COMMENTS

A Disability-Inclusive Theory of "Ordinary" Care: Redistributing Accommodative Labor in Torts

Rachel Caldwell†

Everyone generally owes each other a duty of ordinary care—but what is "ordinary"? How does one act reasonably to meet this burden? The answer depends on a plaintiff's disability status. This Comment analyzes the current reasonable person standard for disabled plaintiffs and the corresponding duty of "ordinary care" provided by defendants through a critical disability studies lens. The current system burdens disabled plaintiffs with accommodating themselves, rather than requiring defendants to include accessible care in meeting their general duty of ordinary care. To redistribute this inequitable distribution of accommodative labor, this Comment proposes three stackable policies: (1) courts should reinterpret defendants' duty of ordinary care to include care of individuals with disabilities by eliminating the doctrine that tortfeasors owe accommodations to people with disabilities only if they are on notice of their disabilities; (2) courts could further shift the balance of accommodative labor by factoring the mental and physical cost of accommodating oneself, or "disability admin" labor, into the reasonable care inquiry when the plaintiff is disabled; and (3) courts could eliminate comparative negligence for plaintiffs with disabilities to address the problematic "reasonable person with a disability" standard. This Comment also explores theoretical, doctrinal, and normative justifications while also creating space for a more robust dialogue on how the law treats disability as "extra"—but not ordinary.

INTRODUCTION 2270
I. SITUATING DISABILITY AND LABOR IN THEORIES OF TORT LAW 2275
A. Theories of Tort Law 2275
B. The Social Model of Disability as a Normative Framework 2277
1. The social model of disability. 2278
2. Universal Design. 2279
3. Defining labor. 2281

† B.A. 2021, Arizona State University; J.D. Candidate 2025, The University of Chicago Law School. I would like to thank Professor Adam Chilton for advising this Comment, as well as Andrew Webb, Barry Taylor, and Professor Katie Eyer for their feedback.

II. TORT LAW BACKGROUND: A SYSTEMIC DISTRIBUTION OF RELATIVE RESPONSIBILITY 2283
A. The Reasonable Person Standard 2283
B. Reasonableness Relative to the Other Party 2285
1. Foreseeability and the role of notice. 2285
2. Comparative negligence. 2288
C. Historical Relativity in the Disability Context: White-Cane Laws 2289
III. SYSTEMIC DEVALUATION OF DISABLED INDIVIDUALS 2291
A. Foreseeability Reinforces a Segregationist Paradigm 2291
B. Notice and Accommodation as Extra Labor 2293
C. Contributory Negligence: Unfair Outcomes and Incentives 2296
1. The stakes: reduced damages and lost cases. 2297
2. The underlying problem: unreasonable expectations. 2297
IV. REINTERPRETING "ORDINARY CARE" AND ELIMINATING NOTICE 2300
A. Defining the Disability-Inclusive Duty of Ordinary Care 2300
1. Pedestrians in wheelchairs. 2301
2. Blind pedestrians. 2302
B. Common Law Roots 2303
1. Doctrinal flexibility: res ipsa loquitur and the evolution of duty. 2304
2. Economic theory of torts. 2305
C. The Feasibility of Disability-Inclusive Accommodations 2310
1. Laws already require some accommodations. 2310
2. Disability visibility provides an alternate form of notice. 2311
V. INCORPORATING ACCOMMODATIVE LABOR INTO REASONABLENESS AND DUTY DETERMINATIONS 2311
VI. ELIMINATING COMPARATIVE NEGLIGENCE FOR PLAINTIFFS WITH DISABILITIES 2312
CONCLUSION 2314

INTRODUCTION

Nearly sixty years ago, disability rights scholar Jacobus tenBroek observed that the legal system placed unfair expectations on disabled individuals[1] to accommodate themselves to society rather than placing the expectation on society to create an accommodating environment—an observation that, despite advancements in the law, still holds true today. But tenBroek also imagined a world aligned with burgeoning integrationist policies of the day—a world in which "a blind man may . . . proceed along

[1] Throughout this Comment, I will use "person with a disability" and "disabled person" interchangeably because some members of the disability community value person-first language whereas others prefer identity-first language.

the streets and bus lines to his daily work, without dog, cane, or guide, if such is his habit or preference . . . knowing . . . that he shares with others this part of the world in which he, too, has a right to live."[2]

TenBroek's analysis compared the integrationist policy[3] underlying statutory developments like the Rehabilitation Act of 1973[4] with developments in the common law—particularly tort law.[5] He identified the now mostly obsolete doctrine of contributory negligence and juries' misunderstandings of disabled plaintiffs' capabilities as barriers to justice for those plaintiffs.[6] Yet he did not elaborate on how exactly defendants' duty would change, practically or doctrinally, if the law better evaluated disabled plaintiffs' reasonableness. Scholar Adam Milani suggested thirty-three years later that defendants should be held to a "special" standard of care only when defendants have notice of a pedestrian's disability, in line with then-existing Americans with Disabilities Act[7] (ADA) policy and tort doctrine.[8]

In the twenty-five years since Milani's analysis, significant legal changes have unfolded. Comparative negligence has largely replaced contributory negligence.[9] Most states have substituted the "reasonable person with the same disability" standard for the implicit notion that tort law's "reasonable person" considers an individual's disabilities as part of the circumstances under which

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2 Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 CATH. U. L. REV. 323, 346 (1999) (quoting Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 867–68 (1966)).

3 *See* Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 843 (1966) (describing integrationism as "a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so"); *id.* at 851–52.

4 Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 et seq.). The Rehabilitation Act preceded the Americans with Disabilities Act (ADA), but it applied antidiscrimination provisions only to federally funded entities. *See* 29 U.S.C. § 794(a). Today, Rehabilitation Act claims can be brought simultaneously with ADA claims when applicable.

5 TenBroek, *supra* note 3, at 851–53.

6 *Id.* at 876–77.

7 Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101 et seq.).

8 *See* Milani, *supra* note 2, at 367–68.

9 *See Contributory Negligence*, CORNELL L. SCH. LEGAL INFO. INST., https://perma.cc/3G2Z-57FE ("In a jurisdiction that follows contributory negligence, a plaintiff who is at all negligent cannot recover."). Four states still fully follow contributory negligence doctrine. *See Contributory and Comparative Negligence by State*, BLOOMBERG L. (Jan. 3, 2023), https://perma.cc/7M25-X29R.

they act.[10] The ADA has developed through landmark judicial decisions and congressional amendments.[11] Technological developments have given disability activists broader exposure. Critical disability theory[12] and social justice tort theory have emerged as academic fields that provide more depth and detail to what integration means and the purpose of torts, respectively. Society's understanding of labor has developed as not only a physical but also mental exertion, which has led to scholars naming and describing previously unrecognized labor taken on by individuals with disabilities to accommodate themselves to inaccessible environments.[13]

With decades of hindsight, this Comment examines and reconceptualizes normative issues in tort law that continue to prevent tenBroek's dream from being realized for all people with physical disabilities. The primary issues remain the standard of reasonable care for people with physical disabilities and the limited duty of ordinary care that defendants owe people with physical disabilities. These legal standards reflect a societal expectation that people with disabilities will accommodate themselves, even if that means taking on an unfair amount of labor, rather than placing the onus on others to create a universally accessible environment. The normative issues inherent in these standards contribute to an inequitable labor distribution between disabled tort plaintiffs and defendants, which, combined with the rule of comparative negligence, may disadvantage plaintiffs when determining damages.

To address these normative and systemic issues, this Comment expands on the meaning of tenBroek's seminal concept of "integrationist" torts, situates that concept in current debates over the purpose of tort law, and develops a scheme to shift what I call "accommodative labor" from disabled individuals to society

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10 *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARMS § 11 (AM. L. INST. 2010).

11 *See infra* notes 103–10 and accompanying text.

12 Critical disability theories generally "describe the socio-political constructions of disability and track the impacts of these constructions on oppressed persons, including but not limited to those to whom the concept 'disability' attaches." Melinda C. Hall, *Critical Disability Theory*, STANFORD ENCYCLOPEDIA OF PHIL. (Sept. 23, 2019), https://perma.cc/9ZDB-Z8JN. However, there are many different, nuanced applications of this theory. *See id.* (describing many approaches to critical disability theory). It seems that the goal of integration has shifted to one of a "universally designed" society in which disabled individuals are not only allowed to live in the world safely but valued, considered, and invited in its constant evolution and reconstruction. For an example of discussion on disabled futures, see generally ALISON KAFER, FEMINIST, QUEER, CRIP (2013).

13 *See infra* Part I.B.3.

at large. The Comment proposes three interrelated changes to tort law, which could be implemented together or separately, depending on how far courts are willing to shift this labor distribution. First, courts should reinterpret a defendant's duty of "ordinary care" to include care of individuals with disabilities while eliminating the doctrine that tortfeasors owe people with disabilities accommodations only if they are on notice of their disabilities. I call this the "disability-inclusive theory of ordinary care." Second, factoring the mental and physical cost of accommodating oneself, including "disability admin" labor,[14] into disabled plaintiffs' reasonableness inquiries could further shift the balance of accommodative labor. Third, eliminating comparative negligence for disabled plaintiffs could prevent unfair diminution in damages.

To be sure, addressing the problematic nature of tort law for plaintiffs with disabilities is one piece in a complex puzzle of legal adjustments that could be made to advance disability rights. For example, cities could provide safer walkways, more crosswalks, and assistive technology for disabled pedestrians. Congress could also amend Title III of the ADA to allow private plaintiffs to recover monetary damages from inaccessible places of public accommodation (e.g., restaurants and retail establishments).[15]

With these potential changes in mind, creating a workable tort law regime for plaintiffs with disabilities remains critical. Disabled individuals end up in personal injury accidents just like everyone else, and none of the above solutions address individual actions injurious to people with disabilities. In fact, some studies indicate that people with physical disabilities may be more affected by personal injury accidents—"[p]edestrians in wheelchairs were 36 percent more likely to die in [collisions with cars] than other people"—not necessarily because of their own wrongdoing.[16] Georgetown University Professor John Kraemer has explained that this phenomenon may occur "because drivers are less likely to see [pedestrians using wheelchairs], brake, and collide

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14 Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2342 (2021) (coining and defining the term "disability admin" as administrative labor that disabled individuals take on to access benefits, medical care, and accommodations).

15 *See* 42 U.S.C. § 12182. Under the current language of Title III, private plaintiffs cannot recover monetary damages in privately initiated actions. Courts can only award monetary damages in actions initiated by the Attorney General. *Id.* § 12188(b)(2)(B).

16 Lisa Rapaport, *Wheelchair Users More Likely to Die in Car Crashes*, REUTERS (Nov. 25, 2015), https://www.reuters.com/article/business/healthcare-pharmaceuticals/wheelchair-users-more-likely-to-die-in-car-crashes-idUSKBN0TE2R2/.

slower."[17] This data indicates not only "that city planners should consider ways to make sidewalks safer," but also that "*drivers* should be aware that people in wheelchairs may not move or react in the same way as others do."[18] In sum, retooling tort law complements changes to infrastructure and other policies that advance disability rights.

This Comment proceeds in six parts. Part I identifies and explains the evolution of tort theory and how a disability-rights-centered interpretation of tort law falls in line with this tradition. It then defines the disability framework through which I will analyze current tort doctrine and propose solutions. Part II provides an overview of the reasonableness standards for parties with and without disabilities and how foreseeability, notice, and comparative negligence interact with these standards and the duty of ordinary care. Part III applies the disability-rights-centered interpretation described in Part I to the doctrinal concepts outlined in Part II, critically analyzing how these understandings build on each other to disadvantage people with disabilities.

Parts IV, V, and VI outline interlocking proposals for reconceptualizing existing doctrinal rules to more equitably include plaintiffs with disabilities. Part IV proposes reinterpreting the duty of ordinary care to encompass disability-informed care, which I call the disability-inclusive theory of ordinary care. Simultaneously, this proposal eliminates the requirement that disabled plaintiffs provide notice or somehow appear obviously disabled to expect accommodative care from potential tortfeasors. Part V proposes incorporating mental labor stemming from self-accommodation, including disability admin, into reasonableness determinations for plaintiffs with disabilities. Finally, Part VI considers removing comparative and contributory negligence—and therefore inquiries into the reasonableness of disabled plaintiffs' acts of self-accommodation—to prevent disproportionate expectations on plaintiffs with disabilities from influencing their ability to recover. The Comment concludes by urging legal practitioners, judges, and academics to reconsider the current balance of accommodative labor in negligence cases—to treat care of disabled individuals as *ordinary*.

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[17] *Id.*

[18] *Id.* (emphasis added).

I. SITUATING DISABILITY AND LABOR IN THEORIES OF TORT LAW

Before diving into the fine-grained details of tort doctrine and how it applies to cases in which a party has a disability, this Part contextualizes the Comment's project in existing theories of tort law. It first explains how the relationship between normative insights and doctrine have developed over time and outlines the primary normative theories underlying the doctrine. Then, it defines and situates a disability-centered theory of tort law based in the social model of disability.

A. Theories of Tort Law

While terms like "reasonableness" and "duty of ordinary care" are ambiguous, they have historically been interpreted in light of the perceived purposes of tort law.[19] Yet the perceived purposes of tort law have changed over time. The earliest tort practitioners and theorists, including Aristotle, viewed tort law through a "corrective justice" lens, focusing on "the moral relationship that arose from the 'doing and suffering of harm'" as "the basis for the imposition of liability."[20] This understanding continued undisturbed until the late nineteenth century, when jurist Oliver Wendell Holmes Jr. suggested replacing the analysis of a tortfeasor's morality with a tortfeasor's reasonableness, grounding his argument in "social need."[21] Holmes's assertion, paired with a burgeoning legal realist movement, led many judges to innovate based on unique fact patterns.[22] Subsequently, economic and social justice schools of thought arose, providing more stable frameworks for consistent interpretation based on core underlying values. However, neither won out, and this paradigmatic split remains today.[23]

The two dominant theories—corrective justice and economics—have utilized the ambiguous nature of reasonableness to sustain competing normative claims about the purpose of torts. While economic theorists believe efficiency should guide judges' understandings of reasonableness, corrective justice theorists

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[19] *See* Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1331–34 (2017).

[20] *Id.* at 1327 (quoting Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 411 (1989)).

[21] *Id.*

[22] *See id.* at 1328–29.

[23] *See id.* at 1329–30.

point to formal equality as a judge's North Star.[24] On the one hand, "lawyer-economists have suggested that 'reasonable care' depicts the deployment of cost-justified precautions."[25] For example, Judge Guido Calabresi has famously argued that "tort doctrine should aim to reduce the cost of accidents by shifting liability to the least cost avoider," and scholars "William M. Landes and Richard A. Posner [have] argued that . . . the effect of many tort doctrines was to assign liability in a way that incentivized the efficient allocation of resources."[26] Meanwhile, "corrective justice theorists have cast 'reasonable care' in terms of the . . . precautions necessary to ensure that one's freedom of action coexists with the similar freedom of others."[27] Simply put, this line of thought seeks to balance an individual's right to engage in risky behavior with another individual's right to be free from the consequences of that behavior.

Recently, tort scholar Cristina Tilley has suggested that the Second Restatement of Torts, which reflects generally accepted modern views on tort law, does not fully embrace either one of these views. Instead, it embraces a mixture of the two and what she calls "community norms" to guide courts in determining the meaning of reasonableness and the duty of ordinary care.[28] The Third Restatement of Torts has developed consistently with Tilley's analysis of the previous Restatement. For example, the Third Restatement states that judges can "articulat[e] general social norms of responsibility as the basis for" deciding whether a duty exists or not.[29] Tilley asserts that this placeholder of social or community norms provides room for normative input into tort doctrine, in line with developing social values.[30] She also describes economic- and justice-focused theories of torts as working within the ambiguity provided by such broad standards.[31] It seems that tenBroek, too, worked within the "community norms" framework by arguing that a then-recent sociopolitical push for integration

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24 Avihay Dorfman, *Negligence and Accommodation*, 22 LEGAL THEORY 77, 104 (2016).

25 *Id.* at 78.

26 Tilley, *supra* note 19, at 1329.

27 Dorfman, *supra* note 24, at 78.

28 *See* Tilley, *supra* note 19 at 1341–43.

29 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. c. (AM. L. INST. 2010).

30 *See* Tilley, *supra* note 19, at 1365, 1381.

31 *See id.* at 1341–42.

of people with disabilities should act as a framework for understanding and developing tort law.[32]

Finally, social justice tort theory (SJTT) has recently joined the ranks of tort paradigms. It operates from "the premise that tort law reflects and sometimes reinforces systemic forms of injustice in the larger society."[33] Traditionally, proponents of SJTT have aimed "to achieve justice in the distribution of wealth, opportunities, and privileges in society, breaking down structural barriers and challenging implicit and cognitive biases that reproduce longstanding disparities in virtually every facet of social and economic life."[34] SJTT encompasses a variety of critical theories, as well as "social psychology, political economy, and history," for example.[35] Its deeply multifaceted nature distinguishes it from the single-subject approaches of law and philosophy or law and economics.

B. The Social Model of Disability as a Normative Framework

Current scholarship lacks discussion of tort doctrine as a tool for redistributing labor to account for systemic inequality. Proponents of SJTT have not focused on redistribution of labor, even with its seemingly close ties to economics and wealth. Even tenBroek's SJTT-esque analysis about who should bear the cost of accidents focused on using torts to equitably distribute the financial costs of accidents by placing the legal responsibility on the party more likely to have sufficient financial resources. Specifically, he argued that insured drivers should bear the burden against uninsured blind pedestrians and that "[i]f the policy of integration is socially valuable, then it should be financed by the public generally, least of all by the necessitous disabled traveler."[36]

Drawing from tenBroek's integrationist theory, SJTT, and economic theories, this Comment conceptualizes tort law as a tool to incentivize not only integration, but a universally designed society in which people with physical disabilities can shape community norms without having to take on a disproportionate burden in doing so. This Comment's theorization of tort law—of the duty

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[32] *See* tenBroek, *supra* note 3, at 852.

[33] Martha Chamallas, *Social Justice Tort Theory*, 14 J. TORT L. 309, 315 (2021).

[34] *Id.* at 310.

[35] *Id.* at 315–16. For an example of an SJTT piece on critical disability studies, see generally Anne Bloom with Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709 (2011).

[36] TenBroek, *supra* note 3, at 916.

of ordinary care and standard of reasonableness—is rooted in the social model of disability and proactive Universal Design principles illustrated below.

1. The social model of disability.

To critically analyze tort law's current framing of disability and reinterpret it in a disability-positive light, we must first define disability as a concept. Models of disability provide important frameworks for understanding the causes of disability and our cultural understanding of it. The paradigms are constantly evolving, but here I will focus on two of the most well-known: the medical model and the social model. Although the medical model has historically pervaded legal and other policy approaches to disability, the disability community has overwhelmingly rejected it in favor of the social model and other, more nuanced approaches.[37]

The medical model centers a physical condition, or impairment, as the cause of disability and emphasizes a need for the "treatment" or "cure" of the impairment.[38] Scholars and disability rights activists have criticized this model for pathologizing and stigmatizing people with disabilities, as it implies that something is inherently wrong with them.[39] The model's focus on the disabled individual thus "relieves society of any obligation other than to care, treat, or cure the person," disincentivizing individuals from questioning societal structures that "create[ ] barriers to inclusion."[40] In practice, this medical paradigm has supported restrictions on disabled individuals' autonomy through forced institutionalization, medication, and sterilization, for example.[41]

The social model of disability and its variations, such as the civil rights model, directly challenge the medical model and are widely accepted by critical disability scholars and the disability

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37 DAVID CARLSON, CINDY SMITH & NACHAMA WILKER, DEVALUING PEOPLE WITH DISABILITIES: MEDICAL PROCEDURES THAT VIOLATE CIVIL RIGHTS 16 (2012) (available at https://perma.cc/KH59-M9R6).

38 Arlene S. Kanter, *The Relationship Between Disability Studies and Law*, *in* RIGHTING EDUCATIONAL WRONGS: DISABILITY STUDIES IN LAW AND EDUCATION 1, 3, 7 (Arlene S. Kanter & Beth A. Ferri eds., 2013).

39 CARLSON ET AL., *supra* note 37, at 13 ("The medical model of disability led the United States to take the stance that individuals with disabilities should remain out of sight and out of mind.").

40 Kanter, *supra* note 38, at 7.

41 *See id.* at 18; CARLSON ET AL., *supra* note 37, at 13. *But see generally* ELI CLARE, BRILLIANT IMPERFECTION: GRAPPLING WITH CURE (2017) (exploring the tensions between beneficial medical care and the negative social implications of a "cure" framework through theory, history, and personal experience).

community.[42] The social model of disability "does not go so far as to negate the existence of the impairment, nor . . . deny the person's pain, suffering, or need for treatment, rehabilitation, and support."[43] Rather, the social model critically examines social norms associated with disability and rejects the notion that physical or mental impairments are inherently disabling. It posits that "disability [is] the interaction between societal barriers (both physical and otherwise) and the impairment,"[44] defining "the social meaning of the impairment as the source of the person's oppression rather than the person's impairment itself."[45] By "position[ing disability] as a social construct," the social model "put[s] the responsibility for reexamining and repositioning the place of disability on society itself"[46] to "change or adapt its services, programs, facilities, and systems so that *all* people can exercise their rights, regardless of whether they have [a] particular impairment or not."[47] However, many have also criticized the social model of disability or taken a more nuanced view of the model to account for "the fact that some impairments can actually affect a person's life in a negative way that a change in society can't" completely resolve (e.g., chronic pain).[48]

2. Universal Design.

The Universal Design framework strives to create accessible environments on the front end rather than provide ad hoc accommodations after somebody with a disability encounters an inaccessible environment and requests assistance, thereby making accommodations obsolete. The current practice of accommodating and retrofitting previously inaccessible systems reflects the notion that "the law and society in general view difference as a deviation from an 'unstated norm.'"[49] For example, accommodations are typically made retroactively on an individualized basis after an individual with a disability jumps through bureaucratic

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42 Kanter, *supra* note 38, at 7.

43 *Id.* at 11.

44 Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 428 (2000).

45 Kanter, *supra* note 38, at 11.

46 *Id.* at 2.

47 *Id.* at 11 (emphasis in original).

48 *E.g.*, Caroline O'Toole, *Medical vs Social Model of Disability: What the Difference Is, and Why I Chose Social*, THE BREEZE (July 1, 2021), https://perma.cc/MKW6-64WF. *See generally* CLARE, *supra* note 41.

49 Kanter, *supra* note 38, at 20.

hoops, informs another person or business of their disability and needs, or in some cases, sues under the ADA. Requiring disabled individuals to ask others to deviate from the norm to receive services implies that accommodations are something extraneous or additional to normalized needs of people without disabilities.

Universal Design principles can apply to both the law on the books and its aims. Rather than accommodating people with disabilities in the law by providing an extra rule, the law should strive for a universally designed rule that includes the experiences of people with disabilities. Additionally, the law should incentivize development of a universally designed society that makes the need for accommodations obsolete.

The Universal Design movement goes hand in hand with the social model of disability because it focuses on creating accessible environments. The term was first defined in the context of physically accessible architecture as "[t]he design of products and environments to be usable by all people, to the greatest expect [sic] possible, without the need for adaptation or specialized design."[50] Since its conception, the term has been expanded and applied to various fields, including non-physical areas, such as policy. A few applicable principles of Universal Design are:

"1. Equitable Use: The design is useful and marketable to people with diverse abilities.

2. Flexibility in Use: The design accommodates a wide range of individual preferences and abilities.

3. Tolerance for Error: The design minimizes hazards and the adverse consequences of accidental or unintended actions."[51]

This Comment's proposal deploys these principles to reframe tort doctrine. For the first principle, the duty of ordinary care should apply to people with and without disabilities. In doing so, the duty will also apply flexibly to a range of abilities, meeting the second principle. For the second principle, a general shift in the expected behavior that constitutes ordinary care can account for varying ability. It does so by assuming that any person could have a disability and therefore incorporating what some courts refer to as "enhanced" caution or care into the definition of

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[50] Mary A. Hums, Samuel H. Schmidt, Andrew Novak & Eli A. Wolff, *Universal Design: Moving the Americans with Disabilities Act from Access to Inclusion*, 26 J. LEGAL ASPECTS SPORT 36, 40 (2016) (quotation marks omitted) (quoting Valerie Fletcher, *Inclusive/Universal Design: People at the Center of the Design Process*, *in* THE ROUTLEDGE COMPANION FOR ARCHITECTURE DESIGN AND PRACTICE 251, 258 (Mitra Kanaani & Dak Kopec eds., 2015)).

[51] *Id.* at 41.

ordinary care.[52] Finally, for the third principle, expanding the meaning of reasonable care and ordinary care to include care for individuals with disabilities will create more tolerance for error on the part of the people with disabilities by alleviating some of the labor they exercise in taking precautions.

3. Defining labor.

Disability law scholar Elizabeth Emens coined the term "disability admin" to describe the administrative labor that people with disabilities take on in managing healthcare, accessing benefits and accommodations, and reporting discrimination, among other tasks.[53] What Emens calls "life admin," administrative work done outside of the office, accumulates from "scheduling and ordering and answering calls and filling out forms, and . . . long-range planning and financial decision-making and overseeing the work of any helpers."[54] Unlike other forms of labor, "[a]dmin is relatively invisible," as it "is often done in the interstices of everything else . . . and much of it is mental work."[55] However, it is also pervasive. Rather than one-off interactions of self-accommodation, disability admin collectively builds up and weighs on individuals.

This Comment builds on the idea of disability admin by subcategorizing it under what I call "accommodative labor." Accommodative labor goes beyond the administrative-like tasks covered by disability admin. It also includes the labor that disabled individuals put into making nondisabled individuals more comfortable,[56] advocating for accommodations (individual or universal), or

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52 *See, e.g.*, Wright v. Engum, 878 P.2d 1198, 1202 (Wash. 1994).

53 *See* Emens, *supra* note 14, at 2342.

54 *Id.* at 2335.

55 *Id.* at 2336.

56 For example, neurodivergent individuals expend labor while "masking" by hiding shamed or nonnormative traits, expressions, interests, or other characteristics associated with their neurotype to prevent others from discriminating against them or ostracizing them. *See* Beth Radulski, *What Are 'Masking' and 'Camouflaging' in the Context of Autism and ADHD?*, THE CONVERSATION (Jan. 8, 2023), https://perma.cc/GDV7-69HU. While doing so accommodates the individual with a disability by allowing them to fit into a disability-exclusionary society, it more so accommodates nondisabled individuals by making them more comfortable. This accommodative labor is unbalanced. While many people with autism learn scripts or study social cues to be accepted by neurotypical peers, most neurotypical people do not take time to learn about neurodivergent forms of communication. Thus, the party with autism has put more labor in *and* is more uncomfortable than the neurotypical individual.

As a note, neurodivergent is usually an umbrella term for people with autism, ADHD, and other neurotypes medically deemed "atypical." Some individuals with these neurotypes

educating others about disability and access. Accommodative labor also includes any labor undertaken by people without disabilities—or with different disabilities—to accommodate other disabled individuals. Accommodative labor as a term is value neutral: it is not additional or burdensome and should not be viewed as such. In the end, accommodative labor should be normalized, ordinary labor distributed equitably and done on the front end of interactions with people with disabilities. Disability rights authors and advocates Alice Wong, Mia Mingus, and Sandy Ho have aptly summarized this goal in their #AccessIsLove campaign: "[A]ccessibility [should be] understood as an act of love, instead of a burden or an after-thought."[57] I merely use this term to clearly describe the labor distribution addressed by this Comment.

Historically, accommodative labor has disproportionately fallen on disabled individuals and accumulates to more labor than the sum of each individual task. In the context of disability admin, Emens has argued that "[a]bove a certain threshold, a greater quantity of admin demands can come to feel overwhelming in a qualitatively different sense" leading to "*admin onslaught*."[58] Emens further describes the multiplicative effect of disability admin in explaining that "interactions entailed by [it] consume time and mental energy, which already may be taxed by consequences of impairment or of an inaccessible environment."[59] Professor Annika M. Konrad has also coined the term "access fatigue" to describe exhaustion caused by pervasive and persistent self-accommodation in the form of "negotiating access."[60] Rejection or validation of one's life experience hangs over each of these interactions, making this work not only cognitively labor intensive but also emotionally draining.[61]

Put together, under the social model of disability, an inequitable distribution of accommodative labor that weighs on disabled individuals can further disable those individuals by placing them

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do not use the term neurodivergent because it sets them apart from the norm and has been used to pathologize those individuals. However, many people identify with the term as one of pride. *See, e.g.*, Cara Liebowitz, *Here's What Neurodiversity Is—And What it Means for Feminism*, EVERYDAY FEMINISM (Mar. 4, 2016) https://perma.cc/S9MN-3RS6.

57 *Access is Love: About*, DISABILITY INTERSECTIONALITY SUMMIT, https://perma.cc/K5QD-KGMV.

58 Emens, *supra* note 14, at 2341 (emphasis in original).

59 *Id.* at 2354.

60 Annika M. Konrad, *Access Fatigue: The Rhetorical Work of Disability in Everyday Life*, 83 COLL. ENG. 179, 180, 182 (2021).

61 *Id.* at 184.

under significant mental and emotional strain. Both reducing the need for accommodative labor on an individual level through universal design and shifting some individualized accommodative labor onto society at large will reduce the disabling effects our current systems have on individuals with impairments.

II. TORT LAW BACKGROUND: A SYSTEMIC DISTRIBUTION OF RELATIVE RESPONSIBILITY

Tort law is most commonly known by its largest category—personal injury law—which usually boils down to a determination of negligence. Negligence cases require plaintiffs to prove four elements: duty, breach, causation, and harm. This Comment focuses on the first two elements. Unless a special relationship exists between the parties (e.g., between doctor and patient, business and customer, common carrier and passenger, or social host and guest), or one party undertakes an additional duty to care for another,[62] the general duty of care between individuals is one of ordinary care.[63] The reasonable person standard is then used to determine whether a person fulfilled their duty of care by acting reasonably under the circumstances.[64] While judges determine whether a duty exists as a matter of law, juries determine whether a tortfeasor acted reasonably.[65] Still, these responsibilities are not completely bifurcated, as judges can adjust jury instructions to frame deliberation.

A. The Reasonable Person Standard

Generally speaking, "[a] person acts negligently if the person does not exercise reasonable care under all the circumstances."[66] Primary considerations in determining reasonableness include "the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm."[67]

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62 *See* Ocotillo W. Joint Venture v. Superior Court, 844 P.2d 653, 656 (Ariz. Ct. App. 1992) (holding that one party undertook a duty to care for an intoxicated party in offering to drive the intoxicated party home).

63 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (AM. L. INST. 2010).

64 *Id.* § 3.

65 *See id.* §§ 3, 7(a); *Reasonable Person*, BLACK'S LAW DICTIONARY (12th ed. 2024); *Reasonable Person*, CORNELL L. SCH. LEGAL INFO. INST., https://perma.cc/5QLN-KG2T.

66 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (AM. L. INST. 2010).

67 *Id.*

The reasonable person standard applies differently to people with disabilities.[68] Assumptions regarding a disabled individual's duty to accommodate themselves, the foreseeability of conduct affecting a disabled individual, and notice all contribute to the meaning of reasonable care as applied to people with disabilities. However, the black-letter standard is that a plaintiff with a disability "is negligent only if [their] conduct does not conform to that of a reasonably careful person with the same disability,"[69] and this standard may "supplement or somewhat subordinate" the primary considerations of the general reasonableness standard.[70]

Courts and scholars have justified this differential treatment on the premise that people with disabilities cannot always take the same precautions as people without disabilities and therefore should not be held to the same standard. For example, an individual with a mobility impairment cannot "run as a speeding car approaches, even though running is a convenient precaution for most pedestrians," and a "blind person . . . is unable to see dangers that would be readily observed by others."[71] Thus, it would be unreasonable to require disabled individuals to take impossible precautions.

However, tort law also assumes that having a disability necessarily entails greater risk, which the disabled individual should recognize and compensate for in daily life. According to the Third Restatement, conduct of disabled individuals

> will foreseeably entail a greater risk than the same conduct engaged in by able-bodied persons. Able to foresee this, an actor can be found negligent for not adopting *special precautions* that can reasonably reduce the *special dangers* that the actor's conduct involves. For example, it is considerably more dangerous for a blind person to walk over unfamiliar terrain than for a person free of disability. Thus, depending on the circumstances, a blind actor may be found negligent for walking over such terrain without a cane or some other form of assistance. . . . [E]ven with [ ] precautions adopted, there may be a level of risk associated with the

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68 *See id.* § 11.

69 *Id.* For a discussion of the differential application of this standard to defendants and plaintiffs with disabilities, see Dorfman, *supra* note 24, at 90–92.

70 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. d. (AM. L. INST. 2010).

71 *Id.* § 11 cmt. b.

> activity that makes it negligent for an actor to engage in the activity *at all*.[72]

This frames the danger as inherent to the individual, not a product of society.

The perception of heightened danger and emphasis on compensating for one's disabilities to prevent such danger has led some states to burden plaintiffs with using "extraordinar[y] vigilan[ce] in the exercise of their unimpaired senses."[73] Thus, people with disabilities do not have a lower standard of care, but perhaps even an increased standard of care in some instances.[74]

B. Reasonableness Relative to the Other Party

What is considered reasonable for the plaintiff and defendant both shapes and is shaped by assumptions about others' abilities, which can impact the distribution of damages. First, this Section discusses how the relationship between the foreseeability of a person's disability and the requirement of notice reflects this observation. Then, this Section explains how damages are apportioned according to relative responsibility between the parties. Finally, this Section illustrates this relationship through a historical example: white-cane laws.

1. Foreseeability and the role of notice.

A potential tortfeasor's awareness of certain circumstances impacts reasonableness determinations. While a judge has control in determining whether a duty exists, the jury is charged with determining if a defendant (or plaintiff) acted reasonably in executing that duty. Because the foreseeability of a risk, or the awareness of certain circumstances prior to the tortious act, often factors into determinations of reasonableness, it is most relevant to juries.[75]

Without notice of a disability, potential tortfeasors are usually deemed reasonable in assuming that those they interact with

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[72] *Id.* (emphasis added).

[73] WILLIAM LINDSLEY, MARK T. ROOHK, KAREN L. SCHULTZ, LISA A. ZAKOLSKI & STEPHANIE ZELLER, NEW YORK JURISPRUDENCE § 162 (2d ed. 2023).

[74] *See, e.g.*, Dorfman, *supra* note 24, at 89 n.40 (quoting Traphagan v. Mid-Am. Traffic Marking, 555 N.W.2d 778, 787 (Neb. 1996)) ("[A] reasonably careful person with a like disability may be required to put forth a greater degree of effort than would be necessary by others in order to exercise ordinary care under the circumstances.").

[75] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. j. (AM. L. INST. 2010).

will also act reasonably and take their own precautions. The interdependence thesis explains the role awareness plays in reasonableness determinations: awareness (similar to assumption of risk[76]) by one party implicates the reasonable expectations of the other party. If "the defendant reasonably believes that the plaintiff is aware of a risk and voluntarily undertakes it . . . [,] [t]he defendant might reasonably have relied on the plaintiff to avoid the known risk."[77] In other words, a defendant's reliance on a *reasonable belief* about the plaintiff could mean that they acted reasonably and therefore did not breach their duty of care.

In the disability context, this means that a defendant can reasonably rely on a plaintiff to either act like a reasonable person (i.e., not a reasonable person with a disability) or provide notice of disability. Essentially, it is deemed reasonable to assume that another person does not have a disability in calculating reasonable action, making people without disabilities the default in reasonableness calculations.

However, various factors can affect this expectation. A defendant's reasonableness in taking precautions depends in part on their awareness of the plaintiff's disability, either from its foreseeability or from notice. First, foreseeability varies with the type of disability at issue in relation to the context in which the activity occurs:

> [T]he foreseeable presence of physically disabled victims within the zone of danger partly determines the level of care that would properly count as "reasonable." In some cases, the *ex ante* influence exerted by the presence of such victims on the tortfeasor's exercise of care will be quite overwhelming. This will be so if the presence within the zone of danger of a physically disabled person is *particularly* foreseeable. For instance, the tortfeasor knows (or can be expected to know) that she is driving in a closed community of elderly people. At other times, however, the possible presence of physically disabled persons becomes a matter of statistical foreseeability. In such cases, the disabilities of victims exert their (*ex ante*) influence

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[76] Assumption of risk can bar a plaintiff from recovery where they "take[ ] on the risk of loss, injury, or damage." *Assumption of the Risk*, BLACK'S LAW DICTIONARY (12th ed. 2024). Some jurisdictions consider assumption of risk in determining comparative negligence, and therefore reasonableness. Other jurisdictions, such as California, have held that assumption of risk extinguishes the duty of care. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. j. (AM. L. INST. 2010).

[77] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 3 (AM. L. INST. 2000).

> on fixing the amount of care in a way that reflects their (statistically) possible presence within the zone of danger. Thus, whether the disability of a victim is particularly foreseeable or merely statistical, the duty of care places a demand on risk creators to incorporate it into their decision concerning how much care they ought to exercise in any given case.[78]

So, a reasonable person does not necessarily assume anyone could have a disability or that nobody has a disability but determines the likelihood a person will have a disability based on the area they traverse.

Professor Adam Milani has argued that, after the passage of the ADA, "no city or private landowner can now reasonably argue that it cannot foresee people with disabilities using its facilities."[79] Consequently, the city or landowner must "afford that degree of protection" that notifies a disabled individual of a potential danger.[80] In other circumstances, including people with disabilities crossing the street, academics and courts have asserted that drivers should exercise increased caution only if they have reason to believe that the person crossing the street is a person with a disability, as indicated by using a white cane, for example.[81] This is likely because the ADA covers businesses, but not individuals, and therefore provides only businesses with formal notice.

But even in the context of businesses, courts still seem to require more specific notice than the existence of the ADA. In one case, *Pucci v. Carnival Corp.*,[82] plaintiff Judith Pucci drowned on a Carnival cruise snorkeling excursion.[83] Because she notified Carnival of her "limited swimming ability and advanced age" when inquiring about the safety of the snorkeling excursion, "Carnival may have had 'to do more under the reasonable care standard toward [Pucci] than it would toward a passenger with no physical disability,' or other such restrictions."[84] However,

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78 Dorfman, *supra* note 24, at 116–17 (emphasis in original); *see also* Balcom v. City of Independence, 160 N.W. 305, 308–10 (Iowa 1916) (holding that because the blind plaintiff travelled down the same route for ten years, the defendant should have known to warn the plaintiff of the construction that ultimately injured him).

79 Milani, *supra* note 2, at 354–55.

80 *Id.* at 355 (quoting Fletcher v. City of Aberdeen, 338 P.2d 743, 746 (Wash. 1959)).

81 *See, e.g.*, *id.*; tenBroek, *supra* note 3, at 841; Wright v. Engum, 878 P.2d 1198, 1204–06 (Wash. 1994).

82 146 F. Supp. 3d 1281 (S.D. Fla. 2015).

83 *Id.* at 1284–85.

84 *Id.* at 1288 (quoting Carroll v. Carnival Corp., 2013 WL 1857115, at *4 (S.D. Fla. May 2, 2013)).

because Pucci failed to notify the snorkeling excursion's operator, the court held that the operator did not owe Pucci more under the reasonable care standard, and was not required to warn her of potential dangers.[85] Thus, businesses are typically not expected to provide accommodations unless they are put on notice of a disability because the probability of a person having a disability is presumed to be low. This conclusion rests on the assumption that, to act reasonably, people with disabilities will accommodate themselves or notify an individual of their disability.

2. Comparative negligence.

Although defendants in many states can no longer raise the complete affirmative defense of contributory negligence,[86] under the partial comparative responsibility or comparative negligence defense, the jury apportions damages according to the responsibility of each party for the respective harm caused.[87] In determining the plaintiff's responsibility, the reasonable person standard applies in the same way it applies to the question of defendant liability.

In theory, comparative negligence should only reduce monetary damages awarded. However, most states prohibit—in some shape or form—the plaintiff from "recover[ing] damages if they are found to be 50% or more at fault."[88] For example, "courts have used comparative negligence principles to either bar or reduce claims by plaintiffs who have not made reasonable use of their canes or dogs."[89]

Professor Avihay Dorfman has argued that "the method of assessing comparative negligence may sometimes determine the *character* of the defendant's conduct—viz, is the conduct negligent *at all*?—and at other times determine the *scope* of the negligence that can be attributed to the defendant."[90] So, what constitutes reasonable action for the plaintiff can influence the reasonableness of the defendant's action and vice versa (as seen in the discussion of foreseeability). Even where a formal comparative

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85 *Id.*

86 *See supra* note 9.

87 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11 (AM. L. INST. 2010).

88 *Comparative Negligence*, CORNELL L. SCH. LEGAL INFO. INST., https://perma.cc/UDH3-EPGZ.

89 Milani, *supra* note 2, at 360–61.

90 Dorfman, *supra* note 24, at 85–86 (emphasis in original).

negligence analysis does not take place, the relative care expected of each party can influence the ultimate determination of negligence. However, the law also influences the relative responsibilities of both parties by deciding the point of reference for each party to measure their conduct—the reasonable person.[91]

The distribution of damages through comparative negligence relies on the relative negligence of each party, and "the standard of reasonable care fixes the terms of the interaction between defendant and plaintiff."[92] Therefore, the relative responsibility between the plaintiff and defendant in creating an accommodating and accessible environment hinges on what constitutes reasonable care for each party.

C. Historical Relativity in the Disability Context: White-Cane Laws

Historically, courts failed to cohesively define reasonable conduct for blind plaintiffs, which affected contributory negligence determinations. For example, courts arrived at varying conclusions with respect to how blind plaintiffs' use of aids factored into contributory negligence determinations.[93] Additionally, as Milani explained:

> [C]ourts took different positions regarding disabled plaintiffs' knowledge of the surroundings: some said that their knowledge that streets may be dangerous or defective created a type of *assumption of the risk*; other courts found that they could proceed with due care in light of that knowledge; others ruled that disabled persons could assume that streets and highways were kept in a reasonably safe condition and property owners would take precautions to warn or protect them; and still others said that those working on streets and sidewalks only have a duty to protect able-bodied pedestrians.[94]

Courts' analyses here reflect tensions over what constitutes reasonable action for blind individuals and whether failure to comport with that definition denied those individuals relief, as discussed in the previous Section.

The passage of state white-cane laws during the twentieth century provided judges with a clearer definition. Generally,

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91 *See id.* at 86–87.

92 *Id.* at 104.

93 *See* Milani, *supra* note 2, at 342.

94 Milani, *supra* note 2, at 343 (emphasis added).

these laws make it a misdemeanor for a driver to fail to accommodate a clearly blind individual crossing the road.[95] While most of these laws do not directly address tort liability,[96] some courts have held that violating them can constitute negligence per se. At least one of these courts has held that these laws create "special dut[ies]" in addition to "the common-law ordinary care rule."[97] However, these duties do not apply at all unless the driver is aware of the pedestrian's disability. Conversely, other courts have interpreted these statutes as adopting a normal due care standard. For example, the Supreme Court of Washington has explained that nothing "suggests that the Legislature intended to hold motorists liable even where the motorist was reasonably unaware of the pedestrian's impairment."[98]

While these laws changed analysis of contributory and comparative negligence, they did not eliminate them. Regarding unprotected hazards on streets and sidewalks, white-cane laws abrogated (in varying degrees) precedent that considered blind individuals' usage of technological aids in determining contributory or comparative negligence as a matter of law.[99] However, as a matter of common law, courts still allow juries to consider if and how assistive technology was used when determining comparative negligence. For example, *Coker v. McDonald's Corp.*[100] did not hold that the plaintiff's use of such devices meant that they had acted reasonably as a matter of law. The court merely concluded that the plaintiff was *not unreasonable* as a matter of law and that reasonableness was a jury issue.[101] Therefore, white-cane laws still leave plenty of room for reasonableness analyses and assumptions about people with disabilities to bleed into jury determinations.

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95 *See, e.g.*, W. VA. CODE § 5-15-5 (2024) and 775 ILL. COMP. STAT. ANN. 30/4 (West 2024).

96 *But see* ME. STAT. tit. 17, § 1313 (2023).

97 Caskey v. Bradley, 773 S.W.2d 735, 738 (Tex. App. 1989).

98 *Wright*, 878 P.2d at 1203; *see also id*. ("Plaintiff has not presented this court with any examples of statutes in other jurisdictions that hold motorists who collide with blind pedestrians strictly liable regardless of notice.").

99 *See, e.g.*, GEORGE L. BLUM & MARY ELLEN WEST, CALIFORNIA JURISPRUDENCE § 85 (3d ed. 2024) ("[F]ailure to carry a cane or to use [ ] a guide dog does not constitute negligence per se.").

100 537 A.2d 549 (Del. Super. Ct. 1987).

101 *Id.* at 551.

III. SYSTEMIC DEVALUATION OF DISABLED INDIVIDUALS

The current understanding of reasonableness, the relative responsibility of disabled plaintiffs and nondisabled defendants, and comparative negligence collectively operate to systematically disadvantage people with disabilities—devaluing the labor that they put into accommodating themselves to inaccessible environments. This Part identifies currently accepted interpretations of specific segments of tort doctrine that cumulatively disadvantage disabled individuals.

First, the current conception of foreseeability factored into reasonableness inquiries reinforces a segregationist paradigm—one that views people with disabilities as "other" and that has historically underlaid institutionalization.[102] It places disabled individuals outside the norm and reinforces harmful stereotypes about where it is reasonable to expect a person with a disability to exist. To overcome the presumption against disability, people with disabilities provide notice (either explicitly or through appearance) to others to receive disability-inclusive care. Together, the doctrines of notice and foreseeability indicate that nondisabled individuals are the default, or norm, factored into reasonableness calculations. Thus, disabled individuals' needs are not encompassed by "ordinary" care or "reasonable" actions—their needs are extraneous to this system, and they must therefore do more to receive adequate care.

Second, because care for individuals with disabilities in tort law is treated as "extra," disabled individuals must take on a disproportionate amount of labor in accommodating themselves, notifying others, or both.

Third, the comparative negligence regime compounds and enforces this disproportionate distribution of labor by limiting monetary damages based on heightened expectations of disabled individuals.

A. Foreseeability Reinforces a Segregationist Paradigm

The scope and acceptance of integrationist policies have expanded since previous scholarly commentary. With it, so too should our understanding of the community norms that define

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[102] *See generally* MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (Richard Howard trans., Vintage Books ed., Random House 1988) (1961) (critically analyzing the history of institutionalizing and separating people with disabilities from the general public).

reasonableness.[103] Since tenBroek and Milani's analyses, for instance, the U.S. Supreme Court has handed down multiple decisions interpreting the ADA, and Congress amended the Act in 2008.[104] Most notably, in *Olmstead v. L.C.*,[105] the Supreme Court broadly interpreted the ADA's prohibition on discrimination to include segregation and isolation of people with disabilities.[106] There, two women with developmental disabilities remained institutionalized despite medical professionals determining that the women's "needs could be met appropriately" in a less restrictive environment.[107] The Court held that "[u]njustified isolation . . . is properly regarded as discrimination based on disability."[108] In its analysis, the Court relied on congressional findings, including that "historically, society has tended to isolate and segregate individuals with disabilities."[109] This landmark case stands for an antisegregation and prointegration principle that reaches beyond its original Title II context—potentially into common law inquiries.[110] Thus, for tort law to effectively incorporate the integrationist approach of the ADA post-*Olmstead*, and therefore comply with today's community norms, it must break down barriers that reinforce segregation.

However, the reasonableness inquiry's reliance on the foreseeability of interacting with disabled people reinforces assumptions about where people with disabilities reside, work, and engage with the community. Dorfman's explanation—that a tortfeasor's awareness "that she is driving in a closed community of elderly people" necessitates a higher standard of reasonable care based on the overwhelming likelihood of residents having disabilities—relies on this expectation.[111] Adjusting the meaning of reasonable care based on an area that people with disabilities are likely to frequent essentially grants disabled individuals residing in segregated communities more protections than those in

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[103] *See supra* Part I.0 (discussing the role of community norms in tort theory).

[104] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.) (requiring "disability" and "substantial limitation on a major life activity" to be construed without consideration of assistive technology or medication).

[105] 527 U.S. 581 (1999).

[106] *See id.* at 583.

[107] *Id.* at 593.

[108] *Id.* at 597.

[109] *Id.* at 588.

[110] *See, e.g.*, *Justice Department Celebrates Anniversary of the Supreme Court's* Olmstead *Decision*, U.S. DEP'T OF JUST. (June 22, 2023), https://perma.cc/92Y9-DDRP.

[111] Dorfman, *supra* note 24, at 116.

integrated areas while also reinforcing norms about where disabled people belong.

Furthermore, requiring individuals with disabilities to appear disabled in order to receive appropriate caution from drivers or other pedestrians reinforces stereotypes and silos them into specific, expected roles—segregating disabled individuals socially, if not literally. How can individuals with disabilities truly integrate into society if they are forced to represent themselves according to stereotypes set by others?

B. Notice and Accommodation as Extra Labor

Accommodations are seen as additional needs only in comparison to what is considered ordinary ability in the United States. In tort law, this is evidenced by courts referring to the duty of care owed to people with disabilities as enhanced.[112] In addition to stigmatizing disabled people, referring to disabled individuals' needs as "special" reinforces the idea that disabilities are an individual, not societal, problem and "makes those who are disabled sound like an extra burden"[113] rather than simply people with needs like anybody else. The individualization of this problem further entrenches the view of disability as a medical, not social, phenomenon and displaces societal responsibility onto the individual.

Similarly, feminist scholars have critiqued androcentrism—the notion that the cisgender male body and its needs are the norm and bodily functions or needs not experienced by cisgender men are considered extra.[114] For example, pregnancy care is considered an additional need under an androcentric mindset because it exceeds the medical needs of the male norm.[115] These

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[112] *See, e.g.*, Milani, *supra* note 2, at 342–45 (quoting Mitchell v. Des Moines City Ry., 141 N.W. 43, 46–47 (Iowa 1913)) (referring to the duty of care owed disabled individuals on common carriers as "special care and assistance"); Caskey v. Bradley, 773 S.W.2d 735, 738 (Tex. App. 1989) (emphasis added):

> The driver is to take "necessary precautions" for persons guided by a support dog or carrying a white cane to avoid injuring them at or near a crosswalk or intersection. This creates a *special* duty to a specific class of persons at a specific place. As such, we believe that this statute creates a duty of care other than the common-law ordinary care rule.

[113] David Oliver, *'I Am Not Ashamed': Disability Advocates, Experts Implore You to Stop Saying 'Special Needs'*, USA TODAY (June 11, 2021), https://perma.cc/59YW-YZ3Z.

[114] *See* Sandra Bem, *Transforming the Debate on Sexual Inequality: From Biological Difference to Institutionalized Androcentrism*, *in* LECTURES ON THE PSYCHOLOGY OF WOMEN 2, 3–4 (Joan C. Chrisler, Carla Golden & Patricia D. Rozee eds., 4th ed. 2008).

[115] *Id.* at 4.

scholars argue that we must expand our understanding of baseline bodily functions to include all body types and genders. In the context of disability, the needs of or care owed to individuals with disabilities should not be seen as special care or an additional burden, but simply ordinary care.

Deeming accommodations and care for individuals with impairments as extraneous to ordinary or reasonable care further disables them by forcing them to accommodate themselves and adjust to an inaccessible, inhospitable system. Individuals with disabilities take on labor in providing others with notice of their disability or needs and taking extra precautions via assistive technology or planning. Additionally, some disabilities such as ADHD can require more effort to engage in executive functioning and planning, making this additional labor particularly burdensome for those who also have physical disabilities, for example.

Taking these precautions only adds to the mental and physical labor that people with disabilities manage via disability admin. Recall, disability admin encompasses the administrative labor that people with disabilities take on in managing healthcare, accessing benefits and accommodations, and reporting discrimination.[116] Requiring people with disabilities to provide others with notice by appearing disabled not only reinforces the segregationist paradigm as described in the previous Section but also can contribute to access fatigue by constantly "inventing a disabled self that is suitable for public engagement."[117]

Perhaps due to its invisibility, Professor Elizabeth Emens has observed that, in ADA cases regarding the reasonableness of an accommodation, "the cost-benefit analysis that courts and regulations have used to analyze 'reasonableness' . . . fails to account for the costs of the admin associated with particular means of 'accommodation' or 'modification.'"[118] Relatedly, courts have failed to account for the costs of disability admin in tort litigation when determining if a disabled plaintiff acted reasonably. Unlike the types of accommodations people are readily accustomed to (e.g., wheelchairs, ramps, white canes), much accommodative labor is done internally. Although it does not seem administrative in nature, the mental labor that internalized accommodative decisionmaking imposes on the disabled pedestrian is similar to that of Emens's disability admin—it is accommodative labor. Identifying

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116 *See supra* notes 53–55 and accompanying text.

117 Konrad, *supra* note 60, at 182.

118 Emens, *supra* note 14, at 2334.

the expansiveness of hidden forms of labor is crucial to ensuring just allocation of that labor.

For example, disability can impact the wait times for pedestrians crossing the street, as they must take additional actions and make additional internal calculations. One Italian study suggests that wheelchair users have longer wait times at crosswalks and drivers disregard their right-of-way more often than others.[119] The study also found that deaf individuals, while experiencing the same wait times as nondisabled pedestrians, still have to take additional measures, such as being hypervigilant in their surroundings, waiting to cross with crowds, and communicating with drivers via gesturing, because they know that drivers will probably assume that an individual can hear and may therefore only warn a pedestrian by honking their horn.[120] Failure to account for this labor when determining who should accommodate the person with the disability—the disabled individual or society at large—skews the calculation of care allocation. Other studies have found that "[d]isabled people also waited longer and did not take opportunities to cross at intersections/crosswalks due to fear of traffic environments, indicating important [negative] effects on mobility and ease of movement as a result of high traffic risk."[121] Collectively, this research suggests an increased mental load on people with disabilities to navigate the world that is exacerbated by high traffic risks.

The onus placed on the disabled plaintiff is especially stark in comparison to other plaintiffs, who typically must exert less reasonable care than their defendant counterparts. Though both economic and corrective justice theories attempt to incorporate a "symmetric measurement of reasonable care across the defendant/plaintiff divide," Professor Avihay Dorfman has asserted that the standard, in reality, applies asymmetrically.[122] The asymmetric nature, Dorfman argued, allows for substantive equality between parties with different rights at stake—plaintiffs seeking bodily security and defendants seeking unrestrained freedom to move.[123] For example, a pedestrian does not undertake any particularly dangerous activity and merely seeks to not be harmed in going

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[119] Dario Pecchini & Felice Giuliani, *Street-Crossing Behavior of People with Disabilities*, 141 J. TRANSP. ENG'G, no. 10, Oct. 2015, at 1, 13–15.

[120] *Id.*

[121] Naomi Schwartz, Ron Buliung, Arslan Daniel & Linda Rothman, *Disability and Pedestrian Road Traffic Injury: A Scoping Review*, 77 HEALTH & PLACE, Sept. 2022, at 1, 7–8.

[122] Dorfman, *supra* note 24, at 79.

[123] *Id.*

about their day. Meanwhile, a person driving a car or riding a bicycle undertakes a more dangerous activity to move faster. This difference alters how we value interests. Yet the asymmetric nature is upside down when it comes to plaintiffs with disabilities and nondisabled defendants.

Prostran v. City of Chicago[124] illustrates these problems. There, the court held that the city did not have a duty to provide a visually impaired plaintiff with warnings or barriers around a dug-up section of sidewalk because the danger was "open and obvious."[125] The plaintiff saw a rocky and muddy portion of the sidewalk when she got close to it, proceeded to step on it, and broke a few bones.[126] However, the plaintiff explained that the only other option—walking on the other side of the street—would have been more dangerous due to traffic.[127] Additionally, while the plaintiff saw the condition of the dug-up portion of sidewalk, she did not see a rock on the edge, which caused her fall.[128] Rather than considering the accommodative labor that the plaintiff had to put into weighing two dangerous options, the court dismissed this work as a mere "preference."[129] Further, the court found that the plaintiff should have asked for help or taken other action to accommodate the inaccessible landscape, as "a disabled person may be required, under particular circumstances, to take more precautions than a person who is not disabled."[130]

C. Contributory Negligence: Unfair Outcomes and Incentives

There are two problems with the current contributory negligence framework. First, the skewed labor distribution between a plaintiff with a disability and a defendant can lead to decreased damages and lost cases. Second, problematic normative assumptions underpin the relative distribution of labor between plaintiffs and defendants.

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[124] 811 N.E.2d 364 (Ill. App. Ct. 2004). This case does not involve the duty of ordinary care primarily discussed by this Comment, but the same principle applies in determining whether the ordinary rule for determining duty covers a disabled individual's needs.

[125] *Id.* at 370.

[126] *Id.* at 366–67.

[127] *See id.* at 367.

[128] *Id.* at 366–67.

[129] *Prostran*, 811 N.E.2d at 371.

[130] *Id.* at 368.

1. The stakes: reduced damages and lost cases.

Although contributory negligence does not bar a plaintiff from recovery in most states, comparative negligence can still reduce a plaintiff's damages or prevent a plaintiff from recovering damages at all. In determining comparative negligence, heightened expectations of what is an open and obvious danger to a person with a disability can make the difference.

In *Chase v. Physiotherapy Associates, Inc.*,[131] the jury denied plaintiff James Chase Jr. damages after it deemed him 50% negligent for injuries sustained from wheeling up a steep ramp in his wheelchair.[132] Why? Put simply, the jury concluded that Chase should have known better—a conclusion the appellate court found reasonable. The court denied Chase's claims "that there [was] no proof that he was comparatively negligent and that . . . the charge to the jury on this issue was prejudicial."[133] Instead, it ruled that a reasonable jury could have found that "he was negligent in encountering a known risk"—an "awful[ly] steep ramp."[134]

Even when plaintiffs receive damages, the diminution in damages by even apparently small percentages can cost disabled plaintiffs hundreds of thousands of dollars, potentially with no good explanation. For example, in *Eskew v. Burlington North & Santa Fe Railway*,[135] a jury found that decedent Scott Eskew, a blind man who consistently used the train carefully, was nonetheless 5% negligent in his death—reducing his estate's damages by $250,000. The eyewitness accounts provided in the record indicate that Eskew took great care in crossing the railroad path, but that the auditory notices provided by the train and station were confusing and unclear. What more was Eskew to do? Did his estate lose out on a quarter-million dollars simply because he was a blind man using a train station? Because juries do not typically have to explain their rationales, it is hard to tell when bias creeps into these calculations.

2. The underlying problem: unreasonable expectations.

The presumption against disability in exercising reasonable care—that a person is not disabled unless they obviously appear

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131 1997 WL 572935 (Tenn. Ct. App. Sept. 5, 1997).
132 *Id.* at *1.
133 *Id.* at *2.
134 *Id.* at *4.
135 958 N.E.2d 426 (Ill. App. Ct. 2011).

to be or identify as such—harms disabled individuals by placing unreasonable expectations and the onus of accommodation on the person with the disability. In the following examples, this holds true even where the defendant is the least-cost avoider—"the party who could have prevented the accident at the lowest cost."[136]

Tort law embraces skewed expectations of reasonable care exercised by a disabled versus a nondisabled person. *Chase*, the wheelchair-ramp case, provides a stark comparison. There, the court applied a "should have known better" standard to Chase in reasoning that he should have known not to attempt to use a potentially inaccessible ramp. The court ultimately concluded that the fact that Chase had seen the ramp only for a brief moment before ascending and used the ramp per the instructions of the physical therapist's office he was visiting did not outweigh his knowledge of the ramp's steepness before ascending.[137] Meanwhile, the court found that the landlord who leased to the physical therapy office, and was presumably more familiar with the building and its construction, was equally responsible.[138]

Perhaps the landlord of the building should have known that people with disabilities would access a physical therapy office and made sure that the building was accessible. After all, he had greater access to and control over the building and its renovations, and therefore was probably the least-cost avoider.[139] Even an efficiency-centered theory of tort liability would demand that the landlord be held accountable, as he is better equipped to fix a socially harmful structure at a lower cost (purchasing universally designed infrastructure) than a person who has no familiarity with the building or access to skilled workers is in finding out how to accommodate themselves.

Ultimately, the burden of exercising due care fell more heavily on Chase, who suffered injury without compensation, while the building owner suffered no monetary or physical harm. This kind of outcome puts people with disabilities in a bind: either attempt to use potentially dangerous means of entry or do not enter the building at all.

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136 Giuseppe Dari-Mattiacci & Nuno Garoupa, *Least-Cost Avoidance: The Tragedy of Common Safety*, 25 J.L. ECON. & ORG. 235, 235 (2007).

137 *Chase*, 1997 WL 572935, at *4.

138 *Id.* at *2.

139 *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 155 (1970).

Additionally, this case is reminiscent of pre-white-cane law precedent, which connected a disabled individual's use of technology to their ability to see "open and obvious" dangers.[140] Except here, the court expected a wheelchair user to know almost instantaneously when the slope of a ramp was "obviously" dangerous. Although people with disabilities have expert knowledge in disability through their lived experience, this does not mean that the law should expect individuals with disabilities to be experts on everything relating to disability. Here, the court should not have expected the plaintiff to possess extensive knowledge on the safe slope of a ramp—at least not the particular degree at which it becomes safe, and especially not after only a momentary glance. If anyone should be held accountable for knowing what degree of the ramp is safe, it should be the landlord or those they hired to build or design it. This would also be the most efficient assignment of due care because the builders or architects of the ramp would have actual knowledge of what constitutes a safe angle for a wheelchair ramp.

Even when a disabled individual takes precautions, they can still be barred from recovery due to the defendant's lack of perception. Some courts have held that using assistive technology, such as a guide dog or white cane, is not enough to put a defendant on notice unless the defendant actually sees the assistive technology. For example, in *Wright v. Engum*,[141] the court held that "substantial evidence supports a finding that [the defendant] was reasonably unaware of [the plaintiff's] blindness," and therefore, he did not owe her additional care.[142] The defendant did not see the plaintiff's white cane but did notice the plaintiff wearing sunglasses. Still, the court reasoned that although the defendant "noticed [her] dark sunglasses and wondered why anyone would wear such glasses on such a dreary day," he did not realize she "was wearing the glasses because she was blind."[143] So, even when the plaintiff utilized assistive technology and the defendant noticed she wore sunglasses when it was not sunny outside, the plaintiff was still not owed additional care under Washington's

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[140] Milani, *supra* note 2, at 349 (quotation marks omitted) (quoting *Coker*, 537 A.2d at 550–51).

[141] 878 P.2d 1198 (Wash. 1994).

[142] *Id.* at 357–58.

[143] *Id.*

white-cane law.[144] Once again, more is expected of the disabled plaintiff than the nondisabled defendant.

The imbalance in expectations is even more drastic in light of Dorfman's observation that a plaintiff merely seeks security from bodily harm whereas a defendant seeks total autonomy. In crossing the street, a plaintiff exposes only themselves to harm. Conversely, a defendant driving a car has much greater potential to harm—or even kill—others. Weighing each party's power to harm against the rights sought to be protected indicates that the law should expect much more of defendants. Yet here, it does the exact opposite.

IV. REINTERPRETING "ORDINARY CARE" AND ELIMINATING NOTICE

This Part begins by laying out the disability-inclusive duty of ordinary care and providing examples of how it would affect drivers' exercise of care when interacting with wheelchair users and blind pedestrians. It then grounds this proposal in the common law roots of res ipsa loquitur and economic theories of torts. Finally, it evaluates the feasibility of such a proposal amidst social change.

A. Defining the Disability-Inclusive Duty of Ordinary Care

A disability-inclusive theory of the duty of ordinary care assumes that any person could be disabled, rather than weighing: (1) the statistical chance that a potential tort victim is disabled based on the circumstances, as explained by Dorfman,[145] or (2) the assumption that a person is not disabled unless they self-identify as such, as described by Milani.[146] The disability-inclusive duty of ordinary care requires individuals to be aware of, and account for, the needs of people with various sensory and physical disabilities prior to placing themselves in a position to potentially injure others. Contrary to retroactive accommodations, this conceptualization is proactive—interpreting disability-specific care as *ordinary*, rather than an exception or addition.

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144 For a similar example, see *Cook v. City of Winston-Salem*, 85 S.E.2d 696, 702 (N.C. 1955) (holding a blind man contributorily negligent even though he correctly used a seeing eye dog because he "failed to put forth a greater degree of effort than one not acting under any disabilities to attain due care for his safety: that standard of care which the law has established for everybody").

145 *See supra* text accompanying note 78.

146 *See supra* text accompanying notes 79–81.

While personal injury law websites suggest driving slowly to accommodate disabled pedestrians,[147] for example, one can and should take more tangible actions to fulfill one's inclusive duty of ordinary care. This Section uses a few driver-pedestrian examples to identify proactive actions drivers can take to protect pedestrians who use wheelchairs and pedestrians who are blind *without prior notice*.

1. Pedestrians in wheelchairs.

Earlier, I highlighted that many wheelchair users crossing the street are in heightened danger of being hit by a vehicle.[148] Although seeing a pedestrian using a wheelchair would notify a driver of the pedestrian's disability and thus invoke a heightened duty of care under the current tort regime, such as the standard provided by white-cane laws, many drivers fail to see pedestrians in wheelchairs because they are lower to the ground than a person standing up.[149] Perhaps drivers do not see people in wheelchairs because they are not expecting or looking for pedestrians in wheelchairs. Furthermore, people in wheelchairs or motorized scooters may move more quickly than a pedestrian walking across the street and may not always be able to stop as quickly due to momentum from coming down a ramp. The disability-inclusive duty of care would require drivers to actively look for pedestrians with disabilities crossing the street instead of allowing those drivers to expect only walking pedestrians. To do so, the disability-inclusive duty of ordinary care would require drivers to turn their gaze downward and expect pedestrians in wheelchairs who may move more quickly than pedestrians walking across the street.

This paradigmatic shift might have made the difference in *May v. Petersen*,[150] where plaintiff David May, a wheelchair user, collided with a car after the driver did not see him travelling down a ramp that fed into a crosswalk at a school pickup/drop-off zone. There, the trial court concluded after a bench trial that "[g]iven the level of vehicle and pedestrian traffic, the nature of the pedestrian intersection, the known slopes involved, and the visibility restrictions . . . for him to see cars and cars to see him," May

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147 *See, e.g.*, *How to Avoid Pedestrian Accidents*, ADAM S. KUTNER, INJURY ATTORNEYS, https://perma.cc/8MMZ-YE7X.

148 *See supra* notes 16–17 and accompanying text.

149 *See* Schwartz et al., *supra* note 121, at 9 ("[A]nother study showed less yielding for people using wheelchairs, attributed to lower visibility at the crossing.").

150 465 P.3d 589 (Colo. App. 2020).

"travel[led] at an unreasonable rate of speed for the conditions and [did] not appear to have kept a proper lookout."[151] May argued that he could not safely slow down or stop after beginning to proceed down the ramp without injuring himself.[152] The court, however, presumed that the disabled plaintiff should slow down,[153] even when doing so would have been very difficult coming down a ramp directly into the crosswalk. Additionally, although the court identified visibility restrictions for both the plaintiff and defendant,[154] it ultimately penalized the plaintiff for failing to take due care. Instead, the court should have asked why the driver looked only at the crosswalk, and not the ramp immediately feeding into the crosswalk, when exercising care.

2. Blind pedestrians.

Given that tort law for people with disabilities developed substantially around pedestrians who are blind, and previous scholarship has focused on such cases, the rest of this Section provides examples of how the disability-inclusive theory of ordinary care would apply to blind pedestrians. There are many ways that drivers can exercise more inclusive ordinary care towards individuals who are blind, even without realizing that a pedestrian is blind.

First, drivers should "[n]ever come to a stop . . . within a pedestrian crosswalk. Aside from being illegal, this creates a hazardous and disorienting barrier for a blind pedestrian who encounters the car and must then navigate around it."[155]

Second, drivers should "come to a complete stop before [making a right turn at an intersection], then proceed with caution, as a blind pedestrian crossing the perpendicular street is unlikely to hear or notice the turning car in time if it rolls through the stop-and-turn."[156] This is because "[t]he pedestrian's attention is usually focused on the sound of traffic moving perpendicularly on the street that the pedestrian is waiting to cross."[157]

Third, drivers should "[n]ever honk at a blind pedestrian making a street crossing, even (or perhaps especially) if the

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151 *Id.* at 595 (emphasis omitted).

152 *Id.*

153 *Id.* at 595–96.

154 *See id.* at 595.

155 Email from Andrew Webb, Att'y, Equip for Equality, to author (Feb. 1, 2024) (on file with author). Andrew Webb provided these suggestions from personal experience crossing the street as a blind individual.

156 *Id.*

157 *Id.*

pedestrian appears to be disoriented or veering off-line[ ], as this can be frightening and even more disorienting."[158]

Fourth, drivers should "[a]void playing music at an excessive volume in the car, especially if car windows are down."[159] Noise coming from cars can drown out "traffic and environmental cues" that blind pedestrians rely on.[160] "This is especially true for a car idling at an intersection, where the pedestrian may also be standing and listening to the flow of traffic in order to know when it is safe to cross."[161]

None of these examples are particularly laborious. In fact, three of the four require inaction, rather than action, to universally accommodate people with disabilities. Just as universally designed products often benefit people without disabilities as well as people with disabilities (e.g., closed captioning), refraining from blasting music with your windows down can benefit those who become distracted by loud music when driving or are trying to listen to their own music, creating positive externalities.[162]

B. Common Law Roots

While interpreting ordinary care as disability inclusive is novel, it remains rooted in doctrine. It draws on current conceptions of tort law and previous tort innovations to incrementally align tort doctrine with our developing understanding of disability—as the common law should.[163]

First, reinterpreting ordinary care to shift labor's distribution draws on an embraced doctrinal shift regarding information asymmetries: res ipsa loquitur. Social principles and policy have also catalyzed variations from the duty of ordinary care in the past, creating further room for reconceptualization. Second, interpreting ordinary care to include care of people with disabilities would comport with both SJTT and efficiency models of tort theory. Not only would this interpretation require acknowledging

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158 *Id.*

159 *Id.*

160 Email from Andrew Webb to author, *supra* note 155.

161 *Id.*

162 This inclusive duty does not entitle people to assist individuals in crossing the street without their permission or disregard the requests of disabled individuals in some other way. For one wheelchair user's explanation of why individuals should not touch or physically assist a disabled individual without asking, see Melissa Parker, *Please Stop Touching My Wheelchair Without My Consent—It Makes Me Feel Violated and Dehumanised*, GLAMOUR (Sept. 5, 2023), https://perma.cc/DHJ2-XEN8.

163 *See supra* note 29 and accompanying text.

the ways that current interpretations of tort law reinforce ableism and correcting those interpretations to achieve more just outcomes under SJTT; it would also achieve a more efficient system by requiring an integrated, universally designed standard that proactively prevents harm rather than reactively accommodating individuals with disabilities under an economic theory of torts.

1. Doctrinal flexibility: res ipsa loquitur and the evolution of duty.

Tort law has already embraced burden shifting to account for information asymmetries through the common law doctrine of res ipsa loquitur. This proposal mirrors burden shifting, only it shifts the real-world burden (of reasonable care) rather than the in-court burden (of proof) from the plaintiff to the defendant. Doing so accounts for inequality by correcting imbalances in the distribution of labor taken on to make spaces accessible and safe for people with disabilities. Both res ipsa loquitur and the proposed expanded reasonable care standard serve as incentives. While res ipsa loquitur forces information out of the party with exclusive access to the information, the expanded reasonable care standard forces broadened awareness out of the defendant. Thus, the similarity in concepts and rationale between res ipsa loquitur and this Comment's proposal provides some legitimacy in the common law.

Beyond the type of change, the area of change—duty—has previously provided fertile ground for reform. Courts have the power to "determine that modification of the ordinary duty of reasonable care is required" based on social norms and principles.[164] However, some courts have held "that the 'judicial power to modify' this general rule 'is reserved for very limited situations.'"[165] Rather than creating a new rule of duty, this Comment's proposal would repeal the judge-made modification to the ordinary duty of care—the requirement that notice of a disability triggers a duty to accommodate. Instead, it would simplify the doctrine, bringing it back to long-held principles of a generalized, ordinary duty of care while interpreting what ordinary means in a modern, disability-conscious way. In this sense, the change proposed is less radical than the initial exclusion of people with disabilities from the meaning of ordinary care.

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[164] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. a (AM. L. INST. 2010).

[165] *See, e.g.*, *id.* (quoting Stagl v. Delta Airlines, Inc., 52 F.3d 463, 469 (2d Cir. 1995)).

2. Economic theory of torts.

The disability inclusive theory of ordinary care finds further support in two economic concepts that underlie tort doctrine: efficiency and incentives.

a) Efficiency. Interpreting ordinary care to encompass care for people with disabilities could create more efficient exchanges at the individual level by requiring ex ante consideration of people with disabilities rather than last-minute, ex post accommodation. To be sure, the cost of these precautions could appear to be significant in the aggregate. But several dynamics offset this concern and suggest that this proposal will, at the least, not greatly increase the total social cost of accidents.

First, because the potential tortfeasor typically has the most control over the object to cause harm (e.g., a car, faulty sidewalk, or dangerous ramp), they have greater proximity to prevention and can do so more effectively. It is arguably more efficient to universally design structures rather than constantly retrofit them. The same can be said about requiring drivers to act proactively by exercising caution with disabled pedestrians in mind rather than expecting disabled pedestrians—already navigating an inaccessible, potentially distracting environment—to react to an unassuming driver in a moment's notice. Incorporating people with disabilities into the rule of ordinary care, rather than making them the exception to it, streamlines decision-making in these quick, one-off transactions, rather than adding to their complexity. Thus, making the defendants the "cheapest cost avoider[s]" would reduce the cost of accidents.[166] This is especially clear as applied to the example with drivers and disabled pedestrians. Rather than expecting a disabled individual to notify a driver of their need for accessibility and the driver to then adapt the default standard at a moment's notice, this Comment's proposal incentivizes the party with more control over a hazardous vehicle to integrate preparation into daily habits.

The economist-lawyer might disagree, arguing that people with disabilities know their own needs best and therefore are the best suited to accommodate themselves and reduce the social costs of accidents.[167] But this argument is a misguided,

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166 CALABRESI, *supra* note 139, at 156; *see id.* at 155–56.

167 *See* Dari-Mattiacci & Garoupa, *supra* note 136, at 241–42 (asserting that it could be efficient for "highest cost avoider[s]," including disabled individuals, to signal "high care costs . . . before the accident" to decrease "information asymmetry").

self-fulfilling prophecy, partially due to ignorance on the part of nondisabled individuals. This sort of societal negligence is evidenced by the defendants' inability to recognize a blind woman crossing the street in *Wright*[168] or failure to look at not only the crosswalk but the ramp leading into the crosswalk in *May*.[169] Nondisabled individuals have often failed to educate themselves about the needs of people with disabilities, and legal institutions have not ameliorated this issue by educating drivers or incentivizing proper action through tort law.

The economist-lawyer may also argue that the cost potential tortfeasors take on in turning down their music or increased traffic caused by drivers not rolling through stoplights becomes significant at the aggregate level.[170] Shifting labor away from people with disabilities to people without disabilities may seem to increase the number of people engaged in labor, and therefore increase social cost cumulatively. However, this transfer in accommodative labor is plausibly not one-to-one: Disabled individuals must constantly accommodate themselves and educate others in addition to finding resources for themselves. This labor accumulates exponentially, rather than linearly, just as Professor Emens has described the total of labor as qualitatively different than its parts and Professor Konrad has indicated in promulgating concepts of access fatigue.[171]

For example, if two individuals have only one identical task to complete, and no external circumstances influence the individuals' ability to complete the task, the labor put into completing the task should be similar. However, if one person has ten tasks to complete and another has one task to complete, the labor of the person with ten tasks will not be exactly ten times the amount of labor of the person with one task. Instead, the person with ten tasks will have to take on more labor in managing the tasks, and the number of tasks may weigh on them more. Thus, more accommodative labor may exist in general by placing a substantial amount of it on disabled individuals. Transferring some of that labor to society at large could actually reduce the total amount of

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168 878 P.2d 1198 at 1205; *see supra* text accompanying notes 141–43.

169 *May*, 465 P.3d at 591.

170 *Cf.* Kevin J. Coco, *Beyond the Price Tag: An Economic Analysis of Title III of the Americans with Disabilities Act*, 20 KAN. J.L. & PUB. POL'Y, 58, 95 (2010) (conducting such an analysis of Title III of the ADA).

171 *See supra* text accompanying notes 58–60.

labor that exists, as diffusing it amongst many people makes it less burdensome than it is on one individual.

Comparatively, potential tortfeasors would only take on a minimal amount of additional labor. As argued in Part IV.A, drivers can tweak their behavior to be more inclusive in exercising ordinary care. In the examples provided, three even required inaction, rather than action. Even if drivers, for example, must keep their volume lower to make sure a blind individual can safely cross the road, the labor taken to complete this action is minimal compared to disabled individuals having to constantly fear for their safety if they are not vigilant. The value of accommodative labor would weigh more on the individual with the disability than the driver because of its cumulative and pervasive nature, even though either option would reach the same end—safety for disabled pedestrians crossing the street. Furthermore, any loss to a driver's autonomy or joy obtained from listening to music at a high volume would probably be offset by the many other drivers who do not want to hear loud music intrude on their commutes, much as shutting down a nuisance can produce positive externalities for society at large.

Educating oneself and others about the needs of people with disabilities may also take a bit of transitional labor on the front end, but ultimately, normalizing the incorporation of people with disabilities into interactions between strangers will create a more efficient system by making accommodation obsolete. State governments can also internalize some of these educational costs by requiring driver-training programs to include how to accommodate people with various disabilities.[172] Besides, transitional labor likely always accompanies social or legal change, so this temporary inconvenience should not weigh against long-term positive social change.

On balance, decreasing the mental load of accommodative labor for people with disabilities while marginally impacting the liberties of potential tortfeasors would create more efficient one-off transactions. In distributing labor more equitably, this proposal could end up diminishing the overall amount of labor by preventing a minority of people from bearing the costs of constantly shouldering excessively accumulated labor. By shifting some, but not all, accommodative labor to defendants, the net

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[172] *See* Dari-Mattiacci & Garoupa, *supra* note 136, at 241.

amount of labor and negative impacts on mental and physical health may even decrease overall.

Even if the question of social efficiency is unclear, Judge Guido Calabresi and Professor A. Douglas Melamed have acknowledged that a monetized assessment of efficiency is not determinative.[173] Instead, distributional concerns and the values of different societies underlie any cost-benefit analysis. This Comment makes a normative argument that the labor of people with disabilities—specifically accommodative labor (including disability admin)—has gone undervalued and been disproportionately placed on people with disabilities. Devaluing accommodative labor and framing it as burdensome, even if it requires small changes for each individual, shapes any cost-benefit analysis in determining a least-cost avoider.

b) Incentives. Expanding the defendant's duty to include care for disabled individuals is justified because it properly aligns incentives to allocate a limited resource—mental labor—more equitably. Overall, the disability-inclusive interpretation of ordinary care (1) considers the cumulative labor people with disabilities take on as they repeatedly navigate inaccessible spaces and (2) incentivizes the party that needs it.

First, people have a greater interest in not being hit by a car than being able to drive a car. The person driving a car or engaging in some other behavior with negative externalities has less of an interest in engaging in that behavior than a potential victim has in protecting their life and health. Therefore, the person taking on the risky behavior should generally exercise more caution.[174] This does not mean that a person driving a car should always be held liable during an accident—only that taking on greater risk should increase the relative amount of responsibility taken on by an individual. Expanding the reasonableness standard furthers this weighing of the relative rights of the defendant and the plaintiff without depriving the defendant of their autonomy to drive, for example.

More specifically, people with disabilities have a profound interest in protecting themselves, and many already go out of their way to take classes on how to safely cross the street, use guide dogs, plan out accessible paths, and so on. Tort law does not need

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[173] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability*, 85 HARV. L. REV. 1089, 1098 (1972).

[174] Dorfman, *supra* note 24, at 114 ("[W]ithin limits, concern for a person's life and limb takes some priority over the free pursuit of ends.").

to incentivize them any further to care for themselves when they are often the only ones doing so.

Conversely, people without disabilities are often not forced to confront others' needs and accessibility in general, as described above. Therefore, putting legal pressure on these individuals to educate themselves about accessibility and disability could have more of an impact. Ultimately, by holding defendants to a higher standard, they will have a greater incentive to protect themselves from liability by educating themselves on disability and creating safer, more accessible universally designed environments.

Second, people with disabilities must engage in life and disability admin, advocate for themselves, and accommodate themselves to inaccessible environments every day.[175] Other legal commentary fails to take this into account, instead treating each tort suit as a one-off transaction. For example, Professor Avihay Dorfman has argued that the current assignments of reasonable care based on a plaintiff's disability produce a "care asymmetry" that is justified and needed to create substantive equality by recognizing the current imbalance between the parties.[176] However, he only addressed balance in the context of the individual parties and a particular case at hand rather than equity in managing the labor associated with due care in peoples' day-to-day lives.

Looking beyond one-off transactions, this labor accumulates. During every single interaction, a person with a disability is expected to accommodate themselves. Meanwhile, a person without a disability has to accommodate an individual with a disability only when they encounter one and, even then, only if the disabled individual goes out of their way to put the defendant on notice. A nondisabled tortfeasor is not forced to reckon with the accessibility of their buildings or inclusivity of their care on a daily basis, because the existing legal standard adopts many individuals' idea of what ordinary care is—a common sense based on learned norms of inaccessibility. Nondisabled individuals generally do not have to adapt to a world that was built for them.[177]

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[175] *See supra* Part I.B.3.

[176] Dorfman, *supra* note 24, at 107.

[177] Of course, people may have to accommodate themselves to other systems not built with them in mind, or even have to evade systems created to do them harm.

C. The Feasibility of Disability-Inclusive Accommodations

White-cane laws first required drivers to grapple with what accommodations would look like for people with disabilities, yet only when drivers knew a person had a disability. Since the implementation of white-cane laws, disability and accommodation have become much more visible, providing an alternative form of notice through awareness. Together, these developments could make the eradication of an individualized-notice requirement feasible.

1. Laws already require some accommodations.

Professor Adam Milani has claimed that "[s]ociety—in the form of individuals, businesses, schools, etc.—cannot make accommodations for a disability unless there is some notice of its existence."[178] Thus, he asserted, extra care should not be expected of a tortfeasor without prior notice of a disability. In rejecting Milani's claim, this Section shows that individuals can incorporate disability-inclusive precautions into their daily lives without receiving notice of a disability.

Various state laws exemplify Milani's rationale by requiring drivers to exercise additional care when they realize a person with a disability is crossing the street. For example, Colorado requires "any driver of a vehicle who approaches an individual who has an obviously apparent disability [to] immediately come to a full stop and take such precautions before proceeding as are necessary to avoid an accident or injury to said individual."[179]

Statutes like Colorado's implicitly assume that individuals can identify appropriate accommodations for people with disabilities when put on notice. This indicates that people generally know what precautions to take when they see people with different disabilities—or at least the law expects them to. Nothing is preventing individuals from incorporating those same precautions into their ordinary duty of care regardless of whether they know an individual has a disability. For example, if a driver knows what precautions to take when they notice a person with a disability crossing the street, that driver can exercise the same precautions when they are not sure if the person crossing the street has a disability. If the counterargument is that exercising this care on a daily basis would add up, this is exactly what people with disabilities experience in having to accommodate themselves

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[178] Milani, *supra* note 2, at 368.

[179] COLO. REV. STAT. § 42-4-808 (2024).

every day. Yet pedestrians with disabilities can only react to the danger of oncoming cars and have to deal with inaccessible structures and ableism, in addition to carrying the weight of reasonable care on their shoulders.

2. Disability visibility provides an alternate form of notice.

Eliminating the requirement that a person receive formal notice of disability in order to owe a disabled individual heightened care could coincide with increasing generalized notice through education on accessibility and disability rights. Since Milani's article, awareness of disability rights issues and accessibility has also increased through the use of social media platforms[180] and visibility of people with disabilities in mainstream industries.[181] States could also provide further awareness by incorporating education on people with disabilities and their needs in licensing exams for drivers. Increased awareness of accessibility needs, paired with the current legal expectation that drivers should know how to accommodate people with disabilities, indicates that Milani's stance can be taken further, at least in the context of pedestrian-driver interactions.

Finally, by changing what legally constitutes ordinary care, actors receive a form of constructive notice of the behavior expected of them, which is at least equivalent to the type of notice currently afforded individuals. Additionally, shifting the meaning of ordinary care could incentivize individuals (or at least businesses with legal counsel) to educate themselves about how to accommodate others and become aware of the needs of people with various disabilities.[182]

V. INCORPORATING ACCOMMODATIVE LABOR INTO REASONABLENESS AND DUTY DETERMINATIONS

TenBroek previously considered coloring reasonableness inquiries through an integrationist lens.[183] But he limited the development of integrationist torts to the pace at which statutory and

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[180] *See, e.g.*, Katherine Lewis, *Digital Accessibility: The Next Frontier of Disability Rights*, MEDIUM (June 27, 2022), https://perma.cc/E2DY-EP78.

[181] BEN MATTLIN, DISABILITY PRIDE: DISPATCHES FROM A POST-ADA WORLD, at xi–xvi (2023).

[182] For a discussion on the relative attention paid by individuals and businesses to tort law and taking preventative action according to that law, see tenBroek, *supra* note 3, at 881–83.

[183] TenBroek, *supra* note 5, at 881–83.

normative conceptions of integrationist policy progressed.[184] He ultimately dismissed the idea of working within current doctrinal terms, arguing that "[i]t confuses the new direction by using the old signposts."[185] While this may be true to some extent, the new signpost—a reasonable person with the same disability—has resulted in its own issues and further pathologized people with disabilities by framing them as an exception to the standard rules of reasonableness and ordinary care. Alternatively, courts and advocates can, at the very least, encourage juries to factor accommodative labor—the labor that individuals with disabilities take on in navigating an inaccessible world—into determinations of reasonableness.[186]

Though choosing not to use a white cane or guide dog no longer makes a person per se negligent, usage can entitle a blind individual to disability-specific precautions from a tortfeasor (assuming the tortfeasor notices the white cane or guide dog), and juries can consider how an individual used their assistive technology in making reasonableness or comparative negligence determinations. In conducting this analysis, juries and courts should weigh the labor, time, and money that people with disabilities put into accommodating themselves. For example, recall that people with disabilities, particularly individuals in wheelchairs and deaf pedestrians, exert more mental labor in ensuring their safety when crossing the street.[187] Lawyers should further contextualize disabled plaintiffs' actions by bringing information about disability admin to juries. This will better inform a cost-benefit analysis vis-à-vis cases that entail split-second decisions. Additionally, if juries assess the comparative negligence of a plaintiff with a disability, advocates should highlight not only a lack of safe alternative options that made the disabled plaintiff's actions reasonable,[188] but also the labor those individuals are forced to undertake in making those decisions in the first place.

VI. ELIMINATING COMPARATIVE NEGLIGENCE FOR PLAINTIFFS WITH DISABILITIES

To shift the burden further towards the defendant and away from the plaintiff, courts could also eliminate comparative

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184 *Id.* at 914–15.

185 *Id.* at 915.

186 *See supra* Part I.B.3.

187 *See supra* text accompanying notes 119–21.

188 *See, e.g.*, *Wright*, 878 P.2d. at 354–56; *Prostran*, 811 N.E.2d at 366–67.

negligence for plaintiffs with disabilities. This could take the form of a complete ban on comparative negligence or a ban on comparative negligence claims rooted in any behavior particular to or associated with the plaintiff's disability.

Unless a plaintiff commits an intentional intervening tort, contributory and comparative negligence should be barred in cases involving a disabled plaintiff. Barring contributory or comparative negligence for people with disabilities is not a completely new idea, as most courts do not hold plaintiffs deemed insane or incompetent contributorily or comparatively negligent as a matter of law.[189] However, barring contributory and comparative negligence for physically disabled plaintiffs does not rest on the same rationale. While the prohibition in the context of certain mental disabilities rests on the notion that culpability does not exist, people with many physical disabilities can accommodate themselves and take precautions to prevent injury. But this Comment argues that physically disabled individuals should not have to accommodate themselves, and the expectation that they should disadvantages them even when they do take all precautions, perhaps because juries perceive them as being responsible for protecting themselves. The proposed prohibition on comparative negligence and contributory negligence for physically disabled plaintiffs aims to correct this disadvantage.[190]

Eliminating comparative negligence here will allow greater flexibility for error, as suggested in Universal Design's second principle,[191] by preventing plaintiffs with disabilities from being held disproportionately accountable for small errors in crossing the road. Allowing for greater flexibility than currently exists for the disabled plaintiff will simply allow them to make reasonable mistakes rather than holding them to an unfairly high standard. Even if some defendants may be held completely accountable where a plaintiff acted somewhat negligently, this risk is preferable to the alternative, which layers a legal disadvantage on top of other structural and systemic disadvantages for people with disabilities, once again prioritizing others' needs.

Alternatively, the current comparative negligence practice could be altered to eliminate comparative negligence for failing to accommodate oneself or take a precaution specific to an individual's disability. Courts could provide jury instructions to that

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189 Dorfman, *supra* note 24, at 120–22.

190 *See supra* Part III.C.1 and text accompanying note 144.

191 *See supra* text accompanying note 51.

effect, for example. However, limiting the repeal of comparative negligence for plaintiffs with disabilities to actions related to disability may not make all that much of a difference, as there would be no mechanism to account for jury bias in sifting out disability-related versus non-disability-related actions.

This Comment's proposal does not eliminate the consideration of disability in what care an individual is capable of delivering or the reasonableness of exercising this care. It proposes eliminating the disability-specific reasonable care standard and comparative negligence only for plaintiffs with disabilities—not defendants with disabilities. While the current analysis employed by courts toward disabled defendants is not perfect, that issue remains beyond the scope of this Comment.

A nonreciprocal reasonableness standard for plaintiffs and defendants with disabilities fits within the current approach to plaintiff-defendant responsibility differences. Per Dorfman, plaintiffs and defendants do not need to meet the same reasonable care requirements because they have fundamentally different rights at stake: "The crucial question is whether one has created risk of physical harm to oneself *or* to others. It is a question concerning the fundamental right to bodily integrity, not necessarily concerning the social costs (and benefits) of particular activities."[192] Thus, it is reasonable for disabled individuals, like any other individuals, to exercise more care as defendants than as plaintiffs—yet not be expected to exercise more care than they can provide.

Furthermore, part of the rationale for taking the onus of comparative negligence off of plaintiffs with disabilities is to incentivize people without disabilities to incorporate disability-inclusive care in employing precautions. It effectively boosts awareness of disability issues for people without disabilities, and in doing so, places incentives where they are most effective. Therefore, the effect that this rule will have on disabled defendants could be marginal, as they already think about accessibility in accommodating themselves every day.

CONCLUSION

Reinterpreting what qualifies as ordinary care by a defendant and what qualifies as reasonable action by a disabled plaintiff can ensure that individual disabled plaintiffs receive proper

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[192] Dorfman, *supra* note 24, at 101 (emphasis in original).

damages while simultaneously redistributing the labor that people with disabilities take on in accommodating themselves to an ableist and inaccessible world. This Comment proposes multiple interlocking doctrinal changes that would create a systemic shift, effectively redistributing accommodative labor made unequal by a lopsided duty of care.

First, courts should eliminate the notice required for tortfeasors to undertake a duty of disability-inclusive care and instead reinterpret ordinary care to encompass the care necessary for people with disabilities to engage with the world safely—because inclusive, disability-conscious care should be *ordinary* care. Second, courts and lawyers can incorporate consideration of the labor, time, and energy that people with disabilities put into accommodating themselves, including disability admin. Third, courts can bar comparative and contributory negligence for disabled plaintiffs.

From a normative perspective, this Comment has subverted not only current interpretations of tort doctrine, but also traditional research approaches by employing a disability studies research paradigm. This Comment has emphasized the dignity of disabled individuals "who are capable of contributing to society," rather than treating them as "the object[s] of study,"[193] and "affirms the value of life with a disability."[194] It does not propose shifting responsibility away from people with disabilities because they cannot take steps to protect or accommodate themselves—often the opposite is true, and people with disabilities have lived experience that contributes to their expertise in such issues. Rather, disabled individuals should not *have to* accommodate themselves to an inaccessible world.

Additionally, in proposing a redistribution of accommodative labor to society at large, this Comment has "examine[d] the question of 'fixing' systems so that they are accessible to and usable by people with disabilities rather than focusing on 'fixing' the individual so that he or she can better fit into the existing systems."[195] When tort law requires impaired individuals to accommodate themselves, it requires them to assume additional labor to navigate an inaccessible world, and thus disadvantages them. Shifting this burden will hopefully incentivize nondisabled parties to remove barriers to accessibility and actively work towards a universally accessible environment by undermining legal

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193 Kanter, *supra* note 38, at 3.

194 *Id.* at 5.

195 Kanter, *supra* note 38, at 3.

protections on individual actions that perpetuate an inaccessible society. Redistributing accommodative labor could free up more time and mental energy for people with disabilities to live their lives on their own terms.

Ideally, these proposals will not only move tenBroek's dream closer to reality—but also help make it an ordinary one.