Living the World: A New Look at the Disabled in the Law of Torts

Adam A. Milani

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ARTICLES

LIVING IN THE WORLD: A NEW LOOK AT THE DISABLED IN THE LAW OF TORTS

Adam A. Milani*

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The last three decades have seen a revolutionary change in federal statutory law regarding people with disabilities. Spurred by the disability rights movement of the 1960s and 1970s, Congress for the first time approached legislation affecting people with disabilities as a civil rights issue: Congress enacted statutes mandating that federal buildings be accessible,\(^1\) prohibiting disability-based discrimination by federal funds recipients,\(^2\) requiring public schools to provide children with disabilities with a free appropriate public education,\(^3\) and requiring commercial airlines to accommodate disabled passengers.\(^4\) This legislation culminated in 1990 with the passage of the Americans with Disabilities Act (ADA),\(^5\) a comprehensive civil rights bill that bars disability discrimination by private employers, state and local governments, and transportation and telecommunication providers. The ADA was passed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.\(^6\)

As Professor Jacobus tenBroek pointed out over thirty years ago, however, such a mandate can be undermined if common law tort theories place greater burdens on people with disabilities than those placed on the able-bodied.\(^7\) TenBroek decried the inconsistency between statutory policy promoting independence and common law tort theories which held people with disabilities liable if they failed to depend on others or assistive devices. For example, he noted that one of the declared purposes of the public assistance titles of the Social Security Act was to encourage blind people to work and otherwise be as independent as possible.\(^8\) But, if a blind person was injured while on the way to his job because a property owner or construction crew had failed to place a barrier in front of a hazard, some jurisdictions had held that he was per se contributorily negligent if he was walking without the assistance of a dog,

\(^6\) 42 U.S.C. § 12101(b)(1).
\(^8\) See id. at 845 (citing 42 U.S.C. §§ 1201-1206 (1964)).
cane, or sighted companion.9

TenBroek stated that the legislative goal of "integrating" people with disabilities into society would never be fully accomplished unless tort law reflected a view that, as Dean Prosser had stated, "[t]he person who is blind or deaf, or lame, or is otherwise physically disabled, is entitled to live in the world."10 This article seeks to determine whether the inconsistency tenBroek identified still exists. In doing so, it will again ask the questions tenBroek first raised over 30 years ago:

To what extent do the legal right, the public approval, and the physical capacity coincide? Does the law assure the physically disabled . . . the right to be in public places, to go about in the streets, sidewalks, roads and highways, to ride upon trains, buses, airplanes, and taxi cabs, and to enter and to receive goods and services in hotels, restaurants, and other places of public accommodation? If so, under what conditions? What are the standards of care and conduct, of risk and liability, to which they are held and to which others are held with respect to them? Are the standards the same for them as for the able-bodied?11

The thesis of tenBroek's article was that the courts and legislatures

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9. See id. at 866-67 (citing Florida Cent. R.R. v. Williams, 20 So. 558, 561-52 (Fla. 1896)); cf. Smith v. Sneller 26 A.2d 452, 454 (Pa. 1942) (holding that although it is not negligence per se, a blind plaintiff has a duty to use an assistive device). One would hope this view of automatic fault in the absence of assistive devices would have been discredited by now, but it was recently adopted by the District of Columbia Court of Appeals. See Poyner v. Loftus, 694 A.2d 69, 73 (D.C. 1997).


11. tenBroek, supra note 7, at 842. He asks a similar set of questions later in the article:

Once the disabled do appear in a public place where, as it is said, they have a right to be, what are the conditions of their presence? . . . What are their responsibilities toward themselves, toward others, and of others toward them? Is the right to use the streets the same as the right of reasonably safe passage? If the disabled are liable for all acts or accidents proximately caused by their disability, if public bodies and able-bodied persons stand exactly in the same relationship to them as to able-bodied persons, if, in other words, disability is not to be taken into consideration for these purposes so as positively to protect the disabled against major hazards if not minor harms—then the right to be in public places is best described by Shakespeare:

And be these juggling fiends no more believed
That palter with us in a double sense;
That keep the word of promise to our ear,
And break it to our hope.

Id. at 863-64 (quoting WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH, act 5, sc. 8, lines 23-26 (Pocket Books (1959))) (footnote omitted).
should answer these questions using a policy of “integrationism,” which encourages and enables the disabled to participate fully in daily life. He stated that this was, and for some time had been, the nation’s policy as established by Congress and state legislatures, and that courts were bound to use that policy at least as [a] guide, if not as [a] mandate, in deciding common law cases, even if the courts disagreed with the policy’s desirability or feasibility.

This article examines if, as a result of the disability rights movement and the civil rights legislation that was enacted since tenBroek’s article, courts have adopted this thesis and begun to use the statutory policy of integration in deciding tort cases. It concludes that, with a few notable exceptions, courts have not. Much of the inconsistency tenBroek sought to eliminate, however, has been addressed in state and federal statutes focused specifically on tort cases involving people with disabilities or their right to use common carriers. In reaching this conclusion, the article first discusses how the statutory law regarding people with disabilities has changed as a result of the disability rights movement from one based on a “medical model” to one based on a “civil rights model.” Next, it reviews the tort theories regarding people with disabilities extant at the time of Professor tenBroek’s article and his critique of them. Finally, it examines cases and statutes from the three decades since that article was written to see if those criticisms have been addressed.

I. DISABILITY LEGISLATION: SOLVING A MEDICAL PROBLEM OR GUARANTEEING CIVIL RIGHTS?

The history of disability legislation in this century reflects two main views of disability: the medical model and the civil rights model. The medical model views disability as an injury to be treated by doctors and rehabilitation professionals who would “cure” people with disabilities.

12. See id. at 843.
13. See id.
The focus of the medical model is on how the individual adapts to his or her disability, not how society as a whole should deal with people with disabilities.\textsuperscript{16}

The “civil rights model” of disability, conversely, focuses on how society has treated—and should treat people with disabilities. Its premise is that it is how society sees the disabled individual that needs to change, and not disabled people themselves.\textsuperscript{17} It views the primary barriers to full participation of people with disabilities as arising from prejudice and stigma, not physical limitations.\textsuperscript{18} Professor tenBroek, for example, argued that

\begin{quote}
[t]he actual physical limitations resulting from the disability more often than not play little role in determining whether the physically disabled are allowed to move about and be in public places. Rather, that judgment for the most part results from a variety of considerations related to public attitudes, attitudes which not infrequently are quite erroneous and misconceived. These include public imaginings about what the inherent physical limitations must be; public solicitude about the safety to be achieved by keeping the disabled out of harm’s way; public feelings of protective care and custodial security; public doubts about why the disabled should want to be abroad anyway; and public aversion to the sight of them and the conspicuous reminder of their plight.\textsuperscript{19}
\end{quote}

A. “Medical Model” Statutes: People Should Overcome Their Disabilities to Rejoin Society

Laws passed at the beginning of this century were based on the medical model. The first medical model statutes stressed vocational rehabilitation and helping people with disabilities overcome their disabilities and become productive members of the workforce.\textsuperscript{20}


\textsuperscript{17} See \textit{SHAPIRO}, \textit{supra} note 14, at 19.

\textsuperscript{18} For more extensive discussion on disability discrimination in American society and its legal system, see generally \textit{SHAPIRO}, \textit{supra} note 14; \textit{TREANOR}, \textit{supra} note 14; \textit{DISABLED PEOPLE AS SECOND-CLASS CITIZENS} (Myron G. Eisenberg, et al. eds., 1982); and Marcia Pearce Burgdorf & Robert Burgdorf, Jr., \textit{A History of Unequal Treatment: The Qualifications of Handicapped Persons as a “Suspect Class” Under the Equal Protection Clause}, 15 SANTA CLARA LAW. 855 (1975).

\textsuperscript{19} tenBroek, \textit{supra} note 7, at 842.

\textsuperscript{20} See id. at 844.
Massachusetts enacted the first state vocational rehabilitation law in 1918, and other states quickly followed. That same year, Congress passed the Smith-Sears Act to provide rehabilitation for veterans with disabilities from World War I. The first federal civilian vocational rehabilitation act was passed in 1920 and has remained the focal point of federal disability policy ever since.

Under the medical model, people with disabilities are placed in one of


The medical model is similar to the "social pathology model" of disability, which also views disability as a defect that must be "cured" with the assistance of professionals. Professor tenBroek discussed this model in an article published concurrently with his article *The Right to Live in the World*. See Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966). He stated that the social pathology model is based on sociological definitions of "deviation" and "deviant groups," "heuristic device[s] to enable the identification of individuals or groups who depart significantly from 'normal' patterns of behavior." *Id.* at 812. Nondisabled groups so identified include "criminals, delinquents, prostitutes, religious fanatics, [and] addicts" who are "subject[ed] to widespread social disapproval and censure." *Id.* Likewise, "[d]isability . . . is viewed as a form of deviance in the sense that the individual is disadvantaged in social terms because of an 'imputation of an undesirable difference.'" Drimmer, *supra* note 14, at 1348-49 n.27 (quoting Marvin B. Sussman, *Dependent Disabled and Dependent Poor: Similarity of Conceptual Issues and Research Needs, in Social and Psychological Aspects of Disability* 249 (Joseph Stubbsins ed., 1977)). One author has stated that "include[ing] people with disabilities among these groups who display visible behavioral differences exemplifies the view that physical difference resulting from a disability is largely a question of attitude." *Id.* (citing Longmore, *supra* at 143-44 ("citing sources equating disability with 'drunkenness', 'debauchery', and 'criminality' unless the disability is properly 'treated'"))).
two categories depending upon their behavior: 1) "cripples" who refuse "treatment," accept their inferior status and remain outside the mainstream; and 2) "overcomers" who accept assistance from others so they can be integrated into the "normal" world. In both of these roles, however, the people with disabilities are viewed as different from the able-bodied. Cripples are trapped by their infirmity and unable to be productive members of society. Overcomers, conversely, struggle persistently to compensate for their ailments. In both roles, the focus remains on how the individual adapts to his or her disability, not how society adapts to his or her needs.

B. "Civil Rights Model" Statutes and Case Law: Society Should Adapt to People with Disabilities

The civil rights model and the resulting legislation grew out of the disability rights movement of the late 1960s and 1970s. That movement was inspired by the civil rights movement of the 1950s and 1960s, which declared that equal access to society for African Americans and other minorities was a civil right. That position was enacted into law in the Civil Rights Act of 1964, which barred discrimination based on race, sex, and national origin in access to employment, education, and public accommodations; the Voting Rights Act of 1965, which guaranteed access to political participation; and the Civil Rights Act of 1968, which guaranteed access to housing. Although a proposal by the National Federation of the Blind to extend the Civil Rights Act of 1964 to the disabled

25. See Drimmer, supra note 14, at 1352.

26. See id. at 1352-55; see also Wilkinson, supra note 14, at 913 n.24 ("[T]he clinical focus on the individual as the unit of analysis has precluded the diagnosis of architectural or other environmental barriers in the treatment of permanent impairments." (quoting Harlan Hahn, The Political Implications of Disability Definitions and Data, 4 J. POL’Y STUD. 41, 44-45 (1993))).


was never formally introduced, people with disabilities saw, in the civil rights movement, a model for integration into mainstream society.

The first call for federal civil rights legislation for people with disabilities began in the mid-1960s with a movement seeking architectural accessibility to federal buildings. A provision in the Vocational Rehabilitation Act Amendments of 1965 created a national commission to study how architectural barriers kept disabled people from entering the workplace even after rehabilitation. It found that "[m]ore than 20 million Americans are built out of normal living by unnecessary barriers: a stairway, a too-narrow door, a too-high telephone. At the right moment, their needs were overlooked." In response, Congress enacted the first major federal measure not based on the medical model of disability: the Architectural Barriers Act of 1968, which required that all new facilities built with public money be accessible to people with disabilities.

31. See tenBroek, supra note 7, at 853.

32. TenBroek noted that the Civil Rights Act of 1964, 42 U.S.C. § 2000a(a), spoke of the entitlement "to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation," by "all persons." tenBroek, supra note 7, at 853 (emphasis added). He optimistically declared that "[i]t is . . . possible, if not probable, that when we move away from the moment and the immediate cause of the legislation, the judges will bring the disabled within its shelter." Id. While this never took place, his prediction of civil rights protection for the disabled was ultimately fulfilled when Congress based the ADA on the existing civil rights legislation.


34. Percy, supra note 14, at 50 (quoting NATIONAL COMMISSION ON ARCHITECTURAL BARRIERS TO THE REHABILITATION OF THE HANDICAPPED 2 (1967)). States had already identified this problem, and by the time of tenBroek's article, twenty-one states had architectural barriers legislation. See tenBroek, supra note 7, at 861 & n.118 (listing various state statutes).

35. See Pub. L. No. 90-480, 82 Stat. 718 (1969) (codified as amended at 42 U.S.C. §§ 4151-4157 (1994)); see also 36 C.F.R. §§ 1190.1-1190.60 (1998) (setting minimum standards for accessibility). The legislation, which eventually became the Architectural Barriers Act, has been credited to Hugh Gallagher, a wheelchair user due to polio. See Percy, supra note 14, at 50. A legislative aide to Senator E. L. Bartlett of Alaska, Gallagher had experience with the accessibility problems of federal buildings. See id. On the House side, the bill was championed by Congressman Charles E. Bennett of Florida. See Treanor, supra note 14, at 44. Bennett, who used canes because of polio, also had experienced access problems, including problems in his own congressional office in a Jacksonville federal building. See id. at 44-45.

Gallagher later went on to write two significant books on disability. One chronicles the life of the ultimate "overcomer"—Franklin D. Roosevelt—who, as one of our greatest presidents, guided the United States through the Great Depression and World War II while paralyzed by polio. See Hugh Gregory Gallagher, FDR'S SPLENDID DECEPTION (1985). The other examines the prejudice against disability inherent in the social Darwinism and eugenics movements of the late nineteenth and early twentieth cen-
The civil rights model was embraced by some courts shortly after the passage of the Architectural Barriers Act. In the early 1970s, courts for the first time began to accept the principle that people with disabilities have a civil right to participate in society and, more specifically, to have access to education. In *Pennsylvania Ass'n for Retarded Children v. Pennsylvania,* a class action suit on behalf of fourteen mentally retarded students and others similarly situated, the plaintiffs argued that the State had violated their due process and equal protection rights by excluding them from public education. In the resulting consent decree, the court held that the state was obligated to place every mentally retarded child in “a free public program of education and training appropriate to his learning capacities.” The case received widespread publicity as one of the first suits for the benefit of disabled persons, led to similar suits in other states, and was heralded as a “cradle of the whole legal rights movement for handicapped people.”

Another “cradle” for the legal rights of people with disabilities was section 504 of the Rehabilitation Act of 1973. Based on Title VI of the Civil Rights Act of 1964, it barred discrimination against “otherwise qualified individual[s] with a disability” by federal funds recipients.

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37. Id. at 1258-59.
40. Id. § 794(a) (referring to Title VI of the Civil Rights Act of 1964). The statute states in part, that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Id. The first attempt to include disability in a broad-based civil rights statute was a bill sponsored by Senator Humphrey to amend Title VI of the Civil Rights Act of 1964. The bill sought to make disability, like race and national origin, an illegal ground for discrimination for those receiving federal funds by inserting “physical or mental handicap” immediately after “color” in the Act. See S. 3044, 92d Cong. (1972). Repre-
Given the impact this language would ultimately have, it is surprising that the committee and conference reports on the Act give practically no attention to the section and no floor debates raised any questions on it.

Disability groups, however, realized the importance of this language and soon began a prolonged and often fractious dialogue with the Department of Health, Education and Welfare (HEW), the agency responsible for issuing regulations interpreting and implementing section 504. The Ford Administration also soon understood section 504's impact and stalled the implementation of final regulations after HEW estimated compliance would cost billions of dollars. It left behind a 185-page draft of the regulations for the incoming Carter Administration. President Carter had made a campaign promise to complete the regulations, but new HEW Secretary Joseph Califano was concerned about their scope and assigned a team of lawyers to write new regulations.

Disabled activists who had waited four years, through three presidential administrations, and who had a federal court order mandating the regulations to be issued, then took a page from other civil rights groups. Representative Vanik proposed a similar amendment. See H.R. 12154, 92d Cong. (1971). No hearings were held on either bill and the attempt to add disability to the Civil Rights Act of 1964 died. Some have argued that Congressional liberals fought against the measure because they feared that adding "disability" would dilute the power of that Act because it would then apply to too many members of society. See SCOTCH, supra note 27, at 44-45; see also Robert L. Burgdorf, Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 HARV. C.R.-C.L. L. REV. 413, 429 (1991) (offering the same explanation).

The language of section 504, however, came from congressional staffers. See SCOTCH, supra note 27, at 51. In fact, it was not even included in the original draft of the bill. See id. at 52. These staffers were concerned that employers would be hesitant to hire people with disabilities even after they had completed their vocational rehabilitation and believed that one way to overcome the negative attitudes and bias in the business community would be to include anti-discrimination language in the statute. See id. at 51. They adopted language from Title VI of the Civil Rights Act of 1964 and inserted it at the end of the Rehabilitation Act. See id. at 52.

31. See Shapiro, supra note 14, at 65.
32. See id. at 65-66.
33. A discussion of the reasons behind the delay in promulgating the regulations is found in SCOTCH, supra note 27, at 60-120 and TREANOR, supra note 14, at 64-72.
34. See Cherry v. Mathews, 419 F. Supp. 922, 924 (D.D.C. 1976). The plaintiff, James Cherry, had entered the Howard University Law School in 1968 as one of a few white students in a student body that was focused on obtaining civil rights for minorities. See TREANOR, supra note 14, at 65. At that time he used leg braces and crutches as a result of a muscular disease, and he soon saw an analogy between civil rights for blacks and civil rights for people with disabilities. See id.

By the early 1970s Cherry was using a wheelchair. See id. While hospitalized at the Bethesda National Institute of Health for complications of his condition, he became more interested in disability issues and in particular why the section 504 regulations had not been promulgated. See id. From his hospital bed, he single-handedly developed a litiga-
In April 1977, a group of demonstrators in wheelchairs and carrying candles went to Califano's home and demanded that he sign the regulations immediately without weakening them. Two days later, demonstrations were held at HEW offices in Washington and ten other cities, including sit-ins in both Washington and San Francisco. Some of the 300 people who took over Califano's Washington office stayed overnight. Califano, who had previously stated that he welcomed the demonstrations and compared them to Martin Luther King's tactics, however, refused to let in food and cut off telephone communication. Tense negotiations followed and the demonstrators voted to leave after twenty-eight hours.

45. See SHAPIRO, supra note 14, at 66; TREANOR, supra note 14, at 73-77.

46. See SHAPIRO, supra note 14, at 66; TREANOR, supra note 14, at 77; see also JOSEPH A. CALIFANO, JR., GOVERNING AMERICA: AN INSIDER'S REPORT FROM THE WHITE HOUSE AND THE CABINET 260-61 (1981) (offering the HEW Secretary's perspective on the demonstrations). Among the demonstrators and the public officials supporting them were two people who are most often identified as the founders of the disability rights movement: Ed Roberts and Judy Heumann. Ed Roberts was a quadriplegic as a result of polio. See SHAPIRO, supra note 14, at 41. At the time of the protest he was the Director of the California state Department of Rehabilitation. See id. at 54. His presence in that position would have been unthinkable even a decade earlier. Paralyzed by polio in 1953 at the age of 14, he returned to school first by telephone and then, for his senior year of high school, in his wheelchair. See id. at 43. Despite his good grades, however, the school's principal at first refused to grant him his diploma because he had satisfied neither the driver's education nor gym requirements. See id. at 43-44. After his mother, a former labor organizer, protested, his rehabilitation sessions were counted as physical education and the driver's education requirement was waived. See id. at 44.

Following his graduation, Roberts spent two years at a community college and then applied to the University of California at Berkeley—the same school where Jacobus ten Broek taught. The State Department of Rehabilitation refused to pay for his education, however, stating that "it was 'infeasible' that he could ever work." See id. After taking his case to the local newspapers, the agency relented due to the negative publicity. Roberts, however, still had to persuade Berkeley officials to admit him. One dean told him "[w]e've tried cripples before and it didn't work." Id. at 45. He eventually convinced them that he could get around the numerous architectural barriers by relying on friends and attendants to lift him, and the director of student health services allowed Roberts and his "iron lung" to move into the student infirmary. See id. Roberts enrolled at Berkeley shortly after James Meredith integrated the University of Mississippi in the fall of 1962, prompting one writer to state: "The disability rights movement was born the day Roberts arrived on the Berkeley campus." Id. at 41.

By the time Roberts finished his bachelor's and master's degrees and began work on his doctorate, twelve more severely disabled students were living in the student infirmary. See
This decision was later criticized by the San Francisco protestors, who attracted national attention by occupying the regional HEW office for twenty-five days. With donated food, the support of federal, state, and local politicians, and the assistance of other civil rights groups, they stayed until Califano agreed to sign the draft regulations without any changes. One writer said, "[t]he San Francisco sit-in marked the political coming of age of the disability rights movement."  

id. at 46. They soon began to think about living independently off-campus and eventually received a grant from HEW that was used to establish the Physically Disabled Students' Program (PDSP) in the Fall of 1970. See id. The PDSP was at the cusp of the "independent living movement" and soon began to field requests from non-students. In response, Roberts and others founded the Center for Independent Living (CIL) in the Spring of 1972. See id. at 52-53. Three years later, after taking California's new Governor, Jerry Brown, on a tour of CIL, Roberts was appointed the Director of the State Department of Rehabilitation—the same agency which had once stated it was "infeasible" that he would ever have a job. See id. at 54-55.

Roberts made several visits to the HEW sit-in, telling the demonstrators to "keep up the pressure" and that federal officials had "underestimated the commitment of this group." Id. at 67. Roberts later founded the World Institute on Disability and served as its president until his death in 1995. He was eulogized as both the Martin Luther King and Cesar Chavez of disability rights. See Janice Jackson, A King for the Disabled, BALTIMORE EVENING SUN, Apr. 12, 1995, at 25A, available in 1995 WL 2435063; Myrna Oliver, Edward Roberts; Champion of Rights for Handicapped, L.A. TIMES, Mar. 17, 1995, at A26, available in 1995 WL 2025958; see also Steven A. Chin, Champ of the Disabled Honored: 750 Pay Homage to Ed Roberts, S.F. EXAMINER, Mar. 20, 1995, at A2, available in 1995 WL 4916739.

47. SHAPIRO, supra note 14, at 68. For historical accounts and photographs of the protest, see Disability Rights Education and Defense Fund, 504 Sit-in 20th Anniversary Homepage (visited Oct. 23, 1998) <http://www.dredf.org/504home.html>. Judy Heumann, one of the demonstrators listening to Roberts, is closely identified with the founding of the disability rights movement. Judy Heumann also was struck by polio. She entered high school in 1961, after her mother had fought to overturn the New York City public school's policy of returning wheelchair users to their families for home instruction when they reached high school age. See SHAPIRO, supra note 14, at 55-56. She later attended Long Island University's Brooklyn campus where she fought for the right to live in a dormitory and for ramped buildings. See id. at 56-57.

In the spring of 1970, a year after she graduated, Heumann was denied a teaching license by the New York City Board of Education because, although she passed the oral and written exams, she failed the physical exam. See id. at 57. The doctor administering the exam "questioned whether she could get to the bathroom by herself" or assist children exiting the building in an emergency. See id.

Heumann sued the Board for discrimination and also took her case to the newspapers. See id. The Board settled after headlines like "You Can Be President, Not Teacher, with Polio" appeared in the newspapers. See id. As a result of the press coverage, Heumann received numerous letters from other people with disabilities telling of similar problems. See id. Using these contacts, Heumann started her own disability rights group, Disabled in Action, in 1970. See id. Three years later, after participating in several protests on the east coast, she moved to Berkeley to work at CIL. See id. at 58. She was the deputy director of CIL from 1975 to 1982, and in that capacity was one of the leaders of the San Francisco sit-in. See id. at 67. Heumann is now an Assistant Secretary for the Office of Special
The section 504 regulations were significant because for the first time, federal law required schools, employers, and others receiving federal funds to adapt to the needs of people with disabilities. For example, with regard to employment, the regulations required that recipients "make reasonable accommodation[s] to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee," except in cases of "undue hardship."\(^4\) Colleges and universities were required to modify their academic requirements such that the "requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student."\(^4\) In Alexander v. Choate,\(^5\) the Supreme Court recognized section 504's requirement that federal funds recipients make accommodations, but noted that interpreting section 504 requires acknowledgment of "two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep [section] 504 within manageable bounds."\(^5\) The Court's first attempt to balance these considerations occurred in Southeastern Community College v. Davis,\(^5\) where a plaintiff with a major hearing disability sought admission to a college to be trained as a registered nurse. The college denied her admission, citing concerns that she would not be capable of safely performing as a registered nurse, even with full-time personal supervision. The Court held that the college was not required to admit her because it appeared that she would not benefit from any modifications required under the relevant section 504 regulations.\(^3\) In doing so, the Court struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.\(^5\)

This balancing test was extended beyond federal fund recipients to so-

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\(^4\) 34 C.F.R. § 104.12(a) (1998).
\(^4\) See id. § 104.44(a).
\(^5\) Id. at 299.
\(^3\) See id. at 409.
\(^3\) Alexander, 469 U.S. at 300.
society at large in the ADA. Modeled after the Civil Rights Act of 1964, the ADA mandates equal treatment in employment, public services, and public accommodations. For example, Title II of the ADA, which covers state and local governments, states: "[N]o qualified individual with a disability shall . . . be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." This same prohibition is applied to private entities through Title III of the ADA, which bars the disability-based denial of the benefits of the services, programs, or activities of public accommodations. Both public and private entities are required to make "reasonable accommodations" for people with disabilities. According to one commentator, the ADA is "based on the premise that disability is a natural part of the human experience and in no way diminishes the rights of individuals to live independently, pursue meaningful careers and enjoy full inclusion in the economic, political, cultural and educational mainstream of American society."

55. 42 U.S.C. §§ 12101-12213 (1994). For a discussion of the lobbying efforts and demonstrations on behalf of the ADA, see SHAPIRO, supra note 14, at 105-41 and TREANOR, supra note 14, at 104-34.
57. See id. § 12182(a). The provision states: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Id. A public accommodation is "a private entity that owns, leases (or leases to), or operates a place of public accommodation." 28 C.F.R. § 36.104 (1998). A place of public accommodation is "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of [twelve] categories." Id. Included in those categories are restaurants, hotels, amusement parks, doctor's offices, pharmacies, grocery stores, shopping centers, theaters, and schools. See id; see also 42 U.S.C. § 12181(b)(2) (describing public accommodations).
58. See 42 U.S.C. § 12112(b)(5)(A) (defining discriminatory employment practice under Title I as including "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual . . . who is an applicant or employee," except in cases of "undue hardship"); 42 U.S.C. § 12182(b)(2)(A)(i) (defining discrimination by a place of public accommodation under Title III as including "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary" to allow people with disabilities to enjoy the benefits of the accommodations, except where the change would alter the fundamental nature of the benefit).
59. Paul Steven Miller, Commissioner, U.S. Equal Employment Opportunity Commission, ADA Gives Us Our Full Civil Rights, WALL ST. J., Feb. 14, 1995, at 23. A fuller explanation of the premise behind the ADA can be found in the "findings" and "purposes" Congress listed in the first section of the ADA. See 42 U.S.C. § 12101. Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;" that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those oppor-
II. THE DISABLED IN THE LAW OF TORTS

Professor tenBroek, however, found that the “integrationist” policies expressed in statutory law were often ignored in common law tort cases. He stated that Prosser’s “grand pronouncement” on the right to “live in the world,” although purportedly drawn from the common law and “seeming to express for the law of torts the legislatively established policy of . . . integration,” was not reflected in current case law holdings. TenBroek said that courts either qualified or ignored Dean Prosser’s pronouncement on the integration of people with disabilities, ranging from complete rejection to “halting and partial credence.” No court, however, had given the disabled a full and complete right to live in the world. TenBroek also noted that “Dean Prosser himself immediately emasculate[d] his proposition” by limiting its application “to a narrow realm of street accidents. And even there, while freeing the disabled of negligence per se for being where they are, he hobble[d] them with the views of the able-bodied as to what their reasonable conduct should be.” TenBroek summarized the state of the law with respect to the disabled person’s right to live in the world:

The courts, prodding the tardy genius of the common law, have extended a variant of the reasonable man concept to those who injure the disabled on the streets, in traffic, and on common carriers. This constitutes a meager and inadequate accomplishment in the light of the integrationist purpose and the legislative declaration of policy. Unawareness of the policy and its applicability in various situations, rather than considered judgment, as to its social importance, practicability, or relevance in the law of torts, seems to be the principal reason for the wide-

60. tenBroek, supra note 7, at 852. “Grand pronouncements,” however, can also be found in case law. See, e.g., Weinstein v. Wheeler, 271 P. 733, 733-34 (Or. 1928) (“Public thoroughfares are for the beggar on his crutches as well as the millionaire in his limousine.”); Garber v. City of Los Angeles, 38 Cal. Rptr. 157, 163 (Cal. Dist. Ct. App. 1964) (“The ordinary purpose of sidewalks and streets includes their use by the blind, the very young and the aged, the cripple and the infirm, and the pregnant woman. For such persons to use the streets is not contributory negligence.”).
61. tenBroek, supra note 7, at 852.
62. See id.
63. Id.
spread disregard of the policy.  

In supporting this statement tenBroek focused on three distinct types of tort cases: (1) blind people who fell because of unprotected hazards on streets and sidewalks; 2) blind people struck by motorists; and 3) disabled people injured while boarding, exiting, or riding on common carriers. This Article will use these same categories to examine whether

64. Id.

65. TenBroek was a political science professor at the University of California at Berkeley (UC Berkeley) and one of the nation’s foremost constitutional law scholars. He was also blind. He noted at the beginning of his article that “[i]f the blind appear in these pages more than other disabled, it may be because the author is blind and has a special interest in his kind.” Id. at 841. TenBroek then stated that “[h]e [thought] not, however. The fact is that the blind individually and collectively are a very active group of the disabled, if not the most active.” Id.

That activity and the legislative successes of the National Federation of the Blind (NFB), which tenBroek co-founded and is discussed below, may explain why the blind appear less frequently in these pages than people who use wheelchairs. It may also be because this author uses a wheelchair. He thinks not. Rather, it is likely due to the fact that people who use wheelchairs and people with other disabilities were a quarter-century behind the NFB in their efforts to gain equal access to society.

The following biographical information on tenBroek is from PELKA, supra note 27, at 303, and National Federation of the Blind, Dr. Jacobus tenBroek (visited Oct. 23, 1998) <http://www.blind.net/bw000001.html> [hereinafter NFB/tenBroek Web-site].

The son of a Canadian prairie homesteader, tenBroek lost one eye when an arrow struck him at the age of seven. See id. By 14, his other eye had deteriorated to the point that he was totally blind. See id. His family, who had emigrated to the United States when he was eight, moved to Berkeley so tenBroek could attend the California School for the Blind. See PELKA, supra note 27, at 303. He remained in Berkeley to earn four degrees from UC Berkeley: a bachelor’s degree in 1934, a master’s degree in 1935, a law degree in 1938, and a doctorate in law in 1940. See id. He later earned an S.J.D. from Harvard in 1947. See NFB/tenBroek Web-site, supra.

After earning his first law degree at UC Berkeley, he was a Brandeis Research Fellow at the Harvard Law School in 1940 and then a faculty member at the University of Chicago Law School. See id. He returned to Berkeley to teach in 1942, first in the speech department, which he later chaired, and then in political science. See id. TenBroek was also a fellow at the Palo Alto Center for Advanced Study in the Behavioral Sciences and was a two time recipient of fellowships from the Guggenheim Foundation. In 1950, Governor Earl Warren appointed him to the California State Board of Social Welfare. He served as its chairman from 1960 to 1963. See PELKA, supra note 27, at 303.

TenBroek published several books and more than fifty articles and monographs in areas ranging from constitutional law and welfare to family law and disability. See JACOBUS TENBROEK & FLOYD W. MATSON, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951) (revised and republished in 1965 as EQUAL UNDER LAW (1965)); JACOBUS TENBROEK, CALIFORNIA’S DUAL SYSTEM OF FAMILY LAW (1964); JACOBUS TENBROEK, HOPE DEFERRED: PUBLIC WELFARE AND THE BLIND (1959); JACOBUS TENBROEK, PREJUDICE, WAR, AND THE CONSTITUTION (1955) (winner of the Woodrow Wilson Award of the American Political Science Association year on government and democracy). These publications are still frequently cited today, and one of his articles, co-authored with Joseph Trussman, The Equal Protection of the Laws, 37 CAL. L. REV. 341 (1949), is among the most-cited law review pieces. See Fred R. Shapiro, The Most-Cited
courts are still ignoring the “integrationist” policy in deciding tort suits, and how legislatures are abrogating or enhancing the common law rights and responsibilities of people with disabilities.

A. Liability for Unprotected Hazards on Streets and Sidewalks

1. Pre-Civil Rights Movement Common Law: Landowners' Duty to Foresee Pedestrians with Disabilities vs. Blind Pedestrians are Contributory Negligent Per Se if They Fail to Use Assistive Devices

TenBroek began his review of cases brought by disabled people injured by unprotected hazards with a brief summary on the doctrine of negligence and how it was applied to people with disabilities. He stated:

[J]udges pose as the critical question alike for those who create the risk and the disabled who run it: Would a reasonable man of ordinary prudence in like circumstances have done either? It is only if the disabled plaintiff meets this standard of conduct and the defendant does not that the cost of injuries will be placed upon the latter.66

In determining if this standard had been met, Prosser said that a person with a disability was “entitled ‘to have allowance made by others for his disability’; and he in turn, must act reasonably . . . [with] ‘knowledge of his infirmity . . . treated . . . merely as one of the circumstances under which he acts’.”67

66. TenBroek, supra note 7, at 865-66 (footnote omitted).

67. Id. at 866 (quoting PROSSER, Torts § 32, at 155 (3d ed. 1964)). The same statement appears in the fifth edition. See KEETON ET AL., supra note 10, § 32, at 175-76. The Restatement (Second) of Torts includes a similar statement: “If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability.” RESTATMENT (SECOND) OF TORTS § 283C (1965). One comment explains that

[p]hysical handicaps and infirmities, such as blindness, deafness, short stature, or
TenBroek stated, however, that this position generated a number of questions:

"Allowance made . . . for disability"; how, to what extent, in which circumstances, by whom? . . . To what requirements may [the disabled] be subjected: to sally forth only in the care of an attendant? To use a dog as [a] guide? To carry a cane, and if so, of any particular sort, and to be employed in any particular way? To travel only in familiar streets and places? Not to enter streets and places known to be defective or where work is being done? Not to enter streets and places possibly presenting particular traffic hazards? To proceed at his peril, because however carefully he may travel others need not anticipate his presence and take precautions accordingly? 68

According to tenBroek, courts were divided on each of these questions and their "rhetoric [was] even more varied than the answers." 69 Most courts ruled it was not contributory negligence per se if a blind person walked unaccompanied by a companion or attendant; 70 others held that it was contributory negligence per se if he traveled without a dog, cane, or companion; 71 and still others found that it was a jury question as to whether the failure to use one of these aids showed a lack of due care. 72

a club foot, or the weaknesses of age or sex, are treated merely as part of the "circumstances" under which a reasonable man must act. Thus the standard of conduct for a blind man becomes that of a reasonable man who is blind. This is not a different standard from that of the reasonable man stated in § 283, but an application of it to the special circumstances of the case.

Id. § 283C cmt. a. Two illustrations deal with blindness, as does one of the Reporter's Notes:

1. A, a blind man, is walking down a sidewalk in which there is a depression. A normal man would see the depression and avoid it. A does not see it, and walks into it. A may be found not to be negligent.

2. A, a blind man, is walking down a sidewalk in which he knows that there is a dangerous depression. Without asking for assistance from anyone, A attempts to walk through the depression. A may be found to be negligent, although a normal person would not be negligent in doing so.

Id. §283C illus. 1, 2.

68. tenBroek, supra note 7, at 866.

69. Id.

70. See id. & n.146 (citing Town of Salem v. Goller, 76 Ind. 291, 292 (1881); Balcom v. City of Independence, 160 N.W. 305, 310 (Iowa 1916); Kaiser v. Hahn Bros., 102 N.W. 504, 505 (Iowa 1905); Neff v. Town of Wellesley, 20 N.E. 111, 113 (Mass. 1889); Smith v. Wildes, 10 N.E. 446, 448 (Mass. 1887); Hestand v. Hamlin, 262 S.W. 396, 397 (Mo. Ct. App. 1924); Sleeper v. Sandown, 52 N.H. 244, 251 (1872); Davenport v. Ruckman, 37 N.Y. 568, 568-73 (1868); Fletcher v. City of Aberdeen, 338 P.2d 743, 745 (Wash. 1959); Master- son v. Lennon, 197 P. 38, 39 (Wash. 1921)).

71. See id. at 866-67 & n.147-48 (citing Florida Cent. R.R. v. Williams, 20 So. 558, 561-62 (Fla. 1896)).

72. See id. at 867 & n.149 (citing Smith v. Sneller, 26 A.2d 452, 454 (Pa. 1942); Fraser
TenBroek also noted that courts took different positions regarding disabled plaintiffs' knowledge of the surroundings: some said that their knowledge that streets may be dangerous or defective created a type of assumption of the risk; other courts found that they could proceed with due care in light of that knowledge; others ruled that disabled persons could assume that streets and highways were kept in a reasonably safe condition and property owners would take precautions to warn or protect them; and still others said that those working on streets and sidewalks only have a duty to protect able-bodied pedestrians.

Courts used several types of reasoning to justify their holdings as to whether blind plaintiffs could recover after falling into unmarked hazards. Courts rejecting claims by blind plaintiffs relied on contributory negligence principles. In doing so, they implicitly used a medical model of disability—barring the plaintiffs' claims because they had failed to adapt to their disabilities. For example, in Smith v. Sneller, the Supreme Court of Pennsylvania held that a blind man was contributorily negligent as a matter of law because he was not using a cane, seeing eye dog, or companion. Similarly, in Cook v. City of Winston-Salem, a blind man was held contributorily negligent despite the fact that he was handling a trained seeing eye dog in the approved way because he "failed to put forth a greater degree of effort than one not acting under any disabilities to attain due care for his safety: that standard of care which the law has established for everybody."

Courts holding in favor of blind plaintiffs, however, held that it was society that had to adapt. These courts have found that there was a presumption that property owners were on notice that disabled people were

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73. See id. & n.151 (citing Garbanati v. City of Durango, 70 P. 686 (Colo. 1902); Cook v. City of Winston-Salem, 85 S.E.2d 696, 701-02 (N.C. 1955)).
74. See id. & n.152 (citing Hestand v. Hamlin, 262 S.W. 396, 398 (Mo. Ct. App. 1924); Marks' Adm'r v. Petersburg R. Co., 13 S.E. 299 (Va. 1891)).
76. See id. & n.156 (citing Hestand v. Hamlin, 262 S.W. 396, 397 (Mo. Ct. App. 1924); Carter v. Village of Nunda, 66 N.Y.S. 1059, 1061 (App. Div. 1900); Cook v. City of Winston-Salem, 85 S.E.2d 696, 700 (N.C. 1955)).
77. 26 A.2d 452 (Pa. 1942).
78. 85 S.E.2d 696 (N.C. 1955).
79. Id. at 702.
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likely to walk by; thus, the likelihood of harm was foreseeable and they had to take steps to prevent it. For example, the Washington Supreme Court approved this jury instruction: “The city is chargeable with knowledge that all classes of persons, including both the healthy, and diseased, and lame, constantly travel its streets and sidewalks.”

The Iowa Supreme Court used even stronger language in a case where a blind man had fallen into an unprotected ditch. It noted that the city had, “in effect, [taken] the position that because the blind should do more than the seeing to avoid being injured, the city need not take as much care to protect the blind as to protect those who can see.” Such a position was understandable because

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\text{[i]t is easily seen how all [the] emphasis upon the sound position that a blind person must do more to be in the exercise of ordinary care than would be required if he had all his faculties has lead to the impression that one who injures a person under such disability need have no regard for it, and need do no more than would be required for the protection of one who can see.}
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The court said that cases upholding such an argument suggested that the city was not required to take special precautions for the blind, because it was “not bound to anticipate that they will pass upon its walks.”

The court rejected this argument, however, criticizing the earlier cases, because, in emphasizing the blind person’s duty of care, they “failed to make clear that the obligation was correlative, and that therefore, even as the blind man should use more precaution because he was blind, whoever did that which might injure him should use more precautions than would be necessary where the one to be affected was not blind.”

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80. Short v. City of Spokane, 83 P. 183, 185 (Wash. 1905). Missouri courts originally held that a city only had a duty “to use ordinary care to maintain its streets in a reasonably safe condition for general traffic in all the usual and ordinary modes of travel.” Bethel v. City of St. Joseph, 171 S.W. 42, 44 (Mo. Ct. App. 1914); see Wilkerson v. City of Sedalia, 205 S.W. 877, 878 (Mo. Ct. App. 1918). The Missouri Supreme Court overruled these cases and held that a city had a duty to provide reasonably safe streets for all pedestrians, including those with disabilities. See Hanke v. City of St. Louis, 272 S.W. 933, 939 (Mo. 1925); Hunt v. City of St. Louis, 211 S.W. 673, 677 (Mo. 1919).


82. Id.

83. Id. at 309.

84. Id. at 308; see Fletcher v. City of Aberdeen, 338 P.2d 743, 746 (Wash. 1959). The Fletcher court held:

The obligations are correlative. The person under a physical disability is obliged to use the care which a reasonable person under the same or similar disability would exercise under the circumstances. The city, on the other hand, is obliged to afford that degree of protection which would bring to the notice of the person so afflicted the danger to be encountered.
stated the general proposition that in tort cases it is irrelevant whether
the defendant could have anticipated the injury of which he was the
cause, and it is enough that the defendant in fact caused the injury. Applying that rule to the facts before it "preclude[d] [the city] from urg-
ing it was under no obligation to anticipate that any blind man would pass over this walk" and would lead to the conclusion that the city was liable even "if no blind man had ever before used a walk in the town."

The court did not need to go that far in the case before it, however, be-
cause the blind plaintiff was traveling a path that, after ten years of trav-
eling between his home and town center, was well familiar to him, a fact
of which the city could not argue it was ignorant. Furthermore, because
the city "had a duty to use precautions as to this excavation which would
protect the blind as well as those who were not blind, it [could not] avoid
this responsibility as [a] matter of law on the theory that the passage of
this blind man was unforeseen, and not in reason to be anticipated."

Other courts holding in favor of blind pedestrians drew an analogy be-
tween a blind person in the daytime and a seeing person at night. For
example, in *Sleeper v. Sandown*, a blind person, injured when he fell off
a bridge where the railing was missing, argued that it was "immaterial
whether the accident happened for want of light or want of sight." The
court agreed, stating "[b]lindness of itself is not negligence" because,
whether an individual could not see the danger because he was blind or
because there was no light, both individuals are equally unable to see.

Turning specifically to the facts of the case before it, the court held that
the blind plaintiff "had the same right to assume the existence of a rail"
that any seeing pedestrian would have if walking at night.

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85. *See Balcom*, 160 N.W. at 309.
86. *Id.* (emphasis added).
87. *See id.*
88. *Id.* Some courts have used the term "foreseeability" to describe the presumption
that landowners were on notice that disabled people might walk by the unprotected haz-
Cohn*, 73 Pa. D. & C. 544, 548 (C.P. 1950) (defining the class to whom a duty was owed as
all pedestrians).
89. 52 N.H. 244 (1872).
90. *Id.* at 250.
91. *Id.* at 251.
92. *Id.* at 252. In *Davenport v. Ruckman*, 36 N.Y. 566 (1868), a person with limited
sight fell into an unguarded cellarway. The court stated: "The streets and sidewalks are
for the benefit of all conditions of people, and all have the right, in using them, to assume
that they are in good condition, and to regulate their conduct on that assumption." *Id.* at
574. Relying on the blind/night-time analogy, the court held that the blind plaintiff, like
In reviewing these cases, tenBroek noted that in walking to work and to visit friends, the plaintiffs “were doing what other people do who live in the world.”9

Despite this, tenBroek noted:

[n]o courts have held or even darkly hinted that a blind man may rise in the morning, help get the children off to school, bid his wife goodby, and proceed along the streets and bus lines to his daily work, without dog, cane, or guide, if such is his habit or preference, now and then brushing a tree or kicking a curb, but, notwithstanding, proceeding with firm step and sure air, knowing that he is part of the public for whom the streets are built and maintained in reasonable safety, by the help of his taxes, and that he shares with others this part of the world in which he, too, has a right to live.9

Doing so, tenBroek said, would recognize that blind pedestrians were acting in a reasonably prudent manner and foster social policy towards the blind which “judges in their developing common law must be alert to sustain.”

2. Post-Civil Rights Movement Common Law: Blind Pedestrians are Contributarily Negligent Per Se if They Fail to Use Assistive Devices

Three decades later, however, judges developing the common law still seem to be unaware of “integrationist” statutory policies and the civil rights model which underlies them. This is clearly evident in the District of Columbia Court of Appeals’s recent decision in *Poyner v. Loftus.*

William J. Poyner, who was legally blind, but did not use a cane or a dog, was injured when he fell from an elevated walkway while on his way to the dry cleaner.9

Having walked by the area three or four times, Poyner identified bushes along the edge of the platform that provided a natural barrier and prevented him from falling if he attempted to walk too far. On the day of the accident, Poyner heard someone call his name as he was walking along the elevated area. He turned his head, but continued walking towards the end of the platform where he thought a bush

the sighted nightwalker, was entitled to assume that the city would keep the walkways in a safe condition—walking by “faith justified by law.” *Id.; see also Balcom v. City of Independence, 160 N.W. 305, 308 (Iowa 1916) (holding, where a blind man fell into an unguarded watermain ditch, that “requiring a light for him who can see when there is light proves there is a duty to protect those who for any reason cannot see”).

93. tenBroek, *supra* note 7, at 868.
94. *Id. at* 867-68.
95. *Id. at* 868.
96. 694 A.2d 69 (D.C. 1997).
97. *See id. at* 70. By “legally blind,” the court meant that Poyner was able to see only six to eight feet in front of him. *See id.*
would be. One of the bushes was missing, however, and there was nothing to keep him from falling.98

The trial court granted the defendants' motion for summary judgment and the appellate court affirmed, holding that Poyner was contributorily negligent as a matter of law. The court found that the missing shrub was "readily apparent, at least to any sighted person who chose to look,"99 and cited precedents holding that "[a] person must see what is reasonably there to be seen" and that a person has not used "due care if he has 'failed either to look at all or to look observantly and see what should have been plainly visible'."100 It rejected Poyner's argument that he was "not a sighted person, . . . that 'it [was] reasonable for a legally blind person . . . as a response to his name being called, [to] turn towards the direction of his caller, reach for the handle and continue his step towards the door'," and that because of his visual impairment, his conduct should be measured by a standard that took this impairment into consideration.101

The court found support for its holding, in cases from other jurisdictions and stated:

It seems to be the general rule that a blind or otherwise handicapped person, in using the public ways, must exercise for his own safety due care, or care commensurate with the known or reasonably foreseeable dangers. Due care is such care as an ordinarily prudent person with the same disability would exercise under the same or similar circumstances.102

The court also noted:

in the exercise of common prudence one of defective eyesight must usually as a matter of general knowledge take more care and employ keener watchfulness in walking upon the streets and avoiding obstructions than the same person with good eyesight, in order to reach the standard established by the law for all persons alike, whether they be weak or strong, sound or deficient.103

Ultimately, however, the Poyner court relied on the Supreme Court of

98. See id.
99. Id. at 71 (emphasis added).
101. Id. (emphasis omitted).
102. Id. (quoting Cook v. City of Winston-Salem, 85 S.E.2d 696, 700-01 (N.C. 1955)).
103. Id. at 71-72 (quoting Keith v. Worcester & Blackstone Valley St. Ry. Co., 82 N.E. 680, 681 (Mass. 1907), and Cook, 85 S.E.2d at 701 (quoting Keith)).
Pennsylvania's decision in *Smith v. Sneller*\(^{104}\) that a blind person is contributorily negligent as a matter of law if he is not walking with a companion, guide dog, or cane.\(^{105}\) Smith, a salesman, fell into a sewer trench that extended across a sidewalk and had no barricade on one side. The intermediate appellate court stated that, despite the judges' sympathies toward Smith in his effort to overcome his physical handicap, he was barred from recovery because of his contributory negligence.\(^{106}\) The state supreme court affirmed, finding that the accident could have been avoided if Smith had used a "compensatory" device, such as a cane, a guide dog, or a companion.\(^{107}\) The Pennsylvania court concluded: "A blind man may not rely wholly upon his other senses to warn him of danger but must use the devices usually employed, to compensate for his blindness. Only by so doing can he go about with comparative safety to himself."\(^{108}\)

The *Poyner* court agreed with the *Smith* court's analysis, stating: "Like the plaintiff in *Smith* . . . Mr. Poyner was alone, and he used neither a cane nor a seeing eye dog. He also looked away at the critical moment. Under these circumstances, he was contributorily negligent as a matter of law, and summary judgment was properly granted."\(^{109}\)

Even courts holding that blind plaintiffs were not contributorily negligent as a matter of law have applied the rule found in *Smith* requiring the use of a cane, dog, or companion. For example, in *Coker v. McDonald's Corp.*,\(^{110}\) a woman who was legally blind and had a degenerative joint disease in her legs fell from an elevated walkway connecting the entrance of a McDonald's restaurant to the parking lot. Coker was carrying a cane in her right hand and was holding on to a companion with her left hand. She lost her balance while trying to get around a parked car which was partially blocking the walkway. McDonald's moved for summary judgment, arguing that the obstruction was "open and obvious" and that Coker was contributorily negligent as a matter of law; the court disagreed.\(^{111}\)

On the open and obvious argument, the court stated that blind people

\(^{104}\) 26 A.2d 452 (Pa. 1942).
\(^{105}\) See *Poyner*, 694 A.2d at 72.
\(^{107}\) See *Smith*, 26 A.2d at 454.
\(^{108}\) *Id.* (quoting the trial court's finding).
\(^{109}\) *Poyner*, 694 A.2d at 73.
\(^{111}\) See *id.* at 550.
are not required to discover everything that sighted people would. Instead, the blind are required “to use due care under the circumstances,” which includes

a reasonable effort to compensate for [their] unfortunate affliction by use of artificial aids for discovery of obstacles in [their] path. . . . [W]hat is an open and obvious condition to a blind person depends upon what, if any, tools or aids the blind person utilizes to discover the condition, and the degree to which such aids are used. The ordinary, prudent blind person who is reasonably using a cane, dog, or the guidance of her companions should discover open and obvious conditions to the extent these aids permit.

Because Coker was using her cane and companions for guidance, the court held that there was a jury question whether the attempt to compensate for her blindness was reasonable under the circumstances.

Coker’s use of artificial aids was also emphasized in rejecting the contributory negligence defense: “Where the blind plaintiff is not using any aid, such as in Smith v. Sneller, . . . a court could rule as a matter of law that the plaintiff was contributorily negligent.” Because Coker was using two different aids—the cane and the companion—the court held that the contributory negligence issue was for the jury to decide, and McDonald’s was not entitled to summary judgment.

112. Id. at 550-51 (citations and internal quotation marks omitted).
113. Id. at 551.
114. Id.
115. See id.; see also Argo v. Goodstein, 265 A.2d 783, 788-89 (Pa. 1970). Argo was a blind door-to-door salesman who visited stores in a downtown business district every three or four months. See id. at 784. On the day of the accident, he pushed open an unlocked door, felt with his cane, held the door open with his shoulder, grabbed his wares, and stepped quickly inside to avoid the closing door. See id. His first step was within the range of his cane, landing on a solid surface, however, his next step was into the basement floor over eight and a half feet below due to the store’s renovation. See id. A jury awarded Argo $38,000, but the building’s owner appealed arguing, inter alia, that Argo was “contributorily negligent as a matter of law for failing to use his cane to determine the obvious change of level.” Id. at 785, 788.

The court disagreed, holding:

A blind person is not bound to discover everything which a person of normal vision would. He is bound to use due care under the circumstances. Due care for a blind man includes a reasonable effort to compensate for his unfortunate affliction by the use of artificial aids for discerning obstacles in his path. When an effort in this direction is made, it will ordinarily be a jury question whether or not such effort was a reasonable one.

Id. at 788 (quoting Davis v. Feinstein, 88 A.2d 695, 696-97 (Pa. 1952)).

The importance of relying on artificial aids was also illustrated in the following jury instruction, approved by the court:
3. White Cane Laws: Abrogating the Common Law Contributory
Negligence Per Se Rule

Given this continued emphasis on the use of artificial aids by common
law courts, blind people and others with disabilities have turned to the
legislatures to abrogate the common law and declare that the failure to
use a cane or a dog shall not constitute, nor be evidence of, contributory
negligence. Provisions doing so are often included in so-called "white
cane laws," which, with lobbying from organizations for the blind and the
Lions Club, began to be adopted by the states in the 1930s.116 These laws
vary greatly and cover everything from guaranteeing access to common
carriers to traffic safety to employment.117 At the time of tenBroek's ar-
ticle, white cane laws in nineteen states included provisions specifically
abrogating the common law contributory negligence per se rule for blind
persons not using a cane or a dog.118 That number has now grown to
thirty-one. Many of these provisions are found in sections outlining the

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[H]e is bound to use due care under the circumstances and due care for a blind
man includes a reasonable effort to compensate for his unfortunate affliction by
the use of artificial aids for discerning obstacles in his path. It is not negligence
per se for a blind person to go unattended on a sidewalk of a city, but he does so
at great risk and must always have in mind his own disadvantage and do what a
reasonably prudent person in his situation would do to ward off danger and pre-
vent accidents. He is not bound to anticipate an open ditch but should take pre-
cautions to discover possible barriers. In the exercise of due care it is his duty to
use a common, well-known compensatory device for blind people such as a cane, a
seeing eye dog or a companion. The fact that the plaintiff, or a plaintiff's de-
ceased, had impaired vision does not increase defendant's duty toward him nor
excuse him from his own negligence. If the individual knows that he is physically
inferior in any particular, he is required to use his remaining faculties with
greater diligence.

Id. at 789 (emphasis added and original emphasis removed); see also Morgan v. State, 862
P.2d 1080 (Idaho 1993) (finding that a factual dispute existed as to whether a loading dock
presented an "open and obvious" danger to a blind man within the meaning of the Re-
statement (Second) of Torts).

No matter how a landowner's duty toward a blind pedestrian is characterized, at least
one court has held that it does not extend beyond the owner's property lines. In Mendoza
v. White Stores, Inc., 488 P.2d 90 (Colo. Ct. App. 1971), a business was held not liable for a
blind pedestrian's fall after an employee guided him around a truck blocking a sidewalk at
the receiving door but failed to warn him of a flat piece of cardboard lying on a sidewalk
twenty-five to forty feet off the premises. See id. at 91. The court held that the owner or
occupant of land abutting a public sidewalk has no duty to keep the sidewalk in safe condi-
tion and can only be found liable for injuries occurring near his property if the walkway's
hazardous condition is attributable to his active negligence. See id. at 92.

116. See tenBroek, supra note 7, at 904.

117. The provisions on traffic safety will be discussed in depth infra, at notes 154-58
and accompanying text, and the provisions on access to common carriers will be discussed
infra, at Part C.

118. See tenBroek, supra note 7, at 879-80.
right and responsibilities of motorists and blind pedestrians. The strongest ones state: "The failure of a blind person to use a guide dog or to carry a cane or walking stick which is predominantly white or metallic in color, with or without red tip, shall not be construed as evidence of comparative or contributory negligence in any negligence action."119 Others leave open the possibility of contributory or comparative negligence with statutes such as the following: "The failure of a blind or otherwise visually impaired person to carry such a cane or to use such a guide dog shall not constitute negligence per se."120 Others go further and state that such a failure may still be used to show comparative negligence.121


ALASKA STAT. § 11.70.040 (Michie 1996), which was included on Professor tenBroek's list, was repealed in 1972. See 1972 Alaska Sess. Laws § 1 ch 19. The West Virginia statute listed also was apparently repealed, and the current white cane law does not have any language abrogating the common law. See W. VA. CODE §§ 15-5-1 to –8 (1994). The statutes now codified at 625 ILL. COMP. STAT. ANN. 5/11-1004 (West 1993) and KY. REV. STAT. ANN. § 189.575 (Michie 1997) are also on tenBroek's list, but apparently neither ever had such language, or the language was omitted when the statutes were amended.

120. CAL. CIV. CODE § 54.4 (West 1982 & Supp. 1998); see N.J. STAT. ANN. § 39:4-37.1 (West 1990); N.Y. VEH. & TRAF. LAW § 1153(c) (Consol. 1976 & Supp. 1987); 75 PA. CONS. STAT. ANN. § 3549 (West 1996); cf. MD. ANN. CODE art. 30, § 33(d)(3) (1997) (covering deaf people and their failure to use a guide dog wearing an orange tag and collar on a leash, in addition to the blind); MISS. CODE. ANN. § 43-6-9 (1993) (covering deaf people and their failure to use a guide dog on an organge leash, in addition to the blind).

121. See NEV. REV. STAT. ANN. § 426.515 (Michie 1996) (applying to deaf people using guide dogs but limiting admissibility of a failure to use assistive devices as to evidence of contributory negligence in actions against common carriers or places of public accommodation). A few statutes merely state that blind pedestrians have the same rights and/or privileges as any other person regardless of whether he is carrying a cane, using a dog guide, or is being aided by a sighted person. See, e.g., ARIZ. REV. STAT. ANN. § 11-1024(D) (West Supp. 1997); MO. ANN. STAT. § 304.080 (West 1994 & Supp. 1998); N.H. REV. STAT. ANN. § 265:41 (1993); OR. REV. STAT. § 814.110(3) (1997); WASH. REV. CODE ANN. § 70.84.050 (West 1992 & Supp. 1998). These statutes do not abrogate the common law and are not counted in the statutes barring the use of per se contributory
The success of disability advocates in convincing legislators to abrogate the common law contributory negligence per se standard is evidenced by the fact that the Smith case, heavily relied on by the D.C. Court of Appeals in Poyner, was overturned by statute. The Pennsylvania law now states that "the failure of a totally or partially blind pedestrian to carry a cane or to be guided by a guide dog upon the streets, highways or sidewalks of this Commonwealth [shall not] be held to constitute contributory negligence in and of itself."\textsuperscript{122}

The D.C. Court of Appeals's ignorance of this statute, as seen in Poyner, is understandable; its failure to apply the District's own white cane law is inexcusable. The first section of that law, which was passed in 1972 and last amended in 1981, states: "The blind and the otherwise physically disabled have the same right as the able-bodied to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and other public places in the District of Columbia."\textsuperscript{123} A later section, while starting out with a statement on the driver/pedestrian relationship, clearly abrogates the common law per se contributory negligence rule, by stating that:

The driver of a vehicle in the District of Columbia approaching a blind pedestrian who is carrying a cane predominantly white or metallic in color (with or without a red tip) or a deaf pedestrian, either of whom is using a dog guide shall take all necessary precautions to avoid injury to such blind or deaf pedestrian, and any driver who fails to take such precautions shall be liable in damages for any injury caused such pedestrian. A blind pedestrian in the District of Columbia not carrying such a cane or a deaf pedestrian, either of whom is not using a dog guide in any of the places, accommodations, or conveyances listed in [sections] 6-1701 and 6-1702\textsuperscript{124} shall have all of the

\textsuperscript{122} PA. STAT. ANN. tit. 75, § 3549 (West 1996). The drafters and sponsors of the white cane law in Pennsylvania specifically intended this legislative reversal. See ten-Broek, supra note 7, at 880.

\textsuperscript{123} D.C. CODE ANN. § 6-1701 (1995) (emphasis added).

\textsuperscript{124} Section 6-1702(a) states: The blind and the otherwise physically disabled are entitled to full and equal accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats, or any other public conveyances or modes of transportation in the District of Columbia, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited in the District of Columbia, subject only to the conditions and limitations established by law or in accordance with law applicable alike to all persons.

\textit{Id.} § 6-1702(a).
rights and privileges conferred by law on other persons, and the failure of such a blind pedestrian to carry such a cane or the failure of a blind or deaf pedestrian to use a dog guide in any such places, accommodations, or conveyances shall not be held to constitute nor be evidence of contributory negligence.\textsuperscript{125} This language completely undermines the \textit{Poyner} court's reliance on cases from other jurisdictions that apply the common law rule.

4. Discussion: Landowners Should Adapt to the Presence of People with Disabilities

The message to be taken from the \textit{Poyner} court's failure to use the white cane law—other than, perhaps, a shocking research lapse by both counsel and the court—is that, three decades after the disability rights movement, courts are still unaware of "integrationist" policy even when it has been adopted by the jurisdiction's own legislature. Common law courts are still unwilling to make, as tenBroek had hoped, a "considered judgment" on that policy's "social importance, practicability, [and] relevance in the law of torts."\textsuperscript{126} Given this unwillingness, organizations for the blind should continue working to make sure that the states which have not yet done so, pass white cane laws abrogating the contributory negligence per se rule.\textsuperscript{127}

\begin{itemize}
  \item \textsuperscript{125} \textit{Id.} § 6-1704 (emphasis and footnote added). The Delaware court in \textit{Coker v. McDonald's Corp.}, 537 A.2d 549 (Del. Super. Ct. 1987), also inexplicably ignored the state's white cane law, which, like the District of Columbia law, states that "the failure of a totally or partially blind pedestrian to carry a cane or use a dog in any such places, accommodations or conveyances shall not be conclusively held to constitute nor be evidence of contributory negligence." DEL. CODE ANN. tit. 16, § 9503 (1995) (emphasis added).
  
  TenBroek was critical of the North Carolina Supreme Court's failure to discuss or apply the state's white cane law in \textit{Cook v. City of Winston-Salem}, 85 S.E.2d 696 (N.C. 1955). See \textit{tenBroek, supra} note 7, at 880. He noted that the provision on contributory negligence was not technically dispositive because the pedestrian there was guided by a dog, but said that it "and the other clauses of the white cane law can only be read to settle the case." \textit{Id.} He said white cane laws were designed to relieve blind people of contributory negligence in ordinary street and sidewalk cases regardless of whether or not they use travel aids. See \textit{id.} TenBroek continued:
  
  This design is frustrated and these laws are rendered meaningless by a decision which holds that the blind with travel aids (and presumably without them as well) are guilty of contributory negligence as a matter of law in ordinary street and sidewalk accident cases if they fail to see what is plainly visible to the seeing. In North Carolina, the white cane law is thus ignored by the supreme court and the blind are required to see.
  
  \textit{Id.} at 880-81.
  
  \textsuperscript{126} \textit{Id.} at 852.
  
  \textsuperscript{127} The National Federation for the Blind has developed a Model White Cane Law that can be found on its Web-site. \textit{See NFB, Model White Cane Law} (visited Jan. 28, 1999) <http://www.nfb.org/modlwclw.htm>. The model statute abrogates the common law and
In states without such laws, counsel representing blind pedestrians who are injured by unprotected hazards on sidewalks and streets should argue that courts should look to "what any reasonable, or prudent, or reasonably prudent blind man would do," and the integrationist policy that "judges in their developing common law must be alert to sustain." Counsel for the blind can support this position by citing the cases which reject the argument that governments and private landowners could not foresee that people with disabilities use the streets or come onto their property, and hold that these landowners must take steps to warn the disabled of unprotected hazards.

The "foreseeability" argument is buttressed by the ADA's provisions stating that people with disabilities have a civil right to equal access to both public accommodations and facilities owned by city and state governments, and that barriers to access must be removed. Indeed, the ADA's regulations require cities to conduct self-evaluations on their accessibility and to develop transition plans to include, among other things, the installation of curb cuts to make streets and sidewalks accessible. One court held that a city failed to satisfy the ADA's self-evaluation requirement because its plan did "not provide a 'schedule' for providing such curb ramps as required by the regulation," and another court held that a city doing substantial street work was required to install curb cuts to comply with the ADA's accessibility regulations.

Given the ADA provisions and this case law, no city or private land-
owner can now reasonably argue that it cannot foresee people with disabilities using its facilities. Nor can they argue that they are not required to make any accommodations for disabled people. Courts should use this "foreseeability" test and, unlike the court in *Poyner*, evaluate liability with an understanding that property owners and people with disabilities have the following "correlative" obligations:

The person under a physical disability is obliged to use the care which a reasonable person under the same or similar disability would exercise under the circumstances. The [landowner], on the other hand, is obliged to afford that degree of protection which would bring to the notice of the person so afflicted the danger to be encountered.\(^{136}\)

The civil right to use the streets and sidewalks can only reach its full measure if courts use this test and focus not only on how a particular plaintiff has adapted to his disability, but on how a society, which knows of his presence, has made accommodations for it.

### B. Motorists and Disabled Pedestrians

1. **Pre-Civil Rights Movement Common Law: The Reasonable Man Standard**

After navigating hazards on sidewalks and streets, disabled pedestrians must deal with traffic. The common law on contributory negligence in that area was perhaps best summarized by the New Hampshire Supreme Court:

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\text{[T]he [reasonable man] standard has been flexible enough in the case of the aged and physically disabled persons to bend with the practical experiences of every day life. The law does not demand that the blind shall see, or the deaf shall hear, or that the aged shall maintain the traffic ability of the young.}\(^{137}\)

At common law, blind pedestrians and drivers had an equal right to use the streets and had parallel obligations to proceed safely and carefully, avoiding each other and the other's right to use the street.\(^{138}\) In exercising that right, the disabled were required to use "due care in the cir-


\(^{138}\) See *id.* at 896 (citing Rush v. Lagomorsino, 237 P. 1066 (Cal. 1925); Carpenter v. McKissick, 217 P. 1025 (Idaho 1923); Apperson v. Lazro, 87 N.E. 97 (Ind. App. 1909); McLaughlin v. Griffin, 135 N.W. 1107 (Iowa 1912); Stotts v. Taylor, 285 P. 571 (Kan. 1930); Button v. Metz, 349 P.2d 1047 (N.M. 1960); Warruna v. Dick, 104 A. 749 (Pa. 1918); Feltner v. Bishop, 348 P.2d 548 (Wyo. 1960)).
circumstances, including the circumstance of their disability." Courts held that in doing so, blind pedestrians could "rely upon the protection of traffic signals... whether they detect[ed] a change in the signal by the sound of a bell" or by being told by another pedestrian that the light had changed. At intersections without traffic signals or where the blind pedestrian was crossing a street away from an intersection, courts held that it was a jury question as to whether the pedestrians were exercising due care. Blind pedestrians who used due care and were struck by drivers who failed to pay proper attention were awarded damages.

Cases dealing with deaf pedestrians noted the invisibility of the condition and the absence of notice to drivers, and focused on the deaf person's standard of care. Courts held that deaf persons walking along streetcar tracks and roads could be held contributorily negligent as a matter of law if they failed to look backward as well as forward to avoid being struck from behind. They did not, however, have to look continually in all directions, but could focus on the direction from which they anticipated the next danger. If they were otherwise rightfully in a position, the fact that they could have avoided the danger if they could hear did not make them contributorily negligent as a matter of law.

139. Id. at 897.
140. Id. at 900 (citing Griffith v. Slaybaugh, 29 F.2d 437 (D.C. Cir. 1928); Coca-Cola Bottling Co. v. Wheeler, 193 N.E. 385 (Ind. App. 1935); Woods v. Greenblatt, 1 P.2d 880 (Wash. 1931)).
141. See id. (citing Muse v. Page, 4 A.2d 329 (Conn. 1939); Bryant v. Emerson, 197 N.E. 2 (Mass. 1935); Hefferon v. Reeves, 167 N.W. 423 (Minn. 1918); Bernard v. Russell, 164 A.2d 577 (N.H. 1960); Curry v. Gibson, 285 P. 242 (Or. 1930)). An annotation noted that there was a difference in the treatment of those who were totally blind and those who were only partially blind. See D.E. Evins, Annotation, Contributory Negligence, in Motor Vehicle Accident Case, of Pedestrian Under Physical Disability, 83 A.L.R.2d 769, 775-76 (1962). Juries usually found that the totally blind were not contributorily negligent, but that the partially blind were. See id. at 776. TenBroek described this as "a rule of life if not of law." tenBroek, supra note 7, at 900.
142. See e.g., Apperson v. Lazro, 87 N.E. 97, 99 (Ind. App. 1909); McLaughlin v. Griffin, 135 N.W. 1107, 1109-10 (Iowa 1912).
143. See Kerr v. Connecticut, 140 A. 751, 752 (Conn. 1928) (holding that the plaintiff's duty of care is that of a reasonably prudent deaf person); Hizam v. Blackman, 131 A. 415, 416-17 (Conn. 1925) (holding that a deaf plaintiff had a duty to exercise "ordinary care" in crossing the street).
144. See Robb v. Quaker City Cab Co., 129 A. 331, 332 (Pa. 1925).
145. See Fink v. City of New York, 132 N.Y.S.2d 172 (Sup. Ct. 1954). In Fink, a deaf pedestrian approached a corner, waited for the light to change, and began to cross the street when he was hit by a fire truck that was sounding a siren and a bell. See id. at 172-73. The court held that he had "used his eyes and did all that prudence and care would require under the existing circumstances... [H]e was entitled to assume that the green light gave him the right of way... [H]e is not to be penalized because of such affliction." Id. at 173; see also Wilson v. Freeman, 171 N.E. 469 (Mass. 1930). A traffic officer stand-
Few of the cases dealing with disabled pedestrians, however, looked at the drivers' duty of care, leading tenBroek to note that "[t]he disabled have the right to use the streets and highways and it is common knowledge that they exercise the right, yet the doctrine of foreseeability is seldom invoked in the automobile cases." Some early cases held that drivers should expect that persons with disabilities would be among the pedestrians they encountered and that driver should use care to protect such pedestrians from injury. Other courts, however, held that drivers could assume that all pedestrians had full use of the senses that they would exercise to protect themselves. These rules, tenBroek noted, created a disparity in the standards applied to property owners and drivers with respect to disabled pedestrians:

Thus, while a person who digs a trench in a street is bound to anticipate that disabled persons will pass that way, and, accordingly, must put up adequate warning or guard, that same trench-digger driving along the same street to work on the trench is not bound to anticipate the passage of those disabled persons, and hence need not drive his truck with precaution for their protection.... The rule of hazards in the street is not applied to the driver of automobiles on the streets, although the basis for the rule would seem to exist in one case no less than in the other.

Relying on cases from the Louisiana Court of Appeal and the Oregon Supreme Court, tenBroek argued instead for a rule where the driver's knowledge of a pedestrian's disability imposed a higher duty of care.

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146. tenBroek, supra note 7, at 900.
147. See id. at 900-01 (citing Warruna v. Dick, 104 A. 749 (Pa. 1918); Doughtery v. Davis, 51 Pa. Super. 229 (1912)).
148. See id. at 901 (citing Aydlette v. Keim, 61 S.E.2d 109 (N.C. 1950)).
149. Id. (footnotes omitted).
150. See id. (discussing Jacoby v. Gallaher, 120 So. 888 (La. Ct. App. 1929) and Wein-
The Louisiana Court of Appeal held:

The rule that motorists are held to unusual care, where children are concerned, applies also to adults, who, to the knowledge of the driver, possess some infirmity, such as deafness, or impaired sight, or who suffer from some temporary disability such as intoxication. The physical infirmity in one case, and the extreme youth in the other, affect the ability to sense impending danger and to exercise judgment in the emergency by the selection of proper means and observing the necessary precaution to avoid an accident.1

In addition, the Oregon Supreme Court stated that "driver[s] 'must use care commensurate with the danger'" when they knew or should have known that the pedestrian was blind.152

Such a rule, however, raised the question of how a driver could know when a pedestrian is disabled.153 Courts noted that guide dogs and canes gave notice to drivers no matter their usefulness as travel aids, and, with prompting from national organizations for the blind, legislatures soon embraced this in enacting the "white cane laws."154 These laws impose a higher duty of care on drivers approaching pedestrians using canes or dogs.

2. The White Cane Laws: White Canes and Guide Dogs Mean Caution

By the time of tenBroek's article, forty-nine states had white cane laws specifically covering the blind and the partially blind while another state had a statute covering "incapacitated" pedestrians in general.155 Three decades later, all but one state still has a white cane law.156 Delaware's

151. Id. (quoting Jacoby, 120 So. at 890).
152. Id. (quoting Weinstein, 271 P. at 733-34). TenBroek cites the court's explanation that "[i]t will not do to drive on under such circumstances and assume that one, who thus deprived of sight, will jump the right way." Id.
153. See id. at 902.
154. See id. (citing Cardis v. Roessel, 186 S.W.2d 753 (Mo. Ct. App. 1945); Curry v. Gibson, 285 P. 242 (Or. 1930)); see also id. at 904 (discussing the history of white cane statutes).
155. See id. at 904 & nn.369-70 (listing state code sections).
156. As noted above, many—but not all—also abrogate the common law as to whether failure to use a cane or a dog constitutes per se contributory negligence. See supra notes 118-20 and accompanying text. Some states include provisions, in both their statutory titles on people with disabilities and their traffic codes, on drivers' responsibilities to blind pedestrians. See, e.g., ALA. CODE §§ 21-7-6 to -7 (1997); ALASKA STAT. § 9.65.150 (Michie 1996); ARIZ. REV. STAT. ANN. § 11-1024(D) (West Supp. 1997); ARK. CODE ANN. § 20-14-306 (Michie 1991); CAL. CIV. CODE § 54.4 (West 1982 & Supp. 1998); CAL. VEH. CODE § 21963 (West 1971 & Supp. 1998); CONN. GEN. STAT. ANN. §§ 52-175a (West 1991), 53-211 (West 1994 & Supp. 1998); DEL. CODE ANN. tit. 16, § 9503 (1995); D.C.
statute is fairly typical:

The driver of a vehicle approaching a totally or partially blind pedestrian who is carrying a cane predominately white or metallic in color (with or without a red tip) or using a guide dog shall take all necessary precautions to avoid injury to such blind pedestrian, and any driver who fails to take such precautions shall be liable in damages for any injury caused to such pedestrian. A totally or partially blind pedestrian not carrying such a cane or using a guide dog in any of the places, accommodations or conveyances listed in [section] 9502 shall have all of the rights and privileges conferred by law upon other persons and the failure of a totally or partially blind pedestrian to carry a cane or use a dog in any such places, accommodations or conveyances shall not be conclusively held to constitute nor be evidence of contributory negligence.\textsuperscript{157}

This statute has features common to most white cane laws including the condition of blindness or partial blindness; the color or description of the cane; the alternative of using a guide dog; an explanation of the driver’s duty; and a statement that if the driver fails in that duty he “shall be liable.”

White cane laws do differ in some important respects, but generally all were meant to

(1) free the blind and partially blind carrying a white cane or being guided by a dog of contributory negligence, whether as a matter of law or of fact, (2) make the driver who runs into them in effect negligent per se and frequently guilty of a crime, (3) eliminate questions about whether the driver had notice of the pedestrian’s total or partial blindness, and (4) generally give the blind and partially blind a legal status in traffic, thus making effective their right to use the streets in urbanized and automobilized America.

The lack of litigation on these laws suggests that these purposes have largely been fulfilled. As discussed below, however, that does not mean that every blind pedestrian who is injured should win his case.

3. Post-Civil Rights Legislation Case Law: White Cane Laws Do Not Impose Strict Liability and Allow Comparative Negligence

Despite the widespread adoption of white cane laws, there have been surprisingly few cases applying them. These cases have focused largely on whether white cane laws create strict liability for drivers who hit blind pedestrians using canes or dogs, and whether comparative negligence principles apply to such pedestrians who are not cautious despite their use of a cane or dog. The courts have held that blind pedestrians may argue that failure to obey white cane laws is negligence per se but that the laws do not impose strict liability; courts have used comparative negligence principles to either bar or reduce claims by plaintiffs who have

158. Id.

159. Professor tenBroek identified some of the common elements of these statutes. See tenBroek, supra note 7, at 905-10. Some statutes cover only the blind or partially blind while others include those who are “otherwise incapacitated;” some state that the cane needs to be white (with or without a red tip) while others allow the use of metallic canes; some require only that the pedestrian be carrying the cane while others require that it be carried in a “raised or extended” position, at “arm’s length” or “with arm extended.” The duty imposed on the motorist also varies. Several states require motorists to come to a complete stop in all cases, while others require only that they yield the right of way or use reasonable care to avoid injury; some statutes apply wherever the pedestrian attempts to cross the street while others apply only at crosswalks and intersections. See id.

160. Id. at 902-03.
not made reasonable use of their canes or dogs.

For example, in Wright v. Engum, the Supreme Court of Washington held that a white cane law did not impose strict liability, and its duty and liability provisions applied only where it was shown the driver had notice of the blind pedestrian's impairment. In Wright, the administrator for the estate of Theresa McKee, a blind pedestrian who was struck and killed by a truck, sued its driver, Engum, and his employer. Engum, stopped at a flashing red light, turned on his right turn signal, and waited for an opening. He noticed McKee standing on the corner, wearing dark sunglasses and looking over her left shoulder directly at Engum's truck. Engum said that it appeared McKee was waiting to cross the street because she stayed on the sidewalk, looking over her shoulder at the truck. Believing she was waiting for him to turn right, Engum drove into the intersection, swinging wide before beginning his turn in order to avoid running over the curb with the lengthy trailer. As he turned, Engum felt what he thought was a "turtle" dividing the street. He checked his mirror and saw McKee's body lying in the street; no one else saw the accident.

Engum saw a white cane lying next to McKee's body, although he stated that he had not seen the cane before the accident, and made "no connection with her being blind or needing a white cane at the time when she was standing on the corner." McKee's father testified that she owned a collapsible cane that she occasionally used when she traveled unfamiliar areas, she could see large objects as "blurry forms," and was capable of travelling alone.

McKee's estate moved for a directed verdict, claiming that Engum and his employer were strictly liable under Washington's white cane law. The court denied the motion, holding that the white cane law applied "only if the driver knew, or reasonably should have known, that the pedestrian was blind." The jury found for Engum and his employer, and the trial court denied McKee's estate's motion for a judgment notwithstanding the verdict (JNOV).

161. 878 P.2d 1198 (Wash. 1994).
162. See id. at 1199 (describing the facts of the case).
163. Id. (quoting the trial record).
164. See id.
165. See id.; see also WASH. REV. CODE ANN. § 70.84.040 (West 1992) (stating that drivers approaching disabled people "shall take all necessary precautions to avoid injury to such pedestrian[s]").
166. Wright, 878 P.2d at 1199-200.
167. See id. at 1200.
McKee's administrator appealed arguing that the white cane law imposed strict liability. The administrator also argued that the trial court erred in denying the motions for a directed verdict and a JNOV, and in instructing the jury that it had to find that Engum "either saw, or in the exercise of ordinary care should have seen . . . McKee carrying the white cane in the street." In affirming the trial court, the Washington Supreme Court examined both the legislative history of the statute and Professor tenBroek's commentary on white cane laws in *The Right to Live in the World*.

Washington's white cane law states:

The driver of a vehicle approaching a totally or partially blind pedestrian who is carrying a cane predominantly white in color (with or without a red tip), a totally or partially blind or hearing impaired pedestrian using a guide dog, or an otherwise physically disabled person using a service dog shall take all necessary precautions to avoid injury to such pedestrian. Any driver who fails to take such precaution shall be liable in damages for any injury caused such pedestrian. It shall be unlawful for the operator of any vehicle to drive into or upon any crosswalk while there is on such crosswalk, such pedestrian, crossing or attempting to cross the roadway, if such pedestrian indicates his intention to cross or of continuing on, with a timely warning by holding up or waving a white cane, using a guide dog, or using a service dog. The failure of any such pedestrian so to signal shall not deprive him of the right of way accorded him by other laws.

The court noted that the statute was adopted in two parts: the requirement that drivers not enter a crosswalk if a blind pedestrian "indicate[d] his intention to cross" by motioning with a white cane or using a guide dog was in the original statute adopted in 1945; the first two sentences, added in 1969, imposed an enhanced duty of care on drivers encountering blind pedestrians (to take "all necessary precautions"), and directed that drivers failing to meet this enhanced duty and injuring a blind pedestrian "shall be liable" in damages. The court stated that the 1969 amendment, which enhanced protection for blind pedestrians, was "triggered by the presence of a person carrying a white cane or in the

168. *Id.*

169. See id. at 1200-03. See generally tenBroek, *supra* note 7 (outlining the history and extent of white cane laws in the United States).

170. *Wright*, 878 P.2d at 1200 (quoting WASH. REV. CODE § 70.84.040) (emphasis added).
company of a guide dog.”

The court concluded that the white cane law did not create strict liability:

"Reading both parts of the statute together, . . . the Legislature has provided enhanced protection for blind pedestrians only where there is some conduct (carrying a cane or using a guide dog) or indication (waving a cane) by the pedestrian that he or she is sight or hearing impaired. To find as [McKee’s administrator] urges [would] render[] the language regarding “timely warning” and use of a white cane or guide dog superfluous."

The court stated that this conclusion was supported by commentary, including that from tenBroek’s *The Right to Live in the World*. TenBroek had written that “[w]hen the driver knows, or in the exercise of normal faculties should have known, that the pedestrian was disabled, he

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171. *Id.*
172. *Id.* at 1202. The court also rejected McKee’s administrator’s contention that in adopting the 1969 amendment the legislature intended to impose strict liability, holding that a driver could only be liable if he knew of the pedestrian’s disability. See *id.* McKee’s administrator pointed to a discussion between some of the legislation’s sponsors on the Washington Senate floor concerning the standard of care imposed by the statute:

"Senator Mardesich: “I would like to ask . . . if the driver of the vehicle would automatically be liable under new section [four] and I wonder if the sponsors want to go as far as they are going here?”"

"Senator Connor: “Section [four] and [five] gives [sic] the right of way to the blind person crossing the street. The right is extended even though the blind person shall not signal with his cane. Now this is what the ‘White Cane’ people wanted. They have this law passed in several states, I believe Michigan and Wisconsin.”"

"Senator Peterson (Ted): “. . . I just want to say that if they have the white cane or if they have the guide dog, and the motorist ran into them, they would be liable. If the blind person started crossing the intersection against the light without the indicated white cane or the guide dog, then the motorist would not be liable. In this bill you have two indications on this, the all white cane means totally blind, if the cane is half white and half red, then he is partially blind but the indications would be on the cane or the fact that he had a dog which would mean that he was totally blind.”"


McKee’s administrator argued that this exchange showed an intent to hold drivers liable “even if the visually handicapped pedestrian violated what would otherwise be the motorist’s right of way.” *Id.* at 1202. The court said that while it “may be true in that a driver owes a pedestrian carrying a white cane an enhanced duty of care even where the motorist has the right of way, [the exchange did] not [show] evidence of an intent to impose liability absent some indication that the pedestrian [was] blind as evidenced by use of a cane or guide dog.” *Id.* The court further stated that the legislators’ discussion on white canes and guide dogs, in regards to a blind pedestrian’s level of impairment, “implied[ed] that the Senators were concerned with notice to the driver. It certainly does not evidence the clear legislative intent required to impose strict liability regardless of notice.” *Id.*
must exercise a high degree of care to avoid injuring him." 173 The Wright court said that the notice requirement had been incorporated in white cane statutes, and again quoted tenBroek as support. It stated:

Knowledge that the white cane and dog are symbols of the blind is as yet far from universal but is becoming fairly well diffused. To the extent that this knowledge does exist, the cane and the dog provide effective notice and inspire efforts on the part of drivers to avoid their users and on the part of pedestrians and others to assist them. 174

173. Id. (quoting tenBroek, supra note 7, at 901). The court also recognized that "[p]ersons under physical disability . . . are favored by the law," but "no special care is imposed on the motorist in such cases unless he knows, or in the exercise of reasonable care should know, that the person was under some disability." Id. (quoting XENOPHON P. HUDDY, AUTOMOBILE LAW 21-22 (1931)). Furthermore, the following language found in American Jurisprudence was particularly relevant to the court's holding:

"The law exacts of a motorist greater care for those who are unable to care for their own safety, such as blind persons . . . when such physical disability is known or should have been known to the motorist. That is, this increased duty imposed upon a motorist by reason of the physical disability of a person in the highway is dependent upon the motorist's knowledge of such disability or of facts which should charge him with knowledge thereof."

Id. at 1203 (quoting 7A AM. JUR. 2D Automobiles and Highway Traffic § 449 (1980)). Lastly the court surveyed courts throughout the country that had followed the rule requiring notice. See id. (citing, inter alia, Reilly v. Dunnavant, 200 F.2d 213 (4th Cir. 1952) (duty to exercise higher degree of care arises only where person has knowledge of incapacity); Becka v. Horvath, 184 N.E.2d 455 (Ohio Ct. App. 1962) (driver has greater duty of care to pedestrian known to be blind); Weinstein v. Wheeler, 271 P. 733 (Or. 1928) (drivers who know, or reasonably ought to know, that pedestrian is blind must use commensurate care)). Further, courts had resisted applying the higher standard of care without evidence that the defendant knew of the disability. See id. (citing Provinsal v. Peterson, 169 N.W. 481 (Minn. 1918) (affirming directed verdict where there was no evidence showing defendant had notice of plaintiff's disability); Cardis v. Roessel, 186 S.W.2d 753 (Mo. Ct. App. 1945) (holding that proving defendant's knowledge of infirmity is integral to plaintiff's recovery); Belknap v. Klaumann, 178 P.2d 154 (Or. 1947) (reversing trial court which did not instruct jury on need for defendant's notice of plaintiff's disability)).

174. Id. at 1203 (quoting tenBroek, supra note 7, at 901). The court also distinguished two Washington statutes which had been found to create strict liability. See id. at 1201. One provided that dog owners are liable when their dog bites a person who is not trespassing. See id. (citing WASH. REV. CODE § 16.08.040. (1992)). The court noted that unlike the white cane law, that statute addressed the knowledge issue, stating that the owner could be held liable regardless of the "owner's knowledge of such viciousness." Id. A court interpreting that statute noted that, because it eliminated the knowledge requirement, the statute overruled common law cases and the statute's express language mandated strict liability. See id. (citing Beeler v. Hickman, 750 P.2d 1282 (Wash. Ct. App. 1988)). The Wright court stated that there was no such express language in the white cane law. See id.

It also distinguished a statute, WASH. REV. CODE § 81.29.020 (1992), that stated common carriers "shall be liable" for any property damage occurring during transport and caused by the common carriers. In Albrecht v. Groat, 588 P.2d 229 (Wash. 1978), the court held that this statute created strict liability. See Wright, 878 P.2d at 1201. The Wright
A similar decision was reached in Caskey v. Bradley, where a Texas court upheld a jury instruction which stated that violating a white cane statute was negligence per se, but that comparative negligence principles still applied. Bradley was walking along a highway at eleven o'clock at night accompanied by his seeing eye dog, Ozzie, when he was struck by a car driven by Caskey. Bradley, who had been drinking, was seriously injured and Ozzie was killed. A jury found both parties equally responsible for the accident.

On appeal, Caskey argued that certain jury instructions were "invalid and erroneous direct comment[s] on the evidence." One instruction given by the court was based on the Texas white cane law which reads:

The driver of a vehicle approaching an intersection or crosswalk where a pedestrian guided by a support dog or carrying a white cane is crossing or attempting to cross shall take necessary precautions to avoid injuring or endangering the pedestrian. The driver shall bring the vehicle to a full stop if injury or danger can be avoided only by that action.

The trial court also gave the following instruction to the jury:

The law states whenever a pedestrian is crossing or attempting to cross a public street or highway, at or near an intersection or crosswalk, guided by a dog, the driver of every vehicle approaching the intersection or crosswalk shall take such precautions as may be necessary to avoid injuring or endangering such pedestrian, and if injury or danger can be avoided only by bringing his vehicle to a full stop, he shall bring his vehicle to a full stop. A failure to comply with this law is negligence in itself.

The appellate court found that the negligence per se instruction was correct because the statute created "a special duty to a specific class of persons at a specific place," which was different from the common law ordinary care rule. Because it was undisputed that Bradley was blind and was being guided by a dog at the time of the accident, he was in the...
class of persons intended to be protected by the statute, and any violation was negligence as a matter of law.\textsuperscript{181}

The appellate court also found, however, that there was sufficient evidence to support the jury’s verdict on comparative negligence. There was conflicting evidence as to where Bradley was on the road; some accounts had him on the shoulder at the time of the accident and some placed him in the center of the road. Nonetheless, the court found there was sufficient evidence to support the jury’s finding of equal negligence of both parties and stated that Bradley’s own testimony defeated an argument that there was no evidence of comparative negligence.\textsuperscript{182}

Another case applying the Texas white cane law found that a blind man who was struck in an intersection after he disregarded his guide dog’s warning was comparatively negligent and that neither defendant was negligent per se.\textsuperscript{183} James Earl Scott stopped and listened for traffic; hearing nothing and ignoring his guide dog’s refusal to move on command, he started to cross the street. Although Scott disputed whether his dog refused to move, there was apparently no dispute that Joe Simmons stopped his vehicle when he saw Scott in the intersection and that his vehicle obscured a second driver’s view of Scott until it was too late to avoid hitting Scott. The jury found that the second driver, William Webb, was not negligent, Simmons was twenty-five percent at fault, and Scott was seventy-five percent at fault.\textsuperscript{184}

Scott appealed, arguing that both Simmons and Webb were guilty of negligence per se because they violated the white cane law which pro-

\textsuperscript{181} See id. at 737. Caskey argued that the trial court erred in not submitting a requested special instruction that read: “A blind pedestrian is not accorded any greater rights or privileges than are accorded normal pedestrians in regard to walking upon public streets and highways.” Id. at 738. As authority for this instruction, he cited \textit{Loving v. Meacham}, 278 S.W.2d 466, 470 (Tex. Civ. App. 1955), rev’d 285 S.W.2d 936 (Tex. 1956), but because the case had been reversed, Caskey had to concede that the proposed instruction was erroneous at oral argument. \textit{See id.}

\textsuperscript{182} See \textit{Caskey}, 773 S.W.2d at 739. The court ruled that the trial court had erred in denying Bradley compensation for his guide dog, Ozzie. \textit{See id.} at 740. Texas law recognized a dog as personal property and allowed an owner to recover for its wrongful injury or killing. \textit{See id.} Caskey argued Bradley could not recover for Ozzie’s death because there was no evidence he owned the dog, but the court disagreed. \textit{See id.} It noted that the dog was a gift from Guide Dogs for the Blind and that it was Bradley’s “to use until [it] died or had to be destroyed.” \textit{Id.} The court stated that it was not aware of any title requirement to prove ownership of dogs, and the fact that Bradley had the dog for ten months prior to the accident provided some evidence that he owned the dog and was entitled to recover for it. \textit{See id.} The court then awarded one-half of the $2,500 value of the dog, as determined by the jury, as additional compensation to Bradley. \textit{See id.}


\textsuperscript{184} See \textit{id.} at 848.
vided that all vehicles approaching an intersection must take all precautions necessary, including stopping, when a blind person crosses an intersection. The court held that there was not enough evidence to show that either defendant was guilty of negligence per se.\textsuperscript{185} It did hold, however, that there was sufficient evidence to show that Scott was negligent in crossing the intersection despite his guide dog’s warning. Simmons’s testimony that Scott told people that he had commanded the dog to move forward after it had tried to stop him was enough to support the jury’s finding.\textsuperscript{186}

4. Discussion: Motorists Should Adapt to the Presence of Pedestrians With Disabilities but Can Only Do So if They Are Put on Notice

The almost universal adoption of white cane laws shows a willingness to apply the civil rights model to tort law. Requiring drivers to take special precautions when approaching disabled pedestrians using canes or

\textsuperscript{185} See id. at 849-50.

\textsuperscript{186} See id. at 850. The court rejected Scott’s hearsay objection to the statements because they were a party admission and admissible as an exception to the hearsay rule. See id. at 850.

In \textit{Epperly v. Kerrigan}, 275 So. 2d 884 (La. Ct. App. 1973), the court found a blind plaintiff was negligent in refusing help to cross the street after becoming disoriented, but still ruled against the driver who hit him under the last clear chance doctrine. See \textit{id.} at 886, 893. Epperly had boarded a bus and requested that the driver let him off at a corner where he was to meet a friend. See \textit{id.} at 886. When he got off the bus, however, he realized that he was at the wrong corner and asked some people to help him get to his destination. See \textit{id.} Unfortunately, the people who offered to help taunted and teased Epperly by guiding him into a lamp post. See \textit{id.} Epperly went out into the street, sat down, and lifted his cane to signal for help. See \textit{id.} Someone took him out of the street and led him for a short distance but then left him. See \textit{id.}

Patterson, a limousine chauffeur, saw Epperly sitting on the street and offered to take him to his destination, but Epperly was reluctant to accept. See \textit{id.} Patterson eventually persuaded Epperly to go back to the curb, where he seemed willing to accept assistance from another passer-by. See \textit{id.} at 887. Patterson went back to his car, but by the time he got back there he saw Epperly back in the street again, apparently trying to cross the street against traffic. See \textit{id.} Patterson saw a cab swerve to avoid hitting Epperly and then the defendant’s car hit him. See \textit{id.} Patterson described Epperly’s condition when he was trying to help him as “bewildered, confused, incoherent and very mixed up,” and that “Epperly seemed fearful or afraid, and unwilling to accept assistance.” Id. Epperly himself testified he was “confused and scared” during the events leading up to the accident. See \textit{id.} at 886.

The appellate court held that the trial judge erred in finding that Epperly was not negligent. See \textit{id.} at 893. It noted that Epperly “was highly self-sufficient in regard to getting around the city streets and he necessarily knew that he was placing himself in a perilous position when he entered [the] street.” Id. at 892-93. The court also noted that he became confused and disoriented before the accident, but refused Patterson’s assistance, ultimately ruling, however, that the driver was liable under the last clear chance doctrine. See \textit{id.} at 893.
guide dogs indicates that legislatures realize that society has to adapt for
blind pedestrians to enjoy equal access to the streets.

The cases interpreting those laws, however, make it clear that a driver
cannot be expected to make this accommodation without notice of a pe-
destrian's disability.\textsuperscript{187} They also hold that the white cane laws do not re-
lieve disabled pedestrians of their common law duty to exercise due
care.\textsuperscript{188}

These positions are consistent with both common sense and case law
interpreting civil rights statutes. Society—in the form of individuals,
businesses, schools, etc.—cannot make accommodations for a disability
unless there is some notice of its existence. Accordingly, courts inter-
preting the ADA and section 504 have repeatedly held that schools and
employers have no duty to provide accommodations where people with
disabilities fail to give notice of their need for them.\textsuperscript{189} Furthermore, the
ADA itself allows people with disabilities to be barred from employment
or public accommodations where they pose a "direct threat."\textsuperscript{190} Tort law
expressed in white cane laws should do no more than the civil rights stat-
tutes.

\textsuperscript{187} \textit{See} Wright v. Engum, 878 P.2d 1198, 1204 (Wash. 1994).

\textsuperscript{188} \textit{See} Caskey v. Bradley, 773 S.W.2d 735, 739 (Tex. App. 1989) (finding the blind
plaintiff contributorily negligent); \textit{Scott}, 583 S.W.2d at 849 (same).

\textsuperscript{189} \textit{See}, e.g., Hunt-Golliday v. Metropolitan Water Reclamation Dist., 104 F.3d 1004,
1012 (7th Cir. 1997) ("An employee has the initial duty to inform the employer of a dis-
ability before ADA liability is triggered for failure to provide accommodations."); Rosso-
("[A]n academic institution can be expected to respond only to what it knows (or is
chargeable with knowing.") (quoting Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 795
(1st Cir. 1992)). For a review of case and administrative rulings on the requirement
that students must provide notice of their need for accommodations, see Adam A. Milani,
\textit{Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability

\textsuperscript{190} \textit{See} 42 U.S.C. \textsection 12111(3) (1994) (defining what constitutes a "direct threat"); \textit{see also}
LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998) (finding an
employee's epilepsy and potential seizures posed a "direct threat" because of the appli-
cances involved in the duties of a line cook). \textit{But see} Rizzo v. Children's World Learning
Ctrs., Inc., 84 F.3d 758, 763 (5th Cir. 1996) (finding a question of fact as to whether a
hearing-impaired teacher's aide was a "direct threat" to the health or safety of others
when driving a van carrying small children).
C. Common Carriers and Passengers With Disabilities

1. Pre-Civil Rights Movement Common Law: Carriers Must Accommodate People with Disabilities, But There is a Presumption That the Disabled are Incompetent to Travel Alone

While walking is good exercise, very few people use it as their sole means of transportation. If one does not drive or needs to travel a long distance, is is often necessary to use the services of a common carrier such as a bus or a plane. And, in an instance of the common law recognizing the need of society to adapt to people with disabilities, carriers were held to a higher duty of care for disabled passengers than that owed to others.

This higher duty arose because of some sharp contrasts between walking the streets and riding on a common carrier. A pedestrian is an "active agent, propelling himself along on his own volition, having some power of control as to his course, pace, and general procedure." Once a pedestrian becomes a passenger, however, "[he] has little control either of what happens to him or of the transport equipment, which, when set in motion, creates and constitutes its own dangers." Because of this surrender of control, courts have long held common carriers to a higher duty of care than other businesses. For example, the "common carrier exception" to the respondeat superior rule holds common carriers liable for their employees' assaults on passengers, even if outside the scope of employment. For passengers with disabilities, carriers were held to a higher duty of care than that owed to others. It was variously described as "reasonable care and assistance in the circumstances," "special care"

191. tenBroek, supra note 7, at 883.
192. Id.
193. See, e.g., Gilstrap v. Amtrak, 998 F.2d 559, 561 (8th Cir. 1993) (holding a train company strictly liable for its employee's assault); Morton v. De Oliveira, 984 F.2d 289, 291 (9th Cir. 1993) (holding a ship owner absolutely liable for a crew member's assault on a passenger). There is a split in authority on whether this exception should apply to health care providers and their permanently or temporarily disabled patients. See, e.g., Sebastian v. District of Columbia, 636 A.2d 958, 961-62 (D.C. 1994) (no strict liability); Nazareth v. Herndon Ambulance Serv., Inc., 467 So. 2d 1076, 1081 (Fla. Dist. Ct. App. 1985) (strict liability); Stropes v. Heritage House Childrens Ctr. of Shelbyville, Inc., 547 N.E.2d 244, 253 (Ind. 1989) (strict liability); Maguire v. State, 835 P.2d 755, 758-59 (Mont. 1992) (no strict liability). For an argument that strict liability should be imposed in such circumstances see Adam A. Milani, Patient Assaults: Health Care Providers Owe a Non-Delegable Duty to Their Patients and Should be Held Strictly Liable for Employee Assaults Whether or Not Within the Scope of Employment, 21 OHIO N.U. L. REV. 1147, 1153-59 (1995).
194. tenBroek, supra note 7, at 886 (citing Denver & R.G.R.R. v. Derry, 108 P. 172,
and assistance, or a high, higher, highest or extraordinary degree of care." This duty, no matter how characterized, only arose, however, when a carrier's employee had notice of the passenger's disability. This could either be actual notice, given to the employees by the person with a disability, or constructive occurring notice because the passenger's disability would be apparent to a reasonably prudent employee. Employees were not required, however, "to anticipate [special] wants or needs, to be on the lookout to discover that any particular passenger needs special assistance, to observe the condition of passengers" to determine whether "they require such assistance," or "on their own initiative provide any special assistance. The basis of the common carrier's duty to disabled passengers was a "voluntary and knowing acceptance of responsibility," but courts made it clear that common carriers were "free to decline to carry disabled persons, at least those who 'ought to be provided with an attendant to take care' of them." Though this refusal seemed to infringe the common

174 (Colo. 1910); Mitchell v. Des Moines City Ry., 141 N.W. 43, 46-47 (Iowa 1913); Single-
tary v. Atlantic Coast Line R. Co., 60 S.E.2d 305, 308 (S.C. 1950)).


199. Id. at 890.

200. Id. (quoting Croom v. Chicago, M. & St. P. Ry. Co., 53 N.W. 1128, 1129 (Minn. 1893)). The Croom court, in a frequently quoted passage, stated:
law rule of non-discriminatory access to common carriers, courts justified it on the grounds that (1) carriers could refuse to serve people who were dangerous to the health, safety, or convenience of other passengers; and (2) "that the disabled in general [did] not have a right to be carried by the common carriers."

Cases brought by disabled people challenging their exclusion from common carriers "opened the door a crack" and held that carriers could not adopt a flat rule barring them from traveling unless accompanied by a companion. TenBroek noted, however, that the courts reaching this holding did not find it necessary to justify the "closed-door policy" applied by the carriers, but instead gave reasons to support "opening the door even the crack they did." Specifically, the courts expressed (1) a fear that the less severely disabled might be impeded in their travels and (2) a concern for "placing an 'unwarranted handicap on a class of men capable of being serviceable to society, and therefore on society itself.'"

Of course, a railroad company is not bound to turn its cars into nurseries or hospitals, or its employees into nurses. If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself, he ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity.

_Id._ (quoting _Croom_, 53 N.W. at 1129).

_201._ _tenBroek, supra note 7_, at 890 (citing _Williams v. Louisville & N.R._, 43 So. 576 (Ala. 1907); _Yazoo & M. Valley R. v. Littleton_, 5 S.W.2d 930 (Ark. 1928); _Illinois Cent. R. v. Allen_, 89 S.W. 150 (Ky. 1905); _Illinois Cent. R. v. Smith_, 37 So. 643 (Miss. 1905); _Zackery v. Mobile & O.R._ 21 So. 246 (Miss. 1897); _Sevier v. Vicksburg & M.R._, 61 Miss. 8 (1883); _Hogan v. Nashville Interurban Ry._., 174 S.W. 1118 (Tenn. 1915); _Benson v. Tacoma Ry. & Power Co._, 98 P. 605 (Wash. 1908)).

_202._ _tenBroek, supra_, at 892.

_203._ _Id._

_204._ _See id._ at 892-93 (citing _Zackery v. Mobile & O.R._ Co., 23 So. 434, 435 (Miss. 1898)).

_205._ _Id._ at 893 (quoting _Hogan v. Nashville Interurban Ry._ 174 S.W. 1118, 1120 (Tenn. 1915) (Hogan, who was paralyzed and used crutches, traveled daily to Vanderbilt University where he was a student and teacher)). TenBroek noted that the courts reaching these decisions had not discussed "why either serviceability to society or the right to live in it should be tested by the physical capacity to mount the train steps unsaid or find one's way to a connecting carrier." _Id._ He added sarcastically: "[t]o the best of our knowledge and belief this question was not put to Franklin Delano Roosevelt as he was assisted aboard a train to go to Washington to be inaugurated President of the United States." _Id._
TenBroek noted, however, these courts did not question whether the rule allowing common carriers to bar passengers with disabilities unaccompanied by attendants was a wholesale invasion of the rights of a large class of people to live in the world, or to go about in it; [made] no reference to the cases declaring the disabled have the same right as others to be upon the streets and highways, saying in effect that if they are able to get there they have a right to be there; [and voiced] no doubts about the proposition—indeed it was explicitly affirmed—that carriers may refuse to receive persons if they require "other care than that which the law requires the carrier bestow upon all its passengers alike."\(^{206}\)

The court in *Illinois Central Rail Co. v. Smith*,\(^{207}\) even identified one group which required such "other care:" "[p]rimarily the affliction of blindness unfits every person for safe travel by railway, if unaccompanied."\(^{208}\) The court said that a carrier could presume blind people were unable to travel alone and that this presumption should not be viewed as "a hardship upon the persons afflicted with blindness or other disabling physical infirmity" but instead as "a safeguard thrown around them for their own protection."\(^{209}\)

TenBroek decried this "presumption of incompetence"\(^{210}\) stating that while it was "perhaps consistent with the prevailing social attitudes of [the] day, [it was] certainly inconsistent with the rule long since developed by the courts regarding the right of the disabled to be on the streets and highways."\(^{211}\) He presented several arguments on why it should be abandoned. First, he stated that it was "wrong in principle"—services necessary for disabled passengers to use common carriers "should be provided . . . as part of the care which 'the law requires the carrier to bestow upon all its passengers alike.'"\(^{212}\) He responded to the argument that such services would add to carriers' costs by stating that "the public should bear the cost of making effective such an important right."\(^{213}\) He labeled the rule presuming the need for an attendant, "largely academic," because "[i]n practice, services adequate to enable most disabled persons to travel, even though they might commonly be thought to re-

\(^{206}\) *Id.* at 892 (quoting *Illinois Cent. R. Co. v. Smith*, 37 So. 643, 644 (Miss. 1905)).

\(^{207}\) 37 So. 643 (Miss. 1905).

\(^{208}\) *Id.* at 644.

\(^{209}\) *Id.*

\(^{210}\) TenBroek, *supra* note 7, at 894.

\(^{211}\) *Id.* at 893.

\(^{212}\) *Id.* (quoting *Illinois Cent. R. Co. 37 So.* at 644).

\(^{213}\) *Id.* at 894.
quire an attendant, are provided by the agents of the company or are available from porters and others on the premises. Finally, he noted that employees ignorant of the subject often misapplied the rule in order to exclude persons with disabilities who did not need attendants.

Ultimately, though, tenBroek argued that the "arguments about cost, availability of existing services, and mis-administration" had to "give way to the fact that the rule [was] in contravention of today's policy of integration of the disabled into the social and economic life of the community." According to tenBroek,

that policy require[d] at least that the presumption of incompetence of the disabled should be exchanged for a presumption of competence, leaving the burden of disproof on the carrier; and that every disabled person who makes his way to the station should be put aboard with whatever help is necessary.

If the disabled are to live in the world, travel by common carrier is a necessary right—as necessary as is the right to use the streets, highways and sidewalks. Only when that right and its implications are fully understood by the courts, and avowed and implemented by them, will this branch of the law of torts be brought into conformity with the demands of the second half of the twentieth century and its policy of the social and economic integration of the disabled.

2. Access Statutes: People with Disabilities Have a Right to Ride

As with the struggle for the streets, people with disabilities chose not to wait for courts to recognize this right and instead went to their legislators and advocated for laws that would guarantee access to common carriers. The first such statutes were "guide dog statutes" which stated that a blind person may bring his or her dog into a public place. At the time

214. Id.
215. Id.
216. Id.
217. Id. at 894-95. TenBroek stated that the fact that streets and sidewalks were public and common carriers were private did "not change the nature of the right or its necessity and harmony with basic social policy." Id. at 894. He said that people could not live in the modern world without being able to move freely within and between communities. See id. That involved "not only walking or riding wheelchairs" on streets and sidewalks, but also using the "means of transportation over them as are commonly available to others." Id. Indeed, tenBroek contended that because people with disabilities were less able to drive themselves, they were more dependent on public transportation than others. See id. Finally, while the public regulation and subsidization of common carriers and the common law right to equal access, "[did] not create the claim of the disabled to live in the world," it "add[ed] strength to that claim and [made] its denial even less tenable." Id.
of tenBroek's article, twenty-three states had guide dog statutes which covered public conveyances, but he noted that the extent to which they modified the rule that presumed a disabled person was incompetent to travel alone was not clear. Modern accessibility statutes are more explicit, they eliminate the presumption of incompetence and state that people with disabilities are entitled to use common carriers and other public accommodations just like other citizens.

Illinois's access statute is typical. It includes both a provision guaranteeing access to common carriers and public accommodations and one covering the use of guide dogs.

The blind, the visually handicapped, the hearing impaired and the otherwise physically disabled are entitled to full and equal accommodations, advantages, facilities and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, street cars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort and other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to

218. Id. at 895; see infra note 219 (listing guide dog access statutes. TenBroek noted that the right of the blind to use public accommodations had "come about in a strange way. The blind have been led by the guide dogs not only into places of public accommodation but into the right to be there." tenBroek, supra note 7, at 853. According to tenBroek,

[i]t is not inaccurate to say that the basic right of all men to join their communities and to gain access to them by the normal means, including the use of public accommodations, has been gained by the blind...as an incident to their reliance on the dogs and the need to have them exempted from restrictions with regard to pets.

Id. at 853-54.

With regard to common carriers, tenBroek stated that there was still a question of whether the dog could be treated as "a competent attendant" or whether a blind person viewed as incompetent by a common carrier's agent must also be accompanied by a human attendant. Id. at 895. There were three possible views on this. The narrowest view took the guide dog statutes literally and did not "enlarge the class of blind persons eligible to travel unattended and that the persons otherwise competent to travel alone may take their dogs with them." Id. The broadest view, which was consistent with the historical origins and purposes of the statutes and the policy of integrationism, was that the statutes "presuppose[d] a right of all persons to use common carriers, and...[were] designed to remove special obstacles placed in the way of blind persons having their dogs with them when exercising the right. Id. Finally, an intermediate view, which was the one actually followed in practice, was that the guide dog statutes "authorize[d] all blind persons with dogs to travel, eliminating all questions of their competence." Id.

TenBroek noted that the arguments between common carrier employees and blind travelers was thus "focus[ed] on the right of the dog to go aboard; the right of the master is not disputed. Thus is human progress achieved." Id. at 896. This, said tenBroek, was "an ironic method of advancing human rights." Id.
all persons.

Every totally or partially blind, hearing impaired or otherwise physically disabled person shall have the right to be accompanied by a support dog or guide dog, especially trained for the purpose, in any of the places listed in this Section without being required to pay an extra charge for the guide, support or hearing dog; provided that he shall be liable for any damage done to the premises or facilities by such dog.\footnote{Living in the World}{219}

These state statutes are reinforced by the “public accommodation” provision of the ADA that states:

\[n\]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and

\footnote{Living in the World}{219} 775 ILL. COMP. STAT. ANN. 30/3 (West 1993). Thirty-four states now have such access statutes with some putting the guide dog provisions in a separate section, and others requiring common carriers to allow guard dogs on board. See ALA. CODE § 21-7-3 (1997) (separate guide dog provisions in § 21-7-4); ARIZ. REV. STAT. ANN. § 11-1024(A) & (B) (West Supp. 1997); ARK. CODE ANN. §§ 20-14-304 (Michie 1991); CAL. CIV. CODE § 54.1 (West Supp. 1998); CAL. PENAL CODE § 365.5(a) (West 1988) (requiring common carriers to allow guide dogs on board); COLO. REV. STAT. §§ 24-34-801(1)(d) (1997); COLO. REV. STAT. § 40-9-109 (requiring common carriers to allow guide dogs on board); DEL. CODE ANN. tit. 16, § 9502 (1995); D.C. CODE ANN. § 6-1702 (1995); FLA. STAT. ANN. § 413.08 (1)(a) & (b) (West 1993); GA. CODE ANN. § 30-4-1 (Supp. 1998); HAW. REV. STAT. ANN. § 347-13 (a) & (b) (Michie 1994); IDAHO CODE §§ 56-703, 56-704, (1994); IDAHO CODE § 18-5812A (requiring common carriers to allow guide dogs on board); IOWA CODE ANN. § 216C.4 (West Supp. 1998); KAN. STAT. ANN. §§ 39-1101, 39-1102 (1993); LA. REV. STAT. ANN. § 46:1953 (West Supp. 1998); ME. REV. STAT. ANN. tit. 17, § 1312 (West 1983); MD. ANN. CODE art. 30, § 33(d) (1997); MINN. STAT. ANN. § 256C.02 (West 1998); MISS. CODE ANN. §§ 43-6-5, 43-6-7 (1993); MO. ANN. STAT. § 209.150 (West Supp. 1998); MONT. CODE ANN. §§ 49-4-211, 49-4-214 (1997); NEB. REV. STAT. § 20-127 (1991); NEV. REV. STAT. ANN. §§ 704.143, 704.145 (Lexis 1998); N.H. REV. STAT. ANN. §§ 354-A:16, 354-A:17 (1993); N.M. STAT. ANN. § 28-7-3 (Michie 1996); N.M. STAT. ANN. § 28-11-3 (requiring common carriers to allow guide dogs on board); N.C. GEN. STAT. §§ 168-3, 168-4.2 (1997); OR. REV. STAT. §§ 346.685, 346.687; (1997); 43 PA. CONS. STAT. ANN. § 953 (West Supp. 1998); R.I. GEN. LAWS § 25-2-13 (1994); id § 39-2-13 (1994) (requiring common carriers to allow guide dogs on board); S.C. CODE ANN. § 43-33-20 (Law. Co-op. 1985 & Supp. 1997); TEX. HUM. RES. CODE ANN. § 121.003 (West 1990); UTAH CODE ANN. § 26-30-1 (1995); VA. CODE ANN. § 51.5-44(B) and (E) (Michie 1998); WASH. REV. CODE ANN. §§ 70.84.010(3), 70.84.030 (West 1992); W. VA. CODE § 5-15-4 (1994).

whose operations affect commerce.\footnote{220}{42 U.S.C. § 12184(a) (1994).}

3. Post-Civil Rights Legislation Cases: Accommodation Should Be Advanced by the Common Law

The access statutes rarely have been invoked,\footnote{221}{See infra notes 229-386 and accompanying text (providing statutes and cases that apply the federal laws prohibiting discrimination in air transportation).} but the presumption of incompetence to travel alone is apparently a thing of the past. Indeed, one court applying an access statute in conjunction with the common law apparently heard Professor tenBroek's call and explicitly cited integrationist policies in ruling that a common carrier had failed to meet its duty to a disabled passenger.

In \textit{Vaughn v. Northwest Airlines},\footnote{222}{See Vaughn v. Northwest Airlines, Inc., 558 N.W.2d 736, 744 (Minn. 1997).} plaintiff Sadie Pearl Vaughn had fibromyalgia, a connective tissue disorder. She attempted to check multiple pieces of baggage, explaining to a Northwest ticket agent that her disability limited her ability to carry heavy baggage and that her doctor had instructed her not to strain herself. The agent told Vaughn that one of the items would have to be carried on board or she would be subject to a $45 fee. She thought he was incorrect about the policy, but he refused to let her talk with anyone else or to make other arrangements to accommodate her disability. Vaughn did not have enough cash or a credit card to pay the $45 fee and her checkbook was packed, so the Northwest agent recommended that Vaughn carry her 30-pound garment bag on board. Vaughn subsequently told three more Northwest employees that she was physically disabled and asked them to help her board the plane and stow her garment bag--none did. Unable to move all her carry-on baggage at one time, Vaughn had to make multiple trips to load and unload the garment bag. She brought suit alleging that while carrying and stowing her baggage she injured her back, chest, neck, arm, hand, and right shoulder, and permanently injured her left shoulder.\footnote{223}{See id. at 737-38 (describing the facts of the case).}

The trial court dismissed Vaughn's tort claim, holding that it was preempted by the Minnesota Human Rights Act (MHRA), which made it unlawful "to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex."\footnote{224}{See id. at 736, 739 (quoting MINN. STAT. ANN. § 363.03, subd. 3(a)(1) (West 1994) (emphasis added)).} The
Minnesota Court of Appeals reversed the bar against Vaughn's common law negligence claim and the Supreme Court of Minnesota affirmed that reversal.\footnote{225}

Northwest argued that carriers did not owe a common law duty to "prevent passengers from injuring themselves in storing their own luggage."\footnote{226} It contended that it had no duty to help able-bodied passengers with their carry-on baggage; accordingly, because Vaughn's negligence claim was based on her disability, it could arise only from the MHRA. The court disagreed.

It quoted a century-old case holding that carriers owed disabled passengers a special duty of care when their disability was made known.

If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself, he ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity.\footnote{227}

The court found that this common law rule was "not undermined" by the MHRA provisions barring common carriers from excluding such pas-

\begin{footnotesize}
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\item The blind, the visually handicapped, and the otherwise physically disabled have the same right as the able-bodied to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and other public places; and are entitled to full and equal accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, boats, or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons. \\
\textsc{Minn. Stat. Ann.} § 265C.02 (West 1998).
\end{itemize}
\end{footnotesize}

\footnote{225}{\textit{Vaughn}}, 558 N.W.2d at 737. Vaughn's complaint alleged three causes of action: (1) violation of the Air Carriers Access Act, (2) common law negligence, and (3) violation of Rehabilitation Act of 1973. The court affirmed the dismissal of ACAA claim as untimely filed; the Rehabilitation Act claim was also dismissed but was not at issue on appeal. \textit{See id.; see also} Vaughn v. Northwest Airlines, Inc., 546 N.W.2d 43, 45, 52 (Minn. App. 1996), aff'd in part, rev'd in part, 558 N.W. 2d 736 (Minn. 1997).

\footnote{226}{\textit{Vaughn}}, 558 N.W.2d at 742.

\footnote{227}{\textit{id.}} at 743 (quoting Croom v. Chicago, M. \& St. P. Ry. Co., 53 N.W. 1128, 1129 (Minn. 1893) and outlining Northwest's arguments).
sengers: "The common-law policy endorsing special carrier assistance to the disabled who need it is strong enough to survive, and in fact complements, the legislature's requirement that public accommodations become open to the disabled." 228 The court then explained how the integrationist policy found in the MHRA could be incorporated in the common law. It described the common law as "the result of accumulated experience," and said its rules were "carefully crafted both to reflect our traditions as a state and to address emerging societal needs." 229 It stated that "[l]aw is perhaps no substitute for ethics" and that "tort may never encompass every duty of good citizenship that we commonly expect from each other[;] [b]ut in this case, a legal duty cannot be denied." 230

In accord with Croom's century-old rule of special care for the disabled, our common law clearly requires that a carrier bear the risk of injury to a disabled passenger when the carrier refuses boarding assistance, knows of the disability and need, foresees the harm, and fails to meet a standard of reasonable care. Inclusion and accommodation for the disabled is a valid policy to be advanced by our common law, and disabled passengers may justifiably expect some assistance with carry-on baggage when they need it. Northwest's position is untenable. 231

There can be no more ringing endorsement of Professor tenBroek's thesis than this statement.

Most courts, however, simply have continued to apply the common law rule that common carriers have a higher duty of care to protect disabled passengers. For example, in Cunningham v. Vincent, 232 the court held that a carrier was liable where a passenger with cerebral palsy fell from his wheelchair while a lift in the carrier's van was being lowered to the ground, breaking his leg so badly that it eventually had to be amputated. 233 The court held:

As a common carrier engaged in the transportation of disabled passengers, [the company that operated the van] not only had a duty to exercise reasonable care for plaintiff's safety "in keeping with the dangers and risks known to the carrier or which it should reasonably have anticipated," but a duty to exercise additional care for his safety as was reasonably required

228. Id. at 743 n.6.
229. Id. at 744.
230. Id.
231. Id. (emphasis supplied).
233. See id. at 852 (describing the facts of the case).
for his disabilities of cerebral palsy and paraplegia.\textsuperscript{234}

Applying this rule, it held "the jury could have found [the van company] had a duty to provide [Cunningham] with a seat belt" to keep him from falling, and that its failure to do so was negligent and the proximate cause of his injury.\textsuperscript{235}

No matter how the duty is characterized, courts have maintained the notice requirement. The court in Washington Metropolitan Area Transit Authority v. Reading\textsuperscript{236} cited cases from other jurisdictions holding that carriers owe a greater duty to disabled passengers if their "condition has been made known to the carrier or is readily apparent."\textsuperscript{237} The Washington court stated that "common carrier[s] [are] not required to take affirmative steps to discover a passenger's disabilities."\textsuperscript{238} Instead, the
court explained:

[A] common carrier's duty to assist a disabled passenger is not determined solely by the fact of the disability. The disability must be one that has somehow been made known to the carrier, and must be one of sufficient seriousness to make assistance necessary under the circumstances presented. . . . 'The employees of a carrier are not required to use diligence to discover the feeble condition of a passenger and his inability to help himself . . . .' Thus, a carrier that has no reason to know of a passenger's disability owes no greater duty to the disabled passenger than to the normal passenger, and ordinarily is under no duty to investigate the passenger's condition. 239

4. Discussion: Common Carriers Must Make Accommodations for People with Disabilities when Given Notice

As with disabled pedestrians, the major change in the law involving

239. Id. (quoting Crear, 469 So.2d at 334-35 (quoting 13 C.J.S. Carriers, § 727, at 1364)); see also Gingeleskie v. Westin Hotel Co., 961 F. Supp. 1310, 1318-19 (D. Ariz. 1997), aff'd in part, rev'd in part, 145 F.3d 1337 (9th Cir. 1998) (holding that shuttle service that drove hotel guest to hospital at his request did not breach common carrier's duty to give first aid where it neither knew nor had reason to know passenger was injured; passenger—who had a fatal heart attack while on the way to hospital—did not appear severely ill or indicate that he was anything more than merely sick, and had been able to think for himself and move without assistance); Willis v. Regional Transit Auth., 672 So.2d 1013, 1014-15 (La. Ct. App. 1996) (finding that a bus passenger who had just entered bus and was not yet seated was injured when the bus stopped to avoid hitting driver did not provide sufficient notice of her disability, because she did not tell the driver that she was impaired or ask him to wait until she was seated; she did not sit in the seats designated for disabled passengers or use a walking aid; and the fact that she used the hand rail when getting on the bus was not sufficient to put the driver on notice that she was physically impaired); Cary v. New Orleans Pub. Serv. Inc., 250 So. 2d 92, 94 (La. Ct. App. 1971) (finding no higher duty was owed to a 75-year-old woman who fell as she stepped down from a bus, because there was no sign of physical disability or infirmity or other reason for the bus driver to suspect that she needed special assistance); Luca v. Massachusetts Bay Transp. Auth., 324 N.E.2d 385, 386 (Mass. App. Ct. 1975) (refusing to find carrier had notice of disability without evidence that passenger walked with a limp or was feeble or restricted in her movements; evidence on passenger's weight, age, and use of cane did not mean disability was visible and obvious to require employee to use special care); Gallin v. Delta Air Lines Inc., 434 N.Y.S.2d 316, 317-18 (N.Y. Sup. Ct. 1980) (finding a lack of sufficient notice, even though passenger used a single elbow crutch and had a slight limp; neither she nor her husband requested assistance from flight personnel and her husband exited plane without giving her any assistance); LeGrand v. Lincoln Lines, Inc., 384 A.2d 955, 957 (Pa. Super. Ct. 1978) (question whether passenger's blindness and advanced age were known to the bus driver). See generally E.B. Morris, Annotation, Duty of Carrier to Discover Abnormal Condition of a Passenger, 124 A.L.R. 1428 (1940).

Courts also have held that carriers are not liable for injuries occurring where an employee recognizes a passenger's disability but the passenger refuses an employee's offer to help. See Smith v. Chicago Limousine Serv., Inc., 441 N.E.2d 81, 85 (III. App. Ct. 1982).
common carriers is due to legislation in the form of state access statutes and the ADA. That legislation effectively has eradicated the presumption that disabled people are incompetent to travel alone. The common law requirement that common carriers accommodate passengers with disabilities has been maintained, however, and more courts should follow Vaughn in holding that "[i]nclusion and accommodation for the disabled is a valid policy to be advanced by our common law, and disabled passengers may justifiably expect some assistance."

Maintaining the notice requirement for such assistance does not interfere with that policy. Like the cases holding that white cane laws do not apply unless the driver knows of the pedestrian's disability, the notice requirement is consistent with both common sense and the case law interpreting civil rights legislation. A common carrier cannot make accommodations for a passenger's disability unless its employees know of its existence.

D. Federal Regulation of Air Carriers: Boon or Bane for Suits by Travelers with Disabilities?

People with disabilities who experience problems with air carriers are faced with a patchwork quilt of federal legislation that appears to give with one hand while taking away with another. It gives in the form of the Air Carrier Access Act, which specifically bars disability-based discrimination. But some air carriers have argued that it also takes away, contending that the Airline Deregulation Act of 1978 preempts common law claims for a failure to provide accommodations.

1. History of Air Carrier Regulation

Airline regulation began when Congress passed the Civil Aeronautics Act of 1938. The 1938 Act created the Civil Aeronautics Authority, which was changed to the Civil Aeronautics Board (CAB) in 1940, and charged it with regulating airlines' entrance into the industry, the routes

240. 558 N.W.2d 736, 744 (Minn. 1997).
241. See supra notes 222-31 and accompanying text (discussing Vaughn).
they could fly, and the fares that they could charge passengers. It also included a “savings clause,” which provided “nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.” And so, “the state law duties of common carriers . . . would be the applicable standard for the fledgling airline industry.”

The Federal Aviation Act of 1958 (FAA) retained the CAB and created the Federal Aviation Agency. It also preserved the savings clause, “thus providing viable common law and statutory remedies for airline negligence.”

The confusion on preemption of common law claims arose with the passage of the Airline Deregulation Act of 1978. It was passed “to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services.” The Deregulation Act retained the savings clause; but, in order to prevent the substitution of state regulations for the recently removed federal regulations, Congress passed a provision preempting any state law “relating to rates, routes, or services of any air carrier.” Courts have struggled to define the scope of this phrase ever since.


247. Starry, supra note 244, at 659.


249. Starry, supra note 244, at 659.

250. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified at 49 U.S.C. §§ 40101-40120 (1994)). The Airline Deregulation Act is commonly referred to in cases interpreting it as the “ADA.” That acronym already has been used in this article, however, for the Americans with Disabilities Act, and the author suspects that people interested in disability issues will automatically think of the latter statute when they see a reference to the “ADA.” In an effort to avoid confusion, the author has changed references to the “ADA” in cases in this section to the “Deregulation Act.”


252. Airline Deregulation Act of 1978, § 105, 92 Stat. at 1708. The preemption clause which was originally codified at 49 U.S.C. §1305(a)(1) is now found at 49 U.S.C. § 41713(b)(1) (1994). The complete text of the section now reads as follows:

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

2. Supreme Court Precedent on Preemption of Common Law Claims Against Air Carriers Under the Airline Deregulation Act

The United States Supreme Court considered the scope of this pre-emption provision in two recent opinions. In *Morales v. Trans World Airlines, Inc.*,253 the Court held that the Deregulation Act "pre-empt[ed] the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes."254 The Court emphasized that the key phrase was "relating to." The Court said that these words "express[ed] a broad pre-emptive purpose" and defined them as "having a connection with, or reference to, airline ‘rates, routes, or services.’"255 It rejected the argument that the Deregulation Act "only pre-empt[ed] the States from actually prescribing rates, routes, or services" because that interpretation "simply reads the words ‘relating to’ out of the statute."256

The Court acknowledged, however, that the Deregulation Act did not preempt all state laws as applied to airlines:

[W]e do not . . . set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly "relat[e] to" rates; the connection would obviously be far more tenuous. . . . "[S]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner” to have pre-emptive effect.257

The Court addressed the scope of the Deregulation Act’s preemption provision again in *American Airlines, Inc. v. Wolens*.258 In *Wolens*, members of the airline’s frequent flyer program sued in state court after the airline retroactively changed the terms and conditions of the program. The Court held that the Deregulation Act’s “preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves.”259

The Court determined that the plaintiffs’ claims “related to” rates, but focused on the words “enact or enforce any law” in the preemption provision. It held that the plaintiffs’ claims under the state consumer protec-

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254. *Id.* at 378.
255. *Id.* at 378, 383-84.
256. *Id.* at 385.
257. *Id.* at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)).
259. *Id.* at 222; see also *id.* at 224-25 (describing changes made by the airline).
tion laws were preempted because of "the potential for intrusive regulation of airline business practices inherent in state consumer protection legislation." It also held, however, that the breach of contract claim was not preempted because the enforcement of private agreements did not involve the potential for intrusive state regulation:

We do not read the [Deregulation Act's] preemption clause . . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings. . . . [T]erms and conditions airlines offer and passengers accept are privately ordered obligations "and thus do not amount to a State's 'enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of [the preemption provision]."

The Court explained how the Deregulation Act's preemption provision and the FAA's saving clause could be read together:

The conclusion that the [Deregulation Act] permits state-law-based court adjudication of routine breach-of-contract claims also makes sense of Congress' retention of the FAA's saving clause . . . . The [Deregulation Act's] preemption clause, § 1305(a)(1), read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

3. Preemption of Tort Claims by Passengers with Disabilities?

Courts interpreting Morales and Wolens are split over whether state law tort claims—including those alleging a breach of a common carrier's duty to the disabled—are preempted. Those holding such claims are preempted argue that allegations about airline employees' actions (or inactions) "relate to" airline "services." Those rejecting preemption point to dicta in the Supreme Court's Deregulation Act decisions saying that tort claims are not preempted, and argue that allowing tort claims does

260. Id. at 227; see also id. at 222-23 (quoting the federal preemption provision).
261. Id. at 228-29 (quoting Brief for United States as Amicus Curiae at 9, American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) (No. 93-1286)).
262. Id. at 232-33.
not interfere with the Deregulation Act's purpose of barring state regulation of airlines.

a. Courts Finding Tort Claims Are Preempted: Failure to Accommodate "Relates to" Airline Services

In *Gee v. Southwest Airlines* the court held that the Deregulation Act preempted a disabled passenger's claim under Oregon law for the emotional distress she suffered due to the failure of airline employees to aid her in boarding and deplaning. *Gee* was a consolidation of four separate tort actions brought by passengers against three different airlines to recover for injuries suffered on their respective flights. One of the plaintiffs was Jan Rowley, who was paralyzed from the chest down and used a motorized scooter for mobility. Prior to her flight, she advised American Airlines that she would need an aisle chair (a narrow wheelchair that can be rolled between seats) to board the plane. Although she was assured that one would be available, American failed to provide the aisle chair in both Dallas and Portland, a violation of the Air Carriers Access Act (ACAA). Consequently, Rowley was forced to move to and from her seat, in the presence of American employees, by holding on to seats and overhead compartments. American also failed to return her motorized scooter to the plane door twice, and in Portland, failed to reassemble the scooter after disassembling it for stowage.

Rowley sued for compensatory and punitive damages under the ACAA, and also asserted several state tort claims for intentional and negligent infliction of emotional distress. The district court granted American's motion for summary judgment on the tort claims, holding they were preempted by the Deregulation Act. Rowley appealed, but the Ninth Circuit affirmed.

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263. 110 F.3d 1400 (9th Cir. 1997), cert. denied, 118 S. Ct. 301 (1997), overruled by Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1260 (9th Cir. 1998) (en banc) (holding the Deregulation Act does not preempt personal injury claims).

264. See id. at 1402-04, 1406 (describing the facts of the case).

265. See id. at 1403 (noting action taken by Rowley and American).

266. See id. The district court also rejected Rowley's motion in limine regarding the availability of punitive damages under the ACAA, holding that "federal law permits recovery of compensatory damages for violation of the ACAA, but not punitive damages." Id. The compensatory damage claim under the ACAA went to trial, and the jury "found that American did violate the ACAA by failing to provide [Rowley with] the aisle chair and failing to return [her] motorized scooter." Id. The jury, however, awarded no compensatory damages. See id. The availability of punitive damages under the ACAA is discussed more fully supra in notes 391 to 428 and accompanying text.

267. See id. at 1402. The Court also affirmed the dismissal of the punitive damage claim under the ACAA. See id. at 1402-03.
The court stated that Rowley’s claim for emotional injury “related to” airline services because it was “grounded on the conduct of American employees who failed to provide assistance with her disability.”\(^{268}\) In reaching this decision, the court analogized to its earlier decision in *Harris v. American Airlines, Inc.*,\(^{269}\) where an African-American woman sought damages for emotional distress caused by a drunk passenger’s racial slurs, claiming American was negligent under state tort law for continuing to serve the inebriated passenger who was harassing her. A sharply divided court found the suit was preempted because Harris’s claims “pertain[ed] directly to a ‘service’ the airlines render: the provision of drink” and also related to the crew’s in-flight conduct—treating intoxicated passengers.\(^{270}\)

The *Gee* court found

> no real distinction between the *Harris* claims based on the “in-flight” conduct of the crew, and Rowley’s claims based on the pre and post flight conduct of the American employees. If the provision of drink is an airline “service,” then the assistance (or lack thereof) in boarding and deplaning passengers is also a service. Under *Harris*, Rowley’s attempt to pursue state tort claims involves activities that “relate to” service and are thus preempted.\(^{271}\)

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268. *Id.* at 1406.
269. 55 F.3d 1472 (9th Cir. 1995), overruled by Charas v. Transworld Airlines, Inc., 160 F.3d 1259, 1260 (9th Cir. 1998) (en banc).
270. *Id.* at 1476; see also *id.* at 1473 (describing the facts of the case).
271. *Id.* at 1406. At least one other court has barred a disabled person’s tort claim as preempted by the Deregulation Act. See *Williams v. Express Airlines I, Inc.*, 825 F. Supp. 831, 833 (W.D. Tenn. 1993) (holding Deregulation Act preempted false imprisonment claim by wheelchair user who alleged that he was left in immobile aisle chair for a substantial time and prevented from boarding his flight; stopping him from boarding flight had “close ‘connection with’ . . . airline service”). For other cases holding that tort or quasi-tort claims were preempted by the Deregulation Act, see *Smith v. ComAir, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998) (holding that Deregulation Act preempted airline passenger’s intentional tort claims of false imprisonment and infliction of emotional distress to extent they were premised on airline’s refusal to permit him to board his flight; boarding procedures were “services” rendered by airline within meaning of Deregulation Act); *Stone v. Continental Airlines, Inc.*, 905 F. Supp. 823, 824-26 (D. Haw. 1995) (holding a claim of assault and battery was preempted, as the court in *Harris* had held); *Costa v. American Airlines, Inc.*, 892 F. Supp. 237, 239 (C.D. Cal. 1995) (following *Harris* as required, but disagreeing with it because it seemed unlikely that “Congress or the Supreme Court would have intended this broad result or the impact it may have on bodily injury claims arising from other kinds of airline services”); *Chukwu v. Board of Dirs. British Airways*, 889 F. Supp. 12, 13 (D. Mass. 1995) (holding that Deregulation Act preempted tort claims based on airline that allegedly wrongfully preventing boarding of flight; boarding a flight was a process uniquely within “service” provided and controlled by air carriers); *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214, 223-25 (S.D.N.Y. 1994) (holding that section 1305
b. Courts Holding Tort Claims Are Not Preempted: Negligence Claims Do Not Interfere with the Act's Purpose of Preventing State Regulation of Air Carriers

Most courts interpreting the preemption provision, however, have held that it does not bar personal injury actions—including those brought by disabled people who were either not served or ill-served by airline employees. These courts looked to dicta from the Supreme Court’s Deregulation Act precedent and its recent shift in other preemption cases and held that allowing negligence claims did not interfere with the Act’s purpose of preventing state regulation of air carriers.

For example, in Knopp v. American Airlines, Inc., the court held that the Deregulation Act did not preempt negligence and contract claims brought by an injured woman. She had fallen from an electric cart after the airline ignored her advance request that she receive wheelchair transportation between gates for changing planes. It supported its conclusion with a close reading of the Supreme Court’s decisions on the Deregulation Act, noting that “[a]lthough Wolens did not actually decide whether state common law negligence actions would be preempted by the [Deregulation Act], dicta abound in each of this case’s three opinions.” In fact, the majority in Wolens noted that the issue was raised at oral argument, where the airline’s counsel was asked about the subsection preceding the preemption provision that requires air carriers to carry insurance “for personal injuries and property losses ‘resulting from the operation or maintenance of aircraft.’” The airline’s counsel conceded that “‘safety claims,’ for example, a negligence claim arising out of


272. 938 S.W.2d 357, 363 (Tenn. 1996).

273. See id. at 362.

274. Id. at 360 (quoting Seals v. Delta Air Lines, Inc., 924 F. Supp. 854, 858 (E.D. Tenn. 1996)).

a plane crash, 'would generally not be preempted.'

In a separate opinion Justice Stevens wrote in Wolens, he said, "[i]n my opinion, private tort actions based on common-law negligence or fraud, or on a statutory prohibition against fraud, are not pre-empted." He stated further:

I would analogize the Consumer Fraud Act to a codification of common-law negligence rules. Under ordinary tort principles, every person has a duty to exercise reasonable care toward all other persons with whom he comes into contact. Presumably, if an airline were negligent in a way that somehow affected its rates, routes, or services, and the victim of the airline's negligence were to sue in state court, the majority would not hold all common-law negligence rules to be pre-empted by the [De-regulation Act]. Like contract principles, the standard of ordinary care is a general background rule against which all individuals order their affairs. Surely Congress did not intend to give airlines free rein to commit negligent acts subject only to the supervision of the Department of Transportation.

And, Justice O'Connor, who had stated that under her reading of Morales the contract claims in Wolens would have been preempted, said that her

view of Morales does not mean that personal injury claims against airlines are always pre-empted. Many cases decided since Morales have allowed personal injury claims to proceed, even though none has said that a State is not "enforcing" its "law" when it imposes tort liability on an airline. In those cases, courts have found the particular tort claims at issue not to "relate" to airline "services," much as we suggested in Morales that state laws against gambling and prostitution would be too tenuously related to airline services to be pre-empted.

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276. Wolens, 513 U.S. at 231 n.7; see also id. (quoting Brief for United States as Amicus Curiae at 20 n.12, American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) (No. 93-1286) ("It is . . . unlikely that Section 1305(a)(1) preempts safety-related personal-injury claims relating to airline operations.").

277. Id. at 235 (Stevens, J., concurring in part and dissenting in part).

278. Id. at 236-37 (citation and footnote omitted) (emphasis added).

279. Id. at 238, 242 (O'Connor, J., concurring in judgment in part and dissenting in part). Justice O'Connor cited a number of cases that had found tort claims were not pre-empted. See id. at 242-43 (citing Public Health Trust v. Lake Aircraft, Inc., 992 F.2d 291, 294-295 (11th Cir. 1993) (holding that the tort claim based on defective aircraft design was not preempted because it was not related to airline services); Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1443 & n. 11, 1444 n. 13 (10th Cir. 1993) (same), Stagl v. Delta Air Lines, Inc., 849 F. Supp. 179, 182 (E.D.N.Y. 1994) (holding that the tort claim based on personal injury was not preempted because it was not related to airline services); Curley v.
Based on this *dicta* in *Wolens*, the *Knopp* court concluded “that the Supreme Court does not interpret the [Deregulation Act] preemption clause to extend to personal injury suits against carriers.” It noted that even Justice O’Connor, who gave the broadest interpretation to the preemption clause, would allow tort suits “on the theory that such safety concerns do not ‘relate’ to provisions of ‘services’ by carriers.”

The *Knopp* court also agreed with the court in *Seals v. Delta Airlines Inc.*, that stated it was “persuaded by the logic of Justice Stevens’ opinion that Congress could not have intended either to leave passengers injured through airline negligence without a remedy or to turn the Department of Transportation into a forum for adjudication of personal injury claims.”

The *Knopp* court also found an opinion from the Texas Supreme Court persuasive.* Continental Airlines, Inc. v. Kiefer,* a passenger and his parents sued after two airlines failed to provide meet-and-assist services, alleging, among other things, negligence. The *Kiefer* court held that under *Morales’s* broad definition of “related to,” this personal-injury negligence action was related to airline rates and services.

Such a negligence action is not related to airline rates and services quite as directly as the contract claims in *Wolens*, but the impact of tort liability on an airline’s rates and services is no less real. . . . Tort liability cannot but have, in *Morales’s* words, “a significant impact upon the fares [airlines] charge,” just as the advertising guidelines in that case.

The *Kiefer* court concluded, however, that negligence actions were not preempted because they did not constitute “enforcement” of state law within the meaning of the preemption provision.

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281. *Id.* (quoting *Seals*, 924 F. Supp. at 859).


283. *See Knopp*, 938 S.W.2d at 361.

284. 920 S.W.2d 274 (Tex. 1996).


286. *Id.* at 281 (citation omitted), quoted in *Knopp*, 938 S.W.2d at 361.
With certain reservations, we think negligence law is not so policy-laden in imposing liability for personal injuries that suits for damages like those before us are preempted by the [Deregulation Act]. We recognize that with negligence law, and other tort law, there is a greater risk that state policies will be too much involved than there is with contract law, especially in the area of damages. . . . One could easily argue that the threat of punitive damages against airlines has a greater regulatory effect than liability for actual damages. Also, recovery of damages for mental anguish may or may not require accompanying physical injury, or aggravated conduct by the defendant, or be subject to other restrictions. Such differences could fall within the concerns argued by the DOT in Wolens . . . .

The court found those concerns did not apply in the case before it, however, because neither of the plaintiffs was seeking punitive damages and it was unclear whether their mental anguish claims were significant. However, the lack of punitive damages and significant emotional distress claims were not the key reason for the court’s decision. Instead, the court looked to the purpose of the Deregulation Act:

Fundamentally, the purpose of [Deregulation Act] preemption is not to absolve airlines from all liability under state law, but to prohibit state regulation of air carriers, direct or indirect. Congress’ concern was “that the States would not undo federal deregulation with regulation of their own”. Common-law negligence actions to recover damages for personal injuries do not impinge in any significant way on Congress’ concern. Such actions did not impair federal regulation before the [Deregulation Act], and we do not see how they impair deregulation since.

287. Id. at 282, quoted in Knopp, 938 S.W.2d at 362.
288. See id.
289. See id.
290. Id. (citation omitted), quoted in Knopp, 938 S.W.2d at 362. The court limited its ruling to negligence cases. It stated that “[o]ther tort actions might [impair deregulation], and . . . so might recovery in negligence actions for punitive damages or even mental anguish damages.” Id. at 282-83. The Kiefer court noted that negligent misrepresentation actions “might be argued to be indistinguishable from the statutory consumer protection actions in Morales and Wolens,” and that “[s]trict products liability could be argued to embody State policies to a degree prohibited by [Deregulation Act] deregulation policy.” Id. at 283. The court stated it did not have to address these issues in the current case and left them for “a closer working out” in future cases. Id. “We hold only that the [Deregulation Act] does not preempt common-law personal-injury negligence claims against air carriers, subject to the reservations we have expressed as to damages.” Id.

For other courts holding that tort claims brought by disabled passengers were not preempted by the Deregulation Act, see, e.g., Kelley v. United Airlines, Inc., 986 F. Supp. 684, 685 (D. Mass. 1997) (disabled passenger’s state law negligence claims against airline
For injuries sustained when she fell out of aisle chair while being boarded on airplane were not preempted; Seals v. Delta Air Lines, Inc., 924 F. Supp. 854, 859 (E.D. Tenn. 1996) (finding Deregulation Act did not preempt contract and negligence claims for airline’s failure to provide ground transport between gates); Moore v. Northwest Airlines, Inc., 897 F. Supp. 313, 315 (E.D. Tex. 1995) (finding that federal law did not preempt claim based on failure to provide appropriate de-planing services to plaintiff who required wheelchair, because preemption is limited to laws that regulate the economic aspects of the airline business).

For other courts holding tort or quasi-tort claims were not preempted, see, e.g., Parise v. Delta Airlines, Inc., 141 F.3d 1463, 1467-68 (11th Cir. 1998) (state law age discrimination claim not preempted); Abdu-Brisson v. Delta Air Lines, Inc., 128 F.3d 77, 86 (2d Cir. 1997) (state disability discrimination claim not preempted); Aloha Islandair Inc. v. Tseu, 128 F.3d 1301, 1304 (9th Cir. 1997) (state disability discrimination claim not preempted); Travel All Over The World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1434-35 (7th Cir. 1996) (finding no preemption of breach of contract and defamation claims by travel agent based on cancellation of group reservations and false statements to clients; claims were preempted to the extent they were based on the airline’s refusal to transport passengers who had booked their flights through agency); Smith v. America West Airlines, Inc., 44 F.3d 344, 347 (5th Cir. 1995) (tort claim for negligent boarding of hijacker found to be “safety” related and not preempted); Price v. Delta Airlines, Inc., 5 F. Supp. 2d 226, 236 (D. Vt. 1998) (tort claim not preempted); Peterson v. Continental Airlines, Inc., 970 F. Supp. 246, 251 (S.D.N.Y. 1997) (intentional infliction of emotional distress claim not preempted by the Deregulation Act); Abdullah v. American Airlines, Inc., 969 F. Supp. 337, 351-52 (D.V.I. 1997) (holding that, although Deregulation Act preempts state and territorial law relating to standards of care for pilots, flight attendants, and passengers on commercial aviation flights, injured plaintiffs may seek a remedy for a violation of federally established standards of care under state or territorial tort law; federal preemption and state and territorial tort remedies may coexist, and the Deregulation Act contains no indication of congressional intent to preempt such remedies); Diaz Aguasviva v. Iberia Lineas Aereas de Espana, 902 F. Supp. 314, 319 (D.P.R. 1995) (holding suit for damages arising from the tortious conduct of an airline not preempted because it does “not impede the free market competition of air carriers”); In re Air Disaster, 819 F. Supp. 1352, 1363 (E.D. Mich. 1993) (finding preemption provisions did not apply to state negligence action based on injuries suffered in crash).


Indeed, even the *Gee* court expressed dissatisfaction with its own ruling. Acknowledging that it was not in line with the Supreme Court's ERISA cases, the *Gee* court followed the earlier decision in *Harris* only because of a circuit rule preventing a previous panel's decision from being overturned except by en banc review, "unless there has been an intervening statutory change or Supreme Court decision." The *Gee* court noted that in a case decided only a month before *Harris*, the Supreme Court had held that an interpretation of a preemption provision must start with the presumption that preemption is not intended: "where federal law is said to bar state action in fields of traditional state regulation, we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" The *Gee* court said that "*Harris* seems to operate from precisely the opposite position—that there is a presumption of preemption from which exceptions, such as breach of contract claims, are carved.

While *Travelers* interpreted the preemption provision in ERISA, the *Gee* court found it significant because *Morales* had "borrow[ed] its interpretation of the preemption clause [in the Deregulation Act] entirely from a line of ERISA cases that interpreted 'identical' relevant language." The *Gee* court stated that *Travelers* "essentially reformulat[ed] the approach to this 'identical' language." "[A] unanimous Supreme Court admitted its prior attempts to construe the phrase 'relate to' did 'not give us much help drawing the line,' noting that, '[i]f "relate to" were taken to extend to the furthest stretch of its indeterminacy, then . . . preemption would never run its course." The *Travelers* Court stated "that in interpreting 'relate to,' a court 'must go beyond the unhelpful text . . . and look instead to the objectives of [the statute] as a guide to the scope of the state law that Congress understood would survive.'

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293. *Gee v. Southwest Airlines*, 110 F.3d 1400, 1406 (9th Cir.) (stating "we may remain bound to apply the *Harris* rationale, however outdated we may find its analysis"), *cert. denied*, 118 S. Ct. 301 (1997); *overruled by Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (en banc).
294. *Id.* (citing *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992)).
296. *Gee*, 110 F.3d at 1405.
297. *Id.* (citing *Morales*, 504 U.S. at 383-85).
298. *Id.*
299. *Id.* at 1405-06 (quoting *Travelers*, 514 U.S. at 655).
300. *Id.* at 1406 (quoting *Travelers*, 514 U.S. at 655).
The Gee court criticized *Harris* because it "seem[ed] to take 'relates to' to the furthest stretch of its indeterminacy." Nonetheless, the Gee court said it was bound by the *Harris* rationale, "however outdated we may find its analysis" because *Travelers* was "not directly on point and *Wolens*, while perhaps recharacterizing *Morales*, did not overrule it."

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301. *Id.*
302. *Id.* A concurring opinion was even more critical of *Harris*, and its reasoning was eventually adopted when the court overruled *Gee* in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1260 (9th Cir. 1998) (en banc). Judge O'Scannlain noted that in following *Harris* "the majority construct[ed] a seemingly simple rule: while the regulation of 'services' is preempted by the [Deregulation Act], the regulation of 'operations and maintenance' is not." *Gee*, 110 F.3d at 1409 (O'Scannlain, J., specially concurring). He criticized this rule, saying that its "emphasis on a few words taken out of context needlessly muddles our preemption jurisprudence," and that the majority's effort to distinguish airline services from aircraft operations and maintenance was misguided both because it was not supported by Supreme Court precedent and because the distinction was so difficult to draw. *Id.* at 1409-10.

Judge O'Scannlain examined *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997), the Supreme Court's most recent decision on the "relating to" language in ERISA's preemption provision, which the *Morales* court used as guidance in interpreting the Deregulation Act. See *Gee*, 110 F.3d at 1409-10. The *Dillingham* Court had unanimously held that the words "relating to" should not be applied with "uncritical literalism," but should emphasize the objectives of the statute and its effect on state law. *Dillingham*, 519 U.S. at 325. Judge O'Scannlain, found Justice Scalia's concurring opinion in *Dillingham* to be especially noteworthy.

After citing statements from earlier decisions to the effect that ERISA's "relating to" language has an expansive sweep, Justice Scalia [(the author of *Morales*), who was joined by Justice Ginsburg (the author of *Wolens*)] wrote that it would "greatly assist our function of clarifying the law if we simply acknowledged that our first take on this statute was wrong." In his view, "the 'relate to' clause of the pre-emption provision is meant, not to set forth a test for pre-emption, but rather to identify the field in which ordinary field pre-emption applies—namely, the field of laws regulating 'employee benefit plan[s]'" described in ERISA. *Gee*, 110 F.3d at 1410 (quoting *Dillingham*, 519 U.S. at 334, 336). Judge O'Scannlain stated that "[i]n light of the Supreme Court's preemption analysis [in *Dillingham*, the services versus operations] test for airline preemption was archaic." *Id.* at 1410.

Judge O'Scannlain also focused on the difficulty of drawing a distinction between airline services and aircraft operations and maintenance. See *id.* He noted that the Deregulation Act did not define "services," leaving courts to "decide whether providing alcoholic beverages to intoxicated persons or warning passengers about the danger of items falling from overhead compartments are related to an airline's 'services' or 'operations.'" *Id.* He argued that, under the current analytical framework, a passenger's personal injury claim would be preempted if it resulted from the negligence of a flight attendant in providing refreshments or checking luggage compartments, but not if the injury resulted from improper maintenance or sudden plane movement. See *id.* (quoting *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 284 (Tex. 1996)).

He stated that courts could avoid "anomalous results" if they used an analytical framework rest[ing] on the regulatory effect of the state tort claim. The proper inquiry then is whether the state common law tort remedies have the effect of frustrating the purpose of deregulation by interfering with the forces of
Other courts are not bound by circuit rules like the Gee court was, however, and have no reason to follow "outdated" analysis. Like the Kiefer court, they should find that, the fundamental purpose of Deregulation Act 'preemption is not to absolve airlines from all liability under state law, but to prohibit state regulation of air carriers, direct or indirect.' As the Kiefer court stated, "[c]ommon-law negligence actions . . . did not impair federal regulation before the [Deregulation Act], and [they] do not . . . impair deregulation [now]." Accordingly, courts should find that common law tort actions brought by disabled passengers are not preempted.

E. Federal Causes of Action

Common law claims against airlines often are brought in conjunction with allegations that the airlines violated federal statutory laws. People with disabilities have sued under several of these statutes.

1. FAA Anti-Discrimination Provision

The first anti-discrimination provision directed solely at airlines was section 404(b) of the Federal Aviation Act of 1958, which prohibited air carriers from giving unreasonable preference to any person or subjecting a person "to any unjust discrimination or any undue or unreasonable prejudice." Courts enforced this prohibition through an implied private right which had first been recognized under the same section of the
Civil Aeronautics Act of 1938.\textsuperscript{306} The FAA also granted air carriers the discretion to ensure safety, however, and disabled passengers have been caught between these two interests. Perhaps the broadest such discretion derives from a section of the FAA that conferred broad authority on air carriers to refuse boarding based on safety concerns.\textsuperscript{307}

Courts have held, however, that this grant of discretion must be balanced with the protections of section 404(b). For example, in \textit{Hingson v. Pacific Southwest Airlines},\textsuperscript{308} a blind passenger traveling with a guide dog sued after Pacific Southwest Airlines (PSA) personnel insisted that he sit in a bulkhead seat. The only applicable PSA policy manual restriction stated that blind passengers should not be allowed to sit by emergency}

\footnotesize{\textsuperscript{306} See Fitzgerald v. Pan American World Airways, 229 F.2d 499, 500 (2d Cir. 1956). Legendary jazz singer Ella Fitzgerald, her pianist, and her secretary, all of whom were black, brought this case after they were not allowed to reboard their plane and continue on to Australia in their first class seats after a stopover in Honolulu, Hawaii. See id. at 499. The complaint alleged that the refusal was racially motivated and constituted “unjust discrimination and undue and unreasonable prejudice and disadvantage, in violation of Section 404, Subdivision (b).” Id. The court rejected the airline’s contention that the only available remedy was a complaint to the Civil Aeronautics Board (CAB). See id. at 502. It noted that, at most, the CAB could issue an order compelling future compliance; it could not order the defendants in 1956 to allow the plaintiffs to board the plane in 1954. See id. The court refused to restrict plaintiffs to a remedy which would not vindicate a violation of an actionable civil right. See id.

Courts refused, however, to find a cause of action under section 404(a), which required air carriers to provide air transportation upon reasonable request and to provide safe and adequate service, equipment and facilities, and to establish just and reasonable rules, regulations and practices. See Anderson v. USAir, Inc., 818 F.2d 49, 34-55 (D.C. Cir. 1987); Hingson v. Pacific Southwest Airlines, 743 F.2d 1408, 1414 (9th Cir. 1984); Diefenthal v. C.A.B., 681 F.2d 1039, 1050 (5th Cir. 1982). This section formerly was codified at 49 U.S.C. § 1374(a)(1) and read:

\begin{quote}
[It] shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and \ldots\ to provide safe and adequate service, equipment, and facilities \ldots\ to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation.
\end{quote}


\footnotesize{\textsuperscript{307} The grant of discretion was formerly codified at 49 U.S.C. § 1511(a) (1988), and provided that “[s]ubject to reasonable rules and regulations prescribed by the Secretary of Transportation, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.” It was recodified at 49 U.S.C. § 44902(b) (1994) and reads “[s]ubject to regulations of the Administrator, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.”

\textsuperscript{308} 743 F.2d 1408 (9th Cir. 1984).}
The issues on appeal were evidentiary, but they arose from Hingson's attempt to show a violation of section 404(b); the parties and the court agreed that the basic issue litigated at trial was "whether PSA acted unreasonably in demanding that Hingson take a bulkhead seat."

The court noted that, despite the pilot's good faith in exercising discretion for the safe operation of the plane, a jury could find that the crew's failure to follow PSA policies was unreasonable and in violation of section 404(b).

The court in *Jacobson v. Delta Airlines, Inc.* also held that an airline's policies were discriminatory. Neil Jacobson had cerebral palsy, could not walk without the assistance of another person, and used a wheelchair. Married and a full-time computer programmer analyst, he lectured frequently on "how wonderful it is to be handicapped." According to the court, "he le[d] a full and productive life."

In March 1980, Jacobson went to a Delta Airlines ticket counter in Birmingham, Alabama to check his baggage for a return flight to Los Angeles. Delta employees "refused to allow him to board his flight unless he first signed a so-called 'medical release form.'" Delta's policy required all disabled persons to sign this form before boarding. The form provided:

> I understand that upon subsequently acquired medical advise [sic], Delta Airlines may refuse me passage or remove me at any point and refund the appropriate portion of my fare without further obligation. I understand that I may be removed at any point if it becomes necessary for the comfort and safety of other passengers.

Jacobson initially refused to sign the form, arguing that it was prohibited by federal law as being discriminatory against disabled persons. He eventually signed the form under protest shortly before the flight's departure, "informing the Delta employees that he intended to bring

309. See id. at 1412.
310. Id. at 1413.
311. See id. at 1413 & n.6.
312. 742 F.2d 1202 (9th Cir. 1984).
313. See id. at 1204.
314. Id.
315. Id.
316. See id.
317. Id.
318. See id.
319. Id.
320. See id.
suit.” The flight proceeded without further incident.

The court stated that the medical release form Delta required Jacobson to sign was an acknowledgment of Delta’s power, pursuant to tariffs it had filed with the CAB, to remove an unescorted passenger if he was unable to take care of his physical needs during the flight, or if removal became necessary for the comfort and safety of other passengers. The court said it assumed that requiring persons to sign the medical release to give them notice of Delta’s power “would be legitimate if applied to all passengers, [but] Delta . . . offered no legitimate reason . . . for requiring the signatures only from handicapped persons.”

Delta argued that because people with disabilities were more likely to have problems that would require removal, having only people with disabilities sign the waiver was reasonably related to ensuring compliance with the CAB tariff. The court held however, that even if the policy possessed a reasonable relationship to a legitimate purpose, Delta still would fail because it had not provided any evidence that disabled passengers were more likely to require removal from a flight. Delta asked the court to take judicial notice that disabled passengers were more likely to experience medical problems, but the court stated that such a broad conclusion was “entirely unwarranted”:

We see no basis for concluding that it is likely that a handicapped person who, for instance, is simply nonambulatory will have some medical problem during a flight. In any event, that likelihood seems no greater than, say, the likelihood that a non-handicapped person will become boorish as a result of an excessive number of martinis.

Accordingly, it found “Delta’s policy of requiring all handicapped persons, and only handicapped persons, to sign medical release forms discriminatory as a matter of law.”

In Adamsons v. American Airlines, Inc., however, the court reversed a trial court’s decision that it was a jury question whether an airline acted negligently in refusing to board a woman paralyzed from the waist

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321. Id. Delta’s counsel stated during oral argument that it had abandoned the policy after the incident. See id. at n.1
322. See id.
323. See id. at 1206.
324. Id.
325. See id.
326. Id.
327. Id. at 1207-08.
328. 444 N.E.2d 21 (N.Y. 1982).
The court held that the airline had the discretion in deciding whether to carry a disabled passenger and that, in reviewing the exercise of that discretion, the standard should be whether the airline was "arbitrary, capricious or irrational" based on the facts and circumstances known by the carrier at the time.

Adamsons had been infected with an undiagnosed illness while living in Haiti. One of her friends arranged with American Airlines for her to fly to New York City. An American Airlines employee was informed that Adamsons was paralyzed and needed a wheelchair; however, she could sit up and her condition was not contagious. Adamsons arrived for departure from the Port-au-Prince airport by ambulance. She repeatedly cried out in pain as she was transferred from the ambulance to a boarding wheelchair, and as she was being wheeled toward the airplane. After airline personnel discovered that Adamsons had a catheter and a Foley disposal bag, they denied her permission to board because her "health and the safety of the other passengers would be jeopardized if [she] was allowed to travel on that flight."

Adamsons sued, alleging that the airline was negligent by denying her permission to board. The trial court rejected a motion for a directed verdict, and the jury returned a verdict of $525,000, which the trial court reduced to $500,000.

The intermediate appellate court affirmed but the New York Court of Appeals reversed. It stated that, "Congress, in enacting the Federal Aviation Act, [did not] intend[] to test the airline's discretion to deny passage to certain persons by standards of negligence."

"[A]irline safety is too important to permit a safety judgment made by the carrier . . . to be second-guessed months later in the calm of the courtroom by a judge or a jury, having no responsibility for the physical safety of anyone, on the basis of words which are inadequate to convey the degree of excitement and tenseness existing at the time the judgment was made."

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329. See id. at 25.
330. Id.
331. See id. at 23 (discussing factual background to the case).
332. See id. Adamsons eventually flew to New York City on Pan American Airlines two days later. See id.
333. See id.
334. Id. at 24-25.
335. Id. at 25 (quoting Cordero v. CIA Mexicana De Aviacion, S.A., 512 F. Supp. 205, 206-207, aff'd in part and rev'd in part, 681 F.2d 669 (9th Cir. 1982). This holding followed Williams v. Trans World Airlines, 509 F.2d 942 (2d Cir. 1975), where the court said the basic inquiry is whether the conduct of the air carrier was rational and reasonable in light of
Applying the arbitrary and capricious standard, the Adamsons court held as a matter of law that the airline did not abuse its discretion in refusing to transport Adamsons. It noted that the airline saw Adamsons for the first time forty-five minutes before takeoff, and only then could it see clearly that she was very sick. Adamsons had an undiagnosed illness that was possibly infectious. Other than the wheelchair, Adamsons had not requested any special preparations or modification of seats and, thus, the airline could not have known what assistance she might need during the three-hour flight.

"Consequently, based upon plaintiff's condition as it appeared to the airline on February 1, we do not believe that defendant abused its discretion in refusing to transport plaintiff to New York City at that time."

2. Section 504 of the Rehabilitation Act of 1973

The safety issue also was raised in suits brought by disabled travelers under section 504 of the Rehabilitation Act of 1973. Attempts to use the Rehabilitation Act to change airline procedures were ultimately unsuccessful however, because courts found that the Act did not apply to airlines as they were not direct recipients of federal funds.

For example, in Anderson v. USAir, Inc., a blind passenger alleged that USAir discriminated against him in violation of section 504 by excluding him from his assigned seat in the exit row. The court found section 504 applicable to USAir by designating "air travel" as a program
receiving federal financial assistance. \[^{340}\] It held that the airline had not violated section 504, however, because the seating requirement was based on safety concerns relating to blind persons' ability to perform emergency exit tasks and thus it was not discriminatory. \[^{341}\]

Other courts, however, never reached the safety question because they held section 504 did not apply to commercial air carriers. They stated that section 504 applied only to direct recipients of federal financial assistance and rejected contentions that indirect subsidies such as technical assistance, airport construction funding, air traffic controllers, or government mail contracts were sufficient to trigger the Rehabilitation Act's protections. \[^{342}\] The Supreme Court ultimately adopted this position in *United States Department of Transportation v. Paralyzed Veterans of America*. \[^{343}\] The Court held that section 504 only applied to "those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds." \[^{344}\] Thus, although it applied to the airport operators who received federal funds, section 504 did not apply to commercial airliners.

3. Air Carrier Access Act of 1986

   a. Cases Deciding Whether Air Carriers Have Violated the ACAA

Within months of the *Paralyzed Veterans of America* decision, Congress enacted a statute designed to overturn it. The Air Carrier Access Act (ACAA) \[^{345}\] states:

   In providing air transportation, an air carrier may not discriminate against an otherwise qualified individual on the following grounds:

   (1) the individual has a physical or mental impairment that substantially limits one or more major life activities[;]

   (2) the individual has a record of such an impairment[;]

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340.  *See id.* at 1194.
341.  *See id.* at 1195.
344.  *Id.* at 606.
(3) the individual is regarded as having such an impair-
ment.\textsuperscript{346}

This broad prohibition of different treatment for disabled passengers is
tempered, however, by statements about safety concerns in both the
ACAA's legislative history and the language authorizing the Secretary of
Transportation to implement the law through regulations.\textsuperscript{347} Senator
Robert Dole, the principal author of the bill, said that "[o]ur intent . . . is
that so long as the procedures of each airline are safe as determined by
the FAA, there should be no restrictions placed upon air travel by handi-
capped persons. Any restrictions that the procedures may impose must
be only for safety reasons found necessary by the FAA."\textsuperscript{348} Also, the
ACAA directed the Secretary of Transportation to "promulgate regula-
tions to ensure non-discriminatory treatment of qualified handicapped
individuals consistent with safe carriage of all passengers on air carri-
ers."\textsuperscript{349} These regulations\textsuperscript{350} have been the subject of repeated litigation.

Prior to the issuance of the ACAA regulations, one court found that
an airline violated the Department of Transportation's [DOT] existing
regulations when it denied Polly Tallarico, a fourteen-year-old with cere-
bral palsy, the right to board a plane unaccompanied by an attendant be-
cause her condition impaired her ability to walk and talk.\textsuperscript{351} The airline
argued that the ACAA did not apply because Tallarico did not meet the
definition of an "otherwise qualified handicapped individual[]" under the
regulations in effect at that time,\textsuperscript{352} which required that the passenger be
willing and able to comply with reasonable requests of airline
personnel or, if not, is accompanied by a responsible adult pas-
senger who can ensure that the requests are complied with. A
request will not be considered reasonable if:

(i) It is inconsistent with this part; or

(ii) It is neither safety-related nor necessary for the provision
of air transportation.\textsuperscript{353}

\textsuperscript{346} 49 U.S.C. § 41705.
\textsuperscript{347} See Air Carrier Access Act of 1986, 100 Stat. 1080 (authorizing secretary); 132
CONG. REC. S11784, S11786 (1986) (legislative history).
\textsuperscript{348} 132 CONG. REC. S11784, S11786 (1986) (statement of Senator Dole).
\textsuperscript{349} Air Carrier Access Act of 1986, 100 Stat. 1080.
\textsuperscript{350} Nondiscrimination on the Basis of Handicap in Air Travel, 14 C.F.R. pt. 382
\textsuperscript{351} See Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 568 (8th Cir. 1989).
\textsuperscript{352} See id. at 569.
\textsuperscript{353} 14 C.F.R. § 382.3(c)(3) (1988) (amended in 1990), cited in Tallarico, 881 F. 2d at
569. The legislative history of the ACAA stated that the definition of "otherwise qualified
handicapped individual" in the regulations to be issued was to be consistent with the De-
The court, however, found that Tallarico satisfied this definition because she could crawl, had normal intelligence, and was capable of communicating her needs through communication devices. She could fasten her own seatbelt and put on an oxygen mask, and her mother testified that Tallarico “could crawl to the bathroom (and, presumably, an exit) on the plane if necessary.”

In Price v. Delta Airlines, Inc., however, the court held there were material issues of fact precluding summary judgment on whether an airline violated the ACAA by removing a passenger with AIDS because of the odor emanating from bandaged lesions on his legs. Gregory Price was flying from Burlington, Vermont to Miami, Florida to keep a doctor's appointment. Price’s condition made it difficult for him to walk, and required him occasionally to use a wheelchair. The lesions were ulcerated, infected, and needed periodic cleansing to control the odor from the draining wounds. Price’s mother accompanied him on the flight; she requested a wheelchair for Gregory, but did not mention his illnesses or why he needed a wheelchair. Price died in Vermont four weeks after the events which formed the basis for the lawsuit.

Though designated a Delta flight, Comair Airlines was the Prices’ operating airline. Price boarded the plane without incident in Burlington and stayed on the plane during a thirty to forty-five minute layover in Manchester, New Hampshire, while his mother and other passengers got off. During the layover, a flight attendant reported to the pilots that she felt nauseated because of an odor from one of the passengers. The captain, co-pilot, and gate agent walked through the plane, and all agreed that the smell was nauseating.

The captain decided to have Price removed from the plane, and one of the pilots radioed the terminal for a customer service agent. The captain told the agent he would not take off with the passenger who was producing the odor on board. The agent asked the captain for written documentation, which was provided. The other passengers now had reboarded the plane, and, apologizing for the inconvenience, the captain announced to them, that they were going to have to deplane again so the

354. See Tallarico, 881 F.2d at 569.
355. Id.
357. See id. at 228-29, 232 (discussing factual setting).
358. See id. at 228-29.
359. Id. at 229 (citation omitted).
crew could "'take care of something on the airplane.'"\textsuperscript{360} Price and his mother were the last passengers off the plane because they had to wait for a wheelchair to arrive. They were taken into the terminal, and when the flight was called for reboarding, the person pushing the wheelchair went in the opposite direction from the other passengers. When Price's mother questioned his actions, his only response was that "he was just doing his job."\textsuperscript{361}

The Prices were taken to the ticket counter where the gate agent told them they were being removed from the plane because of the odor. Price explained that he had cancer, and that the draining wounds on his legs caused the odor. The agent told the Prices that there were no flights until the next day. The airline put them up in an inexpensive motel and paid for their meals. The Prices returned to the airport the following morning, boarded a flight, and arrived in Florida without incident.\textsuperscript{362}

After her son's death, Price's mother sued under the ACAA, alleging that Delta and Comair had violated a regulation that barred carriers from denying transportation to a qualified individual with a disability "'solely because the person's disability results in appearance or involuntary behavior that may offend, annoy, or inconvenience crewmembers or other passengers.'"\textsuperscript{363} Delta and Comair denied the charge, stating that the pilot had Price removed because of a concern for flight safety as allowed by statute and regulation.\textsuperscript{364} A flight attendant had reported to the pilot that she felt nauseated because of the odor, and might not be able to perform her duties.\textsuperscript{365} The pilot personally confirmed that there was a "sickening" odor and stated in his deposition that he denied Price trans-

\textsuperscript{360} Id. (citation omitted).
\textsuperscript{361} See id.
\textsuperscript{362} See id.
\textsuperscript{363} Id. at 230, 233 (quoting 14 C.F.R. § 382.31(b) (1998)). Section 382.7(a) prohibits a carrier from:

\begin{quote}
Discrimin\[ing\] against any otherwise qualified individual with a disability, by reason of such disability, in the provision of air transportation;" [or] (3) Exclud\[ing\] a qualified individual with a disability from or deny\[ing\] the person the benefit of any air transportation or related services that are available to other persons, . . . except when specifically permitted by another section of this part . . .
\end{quote}

14 C.F.R. §382.7(a) (1998).

In addition, Section 382.31(a) further bars a carrier from refusing to provide transportation to a qualified individual with a disability on the basis of the disability. See 14 C.F.R. § 382.31(a).

\textsuperscript{364} See Price, 5 F. Supp. 2d at 233; see also 49 U.S.C. § 44902(b) (1994) (allowing refusal to carry); 14 C.F.R. § 382.31(d) (allowing refusal to carry to avoid violation of Federal Aviation Regulations).

\textsuperscript{365} See Price, 5 F. Supp. 2d at 233.
portation until he "'could get [him]self cleaned up,'" because his odor "'posed a safety threat to the flight crew.'"

Price's mother, however, pointed to the flight attendant's in-flight report that did not mention flight safety, although it did report her nausea. The flight attendant's primary worry seemed to be the other passengers' comfort. Price's mother also cited the gate agent's testimony that the captain never mentioned anything about flight safety and said his main reason for removing Price from the flight was because the offensive odor was making the other passengers ill.

On these facts, the court held that the reason for removing Price from the Comair flight was disputed. More specifically, there was a dispute whether Price's condition resulted in an odor that he could not regulate or whether the odor resulted from insufficient attention to his wounds. Therefore, the court denied summary judgment on the ACAA claim.

In *Adiutori v. Sky Harbor International Airport*, however, the court held that the defendants had not violated the ACAA where the plaintiff had not given notice of the extent of his alleged need for assistance. Larry Adiutori sued after suffering a heart attack on a USAir flight en route to Pittsburgh from Phoenix. He alleged the heart attack resulted from a failure by two airlines, an airport authority, and a skycap service to provide him with proper assistance in traveling the one and one-half miles between terminals at the Phoenix airport. Adiutori was seventy-three years old, five feet, three inches tall, weighed over 300 pounds, and had severe arthritis in both knees. He could walk short distances only with the assistance of two canes.

Adiutori's daughter had made his travel arrangements with USAir. He and his wife originally were booked on a direct flight from Tucson to Pittsburgh with a touchdown in Phoenix. The Tucson-to-Phoenix portion of the flight was canceled, however, and USAir arranged for the Adiutoris to take an America West flight to Phoenix where they would switch to their scheduled flight to Pittsburgh. This arrangement required the Adiutoris to travel between the America West and USAir terminals in Phoenix, which were located approximately one and one-half miles apart. Adiutori's daughter spoke to both USAir and America West officials in Tucson to arrange for a wheelchair to be waiting for him in Phoe-

366. *Id.* (quoting Dobbins Dep. at 50, 55, 56).
367. See *id.* at 233-34.
368. See *id.* at 234.
369. 103 F.3d 137 (Table), No. 95-15774, 1996 WL 673805, at *1 (9th Cir. Nov. 20, 1996).
370. See *id.* at *1, *3.
As requested, a wheelchair was waiting in Phoenix. Adiutori and his wife were met by a skycap from Ogden Aviation Services, International who pushed him in the wheelchair to a shuttle bus stop for the trip to the USAir terminal. When they reached the bus stop, the skycap allegedly asked Adiutori to get out of the wheelchair. Adiutori did so without any assistance, and did not say anything about having to leave the wheelchair behind or suggest that it might be a problem. 372

Adiutori stood against a wall at the bus stop because there were no seats available. He supported himself with his two canes, “which caused him some back pain.” 373 A “somewhat elderly woman” offered Adiutori her seat but he refused because “it was a woman, and she was a little elderly, and I can stand the pain.” 374 He did not request a seat from anyone else because he said he was “very independent.” 375 A regular (i.e., non-handicapped accessible) shuttle bus arrived approximately twenty minutes later. 376 Adiutori did not ask the shuttle bus driver for assistance and climbed the three large steps when getting on and off the bus. 377 At his deposition, Adiutori stated that he did not ask anyone for help because “[he didn’t] need any help.” 378

When Adiutori arrived at the USAir terminal, he asked for a wheelchair and was taken into the terminal where he and his wife waited for their flight. They got on the flight without any other difficulties. 379 During the flight, approximately five hours after he had struggled on and off the bus, Adiutori experienced chest pains and shortness of breath. 380 He was transported to a hospital by ambulance and doctors determined that he had suffered a heart attack. 381

Adiutori sued, contending that “leaving him at the shuttle bus stop unattended and forcing him to negotiate the three steps up to the bus without assistance” was a breach of the airlines’ duties under the ACAA. 382

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371. See id. at *1.
372. See id.
373. Id. at *2.
374. Id. (internal quotations omitted).
375. Id. (internal quotations omitted).
376. See id.
377. See id. The Adiutories had not requested a handicapped accessible shuttle bus. See id.
378. Id. (internal quotations omitted).
379. See id.
380. See id.
381. See id.
382. Id. at *3. “Specifically, he claimed that America West’s failure to provide the re-
The court rejected this claim, finding that Adiutori was able to ask for assistance when he felt he needed it, but he never asked the skycap, any airline official, or the shuttle bus driver for the use of a wheelchair-accessible bus or for assistance in boarding the non-accessible bus. When asked in his deposition why he had not done so, he testified that he was “not the complaining type,” was “too independent for that,” “ask[s] nothing from nobody,” and that he would not ask for “charity and help” no matter how difficult a situation he was in “even if it kills [him].” He also specifically testified that even if the skycap had stayed, he would not have asked for help boarding the bus, and admitted that he refused two separate offers of help from fellow passengers. The court held that it was reasonable for the skycap to leave when Adiutori failed to inform him that he wanted the wheelchair to remain. “Given that [Adiutori] was able to walk with the assistance of his two canes, albeit slowly, and that he made no objection to the skycap leaving, we find that [Adiutori] has failed to show that America West has breached its duty to provide requested assistance under the ACA.”

Requested assistance violated 14 C.F.R. §382.39(a) and that USAir’s failure to adequately assist America West in providing the accommodation breached 14 C.F.R. § 382.33(f).” Id. (footnotes omitted) Section 382.39(a) provides that

[carriers shall ensure that qualified individuals with a disability are provided the following services and equipment:
(a) Carriers shall provide assistance requested by or on behalf of qualified individuals with a disability, or offered by air carrier personnel and accepted by qualified individuals with a disability, in enplaning and deplaning. The delivering carrier shall be responsible for assistance in making flight connections and transportation between gates.
(1) This assistance shall include, as needed, the services personnel and the use of ground wheelchairs, boarding wheelchairs, on-board wheelchairs where provided in accordance with this part, and ramps and mechanical lifts.

Section 382.33(f) provides that

[i]f a qualified individual with a disability provides advance notice to a carrier, and the individual is forced to change to the flight of a different carrier because of the cancellation of the original flight or the substitution of inaccessible equipment, the first carrier shall, to the maximum extent feasible, provide assistance to the second carrier in providing the accommodation requested by the individual from the first carrier.

Id. 14 C.F.R. § 382.33(f).

383. See Adiutori, 103 F. 3d 137, 1996 WL 673805, at *3.
384. Id. (internal quotations omitted).
385. See id.
386. Id. The court reached a similar ruling for USAir. See id. at *4. Adiutori argued that USAir breached its duty by only informing America West that he required “wheelchair assistance,” rather than telling America West that he was “wheelchair dependent” and required “complete service between terminals.” Id. The court noted that although Adiutori’s daughter had identified him as “wheelchair dependent” when she spoke to her
b. Discussion: Airlines Must Undertake an Individualized Assessment of Passengers' Conditions and Clearly Articulate Safety Concerns Before Refusing to Board Passengers but Only Need to Make Accommodations for Which They Have Notice

The decisions on liability under the ACAA and earlier civil right statutes are a positive step because they clearly reject the presumption that travel agent she had only requested "wheelchair assistance" when she spoke with USAir. See id. USAir gave this information to America West, and the court held it had no further duty under the ACAA. See id.

Adiutori conceded on appeal that the city and skycap company were not "air carriers" and thus not subject to the ACAA. See id. at *3 n.3. This concession probably was triggered by the decision in Wilson v. United Air Lines, No. 94 C 5411, 1995 WL 530653 (N.D. Ill. Sept. 7, 1995), where the court held that a company which contracted with United to provide wheelchair services at several airports was not covered under the ACAA because it was not an "air carrier." See Wilson, at *1, *3.

The court relied on case law applying the Federal Aviation Act which found that a company could be covered as an "indirect air carrier" if it [held] itself out to the public that it engage[d] in air transportation; 2) [sold] flights to the general public; 3) furnish[ed] flights otherwise not serviced by regularly scheduled airlines; or 4) solicit[ed] members of the general public to purchase tickets on the flights it arrange[d].

Wilson, 1995 WL 530653 at *2 (citations omitted).

The court held that ITS did not satisfy the definition of an "indirect air carrier." See id. at *3. It stated that the earlier cases "support[ed] the proposition that 'indirect air carriers' function[ed] as providers of travel arrangements or flight transportation in exchange for fees, [and were] perceived by the public as providing air transportation." Id. ITS, however, "only provides wheelchair services at certain airports based on contracts with specific airlines." Id.

The court in Bower v. Federal Express Corp., 96 F.3d 200 (6th Cir. 1996), however, held that an all-cargo carrier was an "air carrier" within the meaning of ACAA where it provided its employees with the fringe benefit of riding "jumpseat" - flying free using the limited passenger seating available on its cargo flights. See Bower, 96 F.3d at 202, 204.

In reaching this conclusion, the court specifically rejected FedEx's argument based on a regulation defining "qualified handicapped individual." See id. at 206, 209.

FedEx argued that "the definition of 'qualified handicapped individual' given in § 382.5 strongly implie[d] that only passenger airlines can be termed 'air carriers.'" Bower, 96 F.3d at 206.

The Sixth Circuit rejected this analysis. See id. at 207. The court stated that [t]o the extent ... the definition of "qualified handicapped individual" in § 382.5 impliedly excluded FedEx from being an "air carrier" for the purposes of § 41705, that regulation [was] not entitled to Chevron deference because it [was] outside the plain meaning of § 41705, given the statutory definitions associated with that provision ... clearly cover[ed] cargo carriers.

Id. at 208. In addition, Bower's counsel had produced an uncontradicted affidavit stating that DOT's Office of General Counsel for Litigation maintained that FedEx was covered by the ACAA. See id. at 208. Thus, "even DOT does not seem to interpret its own regulations in the way FedEx does." Id. But see Squire v. United Airlines, Inc., 973 F. Supp. 1004, 1009 (D. Colo. 1997) (holding that the ACAA applied only to airline customers, and not to job applicants).
disabled people are incompetent to travel alone. At the same time, they balance the interests of people with disabilities with those of the air carriers and other passengers. The key to whether the ACAA’s protections are truly effective will be the standard used in determining whether airlines have properly balanced those interests.

Decisions applying the FAA’s anti-discrimination provision stated that courts should look to whether an airline’s decision was “arbitrary, capricious or irrational” based on the facts and circumstances known by the carrier at the time. One commentator noted, however, that this test did not offer much protection to disabled travelers. “This standard requires only minimal investigation by the air carrier since critical decisions often must be made within minutes.”

Courts applying the ACAA have yet to articulate a standard for reviewing airlines’ discretionary decisions to refuse to serve passengers with disabilities. The decisions in Tallarico and Price, however, seem to indicate that airlines must meet the higher burden of undertaking an individualized assessment to determine if it is safe for the person with a disability to fly. This stricter standard is consistent with ADA regulations that require the determination that an individual poses a “direct threat” be based on an “individualized assessment” that relies on “the most current medical knowledge and/or on the best available objective evidence.” Courts have rejected direct threat defenses where employers have not performed an individual assessment.

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389. 29 C.F.R. § 1630.2(r) (1998); see also H.R. REP. NO. 101-485, pt. 3, at 45 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 468 (“The purpose of creating the ‘direct threat’ standard is to eliminate exclusions which are not based on objective evidence about the individual involved.”).

390. See DiPol v. New York City Transit Auth., 999 F. Supp. 309, 316 (E.D.N.Y. 1998) (holding that reports by an employer’s physicians failed to establish that an employee with diabetes posed a safety risk or a “direct threat” to others where the physicians did not consider whether the employee “ever had any diabetes-related problems on the job in the past . . . and [did] not perform[] an individual assessment of [his] condition to determine whether it posed a direct threat”); EEOC v. Union Pacific R.R., 6 F. Supp. 2d 1135, 1138-39 (D. Idaho 1998) (holding that employer, which failed to perform an individualized assessment to establish that an employee’s monocular vision posed a direct threat to the safety of others, violated the ADA by removing him from his driving position in a rail yard because the employer merely speculated that the employee’s vision contributed to an accident in the rail yard, and a management employee testified that company rules did not prohibit monocular-sighted drivers); EEOC v. Chrysler Corp., 917 F. Supp. 1164, 1171
plying the ACAA should explicitly adopt this individualized assessment standard because the arbitrary and capricious rule can be so easily satisfied that it undermines the purpose of the statute.

The notice requirement as seen in *Adiutori* is again consistent with both common sense and case law interpreting the civil rights statutes. Air carriers only can provide the accommodations they know about, and people with disabilities who decline assistance when offered should not later be heard to claim that accommodations were inadequate.

c. Availability of Emotional Distress and Punitive Damages under the ACAA

Proving a carrier violated the ACAA regulations could result in a Pyrrhic victory, however, given the limitation on damages found by some courts. The *Tallarico* court recognized a private right of action under the (E.D. Mich. 1996) (holding that doctor's report on a job applicant's diabetes was insufficient to support the determination that he was a "direct threat" to the health or safety of other workers at an automobile plant when the doctor conducted blood tests but did not ask the applicant about "his past or current health . . . [or] whether he [had been] experiencing any diabetes-related complications, . . . [and] restricted his ability to work, assuming that he would suffer from dizziness, fainting, or convulsions, [but] did not ask him if he had ever experienced these conditions while he worked as an electrician for twenty-five years"). *But see* EEOC v. Exxon Corp., 967 F. Supp. 208, 211 (N.D. Tex. 1997). That case stated that

an employer need not satisfy the direct threat test via individualized assessment if that employer can prove that it is impossible or impractical to individually assess each employee affected by the [company] policy. However, . . . [the employer] must still satisfy the direct threat test by showing that the group affected by the policy constitutes a significant risk of substantial harm to themselves or others that cannot be reduced or eliminated by reasonable accommodation.

*Id.* at 211.
ACAA and subsequent cases have concurred. They have disagreed, however, on whether the ACAA allows damages for emotional distress and/or punitive damages.

In *Tallarico*, the jury awarded Polly and her parents $80,000. The district court, however, granted a JNOV in favor of TWA as to $78,650 of the damages award. It concluded that $1,350 was for out-of-pocket damages as a result of TWA’s refusal to allow Tallarico to board and the remainder was for emotional distress. The district court held that because the ACAA was an anti-discrimination statute, “as a matter of law, emotional distress damages were not recoverable for violations of the

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391. See *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566, 570 (8th Cir. 1989). The *Tallarico* court applied the analysis of implied private rights of action adopted by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975). See *Tallarico*, 881 F.2d at 568. In *Cort*, the Court listed four relevant factors to determine whether a statute implies a private remedy:

- First, is the plaintiff “one of the class for whose especial benefit the statute was enacted”—that is, does the statute create a federal right in favor of the plaintiff?
- Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

*Cort*, 422 U.S. at 78 (citations omitted), quoted in *Tallarico*, 881 F.2d at 568. As discussed above, the *Tallarico* court found that the plaintiff was a qualified individual with a disability and thus satisfied the first factor of the *Cort* test: she was a member of the class for whom the statute was enacted. See *Tallarico*, 881 F.2d at 569. It found the second factor on legislative intent was satisfied because the ACAA was enacted to overturn the holding in *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986) “that § 504 of the Rehabilitation Act of 1973 applies only to those commercial airlines receiving direct federal subsidies.” *Tallarico*, 881 F.2d at 569-70 (citations omitted). The court said that this legislative history and the fact that the ACAA was patterned after the Rehabilitation Act of 1973, which [had] been held to imply a private cause of action, demonstrated that “Congress implicitly intended that handicapped persons would have an implied private cause of action to remedy perceived violations of the [ACAA].”

*Id.* at 570 (quoting Tallarico v. Trans World Airlines, Inc., 693 F. Supp. 785, 789 (E.D. Mo. 1988)). Finally, the court found that the third and fourth factors of *Cort* were satisfied because allowing a private cause of action was consistent with the underlying purposes of the ACAA... [and] the area of discrimination against handicapped persons by air carriers was not an area which was basically the concern of the states.” *Id.*

392. See *Adiutori v. Skywest Int’l Airport*, 103 F.3d 137 (Table), No. 96-15774 1996 WL 673805, at *1, *3 (9th Cir. Nov. 20, 1996); *Shinault v. American Airlines, Inc.*, 936 F.2d 796, 800 (5th Cir. 1991) (stating that the provision of a private cause of action is implied in the ACAA).

It supported this decision by citing cases that disallowed emotional distress damages under other anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973.

The Eighth Circuit reversed, stating that the district court was incorrect in determining that all anti-discrimination statutes disallowed emotional distress damages. It noted that the Supreme Court had held mental and emotional distress damages were available under 42 U.S.C. § 1983, and lower courts had allowed them under 42 U.S.C. § 1982 and the Fair Housing Act. The Eighth Circuit found that the ACAA's "purpose and operation ... [were] more closely analogous to section 1983 than to Title VII, the ADEA and the Rehabilitation Act" and concluded that emotional distress damages were allowable under the ACAA. It also found that the Tallaricos had produced sufficient evidence to support an award for such damages through testimony from Tallarico's mother, her father, the assistant director for her school, and the driver who was with her when the incident took place.

The court, however, did not address the question of whether punitive damages were allowed under the ACAA. It stated that punitive damages are only available where the "defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or reckless disregard" for the plaintiff's rights, and found that the Tallaricos had failed to produce sufficient evidence to meet this standard.

The court in Shinault v. American Airlines, Inc. reached similar rulings on the emotional distress and punitive damages questions. In Shinault, a quadriplegic passenger was denied the right to board a plane due
to a time constraint. The court agreed with the result reached by the Eighth Circuit in Tallarico on the emotional distress issue, but "travel[ed] there on a different road." The Shinault court said it found "attempts to 'match' federal antidiscrimination statutes both complex and unilluminating," and "f[e]ll back on a well-established canon of statutory construction: 'The existence of a statutory right implies the existence of all necessary and appropriate remedies.' It found this rule applicable because there was no evidence of any "congressional intent to deny or limit private remedies under the ACA." The Shinault court also noted that the Supreme Court, in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, held that plaintiffs were entitled to "money damages for any injuries . . . suffered." Likewise, in Davis v. Passman, the Court stated, "if petitioner is able to prevail on the merits, she should be able to redress her injury in damages.

The Shinault court stated that, although Bivens and Davis involved constitutional rights, the same reasoning had been applied to statutory rights. Accordingly, it concluded that "the ACA allows recovery of compensatory damages, including damages for emotional distress." It also held, however, that it need not determine whether punitive damages were available under the ACA because "Shinault d[id] not allege the type of wanton and malicious conduct necessary to recover punitive damages."

See id. at 798-99.
405. Id. at 804.
407. Id.
408. 403 U.S. 388 (1971).
409. Shinault, 936 F.2d at 805 (quoting Bivens, 403 U.S. at 397).
410. 442 U.S. 228 (1979).
411. Shinault, 936 F.2d at 805 (quoting Davis, 442 U.S. at 248).
412. See id. (citing J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); Burr by Burr v. Ambach, 863 F.2d 1071, 1078 (2d Cir. 1988); Miener v. Missouri, 673 F.2d 969, 977-78 (8th Cir. 1982)).
413. Id.
414. Id. The court in Gee v. Southwest Airlines, 110 F.3d 1400 (9th Cir.), cert. denied, 118 S. Ct. 301 (1997), overruled on other grounds, Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1260 (9th Cir. 1998) (en banc), held that even if punitive damages were available as a matter of law under the ACA, plaintiff Jan Rowley had not alleged the type of wanton or malicious conduct required to recover them. See Gee, 110 F.3d at 1408. The Gee court noted that, under former section 404 of the FAA, it had limited the availability of punitive damages to discrimination inflicted "wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations." Id. (internal quotations omitted) (quoting Hingson v. Pacific Southwest Airlines, 743 F.2d
The court in *Americans Disabled for Accessible Public Transportaion v. SkyWest Airlines, Inc.* however, held that both emotional distress and punitive damages were not available under the ACAA. It noted that such damages were unavailable under the Rehabilitation Act, and quoted the district court decision in *Shinault*:

> It is clear from the legislative history that the ACAA was promulgated in response to the decision of the Supreme Court in *Paralyzed Veterans* which declined to extend coverage under the Rehabilitation Act to private air carriers. It is therefore difficult to imagine that Congress intended to provide remedies of a different nature under the ACAA than are recoverable under section 504 of the Rehabilitation Act.

> ... because the ACAA is *in pari materia* with the Rehabilitation Act, it follows that Congress intended to exclude the same remedies for both acts. Plaintiffs' claims for punitive and emotional distress damages for alleged violations of the ACAA are dismissed.

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1408, 1412 (9th Cir. 1984) (citations omitted)).

Rowley claim[ed] that [the airline] failed to provide her an aisle chair on four separate occasions and twice failed to return her motorized scooter to her at the plane. As a result [of the airline's violations], she had to walk... by holding onto seat backs and overhead compartments, approximately ten feet to and from her seat. Rowley claim[ed] that no crewmember offered to help her, although one employee did offer her a glass of water and another told her that what she was holding onto was unstable. [The court found that] while American's conduct was regrettable and in violation of ACAA, it simply [did] not rise to the level of wanton or malicious conduct that could support punitive damages.

*Id.*


416. See *id.* at 325, 327 (citing Marshburn v. Postmaster General, 678 F. Supp. 1182, 1184-85 (D. Md.), aff'd, 861 F.2d 265 (4th Cir. 1988) (holding that, in an employee's discrimination claim, no damages for pain and suffering may be recovered under Title VII and the Rehabilitation Act); Shuttleworth v. Broward County, 649 F. Supp. 35, 38 (S.D. Fla. 1986) (holding that damages for mental suffering or humiliation were not recoverable in an employment action under section 504 of the Rehabilitation Act); Martin v. Cardinal Glennon Mem'l Hosp. for Children, 599 F. Supp. 284, 284 (E.D. Mo. 1984)).


d. Discussion: Emotional Distress and Punitive Damages Should Be Available Under the ACAA Because Courts Have Held that a "Full Panoply" of Legal Remedies Are Available Under the Statute on Which It Is Based

The argument that compensatory and punitive damages are not available under the ACAA because they were not available under the Rehabilitation Act has been effectively refuted by a Supreme Court decision involving a statute and subsequent cases applying that decision to the Rehabilitation Act. In Franklin v. Gwinnett County Public Schools\(^4\) the Court held that damages were available under Title IX of the Education Amendments of 1972 which bars sex discrimination by federal fund recipients.\(^4\) In doing so, the Franklin Court noted that, in Guardians Association v. Civil Service Commission\(^4\) "a clear majority [of the Justices] expressed the view that damages were available under Title VI [of the Civil Rights Act of 1964] in an action seeking remedies for an intentional violation."\(^4\) This determination is important because of the Rehabilitation Act states that the remedies available for violations of section 504 are the same as those set forth in Title VI.\(^4\) Accordingly, courts following Franklin have held uniformly that compensatory damages, including ones for mental injuries, are available under section 504 where the plaintiff can show intentional discrimination.\(^4\) And, while courts remain split on the availability of punitive damage claims under section 504, the clear majority allow them.\(^4\)

\(^{419}\) 503 U.S. 60 (1992).
\(^{420}\) See id. at 76; see also 20 U.S.C. §§ 1681-88 (1994).
\(^{421}\) 463 U.S. 582 (1983).
\(^{422}\) Franklin, 503 U.S. at 70.
\(^{423}\) See 29 U.S.C. § 794(a).
\(^{424}\) See, e.g., W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995) (holding that a mother of a disabled child may recover damages directly under section 504 if she proves that the school officials intentionally discriminated against her child); Rodgers v. Magnet Cove Pub. Schs., 34 F.3d 642, 645 (8th Cir. 1994) (holding that money damages are available under section 504 if an individual is discriminated against by any program receiving federal financial assistance); Waldrop v. Southern Co. Svs., 24 F.3d 152, 157 n.5 (11th Cir. 1994) (holding that the remedies available under Title IX and Title VI are also available to discrimination actions under section 504); Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 830-31 (4th Cir. 1994) (holding that the similarity between Title IX and section 504 requires the allowance of damages if intentional discrimination is shown).
In reaching these decisions, the courts have used broad language, holding that the “full spectrum”\(^{426}\) or “full panoply”\(^{427}\) of legal and equitable remedies are available under section 504. The same should be true under the ACAA, which was passed to extend section 504’s duties to air carriers that did not receive federal funds. It would make little sense for a statute passed to broaden the application of another to have weaker remedies. Accordingly, emotional distress and punitive damages should be allowed under the ACAA.\(^{428}\)

\(^{426}\) Rodgers, 34 F.3d at 644.

\(^{427}\) Waldrop, 24 F.3d at 157; Pandazides, 13 F.3d at 832.

\(^{428}\) Citing section 504 cases, the courts allowing damages under the ACAA have held that the plaintiff must prove intentional discrimination. Courts interpreting Title II of the ADA, 42 U.S.C. § 12133 (1994), which specifically adopts the enforcement mechanism used in § 504 cases, have reached similar holdings. See Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998) (holding that intentional discrimination must be shown in or-
III. CONCLUSION

The three decades since tenBroek's article arguing that tort law should recognize people with disabilities' right to live in the world have seen a dramatic change in the statutory approach to disability. Instead of using the "medical model" and treating it as a problem to which the disabled must adapt in order to join society, Congress now has adopted the "civil rights" model, which says that society must adapt and accommodate people with disabilities. This same policy should be applied in tort cases.

In negligence actions involving blind pedestrians injured by unprotected hazards, courts should avoid focusing solely on whether the blind person was using an assistive device; instead, the courts should evaluate liability with an understanding that property owners and people with disabilities have "correlative" obligations. Specifically, landowners have an obligation to foresee that people with disabilities are able to use the streets or access their property, and must take steps to warn these people of unprotected hazards. Organizations for the blind and other interested groups would be wise not to rely on courts to reach such holdings, however, and should continue working to make sure that the states that have not yet done so pass white cane laws abrogating the common law contributory negligence per se rule.

The almost universal adoption of white cane laws governing the relationship between drivers and disabled pedestrians shows a willingness to recover compensatory damages under Title II of the ADA; Wood v. President & Trustees of Spring Hill College, 978 F.2d 1214, 1219-20 (11th Cir. 1992) (holding that compensatory damages are precluded where discrimination is unintentional, but are permissible if discrimination is intentional); Tafoya v. Bobroff, 865 F. Supp. 742, 749-50 (D.N.M. 1994) (stating that every court has imposed the burden of alleging intentional discrimination as a prerequisite to damages recovered under the Rehabilitation Act or § 12133 of the ADA), aff'd mem., 74 F.3d 1250 (10th Cir. 1996); Tyler v. City of Manhattan, 849 F. Supp. 1442, 1444-45 (D. Kan. 1994) (holding that the plaintiff could not recover compensatory damages because he did not allege that intentional discrimination caused the emotional distress, mental anguish and humiliation), aff'd on other grounds, 118 F.3d 1400, 1403 (10th Cir. 1997); Miller v. Spicer, 822 F. Supp. 158, 168 (D. Del. 1993) (holding that monetary damages may be recovered for intentional violations of section 504 of the Rehabilitation Act). But see Ferguson 157 F.3d at 676-80 (Tashima, J., dissenting) (arguing that Title II does not require plaintiffs to prove intentional discrimination); Tyler, 118 F.3d at 1406 (Jenkins, J., dissenting) (same). For a discussion of the different standards courts have used to determine if an act is "intentional," as well as an argument that Title II does not require intent for compensatory damages because Congress enacted it pursuant to the Commerce Clause and the Fourteenth Amendment rather than the Spending Clause like section 504, see Leonard J. Augustine, Jr., Note, Disabling the Relationship Between Intentional Discrimination and Compensatory Damages Under Title II of the Americans with Disabilities Act, 66 GEO. WASH. L. REV. 592, 599-605, 607-12 (1998). The ACAA was also enacted pursuant to the Commerce Clause, 132 Cong. Rec. S11784, S11785 (daily ed. Aug. 15, 1986), and the arguments regarding Title II in the dissents of Ferguson, Tyler, and Augustine's article would be equally applicable to it.
apply the "civil rights" model to tort law. Requiring drivers to take special precautions when approaching disabled pedestrians that are using canes or guide dogs is an excellent example of how society can adapt in order for disabled pedestrians to enjoy equal access to the streets. Drivers cannot be expected to make this accommodation, however, without notice of a pedestrian's disability, and disabled pedestrians should still be required to proceed in a prudent manner. Thus, white cane laws should not be read to create strict liability or bar a comparative negligence claim.

State access statutes and the ADA have effectively eradicated the presumption that disabled people are incompetent to travel alone on common carriers. The common law requirement that common carriers accommodate passengers with disabilities has been and should be maintained. The notice requirement for such assistance should be maintained as well. It does not interfere with the policy of integrating people into society, because a carrier cannot be expected to make accommodations for a disability unless its employees know of its existence.

Recent Supreme Court precedent on ERISA's preemption provision undermines the position that courts applying the Airline Deregulation Act should attempt to determine the narrow question of whether a tort action "relates to" an airline's services. Tort actions against airlines by people with disabilities should not be preempted because they do not interfere with the Airline Deregulation Act's purpose of preventing state regulation of air carriers.

The Air Carrier Access Act requires airlines to undertake an individualized assessment to determine whether it is safe for a person with a disability to fly and to clearly articulate those safety concerns at the time of the refusal to board. The requirement that disabled passengers provide air carriers with notice of their disabilities is consistent with both common sense and the case law interpreting the civil rights statutes, because air carriers can only provide accommodations when they know about a person's disability.

The legislative goal of "integrating" people with disabilities into society will never be fully accomplished unless tort law reflects a view that those people have a right to live in the world. Courts should require not only that people with disabilities take precautions for their own protection, but that society acknowledge their existence and make accommodations for them.