.

The clash between various autism groups is a compelling example. Groups like “Autism Research Institute”¹⁰⁵ and “Autism Speaks”¹⁰⁶ advocate researching treatments or a cure for autism. These groups think of autism as a disease that might one day be eradicated.¹⁰⁷ On the other hand, “The Autistic Self Advocacy Network”¹⁰⁸ embraces the tenets of the disability rights movement and argues that “the goal of autism advocacy should not be a world without Autistic people. Instead, it should be a world in which Autistic people enjoy the same access, rights and opportunities as all other citizens.”¹⁰⁹ “Autism Network International” has a similar perspective.¹¹⁰

These drastically divergent attitudes among people with the same disability, along with the divergent attitudes held by people with different disabilities, call into question tort law’s ability to send appropriate messages with a single rule that applies equally to any actor with any “mental or emotional disability.”¹¹¹ For example, should a

103. See DISABLED WORLD, *supra* note 1.

104. See *id.*

105. See *About Our Work*, AUTISM RESEARCH INST., <http://www.autism.com/index.php/about-ari> (last visited Oct. 20, 2012).

106. See *About Us: Mission*, AUTISM SPEAKS, <http://www.autismspeaks.org/about-us/mission> (last visited Oct. 20, 2012).

107. See *id.*

108. See AUTISTIC SELF ADVOCACY NETWORK, <http://autisticadvocacy.org/> (last visited Oct. 17, 2012).

109. Cheryl M. Jorgensen, *From One Ally to the Education Community: A New View of Students with Autism*, AUTISTIC SELF ADVOCACY NETWORK (April 27, 2012), <http://autisticadvocacy.org/2012/04/from-one-ally-to-the-education-community-a-new-view-of-students-with-autism/> (quoting Ari Ne’eman, founder of The Autism Self-Advocacy Network).

110. See Autism Network International, *Introducing ANI*, AUTREAT.COM, <http://www.autreat.com/intro.html> (last modified July 29, 2012) (“Supports for autistic people should be aimed at helping them to compensate, navigate, and function in the world, not at changing them into non-autistic people or isolating them from the world.”). It is not only people with autism who hold this view, “People First” is “an organisation run by and for people with learning difficulties,” PEOPLE FIRST, <http://peoplefirstltd.com> (last visited Oct. 17, 2012), that “promotes the social model of disability,” *Info and FAQ*, PEOPLE FIRST, <http://peoplefirstltd.com/about-us/info-faq/> (last visited Oct. 17, 2012).

111. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11(c) (2010). While it is not the focus of this Article, the heterogeneity and divergent attitudes described above are not limited to people with cognitive disabilities. For example, some people with deafness happily attempt to “cure” their condition with cochlear

person with schizophrenia, who may consider him- or herself diseased, not disabled, and be perfectly amenable to notions of a “cure,” necessarily be governed by the same rule as a person with autism or Down syndrome who conceives of his or her disability as an integral part of his or her personhood?¹¹² Given this heterogeneity, it seems inevitable that the messages sent by the tort system will not be a perfect fit for everyone. The question is which rule has the most potential for beneficial expressive effects.

With this introduction to expressivism and the disability rights movement complete, I now move to the specific issue at hand—the expressive consequences of applying the objective reasonable person standard (and of applying a relaxed standard) to people with cognitive disabilities. The Article first addresses the problematic expressive consequences of a relaxed standard. It then discusses the expressive consequences of the current rule as it is currently justified by courts and the *Restatement* and concludes that any potential that the current rule may have for expressive benefits is lost in the delivery. Finally, the Article explains the potential expressive benefits of a shift in discourse regarding the current rule.

V. EXPRESSIVE CONSEQUENCES OF A RELAXED STANDARD

Just as the imposition of punishment or liability contains embedded messages, a decision to withhold liability can speak volumes. A relaxed standard would lead to less liability for people with cognitive disabilities, which at first blush might seem to send a positive message. But for people with certain disabilities and attitudes, the messages contained within the relaxed standard and the litigation strategies the relaxed standard would encourage could be damaging.

There are brief endorsements of the current rule scattered throughout commentary on the law of torts,¹¹³ but these endorsements do not consider the rule’s effect on the disabled community, focusing instead on fairness to the opposition and economic efficiency.¹¹⁴ The

implants, while other members of the Deaf community “reject the very idea of trying to find a ‘cure’ for deafness. Indeed they have compared it to genocide.” Robert Sparrow, *Defending Deaf Culture: The Case of Cochlear Implants*, 13 J. POL. PHIL. 135, 135 (2005).

112. Cf. BAGENSTOS, *supra* note 72, at 50 (discussing the variety of ways people deemed “disabled” may identify themselves).

113. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 127–28 (1987); RIPSTEIN, *supra* note 38, at 84–87.

114. See LANDES & POSNER, *supra* note 113, at 127–28 (arguing that the current rule is

limited literature that explores the expressive effects of the current rule concentrates on a simple theme: if the tort system allowed a relaxed standard for actors with cognitive disabilities, it would label them as incompetent, incomplete human beings in a manner inconsistent with modern goals of inclusion and integration.¹¹⁵ In other words, a relaxed standard that led to less liability for people with cognitive disabilities would undermine inclusion and integration.

The notion that applying the objective standard to people with cognitive disabilities aids integration and inclusion has been criticized because it is “improbable . . . that individuals will choose harm and potential tort recovery over *ex ante* avoidance of the harm.”¹¹⁶ This criticism is almost certainly valid. It is far-fetched to assume that very many people would decide how to engage with a person with a cognitive disability based on whether they will have an opportunity to sue the person for negligence if they are harmed.¹¹⁷ However, the inclusion argument need not rest on the questionable claim that a possibility of *ex post* compensation influences individual decisionmakers.

The objective standard has the power to aid inclusion efforts not because potential compensation will immediately motivate people to be more inclusive, but because the expressive consequences of the objective standard may play a role in slowly changing widely held stereotypes and misconceptions about people with cognitive disabilities.¹¹⁸ In this Part, I discuss how the expressive consequences of a relaxed standard would undermine this project.

justifiable because it reduces administrative costs and because it protects the public against “highly dangerous—one might say ultrahazardous”—insane people). This instrumental approach seems undesirable on expressive grounds because it dehumanizes actors by treating them as vehicles for maximizing social welfare.

115. See Alexander & Szasz, *supra* note 2, at 35 (“[T]o deny a person the legal capacity to form intentional acts for which he is held responsible is to diminish, or even deny, his status as a full-fledged human being.”); Splane, *supra* note 2, at 167 (arguing that holding the mentally ill liable avoids “treating the mentally ill as a special sub-class of inept citizens who cannot be blamed or held accountable for socially undesirable conduct”).

116. See Goldstein, *supra* note 2, at 89; see also *id.* at 88 (“[A]ctors may rationally choose to forgo the possibility of harm by not interacting with the mentally ill.”).

117. One can perhaps imagine a landlord or an employer who might feel better about renting to or hiring a person with a cognitive disability because of this rule, though it is a bit far-fetched to think this consideration would push someone from discriminating to including.

118. Reshaping societal perceptions is undoubtedly a tall task and I do not mean to overstate the potential benefits of the change in discourse I propose. Even the ADA, which was a historic and large-scale legislative proclamation, has proven unable to alleviate many of the problems it was intended to address. See, e.g., COLKER, *supra* note 73.

A relaxed standard would likely track the Second *Restatement's* rule for actors with physical disabilities.¹¹⁹ The hypothetical §11(c) of the third *Restatement* would read: “The conduct of an actor with a mental or emotional disability is negligent only if the conduct does not conform to that of a reasonably careful person with the same disability.” Under any variation of this rule,¹²⁰ the courts’ analysis would essentially focus on whether or not the person acted in a way we consider reasonable for a person in his or her situation, given what we know and understand about the disability. There are several reasons to resist this scenario.

A. Underestimation of Capability

The first problem with applying a relaxed standard to people with cognitive disabilities is that if judges and juries¹²¹ were asked to determine if the conduct of a person with a cognitive disability was reasonable for a person with such a disability, there is a risk that they would too readily presume incompetence. Many people, including judges, tend to underestimate the potential of people with cognitive disabilities.¹²² Bagenstos and Schlanger provide the powerful example of Nicholas Romeo.¹²³ Romeo, the plaintiff in a Fourteenth Amendment case that reached the Supreme Court,¹²⁴ was living in an institution at the time of his case and was described by the Court as “profoundly retarded” and as having “the mental capacity of an 18-month-old child, with an I.Q. between 8 and 10.”¹²⁵ His own counsel stated that “no

119. See RESTATEMENT (SECOND) OF TORTS § 283C (1965) (“If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability.”); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11(a) (2010) (“The conduct of an actor with a physical disability is negligent only if the conduct does not conform to that of a reasonably careful person with the same disability.”).

120. See, e.g., Dark, *supra* note 2, at 207 (“[W]here the mental illness has a verifiable physical origin that is a significant factor in the diagnosis and treatment of the person, that person should have the benefit of the physical disability rule in evaluating his or her conduct . . .”); Jacobi, *supra* note 2, at 115–18 (proposing a “‘reasonably prudent insane person’ standard” that categorizes mental illnesses as “[s]udden onset—no warning[.]” “[c]hronic serious mental illness, controlled (at least in part) by treatment[.]” or “[c]hronic severe mental illness, uncontrolled”).

121. Presumably, judges would need to decide whether to allow the relaxed standard and how to instruct juries, then juries would try to apply it.

122. See, e.g., Bagenstos & Schlanger, *supra* note 47, at 782–83.

123. *Id.* at 782–83 n.177.

124. Youngberg v. Romeo, 457 U.S. 307, 314 (1982).

125. *Id.* at 309.

amount of training will make possible his release.”¹²⁶ However, less than a year after the decision, Romeo moved to a community residence and was working part-time in his neighborhood.¹²⁷ The scope of the Court and Romeo’s counsel’s misconception is striking.¹²⁸

Because many jurisdictions apply a relaxed standard in negligence cases when the person with the cognitive disability is a plaintiff,¹²⁹ we can get some sense of whether courts accurately assess the capabilities of people with cognitive disabilities. In *Mochen v. State*, a 17-year-old with a history of psychosis was injured while trying to escape from a second-story window of a mental institution using bed sheets.¹³⁰ Although doctors hired by the plaintiff and the State disagreed about whether the plaintiff was capable of resisting an opportunity to escape, they agreed that he “could perceive the risk resulting from going out of the window.”¹³¹ Nonetheless, the court declared that “his emotional development was that of a young child and he was unable to comprehend the possible consequences from the attempt to exit the second story window.”¹³² By underestimating this plaintiff’s capabilities, the court labeled him as incompetent and dangerous.¹³³ As the public absorbs this message, people are likely to become more wary of

126. *Id.* at 317.

127. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 443 (1991).

128. It is possible that Romeo’s lawyers strategically downplayed his capabilities as opposed to inadvertently underestimating them. If this is the case, it is illustrative of a separate problem that would arise if the relaxed standard were available. See *infra* notes 161–73 and accompanying text.

129. For a discussion of this somewhat puzzling, but arguably defensible, doctrine, see *infra* Part VII.B.1.

130. *Mochen v. State*, 352 N.Y.S.2d 290, 292 (App. Div. 1974).

131. *Id.* at 295.

132. *Id.* In fact, the court was confident enough in this assessment that it overruled a lower court’s contrary finding, despite the factual nature of the determination calling for deferential review. *Id.*

133. It is worth noting that in contributory negligence cases courts may, out of sympathy, ascribe less competence to plaintiffs with cognitive disabilities so that they can recover. It does not necessarily follow that the court would assess the actor’s competence in the same way when he is a defendant. Additionally, the court in *Mochen* may have been lashing out against the harshness of contributory negligence, which was still the regime of choice in New York in 1974 but was quickly falling out of favor. See Harry A. Gair, *The Contributory Negligence Rule: An Offense to Justice (Part I)*, 35 N.Y. ST. B. J. 392 (1963) (explaining New York’s rule of contributory negligence); Charles F. Krause, *Comparative Negligence in New York*, 47 N.Y. ST. B. J. 638 (1975) (discussing the state’s adoption of comparative negligence in 1975).

interaction with people with cognitive disabilities. It might be more progressive to assign liability on the grounds that doctors believed the plaintiff understood the risks and still acted carelessly.

Another example of both our tendency to underestimate people with cognitive disabilities and the uncertainty of the scientific understandings of various conditions comes not from caselaw, but from the Autism Rights Movement.¹³⁴ Traditional understandings of “classical” autism would suggest that people with autism could not possibly be self-advocates and actively participate in a civil rights movement,¹³⁵ but the growing number of “severely” autistic people who have achieved literacy casts doubt on that view.¹³⁶

The self-advocacy movement originated decades ago when people with “mental retardation” formed “People First,”¹³⁷ an organization that now has hundreds of chapters across the country.¹³⁸ The movement developed because the professionals who historically made decisions for people with cognitive disabilities underestimated them and insulated them too much from society.¹³⁹ “Underpinning the self-advocacy movement is a faith that people with retardation—even the most severely retarded person—can be taught to make good choices.”¹⁴⁰ The scope and momentum of the self-advocacy movement highlights how pervasively society tends to underestimate the abilities of people with cognitive disabilities and their “willing[ness] to take risks—like anyone else—to live like other adults around them.”¹⁴¹

Given this general tendency to underestimate potential, it seems likely that whenever a person with a cognitive disability acted in a way

134. See *supra* notes 108–10 and accompanying text.

135. See, e.g., OLIVER SACKS, *AN ANTHROPOLOGIST ON MARS* 246 (1995) (“Autistic people . . . have no true concept of, or feeling for, other minds, or even their own; they have, in the jargon of cognitive psychology, no ‘theory of mind.’”).

136. See, e.g., SAVARESE, *supra* note 90, at xi–xxxi (discussing examples of literate people with classical autism). An additional example is that the author’s son, who has autism, wrote, the final chapter of this book. See *id.* at 432–42.

137. See SHAPIRO, *supra* note 84, at 184–92 (discussing the origins and growth of the self-advocacy movement). The term “mental retardation” has fallen out of favor and is increasingly being replaced by “intellectual disability,” even in the United States Code. See Rosa’s Law, Pub. L. No. 111-256, 124 Stat. 2643 (codified as amended at 20 U.S.C. § 1400 (Supp. IV 2011)).

138. See SHAPIRO, *supra* note 84, at 186.

139. *Id.*

140. *Id.* at 187.

141. *Id.* at 192.

that looked abnormal or sub-standard, judges would assume that it was the best that person could do, and that it was therefore reasonable, given their disability.¹⁴² This presumption of incompetence would carry damaging messages about the capabilities of people with cognitive disabilities, hardening societal opinions that are already tightly held.

B. Labeling and Stereotype Threat

Even if we could confidently assume that courts would accurately assess the capabilities of people with cognitive disabilities, rather than systematically underestimate them, there are reasons to resist giving courts the freedom to label a person as incapable of conforming to the reasonable person standard. A substantial (and sometimes controversial) psychological, criminological, and sociological literature on “labeling theory” suggests that there is a potential for harm when official sources like courts and lawmakers attach labels to groups of people.¹⁴³ Strong proponents of labeling theory argued “that behavior of any sort was not intrinsically deviant, but only became deviant when it was so designated by powerful social forces”¹⁴⁴ and that “some of the characteristics used to support the label were either figments of the imagination of those assigning it or responses of the labeled person to its effects.”¹⁴⁵ Taken to its extreme, it is no surprise that labeling theory has been highly criticized. It essentially claims that mental illness does not exist—that it is a “socially derived myth.”¹⁴⁶

142. This type of underestimation would inappropriately skew how likely judges would be to grant summary judgment, how likely they would be to instruct juries to apply the relaxed standard, and how likely juries would be to find for the defendant based on the relaxed standard.

143. See Bruce G. Link et al., *The Effectiveness of Stigma Coping Orientations: Can Negative Consequences of Mental Illness Labeling be Avoided?*, 32 J. HEALTH & SOC. BEHAV. 302 (1991).

144. PAUL S. APPELBAUM, *ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE* 5 (1994).

145. MINOW, *supra* note 49, at 175.

146. See APPELBAUM, *supra* note 144, at 7; see also MINOW, *supra* note 49, at 174–77 (recounting the development of, and controversy surrounding, labeling theory). Thomas Szasz is a central figure among the labeling theorists and he, unlike others who once shared his views, “is entirely unrepentant” about having “denied the existence of mental illness.” APPELBAUM, *supra* note 144, at 7. Despite the flaws in Szasz’s theory, an article that he co-authored that discusses applying an objective standard to people with cognitive disabilities is highly relevant to this Article. See Alexander & Szasz, *supra* note 2. It is worth distinguishing between the erroneous view that cognitive disability is a “socially derived myth” and the pursuit of a “social model” of disability that is central to the disability rights

However, a tempered version of labeling theory has greater value. More moderate advocates “did not assert that mental disability is itself fictional. Instead, they targeted the consequences of the label’s application: that is, the social meanings of mental disabilities rather than the fact of mental disability.”¹⁴⁷ Along these lines, Bruce Link pioneered a “modified labeling theory” that “does not assign to labeling the power to create mental illness directly. Instead, [it] view[s] labeling and stigma as possible causes of negative outcomes.”¹⁴⁸ Link maintains that a label’s stigma can negatively affect a person by exposing them to stereotypes and cultural rejection, but he also acknowledges that labeling is crucial because it allows for beneficial treatment.¹⁴⁹ When a person with a cognitive disability seeks treatment, “they can benefit from the positive effects of treatment, [but] they are also exposed to the negative effects of stigma.”¹⁵⁰

Link focused specifically on mental illness (such as schizophrenia and psychosis),¹⁵¹ as opposed to cognitive disability broadly, but his insight about labels can be applied across disabilities and, more importantly, across groups of people with different attitudes toward their disabilities. Link’s work assumes the desire for “treatment,”¹⁵² an attitude that is not universal to people with cognitive disabilities.¹⁵³ Yet, in the same way that a person seeking treatment must accept the official label that comes with it, a person seeking appropriate adaptive and assistive technology must accept being labeled in order to take advantage of the most up-to-date technologies and techniques for helping a person with their particular disability.¹⁵⁴

movement. Proponents of the social model of disability do not deny the existence of differences between disabled and non-disabled people; however, they shift the focus away from the inherent traits of the person with a disability toward the interaction between those traits and aspects of the physical and social world that make the disability more limiting than it otherwise would be. See *supra* Part IV.B.1.

147. MINOW, *supra* note 49, at 175.

148. Bruce G. Link et al., *A Modified Labeling Theory Approach to Mental Disorders*, 54 AM. SOC. REV. 400, 404 (1989) (emphasis added).

149. See Bruce G. Link & Jo C. Phelan, *Labeling and Stigma*, in HANDBOOK OF THE SOCIOLOGY OF MENTAL HEALTH 481, 486 (Carol S. Aneshensel & Jo C. Phelan eds., 1999).

150. *Id.* at 491. For a classic discussion of stigma, see ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

151. See Link & Phelan, *supra* note 149, at 481.

152. *Id.* at 486.

153. See *supra* notes 105–10 and accompanying text.

154. See Link & Phelan, *supra* note 149, at 491–92.

Modified labeling theory sheds important light on the expressive harms that would accompany a relaxed standard. Psychiatrists, caretakers, and family members must be in the business of assigning labels in order to serve the needs of people with cognitive disabilities, whether their goal is treatment or acceptance, integration, and independence. The same cannot be said of the tort system. The recipient of the official label would be subjected to the stigma associated with the label, without receiving the potential benefits of the label that Link envisioned.

A related theory, which also highlights the importance of expressive effects, is Claude Steele and Joshua Aronson's theory of "stereotype threat."¹⁵⁵ They claim that members of stereotyped or stigmatized groups "face the threat of confirming... a negative societal stereotype... about their group's... ability and competence."¹⁵⁶ In other words, stereotypes can become self-fulfilling prophecies.¹⁵⁷ The stronger a stereotype is and the more salient it becomes to a stereotyped group, the more likely it is that the group's behavior will confirm the stereotype.¹⁵⁸

When people are made to believe they are less intellectually capable by virtue of belonging to a certain race or gender, they are at risk of confirming the stereotype by performing intellectual tasks poorly.¹⁵⁹ Other groups are vulnerable to stereotype threat as well. For example, a study found that people who had suffered head injuries performed worse on intellectual tests if they were made to believe that they were expected to perform badly due to their injuries.¹⁶⁰ Given these findings, it is likely that people with cognitive disabilities are also vulnerable to stereotype threat, and it is conceivable that if the legal system fosters a belief that people with cognitive disabilities are dangerous and incompetent, stereotype threat will increase the likelihood that their

155. See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995).

156. *Id.* at 797.

157. *Id.*

158. For a summary of the stereotype threat literature, which demonstrates the breadth of the research and the consistency of the findings, see Loriann Roberson & Carol T. Kulik, *Stereotype Threat at Work*, 21 ACAD. MGMT. PERSP. 24, 28–29 (2007).

159. See, e.g., Steele & Aronson, *supra* note 155.

160. See Julie A. Suhr & John Gunstad, "Diagnosis Threat": The Effect of Negative Expectations on Cognitive Performance in Head Injury, 24 J. CLINICAL & EXPERIMENTAL NEUROPSYCHOLOGY 448 (2002).

behavior will match these preconceived notions.

Under a relaxed standard, labels of incompetence and dangerousness would be written on the face of the law. Whenever a judge applied the relaxed standard, a label would be attached and a stereotype would be strengthened. The label would say, simply, that the person is incompetent and incapable of reasonable behavior. Modified labeling theory and stereotype threat theory demonstrate the potential negative repercussions of this official message.

C. *Other Concerns*

There are at least two other problems the relaxed standard could cause. First, it would force parties to either maintain their potential for competence and face liability or label themselves as incompetent and avoid liability. Imagine a person with autism or Down syndrome who is working with family members and caretakers to develop literacy skills, vocational skills, and independence. If this person became involved in a tort suit and had access to a relaxed standard, it would be in the family's financial interest to present lay and expert testimony on the scope of the person's incompetence. Litigation is already a psychologically taxing, even traumatic, ordeal, and if the people closest to a party argue that he or she is incompetent and present endless evidence about the severe limitations of his or her disability, it could have damaging effects.¹⁶¹ Additionally, because the relaxed standard would only protect "particular identity groups," it would "effectively force group members to conform with the identity script that is dominant within their group at the pain of being denied protection."¹⁶² For example, a person with autism would need to conform to the widely held belief that he or she is incapable of certain levels of understanding and self-control in order to avoid liability.

While there is undoubtedly something paternalistic about arguing that people with disabilities and their families should not be allowed to make the choice to pursue a relaxed standard, the temptation to avoid

161. Taking this thought experiment one step further, one can imagine that it might be empowering for a party to hear the opposition build a case of their competence and capabilities, but nonetheless, the messages sent by the person's own lawyer and family would probably be particularly powerful.

162. BAGENSTOS, *supra* note 72, at 51. Along these same lines, scholars have argued that civil rights statutes like the ADA encourage litigation strategies that contribute to stereotypes rather than chip away at them. See Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 250.

liability could be powerful enough and the ordeal of presenting one's self as incompetent damaging enough that the choice between avoiding liability and potential competence should not be on the table.¹⁶³

A recent case is illustrative. In a battery case, the court modified the common law rule of applying the objective standard to people with cognitive disabilities and allowed the defendant to present the defense that he was incapable of forming the requisite intent to commit a tortious battery.¹⁶⁴ The defendant "suffered from autism and 'mild to moderate mental retardation.'"¹⁶⁵ Because the court allowed a defense based on inability to form intent (which is effectively analogous to a court applying a relaxed standard in a negligence case), it was advantageous for the defendant to argue that he was incompetent. Thus, the defendant submitted "extensive medical records documenting his diminished mental capabilities and contend[ed] that they indicate that he had the mental capacity of a child that is six years and six months old."¹⁶⁶ On the other hand, the plaintiff presented evidence that the defendant almost certainly would have embraced, but for its legal significance in his case.¹⁶⁷ This included a report from a psychologist the defendant had seen prior to becoming involved in the suit stating that "[t]he overwhelming feeling regarding [the defendant] is that he will continue his positive behavior, and demonstrate more independence and self reliance" and that he was "displaying increasing maturity."¹⁶⁸ The fact that the defendant allegedly committed a battery suggests he had behavioral problems to address, but the plaintiff's evidence showed he had been improving.¹⁶⁹ The availability of a relaxed standard forced the defendant and his family to argue that the improvements were meaningless.¹⁷⁰ Given the fragility of our conceptions of our own

163. Along these same lines, Alexander and Szasz raised concerns about a defense of mental illness being imposed on the party by guardians who are "vitaly interested in preserving the insane person's assets." See Alexander & Szasz, *supra* note 2, at 36–37. That being said, the presence of liability insurance, discussed *infra* notes 255–258 and accompanying text, may mitigate this risk.

164. See *Braley v. Midland Cnty. Educ. Servs. Agency*, No. 06-11990-BC, 2007 WL 3332859, at *8 (E.D. Mich. Nov. 8, 2007).

165. *Id.* at *2.

166. *Id.* at *7.

167. *Id.* at *8.

168. *Id.*

169. *Id.* at *3, *8.

170. *Id.* at *7.

competence,¹⁷¹ one can imagine that the defendant suffered as a result of the litigation strategies he had to pursue in an attempt to avoid liability.¹⁷²

A final concern with a relaxed standard is that a defendant who avoids liability might be involuntarily committed, as in the criminal system after a successful insanity defense. One commentator who argues for a relaxed standard suggests that this result would be appropriate.¹⁷³ Because Harlow focuses primarily on people with psychotic disorders,¹⁷⁴ she does not consider that the same rule would likely be applied to everyone under the broad label of cognitive disability. The fact that courts might order involuntary commitment adds another layer to the difficult decision parties would face. For some, the threat of involuntary commitment would make the option of arguing for competence and accepting liability more appealing, but others still might end up facing involuntary commitment if the prospect of liability was too daunting. Involuntary commitment is certainly appropriate in a narrow subset of cases, but it would not be an appropriate remedy for every defendant who would avoid liability as a result of their cognitive disability under a relaxed standard.

VI. EXPRESSIVE CONSEQUENCES OF THE OBJECTIVE STANDARD

In Part III, I argued that the current rule is fairer than a relaxed standard and is also consistent with tort law's wider preference for ignoring individuals' cognitive capabilities. In Part V, I argued that a relaxed standard would come with troubling expressive consequences as well. I now examine whether the expressive effects of the current rule—as it is currently justified and applied—are preferable. Then I consider how tort law could maximize the current rule's potential for expressive benefit by discussing and justifying the rule differently.

171. See, e.g., Joshua Aronson & Claude M. Steele, *Stereotypes and the Fragility of Academic Competence, Motivation, and Self-Concept*, in HANDBOOK OF COMPETENCE AND MOTIVATION 436, 436 (Andrew J. Elliot & Carol S. Dweck eds., 2005) (“[C]ompetence is much more fragile—and malleable—than we tend to think.”).

172. Interestingly though, the court in this case denied summary judgment, leaving open the possibility that the defendant was more competent than he argued. *Braley*, 2007 WL 3332859, at *8. Given courts' tendency to underestimate the ability of people with cognitive disabilities, this is a somewhat surprising result.

173. Harlow, *supra* note 2, at 1759–60 (“[T]he logical outcome of finding a defendant not liable based solely on his mental illness is inpatient treatment. As in criminal cases, the defendant would be discharged at the suggestion of the treating psychiatrist.”).

174. *Id.* at 1737.

A. *Expressive Harms of the Current Rationales*

One could argue that holding people with cognitive disabilities to the reasonable person standard sends a message that they are competent, that they are complete citizens, and that they deserve equal treatment. However, the simple application of a law—the fact of its existence—can express a wide range of messages depending on why the law exists and the rhetoric with which it is discussed in court.¹⁷⁵ While some might receive a message of competence and equality from the current rule, others might receive the message that people with cognitive disabilities are dangerous and must be made to compensate those that they will inevitably injure. Therefore, we must examine the reasons for the law that are presented to the public by the *Restatement* and by judges in order to figure out which message is being sent.

Commentators have supported the current rule with a variety of arguments. Stephanie Splane focuses on a goal of “community treatment” and argues the rule “helps foster community acceptance of the mentally ill, and encourages the mentally ill to become self-sufficient, responsible members of the community.”¹⁷⁶ George Alexander and Thomas Szasz argue that applying the objective reasonable person standard to people with cognitive disabilities avoids “creat[ing] a class of irresponsible persons,” “shut off from society and desocialized,” “dehumanized and friendless.”¹⁷⁷ Both Splane and Alexander & Szasz argue that applying the objective standard will aid inclusion and integration.¹⁷⁸ They argue that individuals will be more likely to engage with people with cognitive disabilities if they know they might be compensated if harm occurs.¹⁷⁹ Daniel Shuman makes a different argument. He focuses on therapeutic jurisprudence and proposes a way in which the objective standard could “encourage[] a therapeutic result by stating to the mentally ill and walking wounded that they cannot rely on their mental or emotional problems to avoid responsibility for their behavior or failure to initiate treatment.”¹⁸⁰

Missing from these discussions of the rule’s benefits is analysis of the rhetoric courts and the *Restatement* use in applying it. Splane,

175. See *supra* Part IV.A.

176. Splane, *supra* note 2, at 163–64.

177. Alexander & Szasz, *supra* note 2, at 36.

178. See Alexander & Szasz, *supra* note 2, at 36; Splane, *supra* note 2, at 164–65.

179. See Alexander & Szasz, *supra* note 2, at 36; Splane, *supra* note 2, at 165.

180. Shuman, *supra* note 2, at 419.

Alexander & Szasz, and Shuman may overstate the rule's upside because of this oversight. There is potential for expressive benefit in applying the objective standard, which I will discuss below,¹⁸¹ but the *Restatements* and the courts do not tend to discuss the rule in a manner likely to capitalize on this potential.

As noted above, the most recent *Restatement* presents three primary justifications for applying the reasonable person standard to people with cognitive disabilities: (1) determining the causal connection between a cognitive disability and substandard conduct presents administrative concerns (presumably the Reporters envision difficult line-drawing problems); (2) because “modern society” is “in favor of deinstitutionalization, there is nothing especially harsh in at least holding [people with cognitive disabilities] responsible for [the] harms that [their] clearly substandard conduct causes”; and (3) “it frequently will be the case that the law cannot expect [a person with cognitive disabilities] wisely and appropriately to moderate conduct choices so as to take the person's disability into account.”¹⁸² The justification that courts seem to rely on most heavily is the second, which posits that it is fair for people with cognitive disabilities to pay for the harm they cause.¹⁸³

The *Restatement* and judges seem to accept that there is a societal preference for deinstitutionalization and believe this will inevitably lead to harms at the hands of people with cognitive disabilities.¹⁸⁴ Requiring people with cognitive disabilities to pay for harm they cause is both fair and doctrinally coherent;¹⁸⁵ however, in asserting this justification, courts tend to project the message that people with cognitive disabilities are

181. See *infra* Part VI.B.

182. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11 cmt. e (2010). The third justification is an attempt to explain why courts allow a relaxed standard for people with physical disabilities, but not people with cognitive disabilities. The comment compares people with cognitive disabilities to people with physical disabilities and asserts that people with physical disabilities can be “expected to adopt extra precautions to respond to the extra level of risk that [they] create[.]” *Id.*

183. See, e.g., *Mochen v. State*, 352 N.Y.S.2d 290, 292 (App. Div. 1974) (“The injury to the plaintiff is quite as real whether precipitated by a careless or clumsy defendant or by one who suffers some mental deficiency. Under any circumstances, the negligently injured plaintiff's right to be compensated does not depend upon the operation of the individual defendant's mind.”).

184. See, e.g., *Creasy v. Rusk*, 730 N.E.2d 659, 664–66 (Ind. 2000) (citing legislative developments in Indiana and nationally that show the trend toward deinstitutionalization and supporting the policy justifications presented in the *Restatement*).

185. See *supra* Part III; see also *infra* Parts VII.B, VII.C.

dangerous and only the promise of compensation makes deinstitutionalization defensible. The incompetence of people with cognitive disabilities is presented as an incontestable truth that the law and the rest of society must work around. A state court of appeals summed up the judicial stance in 1991: “[I]t is impossible to ascribe . . . the departure from the standard of a ‘reasonable’ person . . . to one who, like [the defendant], is *by definition unable to control his own actions through any exercise of reason*. . . . Instead, the conclusion that liability exists is founded . . . upon principles of good public policy”¹⁸⁶

By heavily emphasizing that deinstitutionalization is only acceptable if people with cognitive disabilities are held liable for harms they cause, courts frame those harms as categorically different than harms caused by people without disabilities. When a nondisabled person causes an accidental harm, it is typically seen as blameworthy and deterrable, but when a person with a cognitive disability causes harm, the knee-jerk reaction is that the harm was inevitable, that deterrence is not a relevant consideration, and that the actor should be held liable but is not blameworthy due to his incompetence.

This type of rhetoric, which suggests that there is no hope for reasonable behavior and that only fairness to the injured party justifies the current rule, will lead people to believe that harm will inevitably follow if they interact with individuals with cognitive disabilities. This is not a message that will encourage inclusion and integration. The promise of compensation *ex post* is not likely to persuade people to interact with a person they believe will inevitably harm them or their property.¹⁸⁷ The messages embedded in the current rule do nothing to improve societal perceptions of people with cognitive disabilities. In fact, they perpetuate stereotypes of complete incompetence and may increase the stigmatization and rejection of people with cognitive disabilities.

One of the most powerful sources of stigma and rejection faced by people with cognitive disabilities is a public perception that they are dangerous. According to some researchers, “[t]he association between mental illness and violence in public consciousness is pervasive,” and it “is the most damaging stereotype faced by the mental health

186. *Anicet v. Gant*, 580 So. 2d 273, 275 (Fla. Dist. Ct. App. 1991) (emphasis added) (citations omitted).

187. See *supra* notes 116–17 and accompanying text.

community.”¹⁸⁸ These perceptions have “existed for centuries” and “[t]he fear is nourished by public media portrayals of criminals as insane and the highlighting of cases of violence among individuals with psychiatric histories.”¹⁸⁹ These widespread, exaggerated¹⁹⁰ perceptions “can have a devastating effect on a person’s prospects for relationships, employment, housing, and social functioning.”¹⁹¹ The classic source of this fear may be an erratic violent outburst committed by a person with some form of psychosis, but the public’s fear extends to people with all sorts of cognitive disabilities who are viewed as incompetent.¹⁹²

Given that public perceptions of dangerousness are a particularly salient source of stigma, the courts should tread with special care when they send messages about a person’s competence and potential for reasonable behavior. Stereotypes and public perceptions of people with disabilities are at least partially to blame for the inability of people with disabilities to integrate into communities and find employment.¹⁹³ The

188. John Monahan & Jean Arnold, *Violence by People with Mental Illness: A Consensus Statement by Advocates and Researchers*, 19 PSYCHIATRIC REHABILITATION J. 67, 67 (1996).

189. Caroline L. Kaufmann, *Reasonable Accommodation to Mental Health Disabilities at Work: Legal Constructs and Practical Applications*, 21 J. PSYCHIATRY & L. 153, 168 (1993) (footnotes omitted).

190. Some studies have found that “[u]nless drugs or alcohol are involved, people with mental disorders do not pose any more threat to the community than anyone else.” See John M. Grohol, *Dispelling the Myth of Violence and Mental Illness*, PSYCH CENTRAL (June 1998), <http://psychcentral.com/archives/violence.htm>. Others have found that people with serious mental illness, such as schizophrenia or bipolar disorder, are slightly more likely to commit a violent act, but that this should not distract from “the larger perspective—that most people who are violent are not mentally ill, and most people who are mentally ill are not violent.” See Richard A. Friedman, *Violence and Mental Illness—How Strong is the Link?*, 355 NEW ENG. J. MED. 2064, 2065–66 (2006); see also *Violence and Mental Illness: The Facts*, RESOURCE CENTER TO PROMOTE ACCEPTANCE, DIGNITY & SOC. INCLUSION, <http://promoteacceptance.samhsa.gov/publications/facts.aspx> (last updated June 22, 2012) [hereinafter *Violence and Mental Illness—How Strong is the Link?*] (surveying studies on the link between violence and mental illness and finding that “[m]ost citizens believe persons with mental illnesses are dangerous” and that, “in truth, people have little reason for such fears”).

191. Friedman, *supra* note 190, at 2064; cf. *Palmer v. Circuit Court*, 117 F.3d 351, 352 (7th Cir. 1997) (“The [ADA] does not require an employer to retain a potentially violent employee.”).

192. See Martha Nussbaum, *The Capabilities of People with Cognitive Disabilities*, in COGNITIVE DISABILITY AND ITS CHALLENGE TO MORAL PHILOSOPHY 75, 81 (Eva Feder Kittay & Licia Carlson eds., 2010) (“[M]any if not most social preferences in this area are deformed by ignorance, stigma, and fear.”).

193. Not only are people with disabilities more likely to be unemployed than the nondisabled, they are also less likely to eat at restaurants, socialize with friends, and participate in other community activities. See BAGENSTOS, *supra* note 72, at 116–17.

courts have some power to either exacerbate or alleviate these harms. When courts portray harms as inevitable and undeterrable, they feed an already overblown misconception that all people with cognitive disabilities are dangerous.¹⁹⁴

Additionally, the insights of modified labeling theory and stereotype threat theory shed important light on the expressive harms that are embedded in the current rule's justifications.¹⁹⁵ The justifications presented in the third *Restatement* portray people with cognitive disabilities as incompetent, thereby reinforcing the stigma and stereotypes associated with the label.¹⁹⁶ Crucially though, none of the positive aspects of labeling occur. Whether a person undergoes treatment or seeks therapy and technology that will lead to integration is a decision that does not hinge on a judge's pronouncements and rhetoric in a tort suit.¹⁹⁷

There are legitimate doctrinal and policy considerations that support the current rule,¹⁹⁸ but these goals would be served equally well whether the rule's justifications labeled people with cognitive disabilities as incompetent or managed to refrain from sending such messages. For these reasons, the *Restatement* and judges should develop a heightened awareness of the labels they attach to the parties before them and avoid rhetoric that contains damaging messages when there are sensible alternative justifications for their decisions.¹⁹⁹

Finally, the rule's few supporters seem to assume that people with cognitive disabilities who become parties in tort suits will be similar enough that what is good for one will be good for all. For example, Daniel Shuman proposes offering a relaxed standard to people with cognitive disabilities who have taken efforts to treat their condition

194. See *Violence and Mental Illness—How Strong is the Link?*, supra note 190.

195. See *supra* Part V.B.

196. For example, the comment argues that allowing a relaxed standard for people with cognitive disabilities “would be one-sided in a way that recognizing physical disability is not” because “it frequently will be the case that the law cannot expect the person wisely and appropriately to moderate conduct choices.” RESTATEMENT (THIRD) OF TORTS § 11 cmt. e. The insertion of the word “frequently” does not do much to soften the message, which is that people with cognitive disabilities are necessarily incapable of recognizing their limitations or difficulties and incapable of exercising rational thought.

197. By inadvertently reinforcing stereotypes, the *Restatement* and courts expose people with cognitive disabilities to the risks of stereotype threat as well.

198. See *supra* Part III.

199. See *infra* Part VI.B.

prior to the lawsuit.²⁰⁰ If the tort system incentivizes people to “treat” their cognitive disabilities, it buys into the damaging medical model of disability. The message embedded in this proposed law would be that all should seek to eliminate their disabilities and take all steps to become “normal.” This might be appropriate for individuals who conceive of their disability as a disease, but groups like “The Autism Self-Advocate Network” or “Autism International Network” would probably not find it benign.²⁰¹

The literature primarily focuses on “mental illness,” “insanity,” or “psychosis.”²⁰² This is perhaps because most of the cases applying the objective standard to people with cognitive disabilities have involved actors with schizophrenia or some other form of psychosis.²⁰³ However, it overlooks the heterogeneity of cognitive disability. The number of Americans with cognitive disabilities is staggering²⁰⁴ and the number of tort suits involving people with a variety of cognitive disabilities is bound to increase as the movement toward integration and independence continues to grow.²⁰⁵ Courts will have to decide if the policy justifications expressed in the third *Restatement*, which developed in response to cases involving actors with psychoses, can be applied to people with substantially different cognitive disabilities who may

200. See Shuman, *supra* note 2, at 426.

201. See *supra* notes 108–10 and accompanying text.

202. See, e.g., Harlow, *supra* note 2, at 1737 (focusing on actors who are unable to “distinguish between fact and thoughts and sensations caused by the actor’s illness”); Jacobi, *supra* note 2, at 115 (proposing a “‘reasonably prudent insane person’ standard”).

203. See, e.g., Delahanty v. Hinckley, 799 F. Supp. 184, 185 (D.D.C. 1992); Ramey v. Knorr, 124 P.3d 314, 320 (Wash. Ct. App. 2005); Jankee v. Clark Cnty., 2000 WI 64, ¶ 11, 235 Wis. 2d 700, 612 N.W.2d 297. *But see* Burch v. Am. Fam. Mut. Ins. Co., 198 Wis. 2d 465, 469, 543 N.W.2d 277, 278 (1996) (“[Defendant] was born with cerebral palsy and mental retardation with autistic tendencies . . .”).

204. For example, by some counts, there are over one million people in America with an autism spectrum disorder, *Facts and Statistics*, AUTISM SOCIETY, <http://www.autism-society.org/about-autism/facts-and-statistics.html> (last visited Oct. 17, 2012), and hundreds of thousands of people with Down syndrome, Nat’l Down Syndrome Soc’y, *Down Syndrome Facts*, NDSS.ORG, <http://www.ndss.org/Down-Syndrome/Down-Syndrome-Facts/> (last visited Oct. 17, 2012).

205. Not because people with cognitive disabilities are necessarily more likely to cause accidental harm, but simply based on the law of averages. As the disability rights movement grows over time, more people with cognitive disabilities will find ways to live independently, enter the workforce, and attend college. For a story about a non-speaking person with autism preparing to attend a selective liberal arts college and live in the dormitories, see Ralph James Savarese, *The Silver Trumpet of Freedom*, HUFFINGTON POST, Feb. 23, 2011, http://www.huffingtonpost.com/ralph-james-savarese/the-silver-trumpet-of-fre_b_827107.html.

conceive of their disability in an entirely different light than prior parties. Commentators, judges, and the *Restatement's* Reporters tend not to sufficiently acknowledge the substantial heterogeneity of people with cognitive disabilities (and the heterogeneity of their attitudes toward their disabilities). Most importantly, they too frequently presume incompetence and treat harms caused by people with cognitive disabilities as undeterrable, which exacerbates stereotypes and fear, to the detriment of inclusion and integration efforts.

B. *Sending a More Progressive Message*

The practical effects of the objective standard may not directly motivate better treatment of people with cognitive disabilities,²⁰⁶ but the potentially positive expressive effects could do so over time. Judges and the *Restatement's* Reporters have the power to carefully control the social meaning that is embedded in the rules of tort law. The current rule could express very different messages depending on how it is discussed, justified, and implemented. This Part considers how the tort system could send more progressive, beneficial messages without abandoning the results it favors.

The primary change I advocate is for courts to avoid unnecessarily announcing that a person is incompetent. Courts should also adopt and express a presumption of competence in appropriate cases when there is uncertainty about the abilities of an actor with a cognitive disability.

The nature of the objective standard is that liability attaches regardless of whether a person who acted negligently was, in fact, capable of exercising greater care.²⁰⁷ Once a court or jury finds that a person's conduct fell short of the reasonable person standard, there is no need to take another step and announce the belief that the person was incapable of exercising adequate care.²⁰⁸ The ideal response would be for a court to explain that it is unnecessary to inquire into whether the person was actually capable of greater caution. Courts could even acknowledge our uncertainty about the potential competence of many people with cognitive disabilities and explain that the objective standard effectively presumes the competence of the person before the court.

206. See *supra* notes 116–17 and accompanying text.

207. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283B cmt. c (1965); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11 cmt. e (2010).

208. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283B cmt. c; RESTATEMENT (THIRD) OF TORTS § 11 cmt. e.

Additionally, and closely related, courts should not assume that harms caused by people with cognitive disabilities are categorically different than harms caused by nondisabled people. That is, courts should strive to avoid presenting harm as inevitable and undeterrable. Those messages run the risk of perpetuating stereotypes about the dangerousness of people with cognitive disabilities and enhancing stigma and rejection. By adopting a universalist approach (that is, eschewing labels and conceiving of accidental harms caused by all people similarly), courts could send a more progressive message.

In practice, this would be a somewhat subtle change, but subtle changes in the messages sent by official actors can alter societal opinions in meaningful ways. By avoiding unnecessarily attaching a label of incompetence, acknowledging our uncertainty about the capabilities of many people with cognitive disabilities, and expressing a presumption of competence in appropriate cases, courts will increase the likelihood that the public will do the same. This will reduce the public's discomfort with people with cognitive disabilities, motivate the public to be more accepting, and work to the benefit of inclusion and integration efforts.

One of the few cases involving a party with an intellectual cognitive disability opposed to psychosis demonstrates the problematic messages sent when a court does not follow the practices suggested above. In *Burch v. American Family Mutual Insurance*, a state supreme court adhered to the traditional rule and applied the reasonable person standard to a fifteen year-old girl (Amy)²⁰⁹ who was "severely developmentally disabled."²¹⁰ The court did not discuss the justifications for the rule in detail, but it did discuss Amy's capabilities.²¹¹ Despite its

209. *Burch v. Am. Fam. Mut. Ins. Co.*, 198 Wis. 2d 465, 473–74, 543 N.W.2d 277, 280 (1996). The court did not apply a relaxed standard based on Amy's age because operating a vehicle was held to be an adult activity by the court below. *Id.* at 473–74 n.5, 543 N.W.2d at 280 n.5.

210. *Id.* at 468, 543 N.W.2d at 278.

211. *Id.* at 474–75, 543 N.W.2d at 281 ("Amy . . . was not capable of performing household chores such as sweeping or making her bed. She did not testify at the trial because . . . her mother indicated that Amy would not be able to understand the oath . . . [and] would have no comprehension of the court, jury or trial process."). In this case, the court could not follow this article's primary suggestion of simply not discussing the person's subjective capabilities because Amy's competence was relevant to whether her father was negligent in his supervision of her. *See id.* at 473 n.4, 543 N.W.2d at 281. The court was effectively applying a somewhat well-established rule that the mental capabilities of an actor are considered when the question is whether another person was negligent for "encouraging or provoking" them. *See* Mark F. Grady, *The Free Radicals of Tort*, 11 SUP. CT. ECON. REV. 189, 189 (2003).

somewhat limited understanding of Amy's abilities, the court determined as a matter of law that her father's contributory negligence in leaving her alone in a parked truck exceeded her negligence for allegedly reaching over and turning the key.²¹² The Court expressed no reservations about the conclusion of the jury below, holding that the verdict should "clearly" be affirmed.²¹³ The court's conclusion sends damaging messages about people with cognitive disabilities.

Amy's father testified that Amy had been instructed not to touch the truck's controls and she had not done so in the past.²¹⁴ He seemingly believed she was capable of following instructions and controlling her behavior, yet the court held that it was more negligent for Amy's father to leave her unattended in the passenger seat for a brief moment than it was for her to turn the keys in the ignition from the passenger seat, which she had been told not to do.²¹⁵ The court seemed to presume Amy's complete incompetence and sent a message that people with cognitive disabilities must be attended to at all times for their safety and the safety of others.

Applying the reasonable person standard to people with cognitive disabilities gives courts a valuable opportunity to send a message of potential competence. Whether the disability rights movement succeeds in achieving greater integration and inclusion for people with cognitive disabilities hinges largely on societal perceptions of people with cognitive disabilities. Societal perceptions are malleable, and the courts have a role to play in reducing people's discomfort and fear, rather than reinforcing it. Once the reasonable person standard is applied, the concrete consequences are fixed, but the expressive consequences could be altered if courts justified the rule based on uncertainty about the capabilities of actors with cognitive disabilities. Instead, courts typically recite the explanations presented in the *Restatement* and unnecessarily presume incompetence.²¹⁶

My argument that courts should avoid unnecessarily opining on people's subjective capabilities and embrace a presumption of potential competence in their opinions does not deny that people with cognitive disabilities encounter limitations and sometimes find it difficult, or

212. *Burch*, 198 Wis. 2d at 476, 543 N.W.2d at 281.

213. *Id.* at 476, 543 N.W.2d at 282.

214. *Id.* at 475, 543 N.W.2d at 281.

215. *Id.* at 476, 543 N.W.2d at 281.

216. *See, e.g., Anicet v. Grant*, 580 So. 2d 273, 275 (Fla. Dist. Ct. App. 1991).

impossible, to behave “normally.” It is probably true that courts sometimes encounter parties who, due to particularly severe limitations, unquestionably could not have acted differently. For this reason, courts need not alter their rhetoric in every case involving a person with a cognitive disability. If an actor’s conduct was unambiguously non-volitional and it is abundantly clear that the actor lacks the potential to meet the reasonable person standard, courts can carefully adjust the language they use to justify the rule, focusing more on fairness to the injured party. However, given our uncertainty about people’s potential and our tendency to underestimate it, courts should still err strongly on the side of sending a message of potential competence by simply not discussing the person’s actual, subjective capabilities because such discussion is not necessary to the resolution of the case.

The rhetoric I propose may also seem an ill fit for people who conceive of their disability as a disease, would welcome an opportunity to be “cured,” and do not consider themselves competent. With respect to these individuals, it may be especially paternalistic to argue that courts should adopt a presumption of competence and present all accidental harms as potentially deterrable rather than acknowledging that in some cases, a disability undoubtedly made it impossible for the individual to act at all differently. However, as I will discuss below, laws and policies cannot immediately be declared inconsistent with the projects of the disability rights movement simply because they have paternalistic elements.²¹⁷

These subtle changes to judicial rhetoric are necessary because courts have been known to underestimate the competence of people with cognitive disabilities.²¹⁸ Further, the harm of sending a message of incompetence about a person who may be more capable than the court realizes seems likely to outweigh the harm of sending a message of competence about a person who truly does not have the potential to do any better. Without abandoning doctrine that leads to the fairest results, courts have the ability to leave open the possibility of potential competence in the people they judge and not present accidental harms caused by people with cognitive disabilities in a categorically different light than those caused by nondisabled individuals. By making these subtle changes, courts can potentially chip away at damaging stereotypes and stigmas, or at least not perpetuate them.

217. See *infra* Part VII.A.

218. See *supra* notes 122–33 and accompanying text.

Judicial opinions and the *Restatement* are not tort law's only mechanisms for causing expressive harms or benefits. In many civil trials, there is no written opinion, which means the jury instructions may be the most powerful official opportunity to send either harmful or beneficial messages to the public.²¹⁹ New York courts provide the following jury instruction on the standard of care for people who have cognitive disabilities:

One who is disabled by reason of (mental illness, retardation, developmental disability) and who is thus lacking in mental capacity and prudence must still observe toward others the same care which a normal and reasonably prudent person would use under the same circumstances. If the acts of a (mentally ill, mentally retarded, developmentally disabled) person would constitute negligence on the part of a normal and reasonably prudent person under the same circumstances, then the (mentally ill, mentally retarded, developmentally disabled) person must be found negligent.²²⁰

Aside from the repeated juxtaposition between "normal" and "disabled" people, the instruction is not inherently harmful on an expressive level, but no explanation is given for the rule, despite the fact that many jurors are likely to find it counterintuitive. Jurors are likely to fall back on stereotypes and misconceptions and assume that the person with the cognitive disability is incompetent. An instruction like the following could be more expressively beneficial:

The standard of care required for people of all mental ability levels is that of a reasonably prudent person. People who may be more capable of exercising caution than average are not held to a higher standard, and people who may be less capable of exercising caution than average, because of disability or any other reason, are not held to a lower standard. The jury should not attempt to assess an individual's actual capability to exercise

219. Beyond judges and the *Restatement's* Reporters, legal commentators also have a role to play in shaping the expressive effects of legal rules. For an example of an article that is arguably a bit insensitive about rhetoric's potential to cause expressive harms, see Grady, *supra* note 211, at 191, which coins the label "free radicals" to describe persons with mental illness and other groups of "irresponsible people." Free radicals are "materials with high reactivity and high energy [that] can be collected and stored only with special precautions." *Id.* at 191 n.5 (quoting ARTHUR ROSE & ELIZABETH ROSE, *THE CONDENSED CHEMICAL DICTIONARY* 514 (6th ed. 1961)).

220. NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL § 2:21 (West 1997).

caution and should not hold an individual to a higher or lower standard based on any such assessment.

This hypothetical instruction highlights that the tort system ignores all people's unique mental capabilities, not just the mental capabilities of people with disabilities. Without being unfairly prejudicial to either party, it avoids creating the perception that harms caused by people with disabilities are categorically different than harms caused by people without disabilities, and leaves jurors' minds open to the possibility that the party with the disability is more capable than one might assume.

VII. Counter-Arguments

I have argued that the current rule is defensible on fairness and doctrinal grounds and that considering the expressive effects of each rule, the current rule can better serve social goals than the relaxed standard. Yet, questions still remain. Avoiding paternalism toward people with disabilities is one of the central projects of the disability rights movement, closely related to independence and autonomy. And reasonable accommodations are the heart of the ADA's antidiscrimination model. The current rule that withholds the opportunity to seek a relaxed standard could be attacked as both paternalistic and as a failure to make a reasonable accommodation. I address these concerns, as well as some doctrinal puzzles and the practical impact of the current rule, below.

A. Disability Rights Considerations

1. Paternalism

Anti-paternalism, independence, and autonomy are central goals of the disability rights movement, but they contain complex tensions and contradictions.²²¹ For example, although “self-advocacy is a revolt against professionals and the nonretarded world, it also, paradoxically, remains dependent on people who are not retarded” to facilitate and advise because “people with retardation often need help in making the choices and judgments that constitute their own acts of self-assertion.”²²² “[V]irtually all participants in the disability rights movement have united in their opposition to paternalism—to nondisabled people acting

221. See *supra* Part IV.B.2.

222. SHAPIRO, *supra* note 84, at 187.

to deny opportunities to people with disabilities ‘for their own good,’”²²³ yet many people with disabilities require significant assistance from nondisabled individuals in their personal lives, and the disability rights movement relies extensively on the efforts of nondisabled lawyers, teachers, parents, and others to achieve its goals.²²⁴ It is too quick to immediately assume a rule is inconsistent with disability rights considerations merely because it has paternalistic elements. There are situations where a somewhat paternalistic policy may be the best policy.²²⁵

The few commentators who have supported the current rule have been criticized for employing what is seen as a paternalistic, “for-their-own-good” justification.²²⁶ There is undoubtedly some truth to the criticism. Central to this Article’s argument is the notion that withholding a relaxed standard and subjecting people with cognitive disabilities to more liability carries expressive benefits that could work to their advantage. Within this argument is the admittedly paternalistic idea that people with cognitive disabilities will be better off if they do not have the choice to argue for a relaxed standard when they are defendants in tort suits. However, the motivating fear is that allowing the relaxed standard will lead families, expert witnesses, and judges to paternalistically tell people with cognitive disabilities what they are capable of. Thus, the desire to avoid paternalism can cut in either direction.²²⁷

Antipaternalism arguments can often support either side of a debate. An example exists in the debate over assisted suicide. Explaining the views of people who oppose assisted suicide, Bagenstos writes:

Those critics accept that autonomy is the basic goal of the disability rights movement, and many agree that an autonomous choice to commit suicide should, in principle, be protected. But they contend that if assisted suicide is allowed at all, the pressures will be so powerful that many people with disabilities

223. BAGENSTOS, *supra* note 72, at 90.

224. *Id.* at 4.

225. *See, e.g.*, Bagenstos & Schlanger, *supra* note 47, at 795–96 (acknowledging that their proposal to eliminate “damages based on . . . hedonic harms” is “paternalistic in many individual cases”).

226. *See* Jacobi, *supra* note 2, at 114.

227. *Cf.* BAGENSTOS, *supra* note 72, at 114 (“The antipaternalist principle, therefore, is . . . limited. Multiple, even opposing, policy outcomes are likely to be consistent with it, and paternalism will sometimes be justified in any event.”).

will be forced to “choose” to end their lives In those circumstances . . . autonomy is best served by prohibiting assisted suicide altogether.²²⁸

In the context of a relaxed standard for negligence, there is a risk that people with cognitive disabilities could be coerced into seeking the protection of the standard and, therefore, forced to present themselves as incompetent. If this risk (combined with the attendant risks of underestimation of capability, labeling, and others discussed above) outweighs the harm that is suffered by those people with cognitive disabilities who truly would prefer to be judged by a relaxed standard, then withholding the standard arguably is most faithful to the principles of autonomy and antipaternalism.

One cannot write off a law or policy as inconsistent with disability rights simply because it can be construed as paternalistic. With respect to the standard of care applied to people with cognitive disabilities, withholding the opportunity to choose a relaxed standard may be the more progressive option.

2. The ADA and Reasonable Accommodation

One commentator argues at length that courts violate the ADA by not allowing people with cognitive disabilities access to a relaxed standard.²²⁹ But the argument probably underestimates how significantly courts have constrained the scope of the ADA. In *Doe v. Mutual of Omaha Insurance Co.*, the plaintiffs challenged AIDS caps in their health insurance policies under Title III of the ADA, which prohibits discrimination by places of public accommodation, like insurance vendors.²³⁰ Judge Posner held in favor of the defendants, stating that “[t]he common sense of the statute is that the *content* of the goods or services offered by a place of public accommodation is not regulated.”²³¹

Bagenstos has defined this limitation “the access/content distinction.”²³² “[C]ourts have held that an accommodation can be required only if it provides people with disabilities ‘access’ to the same

228. BAGENSTOS, *supra* note 72, at 110.

229. See Jacobi, *supra* note 2, at 125–36.

230. See *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 558–59 (7th Cir. 1999).

231. *Id.* at 560 (emphasis added).

232. See BAGENSTOS, *supra* note 72, at 70–72; Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 45–50 (2004).

benefit received by nondisabled individuals; an accommodation that would alter the ‘content’ of the benefit will not be required”²³³

In the situation at hand, people with cognitive disabilities have “access” to the exact same service as people without cognitive disabilities (a tort system that applies the reasonable person standard), just as the plaintiffs in *Doe* had “access” to the exact same product as nondisabled individuals (an insurance policy with an AIDS cap). Allowing a relaxed standard would alter the “content” of the service so courts are unlikely to find the failure to accommodate violates the ADA.

Doe demonstrates how dramatically the access/content distinction undermines the true spirit of the ADA by limiting the “reasonable accommodations” the law requires.²³⁴ The ADA’s vision would be better served if the court in *Doe* formulated the “content” sought more functionally, as an insurance policy that provided adequate coverage for all diseases. One could similarly argue that the content sought by those arguing for a relaxed standard is a tort system that only holds parties responsible for harms they had the capacity to avoid. However, following the reasoning in *Doe*, a court would likely reject this functional characterization. Fortunately, in this case, unlike in *Doe*, such formalism might lead to the optimal result.

Just as some laws with paternalistic elements may be consistent with the goals of the disability rights movement, some laws that could be construed as failing to accommodate may do more to further those goals than the accommodation would. The further the accommodation requirement is taken, the more it begins to look like a form of charity,²³⁵ which can distract from some of the disability rights movement’s most important projects. As I have argued throughout this Article, there are a number of arguments that suggest that allowing a relaxed standard is

233. BAGENSTOS, *supra* note 72, at 71.

234. *Cf.* BAGENSTOS, *supra* note 72, at 1 (“[M]atters have not worked out as disability rights advocates hoped. . . . [T]he Supreme Court has read the statute’s provisions very narrowly. . . . ADA plaintiffs lose their cases at astounding rates. . . . The statutory provisions that require businesses to be accessible are wildly underenforced. And the employment rate for people with disabilities has remained stagnant at best.”); JOHNSON, *supra* note 68, at xiv (“Twelve years [after the passage of the ADA], most people still do not understand the nature of disability discrimination. And there is still very little public discussion about it.”).

235. *Cf.* BAGENSTOS, *supra* note 72, at 51–54 (proposing the broader definition model of Australia’s Disability Discrimination Act as an alternative to the ADA model and explaining the Australian law’s limitations in empowering individuals with disabilities).

an accommodation we might be better off avoiding.

B. Doctrinal Puzzles

1. Contributory Negligence

Many commentators have noted an apparent inconsistency in the standard applied to people with cognitive disabilities when they are plaintiffs in negligence actions, as opposed to defendants.²³⁶ Some courts explicitly acknowledge that they apply a different standard to a person with a cognitive disability if that person is a plaintiff and the issue is the plaintiff's comparative negligence.²³⁷ Critics of the current rule argue that the courts' treatment of plaintiffs with cognitive disabilities shows their discomfort with the general rule against a relaxed standard.²³⁸ On the other hand, the one supporter of the current rule who addressed the contributory negligence issue criticizes courts for what she considers an indefensible doctrinal inconsistency.²³⁹

Allowing a relaxed standard for plaintiffs with cognitive disabilities but not defendants with cognitive disabilities may actually be a sensible and sustainable equilibrium, not merely a step toward allowing a subjective standard for all parties with cognitive disabilities (as critics of the rule suggest) or an indefensible and damaging inconsistency (as supporters of the rule suggest). The inconsistency represents something of a compromise between a universal model of disability and a minority group model. When the actor is a defendant, the reasonable person standard is applied universally and harms caused by all people are treated similarly.²⁴⁰ Not only does applying the reasonable person

236. See, e.g., Dark, *supra* note 2, at 191 (“When the mentally disabled person is a plaintiff, the courts have usually taken plaintiff’s limitations due to a mental illness or mental disability into account.”); Harlow, *supra* note 2, at 1745 (“[T]he law has shifted to allow mental illness as a defense to contributory negligence.”).

237. See, e.g., Mochen v. State, 352 N.Y.S.2d 290, 294 (App. Div. 1974) (“It is not appropriate that an injured party be foreclosed from recompense by objective notions of care not related in any way to his fault or to his ability to avoid fault.”).

238. See, e.g., Dark, *supra* note 2, at 194 (“[T]he fact that a series of contributory negligence cases exist strongly suggests that courts are . . . trying, whenever possible, to mediate the harshness of the rule”); Harlow, *supra* note 2, at 1745 (arguing that allowing a relaxed standard as a defense to contributory negligence could “indicat[e] that perhaps the common law is moving towards allowing a subjective standard for defendants with mental illness as well”).

239. See Splane, *supra* note 2, at 169–70.

240. See Harlow, *supra* note 2, at 1734 (explaining that the common law “requires defendants in negligence actions to meet an objective ‘reasonable person’ standard to avoid

standard lead to just results for the injured party, it also subjects the person with a disability to the risks and consequences of full citizenship, risks that many people with cognitive disabilities are explicitly willing to take.²⁴¹ Conversely, when the actor is a plaintiff, allowing a relaxed standard recognizes that people with cognitive disabilities are, as a group, underprivileged and subject to “prejudice, stereotypes, and neglect,”²⁴² which helps justify the targeted, sympathetic treatment in this limited class of cases.²⁴³

That being said, there is obvious tension in the set of arguments above. If an objective standard is just and expressively beneficial when applied to defendants with cognitive disabilities, would it not be similarly just and beneficial if applied to plaintiffs with cognitive disabilities? And if a subjective standard is warranted when applied to plaintiffs with cognitive disabilities as a limited recognition of the plight of an underprivileged group, why not extend the sympathetic treatment to cases of primary negligence?

The current inconsistency seems to represent a compromise between two compelling poles. The same arguments that favor applying an objective standard to defendants with cognitive disabilities do apply to plaintiffs with cognitive disabilities as well, but with less force. Courts are motivated to apply the objective standard to defendants with cognitive disabilities because it seems unjust for a person who is injured by someone with a cognitive disability to receive no compensation. Courts are understandably less motivated to apply the objective standard to plaintiffs with cognitive disabilities because the injustice is less stark when the person who loses money because of the application of a relaxed standard is a defendant who was not injured and is at least partially responsible for the other party’s harm. Similarly, while there could be seriously damaging stigma, stereotyping, and rejection if people with cognitive disabilities were not made to compensate those that they injure, society is unlikely to react as harshly if people with cognitive disabilities are treated sympathetically by the tort system when they are the ones who suffered injuries.

On the other side of the scale, the arguments that favor treating

liability”).

241. See SHAPIRO, *supra* note 84, at 192.

242. See BAGENSTOS, *supra* note 72, at 20.

243. One might actually believe that all plaintiffs, nondisabled and disabled alike, should be subject to a slightly more sympathetic standard than defendants simply because it is less problematic for society when people put themselves at risk than when they put others at risk.

people with cognitive disabilities sympathetically when they are plaintiffs also apply when they are defendants, but they are overpowered by the expressive consequences that would follow and the unjust results that such a rule would entail for innocent injured parties. Further, allowing a relaxed standard across all cases would seem comparable to the type of charity that proponents of the social model of disability believe is a problematic approach to disability,²⁴⁴ and it would deny people with cognitive disabilities the “dignity of risk,” which is essential to many of the goals of the disability rights movement.²⁴⁵ If people with cognitive disabilities do not face the same consequences for the risks they take as all people do, the ideals of integration and independence are less likely to truly be realized.

Despite these tensions, this Subpart shows that there could be a defensible explanation for the balance the tort system has struck, whether the judges crafting the rules were attuned to these arguments or not.

2. Criminal Law and Contract Law

Some commentators have pointed out that courts are capable of applying a relaxed standard because they do so in other contexts, such as criminal law and contract law, when they apply capacity defenses.²⁴⁶ It is surely true that courts can administer doctrines that require drawing difficult lines. The *Restatement's* concern over whether courts could make these determinations consistently from case to case may be overblown because courts often make similar decisions with the aid of expert testimony. But crucially, because of society's general tendency to underestimate the competence of people with cognitive disabilities, it seems likely that courts would systematically be too quick to presume the actor could not have done any better.²⁴⁷

In the criminal context, these errors are more justifiable because

244. See, e.g., BAGENSTOS, *supra* note 72, at 18.

245. See BAGENSTOS, *supra* note 72, at 26 (quoting Gerben DeJong, *Defining and Implementing the Independent Living Concept*, in *INDEPENDENT LIVING FOR PHYSICALLY DISABLED PEOPLE* 20 (Nancy M. Crewe & Irving Kenneth Zola eds., 1983)).

246. See, e.g., Jacobi, *supra* note 2, at 112. The *Restatement* does not overlook these other systems, but argues that “[t]he awkwardness experienced by the criminal-justice system in attempting to litigate the insanity defense” partially motivates their decision. *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM* § 11 cmt. e (2010).

247. See *supra* Part V.A.

criminal defendants face graver potential consequences (e.g., loss of liberty and perhaps loss of life) than defendants in negligence suits who face only financial consequences. A defendant's interest in life and liberty outweigh the risk of expressive harm that might accompany the capacity defense. Additionally, capacity defenses are sensible in criminal cases because there is no individual plaintiff that is denied compensation by the capacity defense. The plaintiff in a criminal case is the state, which ordinarily has an interest in securing a conviction only if the defendant is morally blameworthy. On the other hand, an injured plaintiff in a tort case has the same interest in compensation whether or not the person that caused the harm is morally at fault.²⁴⁸

Allowing a capacity defense is also justifiable in contract law. In the context of contracts, parties engage with one another voluntarily, which raises different concerns than the negligence context.²⁴⁹ The capacity defense protects people with cognitive disabilities from parties who might seek them out and take advantage of them.²⁵⁰ There is some risk of unfairness to a party who unknowingly enters a bargain with a person with a cognitive disability, but it is mitigated.²⁵¹ The *Restatement* declares that when the impaired party "is unable to act in a reasonable manner in relation to the transaction," the capacity defense is only available if "the other party has reason to know" of the person's condition.²⁵² This is quite unlike negligence cases, where a capacity defense would result in serious unfairness to the other party.²⁵³

A concern in negligence cases is that it would be advantageous to all defendants with a cognitive disability to argue that they are incompetent in order to avoid liability.²⁵⁴ In the contracts context, parties would only find themselves in this situation if they later regretted their contract. Thus, not only does the capacity defense work less unfairness on other parties in contracts than in torts, but it also imposes expressive harms on

248. See *supra* notes 38–43.

249. See Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 834 (1983).

250. See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.2 (2nd ed. 1998).

251. See RESTATEMENT (SECOND) OF CONTRACTS § 15(2) (1981).

252. *Id.* § 15(1)(b). The unimpaired party's expectation interest is not perfectly protected, though. The capacity defense is available regardless of the other party's awareness if the impaired party is "unable to understand . . . the nature and consequences of the transaction." *Id.* § 15(1)(a).

253. See *supra* Part III.

254. See *supra* Part V.C.

a smaller proportion of the parties with cognitive disabilities. Most importantly, the relaxed standard is needed in contract law to protect against the risk of a person taking advantage of someone with a cognitive disability. This risk does not exist in the negligence context, where people do not choose their counter-parties.

C. *The Effects of Financial Liability*

Some may still be uncomfortable with assigning financial liability to a person with a cognitive disability who may truly have been incapable of acting differently. To the extent that this is unjust, some comfort lies in the fact that many defendants may be protected by liability insurance.²⁵⁵ A homeowner's liability insurance typically covers liability for negligence by the homeowner and family members.²⁵⁶ People with cognitive disabilities who live with their families may be covered this way. Also, group homes and providers of supported living are required to carry liability insurance in some states.²⁵⁷ While not all people with cognitive disabilities will have protection through their living arrangements, and liability insurance does not entirely remove the financial burden of liability in tort, it lessens the blow dramatically for many.²⁵⁸ The result is a burden that is more proportional to the wrong.

Further, as explained above, those who perceive it as unjust for a person with a cognitive disability to face financial liability for a harm he or she was incapable of avoiding should remember that it is the nature of the objective standard that a defendant is held liable for conduct that falls short of reasonable, regardless of whether the defendant was

255. See Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 111–12 (2010) (“[T]ort suits are often battles between an insurer that has subrogated the plaintiff’s claim and an insurer that that has issued a liability policy to the defendant.”). Hershovitz’s contention that “tort scholars should engage tort law as it is realized in the world, not as it looks in the pages of the *Restatement*” is important to keep in mind. *Id.* at 112.

256. See, e.g., WIS. OFFICE OF THE COMM’R OF INS., PI-015, CONSUMER’S GUIDE TO HOMEOWNER’S INSURANCE 4 (2008), available at http://www.oci.wi.gov/pub_list/pi-015.pdf.

257. See, e.g., FLA. STAT. § 400.411(6) (2004).

258. Cf. Hershovitz, *supra* note 255, at 113 (“[I]n the absence of liability insurance, justice would not require people who are momentarily careless (e.g., by looking away from the road for a split second to read a billboard) to pay ‘make whole’ damages to someone they severely injure, because the remedy would be utterly out of proportion to the infraction. With liability insurance, however, justice might well demand such damages, if we are of the view that responsible people prepare in advance to make good any injuries their negligence might inflict on others.”).

capable of exercising reasonable care.²⁵⁹ This is true whether the defendant has a cognitive disability or not.²⁶⁰

I have argued that the current rule could have positive expressive effects and coincide with the goals of the disability rights movement. One could argue, though, that assigning financial liability to people with cognitive disabilities will actually reduce their autonomy. Family members or caretakers might restrict the freedom of people with cognitive disabilities for fear of liability, and insurance companies and employers might discriminate against people with cognitive disabilities because they would indirectly be affected by the financial liability. While the effects of the current rule are certainly ambiguous, these concerns may be overstated. First, the ADA protects against blatant discrimination by employers or insurers.²⁶¹ Second, if the current rule actually made caretakers and family members restrict the freedom of people with cognitive disabilities, one might expect to hear more complaints about the rule from progressive members of the disability rights movement. Tort doctrine may simply not have a strong effect on individuals' decisions in this context. It should instead be viewed as part of a broader project of reshaping societal perceptions of people with cognitive disabilities.

VIII. CONCLUSION

There are compelling arguments in favor of both the current rule and a relaxed standard. While the question is a close one and neither rule is free from criticism on various levels, the balance favors retaining the current rule, particularly when one considers its potential for expressive benefits. Unlike the often-proposed relaxed standard, the

259. See *Splane*, *supra* note 2, at 168.

260. See RESTATEMENT (SECOND) OF TORTS § 283B cmt. c. at 289, 290 (1965); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11 cmt. e (2010).

261. This may be a small comfort considering the aforementioned fact that “ADA plaintiffs lose their cases at astounding rates—the only litigants less successful than ADA employment plaintiffs are prisoner plaintiffs.” BAGENSTOS, *supra* note 72, at 1. The ADA has not nearly met expectations as a tool for social change. See, e.g., COLKER, *supra* note 73, at 6–8. Restrictive judicial interpretations like the one in *Doe*, described above, are at least partially to blame. *Doe v. Mut. Of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999). The literature exploring the ADA’s perceived failures is substantial. See, e.g., Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 7 (2000) (surveying literature).

current preference for applying the reasonable person standard to people with cognitive disabilities at least has the potential to be expressively beneficial and in harmony with some of the complex goals of the disability rights movement.

Unfortunately, this potential for expressive benefit is not realized because the most common rationales for the rule and the rhetoric employed by courts applying the rule entrench the stereotype that people with cognitive disabilities are incompetent and dangerous. This stereotype increases the stigma of cognitive disability, is detrimental to inclusion and integration efforts, and encourages outsiders to view cognitive disability as a medical (rather than a social) problem that is completely inherent to the person with the disability. However, because the expressive harms of a relaxed standard would likely be even greater and the concrete results less defensible on fairness and doctrinal grounds, the proper response is not to abandon the current rule. Instead, courts should retain the current rule, but modify its rationale in a way that is more consistent with progressive notions of cognitive disability and is more attuned to the expressive power of law.

Courts should focus heavily on fairness to the injured party as a justification for the rule. Courts should recognize our uncertainty about the capabilities of many people with cognitive disabilities and avoid unnecessarily labeling people with cognitive disabilities as incompetent by announcing that they could not have done any better. Whether a party has a cognitive disability or not, the reasonable person standard does not ask whether the party could have done better. Little is gained by a court labeling a person with a cognitive disability as incompetent when such a pronouncement has no impact on the outcome of the case. By not unnecessarily opining on the capabilities of people with cognitive disabilities, courts will avoid underestimating those capabilities and perpetuating damaging stereotypes.