Fakers, Nuts, and Federalism: Common Law in the Shadow of the ADA

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INTRODUCTION

The common law in this country has always mistreated the mentally ill. Although accident law has qualifiedly excused the physically disabled for the excess risk they impose on society, it treats the psychologically disabled very differently.[1] Throughout this century, courts and commentators have argued about whether this disparate treatment is just and whether it is consistent with negligence law's dominant fault principle.[2] Many commentators have sided with the mentally disabled, while most courts have held against them — in part out of mistrust of psychologists' diagnostic acuity, and in part out of a utilitarian calculus that the psychologically disabled are simply more dangerous than the physically disabled. To date, the commentators have failed to convince judges of their view, and the discrimination of the mentally ill continues.

In 1990 Congress passed the Americans with Disabilities Act ("ADA"),[3] driven both by antidiscrimination and utilitarian concerns.[4] The ADA appeared to give advocates of equal treatment of the mentally ill a new weapon by applying a very strong equal treatment imperative to state government instrumentalities — including, perhaps, common-law courts. But whether the ADA prohibits common-law courts from discriminating against the mentally ill has yet to be tested.

Nearly contemporaneous with the ADA's expansive assertion of congressional power over state government activities emerged the Supreme Court's cranky reconsideration of federalism principles. In a string of stunning cases, the Court turned Tenth and Eleventh Amendment jurisprudence in a new direction, casting doubt on the ADA's sweeping promise. In light of these decisions, several novel constitutional questions pose temporary, and perhaps some permanent, obstacles to the application of the ADA to the states. For example, does the ADA prohibit disability discrimination with

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[1] *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 9(c) (Discussion Draft 1999) ("Unless the actor is a child, the actor's mental or emotional disability is not considered in determining whether conduct is negligent."). In contrast, a physically disabled actor's conduct is negligent if the conduct does not conform to that of a reasonably careful person with the same disability. *See id.* § 9(a).

[2] *See infra* Part I.B.

[3] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)).

[4] *See* 42 U.S.C. § 12101(a)(8), (9) (1994).

sufficient clarity to reach core judicial activities?[5] If so, is the congressional response to disability discrimination with the ADA "congruent and proportionate" to the actual harm suffered by the disabled?[6] And last, does the doctrine of sovereign immunity limit the application of the ADA in states' own courts,[7] or does the Supremacy Clause continue to require state courts to enforce valid federal law?[8]

Part I of this Article examines negligence law's fault principle, which, under the classic formulation articulated by Oliver Wendell Holmes, assigns fault to the defendant if the "act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm."[9] This principle avoids the extremes both of strict liability in which liability is tied to causation alone,[10] and of a purely subjective standard in which liability turns on whether the actor did his best.[11] The fault principle thus sets an objective benchmark for negligent conduct, weighing an actor's conduct against the standard of a hypothetical reasonably prudent person.[12] At the same time, it softens the harshness of this standard by permitting the actor's conduct to be measured "under the circumstances" actually faced by the actor.[13] But which circumstances are considered? Although contrary to the argu-

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[5] *See* Gregory v. Ashcroft, 501 U.S. 452, 473 (1991); *infra* notes 259-57 and accompanying text.

[6] *See* City of Boerne v. Flores, 521 U.S. 507, 529 (1997); *infra* notes 263-298 and accompanying text.

[7] *See* Alden v. Maine, 119 S. Ct. 2240, 2266-67 (1999); *infra* notes 253-255 and accompanying text.

[8] *See* Testa v. Katt, 330 U.S. 386, 392 (1947) ("'When Congress, in the exertion of power confided to it by the Constitution, adopted [the Federal Employers' Liability Act], it spoke for all the people of the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.'" (quoting Mondou v. New York, 223 U.S. 1, 57 (1912))).

[9] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 96 (Little, Brown & Co. 1948) (1881).

[10] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 192 (5th ed. 1998) (explaining that "[s]trict tort liability means that someone who causes an accident is liable for the victim's damages even if the injury could not have been avoided by the exercise of due care").

[11] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 169 (5th ed. 1984) (suggesting that subjective standard would evaluate conduct in light of actor's "clumsiness, stupidity, forgetfulness, . . . excitable temperament, or even sheer ignorance") (footnote omitted); *see also* Vaughan v. Menlove, 132 Eng. Rep. 490, 493 (1837) (declining to consider evidence of defendant's poor judgment in evaluating reasonableness of his conduct).

[12] *See* KEETON ET AL., *supra* note 11, § 32, at 174-75.

[13] HOLMES, *supra* note 9, at 96.

ments of the majority of commentators over the years,[14] jurors may consider physical, but not mental, disabilities when assessing the reasonableness of an actor's conduct. This principle adheres to the famous 1616 dictum from *Weaver v. Ward*: "[I]f a lunatic hurt a man, he shall be answerable in trespass."[15] This rule persists heedless of advances in psychological diagnostic techniques obviating its practical necessity.

Part II argues that common-law courts violate Title II of the ADA with their differential treatment of physical and mental disabilities.[16] It describes the intentionally bold and intrusive means by which the ADA forces federal policy into the states' common law. It further argues that the remedial application of the ADA to state courts is unimpaired by the Supreme Court's recent federalism cases, as the ADA clearly and explicitly applies to state courts. Through the Fourteenth Amendment, moreover, it is fully applicable to the states because it is a proportionate and congruent remedy of past discrimination.

I. TORT LAW'S HISTORIC REJECTION OF A MENTAL ILLNESS "EXCUSE"

A. The Physical/Mental Dichotomy

1. The Fault Standard and the Reasonably Prudent Person

The law of accidents is centered on notions of negligence. As negligence law has developed, it has taken a middle path between strict liability, in which liability is tied to causation only,[17] and a purely subjective moral standard, in which liability turns on whether the actor did his best.[18] It continues to follow Holmes's analysis:

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[14] *See, e.g.*, James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908); W.G.H. Cook, *Mental Deficiency in Relation to Tort*, 21 COLUM. L. REV. 333, 344-49 (1921); William J. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52, 61-63 (1960); Harry J.F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 LAW & PSYCHOL. REV. 1, 27-45 (1995); David E. Seidelson, *Reasonable Expectations and Subjective Standards in Negligence Law: The Minor, the Mentally Impaired, and the Mentally Incompetent*, 50 GEO. WASH. L. REV. 17, 37-41 (1981).

[15] Weaver v. Ward, 80 Eng. Rep. 284, 284 (K.B. 1616).

[16] 42 U.S.C. §§ 12131-12150 (1994).

[17] *See* POSNER, *supra* note 10, at 192 (discussing strict tort liability in cases where due care could not have prevented harm).

[18] *See* KEETON ET AL., *supra* note 11, § 31, at 169 (discussing subjective standard to evaluate actor's conduct); *see also* Vaughan v. Menlove, 132 Eng. Rep. 490, 493 (1837) (de-

> The general principle of our law is that loss from accident must lie where it falls . . . . If this were not so, any act would be sufficient . . . even coming to a place where one is seized with a fit and strikes the plaintiff in an unconscious spasm. Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff? The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen . . . .
>
> Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.[19]

The concept of reasonableness is central to ascertaining wrongful acts — acts for which the burden of loss shifts from the plaintiff to the defendant. A person is negligent if he acts with a want of "reasonable care."[20] The reasonable care standard is applied by comparing the actor's conduct to the standard set by a hypothetical "reasonably prudent person."[21] On a case by case basis, fact finders[22] determine whether a defendant's conduct meets this reasonable person standard.[23] A reasonably prudent person considers the likelihood that his conduct will cause harm, judges the probable severity of that harm against the cost of avoiding it, and conforms his conduct accordingly.[24] But the reasonable person is not entirely disconnected from the context in which he acts.[25] Under

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clining to consider evidence of defendant's poor judgment in evaluating reasonableness of his conduct).

[19] HOLMES, *supra* note 9, at 94-96.

[20] *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 4.

[21] *See id.* cmt. a; *see also* New Maumell Harbor v. Rochelle, 991 S.W.2d 552, 554 (Ark. 1999); Trentacost v. Brussel, 412 A.2d 436, 443 (N.J. 1980); Mathis v. Ammons, 928 P.2d 431, 434 (Wash. Ct. App. 1996); *Vaughan*, 132 Eng. Rep. at 493 (1837); KEETON ET AL., *supra* note 11, § 32, at 174.

[22] *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 5.

[23] *See id.* § 5 cmt. b.

[24] *See id.* § 4.

[25] The consideration of context in the application of the fault principle historically has been justified on the moral grounds that it would be unjust to assess liability against a person

some conditions, he may be excused for otherwise unreasonable actions in light of the particular circumstances he faced. One condition giving rise to such an excuse is that he did not, at the time he acted, have the power to do otherwise.[26] Unconscious acts and acts under compulsion, for example, do not run afoul of the fault principle.[27]

2. "Under the Circumstances": Physical Conditions

Fact finders applying the reasonableness test, then, do not compare the defendant's actions with those of the reasonably prudent person in abstract, ideal conditions. That would be too harsh a test because it would fail to consider the context of the defendant's actions. Rather than judging reasonableness in the abstract, fact finders take into account the circumstances surrounding the defendant's actions, such as weather conditions, emergently arising dangers, or countervailing demands on her attention.[28]

If, for example, a defendant were to be confronted with "an unexpected emergency requiring rapid response,"[29] the fact finder may judge the reasonableness of the defendant's conduct by considering that the defendant's responses to the circumstances confronting her were appropriately "instinctive rather than deliberative"[30] or that "the opportunities for deliberation [had] been limited by severe time pressures."[31] Fact finders undertaking this analysis, however, have striven to maintain objectivity to a high degree, and "[t]he law takes no account of the infinite varieties of temperament, intellect and education which make the internal character of a given act so different in different men."[32] The resistance to a more fully subjective standard derives both from the

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unable to conform his conduct to societal norms. *See* HOLMES, *supra* note 9, at 94-96; WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 127-28 (1987) (arguing same on grounds of economic efficiency).

[26] *See* HOLMES, *supra* note 9, at 95 ("[T]he only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability.").

[27] *See id.*

[28] *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 4; *see* RESTATEMENT (SECOND) OF TORTS: CONDUCT OF A REASONABLE MAN § 283 (1965).

[29] RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 7; *see* RESTATEMENT (SECOND) OF TORTS, *supra* note 26, § 296(1).

[30] RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 7 cmt. a.

[31] *Id.*

[32] HOLMES, *supra* note 9, at 108.

practical difficulty of evaluating each person's innate and experiential profile[33] and the desire to encourage people to maintain their level of social performance at an acceptable level.[34] Applying the reasonableness standard contextually, then, is a compromise between the easily administered but overly harsh fully objective standard and the unwieldy subjective standard that would be truer to Holmes's notion of the "moral basis of liability."[35]

The objective reasonably prudent person is a societal norm from which actors deviate under threat of liability for the losses of others. But this threat is softened by a fact finder's ability to evaluate the circumstances and determine that a harmful, apparently unreasonable action was reasonable when the actor was faced with genuine difficulties that were not his fault.[36] The resulting issue is which innate or contextual factors a fact finder may consider as part of the circumstances the actor faced.[37]

Holmes suggested that a physical disability is one factor that might excuse harmful conduct if it precludes compliance with otherwise applicable norms of behavior:

> When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them. A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for injuring another.[38]

Tort law has uniformly accepted this application of the contextual circumstances to the reasonably prudent person standard for physically disabled tortfeasors. For example, this standard has long been entrenched in the American Law Institute's *Restatement of*

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[33] *See id.*; Ames, *supra* note 14, at 97 (quoting Chief Justice Brian for proposition that "[t]he thought of man shall not be tried," and that "the devil himself knoweth not the thought of man").

[34] *See* HOLMES, *supra* note 9, at 108.

[35] *See id.* at 109.

[36] *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 7 cmt. d (noting that some courts have refused application of emergency doctrine where emergency arises from negligence of defendant).

[37] *See id.* § 4.

[38] HOLMES, *supra* note 9, at 109.

Torts.[39] The working draft of the third *Restatement of Torts* reaffirms this acceptance, stating that "[i]f the actor has a physical disability, the actor's conduct is negligent if it does not conform to that of a reasonably careful person *with the same disability*."[40]

Other circumstances may soften the application of the reasonable person standard. One example is the cluster of cases examining "sudden emergencies." The third *Restatement* posits a person driving a car when her brakes suddenly fail. As she approaches another car, she must quickly decide what to do to avoid a collision. She chooses to again apply the nonfunctioning brakes rather than swerve to one side. A reasonable person, with the leisure to contemplate her choices, would choose the latter option over the former. In emergent circumstances, however, a person might reasonably, although mistakenly, choose trying the brakes one more time. Deciding the question of liability for the accident, a jury could consider the sudden emergency as a factor in assessing the reasonableness of the actor's conduct. If a reasonable person might try the brakes again during the sudden emergency, then the jury might find that the actor acted reasonably and, therefore, nonnegligently.[41]

Similarly, courts have permitted juries to consider infancy when assessing an actor's reasonableness. A child's conduct is not compared to the standard of a reasonably prudent adult; instead, her conduct is evaluated according to a standard even more subjective than that applied to the physically disabled or actors facing a sudden emergency. A child's conduct is negligent only if "it does not conform to that of a reasonably careful person of the same age, intelligence and experience."[42]

The injection of the actor's circumstances into the reasonableness calculus provides, in practical terms, an affirmative defense or excuse.[43] That is, if the actor wishes the jury to be instructed that his age, exposure to emergency conditions, or physical disability

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[39] *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 28, § 283B.

[40] RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 9(a).

[41] *See id.* § 7 cmt. a, illus. 1. The facts of the illustration are taken from Tomforde v. Newman, 244 N.W.2d 47 (Minn. 1976). *See id.* § 7 cmt. a, reporter's note.

[42] *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 8(a). A sufficiently young child is conclusively presumed incapable of negligence. *See id.* § 8(b) (defining sufficiently young child as less than five years old).

[43] *See* Vosnos v. Perry, 357 N.E.2d 614, 614-15 (Ill. 1997) (referring to introduction of actor's disability as "affirmative defense").

should be considered in assessing reasonableness, he must provide facts that allow the jury to consider those factors. Once the record is made, the actor may argue that he ought not to be judged by the abstract standard of the reasonable person untroubled by particular impediments. Instead, he ought to be judged according to the (usually more forgiving) standard of the reasonable person faced with a sudden emergency,[44] a reasonable person of an "age, intelligence and experience" identical to the child-actor's,[45] or a "reasonably careful person with the same [physical] disability."[46]

These context-specific defenses permit assessment of the actor's ability to "avoid[] the evil complained of,"[47] absolving the actor from liability if he was powerless to avoid the harm. But no such defense is available for psychological disabilities, and no assessment is therefore made of the mentally ill actor's actual ability to avoid injury. A mentally ill person who causes harm is liable in negligence even if he was unable to act otherwise, provided that a reasonable person with no psychological disability would have acted otherwise.

3. No Contextual Excuse: Mental Conditions

Consistency suggests that the psychologically disabled, like the physically disabled, should be excused from liability for unintentional harm if their psychological state rendered them incapable, through no fault of their own, of acting safely. Establishing this, however, may be very difficult.[48] Holmes recognized this consistency argument, but also recognized the difficulties that a contextual excuse for the mentally ill might engender. After explaining that a blind man need not take precautions that require eyesight,[49] he stated:

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[44] *See* Rivera v. New York City Transit Auth., 569 N.E.2d 432, 434 (N.Y. 1991) (finding reversible error when court denied emergency doctrine charge where evidence supported sudden emergency).

[45] *See* Mathis v. Massachusetts Elec. Co., 565 N.E.2d 1180, 1184 (Mass. 1991).

[46] RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 9(a); *see also* Memorial Hosp. v. Scott, 300 N.E.2d 50, 55 (Ind. 1973) (holding that "a departure from the general rule is required where the [actor] is suffering from physical infirmities which impair his ability to function as an 'ordinary reasonable man'" and that "[t]he proper test to be applied in such cases is the test of a reasonable man *under the same disabilities and infirmities* in like circumstances").

[47] HOLMES, *supra* note 9, at 95.

[48] *See* discussion *infra* Part I.C.

[49] *See supra* notes 38-40 and accompanying text.

> Insanity is a more difficult matter to deal with, and no general rule can be laid down about it. There is no doubt that in many cases a man may be insane, and yet perfectly capable of taking the precautions, and of being influenced by the motives, which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.[50]

Apparently, Holmes was wrong to at least one extent; a general rule can be, and has been, laid down about insanity. The current discussion draft of the third *Restatement of Torts*, consistent with the second *Restatement*,[51] is unequivocal: "Unless the actor is a child, the actor's mental or emotional disability is not considered in determining whether conduct is negligent."[52] The rule is a stark and categorical one; it denies a capacity-based excuse to the mentally ill actor regardless of the clarity of the evidence showing the actor could not have acted differently to avoid the injury. This rule sharply contrasts with tort law's treatment of physical disabilities, for which negligence is the failure to "exercise reasonable care under all the circumstances."[53]

The case often used to illustrate the extent to which the fault principle is abandoned in cases involving psychological disability is *Johnson v. Lambotte*.[54] In that case, Johnson injured Lambotte with her car,[55] and her defense contended that her mental illness rendered her unable to act reasonably under the reasonable person standard.[56] She was an involuntarily committed hospital patient diagnosed with schizophrenia. The hospital had given her twenty electroconvulsive treatments without effect, as well as massive doses of Thorazine.[57] She escaped from the hospital, jumped into a car left with its motor running, and "[h]aving little or no apparent

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[50] HOLMES, *supra* note 9, at 95.

[51] *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 28, § 283B.

[52] RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 9(c).

[53] *See id.* § 4.

[54] 363 P.2d 165 (Colo. 1961).

[55] Unaccountably, the Colorado Supreme Court refers to the mentally ill Dorothy Johnson by her first name, as though she were a child, but refers to E.H. Lambotte by his last name. *See Johnson*, 363 P.2d at 165 (stating that "[w]e will refer to plaintiff in error as Dorothy and to defendant in error as Lambotte").

[56] *See id.* at 166

[57] *See id.* at 165.

control of the automobile she collided with plaintiff's car."[58] The court found her liable for the injuries she caused, but it conceded that "she was physically and mentally incapable of performing any volitional act while operating an automobile and did not have the required mental capacity to realize the risk involved to herself and others in operating the automobile."[59] To paraphrase Holmes, she was unable to avoid the complained of evil.[60] Despite this, the court explained that, "[t]he general rule is that an insane person may be liable for his torts the same as a sane person. . . . As far as his liability for negligence is concerned, he is held to the same degree of care and diligence as a person of sound mind."[61]

This bright-line rule that ignores psychological incapacity, while considering incapacity based on physical disability, age, or emergent circumstances, is universally embraced in the state courts. The leading torts hornbook describes the treatment of mental illness in cases like *Johnson v. Lambotte* by noting:

> [In the case of] insanity, where the actor entirely lacks the capacity to comprehend a risk or avoid an accident, one might expect a relaxation of the standard similar to the physical disability rule. Yet, for a variety of reasons, the law has developed the other way, holding the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.[62]

The following section describes the reasons for tort law's disparate treatment of the mentally ill and the steady but entirely unsuccessful criticism of that treatment by scholars.

B. The Unsuccessful Public Policy-Based Attack on the Dichotomy

1. Historical Justification of the Differential Treatment of Mental Illness

The modern American rule denying a capacity defense to the mentally ill is often traced to the seventeenth-century British case

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[58] *Id.* at 166.
[59] *Id.*
[60] *See* HOLMES, *supra* note 9, at 94.
[61] *Johnson*, 363 P.2d at 166 (quotation omitted).
[62] KEETON ET AL., *supra* note 11, § 32, at 177 (footnote omitted).

Weaver v. Ward[63] and the nineteenth-century New York case *Williams v. Hays*.[64] Few cases arose to test the rule, however, and in the first decades of this century commentators noted that the treatment of the mentally ill in negligence law was far from settled.[65] The early uncertainty, as well as the settling of the rule in its current form by mid-century, can be traced through the treatment of the topic in the *Restatement.*

Section 283 of the first *Restatement*, published in 1934, expressed ambivalence on the topic. It outlined a general "reasonable man under the circumstances" test for negligence but excepted from its application both children and insane persons.[66] A caveat to section 283, however, stated that "[t]he institute expresses no opinion as to whether insane persons are required to conform to the standard of behavior which society demands of sane persons for the protection of the interests of others."[67] By 1948, the American Law Institute eliminated the caveat, removed all reference to an exception for the insane from the rule itself, and explained that the case law was now sufficiently clear to rule out a capacity defense for the insane.[68] The second *Restatement* took the additional step of expressing this point in the text: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."[69]

By 1960, Professor Curran was able to write:

> [I]t is becoming settled law in the common law jurisdictions of the United States that *insane persons* are fully responsible for their torts with the possible exception of those actions requiring a spe-

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[63] 80 Eng. Rep. 284 (K.B. 1616).

[64] Williams v. Hays, 38 N.E. 449, 454 (N.Y. 1894).

[65] *See* Ames, *supra* note 14, at 99-100 (stating that modern doctrine is not applied to all cases that fit logically within its scope); Francis H. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9, 23-28 (1924) (determining that law still uncertain); Cook, *supra* note 14, at 349 (commenting that law still uncertain); William B. Hornblower, *Insanity and the Law of Negligence*, 5 COLUM. L. REV. 278, 284-97 (1905) (discussing uncertainty in law in this area).

[66] *See* RESTATEMENT OF TORTS: CONDUCT OF THE REASONABLE MAN; THE STANDARD § 283 (1934); *see also* Elizabeth J. Goldstein, *Asking the Impossible: The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL'Y 67, 71-72 (1995); Stephanie I. Splane, Note, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153, 155-56 (1983).

[67] RESTATEMENT OF TORTS, *supra* note 66, § 283; *see* Goldstein, *supra* note 66, at 71-72.

[68] RESTATEMENT OF TORTS, *supra* note 66, § 283; *see* Splane, *supra* note 66, at 155.

[69] RESTATEMENT (SECOND) OF TORTS, *supra* note 28, § 283B.

> cial intent or malice. This development is sustained in an almost unbroken, though sparse and often badly reported, line of cases since the early Nineteenth Century. It is also statutory law in five states.[70]

The Institute apparently intends to adhere to this rule in the forthcoming third *Restatement.*[71] However late the rule coalesced, by now it is clear that negligence law does not permit a defense based on the mental incapacity of the actor.[72]

On what does this distinction between mental and physical disability rest? Both the Institute and the commentators have identified four bases for the courts' rejection of a defense based on mental illness:

1. Problems with line drawing. Courts have expressed the concern that an excuse based on psychological incapacity might be difficult to limit. Further, recognition of such an excuse could (or inevitably would) lead to extended consideration of various lesser emotional or cognitive impairments.[73]

2. Diagnostic difficulties: faking and genuine scientific dispute. This difficulty of proof concern with is twofold. First, courts have expressed concern that mental illness is more easily feigned than other putative bases for excuse in negligence. Second, courts have worried that they are unable to assess claims of psychological incapacity, at times referring to the alleged difficulties of discerning insanity in the criminal context. In sum, courts believe that they are technically unfit to assess evidence of insanity.[74]

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[70] Curran, *supra* note 14, at 52 (footnotes omitted).

[71] *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 9(c) (explaining that "[u]nless the actor is a child, the actor's mental or emotional disability is not considered in determining whether conduct is negligent").

[72] *See* Curran, *supra* note 14, at 52-53. Professor Curran argues that due to the dominance of commentators resistant to the harsh treatment of the mentally ill, the rule was settled earlier in the courts than the *Restatement* reported. *See id.* at 53.

[73] *See, e.g.*, Colman v. Notre Dame Convalescent Home, Inc., 968 F. Supp. 809, 812 (D. Conn. 1997); Bell v. Busse, 633 F. Supp. 628, 631 (S.D. Ohio 1986); Jolley v. Powell, 299 So. 2d 647, 649 (Fla. Dist. Ct. App. 1974); Schumann v. Crofoot, 602 P.2d 298, 300-01 (Or. Ct. App. 1979); Gould v. American Family Mut. Ins. Co., 543 N.W.2d 282, 286 (Wis. 1996); *see also* RESTATEMENT (SECOND) OF TORTS, *supra* note 28, § 283B cmt. b(1); Curran, *supra* note 14, at 54; Goldstein, *supra* note 66, at 74-75; Harry J.F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 LAW & PSYCHOL. REV. 1, 27-28 (1995); Seidelson, *supra* note 14, at 37; Splane, *supra* note 66, at 156-57.

[74] *See, e.g., Bell*, 633 F. Supp. at 631; Turner v. Caldwell, 421 A.2d 876, 877 (Conn. Super. Ct. 1980); Sauers v. Sack, 131 S.E. 98, 100 (Ga. Ct. App. 1925); McIntyre v. Sholty, 13 N.E. 239, 240 (Ill. 1887); Vosnos v. Perry, 357 N.E.2d 614, 616 (Ill. App. Ct. 1976); Seals v. Snow, 254 P.2d 348, 349 (Kan. 1927); Williams v. Kearbey, 775 P.2d 670, 672 (Kan. Ct. App. 1989);

3. An island of strict liability.[75] One case stated the bland maxim: "Where one of two innocent persons must suffer a loss it should be borne by the one who occasioned it."[76] This explanation flatly ignores the fault principle, which ordinarily governs negligence law, in favor of strict liability. Denying the fault principle to the mentally ill was justified on the ground that the mentally ill are abnormally dangerous, and case law has approved of this particularly harsh rule.[77]

4. You are your brother's keeper. This justification is mentioned in older cases, but seldom in recent ones.[78] It denies an excuse to the mentally ill so that their caretakers will supervise their activities to protect the mentally ill person's estate.[79]

Sforza v. Green Bus Lines, Inc., 268 N.Y.S. 446, 448 (1934); Williams v. Hays, 38 N.E. 449, 454 (N.Y. 1894); *Schumann*, 602 P.2d at 300-01; *see also* RESTATEMENT (SECOND) OF TORTS, *supra* note 28, § 283B cmt. b(2); KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 58 (1997) ("The main difference between physical and mental infirmities is that the former are typically visible, measurable, and verifiable. By contrast, especially in the nineteenth century when these rules developed, mental infirmities are invisible, hard to measure, and incompletely verifiable."); Curran, *supra* note 14, at 54; Goldstein, *supra* note 66, at 74-75; Korrell, *supra* note 14, at 27-28; Seidelson, *supra* note 14, at 37; Splane, *supra* note 66, at 156-57.

[75] *See* LANDES & POSNER, *supra* note 25, at 128 (commenting that "the reasonable man rule [in the context of, inter alia, the insane] constitutes a pocket of strict liability in negligence law").

[76] Breunig v. American Family Ins. Co., 173 N.W.2d 619, 624 (Wis. 1970).

[77] *See Bell*, 633 F. Supp. at 631; *Sauers*, 131 S.E. at 100; *Williams*, 775 P.2d at 674; *Seals*, 254 P.2d at 349; Beralyski v. Paul, 96 N.W. 2d 868, 868 (Mich. Ct, App. 1972); *Sforza*, 268 N.Y.S. at 448; *Schumann*, 602 P.2d at 300-01. In recent years, a law and economics version of this has been proposed, placing an "efficiency" gloss on the rule subjecting the mentally ill to strict liability in tort. *See* LANDES & POSNER, *supra* note 25, at 127-28; Goldstein, *supra* note 66, at 84-85.

In addition, an argument that strict liability is therapeutically appropriate, for the benefit of the mentally ill themselves, was advanced in a student Note in 1983. *See* Splane, *supra* note 66, at 163-64; *see also* Goldstein, *supra* note 66, at 74-75; Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409, 419-20 (1992).

[78] *See* Splane, *supra* note 66, at 156 (stating that this justification is "cited mostly in early cases"); *see also Williams*, 775 P.2d at 672 (declining to rely on rationale because society no longer favors confinement of mentally ill); Clark v. Halloran, No. 64576, 1994 WL 11321, at *2 (Ohio Ct. App. Jan. 13, 1994) (reasoning that loss that must be borne by someone should be suffered by person at fault); Goila v. Brock, No. 1788, 1989 WL 95010, at *1 (Ohio Ct. App. Aug. 9, 1989) (mentioning Comment b of second *Restatement* section 283B as grounds supporting rule, yet omitting "brother's keeper" reasoning in listing those grounds); *Gould*, 543 N.W.2d at 286 (declining to rely on the rationale because it is "subject to criticism").

[79] *See Seals*, 254 P.2d at 349; *Sforza*, 268 N.Y.S. at 448; *Hays*, 38 N.E. at 450; *Schumann*, 602 P.2d at 301; *see also* RESTATEMENT (SECOND) OF TORTS, *supra* note 28, § 283B cmt. b(4) (stating that objective standard would encourage caretakers of mentally ill to prevent them from harming others); Curran, *supra* note 14, at 54 (explaining that "imposing liability on insane persons will encourage custodians and guardians of the insane to prevent their wards

These justifications have all been applied to cases of run-of-the-mill, "primary" negligence — cases in which a mentally ill person is accused of injuring another's person or property. But there are two variations on the theme: cases involving "sudden onset" of psychological symptoms, and cases in which mental capacity gave rise to contributory or comparative negligence. An example of the former scenario is *Breunig v. American Family Insurance Co.*[80] In *Breunig*, a driver caused an accident, allegedly after a sudden onset of schizophrenia,[81] when "she was not able to operate the vehicle with her conscious mind and . . . had no knowledge or forewarning that such illness or disability would likely occur."[82] The Wisconsin Supreme Court, while recognizing that permanent insanity has not been recognized as a defense,[83] allowed the defense in a sudden onset case. It reasoned that "a sudden mental incapacity equivalent in its effect to such physical causes as a sudden heart attack, epileptic seizure, stroke, or fainting should be treated alike and not under the general rule of insanity."[84] *Breunig* is an exception to the general rule, as other states' courts have rejected the sudden mental incapacity defense,[85] although sudden physical incapacity is a universally recognized excuse.[86]

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from inflicting harm on others"); Goldstein, *supra* note 66, at 74-75 (describing policy espoused in *Restatement (Second) of Torts*); Korrell, *supra* note 14, at 28 (listing numerous policy rationales for disparate treatment of mentally ill and physically disabled); Seidelson, *supra* note 14, at 37 (enumerating three reasons for imposing reasonable person standard on mentally ill); Splane, *supra* note 66, at 156 (noting four rationales courts have given for using objective standard for mentally ill).

[80] 173 N.W.2d 619 (Wis. 1970).

[81] *See id.* at 622.

[82] *Id.* at 622-23.

[83] *See id.* at 623.

[84] *Id.* at 624.

[85] *See* Bashi v. Wodarz, 45 Cal. App. 4th 1314, 1323-24, 53 Cal. Rptr.2d 635, 641-42 (1996); Kuhn v. Zabotsky, 224 N.E.2d 137, 141 (Ohio 1967). Commentators have similarly been rather inconsistent in describing the state of the law in this area. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 28, § 283C cmt. b (limiting cases in which mental state can be considered as "transitory delirium"); KEETON ET AL., *supra* note 11, § 32, at 178 (finding "some sentiment" in the cases for relaxing, in sudden onset cases, the rule against consideration of mental capacity); Curran, *supra* note 14, at 61-63 (noting that sudden onset is not recognized as an exception to the general rule); *see also* J.A. Bryant, Jr., *Liability of Insane Person for His Own Negligence*, 49 A.L.R. 3d 189, 199-201 (1973) (citing cases holding both ways and stating that sudden mental illness may foreseeably be recognized as defense to negligence).

[86] *See* Wingate v. United Servs. Auto. Ass'n, 480 So. 2d 665, 666 (Fla. Dist. Ct. App. 1985) (heart attack); Ferkel v. Bi-State Transit Dev. Agency, 682 S.W.2d 91, 93 (Mo. Ct. App. 1984) (heart attack); State v. Susco, 666 N.Y.S.2d 321, 321-22 (N.Y. App. Div. 1997) (heart attack); Wallace v. Johnson, 182 S.E.2d 193, 195 (N.C. Ct. App. 1971) (cerebral vascular

In contributory or comparative negligence, as opposed to primary negligence cases, the rule is varied. One court, finding that mental capacity is properly considered in evaluating contributory negligence, stated that an actor "should be held to the exercise only of such faculties and capacities with which she is endowed by nature for the avoidance of danger."[87] Another court disagreed, stating that "[t]he standard of care for both negligence and contributory negligence is the same."[88] The third *Restatement* endorses this latter view, that "one set of rules applies to negligence and contributory negligence alike," rejecting "the possibility of giving special consideration to the insanity of contributorily negligent plaintiffs."[89] The case law, then, generally denies a mental capacity defense for primary, contributory, or comparative negligence, whether the incapacity is preexisting or suddenly onset.

2. The Failure of the Critical Attack on the Physical/Mental Dichotomy

In the early part of this century, the scholarly commentary reflected the law's uncertainty regarding a mental capacity defense.[90] The commentators suggested rationales for a rule providing equal treatment of the physically and mentally disabled. Professor Ames,

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thrombosis); Robinson v. Moore, 512 S.W.2d 573, 576 (Tenn. Ct. App. 1974) (diabetic "black out"). The American Law Institute has concluded that "[t]he modern cases are impressively unanimous in accepting the rule that the party does not bear liability if the party's substandard behavior is due to unforeseeable seizure or loss of consciousness." RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 9 cmt. d, reporter's note.

[87] Feldman v. O'Hara, 214 N.E.2d 235, 237 (Ohio Ct. App. 1966), *rev'd on other grounds*, 226 N.E.2d 564 (1967); *see also* DeMartini v. Alexander Sanitarium, Inc., 192 Cal. App. 2d 442, 446-48, 13 Cal. Rptr. 564, 566-67 (1961) (holding that jury may consider evidence of actor's lack of capacity in assessing contributory negligence).

[88] Galindo v. TMT Transp., Inc., 733 P.2d 631, 632 (Ariz. Ct. App. 1986). As was the case with sudden onset, commentators have not agreed on the state of the law on this issue. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 28, § 464(1) (suggesting in comment g that public policy reasons for denying capacity defense for primary negligence "may not have the same force as applied to contributory negligence"); KEETON ET AL., *supra* note 11, § 32, at 178 (noting split in cases divergence of opinion, but finding "great majority" of cases permitting mental incapacity to be "only one of the 'circumstances' to be considered in judging the quality of [a plaintiff's] conduct"); Curran, *supra* note 14, at 63-64 (noting split in caselaw); Splane, *supra* note 66, at 157 (noting split in caselaw and suggesting that future cases will deny capacity defense as states move from contributory to comparative negligence).

[89] RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 9 cmt. e (citing RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 cmt. a, reporter's note (Proposed Final Draft, 1998)).

[90] *See supra* notes 65-69 and accompanying text.

for example, writing in the first decade of the twentieth century, noted the contemporary uncertainty in the law and suggested that the fault principle would eventually lead to a capacity defense for the mentally ill.[91] Writing in the same decade, William Hornblower also predicted that the law would embrace the defense: "The true rule and only rule consistent with justice and reason, and the rule toward which the authorities are evidently tending, is that a person who is *non compos mentis* cannot be held liable in negligence."[92] He believed that the rule was consistent with the notion of fault as a wrongful action (or inaction) coupled with the ability to act otherwise, as that principle was already firmly entrenched in the treatment of the physically ill.[93]

In the 1920s, commentators advanced the same two-prong argument that a capacity defense for the mentally ill was consistent with the fault principle and necessitated by the demands of justice that like cases be treated alike. As Professor Bohlen put it, "so long as it is accepted as a general principle that liability for injuries to certain interests are to be imposed only upon those guilty of fault in causing them, it should be applied consistently and no liability should be imposed upon those for any reason incapable of fault."[94] Similarly, W.G.H. Cook, arguing for equal treatment of the physically and mentally ill, stated that "when a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them."[95]

In 1960, however, Professor Curran noted that it had become settled law that no capacity defense was available to the mentally ill.[96] He therefore sought to explain why a principle that many previous commentators thought obvious and inevitable had not been adopted by common-law judges. He first reviewed the now familiar reasons given by courts rejecting the capacity defense and suggested that those reasons were weak.[97] He then attempted to explain their attraction by attributing to courts an unconscious bias against the mentally ill. He argued that if these reasons "have any

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[91] Ames, *supra* note 14, at 101-102.
[92] Hornblower, *supra* note 65, at 297.
[93] *See id.* at 294.
[94] Bohlen, *supra* note 65, at 32.
[95] Cook, *supra* note 14, at 346.
[96] *See* Curran, *supra* note 14, at 64.
[97] *See id.* at 64-65.

merit, then they are a manifestation of a continued lack of understanding and even continued fear of mental illness in our society."[98]

More recent commentators considering the common law's denial of a capacity defense for the mentally ill have criticized the four common bases for that rejection.[99] With respect to the first basis, that courts would have difficulty drawing distinctions among the mentally ill, critics have pointed to the many other contexts in which courts draw similar lines.[100] One critic suggested that this justification "seems hardly more than an abdication of judicial responsibility. It implies a shoulder-shrugging attitude of preferring ease of resolution over propriety of result."[101]

The second traditional basis for differential treatment is closely connected to the first: even if the rule for a capacity defense were clear, courts might be unable to apply it effectively. The argument was that courts might be fooled by fakers claiming mental illness or be befuddled by mental health professionals who would be unable to present trustworthy, objectively valid opinions.[102] Critics have challenged the concern with fakers as facially implausible, given the high degree of social stigma attached to mental illnesses.[103] Commentators have also argued that advances in psychological diagnostic methods should allay any fears regarding courts' difficulty in assessing expert testimony.[104]

The third justification, that "[w]here one of two innocent persons must suffer a loss it should be borne by the one who occasioned it,"[105] is, as one commentator put it, "an inaccurate statement of generally existing negligence law."[106] In other words, the justification is sensible in the abstract, unobjectionable only if applicable to all defendants in accident cases. As another critic argued:

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[98] *Id.* at 65.

[99] *See supra* notes 73-79 and accompanying text.

[100] *See* Goldstein, *supra* note 66, at 78; Korrell, *supra* note 14, at 36-37. Both of these commentators point to Mochen v. New York, 352 N.Y.S.2d 290, 293 (N.Y. App. Div. 1974), in which the court consulted documentary and expert evidence to place a mentally ill plaintiff along a continuum of capacity for purposes of adjudicating a contributory negligence claim, as an example of a conscientious exercise in line drawing.

[101] Seidelson, *supra* note 14, at 40.

[102] *See supra* notes 73-76 and accompanying text.

[103] *See* Goldstein, *supra* note 66, at 76; Seidelson, *supra* note 14, at 39.

[104] *See* Korrell, *supra* note 14, at 35-36; *infra* Part I.C (describing current state of science of capacity diagnosis).

[105] Breunig v. American Family Ins. Co., 173 N.W.2d 619, 624 (Wis. 1970).

[106] Seidelson, *supra* note 14, at 37.

> This "as between two innocents" reason, however frequently relied upon by modern courts, provides no justification for the imposition of a burden not imposed upon any other class of defendants. . . . A general principle of our tort law is that, absent fault (negligence, recklessness, or intention) justifying a shift, loss from an accident must lie where it falls. . . . This rationale is "nothing more than strict (or absolute) liability dressed up in Sunday-go-to-meetin' garb."[107]

The argument that causation alone should be enough to establish liability is fundamentally contrary to accident law.[108] Although pithy, this "between two innocents" justification is absurd in light of negligence law's long-standing, unshakeable commitment to the fault standard.[109] The Institute's explanation in the second *Restatement* is unhelpful. To justify the rule, it identifies a "feeling that if mental defectives are to live in the world they should pay for the damage they do, and that it is better that their wealth, if any, should be used to compensate innocent victims than that it should remain in their hands."[110] This justification, however, is unpersuasive in the face of the arguments against the rule.

The final justification, that a strict liability rule will encourage greater oversight and responsibility on the part of caretakers of the mentally ill, is archaic and therefore rarely cited by modern courts.[111] The justification is outdated because, since the deinstitutionalization movement, many mentally ill persons are not in a setting in which they are subject to day-to-day control by others.[112]

But courts have rejected these criticisms, and the rule refusing capacity defenses persists.[113] The four historic justifications have continued to persuade courts and have been augmented by two modern variations. One is advanced from a law and economics

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[107] Korrell, *supra* note 14, at 43 (quoting Robert M. Ague, *The Liability in Tort of Infants and Insane Persons*, 60 DICK. L. REV. 211, 222 (1956)); *see also* Goldstein, *supra* note 66, at 75 (commenting that "[i]t is unfair to require only the mentally ill to meet a strict liability standard while the average defendant is only liable when she is at fault").

[108] *See supra* notes 17-25 and accompanying text.

[109] *See* discussion *supra* Part I.A.1.

[110] RESTATEMENT (SECOND) OF TORTS, *supra* note 28, § 283B cmt. b(3).

[111] *See infra* notes 76-77 and accompanying text.

[112] *See* Korrell, *supra* note 14, at 29-30. Korrell also points out that the courts that relied upon this justification, ordinarily refused to impose liability directly on caretakers or guardians of the mentally ill. He therefore concludes that reliance on this rationale was always "suspect." *See id.* at 30.

[113] *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 9(c).

perspective. It argues that the nonrecognition of a capacity defense for the mentally ill is justified because the adjudication of mental capacity would involve unacceptably high information and activity costs.[114] The second has been called the "for their own good" rationale.[115] Overtly paternalistic, this justification begins by observing that the deinstitutionalization of the mentally ill beginning in the 1960s shifted them into the public view and into mainstream social interaction.[116] If community treatment is to be effective, the argument proceeds, the public must be comfortable around mentally ill people; therefore, the mentally ill must be encourage to conform their conduct to social norms:

> The mentally ill must be held to a uniform objective standard of tort liability in order to meet the present requirements and aims of community treatment. The objective standard helps minimize the burden on the community from deinstitutionalization, helps foster community acceptance of the mentally ill, and encourages the mentally ill to become self-sufficient, responsible members of the community.[117]

These two recent justifications, like the older ones, have been roundly criticized,[118] but the rule remains unshaken.

Also unable to shake the hegemony of the discrimination rule are the advances made in recent years in psychological diagnosis.[119] While still fraught with some degree of uncertainty, expert testi-

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[114] *See* LANDES & POSNER, *supra* note 25, at 128.

[115] *See* Korrell, *supra* note 14, at 40.

[116] *See* Splane, *supra* note 66, at 160-65.

[117] *Id.* at 163-64. Splane's reference to a capacity defense as invoking a "subjective" standard seems a bit misleading. Rather, a capacity defense involves an analysis as objective as that applied when a sudden emergency or a physical disability is considered by a fact finder in an accident case. *See* discussion *supra* Part I.A.2; *see also* Grant H. Morris, *Requiring Sound Judgments of Unsound Minds: Tort Liability and the Limits of Therapeutic Jurisprudence*, 47 SMU L. Rev. 1837, 1844-45 (1994) (explaining that capacity defense uses subjective standard). The "objective" standard, after all, asks whether an actor has exercised "reasonable care *under all the circumstances*." RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 4 (emphasis added). Once the range of circumstances to be considered is set by the court, and evidence is adduced as to the presence, or absence, of those circumstances in the course of the events at issue, a fact finder is asked to assess whether a reasonable person, faced with those circumstances, would have acted differently and avoided the accident. *See id.* § 7 cmt. c (explaining role of jury in evaluating claim of sudden emergency). The application of the capacity defense, then, includes mental illness within the circumstances properly considered in applying the objective standard, and does not impose a subjective standard.

[118] *See* Goldstein, *supra* note 66, at 86-91; Korrell, *supra* note 14, at 30-35, 40-42.

[119] *See infra* notes 150-63 and accompanying text.

mony regarding the capacity of the mentally ill to avoid risk is not clearly less reliable than expert testimony in other areas.[120] With the aid of these diagnostic advances, a "reasonably prudent insane person" standard is now a practical possibility.

C. A Reasonably Prudent Insane Person Standard

A "reasonably prudent insane person" standard seems, at first, oxymoronic; in fact, in plain English it is. The common-law reasonably prudent person standard, however, did not derive from logical or semantic purism, but from a pragmatic application of the moral fault principle. The standard attempts to follow the subjective norm of accident law — no liability without personal fault — while building a predictable, consistent system around an objective standard defined by reference to a hypothetical reasonable person. This pragmatic balance has resulted in other oxymorons: reasonably prudent unconscious persons,[121] reasonably prudent persons without adequate time to act prudently,[122] and reasonably prudent children.[123] With this background in mind, it is possible to apply a reasonably prudent person standard to the mentally ill as it has been applied to the physically disabled (including those with cognitive impairments).[124]

As the reasonable person test is applied to physically disabled actors, "reasonableness" is successfully and readily analyzed. For example, a person rendered unconscious due to a heart attack or a diabetic condition is obviously not capable of "reasonable" conduct while insensible, and yet the tort system does not suggest that they are faulty for causing an accident by virtue of their inability to

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[120] *See infra* notes 163-64 and accompanying text.

[121] *See, e.g.*, Wingate v. United Servs. Auto. Ass'n, 480 So. 2d 665, 666 (Fla. Dist. Ct. App. 1986); State v. Susco, 666 N.Y.S.2d 321, 321-22 (N.Y. App. Div. 1997); Robinson v. Moore, 512 S.W.2d 573, 576 (Tenn. Ct. App. 1974) (finding that defendant acted reasonably notwithstanding diabetic "blackout").

[122] *See* Rivera v. New York City Transit Auth., 569 N.E.2d 432, 434-35 (N.Y. 1991) (reversing trial court's ruling permitting jury to consider train conductor's conduct under reasonable person standard rather than under emergency doctrine).

[123] *See* Mathis v. Massachusetts Elec. Co., 565 N.E.2d 1180, 1184 (Mass. 1991) (explaining that child's actions should not be judged against reasonable person, but against that of child of "similar age, intelligence and experience").

[124] *See, e.g.*, *Wingate*, 480 So. 2d at 666 (applying reasonably prudent person standard to defendant who suffered heart attack while driving); Ferkel v. Bi-State Transit Dev. Agency, 682 S.W.2d 91, 93 (Mo. Ct. App. 1984) (invoking reasonably prudent person standard for heart attack victim); *Susco*, 666 N.Y.S.2d at 321-22 (same).

act.[125] Rather, the tort system considers the broader context and finds an actor at fault only if his imprudent conduct increased the risk of the accident.[126] Similarly, a person with a permanent physical illness need not overcome her disability or act at her peril, but must only act as would a reasonably prudent person "with the same disability."[127]

In the same way, the mentally ill can be judged, not on the basis of their reasonableness while insensible, but on the basis of their conduct under the circumstances.[128] Admittedly, this task is somewhat more complex than the application of an "under the circum-

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[125] *See Ferkel*, 682 S.W.2d at 93; *Susco*, 666 N.Y.S.2d at 321-22; *Robinson*, 512 S.W.2d at 576.

[126] *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 9(b). The *Restatement* explains that "[i]f an actor engages in substandard conduct because of sudden incapacitation or loss of consciousness brought about by physical illness, this conduct constitutes negligence only if the sudden incapacitation or loss of consciousness was reasonably foreseeable to the actor." *Id.*

The ability of the tort system to accommodate the loss of cognitive function when there is a sudden onset of physical illness calls into question the rationale of one of the comments to the current discussion draft to the third *Restatement*. The comment, in contrasting the treatment of mental illness to permanent (not sudden onset) physical illness, notes the following:

> [T]o recognize mental disability as a factor bearing on findings of negligence would be one-sided in a way that recognizing physical disability is not. . . . [T]he physically disabled person, though relieved from doing what the disability prevents the person from doing, is expected to adopt extra precautions to respond to extra level of risk that the person creates or incurs on account of the disability. Yet when the disability is mental or emotional, the disability directly affects the rationality and judgment; because of this, it will often be the case that the law cannot expect the person to wisely and appropriately moderate conduct choices so as to take the person's disability into account. Therefore, in mental disability cases the law is unable to implement the balanced approach that it applies to problems of physical disability.

RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 9 cmt. e. But the "balanced approach" is successful in cases of sudden onset of unconsciousness due to physical illness, even though it is equally impossible to "expect the person to wisely and appropriate moderate conduct choices." *Id.* A person who is unconscious is by definition no more able to act reasonably than a person in the midst of a psychotic episode. But in the case of sudden onset of physical illness, the approach is to test whether the person acted prudently in taking into account foreseeable illness, and to forgive her if she could not foresee the physical incapacitation. *See id.* § 9(b). Subject to the actor meeting her burden of proof on both foreseeability and incapacitation, there appears to be no principled reason to distinguish between physical and mental illness.

[127] RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 9(a); *see* ABRAHAM, *supra* note 74, at 59 (1997) (observing that "[a] blind person cannot read a sign that says 'Warning: Highly Flammable Vapors. Do not smoke.' If his smoking starts a fire, the jury will be instructed in a suit by the owner of the property damaged by the fire that it may (probably must) take into account the defendant's blindness in determining whether he behaved reasonably or negligently under the circumstances.").

[128] *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 4.

stances" test to the physically disabled,[129] but it is not impossible. This standard would not construct a set of social rules to judge the conduct of mentally ill patients while they are in the midst of a psychotic break. That undertaking would be a caricature of an effort to obtain equal treatment for the mentally ill. It would be akin to asking whether a driver, unexpectedly rendered unconscious by a stroke, had acted reasonably while slumped over the wheel of his speeding automobile. That analysis would be silly, as would an attempt to assess whether a clearly psychotic person had acted reasonably while in the midst of a severe psychotic episode. Instead, the test for the mentally ill borrows from the test for others impaired in their ability to avoid risk. In the case of the unconscious driver, the question is whether the driver acted unreasonably in choosing to drive, and the question is usually answered by inquiring whether he had forewarning that unconsciousness was reasonably likely to occur.[130] The formula would be the same with the mentally ill. In general terms, it would ask whether the actor possessed the ability to avoid the risk when the accident occurred,[131] and, if not, whether the actor behaved reasonably if she could foresee that she could be incapacitated.[132]

Once a coherent, manageable standard for evaluating the reasonableness of a mentally ill actor's conduct is formed, the mentally ill should be accorded the same access to a capacity defense as the physically disabled. The construction of that standard begins by dividing the possible mental capacity defenses into three common sense, nonscientific categories:

1. Sudden onset — no warning. Persons in this category are suddenly stricken with symptoms of severe mental illness so that they were unable to avoid creating the danger and, in addition, did not

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[129] *See* Korrell, *supra* note 14, at 47-48 (suggesting that rule for mentally ill is not "immediately transferable" from that for physically ill).

[130] *See* Wingate v. United Servs. Auto. Ass'n, 480 So.2d 665, 665 (Fla. Dist. Ct. App. 1986); *Ferkel*, 682 S.W.2d at 93; *Susco*, 666 N.Y.S.2d at 321.

[131] *See* HOLMES, *supra* note 9, at 95 (explaining that "[t]he requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability").

[132] *See id.*; RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 9(b) (stating that "[i]f an actor engages in substandard conduct because of sudden incapacitation or loss of consciousness brought about by physical illness, this conduct constitutes negligence only if the sudden incapacitation or loss of consciousness was reasonably foreseeable to the actor").

previously suffer the symptoms or were otherwise unable to anticipate the onset of the symptoms.[133]

2. Chronic serious mental illness, controlled (at least in part) by treatment. Persons in this category have, and are aware that they have, a serious mental illness with associated symptoms that could, if uncontrolled by medication or treatment, render them unable to avoid creating danger.[134]

3. Chronic severe mental illness, uncontrolled. Persons in this category have serious mental illness with severe symptoms not amenable to successful treatment and are, for that reason, precluded from exercising reasonable care to avoid danger.[135]

To apply a reasonably prudent insane person standard, fact finders must first determine which category applies to an actor. All mentally ill tort litigants should fit into one of these three mental illness categories: an unforeseen, "first-time" symptom; a symptom associated with a known, chronic, and partially controlled condition; or a symptom emblematic of long-term uncontrollable illness.[136] Fact finders would then be equipped to determine fault by

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[133] *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 282 (4th ed. 1994) [hereinafter DSM-IV]. Courts have found a distinction between the sudden onset of physical illness and mental illness. *Compare* Turner v. Caldwell, 421 A.2d 876, 876-77 (Conn. Super. Ct. 1980) (finding defendant liable for negligent operation of motor vehicle despite defendant's defense "that she was stricken by mental illness which she had no cause to anticipate"); Breunig v. American Family Ins. Co., 173 N.W.2d 619, 623 (Wis. 1970) (noting evidence that defendant did not have forewarning of onset of hallucinations), *with Susco*, 666 N.Y.S.2d at 322 (involving sudden unforeseeable heart attack), *and* Wallace v. Johnson, 182 S.E.2d 193, 194 (N.C. Ct. App. 1971) (discussing evidence, accepted by jury, that unforeseeable stroke caused accident).

[134] *See* ROBERT G. MEYER & SARAH E. DEITCH, THE CLINICIAN'S HANDBOOK 48-51 (4th ed. 1996) (stating that schizophrenic patients gain some relief from symptoms through psychological therapy and/or treatment with antipsychotic medications); *see also* DONALD W. GOODMAN & SAMUEL B. GUZE, PSYCHIATRIC DIAGNOSIS 65-67 (5th ed. 1996) (explaining that antipsychotic medication can help control symptoms). The available treatments for schizophrenics and other seriously mentally ill persons cannot, even with full compliance, assure a symptom-free existence. The patient is never "better," although there is a range of severity of illness with treatment, from mild to severe. *See id.* at 277-85.

[135] *See* Johnson v. Lambotte, 363 P.2d 165, 165-66 (Colo. 1961) (noting defendant's argument that at the time of the accident at issue, she was being treated for schizophrenia and had received dose of Thorazine immediately prior to accident and therefore "undisputed evidence was that she was physically and mentally incapable of performing any volitional act while operating an automobile and did not have the required mental capacity to realize the risk involved to herself and others in operating the automobile"); *see also* DSM-IV, *supra* note 133, at 24 (describing patients with ongoing severe symptoms as not amenable to successful treatment).

[136] It is sensible for the burden of proof on the capacity defense to rest with the actor claiming its protection, as is the case when an actor claims a sudden onset of physical incapacity. *See* Rogers v. Wilhelm-Olsen, 748 S.W.2d 671, 673 (Ky. 1988) (holding that defen-

answering the two capacity questions: whether the actor had the capacity to avoid the risk at the time of the accident, and, if not, whether the actor had the ability prior to losing this capacity to guard prospectively against creating the risk.

Determining fault for actors in the first category is simple, and, in fact, some courts have been willing to recognize a capacity defense for persons so situated.[137] The reason for this is simple: an actor with no history of mental illness or forewarning of her mental incapacity is no more at fault for the accident than a person who unexpectedly suffers a heart attack. "[I]t is unjust to hold a man responsible for his conduct which he is incapable of avoiding and which incapacity was unknown to him prior to the accident."[138]

Those in the second category are most difficult to judge. These people are part of a large population of chronically mentally ill persons,[139] usually living in the community, whose symptoms are only partially responsive to treatment.[140] Many people with serious mental illness experience "cycles" of symptoms, where they are symptom-free for long periods and then for a time experience symptoms that medication cannot readily control.[141] When a chronically mentally ill person can establish that, with treatment, he presents a tolerably small risk of harm to others, his conduct should be judged according to the standard applied to persons with chronic, sporadically incapacitating physical conditions, such as epilepsy.

In the familiar case of *Hammontree v. Jenner*, a court found reasonable the conduct of a driver with a history of epilepsy that caused an accident after having a seizure.[142] The court in *Hammontree* assumed that a person whose epilepsy is well-controlled by medication might reasonably drive, even though it is foreseeable

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dants have a defense to liability when they suffer from sudden, unforeseeable incapacitation); McCall v. Wilder, 913 S.W.2d 150, 151-52 (Tenn. 1995) (holding that drivers who know they have incapacitating disorders and disregard this information can be held liable).

[137] *See Breunig*, 173 N.W.2d at 623-24 (refusing to find defendant liable where he was incapable of controlling conduct and had no prior notice of his condition).

[138] *Id.* at 624.

[139] *See* MEYER & DEITSCH, *supra* note 134, at 40 (explaining that one out of every one hundred people will be diagnosed with schizophrenia).

[140] *See id.* (describing frequency of recurrence of significant symptoms); *see also* Harold Alan Pincus et al., *Prescribing Trends in Psychotropic Medications: Primary Care, Psychiatry, and Other Medical Specialties*, 279 JAMA 526 (1998) (stating that psychotropic medications are widely prescribed in United States).

[141] *See* DSM-IV, *supra* note 133, at 277-85.

[142] 20 Cal. App. 3d 528, 97 Cal. Rptr. 739 (1971).

that he might infrequently and without warning suffer a seizure. This assumption is unremarkable and has found its way into statutory law in many states, reflected in rules that regulate epileptics' eligibility to drive based on the frequency of their seizures and physicians' evaluation of the risks involved.[143] The common and statutory laws, in the case of chronically incapacitated epileptics, thus realize that some marginal risk to society is acceptable to enable the physically disabled to participate in economic and social life.

In light of the benefit of enabling the disabled to participate in society, some marginal risk above that presented by the nondisabled population is reasonable. The test for chronically physically disabled actors is whether they have acted with reasonable prudence to minimize the risk they cause and have avoided risky activity when they had reason to foresee their unavoidable incapacity. The rule with the chronically mentally ill should be the same; they act reasonably when they have reason to foresee that incapacity is likely and minimize risk and avoid risky behavior. This test produces a corollary: if a chronically mentally ill person willfully avoids treatment that can significantly reduce risk (e.g., taking medications), he is probably not acting reasonably. This follows for the same reason that voluntary intoxication can subject an actor to liability;[144] a reasonable person is expected to undertake available risk-reduction measures.[145]

The final category includes persons without capacity to conform their conduct, and formulating a standard for this group is straightforward. If the fault standard in negligence law is to have any moral coherence, it must contemplate choice and couple liability with the ability to have acted otherwise.[146] In *Johnson v. Lambotte*,[147] for example, the driver was an inpatient in a hospital, clearly seriously mentally ill with a condition that medication could not im-

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[143] ALASKA ADMIN. CODE tit. 13, § 08.340 (1998) (requiring six month seizure-free period before licensing, and periodic medical updates at DMV's discretion after licensing); KY. REV. STAT. ANN. § 186.411 (Michie Supp. 1994) (mandating that drivers be seizure-free for 90 days and present medical certification when they apply for or renew driver's licenses); S.D. CODIFIED LAWS § 32-12-5.1 (Michie 1998) (requiring one year seizure-free period before licensing, and medical updates until seizure-free for one year after licensing).

[144] *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 28, § 283C cmt. d.

[145] *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 4 cmt. h; *see also* Stuyvesant Assoc. v. Doe, 534 A.2d 448, 450 (N.J. Super. Ct. Law Div. 1987) (holding that failure to take antipsychotic medication, which led to actor's inability to avoid harmful behavior, constituted gross negligence).

[146] *See* HOLMES, *supra* note 9, at 95; Hornblower, *supra* note 65, at 294.

[147] 363 P.2d 165 (Colo. 1961).

prove.[148] When she caused the accident, she had no more volitional capacity to avoid the accident than a blind man has to read a warning sign or an unconscious man to drive a bus. Under the circumstances in *Johnson*, therefore, consistency and reasonableness dictate that the mentally ill actor have an opportunity to prove a defense, as do blind and physically ill actors.[149]

If the questions are cabined in this fashion, the only remaining inquiry is whether clinical and diagnostic certainty regarding mental illness sufficiently permits fact finders to apply these principles. The clinical and diagnostic questions are limited to whether an actor had the capacity to avoid risk at the time of an accident and, in some circumstances, whether the actor had forewarning and an ability to plan for the incapacity.[150] Courts are much more able to make these judgments now than they were in the decades when the common-law rule was formulated. As one commentator remarked, "The task may be simpler now than when [the 'burden on the courts'] rationale was first offered, given the increased accuracy of psychiatric diagnosis . . . and the modern recognition of mental disorders."[151] Indeed, in the context of permitting a capacity defense to a contributory negligence claim, the New York Court of Appeals was sufficiently comfortable to state:

> Considering the present state of medical knowledge, it is possible and practical to evaluate the degrees of mental acuity and corre-

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[148] *See id.* at 165

[149] To the extent that courts are reluctant to grant an excuse under circumstances where an "innocent victim" of an accident would suffer a loss, two observations may be made. First, such circumstances arise also when a blind person or a physically ill person is granted such an excuse. *See, e.g.*, Hammontree v. Jenner, 20 Cal. App. 3d 528, 530-32, 97 Cal. Rptr. 739, 740-42 (1971). That, after all, is the point of the fault principle. *See* HOLMES, *supra* note 9, at 94-95 (explaining that "[t]he general principle of our law is that loss from accident must lie where it falls" and that "[i]f this were not so, any act would be sufficient, however remote, which set in motion or opened a door for a series of physical sequences ending in damage, . . . even coming to a place where one is seized with a fit and strikes the plaintiff in an unconscious spasm"). But second, as the *Johnson* case perhaps illustrates, those harmed by an incompetent person subject to another's custody are no longer likely to be without a remedy. Instead, the custodians themselves are likely to be found liable for breaching their duty to act reasonably to avoid their charge's causing harm. *See* Mochen v. New York, 352 N.Y.S.2d 290, 292-95 (N.Y. App. Div. 1974). This trend sensibly looks to those who have capacity to avoid harm, and visits on them the tort responsibility.

[150] It would probably be unnecessary to address the question of predictions of future dangerousness, a more problematic function. *See* John Kip Cornwell, *Confining Mentally Disordered "Super Criminals": A Realignment of Rights in the Nineties*, 33 HOUS. L. REV. 651, 706-17 (1996) (detailing difficulties in predicting future dangerousness of mentally ill).

[151] Korrell, *supra* note 14, at 35.

> late them with legal responsibility. Within the broad spectrum of scientifically differentiated mental illnesses, there are intermediate levels of disability which may interfere with the perception of danger or the free exercise of judgment to avoid danger to such a degree that a mentally sick plaintiff suffering from such an infirmity should be excused from responsibility for his own injury.[152]

In light of courts' ability to evaluate psychiatric diagnoses, the concerns expressed regarding malingering, or "faking," overstate the true magnitude of the problem.[153] But the concern is real, and the ability to discern faking is important. In recent years, psychologists have developed a number of increasingly reliable tests to detect faking, the most studied of which is carefully structured clinical interviews.[154] One interviewing method is the Structured Interview of Reported Symptoms (SIRS).[155] It uses a series of questions drawing different impressions and information from the subject, permitting a "systematic exploration of the various malingering strategies . . . ."[156] The results of the studies are quite positive: "The scores on the SIRS have consistently discriminated known or simulated malingerers from normal and clinical control groups instructed to respond honestly, even when feigning subjects have been provided with information regarding the detection strategies employed in the test or were psychologically knowledgeable about specific disorders to be feigned."[157] The combination of SIRS, other structured interview methods, and the experience of the interviewing psychologist or psychiatrist thus greatly lessens the risk that a professional will be fooled by a malingerer.[158]

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[152] *Mochen*, 352 N.Y.S.2d at 293; *see* Korrell, *supra* note 14, at 36.

[153] *See* Goldstein, *supra* note 66, at 75; Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1404-05 (1997). Most of the research on malingering has been undertaken in the context of the invocation of the insanity defense.

[154] *See* GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 55-56 (2d ed. 1997).

[155] *See id.* at 55.

[156] *Id.* (emphasis omitted).

[157] *Id.*

[158] *See id.* at 54-57 (describing variety of techniques that psychologists can use to identify malingering); A. Louis McGarry, *Forensic Psychiatric Reports: Selected Clinical Topics and Models for Report Preparation*, *in* WILLIAM J. CURRAN ET AL., FORENSIC PSYCHIATRY AND PSYCHOLOGY 83-85 (1986) (discussing psychological tests that can help diagnose malingering); Richard Rogers & James L. Cavenaugh, *Application of SADS Diagnostic Interview to Forensic Psychiatry*, 9 J. PSYCHIATRY & L. 329, 329-30, 337-41 (1981) (suggesting that proper diagnostic interview will reduce likelihood of malingering and, consequently, make diagnosis more accurate).

Perhaps the greatest fear in the adjudication of mental illness is the perceived lack of agreement among mental health professionals — the "'for every Ph.D. there is an equal and opposite Ph.D.'" phenomenon.[159] Even in the context of forensic examinations,[160] the reliability[161] and validity[162] of examiners has proven to be quite high in recent studies.[163] But most of these studies concerned the criminal system, in which forensic examiners are often the only experts presented to the court.[164] In civil litigation, where an actor may be relying on evidence of a long-standing chronic mental illness, a significant number of the expert witnesses offering opinions to the court will likely be psychologists or psychiatrists in a therapeutic relationship with the actor. This relationship can only enhance the quality, reliability, and validity of the testimony offered in the civil context.

An expert having a therapeutic relationship with an actor is simply more capable of reporting an accurate picture of the actor's mental state than is a forensic examiner.[165] Unlike the therapist, the forensic examiner is ethically unable to establish the rapport that is extremely helpful in gaining a complete understanding of the actor's mental state. This rapport helps the therapist gain reli-

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[159] MELTON ET AL., *supra* note 154, at 228 (quoting PETER DIXON, THE OFFICIAL RULES (1978)).

[160] *See* MALCOLM FAULK, BASIC FORENSIC PSYCHIATRY 1 (2d ed. 1994) (defining forensic as being related to court use and explaining that forensic psychiatrists prepare reports on abnormalities of suspects' mental states for courts); MELTON ET AL., *supra* note 154, at 41 (explaining that forensic assessments are "conducted at the behest of the legal system," while therapeutic assessments take place in context of traditional therapy at patient's request).

[161] "Reliability" of psychological assessment connotes the rate of agreement among examiners of the same subject. *See* MELTON ET AL., *supra* note 154, at 228; Thomas Grisso, *Psychological Assessments in Legal Contexts*, *in* CURRAN ET AL., *supra* note 158, at 106-07.

[162] "Validity" of psychological assessment connotes the rate of agreement with external criteria. *See* MELTON ET AL., *supra* note 154, at 230-31; Grisso, *supra* note 157, at 107-08. Unfortunately, the testing of this factor has been nearly circular, as the benchmark "external criterion" most often used has been the judgment of the court to which the forensic examiner's report has been presented.

[163] *See* MELTON ET AL., *supra* note 154, at 228-34 (surveying recent studies assessing reliability of clinicians' opinions in insanity defense cases).

[164] *See* CURT R. BARTOL & ANNE M. BARTOL, PSYCHOLOGY AND LAW: RESEARCH AND APPLICATION 134-35 (1994) (discussing studies performed assessing reliability of clinical assessments for defendants wishing to utilize insanity defense in criminal trials); MELTON ET AL., *supra* note 154, at 160-62 (discussing Thomas Grisso and Sandra Seigel's studies of competency to stand trial).

[165] MELTON ET AL., *supra* note 154, at 43-44 (explaining that in therapeutic relationship between client and therapist, which is typically voluntary, client is more likely to be open with therapist than in involuntary relationship between client and forensic examiner).

able information through the instruments discussed above, with the assistance of intuition and common sense.[166] In addition, a therapist with an ongoing relationship with the actor — a relationship that predates the accident giving rise to the civil litigation — will be able to draw on a therapeutic history created when the actor had only positive incentives to be forthcoming.[167]

The expert information available to evaluate a capacity defense is thus likely to be trustworthy and reliable. Fact finders will apply the expert testimony to a coherent framework of analysis and will face limited and exclusive options that are easily understood. Ultimately, the picture often painted of extraordinary uncertainty and difficulty in the fact-finding process will not materialize. Because difficulties involved in evaluating evidence of psychological disability are quite similar to those with physical disability,[168] the difficulties of physical and psychological evaluation in the tort and other civil law contexts are highly similar.[169] These similarities leave the firm impression that denying the capacity defense to the mentally ill is a court system's "shoulder-shrugging attitude of preferring ease of resolution over propriety of result."[170] The reasonably prudent insane person standard fits easily and comfortably into the general negligence framework; therefore, the failure to adopt it is analytically unsupportable.

But the common-law rules are committed to the judgment of the state courts and, wise or unwise, survive nevertheless. For this reason, states' treatment of the mentally ill has been largely insulated from attack on federal constitutional grounds. A forgiving standard of constitutional review applies to this common-law rule because the Supreme Court has not found the mentally disabled to constitute a suspect or quasisuspect class.[171] Under this forgiving rationality standard, the current common-law rule is not so arbitrary as to have no "rational relationship to some legitimate end."[172]

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[166] *See id.* at 44.

[167] *See id.* at 43.

[168] *See id.* at 10-16 (describing methods used to assess psychological disabilities).

[169] *See* Korrell, *supra* note 14, at 37-38 (discussing contract, will contest, divorce, and medical informed consent/capacity cases).

[170] Seidelson, *supra* note 14, at 40.

[171] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (holding that mentally retarded do not form suspect or quasisuspect class).

[172] Roemer v. Evans, 517 U.S. 620, 621 (1996) (describing standard applied to equal protection review of state statutes that "neither burden[] a fundamental right nor target[] a suspect class").

And, prior to 1990, no federal statute suggested any extra-constitutional grounds for calling the rule into question.

In 1990, however, the ADA was adopted, calling into question a broad range of activities disparately treating the disabled, whether that activity is motivated by bias, paternalistic concern, or concern for the greater social good.[173] Specifically, Title II of the ADA prohibits instrumentalities of states[174] from discriminating against the disabled.[175] The following Part examines whether this prohibition against discrimination to state instrumentalities extends to the common-law courts and, if so, whether the Supreme Court's recent Tenth and Eleventh Amendment decisions protect state courts from the ADA's reach.

II. CONGRESS AND THE COURT: THE FEDERAL OVERLAY ON THE COMMON LAW

A. The Denial of a Capacity Defense Violates Title II of the ADA

The ADA has been characterized as the "Emancipation Proclamation" for America's disabled,[176] including those with mental disabilities.[177] Upon signing it into law, President Bush sweepingly observed that, with the ADA's passage, "every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom."[178] Congress described the Act as designed

> to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; . . . and to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate

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[173] *See* 42 U.S.C. § 12101(b) (1994).

[174] *See id.* § 12131(1)(B) (1994).

[175] *See id.* § 12132 (1994).

[176] *See* 136 CONG. REC. S9529 (daily ed. July 11, 1990) (statement of Sen. Harkin); 135 CONG. REC. S10,789 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy).

[177] *See* 42 U.S.C. § 12102(2)(A) (1994); *see also* 28 C.F.R. § 35.104 (1999) (defining "mental impairment" as "[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities").

[178] Remarks on Signing the Americans with Disabilities Act, 2 PUB. PAPERS 1067, 1068 (1990).

> commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.[179]

The ADA built upon and clarified prior antidiscrimination statutes[180] to prohibit broadly disability discrimination in public and private life.[181] It included extensive findings on the prevalence of disabilities among Americans, the historic mistreatment of persons with disabilities, and the harmful social effects of disability discrimination.[182] Congress carefully noted that disability discrimination is sometimes intentional and invidious, but it is also at times based on thoughtless, or even well-meaning, misunderstanding.[183]

Title II of the ADA prohibits discrimination in the services provided by "any State or local government [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government."[184] For purposes of Title II, "discrimination" is broadly defined as when a person, by reason of disability, is "excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or subjected to discrimination by any such entity."[185] Congress instructed the attorney general to adopt regulations to flesh out the range of activity that violates Title II,[186] and those regulations add substantial detail to the bare bones mandate of the Act.[187]

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[179] 42 U.S.C. § 12101(b)(1)-(2), (4) (delineating purpose of ADA).

[180] In particular, the ADA advanced the goals of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791-794 (1994). *See* Helen L. v. DiDario, 46 F.3d 325, 329-32 (3d Cir. 1995) (recounting circumstances leading up to enactment of ADA).

[181] *See* 42 U.S.C. § 12101(b) (1)-(4); *see also* Keri K. Gould, *And Equal Participation for All . . . The Americans with Disabilities Act in the Courtroom*, 8 J.L. & HEALTH 123, 128-32 (1993-1994) (describing scope of ADA); Emily Alexander, Note, *The Americans with Disabilities Act and State Prisons: A Question of Statutory Interpretation*, 66 FORDHAM L. REV. 2233, 2237-38 (1998) (same).

[182] *See* 42 U.S.C. § 12101.

[183] *See* 42 U.S.C. § 12101(a)(5). "[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." *Id.* § 12101(a)(7).

[184] 42 U.S.C. § 12131(1)(A)-(B) (1994). Title II also prohibits discrimination by the National Railroad Passenger Corporation. *Id.* § 12131(1)(C).

[185] *Id.* § 12132 (1994).

[186] *See id.* § 12134(a) (1994); *see* Olmstead v. Zimring, 119 S. Ct. 2176, 2182-83 (1999); Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir. 1995) (citation omitted).

[187] *See* 28 C.F.R. § 35.130 (1999) (describing, in detail, prohibitions against discrimination).

A claim of discrimination under Title II requires a showing that the claimant is disabled within the meaning of the ADA;[188] the claimant has suffered discrimination[189] at the hands of a public entity[190] by reason of the disability;[191] and the claimant is "qualified" for the public service in question, with or without "reasonable modifications" to the services.[192]

Title II has never been applied to the core common-law adjudicatory functions of state courts. Reasonable review of the statutory language and interpretive case law, however, reveals that state courts violate Title II by denying mentally ill tort litigants a capacity defense available to other, nonmentally ill litigants. First, state courts come within the literal definition of "public entity," as they are a "department, agency . . . or other instrumentality of a State."[193] In addition, some actors seeking to invoke the capacity

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[188] *See* 42 U.S.C. § 12102(2); 28 C.F.R. § 35.104 (1999).

[189] *See* 42 U.S.C. § 12132 (1994); 28 C.F.R. § 35.130 (1999).

[190] *See* 42 U.S.C. § 12131(1) (1994); 28 C.F.R. § 35.104.

[191] *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a). In this element, the ADA differs from its predecessor, The Rehabilitation Act of 1973. The ADA requires that a claimant show discrimination "on the basis of" a disability; under section 504 of the Rehabilitation Act, a claimant must show discrimination "*solely* by reason of her or his disability." 29 U.S.C. § 794(a) (1994) (emphasis added). The treatment of "mixed motive" cases would seem to be different under the two statutes, although the regulations promulgated pursuant to section 504 omit the word "solely" from their basic description of prohibited discrimination. *See* 28 C.F.R. § 41.51(a) (1999).

[192] *See* 42 U.S.C. § 12131(2); *see also* 28 C.F.R. § 35.104 (defining "qualified individual with a disability" as a person who "with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity").

Regardless of the element of an ADA cause of action with which the present question is connected, the issue is colored by concerns for practicality. As the Supreme Court said in connection with the ADA's predecessor statute, any interpretation of a disability discrimination statute will be undertaken in "response to two powerful but countervailing considerations — the need to give effect to the statutory objectives and the desire to keep [the statute] within manageable bounds." Alexander v. Choate, 469 U.S. 287, 299 (1985) (discussing Rehabilitation Act of 1973); *see also* School Bd. of Nassau County v. Airline, 480 U.S. 273, 293 (1987) (Rehnquist, C.J., dissenting) (pointing out that "[i]n *Alexander v. Choate*, this Court stated that '[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations — the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds.'" (citations omitted) (quoting *Alexander*, 469 U.S. at 299)). But the Court's moderating instincts may go just so far. After reciting the legislative history of the Rehabilitation Act describing Congress's appreciation of the degree of intentional and unintentional discrimination faced by the disabled, and Congress's intent to provide remedies, the Court stated, "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as design." *Alexander*, 469 U.S. at 297.

[193] 42 U.S.C. § 12131(1)(b); *see* Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 731 (9th Cir. 1999) (regarding zoning law); Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998) (discussing litigant's physical access to court); Innovative Health

defense are certainly "disabled" under the ADA, or have a "record" of a disabling mental impairment or be "regarded as having such an impairment."[194] A mental disability includes "mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities"[195] and must be sufficiently severe as to "limit[] one or more of the major life activities of such individual."[196]

It is equally clear that the mentally ill suffer from "discrimination" in the common-law system. In providing the "program [or] service"[197] of adjudication of private wrongs, common-law courts

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Sys., Inc. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997) (involving zoning); Galloway v. Superior Court, 816 F. Supp. 12, 18-19 (D.D.C. 1993) (pertaining to jury service); *In re* Rubenstein, 637 A.2d 1131, 1136 (Del. 1994) (discussing state board of bar examiners); People v. Caldwell, 603 N.Y.S.2d 713, 714 (N.Y. Crim. Ct. 1993) (pertaining to jury service); Oklahoma Bar Ass'n v. Busch, 919 P.2d 1114, 1118 (Okla. 1996) (involving conduct of bar association found to be "arm of" state supreme court).

[194] *See, e.g.*, Johnson v. Lambotte, 363 P.2d 165 (Colo. 1961) (holding that insane people are liable for their torts). In *Johnson*, the defendant had been committed to a psychiatric hospital prior to the accident in question, had been given twenty electroconvulsive treatments "without beneficial effect," and "was frequently given high dosages of thorazine." *See id.* at 165-66. Just after the accident, she was "adjudged a mental incompetent." *See id.*

The degree of mental illness necessary to demonstrate limitation of major life activities does not necessarily fall into the degree of incapacity necessary to demonstrate an "excuse" from liability, were one available to the mentally disabled as it is for the physically disabled. The two processes are quite separate. If the disparate treatment of the mentally ill by the common-law system were found to violate the ADA, the remedy for the breach would be a modification of state common law to permit the assertion of an incapacity defense cognate to that now available to other negligence defendants. The mentally disabled defendant would still need to adduce facts sufficient to meet the requirements of that defense. *See* discussion *infra* Part III (describing proposed test by which offer of proof would be measured in nondiscriminatory common-law regime).

[195] 28 C.F.R. § 35.104 (1999).

[196] 42 U.S.C. § 12102(2)(A). "Major life activities" are "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 35.104.

The Supreme Court has recently ruled that corrective measures — in the case before it, eyeglasses, but presumably also medications to control symptoms of psychological illness — must be taken into account when assessing disability. The assessment must include "[b]oth positive and negative" effects of these corrective or "mitigating" measures. *See* Sutton v. United Air Lines, 119 S. Ct. 2139, 2146 (1999).

[197] See 42 U.S.C. § 12132 (1994). The reach of Title II, insofar as the activities ("programs" and "services") of public entities within its ambit, is extremely broad, and has been construed to reach court proceedings. *See* Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 210-12 (1998) (holding that Title II of ADA applies to state prisons when prisoner claims right to transfer to boot camp program); *Layton*, 143 F.3d at 472 (holding that county violated ADA in effectually denying veteran access to county courthouse's second floor); Heather K. by Anita K. v. City of Mallard, 946 F. Supp. 1373, 1386-87 (N.D. Iowa 1996) (discussing drafting of public health and safety violations and holding that Title II applies if ordinances have discriminatory affect on ability of disabled persons to take advantage of city services, programs, or facilities); *Galloway*, 816 F. Supp. at 15-19 (finding that court proceed-

"afford [the mentally disabled] an opportunity to participate in or benefit from the [adjudicatory process] that is not equal to that afforded others,"[198] for example, nonmentally disabled litigants such as those faced with sudden emergencies or physical disabilities.[199] And, just as certainly, the discrimination is "by reason of" the mental disability.[200] After all, the capacity defense is not denied or allowed on the basis of degree of function, degree of capacity, or ability to prove incapacity.[201] Rather, the rule on capacity defense is categorical; in the case of sudden emergency[202] or physical

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ings fall within section 504 and applying Title II of ADA). In none of these cases, however, was the core adjudicatory function at issue. Thus, a case in which Title II was applied to the process by which state courts make common law would raise jurisdictional issues of first impression.

[198] 28 C.F.R. § 35.130(b)(1)(ii) (1999). Alternatively, the common-law courts could be seen, in terms of the capacity defense, as "excluding" or "denying participation to" the mentally ill. After all, the definition of discrimination in Title II is written in the disjunctive, and forbids both "discrimination" in the usual sense (disparate treatment or effect, in comparison to a reference group), and exclusion from or denial of services on the basis of disability, regardless of the absence or presence of a better-treated reference group. *See* 42 U.S.C. § 12132; Crowder v. Kitagawa, 81 F.3d 1480, 1483-84 (9th Cir. 1996) (discussing congressional intent in adopting section 12132 of ADA).

[199] *See supra* Part I.A.2. Until recently, courts had struggled with the question of which reference group to consider against a claimant's treatment. Some courts held that a person cannot state a claim under the ADA by juxtaposing her treatment with that experienced by persons with different disabilities, but only by juxtaposing her treatment with that experienced by the nondisabled. *See* Doe v. Pfrommer, 148 F.3d 73, 82-84 (2d Cir. 1998); Cerpac v. Health & Hosp. Corp., 147 F.3d 165, 168 (2d Cir. 1998); Rodriguez v. DeBuono, 44 F. Supp. 2d 601, 615-18 (S.D.N.Y. 1999). Other courts disagreed, holding that discrimination among classes of disabled people could give rise to an ADA claim. *See* Zimring v. Olmstead, 138 F.3d 893, 899 (11th Cir. 1998), *aff'd on this point, vacated in part and remanded sub nom.* Olmstead v. Zimring, 119 S. Ct. 2176 (1999); Helen L. v. DiDario, 46 F.3d 325, 335-36 (3d Cir. 1995); *see also* Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1016 n. 15 (3d Cir. 1995) (regarding section 504 claim); Plummer by Plummer v. Branstad, 731 F.2d 574, 578 (8th Cir. 1984) (same); Jackson by Jackson v. Fort Stanton Hosp. & Training School, 757 F. Supp. 1243, 1296-99 (D.N.M. 1990), *rev'd in part on other grounds*, 964 F.2d 980 (10th Cir. 1992) (same).

The Supreme Court recently resolved this issue, rejecting any requirement that a disabled person point to a class of nondisabled persons who are treated more favorably. The Court found the arguments for such a requirement to be "incorrect as a matter of precedent and logic." *Olmstead*, 119 S. Ct. at 2186. The "comprehensive view" of discrimination captured by the ADA, then, includes disparate treatment between disabled groups. For example, this view would include situations where the physically disabled are treated more favorably than the mentally disabled. *See id.*; *DiDario*, 46 F.3d at 333-36. The definition of "discrimination" under Title II therefore encompasses disability discrimination compared with any group, disabled or not.

[200] *See* 42 U.S.C. § 12132.

[201] *See* Johnson v. Lambotte, 363 P.2d 165, 165-66 (Colo. 1961) (finding that severely mentally ill defendant lacked capacity to realize risk involved in operating car).

[202] *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 1, § 7.

disability,[203] the defense is available, but in the case of a mental disability, it is not.[204]

The final element is the most problematic one. The claimant must establish that she is "qualified" for the public service in question, with or without "reasonable modifications" to the service; that is, the claimant must "meet[] the essential eligibility requirements for the receipt of services or participation in programs or activities provided by a public entity."[205] On one hand, this element seems easy to satisfy. After all, the disabled person is almost by definition qualified for the service of common-law adjudication by her status as a litigant. But this analysis is somewhat too pat. In a sense, the differential treatment complained of is that, within the litigation process, the mentally ill are denied an opportunity to advance a capacity defense that is available to other litigants.

The application of Title II to the denial of equal treatment in the decision-making process was recognized in *Innovative Health Systems, Inc. v. City of White Plains.*[206] In that case, a community service provider to the disabled complained that a municipality denied a zoning application in violation of the ADA. The municipality responded, inter alia, that the process was not discriminatory because the service provider could participate fully in the zoning activity "in every step of the process."[207] The court brushed this observation aside, noting that the provider's "claim is not premised on the denial of the right to participate in the zoning approval process. Rather, they allege that they have been denied the benefit of having the City make a zoning decision without regard to the disabilities of [the provider's] clients."[208] A parallel analysis is appropriate in the context of the capacity defense. Of course the mentally ill are qualified to be litigants in tort actions, but that observation is beside the point. The real issue is whether they are properly denied the opportunity to prove a lack of capacity to avoid liability in

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[203] *See id.* § 9(a).

[204] *See id.* § 9(b).

[205] 42 U.S.C. § 12131(2) (1994); *see also* Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840, 849 (7th Cir. 1999) ("Similarly, under the analogous section of the Rehabilitation Act, '[a]n otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap,' . . . with reasonable accommodation." (quoting Knapp v. Northwestern Univ., 101 F.3d 473, 482 (7th Cir. 1996) (alteration in original)).

[206] Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 48-49 (2d Cir. 1997).

[207] *See id.* at 48.

[208] *See id.* at 48-49.

a tort action. The relevant inquiry, then, is whether they are qualified to interpose a capacity defense.

The question of qualification can be framed in two ways. Under the first, the issue is whether the common law is overtly discriminatory on its face. After all, it explicitly excludes the category of the mentally ill from the capacity defense without any individualized examination of capacity, cognizable proof of capacity, or even dispute as to capacity.[209] Under those circumstances, then, there is no question of "reasonable modification" of the common-law rule;[210] the question is only whether the mentally ill are qualified to assert a capacity defense.[211] If they are, then the rule of law forbidding them from interposing such a defense must be stricken.[212]

Under the second framing of the issue, the mentally ill are assumed to qualify for the capacity defense, and the question then becomes whether the modification of the common law, presumably to permit them to employ the capacity defense, is reasonable.[213] A public entity must undertake a modification that would eliminate discrimination against a qualified person unless it "can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity."[214] The public entity must establish that modifying "the rule in the particular case at hand would be so at odds with the purpose behind the rule that it would be a fundamental and unreasonable change."[215]

But these may be distinctions without difference. The common question under both framings of the issue is whether the mentally ill and others differ in kind or degree for purposes of the justifications for employing the capacity defense that are cognizable under

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[209] *See* Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 733-35 (9th Cir. 1999) (holding that there is no need to examine whether modifications to facially discriminatory ordinance would be reasonable because if claimant is "qualified," ordinance is invalid); *see also Indiana High Sch.*, 181 F.3d at 851 ("The remaining question is whether [plaintiff] is otherwise qualified for the job. . . . To answer this question in most cases, the district court will need to conduct an *individualized inquiry* and make appropriate findings of fact." (quoting School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987))).

[210] *See* 42 U.S.C. § 12131(2).

[211] *See id.*

[212] *See City of Antioch*, 179 F.3d at 734 ("The only possible modification of a facially discriminatory law that would avoid discrimination on the basis of disability would be the actual removal of the portion of the law that discriminates on the basis of disability.").

[213] *See* 42 U.S.C. § 12131(2).

[214] 28 C.F.R. § 35.130(b)(7) (1999).

[215] *Indiana High Sch.*, 181 F.3d at 850.

the ADA. If there are differences only in degree — for example, the litigation process could, with little or no modification, assess the capacity of the mentally ill — then a mentally ill litigant would meet the "essential eligibility requirements" for the capacity defense.[216] And similarly, modifying rules to permit the mentally ill to assert the capacity defense would not "fundamentally alter" the common law system.[217] But if the there is a sharp difference between the mentally ill and others for these purposes — for example, the litigation process as it currently exists could not with adequate reliability assess the capacity claims of the mentally ill — then the mentally ill would be unqualified. The common-law system would be fundamentally altered if modified to permit the mentally ill to assert a capacity defense, so the ADA would not require that modification.

Under either analysis, it is sensible to examine the justifications that common law courts have offered for the disparate treatment.[218] Presumably, these justifications are comprehensive and constitute the universe of arguments against permitting a capacity defense for the mentally ill. The common-law justifications fall into two categories. One category includes justifications simply not cognizable under the ADA. They reflect an explicit decision to treat the mentally ill differently for the benefit of the larger society and without any excuse under the ADA. The second category includes justifications that are cognizable under the ADA. They reflect decisions to treat the mentally ill differently for reasons that comport with excuses under the ADA, specifically those related to the "qualifica-

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[216] *See* 42 U.S.C. §12131(2).

[217] *See* 28 C.F.R. § 35.130(b)(7).

[218] It is proper to examine the courts' articulated reasons for establishing and maintaining the differential rule:

> [I]n virtually all controversies involving the ADA and state policies that discriminate against disabled persons, courts will be faced with . . . deliberation over relevant statutes, rules and regulations.
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> The court's obligation under the ADA and accompanying regulations is to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives. [If the state's own deliberations were beyond the scope of court review in an ADA action,] any state could adopt requirements imposing unreasonable obstacles to the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA merely by explaining that the state authority considered possible modifications and rejected them.

Crowder v. Kitagawa, 81 F.3d 1480, 1485 (9th Cir. 1996) (discussing proper scope of review of legislative deliberations).

tion" of a mentally ill litigant for a capacity defense or to the reasonableness of modifications to the common-law process that accommodating the mentally ill would require. The success of these justifications turns on the resolution of fact questions.

Included in the first category are justifications that avowedly seek to benefit society in general by denying equal treatment to the mentally ill. Among these justifications are encouraging caretakers of the mentally ill to be cautious;[219] a "between two innocents" strict liability basis applicable only to the mentally ill;[220] and the law and economics justification of reducing the cost to society of accidents caused by the mentally ill.[221] These justifications share a willingness to disadvantage the mentally ill so that society as a whole may benefit.

There is nothing unusual in this mode of rule making. Indeed, it is grist for the mill for courts, legislatures, and administrative agencies as they govern society. And such social benefit-maximizing is consistent with equal protection analysis if the classification inherent in the rule is rationally related to a legitimate state interest[222] and is not "drawn for the purpose of disadvantaging the group burdened by the law."[223] But these justifications fly in the

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[219] *See supra* notes 111-112 and accompanying text.

[220] *See supra* notes 105-110 and accompanying text.

[221] *See supra* note 114 and accompanying text. To the extent the law and economics justification is premised on reducing the cost of adjudicating accident cases, it more properly fits into the second category of justifications.

[222] *See* Roemer v. Evans, 517 U.S. 620, 632-33 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); Schweiker v. Wilson, 450 U.S. 221, 230 (1981); Williamson v. Lee Optical, 348 U.S. 483, 489-90 (1955). Rational basis is the test applied to the mentally disabled, as they do not form a suspect or quasisuspect class. *See Cleburne*, 473 U.S. at 442-43.

[223] *Roemer*, 517 U.S. at 633 ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." (Stevens, J., concurring) (quoting United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 181 (1980))); *see Cleburne*, 473 U.S. at 450 (striking down local occupancy permit provision under rational basis standard on finding that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded").

The common law rule denying a capacity defense to the mentally ill might deserve a similar fate under the rational basis test. Although the language is not a court's language, it is hard not to perceive "irrational prejudice" in the second *Restatement*. In comment b, the second *Restatement* justifies the rule by reference to "the feeling that if mental defectives are to live in the world they should pay for the damage they do, and that it is better that their wealth, if any, should be used to compensate innocent victims than that it should remain in their hands." RESTATEMENT (SECOND) OF TORTS, *supra* note 28, § 283B cmt. b(3). The ADA obviously reflects a congressional judgment that instrumentalities of the state may not impose a toll on the disabled for the privilege of "living in the world." The passage of the ADA obviates the need to subject common law rules to constitutional analysis like the court did in *Cleburne*. *See Cleburne*, 473 U.S. at 440.

face of the ADA's antidiscrimination principles. While disparately treating the psychologically disabled may rationally advance common-law courts' view of the greater good, it is not a permissible social trade-off under the ADA even if the courts or commentators were to show the mentally ill are riskier than other groups, which they have not.

Also in the first category of justifications is the "for their own good" rationale.[224] Under this justification, the mentally ill may be treated more harshly than, for example, the physically disabled as a therapeutic device to "help[] foster community acceptance of the mentally ill, and encourage[] the mentally ill to become self-sufficient, responsible members of the community."[225] At a minimum, this rule sweeps with too broad a brush because it includes all mentally ill into one stereotypic view. In addition, it is difficult to imagine jurisprudence more at odds with the sensibility of the ADA, which mandates the nonpaternalistic treatment of the disabled as full-fledged members of society, even in the absence of "community acceptance."[226]

The second category of common-law justification is on a different footing than the first. This category appears on its face to be sanctioned by the ADA, as the justifications focus on the process of common-law adjudication and the integrity of the adjudicatory process. In this category are those justifications maintaining that permitting the mentally ill to assert a capacity defense would damage the enterprise of maintaining a coherent fault standard[227] or would prove to be overly taxing to the adjudicatory process.[228] A closely related rationale is premised on the inability of a common-law fact finder to assess the evidence offered in support of a mentally ill litigant's capacity, either because litigants would convincingly feign mental illness or because expert witnesses would be un-

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[224] *See supra* notes 115-117 and accompanying text.

[225] Splane, *supra* note 66, at 163-64.

[226] *See* 42 U.S.C. § 12101(a)(7) (1994); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 49 (2d Cir. 1997) (holding that municipality discriminated by pandering to invidious views of residents). The court in *Innovated Health* further stated that "[a]lthough the City certainly may consider legitimate safety concerns in its zoning decisions, it may not base its decisions on the perceived harm from . . . stereotypes and generalized fears." *Id.*

[227] *See supra* notes 100-101 and accompanying text.

[228] *See supra* notes 102-103 and accompanying text.

able to present a sufficiently coherent scientific body of diagnostic evidence.[229]

Courts advancing this cluster of concerns uniformly premise their denial of a capacity defense on skepticism with the accuracy and reliability of differential diagnoses in psychology and psychiatry. As one court explained, "We are wary of establishing a defense to negligence based on indeterminate standards of mental disability given the complexities of the various mental illnesses and the increasing rate at which new illnesses are discovered to explain behavior."[230] If it is sufficiently burdensome for a common-law court to formulate standards for the capacity of mentally ill litigants or to apply those capacity standards in particular cases, then the court is probably not violating the ADA. This is so for one of two reasons: first, it may be that the litigant is not "qualified" for the capacity defense because he fails to "meet[] the essential eligibility requirements"[231] for the defense — for example, he cannot with sufficient certainty prove he has a disability. Second, the litigant may be demanding a modification of the common-law process that would "fundamentally alter" the common-law negligence process by adding a defense that is impossible to prove to the level of certainty otherwise required in tort actions.[232]

For either articulation of the problem, the test under the ADA is the same. The test compares the circumstances of a class of litigants — for example, the physically disabled — to the circumstances of the mentally disabled.[233] Common-law courts thus violate the ADA if the mentally disabled can meet the "essential eligibility requirements"[234] for the capacity defense as can the physically dis-

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[229] *See supra* notes 103-104 and accompanying text.

[230] Gould v. American Family Mut. Ins. Co., 543 N.W.2d 282, 286 (Wis. 1996); *see also* Jolley v. Powell, 299 So. 2d 647, 649 (Fla. Dist. Ct. App. 1974) ("Practical considerations in the administration of justice militate against unnecessarily injecting all of the confusion and potential for false claims inherent in the unsatisfactory tests of insanity in criminal cases into civil actions.").

[231] 42 U.S.C. § 12131(2) (1994).

[232] 28 C.F.R. § 35.130(b)(7) (1999) (instructing public entities to make reasonable accommodations to policies and practices so long as modifications would not fundamentally alter nature of policy or practice); *see also* Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840, 852 (7th Cir. 1999) (assessing whether or not waiving eight month high school enrollment requirement fundamentally alters enrollment rule).

[233] *See* Hellen L. v. DiDario, 45 F.3d 325, 335 (3d Cir. 1995). As described above, the ADA defines "discrimination" broadly, including disparate treatment of a disabled person or group vis-à-vis a group with a different disability. *See* Olmstead v. Zimring, 119 S. Ct. 2176, 2180 (1999).

[234] 42 U.S.C. § 12131(2).

abled or, in the alternative, if accommodating the mentally ill requires modifications to the common-law system similar to those required by the capacity defense for the physically disabled. A showing of comparability between the relevant circumstances of the physically and mentally disabled would meet this test.

As this Article explains, modern diagnostic methods are now increasingly capable of differentiating between persons psychologically capable of conforming their behavior to social norms and those unable to do so due to mental disability. It is now "possible and practical to evaluate the degrees of mental acuity and correlate them with legal responsibility."[235] Courts, then, can adjudicate capacity claims of the mentally ill using techniques as certain as those used to evaluate the physically disabled. The continued denial of a capacity defense to the mentally disabled, but not the physically disabled, therefore violates the ADA.

B. Congressional Power to Modify Common Law

As described above, state common law discriminating against the mentally ill violates the ADA. Where state common law conflicts with the ADA, the ADA must prevail because federal law is supreme.[236] The mechanism by which Title II applies to state common law is quite direct and intrusive, challenging the state's own interpretation of its law. The remedy for this violation is not for federal law to preempt state law,[237] but rather for state law to conform to the standard federal law requires.

A Title II challenge to state common law would likely arise in the course of a tort lawsuit in which a mentally disabled defendant wished to raise a capacity defense. She would likely raise the issue

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[235] Mochen v. New York, 352 N.Y.S.2d 290, 293 (N.Y. App. Div. 1974).

[236] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[237] Conflict preemption is the branch of preemption theory that comes closest to fitting this situation. It applies where compliance with both the state and federal laws is impossible, or where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" English v. General Elec. Co., 496 U.S. 72, 79 (1990) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 808-10 (1994); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 620-27 (1997); Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 WM. & MARY L. REV. 903, 907-09 (1996); Susan Raeker-Jordan, *The Pre-emption Presumption that Never Was: Pre-emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1385-87 (1998).

with a motion for a directed verdict, a request for jury charge, a motion to strike a defense, or some other routine trial court proceeding.[238] The trial court would rule on the motion, and the case would go to judgment. If the party losing on the merits also lost the capacity defense motion, the Title II issue would proceed through the state appellate courts, and potentially to the United States Supreme Court by writ of certiorari.

The issue would not likely be raised by way of a direct challenge under 42 U.S.C. § 12133 due to problems with ripeness[239] or abstention.[240] Also, a collateral action in United States District Court would likely be barred by the *Rooker-Feldman* doctrine, which counsels that the sole venue for federal court challenge to state court decisions is in the Supreme Court.[241] A mentally ill litigant, then,

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[238] *See* DeMartini v. Alexander Sanitarium, Inc., 192 Cal. App. 2d 442, 446-47 (1961) (discussing common-law dispute as to availability of capacity defense to assertion of primary negligence arising by way of objection to jury charge); Turner v. Caldwell, 421 A.2d 876, 876 (Conn. Super. Ct. 1980) (involving common law dispute as to availability of capacity defense to assertion of primary negligence arising by way of motion to strike defense); Feldman v. Howard, 226 N.E.2d 564, 565 (Ohio 1967) (involving dispute as to availability of capacity defense to contributory negligence assertion arising from directed verdict motion).

[239] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 109-10 (1983) (holding that real and immediate threat of harm must be shown to establish "case or controversy" under Article III); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (requiring actual or imminent injury in order to establish standing to sue); O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974) (explaining that "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects").

[240] *See* Younger v. Harris, 401 U.S. 37, 45-46 (1971) (articulating standards for federal court abstention in favor of pending state actions); Alexander v. Margolis, 921 F. Supp. 482, 485-86 (W.D. Mich. 1995) (discussing application of *Younger* abstention to ADA claim challenging ongoing administrative process), *aff'd*, 98 F.3d 1341 (6th Cir 1999) (unpublished table decision); *see also* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716-24 (1996) (describing exhaustively branches of abstention doctrine); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431-32 (1982) (stating that *Younger* "and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances" and that "[p]roceedings necessary for the vindication of important state policies or for the functioning of the state judicial system. . . evidence the state's substantial interest in the litigation"); Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 28 (1959) (finding abstention proper in damages action when unsettled issue of state law may be resolved in pending state court action).

[241] *See* Court of Appeals v. Feldman, 460 U.S. 462, 463 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923). The *Rooker-Feldman* doctrine is a jurisdictional bar on lower federal courts' consideration of challenges to, or appeals from, state court decisions, or to their consideration of issues "inextricably intertwined" with prior state court decisions. *See Feldman*, 460 U.S. at 483 n.16; Suzanna Sherry, *Judicial Federalism in the Trenches: The* Rooker-Feldman *Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1087-88 (1999). Professor Sherry points out an application of the doctrine, which she observes is often redundant of preclusion and abstention doctrine, in a setting relevant to this Article. She applies the doctrine where "the injury alleged by the federal plaintiff resulted from the state court judgment

would pursue her Title II remedies through the relatively mundane mechanism of defending against a tort complaint and appealing state court decisions that violated the ADA by denying her capacity defense. When she interposed a capacity defense, she would invoke the ADA, arguing that it trumps[242] contrary state law denying the capacity defense. The state court judge would then be confronted directly with conflicting state and federal law.

Courts have held that federal law directly trumps conflicting state law in many circumstances. In *Shelly v. Kraemer*,[243] for example, the Supreme Court found that common-law adjudication is state action for purposes of the Fourteenth Amendment and that the state, in enforcing racially restrictive covenants, had violated the Equal Protection Clause.[244] In *New York Times v. Sullivan*,[245] the Court again confronted a conflict between a state's common law and federal law.[246] Finding Alabama common law to be "constitu-

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itself," as opposed to where the injury is simply unremedied by the state court. *See id.* at 1095 (quoting Garry v. Geils, 82 F.3d 1362, 1365 (7th Cir. 1996)); *see also* Susan Bandes, *The* Rooker-Feldman *Doctrine: Evaluating Its Jurisdictional Status*, 74 NOTRE DAME L. REV. 1175, 1202 (1999) (discussing instances in which *Rooker-Feldman* doctrine is applicable).

[242] *See* Gardbaum, *supra* note 237, at 770-71. Gardbaum uses the term "trump" to explain the difference between the direct application of federal law to state law through the Supremacy Clause and the effect of preemption:

> The supremacy of federal law means that valid federal law overrides otherwise valid state law in cases of conflict between the two. In itself, federal supremacy does not deprive states of their preexisting, concurrent lawmaking powers in a given area; rather, it means that a particular state law in conflict with a particular federal will be trumped in cases where both apply. State legislation has full effect as long as it is not in conflict with federal law, and state legislative competence in a given area fully survives the trumping of any particular state law on supremacy grounds. This means, for example, that in the face of a potential or actual conflict with federal law, states retain legislative power to amend their legislation in order to avoid the conflict. It also means that where no federal law covers specific subjects within a given field of congressional regulation, states remain free to regulate those subjects without regard to the federal scheme.

Id.

[243] 334 U.S. 1 (1948).

[244] *See id.* at 18-20. Notwithstanding the private nature of the underlying agreements, the employment of the enforcement power of the state courts brought to bear "the full coercive power of the government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights. . . ." *Id.* at 19. The court further stated that "[t]he difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioner between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." *Id.*

[245] 376 U.S. 254 (1964).

[246] *See id.* at 264.

tionally deficient," the Court reasoned that state court adjudication is itself state action for purposes of constitutional analysis and that state common law is therefore subservient to federal constitutional norms:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, although supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.[247]

Shelly v. Kraemer and *New York Times v. Sullivan* thus stand for the proposition that state common law, even in purely private litigation between purely private parties,[248] must bend to the requirements of federal constitutional[249] or statutory[250] law when federal and state law conflict.

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[247] *Id.* at 265.

[248] In *Flagg Bros., Inc. v. Brooks*, the Court described the extent of state court activity necessary to constitute state action:

> It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.
>
> This situation is clearly distinguishable from cases such as North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) .... The constitutional protection attaches not because, as in *North Georgia Finishing*, a clerk issued a ministerial writ out of the court, but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia. The creditor in *North Georgia Finishing* had not simply sought to pursue collection of his debt by private means permissible under Georgia law; he had invoked the authority of the Georgia court, which in turn had ordered the garnishee not to pay over money which previously had been the property of the debtor.

436 U.S. 149, 160-61 n.10 (1978).

[249] *See* Soldal v. Cook County, 506 U.S. 56, 59-64 (1992); Connecticut v. Doehr, 501 U.S. 1, 9-11 (1991); Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 143-46 (1987); Lugar v. Edmondson Oil Co., 457 U.S. 922, 927-32 (1982); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 716-19 (1981); North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601, 605-08 (1975); Fuentes v. Shevin, 407 U.S. 67, 96-97 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 341 (1969); Sherbert v. Verner, 374 U.S. 398 (1963).

[250] Some cases involving conflicts between state law and federal statutory law that have been analyzed under a preemption rubric might more properly be considered under this supremacy analysis. For example, several cases have held that state unfair competition laws,

Like the Fourteenth Amendment, Title II of the ADA applies to the actions of the states.[251] If Title II requires that common-law courts recognize a capacity defense in negligence actions, then state law must yield to federal law. The ADA supplants common law, however, only if Congress is constitutionally empowered to interfere with the relevant state governmental function — in this case, common-law adjudication. The Court has recently engaged in a comprehensive reexamination of the constitutional relationship between the federal and state governments. Focusing on the Eleventh Amendment, it has recently examined federal power to abrogate states' sovereign immunity from suit in both federal[252] and state[253] courts. In addition, the Court has recently limited the federal government's power to "commandeer" state government actors.[254] Despite the Court's recent federalism jurisprudence, the ADA's modification of state common law remains a valid exercise of congressional power.

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to the extent that they govern the reproduction of unpatented goods, conflict with the federal system of patent statutes. *See, e.g.*, Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 164-65 (1989) ("The States are simply not free in this regard to offer equivalent protections to ideas which Congress has determined [in the range of patent statutes] should belong to all."); Compco Corp. v. Day-Bright Lighting, Inc., 376 U.S. 234, 237-38 (1964); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231-32 (1964) (holding that "[t]o allow its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the state to block off from the public something which federal law has said belongs to the public"). As the Court said in *Stiffel*, the laws "of the United States enacted pursuant to constitutional authority, are the supreme law of the land. When state law touches upon the area of these federal statutes, it is 'familiar doctrine' that the federal policy 'may not be set at naught or its benefits denied' by the state law." 376 U.S. at 229 (quoting Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942)). The distinction between implied, or inferred, preemption in the case of a conflict between state and federal law and the application of the Supremacy Clause in the same situation is famously slippery. *See* Gardbaum, *supra* note 237, at 770-73.

[251] *See* 42 U.S.C. § 12131(i) (1994).

[252] City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act on the ground that it was beyond Congress's abrogation power under Section 5 of the Fourteenth Amendment); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (striking down provisions of Indian Gaming Regulating Act on ground that Indian Commerce Clause did not give Congress power to abrogate state immunity).

[253] *See* Alden v. Maine, 119 S. Ct. 2240, 2254 (1999) (holding that Fourteenth Amendment generally bars Congress from abrogating states sovereign immunity in state courts).

[254] *See* Printz v. United States, 521 U.S. 898, 926-28 (1997); New York v. United States, 505 U.S. 144, 174-75 (1992) (commenting that "federal action [that] would 'commandeer' state government into the service of federal regulatory purposes" would be unconstitutional).

1. The States Are Not Immune from Suit Under the ADA

Title II of the ADA contemplates an affirmative cause of action against the states.[255] But for the procedural peculiarities involved in applying Title II to common-law tort actions,[256] Title II would undoubtedly be applied to state common law through such an independent action. Neither the Eleventh Amendment nor common-law sovereign immunity prevents the ADA's creation of a private right of action against state common-law courts.

In *Seminole Tribe of Florida v. Florida*,[257] the Court established a two-pronged analysis for assessing the validity of a federal statute that subjected a state to suit in federal court. The first prong requires courts to analyze whether "Congress' intent to abrogate the States' immunity from suit [is] obvious from a 'clear legislative statement.'"[258] Every decision applying this first prong to Title II has found it to contain the requisite clear statement.[259] The second prong focuses on whether the statute was "passed pursuant to a

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[255] *See* 42 U.S.C. § 12132 (1994) (defining "discrimination" in terms of actions by public entities). 42 U.S.C. § 12131(1) in turn defines "public entity" as including state or local governments, as well as any "department, agency. . . or other instrumentality" thereof. Finally, 42 U.S.C. § 12133 makes available to any person suffering discrimination all of the remedies available under section 504 of the Rehabilitation Act, including a private right of action, against the discriminating entity. *See* Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 213 (1998) (finding that ADA creates private cause of action against state actors); Coolbaugh v. State of Louisiana, 136 F.3d 430, 438 (5th Cir.) (holding private cause of action exists against state actors under ADA), *cert. denied*, 119 S. Ct. 58 (1998).

[256] *See supra* note 238 (discussing application of ripeness, abstention, and *Rooker-Feldman* doctrines to challenges to common law courts' rules of decision).

[257] 517 U.S. 44 (1996).

[258] *Id.* at 55 (quoting Blatchford v. Native Village of Nontak, 501 U.S. 775, 779 (1991)).

[259] *See* Alsbrook v. City of Maumelle, 184 F.3d 999, 1006 (8th Cir. 1999) (en banc); Torres v. Puerto Rico Tourism Co., 175 F.3d 1, 3-4 (1st Cir. 1999); Brown v. North Carolina DMV, 166 F.3d 698, 705 (4th Cir. 1999); Kimel v. State of Florida Board of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998), *aff'd*, 120 S. Ct. 631 (2000); *Coolbaugh*, 136 F.3d at 433; Clark v. California, 123 F.3d 1267, 1269-70 (9th Cir. 1997).

Because its application to state common law lawmaking may affect a "traditional and essential State function," the ADA may be required to meet an even clearer "clear statement" test. *See Yeskey*, 524 U.S. at 207; John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 813-18 (1995). In *Gregory v. Ashcroft*, the Court found that statutes that "alter the usual constitutional sovereign powers" require that Congress express an "unmistakably clear" intent to trench upon state sovereignty. 501 U.S. 452, 460-61 (1991). In *Yesky*, the Court assumed without deciding, that *Gregory*'s "unmistakably clear" standard applied to Title II of the ADA for state prison administration, and found that the standard was amply met. 524 U.S. at 208-09. The Court held that "the ADA plainly covers state institutions without any exception that could cast the coverage of prisons into doubt." *Id.* at 208. The ADA similarly provides no exception that could be seen as applicable to state courts. *See* 42 U.S.C. § 12131(1). It follows, therefore, that Title II's application to state courts is consistent with even the higher, "unmistakably clear" standard of *Gregory*.

constitutional provision granting Congress the power to abrogate."[260] Congress relied on both the Commerce Clause and Section 5 of the Fourteenth Amendment as authority for abrogating state immunity in the ADA.[261] Following *Seminole Tribe*, however, only the latter authority is recognized as valid.[262] Accordingly, the principal issue raised by the second prong is whether Title II of the ADA constitutes a valid exercise of congressional authority under the Fourteenth Amendment.

The Court comprehensively examined the criteria for a valid action under the Fourteenth Amendment in *City of Boerne v. Flores*.[263] In *City of Boerne*, the Court reiterated the remedial nature of Congress's power[264] and invalidated the Religious Freedom Restoration Act ("RFRA"). The Court held that Congress exceeded its power

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[260] *Seminole Tribe*, 517 U.S. at 58.

[261] *See* 42 U.S.C. §12101(b)(4) (1994) (stating intention of Congress "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce" to support provisions of ADA).

[262] *Seminole Tribe*, 517 U.S. at 72 ("[T]he Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states. The Eleventh Amendment restricts judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed on federal jurisdiction.").

Three years later, the Court made it clear that states are similarly protected from suit in their own courts under the common law doctrine of sovereign immunity. *See* Alden v. Maine, 119 S. Ct. 2240, 2266 (1999). In *Alden*, the Court determined that the history of the Eleventh Amendment establishes that the Eleventh Amendment was intended to shield states from suit under federal causes of action in their own, as well as federal courts, absent explicit constitutional authority or a waiver by the states. *See id.* at 2260-62. Following *Alden*, the Eleventh Amendment and sovereign immunity questions merge, for all practical purposes, when federal statutory claims are aimed at states. The jurisdictional issue is whether the action against the state is supported by an explicit constitutional grant of authority to Congress or a waiver of immunity by the state. *Alden* relied on a historical analysis of the treatment of sovereign immunity, and rejected any inference that the Supremacy Clause permits congressionally mandated jurisdiction in state courts beyond that which federal courts could mandate:

> The Supremacy Clause does impose specific obligations on state judges. There can be no serious contention, however, that the Supremacy Clause imposes greater obligations on state-court judges than on the Judiciary of the United States itself. The text of Article III, § 1, which extends federal judicial power to enumerated classes of suits but grants Congress discretion whether to establish inferior federal courts, does give strong support to the inference that state courts may be opened to suits falling within the federal judicial power. The Article in no way suggests, however, that state courts may be required to assume jurisdiction that could not be vested in the federal courts and forms no part of the judicial power of the United States.

Id. at 2266.

[263] 521 U.S. 507, 520 (1997).

[264] *See id.* at 520.

to prevent states' unconstitutional actions when it attempted to exercise "substantive, non-remedial" power over the states.[265] The Court explained that the Fourteenth Amendment's remedial power[266] extended only to violations of Section 1 of the Fourteenth Amendment. Within this constraint, however, Congress enjoys a "positive grant of power" under Section 5,[267] and its actions are valid even "if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[268]

But *City of Boerne* is most notable for its limitation on congressional authority under Section 5. Congress may not assert authority under Section 5 if that action "alters the meaning" of a constitutional right; Congress may only enforce the requirements contained in the Constitution itself.[269] The distinction between "measures that remedy or prevent unconstitutional actions and measures that make substantive changes in the governing law is not easy to discern,"[270] but the test is whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[271] In the absence of this congruence and proportionality, the statute in question is not remedial, but rather improperly "substantive in operation and effect."[272] Title II of the ADA, then, is a proper exercise of congressional authority

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[265] *See id.* at 524-25 (1997) (stating that remedial power of Congress extends to enforcement and prevention). The *Flores* Court further stated:

> Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to the supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.

Id. at 532.

[266] U.S. CONST. amend. XIV, § 5 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[267] *Flores*, 521 U.S. at 517-18 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[268] *See id.* at 519 (quotation omitted).

[269] *See id.*; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 199 (1803) (holding that limits of Constitution's curtailment of state power are defined by Court's last analysis); *see also Flores*, 521 U.S. at 533-35 (finding that RFRA went beyond remediation and instead changed definition of First Amendment by comparing its provisions to Court's interpretation of First Amendment in Dep't of Human Resources v. Smith, 494 U.S. 872 (1990)).

[270] *Flores*, 517 U.S. at 519.

[271] *Id.* at 520.

[272] *Id.*

if is applied to remedy a constitutional violation and if its remedial program is congruent and proportionate to the harm caused or threatened by the discriminatory conduct.[273]

Section 1 of the Fourteenth Amendment bars the states from making or enforcing a law that denies "any person within its jurisdiction the equal protection of the laws."[274] In *City of Cleburne v. Cleburne Living Center*,[275] the Court found that a zoning ordinance

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[273] Title II of the ADA has been challenged repeatedly on the grounds that it exceeds congressional authority under Section 5. The Supreme Court has not yet addressed the question. The Court was asked to answer the question in *Yeskey*, but declined to do so because the question was raised for the first time in that Court. *See* Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 210-11 (1998). In *Coolbaugh v. State of Louisiana*, the Court denied certiorari and held that the Title II of the ADA was properly enacted under Congress's Section 5 powers. *See* 136 F.3d 430, 438 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 58 (1998).

Most, but not all, of the lower courts that have addressed the question have found that Title II was properly enacted. *See* Amos v. Maryland Dep't of Public Safety and Correctional Serv., 178 F.3d 212 (4th Cir. 1999); Torres v. Puerto Rico Tourism Co., 175 F.3d 1 (1st Cir. 1999) (dictum); *Kimel*, 139 F.3d at 1433; *Coolbaugh*, 136 F.3d at 433; Clark v. California, 123 F.3d 1267, 1269-70 (9th Cir. 1997); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997). *But see* Alsbrook v. City of Maumelle, 184 F.3d 999, 1009-10 (8th Cir. 1999) (en banc); Brown v. North Carolina DMV, 166 F.3d 698, 706-08 (4th Cir. 1999); Nihiser v. Ohio E.P.A., 979 F. Supp. 1168, 1176 (S.D. Ohio 1997).

As this Article was going to press, the Supreme Court decided *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000) (*Kimel I*). The Court, in a 5-4 decision, determined that Congress had exceeded its Section 5 powers in creating a private right of action for damages against the states in the Age Discrimination in Employment Act. Shortly after that decision, the Court granted certiorari in *Florida Department of Corrections v. Dickson*, Civ. No. 98-829 (D. Fla. 1998), *cert. granted*, 2000 WL 63302 (U.S. Jan. 25, 2000) (*Kimel II*) on the following question: "Did Congress exceed scope of its authority to 'enforce' 14th Amendment when it made broad employment provisions of Title I of American with Disabilities Act applicable to the states?" *Kimel I* casts new doubt on the continuing validity of private rights of action for damages against states under the ADA. *Kimel II* will address this issue with respect to Title I of the ADA.

As is more fully described above, however, the application of the ADA to state common law will not arise in actions for damages, but rather in the context of a state tort action in which a mentally disabled litigant will seek prospective compliance by state officials with supreme federal law. *See supra* text accompanying notes 238-42. The effect of *Kimel*, then, will be far less significant to the validity of the argument set out in the Article than the Court's future treatment of *Ex Parte Young*, 209 U.S. 123 (1908) (actions against state officials for injunctive relief in federal court does not offend 11th Amendment). And the Court reaffirmed the continuing validity of the central holding of *Ex Parte Young* in *Alden v. Maine*, 119 S. Ct. 2240, 2263 (1999). *See* Mark Tushnet, *Forward: The New constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 72 (1999). While the Court's 11th Amendment jurisprudence is obviously in flux, then, neither *Kimel I* nor the ultimate resolution of *Kimel II* appear likely to undermine seriously the conclusions reached in this Article.

[274] U.S. CONST. amend. XIV, § 1.

[275] 473 U.S. 432 (1985).

that singled out the disabled[276] for unfavorable treatment violated the Fourteenth Amendment's Equal Protection Clause[277] as an "irrational prejudice against the mentally retarded."[278] In its decision, the Court declined to apply heightened scrutiny to state actions that discriminate against the disabled.[279] Instead, it found an equal protection violation under the more deferential rational basis test.[280]

Cleburne clearly establishes that discriminatory treatment of the disabled by state actors violates the Equal Protection Clause.[281] The Court applied a deferential standard of review to the judicial activity of evaluating possible equal protection violations of state action, demanding only that the state actor establish a rational, nondiscriminatory basis for the differential treatment.[282] Some lower courts have expanded *Cleburne*'s rational basis standard to congressional action under Section 5 of the Fourteenth Amendment.[283]

A deferential standard of judicial review of state actions affecting nonsuspect classes such as the disabled does not imply that Congress is held to a higher standard in adopting a statute designed to prevent discrimination against those classes than against suspect classes such as racial minorities. Indeed, *Cleburne* adopted the rational basis test at least partly based upon its assessment that legislatures were more competent that courts to judge the treatment of the disabled, observing that "[h]ow this large and diversified group is to be treated under the law is a difficult and often technical matter, very much a task for legislators guided by qualified professionals and not by perhaps ill-informed opinions of the judiciary."[284]

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[276] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985) (holding that zoning ordinance singled out mentally retarded individuals and suggesting that other disabled persons were similarly protected by Equal Protection Clause). Lower courts have uniformly interpreted *Cleburne* as applying to equal protection analysis for all disabled persons. *See* Alsbrook v. City of Maumelle, 184 F.3d 999, 1008 n.15 (8th Cir. 1999); *Brown*, 166 F.3d at 706; *Coolbaugh*, 136 F.3d at 434 n.1.

[277] *See Cleburne*, 473 U.S. at 447-50.

[278] *Id.* at 450.

[279] *See id.* at 442-46.

[280] *See id.* at 446-50.

[281] *See id.* at 447-50.

[282] *See id.* at 442-46.

[283] *See* Alsbrook v. City Maumelle, 184 F.3d 999, 1008 (8th Cir. 1999) (finding that "enforcement of Title II against the states [does not] comport with the rationale behind the Supreme Court's decision to adopt the rational basis test in *Cleburne*"); Brown v. North Carolina DMV, 166 F.3d 698, 706 (4th Cir. 1999) (stating that Supreme Court held that classifications based on mental retardation must satisfy only rational basis standard).

[284] *Cleburne*, 473 U.S. at 442-43.

In contrast to courts' acknowledged dearth of expertise in legislative fact finding, congressional judgment is entitled to significant deference in determining "'whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.'"[285] In particular, Congress's findings of fact[286] and predictive judgments must be accorded great weight by a reviewing court, which must uphold reasonable congressional inferences that are supported by substantial evidence. In the case of the ADA (in contrast to that of RFRA),[287] Congress made specific and detailed findings of discrimination against the disabled,[288] findings that developed only after the creation of an extensive factual record.[289]

These factual findings set out extensive and disturbing instances of discrimination against the disabled, including discrimination in access to public services.[290] The ADA, then, has every indicia of being remedial, and the congressional record indicates that Title II of the ADA is a proportionate and congruent response to the discrimination against the disabled.[291] Unlike RFRA, the ADA does not sweep so broadly that it risks "displacing laws and prohibiting official actions of almost every description and regardless of subject

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[285] City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)); *accord Alsbrook*, 184 F.3d at 1012-13 (McMillian, J., dissenting); Coolbaugh v. State of Louisiana, 136 F.3d 430, 435-36 (5th Cir. 1998).

[286] *See* 42 U.S.C. § 12101 (1994) (listing findings and purposes of ADA); *Coolbaugh*, 136 F.3d at 435-37 (chronicling hearings and scholarship sources Congress considered in passing ADA). The contrast between the factual assertions in *Cleburne* and the factual record amassed by Congress in considering passage of the ADA could stand as an object lesson on the relative competence of the two bodies in fact-finding. The Court in *Cleburne*, on relatively mysterious authority, seemed to assume a lack of broad discrimination against the disabled. *See Cleburne*, 473 U.S. at 442.

[287] *Coolbaugh*, 136 F.3d at 438 ("The findings in the ADA distinguish it from RFRA, in which Congress made no specific findings regarding the seriousness or the scope of discrimination against religious persons.").

[288] 42 U.S.C. § 12101 (outlining findings and purposes of ADA).

[289] *See* Amos v. Maryland Dep't of Public Safety and Correctional Serv., 178 F.3d 212 (4th Cir. 1999); *Coolbaugh*, 136 F.3d at 436-37 (chronicling hearings and scholarly sources considered by Congress in passing ADA).

[290] *See* 42 U.S.C. § 12101(a).

[291] *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998) (noting that Congress specifically found that individuals with disabilities are a discrete insular minority . . . subjected to a history of purposeful discrimination," and holding that "the ADA was properly executed under Congress's Fourteenth Amendment enforcement powers"), *aff'd*, 120 S. Ct. 631 (2000); *Coolbaugh*, 136 F.3d at 438 (rejecting argument that ADA's remedies "are too sweeping to survive the *Flores* propositionality test to legislation that provides a remedy for unconstitutional discrimination or prevents threatened unconstitutional actions").

matter."[292] Instead, the provisions of the ADA are relatively cabined and are calculated to address the discrimination detailed in the record before Congress. As the Fifth Circuit stated in *Coolbaugh v. State of Louisiana*:

> We are persuaded that Congress' scheme in the ADA to provide a remedy to the disabled who suffer discrimination and to prevent such discrimination is not so draconian or overly sweeping to be considered disproportionate to the serious threat of discrimination Congress perceived. The ADA first sets forth broad provisions generally outlawing discrimination. In addition to these general provisions outlawing discrimination, Congress made specific judgments in particular circumstances as to what it perceived to be reasonable and appropriate to prevent unconstitutional discrimination. . . . Congress made these particularized judgments after hearing testimony on the reasonableness and feasibility of these provisions.[293]

Title II may require modifications of public entities' services[294] that go beyond prohibiting unconstitutional behavior; however, the deliberative process undertaken by Congress and the narrowly targeted nature of the modifications indicate that the statute as a whole is nevertheless remedial in nature and therefore within Congress's power under Section 5.[295]

While it appears likely that the ADA generally meets the *City of Boerne* test for proportionate and congruent enforcement legislation, it is even clearer that this test is satisfied when the ADA is applied to courts' denial of a capacity defense for the mentally disabled.[296] As described above, the common-law rules are either discriminatory on their face, and therefore within Congress's authority to remedy as unconstitutional, or discriminatory for not modifying the common law to provide the psychiatrically disabled with the defense available to the physically disabled.[297] Therefore, the rules

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[292] City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

[293] *Coolbaugh*, 136 F.3d at 438 (footnotes omitted).

[294] *See* 42 U.S.C. § 12131(2) (1994).

[295] *See Flores*, 521 U.S. at 517-18 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

[296] *See* Brown v. North Carolina DMV, 166 F.3d 698, 703-04 (4th Cir. 1999) (refusing to examine ADA in its entirety and instead examining proportionality and congruence of isolated regulation challenged in litigation).

[297] *See supra* notes 42-47 and accompanying text.

are easily within Congress's power to remedy or prevent unconstitutional behavior.[298]

Title II of the ADA, then, survives constitutional scrutiny under *City of Boerne.* Its structure and Congress's deliberation suggest that it is a congruent and proportionate response to disability discrimination, thereby rendering it a proper exercise of Congress's remedial power under Section 5 of the Fourteenth Amendment. Likewise, the ADA remains valid under the line of cases in which the Court limited Congress's right to "commandeer" state officials.

2. The ADA Does Not Improperly Commandeer State Officials

In *Printz v. United States*[299] and *New York v. United States,*[300] the Court invalidated federal statutes that temporarily conscripted state officials "in the administration of federally enacted regulatory schemes."[301] These cases dealt, respectively, with the commandeering of state executive[302] and legislative officials.[303] In the *City of Boerne v. Flores*[304] and the related cases discussed above, the constitutional question raised was when Congress may, consistent with Section 5 of the Fourteenth Amendment, create a statutory scheme subjecting the states to liability. The question raised by *Printz* and *New York,* on the other hand, was whether Congress, assuming that it has power to regulate in an area, may require state officials to implement that regulation.[305]

Answering this question requires that Congress's power be considered in light of the history of federal and state legislative interaction,[306] the structure of the original constitution,[307] and the Tenth Amendment.[308] The continuing vitality of *Testa v. Katt,*[309] in which the Court recognized broad congressional power to commandeer

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[298] *See Flores,* 521 U.S. at 518.

[299] 521 U.S. 898, 933 (1997).

[300] 505 U.S. 144 (1992).

[301] Printz v. United States, 521 U.S. 898, 904 (1997).

[302] *See id.* at 904-05.

[303] New York v. United States, 505 U.S. 144, 159-60 (1992).

[304] 521 U.S. 507 (1997).

[305] *See id.* at 902; *New York,* 505 U.S. at 159.

[306] *See Printz,* 521 U.S. at 905-18.

[307] *See id.* at 918-26.

[308] U.S. CONST. amend. X ("The powers delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see New York,* 505 U.S. at 155-56.

[309] 330 U.S. 386 (1947).

the state judiciary, strongly suggests that *Printz* and *New York*[310] do not bar the application of Title II to remedy state courts' mistreatment of the mentally ill in common-law actions.[311]

In *New York v. United States*, the Court expressed concern that the conscription of state officials to do the work of federal regulation, at least federal regulation authorized by Congress's Article I powers,[312] would be inimical to the federal structure.[313] These regula-

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[310] Whether *Printz* and *New York* constitute, reflect or begin a "line" of Tenth Amendment cases is open to debate. Seekers after definitive answers in that regard will not find them here. *See generally* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz *and* Yeskey, 1998 SUP. CT. REV. 71 (1999) (discussing ramifications of these cases for federalism doctrine); Tonya M. Gray, *Separate but Not Sovereign: Reconciling Federal Commandeering of State Courts*, 52 VAND. L. REV. 143 (1999) (same); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998) (same); Vicki C. Jackson, Printz *and* Testa*: The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111 (1998) (same); Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1 (1999) (same).

[311] *See* Printz v. United States, 521 U.S. 898, 928-29 (1997) (reaffirming Testa v. Katt, 330 U.S. 386 (1947), which required that state court apply a federal penal statute contrary to that state's own common law policies, as though the federal law "had emanated from its own legislature."); *Testa*, 330 U.S. at 392 (quoting Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1, 57 (1912)); *see also* Alden v. Maine, 119 S. Ct. 2240, 2269-70 (1999) (limiting congressional power to require state courts to enforce federal law to extent Congress was empowered to create similar enforcement power in federal courts).

[312] In each of the cases in which the Court has invalidated a federal action for impermissibly commandeering state officials, the federal action has been taken pursuant to Congress's Article I powers. *See Printz*, 521 U.S. at 923-24 (concerning federal action taken pursuant to Commerce Clause); *New York*, 505 U.S. at 167-68 (involving Congress' spending power and Commerce Clause). Congress resorted to its power under Section 5 of the Fourteenth Amendment in enacting the ADA, and the court has never applied the anticommandeering language to statutes invoking the Reconstruction Amendments. *See* 42 U.S.C. § 12101(b)(4) (1994)

It is not clear, however, whether the political-accountability justifications for the Court's anticommandeering decisions do not apply with equal force to congressional actions justified by Section 5.

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the Public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.

New York, 505 U.S. at 168-69. This accountability argument clearly applies, if at all, with much less force in application to the nonpolitical judicial branch. *See infra* notes 325-30 and accompanying text (discussing Testa v. Katt, 330 U.S. 386 (1947)). In addition, however,

tions concerned the disposal of low-level radioactive waste. The Court found permissible the regulations imposing conditions on the states under Congress's spending and commerce powers,[314] but found impermissible the regulations imposing on the states a choice between taking title to privately owned radioactive waste or having their legislatures "commandeered" to enact legislation consistent with a federal blueprint.[315] The Court found no constitutional authority for Congress to require States to take title to the waste.[316] This commandeering was, then, a naked imposition on the states and not one states could freely refuse by the simple expedient of declining to accept federal spending.[317] The Court found this commandeering of states' legislatures pernicious in a way that goes to the heart of the Constitution's structure:

> [T]he Constitution . . . divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. . . . States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. . . . The Federal Government may not compel the States to enact or administer a federal regulatory program.[318]

Several years later, the Court applied the same structural and political analysis of the Tenth Amendment to find that a federal statute unconstitutionally commandeered executive branch state officials.[319] The commandeering examined in *Printz* was quite direct; the law required the "chief law enforcement officer"[320] to perform

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even these accountability arguments must be approached much differently in discussion of congressional power under the original constitution and under the Reconstruction Amendments, which fundamentally altered the balance of federal power. *See* Adler & Kreimer, *supra* note 310 at 119-33; *see also* Jackson, *supra* note 310, at 122-23 (noting shift in federal relationships created by postwar amendments).

[313] *See* 505 U.S. at 162.

[314] *Id.* at 173-74.

[315] *Id.* at 175-76.

[316] *Id.* at 175.

[317] Congress is, of course, free to impose reasonably related conditions on states' entitlement to funds made available through otherwise permissible federal programs. *See id.* at 171-72.

[318] *Id.* at 187-88.

[319] *See* Printz v. United States, 521 U.S. 898, 928 (1997).

[320] *See* 18 U.S.C. § 922(s)(8) (1994).

certain ministerial functions[321] to ensure compliance with a federal statute, the Brady Act.[322] Chief law enforcement officers of two jurisdictions challenged the federal government's imposition of these duties.[323] Siding with the officers, the Court rejected one attempt to distinguish *Printz* from *New York* by holding that Congress is no more empowered to commandeer state executive than legislative officials.[324] It rejected another ground of possible distinction by holding that Congress is no more empowered to commandeer state officials to perform ministerial than policy-making functions.[325] It concluded that the result in *Printz* simply followed from that of *New York*.[326] As the earlier case had prohibited Congress from compelling state legislatures to "enact and enforce a federal regulatory program,"[327] so *Printz* held "that Congress cannot circumvent that prohibition by conscripting the State's officers directly."[328]

Printz and *New York*, then, establish that Congress may not conscript state legislative or executive officers to perform either policy-making or ministerial acts to implement or enforce a federal regulatory program. It has been argued that state judicial officers should be afforded the same level of protection from federal commandeering.[329] But the Court has sharply and consistently differentiated between legislative and executive officers on the one had, and adjudicatory officers on the other,[330] basing its distinction

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[321] *See Printz*, 521 U.S. at 903-04.

[322] 18 U.S.C. § 922(s).

[323] *Printz*, 521 U.S. at 904.

[324] *Id.* at 935.

[325] *Id.* at 927-28.

[326] *See id.* at 926-28.

[327] New York v. United States, 505 U.S. 144, 188 (1992).

[328] *Printz*, 521 U.S. at 935.

[329] *See New York*, 505 U.S. at 178 (discussing United States's argument that treatment of legislative branch for commandeering purposes should be similar to that afforded judicial branch in Testa v. Katt, 330 U.S. 386 (1947)); *see also* Adler & Kreimer, *supra* note 310, at 115-19; Gray, *supra* note 310, at 168-69.

[330] The Court has read the definition of "judicial officers" quite broadly for these purposes. In *Federal Energy Regulating Comm'n v. Mississippi*, 456 U.S. 742, 764-66 (1982), the Court upheld a federal requirement that state public utility regulators consider federal standards in regulating energy companies. In *Printz*, the Court swept this case within the doctrine of *Testa v. Katt*, finding that the Supremacy Clause applies with full force not simply on state court judges, but on "officers who conduct adjudications similar to those traditionally performed by judges." *Printz*, 521 U.S. at 929 n. 14.

largely on the explicit mention of state judges in the Supremacy Clause.[331]

In *Testa v. Katt*, the Rhode Island Supreme Court had refused to enforce the terms of a wartime federal price control statute, determining that state common law precluded it from enforcing what it regarded as the penal laws of a foreign government.[332] The Court reversed, relying on the Supremacy Clause:

> [W]e cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of Article VI of the Constitution which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, are the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." . . . For the policy of the federal Act is the prevailing policy in every state.[333]

In both *New York* and *Printz*, the United States argued that *Testa* supported the federal government's power to command state officers to follow federal law. In both cases, the Court rejected this argument, finding that the Supremacy Clause bound state judges to apply federal law in a way that found no parallel in the Constitution's treatment of executive or legislative officers.[334] Although given the opportunity to overrule or diminish *Testa*'s exclusion of state judges from the protection of the anticommandeering doctrine, the Court has instead reaffirmed *Testa* twice in recent years. Congress remains empowered, then, to impose substantive rules of

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[331] *See Printz*, 521 U.S. at 928-29.

[332] 330 U.S. 386, 388 (1947).

[333] *Id.* at 389-93.

[334] *See Printz*, 521 U.S. at 928-29 ("*Testa* stands for the proposition that state courts cannot refuse to apply federal law — a conclusion mandated by the terms of the Supremacy Clause ('the Judges of every States shall be bound [by federal law]')") (alteration in original); *New York*, 505 U.S. at 178 ("[*Testa* and other cases] involve no more than an application of the Supremacy Clause's provision that federal law 'shall be the supreme Law of the Land.'").

decision on state courts, and in so doing does not impermissibly commandeer state officials.[335]

While *Printz* and *New York* may suggest that Title II of the ADA could constitute an impermissible commandeering of state officers, the Court's explicit reaffirmation of *Testa* means that state judiciaries are treated differently. Title II of the ADA, then, is within Congress's enforcement power under *City of Boerne* and, in light of the continuing validity of *Testa*, does not constitute improper commandeering under *Printz* or *New York*. Further, the Supremacy Clause permits Congress to impose substantive rules of decision on state courts to enforce valid federal laws.[336] There being no consti-

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[335] Several commentators have developed extensive rationales for the Court's distinction between federal commandeering of executive or legislative officials on the one had, and the commandeering of state court judges on the other, usually as a prelude to arguing that the distinction is without historical or constitutional justification. *See* Adler & Kreimer, *supra* note 310, at 115-19; Gray, *supra* note 310, at 161-65. The limited attention given *Testa* in both *Printz* and *New York* fails to cast much light on this discussion.

Should the Court again revisit the viability of *Testa*, and determine to conform that treatment of "commandeering" legislation affecting courts to that affecting executive and legislative actors, it would be faced squarely with the Fourteenth Amendment question. As is noted above, all of the Court's commandeering cases have involved congressional action under its Article I powers. In the ADA, however, Congress utilizes its power under Section 5 of the Fourteenth Amendment, power the Court has never considered in an anticommandeering analysis. Although this question is beyond the scope of this article, Adler & Kreimer, *supra* note 310, at 119-33, persuasively argue that Congress has power, perhaps limited only by notions of congruence and proportionality, to commandeer state courts to vindicate rights protected by the Fourteenth Amendment.

[336] I recognize that there is a distinction between the circumstances of *Testa*, in which state judges were required to adjudicate claims brought between private actors under a federal statute, and the circumstances that arise under Title II of the ADA, when a state court judge is required to modify preexisting state tort law to conform to a federal statute. In the former case, the force of the statutes are directed at private individuals, and state courts are "merely" required to preside over the adjudication of claims brought under those statutes. In the latter, Title II is directed at the judges directly, because state courts are "public entities" under Title II. *See New York*, 505 U.S. at 178 (distinguishing circumstances of *Testa* and other cases involving the requirement that state judges apply federal law from those in which state legislature is required to legislate by observing that those "involve congressional regulation of individuals, not congressional requirements that states regulate."). The application of Title II seems to straddle these two categories. Title II would be brought to bear when, in the course of private litigation, a mentally ill defendant addresses the court as a quasi-party, and insists that the court permit the defendant to assert a defense not previously recognized under state common law. This request would be made under a threat that a refusal to grant the defense could result in a finding, not merely that the court had applied the law incorrectly, but that it had affirmatively violated federal law by discriminating against the defendant.

Troubling though this distinction is, I do not believe that it changes the *Testa* analysis. Whether Congress has the power to require that state courts apply Title II in the course of adjudication is a question of the scope of its authority under Section 5 of the Fourteenth Amendment, a question that is addressed in Part II.C(1) above. Once that power is found, the fact that state courts are "commandeered" by the mechanism of a directly applicable

tutional impediment to the ADA's application to state courts, state common law must conform to the ADA's mandate of nondiscriminatory treatment for the mentally ill.

CONCLUSION

The disparate treatment of the mentally ill by the common law has been an irritant for decades, chafing against the growing social sensibility favoring equality and integration. This social sensibility culminated in 1990 with the passage of the ADA, which promised to enforce principles of nondiscrimination in all quarters, including the conduct of state governments. But even before the this new tool of equality could be brought to bear, the Supreme Court launched a reexamination of the relationship between Congress and the states that threatened to undercut all national efforts at law reform. Notwithstanding the Court's severe pruning of national power in the interest of federalism, the power of the ADA over states remains substantial.

State common law, which has long treated the mentally ill as though strictly liable for the costs of the accidents they cause, must now conform to principles of nondiscrimination. Now, the mentally ill should be entitled to the same defenses to the same degree as all other participants in common-law adjudication. This change, while subtle in practical effect, is powerful in symbolic value, as it stamps out an institutional vestige of the mentally ill's former second-class citizenship.

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mandatory statute, rather than by the mechanism of being required to apply federal law pursuant to the Supremacy Clause seems not to raise problems under *Testa*. In practice, the application of Title II to common law actions would be indistinguishable from the application of a federal statute that preempted the state common law rule: the state rule of decision gives way to the federal. Ultimately, I suppose, the question may turn on the sensibility of the Court, when and if it is asked to determine whether it is more intrusive for a state court to be directly bound by Title II of the ADA to change its common law, or to be bound to disregard its common law in favor of conflicting (or at least supreme) federal law.