

The Right to Live in the World: The Disabled in the Law of Torts[†]

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MOVEMENT, WE ARE TOLD, is a law of animal life. As to man, in any event, nothing could be more essential to personality, social existence, economic opportunity—in short, to individual well-being and integration into the life of the community—than the physical capacity, the public approval, and the legal right to be abroad in the land.

Almost by definition, physical disability in many of its forms entails difficulties in getting about, and this is so quite regardless of the particular surroundings. Such is the case of the cripple, the paraplegic, and the legless. The word “halt” itself is a description of disability in terms of limitation on mobility. Some difficulties in getting about arise out of the conditions of the modern world in combination with the particular disability, as in the case of the deaf person in traffic. However different from what they are widely supposed to be, there are travel problems inherent in blindness and these are to some extent increased, to some extent diminished, by the structures and conditions of modern urban

[†] Author's Note: If 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. He thinks not, however. The fact is that the blind individually and collectively are a very active group of the disabled, if not the most active. If the National Federation of the Blind appears in these pages more often than other organizations and agencies composed of the blind or dealing with their problems, it may be because the author founded that organization in 1940, served as its president for 21 years, and is still an active leader in it. He thinks not, however. The National Federation of the Blind is an aggressive, militant, activist organization of the blind themselves which in a quarter of a century has achieved a great deal, legislatively and otherwise, and has always been in the thick of the fight. If the *Braille Monitor* is cited more often than other magazines, it may be because the author is editor of that journal. He thinks not, however. That journal specializes in information and coverage which have a special relevance to the issues here discussed.

This article is amply flecked with footnotes, citing a wide range of formal materials. The views expressed, the author believes, are verified by his personal experience as a disabled individual far more than by all the footnote references put together.

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life and activities. In its 1962 survey of the characteristics of those receiving federal-state aid to the permanently and totally disabled, the Department of Health, Education and Welfare concluded that twenty-nine per cent are confined to the home because of physical or mental conditions, a conclusion apparently based on the responses of the recipients themselves rather than on medical evidence of physical capacity.¹ Of the roughly 85,000 aid-to-the-blind recipients, presumably the least active segment of the blind population, only 15.9 per cent are so confined.²

The 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. For our purposes, there is no reason to judge these attitudes as to whether they do credit or discredit to the human head and heart. Our concern is with their existence and their consequences.

To what extent do the legal right, the public approval, and the physical capacity coincide? Does the law assure the physically disabled, to the degree that they are physically able to take advantage of it, the right to leave their institutions, asylums, and the houses of their relatives? Once they emerge, must they remain on the front porch, or do they have 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? Are there legal as well as physical adaptations; and to what extent and in what ways are these tied to concepts of custodialism or integrationism?

¹ U.S. Dep't of Health, Educ. & Welfare State Letter No. 747, Table 27, July 2, 1964.

² U.S. Dep't of Health, Educ. & Welfare, State Letter No. 746, Table 32, July 2, 1964. Roughly 40% travel with family members, friends, or paid guides; 13.3% with canes; 1% with dogs; 22.7% travel alone and without a cane. *Ibid.*

I

THE POLICY OF INTEGRATIONISM

A. Integrationism the Answer

It is the thesis of this paper that the answers to these questions to be returned by the courts, other agencies of government, and other public and private bodies should be controlled by a policy of integrationism—that is, a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so—that this policy is now, and for some time has been, the policy of the nation, declared as such by the legislatures of the states and by the Congress of the United States; and that the courts and others are thus bound to use that policy at least as guide, if not as mandate, in reaching their decisions, whatever may be their views as to its desirability or feasibility.

The policy of integrationism is implicitly and explicitly adopted by the nation and by all of the states in the set of laws, agencies and activities known as the Rehabilitation Program. Commenced in several of the states as long ago as 1918 and 1919,³ and given national support by Congress in 1920,⁴ that program has been enlarged in conception and increased in funding by successive legislative amendments,⁵ by the impact of World War II, by pressures from organized groups of the disabled, and by a growing sense of its importance and potentialities.

At the head of the 1965 Rehabilitation Act Amendments stands this declaration: "The Secretary is authorized to make grants as provided in . . . this title for the purpose of assisting States in rehabilitating handicapped individuals so that they may prepare for and engage in gainful employment to the extent of their capabilities, thereby increasing not only their social and economic well-being but also the productive capacity of the Nation."⁶ Specifically, the federal grants are to be made to these states to aid them in meeting the costs of rehabilitation services,⁷ making innovations in those services,⁸ expanding them by planning and initiating special services,⁹ developing a comprehensive rehabilitation

³ *E.g.* Gen. Acts of Mass. 1918, ch. 231, at 201-02; Cal. Stats. 1919, ch. 183, at 273-74; Laws of Ill. 1919, S.B. No. 449, at 534-37; Laws of Minn. 1919, ch. 365, at 389-90; New Stat. 1919, ch. 182, at 329; Laws of N.J. 1919, ch. 74, at 138-44. For a general history of vocational rehabilitation, see OBERMANN, *A HISTORY OF VOCATIONAL REHABILITATION IN AMERICA* (1965).

⁴ 41 Stat. 735.

⁵ 57 Stat. 374 (1943), 68 Stat. 652 (1954), 79 Stat. 1282 (1965).

⁶ 79 Stat. 1282, 29 U.S.C. § 31 (Supp. I, 1965).

⁷ 79 Stat. 1282, 1283, 29 U.S.C. §§ 31-33 (Supp. I, 1965).

⁸ *Ibid.*

⁹ 79 Stat. 1282, 1289, 29 U.S.C. § 34(a) (Supp. I, 1965).

plan in each of the states,¹⁰ and for rehabilitation research,¹¹ demonstration,¹² and training projects.¹³ The federal Vocational Rehabilitation Administration is authorized to conduct research and gather and disseminate information with respect to the abilities, aptitudes and capacities of handicapped individuals, development of their potentialities, and their utilization in gainful and suitable employment.¹⁴ The 1965 Amendments also increase the appropriation for the earlier-created President's Committee on National Employ the Physically Handicapped Week¹⁵ to carry out the function indicated by its title, to stimulate similar committees in the states, and to sponsor the annual event known as "Employ the Handicapped Week."¹⁶ The purpose of the 1965 Amendments, said the House Committee on Education and Labor,¹⁷ is "to provide the physically and mentally disabled persons of this Nation an improved and expanded program of services which will result in greater opportunities for them to more fully enter into the life of our country as active participating citizens."¹⁸

According to the 1964 annual report of the federal Vocational Rehabilitation Administration, in that year 119,000 disabled persons were rehabilitated through this program into productive activity and employment at an expenditure by states and nation of \$133,000,000; 795 research and demonstration projects were conducted at a cost to the government of \$15,179,000; and 447 teaching programs and 3,259 traineeships and research fellowships were granted at a cost of \$16,528,000.¹⁹ Of the rehabilitated persons, over seventy per cent were unemployed when they entered the rehabilitation process, and most of the remainder had low earnings; about 16,000 were recipients of public assistance, and about 5,200 resided in tax-supported institutions.²⁰ With rehabilitation funds, scores of communities and organizations have been aided in the construction of comprehensive rehabilitation centers, special centers for specific disabilities, and clinics in connection with hospitals—all devoted to reducing and preventing dependency and thereby furthering the policy of integrationism.²¹

¹⁰ *Ibid.*

¹¹ 79 Stat. 1282, 1291, 29 U.S.C. § 37(a) (Supp. I, 1965).

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Joint Resolution, 63 Stat. 409 (1949).

¹⁶ 79 Stat. 1282, 1294, 29 U.S.C. § 38 (Supp. I, 1965).

¹⁷ H.R. REP. No. 432, 89 Cong., 1st Sess. (1965).

¹⁸ *Id.* at 2.

¹⁹ 1964 U.S. DEP'T OF HEALTH, EDUC. & WELFARE ANN. REP. 327-29.

²⁰ *Id.* at 329.

²¹ *Id.* at 330, 331.

All of the states receive grants-in-aid from the federal government under the vocational rehabilitation acts and necessarily commit themselves to the implicit and explicit policy of those acts of maximum integrationism for the disabled. In California, for example, an act coordinate to the national act has been in existence since 1919.²² It currently vests state officials "with all necessary powers and authority to cooperate with the government of the United States"²³ and declares: "It is the public policy of the State of California to assist and encourage handicapped individuals to attain their maximum usefulness and self-sufficiency in order that they may make their full contribution to society."²⁴ Other state services and institutions such as the home-teacher-counselor service²⁵ and the Orientation Center for the Blind²⁶ espouse this policy with equal emphasis.

With this very same objective in mind, the public assistance titles of the Social Security Act have been amended: (1) to declare self-support one of the purposes of that act with respect to the blind and the permanently and totally disabled;²⁷ (2) to encourage the provision of services to help recipients attain or retain capability for self-support or self-care or likely to prevent or reduce dependency;²⁸ (3) to permit the blind and disabled to retain, without consequence to their aid eligibility or grant, other income and resources necessary to fulfill a plan for self-support;²⁹ (4) to exempt various amounts of earned income from consideration in determining the amount of the blind and disabled aid grants;³⁰ and, (5) to require that the states provide an incentive for employment giving consideration to any expenses reasonably attributable to the earning of income.³¹ All of these amendments were designed to add new dimensions to the rehabilitative aspects of the public assistance programs.³² From its beginning in 1954, the disability insurance program has contained a declaration that it is "the policy of the Congress that

²² Cal. Stats. 1919, ch. 183, CAL. EDUC. CODE, ch. 10.5.

²³ CAL. EDUC. CODE § 6977.

²⁴ CAL. EDUC. CODE § 6971.

²⁵ CAL. EDUC. CODE § 6209.

²⁶ CAL. EDUC. CODE § 6201-08.

²⁷ 70 Stat. 807, 849 (1956), 42 U.S.C. § 1201, 1351 (1964).

²⁸ 76 Stat. 172 (1962), 42 U.S.C. §§ 303, 1201, 1351 (1964).

²⁹ 49 Stat. 645 (1935), as amended, 42 U.S.C. §§ 1201-06 (1964), as amended by 79 Stat. 286, 42 U.S.C. §§ 1201-06 (Supp. I, 1965); 64 Stat. 555 (1950), as amended, 42 U.S.C. §§ 1351-55 (1964), as amended by 79 Stat. 286, 42 U.S.C. §§ 1202, 1382 (Supp. I, 1965); 76 Stat. 197 (1962), 42 U.S.C. §§ 1381-85 (1964).

³⁰ 79 Stat. 286, 418 (1965), 42 U.S.C. §§ 1201 (blind), 1351 (disabled) (Supp. I, 1965).

³¹ 53 Stat. 1397 (1939), as amended, 42 U.S.C. § 1202 (Supp. I, 1965); 76 Stat. 172, 199 (1962), 42 U.S.C. § 1382 (1964).

³² S. REP. NO. 1589, 87th Cong., 2d Sess. 2, 3, 17-18, 21 (1962); S. REP. NO. 1856, 86th Cong., 2d Sess. 52 (1960); S. REP. NO. 2133, 84th Cong., 2d Sess. 29 (1956).

disabled individuals applying for a determination of disability, and disabled individuals who are entitled to child's insurance benefits, shall be promptly referred" to the state rehabilitation agency, "for necessary vocational rehabilitation services, to the end that the maximum number of such individuals may be rehabilitated into productive activity."³³

Rehabilitation reaches its point of culmination in remunerative employment and self-support through jobs in the common callings, industry, agriculture, independent businesses, and the professions. This congressional policy is implemented primarily through the obligation of rehabilitation counselors and other officials to assist disabled persons in finding such employment. Persuasion and demonstration are the accepted techniques. In some areas, however, there are and have been legal barriers to the employment of the disabled; elsewhere, private resistance has not yielded to persuasion and demonstration. Here the public commitment to the policy of integrationism has required legislative or judicial action. Legislative action has often been forthcoming, judicial action seldom. Congress has forbidden discrimination against the handicapped in the federal civil service.³⁴ A number of states, beginning with California in 1939,³⁵ have laid down a similar ban.³⁶ In addition some states have enacted special statutes prohibiting such discrimination with respect to teaching in the public schools,³⁷ social work,³⁸ physical therapy,³⁹ and the practice of chiropractic.⁴⁰

Four other extensive legislative programs—the so-called architectural barriers statutes, the programs for the education of disabled children and youth in the regular public schools and colleges, the guide dog laws, and the white cane laws—are built upon an integrationist foundation and necessarily imply an integrationist objective. The architectural barriers statutes provide that public buildings and facilities hereafter constructed or remodeled shall be made "accessible to and functional for" the physically handicapped,⁴¹ presupposing that the physically handicapped will make their way to such buildings and facilities and have occasion to be in them. The programs for the education of disabled students in the

³³ 68 Stat. 1052, 1082 (1954), 42 U.S.C. § 422 (1964).

³⁴ 22 Stat. 403 (1883), as amended, 5 U.S.C. § 633(2)9 (1964).

³⁵ Cal. Stats., 1939, ch. 139, § 1 now contained in CAL. GOV'T CODE § 19701.

³⁶ IDAHO CODE ANN. § 59-1025 (Supp. 1965); MO. STAT. ANN. § 36.180 (Supp. 1965); WIS. STAT. ANN. §§ 63.32, 63.33 (Supp. 1965); N.Y. CIV. SERV. LAW § 55 (Supp. 1965).

³⁷ CAL. EDUC. CODE § 13125; MASS. GEN. LAWS ANN., ch. 71, § 38G (Supp. 1965); N.Y. EDUC. LAW § 3004; 24 PA. STAT. ANN. § 12-1209 (1959).

³⁸ CAL. BUS. & PROF. CODE § 9030.

³⁹ CAL. BUS. & PROF. CODE § 2631.

⁴⁰ CAL. BUS. & PROF. CODE §§ 1000-8.1.

⁴¹ For a review of these statutes see text accompanying notes 102-31 *infra*.

public schools are supported by legislation opening the public schools to the blind and deaf, providing special tools, equipment, books, and supplementary teaching services, appropriating funds to enable blind students to hire sighted readers, and exempting scholarships from consideration in determining the amount of the blind aid grant.⁴² Guide dog legislation strikes down restrictions on the use of the dog by the blind, and sometimes by other incapacitated persons, on common carriers, in public places and buildings, and in places of public accommodation.⁴³ The white cane laws are intended to make it safer for blind persons who travel with the aid of this device.⁴⁴ Congress in a Joint Resolution,⁴⁵ and the President in two Proclamations⁴⁶ setting aside a White Cane Safety Day, have emphasized that the cane is not only a useful travel aid but also a symbol of the independence and the social and economic integration of the blind.

From the foregoing, it is abundantly clear that integration of the disabled is the policy of the nation. This policy has been expressed by Congress and by the state legislatures, not once, but many times, and not merely with respect to a single, narrow area of human endeavor, but with respect to the whole broad range of social, economic, and educational activity backed up with numerous specially created agencies and instrumentalities of government, with affirmative assistance and negative prohibitions, and with vast expenditures of money amounting to hundreds of millions of dollars each year.

The basic question to which we seek an answer is this: How has this legislative policy of integrationism fared in the courts, and particularly in the law of torts? Has the law of torts been redirected and remolded according to the prescriptions of the policy? What redirecting and remolding do these prescriptions require?

B. Implications of Integrationism for the Law of Torts

According to the policy of integrationism, the disabled are not to be confined to their houses, asylums, and institutions—threatened, if they emerge, with not only social sanctions but legal sanctions as well, in the form of legal barriers, disadvantages, and inadequate protections. Nature may confine them to an iron lung, a bed, a wheel chair, straps, braces, or crutches, or to mouldering in health and idleness in chair-bound

⁴² See, e.g., CAL. EDUC. CODE §§ 6821, 9354, 10651, 18060, 18060.2, 18102, 18103, 18106; CAL. WELFARE & INST'NS CODE §§ 12800, 18600-870.

⁴³ For a review of these statutes see text accompanying notes 69-102 *infra*.

⁴⁴ For a review of these statutes see text accompanying notes 360-411 *infra*.

⁴⁵ 78 Stat. 1003 (1964).

⁴⁶ 29 Fed. Reg. 14051 (1964); 30 Fed. Reg. 12931 (1965).

blindness. Mistaken public and family attitudes and the dependent law may not so confine them. Such confinement would in effect be a form of house arrest, which in the houses of the poor may not be noticeably different from outright imprisonment. Personal liberty, in this basic sense of the right not to be unjustly or causelessly confined, has been taken as a fundamental, natural, and social right in Chapter 39 of Magna Charta and the due process clauses of federal and state constitutions. If the disabled have the right to live in the world, they must have the right to make their way into it and therefore must be entitled to use the indispensable means of access, and to use them on terms that will make the original right effective. A right on such terms to the use of the streets, walks, roads and highways is a rock-bottom minimum. The right to gain access to the world in which they have a right to live must also include, as a part of the same rock-bottom minimum, the right to utilize the common thoroughfares by riding on common carriers. Upon descending from these, the disabled have a right of uninhibited and equal access to places of public accommodation to seek their ease, rest, sustenance, or recreation.⁴⁷

II

THE RIGHT TO LIFE IN THE WORLD—THE ABLE-BODIED AND THE DISABLED

With respect to able-bodied groups and individuals, the basic rights of effective public access have been long established and newly vindi-

⁴⁷ Places of public accommodation are defined in some of the state acts in general terms; in others by specific listing. Utah's statute illustrates the former method: "All persons within the jurisdiction of this state are free and equal and are entitled to the full and equal accommodations, advantages, facilities, privileges, goods and services in all business establishments and in all places of public accommodation of every kind whatsoever . . ." UTAH CODE ANN. § 13-7-1 to 13-7-4 (Supp. 1965); the ordinance of Rockville, Maryland, Ordinance 43-64, 1965, 9 Race Relations Rep. 1895 (1964-65), illustrates the exhaustive list method:

Section 13-2.02 . . . a. Any inn, hotel, motel or other establishment which provides lodging to transient or permanent guests;

b. Any restaurant, cafeteria, lunchroom, lunch-counter, soda fountain, or other facility principally engaged in selling food or beverages, whether alcoholic or not, for consumption on or off the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station;

c. Any motion picture house, theater, concert hall, meeting hall, sports arena, stadium, recreation park, amusement park, picnic grounds, fair, circus, carnival, skating rink, swimming pool, tennis court, golf course, playground, bowling alley, gymnasium, shooting gallery, billiard or pool room, or any place used for common or public entertainment, exhibition, sports or recreational activity or other assembly;

d. Any retail store engaged in selling commodities of any type to the public;

e. Any service establishment serving the public, including but not limited to all hospitals, clinics, barber shops, beauty parlors, business or commercial services, repair services, or other services of any type offered to the public.

cated. They were safeguarded at the common law as to roads and streets, inns, other victualers, ferries, horseshoers, and carriers.⁴⁸ Three quarters of the states of the Union implicitly assume their general applicability while forbidding the discriminatory denial of them on the basis of race, creed, color, or ethnic origin.⁴⁹ Through the Civil Rights Act of 1875,⁵⁰ Congress sought to give them national protection. They were generally acknowledged, and, in part, expressly affirmed, by the United States Supreme Court in 1883 at the time the Civil Rights Act of 1875 was held not to be authorized by the fourteenth amendment.⁵¹ In the debates upon the Civil Rights Act of 1964, these rights were loudly proclaimed.⁵² The Senate Commerce Committee saw the denial of the right of equal access as an affront to human dignity,⁵³ the guarantee of the right as the "time honored means to freedom and liberty,"⁵⁴ and public accommodations themselves as existing "for the purpose of enhancing the individual freedom and liberty of human beings."⁵⁵ The House Judiciary Committee thought the right of equal access to public accommodations "so distinctive in nature that its denial constitutes a shocking refutation of a free society." "[T]he badge of citizenship . . . demands that establishments that do public business for private profit not discriminate . . ."⁵⁶ President Lyndon Johnson in sponsoring enactment of the Civil Rights Act of 1964 declared "this is not merely an economic issue—or a social, political or international issue. It is a moral issue. . . . All members of the public should have equal access to facilities open to the public."⁵⁷ The United

⁴⁸ *Kisten v. Hildebrand*, 48 Ky. (9 B. Mon.) 72 (1849) (dictum); *Markham v. Brown*, 8 N.H. 523 (1837); *DeWolf v. Ford*, 193 N.Y. 397, 86 N.E. 527 (1908); *Hogan v. Nashville Interurban Ry.*, 131 Tenn. 244, 174 S.W. 1118 (1915) (dictum); *Rex v. Irens*, 7 C. & P. 213, 173 Eng. Rep. 94 (1835); *Boss v. Lytton*, 5 C. & P. 407, 24 E.C.L. 628 (K.B. 1832); *Lane v. Cotton*, 12 Mod. 472 (1701); *White's case*, 2 Dyer Rep. 158 (1558); *De Termino Pascal, Keilway* 50, Pl. 4 (1450); 3 BLACKSTONE, COMMENTARIES * 166; Hale, 1 HARG. LAW TRACTS 78 (1787).

⁴⁹ See the list of thirty-two states supplied by Clark, J., in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259 (1964). For states not on Justice Clark's list see ARIZ. REV. STAT. ANN. §§ 41-1441, 41-1442 (Supp. 1965); Nev. Stat. 1965, ch. 332; UTAH CODE ANN. § 13-7-1 (Supp. 1965); Mo. ANN. STAT. § 314.010 (Supp. 1965).

⁵⁰ 18 Stat. 335. That act forbade discrimination in "inns, public conveyances on land or water, theaters, or other places of public amusement . . ."

⁵¹ *The Civil Rights Cases*, 109 U.S. 3, 24-25 (1883).

⁵² See, e.g., 110 CONG. REC. 12876 (1964) (Remarks of Senator Humphrey); *id.* at 1928 (Remarks of Rep. Joelson); *id.* at 1519-21 (Remarks of Rep. Celler); *id.* at 1538-40 (Remarks of Rep. Rodino); *id.* at 1540-42 (Remarks of Rep. Lindsay); *id.* at 1601-02 (Remarks of Rep. Mathias).

⁵³ S. REP. NO. 872, 88th Cong., 2d Sess. 18 (1964).

⁵⁴ *Id.* at 22.

⁵⁵ *Ibid.*

⁵⁶ H.R. REP. NO. 914, Part 2, 88th Cong., 1st Sess. 7 (1963).

⁵⁷ State of the Union Message, 110 CONG. REC. 115 (1964).

States Supreme Court, in passing upon the constitutionality of that legislation, joined in the refrain that the denial of equal access was a social and moral wrong as well as a burden on commerce.⁵⁸ The act itself speaks of the entitlement of "all persons . . . to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation."⁵⁹

So the rights at stake are not merely procedural; nor are they comparative. They are substantive and belong to all men. Evocative reference to these, rather than a truly comparative conception, lies at the heart of the movement and legislation to gain access to public accommodations. The language is that of the equal protection clause of the fourteenth amendment and of the Civil Rights Act of 1866.⁶⁰ The vision, ardor, and simple principles are those of the Abolitionists.⁶¹ The rhetoric is replete with moral reform, social justice, and natural rights. The sentences end with a prohibition against discrimination based on race, creed, color, ancestry, or national origin. But they begin with the declaration that "all persons are entitled to the full and equal enjoyment . . . of privileges . . . and accommodations."⁶² The legislation in Arizona drives the point home.⁶³ An exception to the ban on discrimination based on the listed grounds, one would suppose, would permit discrimination on those grounds for particular purposes and presumably within narrow limits. Not so in Arizona. Assuming that a basic right of access is being guaranteed, the statute in that state provides that certain persons under certain conditions may be excluded. The excluded persons and conditions are unrelated to the forbidden grounds of discrimination. The persons are those who are of "lewd or immoral character," guilty of boisterous conduct or physical violence, under the influence of alcohol or narcotics, or who violate non-discriminatory regulations of the place.⁶⁴ And not a blind man or a cripple is among them.

However much mingled with talk about burden on commerce, however much buttressed with common law precedents and founded in history, however much explicitly designed to strike down discriminations based on race, color, religion, national origin and sex, however much a product of the modern-day civil rights revolution, aimed principally at

⁵⁸ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964).

⁵⁹ 78 Stat. 241, 243, 42 U.S.C. § 2000(a) (1964).

⁶⁰ 14 Stat. 27.

⁶¹ See TENBROEK, *EQUAL UNDER LAW* (1965); Graham, *The Early Anti-Slavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479, 610.

⁶² *E.g.*, Civil Rights Act of 1964, 78 Stat. 241, 243, 42 U.S.C. § 2000(a) (1964); Nev. Stat. 1965, ch. 332, § 4; UTAH CODE ANN. §§ 13-7-1 to 13-7-3 (Supp. 1965).

⁶³ ARIZ. REV. STAT. ANN., ch. 27 (Supp. 1965).

⁶⁴ ARIZ. REV. STAT. ANN. § 41-1442(C) (Supp. 1965).

securing equal rights for colored persons, the statutes of the states in their present form, the Civil Rights Act of 1964, the congressional debates and proceedings upon it, and the judicial opinions validating its constitutionality—all, implicitly and explicitly, necessarily and unavoidably, are built upon a recognition of the absolute importance to the nation, community and individual, of persons having, holding, and enjoying rights of access to the community and to the public, quasi-public, and private instrumentalities necessary to make those rights effective.

Are humans to be denied human rights? Are persons after all not to be persons if they are physically disabled? Are members of the community to be robbed of their rights to live in the community, their certificates cancelled upon development or discovery of disability? These rhetorical questions, the hallmarks of crusade and reform throughout American history, have in our generation become the plea of the disabled as well. As with the black man, so with the blind. As with the Puerto Rican, so with the post-polio. As with the Indian, so with the indigent disabled.

Without legal redress in many areas, and with the frequency of arbitrary action, disabled persons have been turned away from trains, buses, and other common carriers, from lodgings of various sorts, from the rental of public and private housing, from bars, restaurants and places of public amusement, from banks to rent a safety deposit box, from other kinds of banks to give a pint of blood, and from gambling casinos in Nevada,⁶⁵ declared by statute as well as by common experience to be places in which the public is accommodated.⁶⁶

In his widely used, much-quoted and, I think, justly celebrated text on the Law of Torts, Dean Prosser announces a remarkable proposition: "The man who is blind, or deaf, or lame, or is otherwise physically disabled, is entitled to live in the world. . . ."⁶⁷ Taken at its most literal level, surely this proposition proclaims a platitude. Obviously, we do not kill off our disabled, as the Greeks and Romans did their deformed babies. There is no campaign afoot in the land to extend euthanasia proposals from the incurably ill and the sufferers of unbearable pain to the halt, the lame, and the blind.

⁶⁵ Nev. Stat. 1965, ch. 332, § 1.

⁶⁶ tenBroek, *Cross of Blindness*, 23 VITAL SPEECHES 732 (1957).

⁶⁷ PROSSER, TORTS § 32, at 155 (3d ed. 1964). Among the "otherwise physically disabled," Dean Prosser lists: bone condition, *Wray v. Fairfield Amusement Co.*, 126 Conn. 221, 10 A.2d 600 (1940); crippled, lacking coordination on crutches, *Goodman v. Norwalk Jewish Center, Inc.*, 145 Conn. 146, 139 A.2d 812 (1958); short stature, *Mahan v. State, Use of Carr*, 172 Md. 373, 191 Atl. 575 (1937); lame, *Bianchetti v. Luce*, 222 Mo. App. 282, 2 S.W.2d 129 (1927); club foot, *Texas & N.O.R.R. v. Bean*, 55 Tex. Civ. App. 341, 119 S.W. 328 (1909).

Read less literally, the right to live in the world is something more than the right to remain in it. Now Dean Prosser's proposition assumes something of the significance of one of Jefferson's self-evident truths—the inalienable right to life. In fact, Dean Prosser updates Thomas Jefferson: He moves from a noun to a verb—from the right to life to the right to live—and specifies, somewhat redundantly, that this shall be in the world. In the vernacular of the day, Dean Prosser is talking about the right “to live a little.”

Taken in its broader sense, Dean Prosser's proposition is amply capable of accommodating the most enlightened social policy for the physically disabled in the law of torts and elsewhere. Properly understood, that proposition might be taken as a definitive statement of the goals, as a comprehensive formulation of the policy of integrationism.

Dean Prosser's grand pronouncement, however, while purporting to be drawn from the case law, and while seeming to express for the law of torts the legislatively established policy of the integration of the disabled, is in no sense an accurate summary of the law of torts as that law stands today. The judges either qualify or ignore Dean Prosser's pronouncement and the integrationist policy. In some areas, the pronouncement and the policy are completely rejected; in others, they are given only halting and partial credence; and in none are they fully and positively implemented by the courts. Dean Prosser himself immediately emasculates his proposition.⁶⁸ He applies it only to a narrow realm of street accidents. And even there, while freeing the disabled of negligence per se for being where they are, he hobbles them with the views of the able-bodied as to what their reasonable conduct should be. In these areas, the sum total of the law's beneficence to the disabled seeking a full-fledged right to live in the world can be easily and briefly summarized: 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 widespread disregard of the policy.

A. The Rights of Dogs and the Rights of Men

The disabled are neither specifically included nor specifically excluded from the general public accommodations legislation. That legislation

⁶⁸ PROSSER, *op. cit. supra* note 67.

was extended at the time of passage to go beyond forbidding discrimination on a basis of race, color, and national origin, to cover discrimination based on religion⁶⁹ and, in employment, on sex.⁷⁰ During its passage through Congress, Congressman Dowdy offered an amendment to add age to the proscribed bases of discrimination.⁷¹ The amendment was defeated by a vote of 123 to 94 after some members of the House had stated that they agreed with the substance and content of the motion, but thought the procedures set out in the act were not suited to the object sought.⁷² The final act did, however, require that the Secretary of Labor make a "full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."⁷³ A proposal by the National Federation of the Blind to extend the protection of the act to the disabled did not reach the stage of formal introduction. The Civil Rights Act of 1964 does extend to "all persons" and does imply substantive rights. It is therefore 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.

While state and national general public accommodations legislation has not expressly covered the disabled, that legislation has served as the model and source of specific public accommodations legislation for the blind in twenty-five states.⁷⁴ This has 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. It 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 in these twenty-five states as an

⁶⁹ Civil Rights Act of 1964, 78 Stat. 241, 243, 42 U.S.C. § 2000(a) (1964).

⁷⁰ 78 Stat. 241, 255, 42 U.S.C. § 2000(e)-2 (1964).

⁷¹ 110 CONG. REC. 2596 (1964).

⁷² 110 CONG. REC. 2599 (1964).

⁷³ 78 Stat. 241, 265, 42 U.S.C. § 2000(e)-14 (1964).

⁷⁴ ARK. STAT. §§ 78-211 to 78-213 (1957); CAL. PEN. CODE § 643.5; COLO. REV. STAT. ANN. § 115-12-9 (1953); CONN. GEN. STAT. REV. § 22-346a (1958); FLA. STAT. § 413.08 (1963); GA. CODE ANN. §§ 79-601, 79-9901 (1964); HAWAII REV. LAWS §§ 109-20, 109-21 (1957); IDAHO CODE ANN. § 39-1604 (Supp. 1965); ILL. ANN. STAT. ch. 111 2/3, § 40a (Smith-Hurd 1954); IND. ANN. STAT. §§ 16-212, 16-213 (Supp. 1964); IOWA CODE ANN. §§ 351.30-351.32 (Supp. 1964); LA. REV. STAT. ANN. §§ 51, 52 (Supp. 1964); MAINE REV. STAT. ANN. § 54 (Supp. 1963); MASS. GEN. ANN. LAWS § 98A (1956); MICH. STAT. ANN. § 28.770(7/8) (1954); MO. ANN. STAT. § 209.140 (1962); N.J. STAT. ANN. §§ 48:3-33, 48:3-34 (1940); N.M. STAT. ANN. § 47-1-7 (1953); N.Y. PEN. LAW § 518; R.I. GEN. LAWS ANN. §§ 39-2-16 to 39-2-17 (1956); TENN. CODE ANN. § 62-717 (Supp. 1965); TEX. REV. CIV. STAT. art. 4596a, 889a (1948); VA. CODE ANN. § 35-42.1 (Supp. 1964); WASH. REV. CODE §§ 49.60.216, 81.28.140 (1962); W. VA. CODE ANN. §§ 2568(1), 2569 (1961).

incident to their reliance on the dogs and the need to have them exempted from restrictions with regard to pets. Whether the man takes the dog or the dog takes the man may be a question of some importance. There is quite a difference between saying, as California does, for example, that "any blind person"⁷⁵ is entitled to have the dog with him or, no "blind person . . . shall be denied admittance" though he has a guide dog with him;⁷⁶ and saying, on the other hand, as New Mexico does, that "no person shall debar a guide dog . . . in any place of public accommodation . . . provided such dog is safely muzzled and is under the control of the blind person."⁷⁷

Whatever the relative roles of man and dog, the almost universal ban against dogs and other pets in places of public accommodation—a ban no doubt based on good reasons of public health, safety and convenience—had to be lifted in favor of the guide dog and its master if its services were to be available to him in getting about.⁷⁸ Since the exclusionary rule against pets is founded not only in practice and regulation but also in legislation, remedy had to be sought from the legislatures.⁷⁹ Organizations of the blind, individual guide dog owners, and the management of guide dog schools set to work, jointly and severally, to secure the statutes—which now exist in half the states of the Union—guaranteeing the right of the man to take the dog and the dog to take the man into public places and places of public accommodation.⁸⁰ In a very few statutes, such as that of Idaho, the right has been effected by simply making an exception to the prohibition that "no dog, cat or other animal shall be permitted in any eating place . . ."⁸¹ In most states, however, reliance

⁷⁵ CAL. PEN. CODE § 643.5(a).

⁷⁶ CAL. PEN. CODE § 643.5(b).

⁷⁷ N.M. STAT. ANN. § 47-1-7 (1954).

⁷⁸ For recent examples of the exclusion of a blind person and guide dog from a restaurant see *Guide Dog v. Restaurant*, N.Y. Times, Nov. 3, 1964, reprinted in *Braille Monitor*, Jan. 1965, p. 22; from public housing project see, *New Orleans Housing Project Lifts Guide Dog Ban*, *Braille Monitor*, Sept. 1965, p. 38.

⁷⁹ The only case reported concerning the guide dog statutes arose in Texas in 1945 (*Boyd v. State*, 148 Tex. Crim. 171, 186 S.W.2d 257) where the proprietor of a restaurant denied admission to a blind woman accompanied by a "seeing-eye" dog because of the dog. The proprietor was convicted of violating the Texas statute which relates primarily to carriers, but the conviction was reversed on appeal. The basis of the appellate court's action was the failure of the legislature to include facilities other than conveyances in the caption of the act as required by article III, § 35 of the Texas Constitution. The court, therefore, held § 2 of bill unconstitutional, but found the remaining sections severable.

⁸⁰ For general discussions of the use of guide dogs by blind persons, the training of dogs and masters, and the establishment of guide dog schools, see CHEVIGNY, *MY EYES HAVE A COLD NOSE* (1946); EUSTIS, *THE SEEING EYE* (1927); HARTWELL, *DOGS AGAINST DARKNESS* (1934); ZAHL, *BLINDNESS*, ch. 24 (1950).

⁸¹ IDAHO CODE ANN. § 39-1604 (Supp. 1965). In 1965 Idaho adopted a guide dog statute based on that of California. IDAHO CODE ANN. § 18-5812-A (Supp. 1965).

is placed on the formulations in anti-race discrimination legislation which lie ready to guide draftsmanship and statutory classification and which suggest themselves as highly relevant and appropriate in the circumstances. The Massachusetts legislation follows the model more closely than many states, but it may be used to illustrate the point.

In Massachusetts, a trunk statute was adopted at the close of the Civil War in 1865.⁸² At that time, color and race discrimination in "public places of amusement, public conveyance or public meeting"⁸³ was made an offense punishable by fine. The original provision has since been amended a number of times,⁸⁴ most recently and basically in 1950, by adding religion to the list of forbidden grounds of discrimination and by adding two sentences constituting the heart of the modern civil rights public accommodations formulation: "All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. This right is recognized and declared to be a civil right."⁸⁵ Before 1950 three other subsections had been added: one in 1941 forbidding race, color or nationality discriminations in employment on public works and in dispensing public welfare;⁸⁶ the second in 1943, making punishable as group libel publications intended maliciously to promote hatred of any group because of its race or color;⁸⁷ and the third, in 1938, declaring, under penal sanctions, "any blind person accompanied" by a guide dog, "properly and safely muzzled," to be "entitled to any and all accommodations, advantages, facilities and privileges of all public conveyances, public amusement and places of . . . public accommodations . . . to which persons not accompanied by dogs are entitled, subject only to the conditions and limitations applicable to all persons not accompanied by dogs"⁸⁸ Extra fare for the dog is not to be charged on public conveyances.

Again, the formulation employed in Georgia,⁸⁹ Indiana,⁹⁰ and Louisiana⁹¹ is substantially the same: "Any person who by reason of loss or

⁸² Mass. Acts & Resolves 1865, ch. 277, at 650.

⁸³ *Ibid.*

⁸⁴ Mass. Acts & Resolves 1866, ch. 252, at 242; Mass. Acts & Resolves 1885, ch. 316, at 774; Mass. Acts & Resolves 1893, ch. 43, at 1320; Mass. Acts & Resolves 1895, ch. 461, at 519.

⁸⁵ MASS. GEN. LAWS ANN. ch. 272, § 98 (1959).

⁸⁶ MASS. GEN. LAWS ANN. ch. 272, § 98B (1959).

⁸⁷ MASS. GEN. LAWS ANN. ch. 272, § 98C (1959).

⁸⁸ MASS. GEN. LAWS ANN. ch. 272, § 98A (1959).

⁸⁹ GA. CODE ANN. § 601 (Supp. 1964).

⁹⁰ IND. ANN. STAT. § 16-212 (Supp. 1964).

⁹¹ LA. REV. STAT. ANN. § 21:52 (Supp. 1964).

impairment of eyesight is accompanied by a dog . . . used as a leader or guide . . . is entitled to full and equal accommodations, advantages, facilities, and privileges of all public conveyances, hotels, lodging places, places of public accommodation, amusement or resort, and other places to which the general public is invited, and shall be entitled to be accompanied by such dog . . . subject only to the conditions and limitations applicable to persons not so accompanied”

Variations in detail in these statutes are numerous. They relate to: the mode of defining the blind persons or others entitled to the benefits of the act;⁹² the public accommodations to which the act applies;⁹³ the presence or absence of restrictions on charging for the dog;⁹⁴ training, harnessing, leashing and muzzling the dog;⁹⁵ credentialing the master

⁹² All the statutes require that the dog user be blind or partially blind, with the exception of Idaho, which permits guide dog trainers the same access to eating establishments as is afforded the blind user.

⁹³ Seventeen jurisdictions provide the dog-led blind with access to places of public accommodation in general and also to public conveyances (Arkansas, California, Connecticut, Georgia, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Missouri, New Mexico, New York (except movie theatres), Rhode Island (except railroad cars other than chair cars on passenger trains), Tennessee, Texas, Washington). Five more provide access to public conveyances (Colorado, Hawaii, Illinois, New Jersey, West Virginia), two provide access only to eating places (Idaho, Virginia), and the remaining state, access to hotels and eating places (Florida). See note 74 *supra* for the applicable statutes.

⁹⁴ Sixteen jurisdictions have provisions prohibiting the exacting of additional charges because of the access afforded the guide dog (Arkansas, California, Connecticut, Georgia, Hawaii, Indiana, Iowa, Louisiana, Maine, Massachusetts, Missouri, New York, Rhode Island, Texas, Washington, West Virginia). In six states the prohibition is expressly applicable to both public places and public conveyances (Arkansas, California, Connecticut, Iowa, Missouri, Texas), expressly applicable to common carriers only in five states (Maine, Massachusetts, Rhode Island, Washington, West Virginia), impliedly applicable to public places and public conveyances in four states (Georgia, Indiana, Louisiana, New York), and impliedly applicable to carriers only in one state, Hawaii. See note 74 *supra* for the applicable statutes.

⁹⁵ Louisiana requires that both the dog and the master be trained at a “qualified dog guide school,” such training to enable the master to use the particular dog as a guide. None of the states extends the statutory right to the “otherwise incapacitated” as is done in some white cane laws. See note 378 *infra* and accompanying text. Eleven states (Colorado, Connecticut, Georgia, Illinois, Maine, Massachusetts, Missouri, New Mexico, Texas, Washington, West Virginia) require that the dog guide be muzzled. The requirement is mandatory except in Maine, where the management of the facility to be charged may or may not so demand.

Seven states require harnessing (Arkansas, Connecticut, Iowa, Michigan, Tennessee, Washington, West Virginia). The language used in six of these is typified by the Arkansas provision which provides the right of access “when said dog guide is properly harnessed” The seventh state, Washington, requires harnessing only of “guide dogs” which are entitled to enter public places, as distinguished from “seeing eye” dogs, which can board public conveyances. Only one state, Idaho, provides that the dog need be leashed. A harness would seem to satisfy that requirement. Six states require expressly that the guide dog be under the control of the master (Colorado, Connecticut, Illinois, New Jersey, Rhode Island, Virginia). See note 74 *supra* for the applicable statutes.

and the dog;⁹⁶ custody of the dog in public places and conveyances;⁹⁷ exceptions to the operations of the act,⁹⁸ whether the benefit of the act is expressed in terms of a positively conferred right on the master and the dog or a negative limitation on the operators of places of public accommodation;⁹⁹ and the penalties which may be imposed for breach of

⁹⁶ Six states require the dog be "specially trained" (California, Idaho, Louisiana, Maine, Texas, Washington) of which two also require the user have credentials for the dog (Louisiana, Maine). Six states require the dog guide be properly credentialed (Connecticut, Louisiana, Maine, Michigan, Tennessee, West Virginia). Michigan requires the certifying school be approved by the Veteran's Administration and West Virginia requires the dog be identified by a certificate issued by "The Seeing Eye." Maine is silent as to the origin of the credential which may be required under the statute.

Connecticut and Maine require the credential be presented upon request of the agency to be charged under the statute. Louisiana provides the operation of the statute is inapplicable unless evidence of training is "furnished"—to whom or when is not indicated. Michigan and Tennessee require the blind person must first present for inspection the credentials on the dog, and West Virginia requires only that the blind person accompanied by a dog guide carry the prescribed certificate of identification, with no language requiring presentment upon demand or otherwise. See note 74 *supra* for the applicable statutes.

⁹⁷ Six states make express provisions regarding the custody of the admitted dog (Colorado, Connecticut, Illinois, New Jersey, Rhode Island, Virginia). Five of these grant the right of immediate custody to the master; the sixth, New Jersey, provides the master is to have custody, but subject to the rules and regulations prescribed by the Board of Public Utility. Texas and Washington also provide expressly for the custody of the dog aboard public conveyances; the former providing the carrier shall designate where the dog is to ride and the latter granting custody to the master. These two states have separate provisions for public places and common carriers, the custody in public places is impliedly granted the blind master.

Nineteen jurisdictions, including Texas and Washington, impliedly grant custody of the dog to the blind person while in places of public accommodation and/or public conveyances, with the exceptions as noted above (Arkansas, California, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Missouri, New Mexico, New York, Tennessee, Texas, Washington, West Virginia). The implication arises from the language of the statute permitting access to the "accompanying" dog, or that allowing the user to "take" the dog with him. The implication is strongest in the three states (Georgia, Indiana, Louisiana), which prohibit the admitted dog from occupying a seat in public conveyances. See note 74 *supra* for the applicable statutes.

⁹⁸ Two states provide exceptions to the operation of their statutes where the admission of the dog guide would involve "danger." Hawaii provides the exception where the presence of the dog would endanger "other passengers"; New York provides the exception where such access would "tend to create a dangerous situation. . . ." The Hawaiian exception, while lacking specificity as to what danger is to be apprehended, does limit the range of the danger, while New York's exception is not so limited, the escape provision appears too vague to lend certainty to the statute. New York also excepts motion picture theatres from the scope of the statute. Rhode Island's statute excepts all railroad passenger cars other than chair cars, a loss of substantial significance. Hawaii also excepts the statute's applicability where the dog is unclean. While the statute does not specify the standard of uncleanness essential to the exception, the exception does appear a reasonable one. See note 74 *supra* for the applicable statutes.

⁹⁹ Seventeen states confer a positive right (Arkansas, California, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Missouri, New Jersey, Rhode Island, Texas, Virginia, Washington); eleven impose a negative duty on the manage-

the act.¹⁰⁰

Among all these variations in detail, however, the substantial formulation is generally the same: It is the formulation of the civil rights acts. The strengths and weaknesses of the formulation are the same in the one case as in the other for the meaning is the same. The terms are those of discrimination, that is, of classification and comparison. If other people similarly situated are entitled to the right, then the disabled are; and so are persons of minority race, color, and religion. The right may be denied to all if this is done on equal terms; that is, if the conditions and limitations are applicable to all, or, in other words, are made regardless of race, color, religion, disability, or being guided by a dog.

But the purpose of the legislation is a purpose with respect to which all people are similarly situated. The right of access to public accommodations and common carriers is a civil right. It is a basic right indispensable to participation in the community, a substantive right to which all are fully and equally entitled. The basic contradictions and reconciliations of procedural and comparative phraseology, on the one hand, and the fundamental substantive rights, on the other hand, implicit and explicit in the fourteenth amendment are here repeated.¹⁰¹ Thus, while the guide dog statutes focus on the immediate problem of gaining access by persons with guide dogs and their right of access is declared to be the same as for those without dogs, and while, accordingly, no particular mention is made of the right of access of those without dogs, yet their right is presupposed, implicit and assumed and hence is incorporated within the benefits conferred by the act. The right of all blind persons,

ment of the facility (California, Colorado, Hawaii, Illinois, Michigan, New Mexico, New York, Rhode Island, Tennessee, Texas, Washington); and West Virginia imposes a positive duty on the management of the facility to give access to the dog-led blind. California and Rhode Island expressly confer a positive right on the dog-user and, in the same section, impose the correlative negative duty on the facility in express terms; Texas and Washington each have separate statutes for each of the two types of facilities. The Texas provisions are a conferral of a positive right on the blind with respect to public conveyances and an imposition of a negative duty on the management of the facility respecting public places. The Washington statutes are exactly opposite, the positive right relating to public places and the negative duty to public conveyances. See note 74 *supra* for the applicable statutes.

¹⁰⁰ Nineteen states provide a penalty for the violation of the statutes (Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Missouri, New Mexico, New York, Rhode Island, Tennessee, Texas, West Virginia) all of which are misdemeanors. It should be noted that the inclusion of a penalty provision does not necessarily relate to all provisions of the statute; hence Rhode Island's penalty provision is applicable only to the denial of the blind's right to be accompanied by the dog guide aboard public conveyances and elevators. See note 74 *supra* for the applicable statutes.

¹⁰¹ See HARRIS, *THE QUEST FOR EQUALITY* (1960); TENBROEK, *EQUAL UNDER LAW* (1965).

and more generally, of all disabled persons, to the use of public accommodations is therefore consequentially safeguarded by these acts.

Moreover, the existence of these acts in twenty-five states, with their explicit avowals and implicit assumptions, supported by the right of people generally to the use of public accommodations and common carriers, might reasonably be taken as a sufficient declaration of public policy and fundamental right to found judicial decisions in the other states vindicating the right of the disabled to full and equal access to these necessary instrumentalities of community life. Ultimately, indeed, such may be seen as a mandate of the equal protection clause of the fourteenth amendment.

B. Architectural Barriers

Guide dog legislation is intended to safeguard rights of access to and use of common carriers and public accommodations. The legislation seeks to accomplish the purpose by declaring the rights, in form at least on a comparative basis, and prohibiting the discriminatory denial or withdrawal of them. The legislation deals only with one group of the disabled: the blind, a group otherwise able-bodied and perfectly capable of mounting stairs and passing through narrow doorways once they find them. The formula employed in the guide dog legislation is inadequate on its face to deal with the general problem of architectural barriers. Architectural barriers are defined by the American Standards Association as features of "the common design and construction of buildings and facilities [that] cause problems for the physically handicapped that lessen the social and economic gains now evident in the rehabilitation of these individuals . . . [that] make it very difficult to project the physically handicapped into normal situations of education, recreation, and employment."¹⁰² Simply declaring that the disabled, too, have rights of access and use and forbidding building operators to deny them would do little for the wheel chair-bound paraplegic physically denied access to and use of flights of stairs and narrow doorways. Moreover, prohibiting the installation of such barriers would not do the trick. A more constructive and affirmative approach is required. Buildings and facilities must be

¹⁰² AMERICAN STANDARDS ASS'N, AMERICAN STANDARD SPECIFICATIONS FOR MAKING BUILDINGS AND FACILITIES ACCESSIBLE TO, AND USABLE BY, THE PHYSICALLY HANDICAPPED 3 (1961). For some of the growing literature on architectural barriers, see GOLDSMITH, DESIGNING FOR THE DISABLED (1963); *id.* at 226-36 (Bibliography); Nugent, *Design of Buildings to Permit their Use by the Physically Handicapped*, New Building Research, Fall, 1960, p. 51; Caniff, *Architectural Barriers: A Personal Problem*, 108 CONG. REC., app. 838 (1962).

erected according to a design taking account of the disabled and making buildings and facilities accessible to them and functional for them.

Specifications intended to do this were prepared by the American Standards Association in 1961.¹⁰³ They were developed in consultation with a large number of concerned government officials, private agencies with programs for the disabled, groups of the disabled themselves, and relevant business and professional associations. Principal sponsorship, however, came from the National Society for Crippled Children and Adults and the President's Committee on National Employ the Physically Handicapped Week. The specifications include: wide and suitably located parking places for the cars of the disabled;¹⁰⁴ at least one ground level or ramped entrance;¹⁰⁵ wide doors that can be opened with a single effort¹⁰⁶ and with enough neighboring level floor space for wheel chair maneuver;¹⁰⁷ single level stories or ramp-connected levels;¹⁰⁸ toilets, mirrors, towel dispensers,¹⁰⁹ drinking fountains,¹¹⁰ and public telephones¹¹¹ of the proper height to be reached from wheel chairs; identifying features enabling the blind to find particular rooms;¹¹² auditory as well as visual signals;¹¹³ open manholes, access panels, and excavations in the buildings and on the grounds barricaded at least eight feet from the hazard and warning devices used;¹¹⁴ and, a prohibition on low-hanging or protruding door closers, signs, and fixtures.¹¹⁵ The specifications are intended not only for public buildings and facilities, but for any buildings and facilities generally used by the public. They are applicable in remodeling present structures as well as in new construction.

While the specifications would seem a necessity for the disabled confined to wheel chairs and only less so for those on crutches and braces, they are also of importance for the estimated five million Americans with mobility impairments of other sorts. The Standards list among the direct beneficiaries those with "non-ambulatory disabilities," "semi-ambulatory disabilities," "sight disabilities," "hearing disabilities," "dis-

¹⁰³ AMERICAN STANDARDS ASS'N, *op. cit. supra* note 102.

¹⁰⁴ *Id.* at § 4.3.2.

¹⁰⁵ *Id.* at § 4.1.

¹⁰⁶ *Id.* at § 5.3.1.

¹⁰⁷ *Id.* at § 5.3.2.

¹⁰⁸ *Id.* at § 5.5.2.

¹⁰⁹ *Id.* at § 5.6.

¹¹⁰ *Id.* at § 5.7.

¹¹¹ *Id.* at § 5.8.

¹¹² *Id.* at § 5.11.

¹¹³ *Id.* at § 5.12.

¹¹⁴ *Id.* at § 5.13.2.

¹¹⁵ *Id.* at §§ 5.13.3, 5.13.4.

abilities of incoordination,"¹¹⁶ and "those manifestations of the aging processes that significantly reduce mobility, flexibility, coordination, and perceptiveness. . . ."¹¹⁷ The different and sometimes contradictory needs of these groups illustrate the fallacy of treating the disabled as a single homogeneous class for all purposes. Although all the disabled are helped by eliminating stairs, the crippled are helped far more than the deaf. Manholes, access panels and excavations are of greatest peril for the blind but are also hazardous for all. The deaf require visual signals which are of no use for the blind and vice versa for auditory signals. The paraplegic must have special toilet and washroom facilities and arrangements, while the blind couldn't care less where the mirror is located. For the persons in the wheel chair and the mobile cripple, a site is best developed which is level and without curbs and other abrupt changes. For the blind, large, level, open plazas and other areas around and among buildings, without discernible landmarks such as curbs and well-defined walks, can be traversed only by dead reckoning.

To secure acceptance of the specifications by architects, builders, owners, and operators, the National Society for Crippled Children and Adults and the President's Committee on National Employ the Physically Handicapped Week established steering committees in the various states. They, together with others, put on an active, national campaign. As a result, remarkable progress has been made in five years. Architectural barriers legislation has been adopted in twenty-one states.¹¹⁸ A national commission on architectural barriers to the rehabilitation of the handicapped was established in 1965 in the Department of Health, Education, and Welfare to focus national attention on the problem and to advise, consult, study, and demonstrate.¹¹⁹ The relevant professions, industries, unions, and other interests have been made acquainted with the

¹¹⁶ *Id.* at § 2.

¹¹⁷ *Id.* at § 2.6.

¹¹⁸ "Penn. Becomes 21st State To Pass Architectural Barriers Legislation." Performance, Dec. 1965, p. 3. Available statutes are: Calif. Assembly Concurrent Resolution No. 19 (1965 Reg. Sess.); Conn. Public Act No. 216 (Feb. 1965, Spec. Sess.); FLA. STAT. ch. 255.01, as amended by S.B. No. 109, ch. 65-493 (July 1, 1965); ILL. REV. STAT. ANN. ch. 111, § 11 (Smith-Hurd, Supp. 1965); IOWA CODE ANN. (Sen. File 352 Supp. 1965); MASS. GEN. LAWS ANN., ch. 149, § 44c (Supp. 1965); MENN. STAT. ANN. §§ 73.57-53.61 (Supp. 1965); MONT. REV. CODE ANN. §§ 69-3701 to 69-3719 (Supp. 1965); Neb. Sess. Laws 1965, ch. 430; N.H. REV. STAT. ANN. §§ 155.8-a, 8-b (Supp. 1965); N. MEX. STAT. ch. 67, § 16-18 (Supp. 1965); N.D. CODE ch. 48-02-18 (Supp. 1965); OHIO REV. CODE ANN. § 3781.111 (Supp. 1965); OKLA. STAT. ANN. tit. 61, § 11 (Supp. 1965); PA. STAT. ANN. §§ 1455.1-1455.4 (Supp. 1965); R.I. GEN. LAWS ANN. § 37-8-15 (Supp. 1965); S.C. CODE §§ 1-481 to 1-490 (Supp. 1965); WIS. STAT. ANN. §§ 101.305, 101.306 (Supp. 1965).

¹¹⁹ 79 Stat. 1282, 29 U.S.C. §§ 31-33 (Supp. I, 1965).

nature of the problem of architectural barriers and the relatively simple and inexpensive design features required to reduce it.¹²⁰ The levels of attack have thus been private persuasion, official sponsorship, and, with respect to public buildings and facilities, legislative mandate.

The central feature of the state statutes is reliance on the work of the American Standards Association. Indeed, the principal divergence among the statutes is the extent to which they copy the specifications outright or incorporate them by reference. A fairly typical statute—and, having been passed in 1962, one of the earlier ones—is that of Massachusetts, which provides that public buildings “shall conform with the booklet entitled ‘American standard specifications for making buildings and facilities accessible to, and usable by, the physically handicapped’ approved by the American Standards Association, Incorporated on October thirty-first, nineteen hundred and sixty one.”¹²¹ Montana¹²² and South Carolina,¹²³ on the other hand, practically enacted the booklet as it stood, even to the point of including explanatory footnotes. The state statutes differ among themselves as to the types of buildings and facilities covered, permissible exceptions, methods and agencies of enforcement, and a requirement for public hearing when administrative agencies are delegated authority to establish standards by way of regulations. Most of the statutes accept a variant of the formula used in Connecticut: “[A]ll buildings and facilities constructed, remodeled or repaired by the state or its agents or by any political subdivision of the state or its agents when state funds or state interest is involved.”¹²⁴ Wisconsin applies its requirements to “any public buildings, including state-owned buildings or public housing projects . . . and mercantile buildings. . . .”¹²⁵ The excepting clause provided in the American Standard Specifications—“cases of practical difficulty, unnecessary hardship, or extreme differ-

¹²⁰ An example of voluntary compliance by those in charge of public buildings is that of the University of California which has approved a plan for all of its campuses to make them accessible to the disabled and usable by them. See, e.g., UNIVERSITY OF CALIFORNIA, BERKELEY, ARCHITECTS AND ENGINEERS MANUAL § 8.01, at 5-6 (1960); University of California, Building Design Considerations for Physically Handicapped Students, May 24, 1963. Indeed, with respect to at least one group of the disabled, the blind, there have been special facilities for at least the past twenty-five years on the Berkeley and Los Angeles campuses.

¹²¹ Mass Acts & Resolves 1962, ch. 662.

¹²² MONT. REV. CODE ANN. §§ 69-3701 to 69-3719 (Supp. 1965).

¹²³ S.C. CODE §§ 1-481 to 1-490 (Supp. 1965).

¹²⁴ Conn. Public Act No. 216 (Feb. 1965, Spec. Sess.).

¹²⁵ WIS. STAT. ANN. § 101.305 (Supp. 1965). Specifically excepts: apartment houses, convents and monasteries, jails or other places of detention, garages, hangers, hothouses, all buildings classified as hazardous occupancies, and state buildings specifically built for field service purposes, such as but not limited to conservation fire towers, fish hatcheries, tree nursery buildings and warehouses.

ences¹²⁶—is generally liberalized in the state statutes to require only “substantial conformity”¹²⁷ or conformity “in so far as feasible and financially reasonable.”¹²⁸ Little is said in most of the statutes about enforcement. Usually the administrative officials responsible are identified but not much more.¹²⁹ Minnesota provides that construction or remodeling of public buildings owned by the state “shall not be hereafter commenced . . . until the plans and specifications . . . have been approved by the fire marshal.”¹³⁰ Wisconsin’s provision is specific and drastic: “The owner of any building who fails to meet the requirements of this section may be required to reconstruct the same by mandatory injunction in a circuit court suit brought by any interested person. Such person shall be reimbursed, if successful, for all costs and disbursements plus such actual attorney fees as may be allowed by the court.”¹³¹

C. *The Struggle for the Streets*

“Public thoroughfares are for the beggar on his crutches as well as the millionaire in his limousine.”¹³² “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.”¹³³

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? With what freedoms and liabilities do these phrases endow them? 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

¹²⁶ AMERICAN STANDARDS ASS'N, *op. cit. supra* note 103, at § 1.2.

¹²⁷ N. MEX. STAT. § 67-16-18(B) (Supp. 1965).

¹²⁸ OKLA. STAT. ANN. tit. 61, § 11 (Supp. 1965). In Rhode Island the administrators need only “take into consideration standards promulgated by the American Standards Association . . .” R.I. GEN. LAWS ANN. § 37-8-15 (Supp. 1965).

¹²⁹ *E.g.*, MONT. REV. CODE ANN. tit. 69-3719 (Supp. 1965); Neb. Sess. Laws 1965, ch. 430; N.H. REV. STAT. ANN. ch. 8-b (Supp. 1965). OKLA. STAT. ANN. tit. 61,512 (Supp. 1965); PA. STAT. ANN. tit. 71, § 1455.3 (Supp. 1965); S.C. CODE § 1-49 (Supp. 1965).

¹³⁰ MINN. STAT. ANN. ch. 73-60 (Supp. 1965).

¹³¹ WIS. STAT. ANN. § 101.305(2) (Supp. 1965). For states requiring public hearings before issuance of standards see, *e.g.*, WIS. STAT. ANN. § 101.306 (Supp. 1965); Conn. Public Act. No. 216, § 2 (Feb. 1965, Spec. Sess.).

¹³² Weinstein v. Wheeler, 127 Ore. 406, 413, 271 Pac. 733, 734 (1928), *rehearing denied*, 135 Ore. 518, 296 Pac. 1079 (1931).

¹³³ Garber v. City of Los Angeles, 226 Cal. App. 2d 349, 358, 38 Cal. Rptr. 157, 163 (1964), quoting David, *Municipality Liability in Tort in California*, 7 So. CAL. L. REV. 372, 452 (1934).

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.¹³⁴

This would indeed be requiring the blind man to see at his peril, something that Oliver Wendell Holmes told us a long time ago is not to be done.¹³⁵ In these circumstances, every trip to the mailbox or store, every stroll in the sun, every congregation with one's neighbors, every catching of a bus to go to school or work—all the ordinary and routine transactions of daily life safely conducted by the rest of the community in public places as a matter of course—would be conducted by the disabled at great hazard; such great hazard in fact as to encourage, if not to make necessary, their custodialization. To live in the world presupposes progress toward a goal of integration.

The judicial answers to the questions posed above have come in the form of special substantive rules on the disabled collected under the rubric of the law of negligence. The courts and textwriters prefer to say that the standards are not special or different but one and the same for everybody.¹³⁶ It is the circumstances to which the standards apply that are special and different, a mode of expression giving a sense of rhetorical integrity. However, the differences are important, whether they are said to be in the standards, as in the case of children,¹³⁷ or in the circumstances to which the standards apply, as in the case of the disabled.¹³⁸

Negligence first appeared as an independent tort or civil wrong for which the courts would allow an action for damages in the 19th century at a time when the industrial revolution, and particularly the develop-

¹³⁴ MACBETH, Act V, scene viii, lines 19-23.

¹³⁵ HOLMES, *THE COMMON LAW* 109 (1923 ed.).

¹³⁶ *Fenneman v. Holden*, 75 Md. 1, 22 Atl. 1049 (1891); *Jakubiec v. Hasty*, 337 Mich. 205, 59 N.W.2d 385 (1953); *Davis v. Feinstein*, 370 Pa. 449, 88 A.2d 695 (1952); *Fletcher v. City of Aberdeen*, 54 Wash. 2d 174, 338 P.2d 743 (1959). 2 HARPER & JAMES, *TORTS* § 16.7 (1956); PROSSER, *TORTS* § 32, at 155 (3d ed. 1964); *RESTATEMENT (SECOND), TORTS* § 283c (1964); 38 AM. JUR. *NEGLIGENCE* § 210 (1941).

¹³⁷ In 1841, in the case of *Lynch v. Nurdin*, L.R., 1 Q.B. 29 (1841), the Queens Bench laid down the basic doctrine in respect to the standard of care required of children—it was that of a reasonably prudent child of its years and development, not that of a reasonably prudent adult.

¹³⁸ FLEMING, *TORTS* 249 (3d ed. 1965); 2 HARPER & JAMES, *op. cit. supra* note 136, § 16.7, at 923-24; PROSSER, *op. cit. supra* note 136, § 32, at 154-57; *RESTATEMENT (SECOND), TORTS* § 283c (1964).

ment of the railroads, was beginning to produce a heavy crop of accidental injuries to the person.¹³⁹ The law of negligence is still true to its origins and is dominated today by the same sorts of factors, multiplied a thousandfold by the accident-producing capacity of modern industry and urban life, and above all, by conditions of automobile traffic. Not only are these very factors the causes of a great deal of disability—though disease is still the major cause—but they constitute and give rise to new and ever-increasing hazards of life for those already disabled from whatever cause.

Summarizing the generally accepted doctrine, the second Restatement of the Law of Torts defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."¹⁴⁰ The risk of harm is to be judged in the light of the likelihood that the harm will occur as well as its extent and severity. The risk, so judged, is then to be balanced against the character and importance of the conduct creating the risk and the feasibility and burden of providing protection against it.¹⁴¹ The risk of harm is unreasonable if the first factors outweigh the second and the conduct which creates it is then said to be lacking in "due care." This is conduct in which the reasonable man of ordinary prudence does not engage. It is by this general formula, applied as the courts say to the special circumstances of the physically disabled, that the judges have sought to define the nature and scope of their right to live in the world. The judges 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?¹⁴² 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. Otherwise, it will be allowed to lie where it falls.

If the disability is an element in the circumstances in which the disabled person finds himself, and if all elements in the circumstances are to be given their proper weight by the ordinarily prudent man in regulating his conduct, then a person's disability is to be taken into considera-

¹³⁹ FLEMING, *op. cit. supra* note 138, at 107-08; 2 HARPER & JAMES, *op. cit. supra* note 136, § 12.3, at 751-52; PROSSER, *op. cit. supra* note 136, § 28, at 142-43.

¹⁴⁰ RESTATEMENT (SECOND), TORTS § 282 (1964). See also FLEMING, *op. cit. supra* note 138, at 110; 2 HARPER & JAMES, *op. cit. supra* note 136, at §§ 16.1, 16.2; PROSSER, *op. cit. supra* note 136, at §§ 30, 31.

¹⁴¹ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); *Chicago, B. & Q. R.R. v. Krayenbuhl*, 65 Neb. 889, 91 N.W. 880 (1902); PROSSER, *op. cit. supra* note 136, at 151-52; RESTATEMENT (SECOND), TORTS §§ 291-93 (1964).

¹⁴² PROSSER, *op. cit. supra* note 136, at 154; RESTATEMENT (SECOND), TORTS § 283 (1964).

tion in determining liability for injuries. In this proposition, English and American courts today unanimously agree.¹⁴³ Dean Prosser summarizes the conclusion by saying that the disabled person is entitled "to have allowance made by others for his disability"; and he in turn, must act reasonably "in the light of his knowledge of his infirmity . . . treated . . . merely as one of the circumstances under which he acts."¹⁴⁴ "Allowance made . . . for disability"; how, to what extent, in which circumstances, by whom? As to these issues, the courts are in strong disagreement. The disabled person, says Dean Prosser, "cannot be required to do the impossible by conforming to physical standards which he cannot meet."¹⁴⁵ Quite so! But if the right to live in the world consists only of exemption from this requirement, its proclamation may be a cruel hoax. To what requirements may they be subjected: to sally forth only in the care of an attendant? To use a dog as 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?

The courts are divided as to the answers to each and every one of these questions; and the rhetoric is even more varied than the answers. The majority of courts say that it is not negligence per se for a blind man to walk the streets without a companion or attendant;¹⁴⁶ others that he may do so only in certain circumstances.¹⁴⁷ Some say that it is contributory negligence as a matter of law to travel without dog, cane, or

¹⁴³ *E.g.*, *Muse v. Page*, 125 Conn. 219, 4 A.2d 329 (1939); *Shields v. Consol. Gas Co.*, 193 App. Div. 86, 183 N.Y. Supp. 240 (Sup. Ct. 1920); *Cook v. City of Winston-Salem*, 241 N.C. 422, 85 S.E.2d 696 (1955); *Weinstein v. Wheeler*, 127 Ore. 406, 271 Pac. 733 (1928), *rehearing denied*, 135 Ore. 518, 296 Pac. 1079 (1931); *Davis v. Feinstein*, 370 Pa. 449, 88 A.2d 695 (1952); *Smith v. Sneller*, 345 Pa. 68, 26 A.2d 452 (1942); *Fletcher v. City of Aberdeen*, 54 Wash. 2d 174, 338 P.2d 743 (1959); *Haley v. London Elec. Bd.*, [1965] A.C. 778 (1964).

¹⁴⁴ PROSSER, *op. cit. supra* note 136, § 32, at 155; FLEMING, *op. cit. supra* note 138, at 116-17, 162-63; 2 HARPER & JAMES, *op. cit. supra* note 136, § 16.7, at 920-21.

¹⁴⁵ PROSSER, *op. cit. supra* note 136, § 32, at 155. See also RESTATEMENT (SECOND), TORTS § 283c (1964).

¹⁴⁶ *E.g.*, *Town of Salem v. Goller*, 76 Ind. 291, 292 (1881); *Balcom v. City of Independence*, 178 Iowa 685, 696, 160 N.W. 305, 310 (1916); *Kaiser v. Hahn Bros.*, 126 Iowa, 561, 563, 102 N.W. 504, 505 (1905); *Neff v. Town of Wellesley*, 148 Mass. 487, 495, 20 N.E. 111, 113 (1889); *Smith v. Wildes*, 143 Mass. 556, 559, 10 N.E. 446, 448 (1887); *Hestand v. Hamlin*, 218 Mo. App. 122, 127, 262 S.W. 396, 397 (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*, 54 Wash. 2d 174, 178, 338 P.2d 743, 745 (1959); *Masterson v. Lennon*, 115 Wash. 305, 308, 197 Pac. 38, 39 (1921).

¹⁴⁷ *E.g.*, *Florida Cent. R.R. v. Williams*, 37 Fla. 406, 20 So. 558 (1896).

companion;¹⁴⁸ others, that the failure to use one or more of these travel aids presents a question for the jury as to whether due care was employed.¹⁴⁹ No courts say that a blind man may not, when taking the proper precautions, enter unfamiliar territory; most courts, however, emphasize the plaintiff's knowledge of the surroundings and the frequency of his presence.¹⁵⁰ Some say that the plaintiff's knowledge that the streets are or may be defective or dangerous creates a kind of assumption of risk;¹⁵¹ others, that in the circumstances, the disabled person may proceed but must do so with due care in the light of his knowledge.¹⁵² The latter rule is also applied by some courts to blind persons in railway depots, at railway street crossings, and like places of similar danger,¹⁵³ while others say that it is gross negligence for blind persons to be in such places alone.¹⁵⁴ Some courts say that the disabled may proceed upon the assumption that the streets and highways are kept in a reasonably safe condition, and that cities and abutting property owners must expect the disabled to be abroad in the land and accordingly must take precautions necessary to warn or otherwise protect them.¹⁵⁵ Others say that those who create, maintain, or tamper with the streets and public passageways are only under a duty to safeguard the able-bodied pedestrian.¹⁵⁶

No courts have held or even darkly hinted that a blind man may rise

¹⁴⁸ *Id.* at 419-20, 20 So. at 561-62.

¹⁴⁹ *Smith v. Sneller*, 345 Pa. 68, 72, 26 A.2d 452, 454 (1942); *Fraser v. Freedman*, 87 Pa. Super. 454, 457 (1926).

¹⁵⁰ *E.g.*, *Balcom v. City of Independence*, 178 Iowa 685, 696, 160 N.W. 305, 309 (1916); *Chesapeake & Potomac Tel. Co. v. Lysher*, 107 Md. 237, 240, 68 Atl. 619, 621 (1908); *Neff v. Town of Wellesley*, 148 Mass. 487, 489, 20 N.E. 111 (1889); *Smith v. Wildes*, 143 Mass. 556, 559, 10 N.E. 446, 448 (1887); *Hestand v. Hamlin*, 218 Mo. App. 122, 127, 262 S.W. 396, 397 (1924); *Sleeper v. Sandown*, 52 N.H. 244, 252 (1872); *Davenport v. Ruckman*, 37 N.Y. 568, 573 (1868).

¹⁵¹ *E.g.*, *Garbanati v. City of Durango*, 30 Colo. 358, 360, 70 Pac. 686 (1902); *Cook v. City of Winston-Salem*, 241 N.C. 422, 430, 85 S.E.2d 696, 701-02 (1955).

¹⁵² *E.g.*, *Hestand v. Hamlin*, 218 Mo. App. 122, 128, 262 S.W. 396, 398 (1924); *Marks' Adm'r v. Petersburg R. Co.*, 88 Va. 1, 13 S.E. 299 (1891).

¹⁵³ See, *e.g.*, *Farley v. Norfolk & W. Ry.*, 14 F.2d 93 (4th Cir. 1926); *Rosenthal v. Chicago & A.R.R.*, 255 Ill. 552, 556, 99 N.E. 672, 672-73 (1912); *Lortz v. New York Cent. & H.R.R.*, 7 App. Div. 515, 522, 40 N.Y. Supp. 253, 257 (1896).

¹⁵⁴ *Florida Cent. R.R. v. Williams*, 37 Fla. 406, 419, 20 So. 558, 562 (1896).

¹⁵⁵ *E.g.*, *Balcom v. City of Independence*, 178 Iowa 685, 693, 160 N.W. 305, 308 (1916); *Rock v. American Constr. Co.*, 120 La. 831-33, 45 So. 741-42 (1908); *Sleeper v. Sandown*, 52 N.H. 244, 245 (1872); *Shields v. Consol. Gas Co.*, 193 App. Div. 86, 90, 183 N.Y. Supp. 240, 242-43 (1920); *Davenport v. Ruckman*, 37 N.Y. 568-73 (1868); *Fletcher v. City of Aberdeen*, 54 Wash. 2d 174, 179, 338 P.2d 743, 746 (1959); *Masterson v. Lennon*, 115 Wash. 305, 308, 197 Pac. 38, 39 (1921); *Short v. City of Spokane*, 41 Wash. 257, 261-62, 83 Pac. 183, 185 (1906); *Haley v. London Elec. Bd.*, [1965] A.C. 778, 790 (1964).

¹⁵⁶ *Hestand v. Hamlin*, 218 Mo. App. 122, 127, 262 S.W. 396, 397 (1924); *Carter v. Village of Nunda*, 55 App. Div. 501, 504, 66 N.Y. Supp. 1059, 1061 (1900); *Cook v. City of Winston-Salem*, 241 N.C. 422, 428, 85 S.E.2d 696, 700 (1955).

in the morning, help get the children off to school, bid his wife goodbye, 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. He would then be doing what any reasonable, or prudent, or reasonably prudent blind man would do, and also what social policy must positively foster and judges in their developing common law must be alert to sustain.

What were these blind plaintiffs doing in the streets and highways when they were injured? The answer is very instructive. They were doing what other people do who live in the world. In the two leading Washington cases,¹⁵⁷ they were going to and from work as piano tuners; in Massachusetts, a piano tuner had stopped at a store, made a purchase, and was going on down the street;¹⁵⁸ in Pennsylvania, a door-to-door salesman of small household items was in course of canvassing houses;¹⁵⁹ in New York, a door-to-door salesman was returning home from the meat market down the street;¹⁶⁰ in London, a telephone operator was following his daily routine of going to work;¹⁶¹ in City of Independence, Iowa, a businessman was on his usual path to and from the business part of town;¹⁶² in New Hampshire, a farm hand was passing along a familiar road, "a good man to hire . . . for . . . chopping wood, felling trees, mowing, reaping, threshing grain, digging potatoes, planting and hoeing, although with difficulty the first time hoeing corn";¹⁶³ in Town of Spirit Lake, Iowa, the plaintiff was taking the only available walk to church;¹⁶⁴ in North Carolina, the plaintiff was making a Sunday afternoon visit to a friend;¹⁶⁵ in Vermont, the plaintiff, riding along on a jaunt in a wagon with another fellow and two women, got out on the public highway in the dark of night to urinate.¹⁶⁶ Moreover, almost all of these plaintiffs had one

¹⁵⁷ *Fletcher v. City of Aberdeen*, 54 Wash. 2d 174, 338 P.2d 743 (1959); *Masterson v. Lennon*, 115 Wash. 305, 197 Pac. 38 (1921).

¹⁵⁸ *Smith v. Wildes*, 143 Mass. 556, 10 N.E. 446 (1887).

¹⁵⁹ *Smith v. Sneller*, 345 Pa. 68, 26 A.2d 452 (1942).

¹⁶⁰ *Shields v. Consol. Gas Co.*, 193 App. Div. 86, 183 N.Y. Supp. 240 (1920).

¹⁶¹ *Haley v. London Elec. Bd.*, [1965] A.C. 778 (1964).

¹⁶² *Balcom v. City of Independence*, 178 Iowa 685, 160 N.W. 305 (1916).

¹⁶³ *Sleeper v. Sandown*, 52 N.H. 244, 245 (1872).

¹⁶⁴ *Yeager v. Town of Spirit Lake*, 115 Iowa 593, 88 N.W. 1095 (1902).

¹⁶⁵ *Cook v. City of Winston-Salem*, 241 N.C. 422, 85 S.E.2d 696 (1955).

¹⁶⁶ *Glidden v. Town of Reading*, 38 Vt. 52 (1865). In Missouri, the restaurant operator was walking to other parts of town for supplies as he usually did several times each day. *Hestand v. Hamlin*, 218 Mo. App. 122, 262 S.W. 396 (1924). In the Glenwood, Iowa case,

of the "common, well-known, compensatory devices for the blind . . . a cane, a seeing-eye dog, or a companion."¹⁶⁷

The discussion in the cases has revolved around these principal topics: an analogy between the blind man in the daytime and the seeing man at night; the likelihood that the disabled will come by and be injured; contributory negligence of or the precautions taken or to be taken by the disabled person to prevent injury in the light of his disability; the practicability and cost to the city, contractor, or property owner of reducing the risk to reasonable proportions.

1. *The Analogy*

The early leading opinions dealing with the blind and the near-blind are preoccupied with an analogy built on sighted persons' conceptions of blindness: Blindness is shutting off the vision as by a blindfold or a perfectly dark night. This being so, and assuming the right of the blind to travel the streets at all, should not the law assimilate their daytime situation to that of the seeing man at night? In the early and much quoted New York case of *Davenport v. Ruckman*,¹⁶⁸ the court said:

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 upon that assumption. A person may walk or drive in the darkness of the night, relying upon the belief that the corporation has performed its duty and that the street or the walk is in safe condition. He walks by a faith justified by law¹⁶⁹

This was the case of a person with some sight who, traveling along the walk in the daytime, had fallen into an unguarded cellarway. Four years later, the Supreme Court of New Hampshire dealt with the case of a totally blind person who, also traveling in the daytime, had fallen off a bridge fourteen to sixteen feet wide, the railing on one side of which was no longer present. It is immaterial, the plaintiff's attorney argued, "whether the accident happened for want of light or want of sight."¹⁷⁰

the plaintiff "helps his wife in laundry work for their neighbors, and has on occasion received aid from the county . . ." The court thought it could "fairly assume that he felt the hurt of his bruises . . . none the less keenly than he would had his balance in [the] bank been larger." *Hill v. City of Glenwood*, 124 Iowa 479, 485, 100 N.W. 522, 524 (1904). In Maryland, the man who sewed brooms was leaving the sheltered workshop at the Maryland School for the Blind and returning to his living quarters. *Chesapeake & Potomac Tel. Co. v. Lysher*, 107 Md. 237, 68 Atl. 619 (1908). In New York, the store owner was returning home from business, crossing a creek in a scow. *Harris v. Uebelhoer*, 75 N.Y. 169 (1878).

¹⁶⁷ *E.g.*, *Smith v. Sneller*, 345 Pa. 68, 72, 26 A.2d 452, 454 (1942).

¹⁶⁸ 37 N.Y. 568 (1868).

¹⁶⁹ *Id.* at 573.

¹⁷⁰ *Sleeper v. Sandown*, 52 N.H. 244, 250 (1872).

Quite so, said the court: "Blindness of itself is not negligence. Nor [is] passing upon the highway with the sight of external things cut off by physical incapacity of vision . . . any more than passing upon the highway when the same things are wholly obscured by the darkness of night."¹⁷¹ "[T]his plaintiff, although blind," the court added, "had the same right to assume the existence of a rail on each side that any traveller, passing either in the daytime or in the night-time would have. . . ."¹⁷²

In the 1916 Iowa case, which has led the way for many states, the analogy of blindness to lack of light was given great weight in the case of a totally blind man who, again traveling in the daytime, fell into an unguarded seven-foot deep watermain ditch as he crossed the street.¹⁷³ The city was bound to make it safe for the sighted to pass at night when the sighted are blind. "[R]equiring a light for him who can see when there is a light proves that there is a duty to protect those who for any reason cannot see"¹⁷⁴

While this analogy is basically weak in portraying as the same the travel problems of the blind and the sighted in the dark, it did prove a valuable starting point for the courts in seeing that the duty of the defendant is not confined to the able-bodied. Its logical, or perhaps more accurately, its psychological, role was thus historic in the process of imposing upon cities and abutting property owners an obligation to maintain the streets, highways, bridges and other public places in a condition safe for the disabled traveler—and this in an age when the courts were acutely concerned about keeping in hand judgments of plaintiff-minded juries in the interests of free enterprise and unencumbered industrial development.

While utilizing the analogy for this basic function, and moving, one feels, from humanitarian rather than policy considerations, the courts were not hindered by its difficulties or misled into many of its bypaths. If the daytime care the city owed the blind was the same as the night-time care it owed the sighted, then: providing a lamp should amply warn or illuminate; the use of compensatory travel aids would not be emphasized, unless perchance the sighted at night, in view of their unfortunate affliction, were to be required, on threat of contributory negligence, to use one of those well-known compensatory devices for men in want of light, such as a cane, a seeing-eye cat, or a blind attendant.¹⁷⁵

¹⁷¹ *Id.* at 251.

¹⁷² *Id.* at 252.

¹⁷³ *Balcom v. City of Independence*, 178 Iowa 685, 160 N.W. 305 (1916).

¹⁷⁴ *Id.* at 691, 160 N.W. at 308.

¹⁷⁵ *Bussell v. City of Fort Dodge*, 126 Iowa 308, 101 N.W. 1126 (1905).

At night the blind and the sighted would be put upon an identical footing.

The fact that lanterns placed about an excavation will not make the passage safe for a blind man, said the Iowa court is "adventitious." "Concede that there must be a light for those who have eyesight, when without the light the eyesight would be no protection, and it follows that there is a duty to guard those who cannot see, though a light be furnished, by guarding them with that which will be as much a protection to them as is the lamp to one whose inability to see is due to the darkness of the night."¹⁷⁶ So the differences do matter, too, and not just the similarities or supposed similarities.

The blind man must take his compensatory devices and cautions into the night, though the sighted are not expected to use them. Although the blind man in the road could not see, and, because the night was dark, could not be seen by the driver of a team bearing down on him, great emphasis was placed by the Vermont Supreme Court on his use of a cane in escaping from danger by safely finding the edge of the road and then falling into the ditch.¹⁷⁷ He had a right to assume, said the court, that the road was safe in its "surface, margin and muniments."¹⁷⁸ If plaintiff had been sighted, presumably he would have had the same right to a safe ditch but he would have been free to find it in whatever way a sighted man might in the light of all the circumstances. In another nighttime accident involving a blind man rowing across a creek, the New York court "assumed" that the creek was a public highway, "as much open to the use of a blind man as one having eyesight."¹⁷⁹ Whether sighted in the night or blind, a person "must be more cautious. He must bring about him greater guards, and go more slowly and tentatively than if he had his eyesight, or the light of day shone upon him."¹⁸⁰ Notwithstanding these firm declarations, the court in this case made much of the fact that the blind man had his sighted wife in the boat with him and that the night was clear. Neither enabled him to avoid a collision with a tug boat though both together had a lot to do with his avoiding the defense of contributory negligence.

Some courts have never accepted the basic conclusion about the extent of the defendant's duty, with or without the use of the analogy. In the 1955 case of *Cook v. City of Winston-Salem*,¹⁸¹ the North Carolina Supreme Court held that the city and its contractors were under no duty

¹⁷⁶ *Balcom v. City of Independence*, 178 Iowa 685, 691, 160 N.W. 305, 308 (1916).

¹⁷⁷ *Glidden v. Town of Reading*, 38 Vt. 52, 53, 57 (1865).

¹⁷⁸ *Id.* at 57.

¹⁷⁹ *Harris v. Uebelhoer*, 75 N.Y. 169, 175 (1878).

¹⁸⁰ *Ibid.*

¹⁸¹ 241 N.C. 422, 85 S.E.2d 696 (1955).

to place a signal or guard at a dropoff from the path to the street resulting from an incompleated repaving operation "during the daytime, when it was plainly visible."¹⁸²

2. Likelihood of Harm

Whether the risk of harm created by the conduct of the defendant is unreasonable depends in part on the likelihood that it will occur. If the likelihood is very slight, even though the potential harm be quite serious, the defendant is not charged with responsibility for safeguarding persons against it. This manner of stating the duty of the defendant, increasingly popular today, is not uniformly employed in the cases. Since there is a judicial tendency to describe the accident in terms of the actions of the plaintiff and to focus particularly on questions of contributory negligence, the courts often speak of the right of the plaintiff to proceed upon the assumption that the streets and highways will be maintained in a reasonably safe condition, leaving the duty of the defendant to maintain them implicit or expressed in a subordinate way.¹⁸³

Another mode of stating the duty of the defendant is as the Iowa court did: The due care obligations of the plaintiff and the defendant are correlative. The blind man must use more precautions because he is blind; the city must act in the light of his right to be in the streets and in recognition of his disability.¹⁸⁴ The Iowa court also suggested a stricter standard: The wrongdoer need not anticipate the consequences of his actions; that they did in fact occur is sufficient. In this view, it would not matter that "no blind man had ever before used a walk in the town."¹⁸⁵ In any event, the particular plaintiff had used these very streets for ten years so the city could not claim ignorance of his presence. In 1905, the Washington Supreme Court approved this instruction: "The

¹⁸² *Id.* at 428, 85 S.E.2d at 700.

¹⁸³ *E.g.*, *Town of Salem v. Goller*, 76 Ind. 291, 292 (1881); *Smith v. Wildes*, 143 Mass. 556, 559, 10 N.E. 446, 448 (1887); *Sleeper v. Sandown*, 52 N.H. 244, 251-53 (1872); *Shields v. Consol. Gas Co.*, 193 App. Div. 86, 90, 183 N.Y. Supp. 240, 242-43 (1920); *Harris v. Uebelhoer*, 75 N.Y. 169, 174-77 (1878); *Davenport v. Ruckman*, 37 N.Y. 568, 573 (1868); *Glidden v. Reading*, 38 Vt. 52, 57 (1865).

The right of reliance on a safe street or highway antedates the cases announcing the right of the disabled to be upon the streets and highways. See, *e.g.*, *Thompson v. Bridgewater*, 24 Mass. (7 Pick.) 187 (1829). The first American cases dealing with the right of the blind were handed down in the 1860's. *Winn v. City of Lowell*, 83 Mass. 177, 189 (1861); *Davenport v. Ruckman*, 37 N.Y. 568, 573 (1868); *Glidden v. Reading*, 38 Vt. 52 (1865). An English court in *Boss v. Litton*, [1832] 5 C. & P. 407, 409, 24 E.C.L. 628, 630 (1831), first declared that "all persons, paralytic as well as others, had a right to walk in the road, and were entitled to the exercise of reasonable care on the part of persons driving carriages along it."

¹⁸⁴ *Balcom v. City of Independence*, 178 Iowa 685, 691-92, 160 N.W. 305, 308 (1916).

¹⁸⁵ *Id.* at 696, 160 N.W. at 309.

city is chargeable with knowledge that all classes of persons, including the healthy and diseased and lame, constantly travel its streets and sidewalks."¹⁸⁶ This doctrine was specifically applied to the blind in a later case.¹⁸⁷ Foreseeability is a term used by some courts to cover the presumption that the defendant is on notice that disabled persons are likely to happen along.¹⁸⁸

The statement by an English author that "a century ago there was no rule either recognizing or refusing to recognize a duty of care toward blind pedestrians because they were rarely seen in the streets"¹⁸⁹ is inaccurate as to the facts in England and America and as to the law in America.¹⁹⁰ One century ago, two centuries ago, five centuries ago, the blind were notorious frequenters of the streets of the towns, carrying out their historic role, and often their privileged status, as beggars.¹⁹¹ What was rare was a blind man moving about the streets for some other purpose, and especially for the regular activity of going to work as the plaintiff in *Haley v. London Elec. Bd.* was doing.¹⁹² Indeed, the number of cases getting to appellate courts by and about the turn of the century involving blind or nearly blind plaintiffs is in many ways surprising. While some blind individuals were active and mobile, this course of conduct was not encouraged by governmental policy, by community attitudes, by the mores of the times, or by the public or private programs established for the benefit of the blind. Blind children attended segregated residential schools, if any, where classes and the activities of daily

¹⁸⁶ *Short v. City of Spokane*, 41 Wash. 257, 262, 83 Pac. 183, 185 (1905).

¹⁸⁷ *Fletcher v. City of Aderdeen*, 54 Wash. 2d 174, 338 P.2d 743 (1959). In *Missouri* it was held for a time that the city's duty to keep its sidewalks in repair only required it "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. St. Joseph*, 184 Mo. App. 388, 394, 171 S.W. 42, 44 (1914). See also *Wilkerson v. City of Sedalia*, 205 S.W. 877 (Mo. 1918). The Missouri Supreme Court overruled these cases in favor of the proposition that the duty of the city extended to providing reasonably safe streets for all classes of pedestrians including the disabled. *Hunt v. St. Louis*, 278 Mo. 213, 211 S.W. 673 (1919). See also *Bianchetti v. Luce*, 222 Mo. App. 282, 290, 2 S.W.2d 129, 133 (1928); *Hanke v. St. Louis*, 272 S.W. 933 (Mo. 1925).

¹⁸⁸ *Kennedy v. Cohn*, 73 Pa. D. & C. 544, 548 (C.P. 1950); *Clawson v. Walgreen Drug Co.*, 108 Utah 577, 583, 162 P.2d 759, 762 (1945); *Haley v. London Elec. Bd.*, [1965] A.C. 778, 791 (1964).

¹⁸⁹ *Dias, A Hole in the Road*, 73 THE LISTENER 292, 294 (1965).

¹⁹⁰ See, e.g., *Winn v. City of Lowell*, 83 Mass. (1 Allen) 177 (1861); *Sleeper v. Sandown*, 52 N.H. 244 (1872); *Davenport v. Ruckman*, 37 N.Y. 568 (1868).

¹⁹¹ *tenBroek, California's Welfare Law—Origins and Development*, 45 CALIF. L. REV. 241, 252 (1957); *NUEVA RECOPIACIÓN*, bk. I, tit. XII, law 15 (1567). See, e.g., *NOVISIMA RECOPIACIÓN*, bk. VII, tit. XXXIX, law 8 (1805).

¹⁹² [1965] A.C. 778 (1964). See text accompanying notes 200-09 *infra*, for a discussion of this case.

life were all conducted within the confines of the institution.¹⁹³ In adult life, many of the blind were cared for and custodialized by their families or worked in sheltered shops attached to institutional living arrangements, often the residential school.¹⁹⁴ (Homes provided for the blind and almshouses cared for the aged.¹⁹⁵) Yet even at this time, as we have just shown, some blind persons were abroad in the land and some courts were proclaiming their right to be there and imposing on public bodies the duty to protect them in the safe exercise of it.

Today the picture is quite different. Blind children and youths are attending public schools and colleges, making their way to and from them alone. Blind and otherwise disabled adults are encouraged in many ways to live active lives whether or not they are able to secure gainful employment: by financial aid programs which make this possible;¹⁹⁶ by case work services in the welfare system;¹⁹⁷ by home teacher programs throughout the country designed,¹⁹⁸ among other things, to teach blind persons to travel alone; by orientation and rehabilitation programs which regard mobility as a must.¹⁹⁹ The total number of blind people in a

¹⁹³ See generally FARRELL, *THE STORY OF BLINDNESS* (1956); FRAMPTON & KEARNEY, *THE RESIDENTIAL SCHOOL* (1953); FRENCH, *FROM HOMER TO HELEN KELLER* (1932); RICHARDS, *SAMUEL GRIDLEY HOWE* (1935); RICHARDS, *LETTERS AND JOURNALS OF SAMUEL GRIDLEY HOWE* (1909).

¹⁹⁴ See generally Chouinard, *Sheltered Workshops—Past and Present*, paper read at the Fifth Atlantic City Rehabilitation Conference, 1957; Chouinard & Garrett, *Workshops for the Disabled: A Vocational Rehabilitation Resource*, U.S. Dep't of Health, Educ. & Welfare, Office of Vocational Rehabilitation (Rehabilitation Services Ser. No. 371); FRENCH, *op. cit. supra* note 193. In *Chesapeake & Pacific Tel. Co. v. Lysher*, 107 Md. 237, 68 Atl. 619 (1908), the blind plaintiff when injured was leaving a sheltered shop located at the Maryland School for the Blind where he had worked for four years after graduating from the school. Samuel Gridley Howe, famed pioneer in education of the blind and other educational projects, started the first sheltered shop in the country in connection with the New England Asylum for the blind in 1840. The men who worked in it lived at the asylum until 1880. FARRELL, *op. cit. supra* note 193, at 68, 159-60.

¹⁹⁵ tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 900, 931 (1964).

¹⁹⁶ 49 Stat. 645 (1935), as amended, 42 U.S.C. §§ 1201-06 (1964). See also CAL. WELFARE & INST'NS CODE §§ 13000-102 (California's Program for Aid to Potentially Self-Supporting Blind).

¹⁹⁷ 76 Stat. 186 (1962), 42 U.S.C. §§ 1201, 1351 (1964).

¹⁹⁸ See, e.g., CAL. EDUC. CODE § 6209.

¹⁹⁹ Over twenty public and private educational institutions throughout the country give mobility training. This does not include dog-guide centers, of which there are perhaps a dozen, or training offered by all residential schools or most resource classes in public schools. At least two groups are operating in California under grants from the Federal Department of Health, Education, and Welfare related to public schools—one in Alameda-Contra Costa County and one in Los Angeles County. There are many like projects country-wide. In two universities, West Michigan University located at Kalamazoo, Michigan, and Boston College in Boston, Massachusetts, mobility teacher training courses are offered. See also Rives, *The Blind and Today's Jobs*, Rehabilitation Record, March-April, 1965, p. 6.

community has increased with the general growth in population. But a far greater percentage of them than ever before is out in the community.

In the recent *Haley* case²⁰⁰ decided by the Judicial Committee of the House of Lords, the foreseeability doctrine was thoroughly explored. Reliance was placed on common knowledge, government statistics, and the judicially noticeable fact that "we all are accustomed to meeting blind people walking alone with their white sticks on city pavements."²⁰¹ In the London area at the time there were 7,321 registered blind people, and in Great Britain as a whole, 107,000, or about 1 in every 500.²⁰² In the United States the figures are comparable.²⁰³ Moreover, the growing use of the white cane has increased the visibility and conspicuousness of the blind part of the population. One would suppose that no court in the land would any longer hear a city, from the greatest metropolis to the least village, maintain that it could not be expected to anticipate that numbers of disabled persons, including blind, would pass that way, unattended, and in the free exercise of their right to be in the streets and highways. That the duty of providing suitable warning or protection might still not be imposed, as in North Carolina,²⁰⁴ can rest only on a policy determination, and not on the defendant's claimed lack of knowledge. That policy determination is one contradicting the policy judgment of much of the rest of society.

The House of Lords in *Haley*²⁰⁵ carefully avoided all policy questions and commitments. It merely insisted that the courts recognize the existing fact, a partial and grudging adaptation of the law to contemporary needs.²⁰⁶ "No doubt there are many places open to the public," said Lord Reid, "where for one reason or another one would be surprised to see a blind person walking alone but a city pavement is not one of them. And a residential street cannot be different from any other. The blind people we meet must live somewhere and most of them probably left their homes unaccompanied."²⁰⁷ Cities must be charged with this common knowledge and placed under a duty of warning or other protection. "If it be said that your Lordships are making new law," wrote Lord Evershed, "that is only because, whatever may have been the facts and circumstances reasonably to be contemplated a hundred years or more

²⁰⁰ *Haley v. London Elec. Bd.*, [1965] A.C. 778 (1964).

²⁰¹ *Id.* at 791.

²⁰² *Id.* at 807.

²⁰³ Estimated at between 350,000 to 400,000. Hurlin, *Estimated Prevalence of Blindness in the United States and in Individual States*, 32 SIGHT SAVING REV. 4 (1962).

²⁰⁴ *Cook v. City of Winston-Salem*, 241 N.C. 422, 85 S.E.2d 696 (1955).

²⁰⁵ *Haley v. London Elec. Bd.*, [1965] A.C. 778 (1964).

²⁰⁶ *Ibid.*; see FLEMING, TORTS 162-63 (3d ed. 1965).

²⁰⁷ [1965] A.C. at 778, 791.

ago, at the present time it must be accepted as one of the facts of life that appreciable numbers of blind persons, having had the requisite training, are capable of using or use in fact public footpaths such as that in Charleton Church Lane and that accordingly their presence upon such footpaths cannot reasonably be disregarded or left out of account by those undertaking work of the character being in the present case done by the respondent board.²⁰⁸ In overruling the 1950 leading case,²⁰⁹ the Lords said they were merely distinguishing it and thereby allowed some dangerous doctrine to remain unrepudiated. The law, lagging far behind social developments, was merely catching up with what blind people were actually doing. The Lords were not implementing the public policy of integration, a policy which in large part accounted for so many blind people being in the streets and which made this decision necessary.

3. *Contributory Negligence*

Doctrines of contributory negligence are variously described as harsh, illogical, and disappearing.²¹⁰ Such doctrines have been particularly rife in the disabled cases. Here misconceptions as to the nature of disability have added to the general confusion and there is little evidence that these doctrines are disappearing. Some rhetorical regularity is being achieved as the courts gradually are eliminating talk of a higher standard of care imposed on the disabled person by reason of his disability,²¹¹ and are speaking instead of a universal duty of ordinary care requiring the disabled person, by reason of his disability, to use greater efforts to avoid hazards, to take greater precautions, to be more keenly watchful by the fuller use of remaining senses, or otherwise to seek to compensate for his disability.²¹² This rhetorical regularity, however, accomplishes no sub-

²⁰⁸ *Id.* at 800-01.

²⁰⁹ *Pritchard v. Post Office*, 114 J.P. 370 (C.A. 1950).

²¹⁰ FLEMING, *op. cit. supra* note 206, at 224-25; 2 HARPER & JAMES, *TORTS* § 22.3 (1956); PROSSER, *TORTS* § 64 (3d ed. 1964).

²¹¹ See, e.g., *Winn v. City of Lowell*, 83 Mass. (1 Allen) 177, 180 (1861); *Karl v. Juniata County*, 206 Pa. 633, 637-38, 56 Atl. 78, 79 (1903).

²¹² *Garber v. City of Los Angeles*, 226 Cal. App. 2d 349, 358, 38 Cal. Rptr. 157, 163 (1964); *Muse v. Page*, 125 Conn. 219, 223, 4 A.2d 329, 331 (1939); *Balcom v. Independence*, 178 Iowa 685, 692, 160 N.W. 305, 308 (1916); *Kaiser v. Hahn Bros.*, 126 Iowa 561, 564, 102 N.W. 504, 506 (1905); *Hill v. City of Glenwood*, 124 Iowa 479, 481-82, 100 N.W. 522, 523 (1904); *Gill v. Sable Hide & Fur Co.*, 223 Ky. 679, 680, 4 S.W.2d 676, 677 (1928); *Chesapeake & Potomac Tel. Co. v. Lysher*, 107 Md. 237, 241, 68 Atl. 619, 622 (1908); *Keith v. Worcester Street Ry.*, 196 Mass. 478, 482-83, 82 N.E. 680-81 (1907); *Neff v. Town of Wellesley*, 148 Mass. 487, 495, 20 N.E. 111, 113 (1889); *Sleeper v. Sandown*, 52 N.H. 244, 251 (1872); *Shields v. Consol. Gas Co.*, 193 App. Div. 86, 90, 183 N.Y. Supp. 240, 242 (1920); *Carter v. Village of Nunda*, 55 App. Div. 501, 504, 66 N.Y. Supp. 1059, 1061 (1900); *Kennedy v. Cohn*, 73 Pa. D. & C. 544, 552 (C.P. 1950); *Clawson v. Walgreen Drug Co.*, 108 Utah 577, 584, 162 P.2d 759, 763 (1945); *Masterson v. Lennon*, 115 Wash. 305, 308, 197 Pac. 38, 39 (1921).

stantive change. Still to be decided in each case, in the light of the particular disability and other circumstances, is the question whether the individual plaintiff produced the requisite effort, precautions, watchfulness, or compensation. Whether described as a higher standard of care or as a standard of ordinary care applied to more difficult circumstances makes little difference in the end. The preponderant rule is that this question of requisite care is to be left to the jury or trier of fact. Two fairly recent cases, however, stand as leading authority for a different proposition.

In *Smith v. Sneller*²¹³ the Pennsylvania Supreme Court held a blind plaintiff guilty of contributory negligence as a matter of law who proceeded along the sidewalk without using one of the "common, well-known, compensatory devices for the blind, such as a cane, a 'seeing-eye' dog, or a companion."²¹⁴ In a follow-up case, the same court later held that once the blind person had the compensatory device it was then a question for the jury whether he was guilty of contributory negligence in its use.²¹⁵ In *Cook v. City of Winston-Salem*²¹⁶ the Supreme Court of North Carolina outdistanced even the Supreme Court of Pennsylvania, in an opinion that can only be regarded as more than 100 years behind the times, even though it adhered to the rhetorical regularities before mentioned. The blind plaintiff was declared guilty of contributory negligence in that he "failed to put forth a greater degree of effort than one not acting under any disabilities to attain due care for his own safety: that standard of care which the law has established for everybody" even though he was guided by a well-trained seeing-eye dog handled in the approved way and performing its function as trained.²¹⁷

These cases raise the question as to the nature, adequacy, and proper use of the "common, well-known, compensatory devices for the blind" and their relationship to the law of contributory negligence. In the first place, one takes it for granted that the list of devices provided in the *Smith* case is illustrative and not necessarily exhaustive. Presumably, any or all of them could be discarded as outmoded if new and better devices were developed. Experimental efforts to this purpose have long been going on in the physics departments at the Massachusetts Institute of Technology and Haverford College, many blind-concerned agencies, and by numerous private individuals and companies. A central clearing and testing agency has been established at Massachusetts.

²¹³ 345 Pa. 68, 26 A.2d 452 (1942).

²¹⁴ *Id.* at 72, 26 A.2d at 454.

²¹⁵ *Davis v. Feinstein*, 370 Pa. 449, 452, 88 A.2d 695, 697 (1952).

²¹⁶ 241 N.C. 422, 85 S.E.2d 696 (1955).

²¹⁷ *Id.* at 431, 85 S.E.2d at 702.

Secondly, and more importantly, the situations presented in the cases we have been discussing, if no others, illustrate the limitations of the devices and the people who use them. The farm hand in New Hampshire fell off the unrailed side of a bridge though he "felt his way with his cane very carefully"²¹⁸ The piano tuner in Washington, using his cane in his habitual and customary way while traveling along the walk, "hit the pile of lumber with his cane at the narrow place in the sidewalk, stepped aside to avoid the lumber, and fell into the excavation . . ." on the other side of the walk.²¹⁹ The door-to-door salesman in New York carried a cane but, anticipating no danger, was not using it when he stepped off the curb and fell into the trench, which he could well have done even if he had first found the curb with his cane.²²⁰ "[W]hen he approached the place where the rail was down," on the wooden walk elevated four feet over the street, the partially blind person in Colorado "commenced walking slowly, and felt about him with his cane very carefully, for the purpose of definitely locating the walk, but, notwithstanding these precautions, fell off."²²¹ Haley was using his cane which either went over or under the handle of the punner hammer placed athwart his path, the punner hammer then tripping him and proving a trap rather than a guard.²²² The door-to-door salesman in *Smith v. Sneller*²²³ was not carrying a cane. He stepped on a two-foot-high pile of dirt bordering an unguarded trench across the sidewalk. The dirt gave way and he fell into the trench. This could easily have happened to a man with a cane despite the court's confident assertion that any one of the compensatory devices "probably would have been sufficient to prevent this accident."²²⁴ Just how easily is illustrated by the follow-up Pennsylvania case where the blind plaintiff fell into an open cellarway though he "carried a white cane customarily employed by blind persons."²²⁵ He was using his cane as a guide "moving it laterally in order to touch the walls of abutting buildings and keep on a straight course, and also tapping the ground before him"²²⁶ The carouser by night in Vermont, in seeking the side of the highway, "put his cane before him with the point resting upon the ground, and in that manner felt his way

²¹⁸ *Sleeper v. Sandown*, 52 N.H. 244 (1872).

²¹⁹ *Masterson v. Lennon*, 115 Wash. 305, 307, 197 Pac. 38 (1921).

²²⁰ *Shields v. Consol. Gas Co.*, 193 App. Div. 86, 89, 183 N.Y. Supp. 240, 242 (1920).

²²¹ *Garbanati v. City of Durango*, 30 Colo. 358, 359, 70 Pac. 686 (1902).

²²² *Haley v. London Elec. Bd.*, [1965] A.C. 778, 790 (1964).

²²³ 345 Pa. 68, 71, 26 A.2d 452, 453 (1942).

²²⁴ *Id.* at 72, 26 A.2d at 454.

²²⁵ *Davis v. Feinstein*, 370 Pa. 449, 451, 88 A.2d 695, 696 (1952). See also *Kennedy v. Cohn*, 73 Pa. D. & C. 544, 546 (C.P. 1950).

²²⁶ *Davis v. Feinstein*, *supra* note 225, at 452, 88 A.2d at 696.

before him, moving his cane about as he walked to find obstructions if there were any"; he felt the edge with his cane and then either stepped over or fell over into the ravine below.²²⁷ The guide dog in North Carolina came to the edge of the drop-off and stopped as all good guide dogs should do. His master came down on the foot that was in the air and tumbled down the embankment.²²⁸ The churchgoer in Spirit Lake, Iowa, was not saved from her accident by the fact that she was accompanied by her husband,²²⁹ or the creek-crosser in New York by his wife.²³⁰ All blind people are acquainted with the risk of traveling with an unfamiliar sighted companion who is so preoccupied with the problem of guiding him as to be inalert to ordinary hazards or unsure how to avoid them when observed.²³¹

Among ordinary cane users and the so-called experts alike, there is a lively debate about the merits of various canes—should they be long or short, rigid or folding, metal, fiber glass, or wood, with curved or straight handles. Similar debate exists between the cane users and the dog users.²³² A blind person carrying two canes, one in each hand, tapping the ground before him with one, following the buildings and curb alongside with the other, still exposes his head as a ready target for every leaning ladder, protruding piece of scaffolding, or low-slung awning bar. An agile and adept blind person without any device may in any given case travel better than most blind persons with one. In this state of uncertainty, divided opinion and diverse experience, courts are unwise indeed to make any particular procedure so important as to declare contributory negligence per se the conduct of a blind person who does not use it.

In nineteen states,²³³ questions of contributory negligence of the physi-

²²⁷ *Glidden v. Reading*, 38 Vt. 52, 53 (1865).

²²⁸ *Cook v. City of Winston-Salem*, 241 N.C. 422, 426, 85 S.E.2d 696, 699 (1955).

²²⁹ *Yeager v. Town of Spirit Lake*, 115 Iowa 593, 597, 88 N.W. 1095, 1096 (1902).

²³⁰ *Harris v. Uebelhoer*, 75 N.Y. 169, 170 (1878).

²³¹ In *City of Rock Island v. Gingles*, 217 Ill. 185, 75 N.E. 468 (1905), the only blind participant was a horse, who, at dusk, walked into a deep, unguarded trench in the street, drawing his sighted driver in after him. Though the horse had and was using one of those common, well-known, compensatory devices for blind horses, namely a sighted driver, he walked by a faith not justified by law.

²³² *A White Cane Debate: Liechty vs. Taylor*, *The Braille Monitor*, Mar. 1965, p. 16; *Guide Dog or White Cane: Which One*, *The Braille Monitor*, Mar. 1965, p. 29; *On Dogs: Ask the Man Who Owns One*, *The Braille Monitor*, May 1965, p. 4; *A Further Argument on the White Cane*, *The Braille Monitor*, July 1965, p. 14.

²³³ ALASKA COMP. LAWS ANN. §§ 28.25.010-.040 (Supp. 1963); FLA. STAT. § 413.07 (1959); ILL. REV. STAT. ch. 95½, § 172a (1959); KAN. GEN. STAT. ANN. § 8-558 (1949); KY. REV. STAT. § 189.575 (Supp. 1962); LA. REV. STAT. § 32:217 (Supp. 1962); ME. REV. STAT. ANN. ch. 22, §§ 132-35 (Supp. 1963); MISS. CODE ANN. § 8203.5 (1956); MO. ANN. STAT. §§ 304.080-110 (Supp. 1959); N.C. GEN. STAT. §§ 20-175 (1953); N.D. REV. CODE § 39-10-31

cally disabled in street and automobile accidents have now been settled by the so-called white cane laws, to be discussed in detail later.²³⁴ In substance, those laws confer on the blind, and sometimes on otherwise disabled persons, positive rights in travel if they are carrying the white cane or are led by a guide dog. These laws in the nineteen states, preserve the pre-existing rights on streets and sidewalks and in traffic of blind persons without canes or dogs. The failure to have a cane or dog, it is declared, shall not be held to be contributory negligence or evidence thereof. In general, thus, in these nineteen states, blind persons without cane or dog may travel the streets and sidewalks without being flatly precluded from recovering for accidents, or, even without having their failure to use the travel aids considered at all as a factor in determining whether they were in the exercise of due care. This provision was incorporated in the white cane law of Pennsylvania,²³⁵ enacted after the decisions in the *Fraser*²³⁶ and *Smith*²³⁷ cases and the rule in those cases making it negligence per se to travel without aids has therefore now been reversed by the legislature. To do just that was the intention of the drafters and sponsors of the white cane law in Pennsylvania. The provision is also incorporated in the white cane law of North Carolina²³⁸ enacted prior to the decision of the North Carolina Supreme Court in *Cook v. City of Winston-Salem*.²³⁹ Nevertheless, the provision and the statute were neither discussed nor applied by the court in rendering that decision. Since the blind pedestrian in that case was guided by a dog, the provision was not literally dispositive. Yet the provision and the other clauses of the white cane law can only be read to settle the case. They are designed to free the blind without travel aids of contributory negligence in ordinary street and sidewalk accidents and to free the blind with travel aids of contributory negligence in automobile accident cases. 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

(Supp. 1957); PA. STAT. ANN. tit. 75, § 1039 (1960); R.I. GEN. LAWS ANN. §§ 31-18-13 to 31-18-16 (1956); S.C. CODE §§ 438-41 (Supp. 1962); S.D. CODE §§ 44.0318-1, 44.9932 (Supp. 1960); TEX. REV. CIV. STAT. ANN. art. 671e (1960); VT. STAT. ANN. tit. 23, § 1106 (1959); VA. CODE ANN. §§ 46.1-237 to 46.1-240 (1950); W. VA. CODE ANN. § 1721(373)(7) (Supp. 1961).

²³⁴ See text accompanying notes 360-411 *infra*.

²³⁵ PA. STAT. ANN. tit. 75, § 1039 (1960).

²³⁶ *Fraser v. Freedman*, 87 Pa. Super. 454 (1926).

²³⁷ *Smith v. Sneller*, 345 Pa. 68, 26 A.2d 452 (1942).

²³⁸ N.C. Sess. Laws 1949, ch. 324, §§ 1-4.

²³⁹ 241 N.C. 422, 85 S.E.2d 696 (1955).

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.

4. *Making the Risk Reasonable*

The text-writers more than the courts talk about balancing the risk—that is, the likelihood of the harm occurring and its seriousness when it does—against the importance to the community of the defendant's activity and the feasibility and cost of taking preventive or protective action. Some of the cases, however, do talk in these terms in the field of our concern; and, in most no doubt, it is implicit. Just as, on the one hand, the judges do not consciously consider the importance and policy of the disabled being abroad, so, on the other, they automatically assume the importance and inevitability of trenches for sewers, water and gas pipes down streets and across sidewalks, cellarways and loading pits, street and sidewalk holes for telephone poles and watercocks, miscellaneous street and sidewalk defects without purpose, and obstructions and stumbling blocks left on the roads and walks. So far as the law of torts is concerned, these things are here to stay. No judge has ever so much as intimated that municipalities, street companies, plumbers, and abutting property owners should investigate alternative methods of conducting their activities. So the remaining question is the cost of preventive or protective measures and what they should be. Here again, the answer to this question is often assumed, though discussion of it is becoming more frequent.

In the blind cases, the issue has gradually narrowed to warning versus protection. When trenches, cellarways and holes are involved, must the defendant provide a barricade sufficient to stop and hold the blind pedestrian, or does he do enough if he supplies a contraption which would indicate to the pedestrian that danger lies ahead? No court in recent times has suggested that the defendant must station a workman at the spot. Two courts have taken a definite stand that an adequate warning was adequate.²⁴⁰ Others leave the question of defendant's due care to the jury. In *Haley v. London Elec. Bd.*,²⁴¹ the Lords agreed that "In the exercise of reasonable care, local authorities and other public bodies are entitled to assume that if a blind man exercises his privilege of using a public footpath he will have been trained to protect himself from collisions by the use of his stick."²⁴² The guard is sufficient if it is of a nature such that the stick of a blind man properly being used would

²⁴⁰ *Masterson v. Lennon*, 115 Wash. 304, 197 Pac. 38 (1921); *Haley v. London Elec. Bd.*, [1965] A.C. 778 (1964).

²⁴¹ *Haley v. London Elec. Bd.*, *supra* note 240.

²⁴² *Id.* at 799.

come into contact with it. It need not be so substantial that a blind man could not knock it over and "so be propelled into the excavation."²⁴³ In their Lordships' informed opinion, "a light fence like a towel rail about two feet high,"²⁴⁴ used by the post office department, will adequately serve this purpose. Their Lordships refused to overrule a case in which a blind woman, apparently not carrying a cane, walked into the Post Office light fence, pushed it ahead of her, fell into the hole beyond and was held guilty of contributory negligence.²⁴⁵ Apparently, thus, in England, despite the talk about bringing the law up to date, the street-tampering defendant is entitled to assume that blind pedestrians will be trained in the use of a cane which they will carry, and that a light, moveable, rail fence will be detected by the cane user in time for him to stop. The holding of the *Haley* case goes no further than the facts of the case require; not nearly as far as the facts of life require. Only a minor fraction of the blind are trained and skillful in the use of the cane; a somewhat larger percentage, but still very small, use canes. What about the rest? Are they condemned to a life of ostracism? "One is entitled to expect of a blind person," said Lord Reid in the *Haley* case, "a high degree of skill and care because none but the most foolhardy would venture to go out alone without having that skill and exercising that care."²⁴⁶ Many reasonable, prudent, blind people do just that. To do so is only as foolhardy as to choose to live in the world rather than become a vegetable in the back room of somebody else's home.

To speak of cost to the defendant in these situations is to speak of trifling sums, both in absolute terms and in the relation of money to social policy. To furnish barricades which would keep blind people out of trenches in the sidewalks and streets, said Lord Danning in the English court of appeals, would "be too great a tax on the ordinary businesses of life."²⁴⁷ This has to be a figure of speech and not a serious financial calculation. The House of Lords in *Haley*, while accepting the principle of the court of appeals in this respect, yet found the necessary warning or protection devices to be very inexpensive.

In a 1920 Scottish case,²⁴⁸ much quoted in *Haley*, consideration was given to financial factors. The blind cannot afford to hire attendants so they must be permitted on the streets without them.²⁴⁹ The city allows them free passage on the tramway, indicating knowledge of their pres-

²⁴³ *Id.* at 800.

²⁴⁴ *Id.* at 790.

²⁴⁵ *Pritchard v. Post Office*, 114 J.P. 360 (C.A. 1950).

²⁴⁶ *Haley v. London Elec. Bd.*, [1965] A.C. 778, 791 (1964).

²⁴⁷ [1964] 2 Q.B. 121, 129 (1963).

²⁴⁸ *M'Kibbin v. Glasgow Corp.*, 57 Scottish L.R. 476 (1920).

²⁴⁹ *Id.* at 593.

ence and their poverty.²⁵⁰ No undue financial burden is placed on the city to guard watercock holes in the street. To require the city to pad the lampposts would be an undue burden.²⁵¹ All of this is to speak in absolute fiscal terms. It is to ignore the absolute fiscal cost, not to mention the incalculable social cost, of maintaining the blind in idleness. If all of the blind people capable of doing so were moved into the streets and into employment, more than enough money would be saved to pad all the lampposts, erect gold-plated padded barricades before every hole in the city, with enough left over to pay for a small war or two. The reason for not padding the lampposts is not financial. Nor is it the fact that they are common or ordinary street structures as the Scottish court said. It is that they are not very dangerous. They run up the cost of a blind man's band-aids but little more.

D. Oh, to be Carried by a Common Carrier

With respect to common carriers, a second area in which the law of torts takes note of the disabled, there are certain obvious contrasts with the streets, highways, and sidewalks. When proceeding on the latter, the pedestrian is the active agent, propelling himself along on his own volition, having some power of control as to his course, pace, and general procedure. The streets and sidewalks are a passive and submissive instrumentality, with relatively fixed locations, contours and general characteristics. When the pedestrian becomes a passenger, the situation is reversed. 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. The disabled share with others a passive role, their disability having next-to-nothing to do with whether they are killed in a plane crash, train wreck, but smash-up, or taxi collision. The disabled person comes into a situation of comparative disadvantage only when the transport facility is starting, stopping, or at rest, and he is getting off, or on, making a transfer, moving from carrier to station, or streetcar to curb.

Nor, in contrast with the situation on the streets, is there a problem of preventability, based on the practicability of protection by an inanimate device or the cost thereof. The employees of the carrier are on the spot, available to serve not only as a physical barricade when appropriate, but to provide mobile and positive help.²⁵² Whatever the legal duty, an established function of employees of carriers, in fact realized

²⁵⁰ *Id.* at 594.

²⁵¹ *Id.* at 598.

²⁵² See generally 14 AM. JUR. 2d *Carriers* §§ 871-75 (furnishing adequate accommodations), §§ 876-80 (furnishing information to passengers), §§ 884-90 (stopping to receive and discharge passengers).

and discharged it is true in varying degrees, is that of service to the passenger: in giving direction, aiding him in getting on and off and in making connections, assisting with children, bundles, and luggage. In this context, also, responsibility is less dependent on questions of foreseeability, based on the likelihood that the disabled will come along and be injured. Responsibility is dependent on identifying the disabled among the passengers and adapting assistance to need.

The awareness of the carrier's employees of the presence among the passengers of disabled persons and their needs for assistance is discussed by the courts in terms of (1) actual notice given the employees by the disabled persons or others, and (2) constructive notice arising out of the fact that the disability in the given case is reasonably apparent, that is, observable by the ordinarily prudent employee.²⁵³ Some courts will be satisfied with nothing less than actual knowledge on the part of the employee, however derived.²⁵⁴ Those permitting constructive notice and relying on what the employees should have known in the circumstances, for the most part, leave a good deal to be desired in the standards of employee alertness demanded. They are certainly not those of 20/20 vision or comparable capacity to draw inferences. Courts have held that constructive notice of infirmity or disability and the need for assistance did not arise in the following situations: A 73-year-old woman, weighing about 180 to 200 pounds, slow and sluggish of movement, preparing to descend the steps of a railroad car,²⁵⁵ and a woman with an observable limp produced by a wooden leg, even though an employee had assisted her up the train's stairs when she boarded.²⁵⁶ It has also been held that blindness does not necessarily impart notice. Where a blind person got aboard a train alone, slept through his stop until the train began to pull away, and was then let off in the switchyard in the small hours of the morning where he wandered for well over an hour trying to find the station, and was struck by a switch engine, the company was found not

²⁵³ See *Central of Ga. Ry. v. Carlisle*, 2 Ala. App. 514, 517, 56 So. 737, 738 (1911); *Southern Pac. Co. v. Buntin*, 54 Ariz. 180, 94 P.2d 639 (1939); *Denver & R.G.R.R. v. Derry*, 47 Colo. 584, 587, 108 Pac. 172, 173 (1910); *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 347, 34 Am. Rep. 89, 91 (1878); *Mitchell v. Des Moines City Ry.*, 161 Iowa 100, 141 N.W. 43 (1913); *Wilson v. Pennsylvania R.R.*, 306 Ky. 325, 326, 207 S.W.2d 755, 756 (1948); *Louisville Ry. v. Wilder*, 143 Ky. 436, 438, 136 S.W. 892, 893 (1911); *Croom v. Chicago, M. & St. P. Ry.*, 52 Minn. 296, 53 N.W. 1128 (1893); *Scott v. Union Pac. R. Co.*, 99 Neb. 97, 100, 155 N.W. 217, 218 (1915); *Pierce v. Delaware L. & W.R. Co.*, 358 Pa. 403, 406, 57 A.2d 876, 877-878 (1948); *Welsh v. Spokane & I. E. R. Co.*, 91 Wash. 260, 157 Pac. 679 (1916); *Sullivan v. Seattle Elec. Co.*, 51 Wash. 71, 77, 97 Pac. 1109, 1112 (1908).

²⁵⁴ *Scott v. Union Pac. R.R.*, 99 Neb. 97, 100, 155 N.W. 217, 218 (1915); *Sullivan v. Seattle Elec. Co.*, 51 Wash. 71, 77, 97 Pac. 1109, 1112 (1908).

²⁵⁵ *Wilson v. Pennsylvania R.R.*, 306 Ky. 325, 207 S.W.2d 755 (1948).

²⁵⁶ *Pierce v. Delaware L. & W.R. Co.*, 358 Pa. 403, 57 A.2d 876 (1948).

negligent for having failed to assist him to the depot. Sleepiness and blindness look the same.²⁵⁷

Though, as in the case of the streets, it is common knowledge to employees of common carriers, judges, and everybody else, supported if need be by government statistics, that disabled persons are in the habit of using common carriers unattended and that therefore they are likely to appear on any given carrier at any time, yet the majority of courts hold, today no less than in earlier times, that: carriers are for the able-bodied in the ordinary use of normal senses and limbs;²⁵⁸ the employees are "not required to anticipate [special] wants or needs,"²⁵⁹ are not under a duty "to be on the lookout to discover that any particular passenger needs special assistance,"²⁶⁰ or "to observe the condition of the passengers" in order to see whether "they require such assistance";²⁶¹ employees need not "on their own initiative" render any special service,²⁶² such as helping to detain a woman in feeble health who was carrying a sleeping child in one arm and a valise in the other.²⁶³

1. *Duty of Care Owed by the Common Carrier to the Disabled Passenger*

The duty which the carrier owes to disabled persons, once the employees are aware or should have been aware of their presence, is vari-

²⁵⁷ *Southern Pac. Co. v. Buntin*, 54 Ariz. 180, 94 P.2d 639 (1939). Other cases in which the court found no constructive notice: a woman carrying a valise, a parasol, and a fan, accompanied by her husband, preparing to descend the steps of a railroad car, *Central of Ga. Ry. v. Carlisle*, 2 Ala. App. 514, 56 So. 737 (1911); a man with typhoid fever and resulting impaired reasoning and senses of sight and hearing, crossing tracks in the yard to catch a train and not yet having encountered any employee of the company, *Scott v. Union Pac. R.R.*, 99 Neb. 97, 155 N.W. 217 (1915); a man who staggered when he boarded the train at Coeur d'Alene, Idaho, aided by a trainman who remarked to the conductor that he was "pretty full," but who did not stagger or otherwise evince intoxication when he detained at Spokane, Wash. *Welsh v. Spokane & I.E.R. Co.*, 91 Wash. 260, 157 Pac. 679 (1916).

²⁵⁸ *Sevier v. Vicksburg & Meridian R.R.*, 61 Miss. 8, 48 Am. Rep. 74 (1883).

²⁵⁹ *Illinois Cent. Ry. v. Cruse*, 123 Ky., 463, 471, 96 S.W. 821, 823 (1906).

²⁶⁰ *Ibid*; see *Southern Ry. v. Hayne*, 209 Ala. 186, 95 So. 879 (1923).

²⁶¹ *Illinois Cent. Ry. v. Cruse*, 123 Ky. 463, 471, 96 S.W. 821, 823 (1906).

²⁶² *Ibid*.

²⁶³ *Illinois Cent. Ry. v. Cruse*, 123 Ky. 463, 96 S.W. 821 (1906). In 1939 the Supreme Court of Arizona said about the *Cruse* case: "The case, so far as we know, has never been seriously criticised, nor the doctrine laid down therein repudiated, and it has been quoted approvingly in many cases besides those above cited." *Southern Pac. Co. v. Buntin*, 54 Ariz. 180, 187, 94 P.2d 639, 643 (1939). See also *Central of Ga. Ry. v. Carlisle*, 2 Ala. App. 514, 517, 56 So. 737, 738 (1911); *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 347, 34 Am. Rep. 89, 91-92 (1878); *Wilson v. Pennsylvania R.R.*, 306 Ky. 325, 326-27, 207 S.W.2d 755, 756 (1948); *Scott v. Union Pac. R.R.*, 99 Neb. 97, 101, 155 N.W. 217, 218 (1915); *Welsh v. Spokane & I.E.R. Co.*, 91 Wash. 260, 264-65, 157 Pac. 679, 680-81 (1913); *Sullivan v. Seattle Elec. Co.*, 51 Wash. 71, 77-78, 97 Pac. 1109, 1112 (1908). *Contra Louisville Ry. v. Wilder*, 143 Ky. 436, 437, 136 S.W. 892, 893 (1911): The employees must "exercise . . . the highest degree of care" in discovering disabled persons.

ously stated as reasonable care and assistance in the circumstances,²⁶⁴ special care and assistance,²⁶⁵ or a high, higher, highest or extraordinary degree of care.²⁶⁶ The variation does not seem particularly significant. All courts pretty well agree that the employees must render such assistance as is reasonably necessary for the safety of the disabled person considering the nature of his disability.²⁶⁷ This standard was not attained: by a cab driver who shut the door on the thumb of a 65-year-old diabetic, with right leg cut off above the knee, standing at the side of the cab clutching the center post where the driver had left her after assisting her from a wheelchair;²⁶⁸ by a street car conductor who stood idly by watching an 18-year-old girl on crutches, with one short and shriveled leg, make her way down the streetcar steps;²⁶⁹ by the pullman porter who took hold of a blind passenger's elbows and assisted him up the first step to the platform and then allowed him to proceed up the steps "feeling his way along as best he could" until he found what seemed to him the proper opening, which instead of being the entrance to the car was "the end of the platform away from the door of the car . . . the same having been left open and not closed by a gate as was the usual custom at such times."²⁷⁰ In the last case, the Colorado Supreme Court declared: "Putting it as mildly as the facts justify, we say . . . that the porter, knowing of plaintiff's blindness, was guilty of reprehensible negligence in suffering plaintiff to proceed up the platform steps without even cautioning him, or watching him, or guiding his movements."²⁷¹

In comparison, a cab company was found not negligent where five blind people were entering the cab, the driver, in making room for one of them, asked a second to move from the back to the front seat, and a third shut the door on the fingers of the second.²⁷² The court said the

²⁶⁴ *Denver & R.G.R.R. v. Derry*, 47 Colo. 584, 589, 108 Pac. 172, 174 (1910); *Mitchell v. Des Moines City Ry.*, 161 Iowa 100, 108-09, 141 N.W. 43, 46-47 (1913); *Singletary v. Atlantic Coast Line R. Co.*, 217 S.C. 212, 220, 60 S.E.2d 305, 308 (1950).

²⁶⁵ *Mitchell v. Des Moines City Ry.*, 161 Iowa 100, 109-10, 141 N.W. 43, 47 (1913); *Illinois Cent. Ry. v. Cruse*, 123 Ky. 463, 471, 96 S.W. 821, 823 (1906); *Croom v. Chicago, M. & St. P. Ry.*, 52 Minn. 296, 298, 53 N.W. 1128, 1129 (1893); *Welsh v. Spokane & I.E.R. Co.*, 91 Wash. 260, 264, 157 Pac. 679, 680 (1916).

²⁶⁶ *Southern Pac. Co. v. Buntin*, 54 Ariz. 180, 185-86, 94 P.2d 639, 641 (1939); *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 347, 34 Am. Rep. 89, 91 (1878); *Stallard v. Witherspoon*, 306 S.W.2d 299, 301 (Ky. 1957); *Fournier v. Central Taxi Cab Inc.*, 331 Mass. 248, 249, 118 N.E.2d 767, 769 (1954); *Pierce v. Delaware L. & W.R. Co.*, 358 Pa. 403, 406, 57 A.2d 877, 879 (1948); *Scott v. Union Pac. R.R.*, 99 Neb. 97, 99, 155 N.W. 217, 218 (1915).

²⁶⁷ 2 HARPER & JAMES, TORTS § 16.14 (1956).

²⁶⁸ *Stallard v. Witherspoon*, 306 S.W.2d 299 (Ky. 1957).

²⁶⁹ *Mitchell v. Des Moines City Ry.*, 161 Iowa 100, 141 N.W. 43 (1913).

²⁷⁰ *Denver & R.G.R.R. v. Derry*, 47 Colo. 584, 587, 108 Pac. 172, 173-74 (1910).

²⁷¹ *Id.* at 590, 108 Pac. at 174.

²⁷² *Fournier v. Central Taxi Cab, Inc.*, 331 Mass. 248, 118 N.E.2d 767 (1954).

company was not bound to protect disabled passengers against "highly improbable harm."²⁷³

In the case of accidents to pedestrians caused by defects, obstructions

²⁷³ *Id.* at 249, 118 N.E.2d at 768 (1954). The duty common carriers owe to normal passengers is commonly phrased in terms of the highest degree of care, sometimes qualified by "consistent with the practical operation of the business." *Accord* Pullman Palace Car Co. v. Barker, 4 Colo. 344, 345, 34 Am. Rep. 89 (1878); McMahon v. New York, N.H., & H.R.R., 136 Conn. 372, 374, 71 A.2d 557, 558 (1950); Louisville Taxicab & Transfer Co. v. Smallwood, 311 Ky. 405, 408, 224 S.W.2d 450, 452 (1949); Griffin v. Louisville Taxicab & Transfer Co., 300 Ky. 279, 280, 188 S.W.2d 449, 450 (1945); Guinevan v. Checker Taxi Co., 289 Mass., 295, 297, 194 N.E. 100, 101 (1935); Scott v. Union Pac. R.R., 99 Neb. 97, 99, 155 N.W. 217, 218 (1915); Archer v. Pittsburgh Ry., 349 Pa. 547-48, 37 A.2d 539-40 (1944). Bennett v. Seattle Elec. Co., 56 Wash. 407, 411, 105 Pac. 825, 827 (1909). This doctrine was first laid down in this country by the United States Supreme Court in a case dealing with an overturned stagecoach where the carrier was said to undertake to transport persons safely "so far as human care and foresight can go . . ." Stokes v. Saltonstall, 38 U.S. (13 Pet.) 181, 190 (1839). Harper and James point out that the reasonable care rule, announced by some courts, in guarding passengers against "the great potential dangers which attend rapid transit" is in effect the same as a high degree of care and that the difference between the two forms of statement "resolves itself into one merely of logomachy." 2 HARPER & JAMES, *op. cit. supra* note 267, § 16.14. Moreover, at the same time the courts speak of the highest degree of care, they sometimes declare that the carrier is not under any obligation to assist passengers in alighting, any help given is a matter of courtesy, the employees need merely call the station and stop long enough to provide reasonable opportunity for the passengers to leave the cars or board them. Central of Ga. Ry. v. Carlisle, 2 Ala. App. 514, 516, 56 So. 737, 738 (1911); Ill. Cent. Ry. v. Cruse, 123 Ky. 463, 96 S.W. 821 (1906); Steeg v. St. Paul City Ry., 50 Minn. 149, 151, 52 N.W. 393, 394 (1892); Yarnell v. Kansas City Ry., 113 Mo. 570, 576-77, 21 S.W. 1, 2 (1893). The high degree of care rule seems to be applied principally with respect to the operation of the equipment. Some courts hold that the carrier is bound to provide a suitable and safe place and means of boarding and alighting, and that whether these were provided and the assistance that should have been offered if they were not by the reasonably prudent employee are questions for the jury. *E.g.*, Mitchell v. Des Moines City Ry., 161 Iowa 100, 109, 141 N.W. 43, 47 (1913); Morarity v. Durham Traction Co., 154 N.C. 586, 588, 70 S.E. 938, 939 (1911). Employees in discharging their duties must take reasonable care not to injure passengers. Griffin v. Louisville Taxicab & Transfer Co., *supra* at 281, 188 S.W.2d at 450; Tefft v. Boston Elevated Ry., 285 Mass. 121, 188 N.E. 507 (1934); Benson v. Northland Transp. Co., 200 Minn. 445, 448, 274 N.W. 532, 533 (1937). For an analysis of the differences in boarding and alighting problems of taxis, buses, streetcars, and trains, see Southeastern Greyhound Lines v. Woods, 298 Ky. 773, 184 S.W.2d 93 (1944). The Kentucky court concluded that the rule that a carrier owes passengers the highest duty of care is too generally stated. Rather it should read: that the carrier has "the duty to exercise the highest degree of care, skill and diligence for the safety of the passenger as is required by the nature and risk of the undertaking, in view of the mode of conveyance and other circumstances involved, which may vary according to the immediate activity, instrumentality, time or place." *Id.* at 775-76, 184 S.W.2d at 95. "The modern trend is away from the artificial and perplexing categories of high and highest degree of care and toward the one standard for all cases of reasonable or ordinary care under the circumstances of the particular case." 14 AM. JUR. 2d Carriers § 916 (1964). For cases dealing with the duty of carriers to furnish suitable accommodations, including providing heat necessary for the health, comfort, and safety of passengers during the trip, see Silver v. New York Cent. R.R., 329 Mass. 14, 105 N.E.2d 923 (1925); Owen v. Rochester-Penfield Bus Co., 278 App. Div. 5, 103 N.Y.S.2d 137 (1951).

or excavations in the streets, the judicial focus of discussion is often the conduct of the pedestrian and whether he was duly careful in seeking to avoid harm to himself. In the common carrier cases, doubtless because of the nature of the business including its potential dangerousness in a number of ways, the courts are most often preoccupied with determining the character and extent of the duty of the defendant, and comparatively little is said about contributory negligence. The passenger is of course called upon to exercise due care for his own safety²⁷⁴—even required upon rare occasion to make “a more than ordinary diligent and attentive use” of his remaining senses²⁷⁵—but what that care is, in the circumstances of disability and the surroundings of various common carriers, is seldom analyzed. The situation is regarded as largely in the control of the carriers, and as very little in the control of the passengers. The passenger is under no duty to ask for needed services if his disability is apparent.²⁷⁶ Contributory negligence would normally be hard to establish when the passenger was being assisted by the employee.²⁷⁷ The principal areas left for possible contributory negligence are in the failure to request assistance when disability is not apparent or in not allowing employees a suitable chance to render the aid. The Supreme Court of South Carolina held that there was contributory negligence as a matter of law when a visibly deformed and crippled midget alighted from a train unaided.²⁷⁸ He had not given the employees, said the court, “a reasonable opportunity” to help him.²⁷⁹ It is pointed out in the American Law Reports that the carrier’s conduct at times seems to give the disabled passenger a choice of two dangers: a danger of injury if he alights at once; a danger of injury if he is carried to some further point where there will be no one to aid him.²⁸⁰ The passenger can hardly be charged with negligence if he decides to take his chances at once. In addition, the emergency doctrine is applicable in determining whether the choice was a reasonable

²⁷⁴ See, e.g., *Yazoo & M.V.R. Co. v. Shaggs* 181 Miss. 150, 179 So. 274 (1938); *Singletery v. Atlantic Coast Line R. Co.*, 217 S.C. 212, 219, 60 S.E.2d 305, 308 (1950). The Washington Supreme Court said that the carrier owed the passenger, crazed with drink, “a duty commensurate with his condition. The corollary of this rule must be that his duty to care for his own safety should be measured by his condition as to sobriety.” *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 410, 105 Pac. 825, 827 (1909).

²⁷⁵ *Gonzales v. New York & Harlem R.R.*, 1 Jones & Spencer 57, 62 (N.Y. Sup. Ct. 1871); *Anschel v. Pennsylvania R.R.*, 34 Pa. 123, 127, 29 A.2d 694, 697 (1943).

²⁷⁶ *Mitchell v. Des Moines City Ry.*, 161 Iowa 100, 108, 141 N.W. 43, 46 (1913): “Most people afflicted as she [plaintiff] was feel a delicacy in asking assistance or in urging upon the attention of strangers the fact that they are unfortunate and crippled.”

²⁷⁷ See cases cited in 14 AM. JUR. 2d *Carriers* § 1011 n.21 (1964).

²⁷⁸ *Singletery v. Atlantic Coast Line R. Co.*, 217 S.C. 212, 60 S.E.2d 305 (1950).

²⁷⁹ *Id.* at 217, 60 S.E.2d at 308.

²⁸⁰ Annot., 30 A.L.R.2d 334, 337 (1953).

one.²⁸¹ Moreover, it has been held that where the passenger's disability prevented him from discovering that the car was moving, he was not negligent per se in getting off.²⁸²

Noticeably absent from the common carrier cases is talk about some of the common, well-known, compensatory devices for the blind. Either the seeing-eye dog or the cane would be helpful in keeping the blind man from falling off the unguarded end of the train platform; but neither would be particularly helpful in finding a connecting train or in locating the station from the middle of the switchyard. The cane but not the dog would be helpful in descending train steps, locating the stool placed at the bottom, and determining the height of the steps. Doubtless the absence of judicial talk about these devices is due to the presence of the employee on the scene, regarded by courts as more useful and reliable than either of the other compensatory aids.

That the disabled who need them ought to be provided with attendants, as some courts have said,²⁸³ leaves open the question: by whom? To require the impoverished disabled to supply them out of their own resources on penalty of not being able to travel on common carriers is simply one form of locking the disabled up in their houses and institutions. The government-sponsored arrangements²⁸⁴ by which blind passengers may take a guide with them for the price of one ticket are a recognition of the poverty of the blind as well as their supposed need for guide services. They do not solve the problem of the blind person who is without a guide and who, because of the availability of these arrangements on almost all bus and railroad lines in the United States, is often told that he will not be permitted to get aboard unattended. The arrangements thus work in some cases to the disadvantage of the disabled traveler by giving support to the carriers in the free exercise of a supposed right not to accommodate them. Where services are abundantly available on the airlines, supplying the disabled passenger with many attendants, and only the blind person's poverty remains, the National Federation of the Blind has opposed the two-for-one concession authorized by bills currently pending before Congress.²⁸⁵ As to poverty, the blind are not to be distinguished from others who are poor.²⁸⁶

²⁸¹ *Ibid.*

²⁸² *Poak v. Pacific Elec. Ry.*, 177 Cal. 190, 170 Pac. 159 (1918).

²⁸³ *E.g.*, *Croom v. Chicago M. & St. P. Ry.*, 52 Minn. 296, 53 N.W. 28 (1893).

²⁸⁴ See, *e.g.*, 44 Stat. 1247 (1927), 49 U.S.C. § 22(1) (1964); CAL. PUB. UTIL. CODE § 525; HAWAII REV. LAW § 109-22 (1957); KAN. GEN. STAT. ANN. § 66701 (1949); N.J. STAT. ANN. § 48:3-34 (1940).

²⁸⁵ H.R. 8068, 88th Cong., 1st Sess. (1964); National Federation of the Blind Resolution 64-09, Phoenix 1964.

²⁸⁶ Some smaller groups of the blind have favored these measures: *The BVA Bulletin*, Oct. 1964, Resolution No. 13.

The basis and extent of the duty of common carriers toward disabled passengers is set forth in the oft-quoted words of *Croom v. Chicago, M. & St. P. Ry.*:²⁸⁷

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.²⁸⁸

Thus, the basis of the duty is the voluntary and knowing acceptance of responsibility, making plain that common carriers are free to decline to carry disabled persons, at least those who "ought to be provided with an attendant to take care" of them.

The doctrine of the *Croom* case would seem, on its face, to infringe the common law command of equal and non-discriminatory access to the services and facilities of common carriers and to repudiate any general right on the part of the disabled to travel by this mode. The courts have taken the position that, first, the refusal of the carriers to transport disabled persons is based on proper classification and warrantable discrimination and therefore is not a violation of the common law command; and, second, that the disabled in general do not have a right to be carried by the common carriers, the cases sometimes cited for the proposition that they do being in fact the foundation of the doctrine of the *Croom* case.²⁸⁹

The common law command of equal and non-discriminatory access arises out of and is part of the notion that carriers are common, that is, that they hold themselves out to the public generally as in the business

²⁸⁷ 52 Minn. 296, 53 N.W. 1128 (1893).

²⁸⁸ *Id.* at 298, 53 N.W. 1129.

²⁸⁹ See *Williams v. Louisville & N.R.*, 150 Ala. 324, 43 So. 576 (1907); *Yazoo & M. Valley R. v. Littleton*, 177 Ark. 199, 5 S.W.2d 930 (1928); *Illinois Cent. R. v. Allen*, 121 Ky. 138, 89 S.W. 150 (1905); *Illinois Cent. R. v. Smith*, 85 Miss. 349, 37 So. 643 (1905); *Zackery v. Mobile & O.R.*, 75 Miss. 746, 23 So. 434 (1898); *Zackery v. Mobile & O.R.*, 74 Miss. 520, 21 So. 246 (1897); *Sevier v. Vicksburg & M.R.*, 61 Miss. 8 (1883); *Hogan v. Nashville Interurban Ry.*, 131 Tenn. 244, 174 S.W. 1118 (1915); *Benson v. Tacoma Ry. & Power Co.*, 51 Wash. 216, 98 Pac. 605 (1908).

of transporting persons for hire.²⁹⁰ The command is imposed by law, does not arise out of the contractual relation between the carrier and the passenger, is intended for the benefit of the traveling public and in many states is re-declared and strengthened by statute and constitutional provision.²⁹¹ But equal access, the courts hold, is provided when all who are similarly situated are admitted on the same terms and a ban against discrimination does not forbid distinctions among potential passengers that are warranted by the special relation of a particular class of persons to the function of the carrier or the act of transportation.²⁹² Thus they have held that carriers can refuse to receive persons who are objectionable, dangerous to the health, safety, or convenience of the other passengers: those "who desire to injure the company, notoriously bad, or justly suspicious persons, gross or immoral persons, drunken persons . . . those who refuse to obey the rules,"²⁹³ those who are obnoxiously filthy,²⁹⁴ or those who are affected with a contagious or repulsive disease.²⁹⁵ To this motley crew, in view of the association in men's minds between these ill-assorted persons and problems, it was inevitable that the courts should add the physically disabled. To supply their need for attendants, would, in effect, convert the conveyance into a hospital and the carrier's employees into nurses.²⁹⁶

2. *The Right of the Disabled to be Transported on Common Carriers*

The leading cases on the right of the disabled to be carried by a common carrier open the door of the carrier only a crack to admit a few.²⁹⁷ They hold that the carrier may not properly adopt a flat rule that

²⁹⁰ See, e.g., *Hogan v. Nashville Interurban Ry.*, *supra* note 289, at 254, 174 S.W. at 1120. See generally, 13 AM. JUR. 2d *Carriers* § 2 (1964).

²⁹¹ See cases and statutes cited in 13 AM. JUR. 2d *Carriers* §§ 175, 181 (1964), 14 AM. JUR. 2d *Carriers* § 859 (1964).

²⁹² *Ibid.*

²⁹³ *Zachery v. Mobile & O.R. Co.*, 74 Miss. 520, 21 So. 246 (1897):

²⁹⁴ *Atwater v. Delaware, L. & W.R. Co.*, 48 N.J.L. 55, 2 Atl. 803 (1886).

²⁹⁵ *Pullman Car Co. v. Krauss*, 145 Ala. 395, 40 So. 398 (1906); *Bogard v. Illinois Cent. R.*, 144 Ky. 649, 139 S.W. 855 (1911); *Atwater v. Delaware, L. & W.R.*, *supra* note 294.

²⁹⁶ *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89 (1878); *Croom v. Chicago, M. & St. P. Ry.*, 52 Minn. 296, 53 N.W. 1128 (1893).

²⁹⁷ In *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89 (1878), the ill were declared to have the right. The statement was dictum however and the emphasis of the opinion was upon "the increased risk arising from conditions affecting their fitness to journey" resting upon their own shoulders where they are unknown to the carrier. *Id.* at 348, 34 Am. Rep. at 92. For the language casting doubt on the right in Colorado, see *Denver & R.G.R.R. v. Derry*, 47 Col. 584, 108 Pac. 172 (1910): "It may be that a railroad company is not bound to receive as a passenger one who is helpless or blind, or otherwise incapable of properly caring for himself, unless accompanied by a competent attendant." *Id.* at 588, 108 Pac. at 174. A 1911 Kentucky case, *Louisville Ry. v. Wilder*, 143 Ky. 436, 136 S.W. 892 (1911), declared the right in more encompassing terms: "[C]hildren . . . feeble, infirm, . . . aged

no sick, insane, imbecile, cripple, invalid, or blind person will be received by conductors, or sold tickets by agents, unless accompanied by some person charged with their care and comfort while traveling.²⁹⁸ There was no disposition to question this rule as a wholesale invasion of the rights of a large class of people to live in the world, or to go about in it; 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; 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 to bestow upon all its passengers alike.”²⁹⁹ Moreover, the Mississippi court felt itself able to say what classes of persons require such “other care,” though it faltered a little in vouchsafing information about the character of the additional care: “Primarily the affliction of blindness unfits every person for safe travel by railway, if unaccompanied.”³⁰⁰ Accordingly, the carrier might presume blind people unfit to travel alone, a presumption not to be regarded as “a hardship upon the persons afflicted with blindness or other disabling physical infirmity” but rather “as a safeguard thrown around them for their protection.”³⁰¹ But since not every sick, crippled, infirm, or blind person requires additional care, the individual must be allowed to overcome this presumption against him if he can. This he can do by offering to the company’s agent proof of his competence to travel alone. The company’s flat rule of exclusion was thus to be traded for a presumption of the incompetence of the disabled, itself a rule of exclusion but not a flat one. This opened the door a crack to admit those adjudged by uninformed agents to be competent and who have the hardihood to insist on the point. In the social context of the day, the courts did not feel it necessary to find some rational justification for the closed-door policy which they and the carriers adopted; quite the contrary, they found it necessary to justify opening the door even the crack they did. Two reasons were given for doing so: fear that the less severely disabled—those only slightly sick or lacking a leg or arm—might be caught in the dragnet at

persons [and] persons who are encumbered with babies or bundles . . . all these classes of persons have the right to use the car . . .” *Id.* at 440, 136 S.W. at 894. Here again the statement is dictum. The question in the case was whether the carrier was negligent in starting the train before the plaintiff with a baby in her arms was seated.

²⁹⁸ Illinois Cent. R. Co. v. Smith, 85 Miss. 349, 37 So. 643 (1905); Zackery v. Mobile & O.R. Co., 75 Miss. 746, 23 So. 434 (1898); Zackery v. Mobile & O.R. Co., 74 Miss. 520, 21 So. 246 (1897); Hogan v. Nashville Interurban Ry., 131 Tenn. 244, 174 S.W. 1118 (1915).

²⁹⁹ Illinois Cent. R. Co. v. Smith, 85 Miss. 349, 356, 37 So. 643, 644 (1905).

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

the station door;³⁰² and the undesirability of placing an "unwarranted handicap on a class of men capable of being serviceable to society, and therefore on society itself."³⁰³ The courts did not discuss why either serviceability to society or the right to live in it should be tested by the physical capacity to mount the train steps unaided or find one's way to a connecting carrier. They only thought it a proper test for those who could do these things unaided. To 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.

The rule governing the right of the disabled to ride on common carriers, thus evolved by the courts around the turn of the century, constituted at that time a slight improvement on a harsher rule sought to be imposed by the railroads. While perhaps consistent with the prevailing social attitudes of that day, but certainly inconsistent with the rule long since developed by the courts regarding the right of the disabled to be on the streets and highways,³⁰⁴ that rule is still invoked by the carriers today. In the summer of 1965, it was cited by an agent in Atlanta, Georgia, as justifying refusal to transport a blind person with normal ability to get about. It was widely circulated by the passenger agents' association as their answer to a flurry of protest from organizations of the blind.³⁰⁵ "Rule 8(f). *Ticketing Infirm or Objectionable Passengers*.—No person, who because of mental, physical, or other disability, is incapable of caring for himself or herself, will be received as a passenger, *unless accompanied by a competent attendant*, and no contract for transportation or ticket purchased by or for such a person in contravention of this rule shall be valid."³⁰⁶

The objections to this rule which existed when it was formulated are still valid today and the changed times have added others. At least as to the physically disabled, it is wrong in principle. Services necessary for the use of their equipment and facilities should be provided by the carriers as part of the care which "the law requires the carrier to bestow upon all its passengers alike."³⁰⁷ That this would compel them to convert their trains into hospitals and their employees into nurses is probably

³⁰² *Zackery v. Mobile & O.R. Co.*, 75 Miss. 746, 752, 23 So. 434, 435 (1898).

³⁰³ *Hogan v. Nashville Interurban Ry.*, 131 Tenn. 244, 251-52, 174 S.W. 1118, 1120 (1915). The *Hogan* case involved a young paralytic who, using crutches, traveled by train daily to Vanderbilt University where he was a student and a teacher.

³⁰⁴ See text accompanying notes 132-67 *supra*.

³⁰⁵ Letter to R. Kletzing, president NFB, from Trans-Continental R.R. Passenger Ass'n, E. B. Padrick, Chairman, July 6, 1965.

³⁰⁶ *Ibid.*

³⁰⁷ *Illinois Cent. R. Co. v. Smith*, 85 Miss. 349, 356, 37 So. 643, 644 (1905).

colorful argument rather than fact. In any event, it speaks only to the cost; and the public should bear the cost of making effective such an important right. The argument about the necessity of Rule 8(f) is largely academic. In practice, services adequate to enable most disabled persons to travel, even though they might commonly be thought to require an attendant, are provided by the agents of the company or are available from porters and others on the premises. Equally important, the rule is misapplied by agents not generally knowledgeable about such things to exclude disabled persons who do not need an attendant. Arguments about cost, availability of existing services, and mis-administration, however, all must give way to the fact that the rule is in contravention of today's policy of integration of the disabled into the social and economic life of the community. That policy requires 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. In practice, this is what the large airlines do, without noticeable disaster to themselves or to the country. Architectural barriers in public conveyances should receive the same treatment as they do in public buildings and facilities.³⁰⁸

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. Indeed, it may properly be regarded as aspect of the right to be upon the streets, highways, and walks. That the latter are public, while the common carriers are in some sense private, does not change the nature of the right or its necessity and harmony with basic social policy. People cannot live in the world, today, more than ever, without moving freely within communities and between communities. This involves not only walking or riding wheelchairs upon the sidewalks and streets, but also utilizing such means of transportation over them as are commonly available to others. The disabled are less able to use private cars driven by themselves, and are correspondingly more dependent on public transportation. The fact that common carriers are regulated and subsidized by the public, and are engaged in a common calling with historic common law implications of rights to equal access, does not create the claim of the disabled to live in the world and gain access to it through the use of common carriers. It does, however, add strength to that claim and make its denial even less tenable. 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

³⁰⁸ See text accompanying notes 102-31 *supra*.

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.

The extent to which the existing rule of the carriers has been modified, if at all, by the guide dog statutes is not entirely clear. Those statutes in twenty-three³⁰⁹ states expressly cover public conveyances, occasionally, as in California, detailing these as "common carriers, airplane, motor vehicle, railroad train, motor bus, street car, boat . . ."³¹⁰ As noted earlier,³¹¹ these statutes are generally addressed to the problem of gaining admittance for the dog, that is, of removing restrictions on its presence. In the case of public conveyances, they also seek to make plain that the master is not to be charged for the transportation of the dog,³¹² and sometimes that the dog is not to occupy a seat.³¹³ The special question presented with respect to the carriers is whether the dog is to be treated as "a competent attendant" within the meaning of their rule; or whether the blind person adjudged by an agent to be incompetent is required to be accompanied by a competent human attendant in addition? The narrowest view of the statutes is that they do 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. An intermediate view is that the statutes authorize all blind persons with dogs to travel, eliminating all questions of their competence. The broadest view is that the statutes presuppose a right of all persons to use common carriers, and, presupposing that right, they are designed to remove special obstacles placed in the way of blind persons having their dogs with them when exercising the right. The first view conforms to the literalism of the statutes. The third view conforms to the historic origins and purposes of the statutory formulation and the policy of integrationism. The second view does not particularly conform to either, but is the one that is followed in practice. Arguments between the agents of common car-

³⁰⁹ Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, Rhode Island, Tennessee, Texas, Washington, West Virginia. See note 74 *supra* for a listing of the applicable statutes.

³¹⁰ CAL. PEN. CODE § 643.5.

³¹¹ See text accompanying notes 69-102 *supra*.

³¹² ARK. STAT. ANN. § 78-212 (Supp. 1957); CAL. PEN. CODE § 643.5; CONN. REV. STAT. § 22-346a (Supp. 1963); IDAHO CODE ANN. § 18-5812A (Supp. 1965). IOWA CODE ANN. § 351.30 (Supp. 1964); ME. REV. STAT. § 54 (Supp. 1963); MASS. STAT. ANN. § 98A (1956); MO. STAT. ANN. § 209.150 (1962); N.J. STAT. ANN. § 48:3-34 (1953); R.I. STAT. ANN. § 29-2-16 (1957); TEX. STAT. ANN. § 25-889a (1960); WASH. REV. CODE ANN. § 81.28.140 (1962); W. VA. CODE ANN. § 2568(1) (1961).

³¹³ GA. CODE ANN. § 79-601 (1964); IND. STAT. ANN. § 16-212 (1964); LA. STAT. ANN. § 52 (Supp. 1964).

riers and the blind travelers focus on the right of the dog to go aboard; the right of the master is not disputed. Thus is human progress achieved. Since there are few guiding and no attendant functions the dog can perform in or about public conveyances, this is an ironic method of advancing human rights.

E. Automobiles

Automobile law is the third area in which the law of torts pays special attention to the disabled. The rules of negligence as they stood at the advent of the automobile have been applied generally to the new means of locomotion—true, not without some adaptation, selection, and difference of emphasis.

The starting point is the pre-existing right of people to use the streets and highways. They have this right whether afoot or in automobiles and they can exercise it without distinction as to time or place. Thus, pedestrians and drivers were early held to have an equal right not only to the use of the streets and highways but to be in any part of them at any time.³¹⁴ When using the streets and highways, pedestrians and drivers alike are under an obligation to proceed in a safe and careful fashion so as not to infringe the equal rights of others or to injure them. As always, due care is determined by the circumstances.³¹⁵

Rules of the road have been developed by custom, statute and ordinance to make it possible for the hordes of pedestrians and drivers to use the roads and streets efficiently, with maximum satisfaction and minimum injury to all in the exercise of equal rights. Otherwise, automobiles would have to proceed at the pace of the slowest pedestrian. These rules generally provide that the pedestrian has the right of way in marked cross walks, at intersections, and on the side of the road. Drivers have the right of way elsewhere. Drivers and pedestrians alike must proceed with due care even when they have the right of way.³¹⁶ When they do not have the right of way, they may still proceed but must do so with care appropriate in the circumstances, including the circum-

³¹⁴ *Apperson v. Lazro*, 44 Ind. App. 186, 87 N.E. 97 (1909); *McLaughlin v. Griffin*, 155 Iowa 302, 135 N.W. 1107 (1912); *Warruna v. Dick*, 261 Pa. 602, 104 Atl. 749 (1918); *Dougherty v. Davis*, 51 Pa. Super. 229 (1912).

³¹⁵ *Rush v. Lagomorsino*, 196 Cal. 308, 237 Pac. 1066 (1925); *Fahey v. Madden*, 58 Cal. App. 537, 209 Pac. 41 (1923); *Carpenter v. McKissick*, 37 Idaho 729, 217 Pac. 1025 (1923); *Stotts v. Taylor*, 130 Kan. 158, 285 Pac. 571 (1930); *Button v. Metz*, 66 N.M. 485, 349 P.2d 1047 (1960); *Feltner v. Bishop*, 348 P.2d 548 (Wyo. 1960).

³¹⁶ CAL. VEHICLE CODE §§ 2.1950, 2.1954 (Supp. 1965). See also ILL. ANN. STAT., ch. 95½, § 172(c) (Supp. 1965); N.Y. VEHICLE & TRAFFIC LAW § 1154; TEXAS REV. CIV. STAT. art. 6701d, § 79 (1960).

stance that others have the right of way.³¹⁷ In view of the apportionment of rights of way and alternate rights to use particular portions of the streets and highways, the equal character of the rights of pedestrians and drivers has gradually disappeared from the rhetoric of judicial opinions.

The disabled have the same right to the use of the streets and highways that other people do. When they exercise the right, they too must proceed with due care in the circumstances, including the circumstance of their disability. In 1909, an Indiana court, in a case involving an infirm and defectively sighted plaintiff who was run down by the defendant's automobile, held that the plaintiff had a right to be on the highway unattended and was bound to use only ordinary care when there.³¹⁸ The pedestrian and the car had the same right to the road and must not infringe each other's use.³¹⁹ Since the defendant had so infringed the right of the plaintiff by negligently failing to pay proper attention to his presence on the highway, judgment against him was sustained. In 1912, in a leading case³²⁰ the Iowa Supreme Court, affirming a judgment for a plaintiff who was struck by the defendant's automobile, explicitly applied the rule in *Hill v. City of Glenwood*,³²¹ a 1904, blind plaintiff, defective sidewalk case. In the 1912 case, the plaintiff, who had been blind for five or six years and who was familiar with the streets of the town, walked along the main business street and waited to cross at the corner. He let a buggy go by, listened, heard nothing more, started across, and was struck. The court held that the plaintiff had done all he was required to do.³²²

As to contributory negligence in this area, the courts generally follow the line restated by the New Hampshire Supreme Court: "[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."³²³ The reasonable man standard does require that the dis-

³¹⁷ CAL. VEHICLE CODE § 1951; NEW YORK VEHICLE & TRAFFIC LAW, §§ 1151, 1154; ILL. ANN. STAT. ch. 95½, §§ 170-175, especially § 172 (Supp. 1965); PA. STAT. ANN. tit. 75, § 1039 (1959); TEX. REV. CIV. STAT. art. 6701d, §§ 33-34, 82 (1960); N.C. GEN. STAT. § 20-174 (1937). See also *Pearson & Dickerson Contractors v. Harrington*, 60 Ariz. 354, 137 P.2d 381 (1943); *Rhimer v. Davis*, 126 Wash. 470, 218 Pac. 193 (1923).

³¹⁸ *Apperson v. Lazro*, 44 Ind. App. 186, 87 N.E. 97 (1909).

³¹⁹ *Id.* at 186, 88 N.E. at 100 (1909).

³²⁰ *McLaughlin v. Griffin*, 155 Iowa 302, 135 N.W. 1107 (1904).

³²¹ 124 Iowa 479, 100 N.W. 522 (1904).

³²² *McLaughlin v. Griffin*, 155 Iowa 302, 135 N.W. 1107 (1904).

³²³ *Bernard v. Russell*, 103 N.H. 76, 77, 164 A.2d 577, 578 (1960).

abled make greater use of their remaining senses and faculties: that the blind listen more carefully, the deaf look more closely, and the aged or lame allow more space and time.

The distinctiveness of the problems of the deaf arises from the invisibility of their condition and hence the absence of notice to drivers. As a factor in travel accidents, especially those involving automobiles, deafness is almost automatically considered exclusively in terms of the standard of care of the deaf person or, in other words, of the negligence of the deaf plaintiff. The deaf pedestrian who puts himself in a place of danger by walking along a streetcar track must, on peril of being found contributorily negligent as a matter of law, look backward at suitable intervals as well as forward.³²⁴ If he walks diagonally across the roadway on a clear but dark night, he must, at the same peril, be sufficiently watchful of his surroundings to discover that a car with lights aglow, moving at a lawful speed and on the proper side of the road, is approaching him from his right rear.³²⁵ And if he should happen to stand in the middle of a country road just wide enough for one car, the jury might very well think that he should "take a position facing across the road instead of along it so that he could see both ways, or one way as well as the other, by merely turning his head."³²⁶ On the other hand, the deaf pedestrian in making compensatory use of his eyes need not continually look in all directions but may fix his attention on the direction from which the next danger is to be anticipated.³²⁷ He is entitled to assume, moreover, that drivers will not exceed the speed limit.³²⁸ If the pedestrian was otherwise in a position of right the fact that hearing would have saved him will not relieve the defendant of liability.³²⁹ A deaf pedestrian who, approaching the corner, stopped, waited for the light to change, and then proceeded to cross the street, was found not contributorily negligent either as a matter of law or as a matter of fact when he was struck by a fire truck responding to an alarm, moving north in a south-bound lane, with siren and bell sounding at intervals, the traffic on the block having been stopped.³³⁰ The plaintiff, said the court, "used his eyes and did all that prudence and care would require under the circumstances. . . . [He] was entitled to assume that the green light gave him the right of

³²⁴ Kerr v. Connecticut, 107 Conn. 304, 140 Atl. 751 (1928).

³²⁵ Hizam v. Blackman, 103 Conn. 547, 131 Atl. 415 (1925).

³²⁶ Hanson v. Matas, 212 Wis. 275, 279, 249 N.W. 505, 506 (1933).

³²⁷ Robb v. Quaker City Cab Co., 283 Pa. 454, 129 Atl. 331 (1925).

³²⁸ See, Covert v. Randall, 298 Mich. 38, 298 N.W. 396 (1941); Robb v. Quaker City Cab Co., *supra* note 327.

³²⁹ Fink v. City of New York, 206 Misc. 79, 132 N.Y.S.2d 172 (Sup. Ct. 1954); *cf.* Wilson v. Freeman, 271 Mass. 438, 171 N.E. 469 (1930).

³³⁰ Fink v. City of New York, *supra* note 329.

way. . . . [Plaintiff] is not to be penalized because of such affliction and not being able to hear siren and bell."³³¹

Cases dealing with the contributory negligence of the lame are too few in number, scattered in jurisdiction, and some of them too old to be revealing of a judicial view of the special travel problems of this group. In a 1911 Arkansas case,³³² the appellate court held erroneous instructions to the jury that if the motorist ran into the pedestrian a prima facie case of the motorist's negligence was established. In holding, at this early stage of placing the automobile in its proper place in the law of torts, that negligence and contributory negligence were matters of fact, the court did not concern itself with the fact that the plaintiff was "a beggar on his crutches,"³³³ except to say that such as he have the same right to the use of the streets as the man in his automobile. That the crutches gave notice to the motorist of the pedestrian's condition, and therefore of the care required of him in the circumstances, was not a subject of judicial comment.

The New Hampshire court, in a 1946 case,³³⁴ held that the lame can only be required to do what they can do, and whether, with their limitation, they have exercised due care at an intersection is a question for the jury. In a 1954 Michigan case,³³⁵ plaintiff, with a bad hip, and using a cane, was found contributorily negligent as a matter of law for failing to make "further observation in the direction of the approaching vehicle after proceeding into the lane of foreseeable danger. . . . Having discovered the oncoming vehicle, it is the pedestrian's duty to keep watch of its progress and to exercise reasonable care and caution to avoid being struck by it."³³⁶ In Pennsylvania, with its fixation on contributory negligence, this rule was applied to a lame pedestrian with a cane who had not discovered the oncoming automobile in his careful observation before leaving the curb. The court held he must maintain a vigilant lookout all the way across.³³⁷ In California, a cripple on crutches, crossing at an intersection and struck near the opposite curb, was held to have had a right to be where he was and to have exercised due care in the circumstances.³³⁸ In that case, however, the plaintiff saw the defendant's car three or four blocks down the street and kept his eye on it all the

³³¹ *Id.* at 80, 132 N.Y.S.2d at 173.

³³² *Millsap v. Brodgon*, 97 Ark. 469, 134 S.W. 632 (1911).

³³³ *Id.* at 472, 134 S.W. at 633.

³³⁴ *Bellemare v. Ford*, 94 N.H. 38, 45 A.2d 882 (1946).

³³⁵ *Heger v. Meissner*, 340 Mich. 586, 66 N.W.2d 200 (1954).

³³⁶ *Id.* at 589, 66 N.W.2d at 222, citing *Ludwig v. Hendricks*, 235 Mich. 633, 638, 56 N.W.2d 409, 411 (1953).

³³⁷ *Rucheski v. Wisswesser*, 355 Pa. 400, 50 A.2d 291 (1947).

³³⁸ *Florman v. Patzer*, 133 Cal. App. 358, 24 P.2d 228 (1933).

way. But for the fact that the defendant was speeding, the plaintiff would have made it across.

In the case of the blind, relatively less emphasis is placed on the conduct of the pedestrian and more on that of the defendant: less on contributory negligence and more on the higher degree of care owed by the defendant.³³⁹ The courts uniformly hold that the totally blind and the partially blind are entitled to rely upon the protection of traffic signals at intersections,³⁴⁰ and that this is true whether they detect a change in the signal by the sound of a bell,³⁴¹ by notice from others that a light has changed,³⁴² or presumably by their realizing that other pedestrians are starting across and that cars have stopped. At intersections not controlled by traffic signals and when crossing streets elsewhere than at intersections, whether the blind or defectively sighted pedestrian was exercising due care in the circumstances is a question which the appellate courts direct be left to the jury.³⁴³ The *American Law Reports* remarked upon the penalties of being partially blind as against being totally so.³⁴⁴ Contributory negligence of the totally blind pedestrian, in being struck by a motor vehicle, is ordinarily left for the jury, and the jury usually brings in a verdict for the plaintiff which is then sustained by the court.³⁴⁵ Not so with the partially blind. Their motor accident cases are also usually sent to the jury on the issues of negligence and contributory negligence, but the jury generally returns a verdict for the motorist which in turn the court usually sustains. If the *American Law Reports* has counted the cases correctly, and it is not entirely clear that it has with respect to the partially blind,³⁴⁶ this may be a rule of life if not of law.

Though the 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. A few early cases said that drivers must know what everybody else knows, that consequently they must expect that disabled persons will be among the pedestrians they approach and that they must proceed in a manner to

³³⁹ Compare, however, *Trumbley v. Moore*, 151 Neb. 780, 39 N.W.2d 613 (1949), where a pedestrian with impaired vision was held contributorily negligent as a matter of law.

³⁴⁰ *E.g.*, *Griffith v. Slaybaugh*, 29 F.2d 437 (D.C. Cir. 1928).

³⁴¹ *Woods v. Greenblatt*, 163 Wash. 433, 1 P.2d 880 (1931).

³⁴² *Coco-Cola Bottling Co. v. Wheeler*, 99 Ind. App. 502, 193 N.E. 385 (1935).

³⁴³ See, *e.g.*, *Muse v. Page*, 125 Conn. 219, 4 A.2d 329 (1939); *Bryant v. Emerson*, 291 Mass. 227, 197 N.E. 2 (1935); *Hefferon v. Reeves*, 140 Minn. 505, 167 N.W. 423 (1918); *Bernard v. Russell*, 103 N.H. 76, 164 A.2d 577 (1960); *Curry v. Gibson*, 132 Ore. 283, 285 Pac. 242 (1930).

³⁴⁴ Annot., 83 A.L.R.2d 769, § 3, at 775 (1962).

³⁴⁵ *Ibid.*

³⁴⁶ *Id.* at 776.

safeguard them against injury.³⁴⁷ Other courts say, rather, that the driver has a right to proceed upon the assumption that all pedestrians in his path possess normal faculties and that they will exercise those faculties normally in the interests of their own safety.³⁴⁸ 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,³⁴⁹ 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. At this point the rule of hazards in the street³⁵⁰ 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.

When the driver knows, or in the exercise of normal faculties should have known, that the pedestrian was disabled, he must exercise a high degree of care to avoid injuring him. The analogical origin and reasons are given by the Supreme Court of Louisiana: "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."³⁵¹ In the leading case of *Weinstein v. Wheeler*,³⁵² the Oregon Supreme Court said that the driver "must use care commensurate with the danger" when he knows "or in the exercise of reasonable diligence ought to know" that the pedestrian is blind.³⁵³ "It will not do to drive on under such circumstances and assume that one, who thus deprived of sight, will jump the right way."³⁵⁴ The Oregon court at first said that the automobile must be brought to a stop but later modified this to the effect that the automobile must be stopped unless the exercise of due care will

³⁴⁷ See *Warruna v. Dick*, 261 Pa. 602, 104 A. 749 (1918); *Doughtery v. Davis*, 51 Pa. Super. 229 (1912).

³⁴⁸ E.g., FLEMING, TORTS 249 (3d ed. 1965). *Aydlette v. Keim*, 232 N.C. 367, 61 S.E.2d 109 (1950).

³⁴⁹ *Balcom v. City of Independence*, 178 Iowa 685, 160 N.W. 305 (1916); *Fletcher v. City of Aberdeen*, 54 Wash. 174, 338 P.2d 743 (1959).

³⁵⁰ See text accompanying notes 173-74 *supra*.

³⁵¹ *Jacoby v. Gallaher*, 10 La. App. 42, 46, 120 So. 888, 890 (1929).

³⁵² 127 Ore. 406, 271 Pac. 733 (1928).

³⁵³ *Id.* at 414, 271 Pac. at 733-34.

³⁵⁴ *Ibid.*

be satisfied with something less.³⁵⁵ Whether such care was exercised in the circumstances is a question for the jury.

When should the driver know that the pedestrian is disabled? The crutches or wheelchair of the lame are obvious notice to him. Hearing aids, on the other hand, are very inconspicuous. Uncertain step and irregular progress are not obvious signs of blindness in the pedestrian although they may call for further observation by the motorist. The guide dog and the cane are important as devices of notice to the driver, whatever their usefulness as travel aids to the pedestrian. They are greatly emphasized by the courts and no doubt are very influential with juries.³⁵⁶ Short of statutory command, however, the courts have not yet held that it is negligence as a matter of law for a driver to run into a blind man carrying a cane or guided by a dog. In *Cardis v. Roessel*³⁵⁷ the Kansas City court of appeals came close to doing that. There the plaintiff, proceeding along the sidewalk at a steady pace, carrying a cane in the hand nearest the street, walked into the side of defendant's car which crossed the sidewalk in front of him to enter a gas station. Said the court in sustaining a jury verdict for plaintiff: Defendant "saw, or could have seen, if he had looked, that which was plainly visible; and it was his duty to look and see."³⁵⁸ In effect, the court held that the jury is entitled to find that the defendant saw, or in the exercise of reasonable diligence, should have seen, the cane if the plaintiff carried it.³⁵⁹

F. *White Cane Laws: The Struggle for the Streets Revisited*

The rights of blind and partially blind persons in traffic are the subject of the so-called white cane laws. Generally, but with some significant and many minor variations, these statutes (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

³⁵⁵ *Ibid.*

³⁵⁶ See, e.g., *Cardis v. Roessel*, 238 Mo. App. 1234, 186 S.W.2d 753 (1945); *Curry v. Gibson*, 132 Ore. 283, 285 Pac. 242 (1930).

³⁵⁷ 238 Mo. App. 1234, 186 S.W.2d 753 (1945).

³⁵⁸ *Id.* at 1239, 186 S.W.2d at 755.

³⁵⁹ The case was submitted to the jury on the issue of humanitarian negligence under which it must be shown "that the plaintiff was in imminent and impending danger and oblivious thereof or unable to extricate himself, and that defendant saw and observed or could have seen and observed, plaintiff's said danger and his obliviousness or inextricability in sufficient time to have stopped, swerved, slowed, or warned." *Id.* at 1241, 186 S.W.2d at 756.

America. They substantially alter the law of negligence as it stood before the statutes, even in states where the courts extended the greatest protection to the disabled pedestrian.

However such laws have affected the legal status of the blind and partially blind, they have as a matter of fact greatly contributed to their safety. 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.³⁶⁰ The very reasons for the success of the white cane, ironically, are given by opponents of the statutes as arguments against them: They call attention to the blind and in fact make them a conspicuous class, advertising their helplessness, arousing public sympathy, and serving as a badge of their difference and limitations. According to this view, the more the knowledge of the significance of the white cane spreads, the worse the situation becomes for the blind.³⁶¹ The response of one blind man is that he would rather be conspicuous and alive than inconspicuous and dead. The organizations of the blind take the position, that far from being a badge of their separate, unequal and dependent status, the white cane is a symbol of the equality, independence and mobility of the blind.³⁶² The white cane has become the hall mark of the National Federation of the Blind.³⁶³

White cane campaigns are not confined to conveying word about the white cane laws. They are generally designed as well to inform the public about the social and economic conditions among the blind and the aspirations of the blind for full and useful lives. Such campaigns have long been organized around white cane days and white cane weeks sponsored by the National Federation of the Blind and by Lions Clubs. In 1964, the National Federation of the Blind secured a joint resolution by Congress asking the President to proclaim October 15 of each year as white cane safety day.³⁶⁴ In his proclamations, the President has spoken not only of

³⁶⁰ When the New York legislature was considering enactment of a white cane law, a questionnaire on the merits of the proposal was distributed to chiefs of police, attorneys general, and safety officers in other states. A high proportion answered. The conclusion was that white cane laws, when properly publicized and administered, are a definite help to blind and sighted alike. *He Walks by Faith Justified by Law*, *The Blind American*, June 1961, p. 17; Liddle, *Mobility: A Survey, I, II, III*, *The New Beacon*, May, June, July 1964.

³⁶¹ *A White Cane Debate: Leichty vs. Taylor*, *The Braille Monitor*, March 1965, p. 16; *Legal Victory for Blind Pedestrians*, *The Braille Monitor*, Dec. 1964, p. 1; Bartleson, *The White Cane*, *The Braille Monitor*, Dec. 1963, p. 10.

³⁶² *He Walks by Faith Justified by Law*, *op. cit. supra* note 360.

³⁶³ Vice President Humphrey's address at the Twenty-fifth Annual Convention of the National Federation of the Blind, *The Braille Monitor*, Aug. 1965, p. 8.

³⁶⁴ 78 Stat. 1003.

the travel significance of the white cane but of its significance as a symbol of the ability of the blind to live "normal productive lives."³⁶⁵

Though the use of the staff or cane as a travel aid by which the blind person feels his way and avoids obstructions and holes is doubtless very ancient, and though we know from the cases³⁶⁶ that active blind persons have employed such a staff or cane in this country for over 100 years, the white cane as a device for giving notice to drivers and others that the user is blind is strictly modern, though by no means strictly American, and is related to the fabulous growth in the use of the automobile, the thickening of traffic conditions, and the skyrocketing of accidental injuries to pedestrians whether able-bodied or not. The white cane statutes began to be adopted by the states in the 1930's.³⁶⁷ Their enactment is directly traceable to activities of organizations of the blind and to Lions Clubs.³⁶⁸ Today, due to the continuing activities of these organizations, forty-nine states have white cane laws explicitly covering the blind and partially blind³⁶⁹ and one covering the "incapacitated" pedestrian generally.³⁷⁰

³⁶⁵ 29 Fed. Reg. 14051 (1964); 30 Fed. Reg. 12931 (1965).

³⁶⁶ *Balcom v. City of Independence*, 178 Iowa 685, 160 N.W. 305 (1916); *Sleeper v. Sandown*, 52 N.H. 244, 250 (1872); *Glidden v. Town of Reading*, 38 Vt. 52, 53, 57 (1865).

³⁶⁷ Cal. Stats. 1935, ch. 126, §§ 1-3 (1935); Idaho Code S.L. 1937, ch. 46, §§ 1-3, at 62; Mich. Stats. 1937, Act 10, at 13; Nev. Laws 1939, ch. 58, at 53; N.H. Laws 1939, ch. 65, § 1, at 56-57; N.J. Stats. 1939, ch. 274, § 1, at 696.

³⁶⁸ William Taylor, a blind lawyer practicing in Media, Pennsylvania has been chairman of the National Federation of the Blind's White Cane Committee and an active leader in this work for over a quarter of a century.

³⁶⁹ ALA. CODE ANN. tit. 36, § 58 (1940); ALASKA COMP. LAWS ANN. §§ 28.25.010-.040 (Supp. 1963); ARIZ. REV. STAT. ANN. § 28-798 (1955); ARK. STAT. ANN. §§ 75-631, 75-632 (1964); CAL. PEN. CODE §§ 643, 643a, 643b; COLO. REV. STAT. ANN. §§ 40-12-24 to 40-12-26 (1953); CONN. GEN. STATS. REV. § 211 (1949); DEL. CODE ANN. tit. 21, §§ 4144, 4150 (1964); FLA. STAT. ANN. § 413.07 (1955); GA. CODE ANN. § 68-1658 (1957); HAWAII REV. LAWS §§ 109-23 to 109-24 (Supp. 1963); IDAHO CODE ANN. §§ 18:5810-18:5812 (1947); ILL. ANN. STAT. ch. 95½, § 172a (Smith-Hurd 1957); IND. ANN. STAT. §§ 10-4925 to 10-4927 (1956); IOWA CODE §§ 321:332-321:334 (1962); KAN. GEN. STAT. ANN. § 8-558 (1949); KY. REV. STAT. § 189.575 (1962); LA. REV. STAT. § 32-217 (1962); ME. REV. STAT. ANN. ch. 22, § 132-35 (1963); MD. ANN. CODE art. 66½, § 194 (1957); MASS. LAWS ANN. ch. 90, § 14a (1949); MICH. STAT. ANN. § 28:770 (1954); MINN. STAT. ANN. § 169.202 (1960); MISS. CODE ANN. § 8203.5 (1942); MO. ANN. STAT. §§ 304.080-304.110 (1959); MONT. REV. CODES ANN. §§ 32.1143-32.1145 (1961); NEB. REV. STAT. §§ 28,478-28,480 (1956); NEV. REV. STAT. § 426.510 (1957); N.H. REV. STAT. ANN. § 263.58 (1963); N.J. STAT. ANN. § 4-37.1 (1961); N.M. STAT. ANN. § 64-18-65; N.Y. VEHICLE & TRAFFIC LAW § 1153; N.C. GEN. STAT. § 20-175 (1953); N.D. CODE ANN. tit. 39, § 39-10-31; OHIO REV. CODE ANN. §§ 4511.47, 4511.99E (1965); OKLA. STAT. ANN. tit. 7, § 11-13 (1951); ORE. REV. STAT. § 483.214 (1953); PA. STAT. ANN. tit. 75, § 1039 (1960); R.I. GEN. LAWS ANN. § 31-18-13 to 31-18-16 (1956); S.C. CODE § 44.0318-1, 44.9932 (1960); TENN. CODE ANN. §§ 59-880 to 59-881 (1955); TEX. REV. CIV. STAT. art. 6701e (1948); UTAH CODE ANN. § 41-6-80 (1960); VT. STAT. ANN. tit. 23, § 1106 (1959); VA. CODE ANN. §§ 46.1-237 to 46.1-240 (1950); WASH. REV. CODE §§ 46.60.260-.270 (1962); WIS. STAT. ANN. § 346.26 (1958); W. VA. CODE ANN. § 1721(373) (1961).

³⁷⁰ WYO. STAT. ANN. § 31-163 (1957). The 1947 amendment which declared the cane

1. Jurisdictional Analysis of the White Cane Laws

A fairly typical white cane statute is that of Kentucky. It provides: "Whenever a pedestrian is crossing or attempting to cross a public street or highway, guided by a guide dog or carrying in a raised or extended position a cane or walking stick which is white in color or white in color and tipped with red, the driver of every vehicle approaching the intersection, or place where such pedestrian is attempting to cross, shall bring his vehicle to a full stop before arriving at such intersection or place of crossing, and before proceeding shall take such precautions as may be necessary to avoid injuring such pedestrian."³⁷¹ It is made unlawful for any person not totally or partially blind "or otherwise incapacitated" to carry such a cane or at least to do it in that position "while on any public street or highway."³⁷² The act is not to be construed as depriving totally or partially blind or "otherwise incapacitated persons" without a stick or dog of "the rights and privileges conferred by law upon pedestrians crossing streets or highways."³⁷³ Nor is the failure of such persons to have a cane or dog "upon the streets, highways or sidewalks" to be "held to constitute nor be evidence of contributory negligence."³⁷⁴ Violation is made punishable by a fine not to exceed twenty-five dollars.³⁷⁵

The provisions of the Kentucky statute as to: blindness or partial blindness; the otherwise incapacitated; the color of the cane; the position in which it is to be held; the alternative use of the dog; the duty of the driver; the crossing both of streets and highways; preservation of the rights of those without canes or dogs; declaration that they are not contributorily negligent; and the appending of a penal sanction, are all fairly common features in the white cane statutes.

In five states the benefits of the white cane statutes are extended only to those who are "blind."³⁷⁶ Forty-three states extend protection to the wholly, totally or partially blind and the visually handicapped.³⁷⁷ Fifteen

and dog using blind to be included in the class designated as "incapacitated" was subsequently repealed in 1955. Wyo. Sess. Laws 1955, ch. 225, § 70. It thus appears the wholly or partially blind in Wyoming may not be "incapacitated" within the meaning of the statute. There have been no cases so construing the statute.

³⁷¹ KY. REV. STAT. § 189.575(2) (1962).

³⁷² KY. REV. STAT. § 189.575(1) (1962).

³⁷³ KY. REV. STAT. § 189.575(3) (1962).

³⁷⁴ *Ibid.*

³⁷⁵ KY. REV. STAT. § 189.990(1)(16) (1962).

³⁷⁶ Arkansas, Illinois, Minnesota, Nebraska, New Jersey. See note 369 *supra* for the applicable statutes.

³⁷⁷ Alabama, Alaska, Arizona ("blind or industrial blind," which uses 20/200 or peripheral vision defect standard) California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio ("blind" is defined to include partially blind), Oklahoma,

states extend the protection of the white cane laws to those "otherwise incapacitated."³⁷⁸ As these jurisdictions commonly specify that the protection of the statute shall extend to the "wholly or partially blind or otherwise incapacitated" the other disabilities embraced presumably are not of a visual character. Yet the other disabilities must be like blindness or partial blindness in that they involve traffic hazards which can be diminished by the use of the cane or dog.

The most popular device is the white cane, with or without a red tip, which is recognized in forty-one states.³⁷⁹ Ten jurisdictions also recognize the use of metallic, chrome, aluminum or light-colored metal.³⁸⁰ Only three states required the cane to be all white,³⁸¹ while five require the white cane have a red tip.³⁸² In eighteen states, the cane-using blind need only carry or use the cane to comply with the statutes' conditions³⁸³ while twenty-six specify that the cane must be carried in the "raised or extended" position.³⁸⁴ There are no cases construing this quite uncertain expression. Presumably the object of the requirement is to ensure that the cane is in such a position as to be visible to the approaching motorist or pedestrian. This object can be accomplished by the mere carrying or using of the long fiberglass white cane now coming into vogue. A few

Oregon ("blind" is defined to include partially blind), Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin. See note 369 *supra* for the applicable statutes.

³⁷⁸ Alabama, Florida, Kansas, Kentucky, Louisiana, Maine, New York, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia. See note 369 *supra* for applicable statutes.

³⁷⁹ Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin. See note 369 *supra* for the applicable statutes.

³⁸⁰ Alaska, Arkansas, Louisiana, Maine, Maryland, Mississippi, New York, Pennsylvania, Virginia, West Virginia. Not all types of canes are recognized by each of these states; each state listed does recognize one of the metallic type devices. See note 369 *supra* for the applicable statutes.

³⁸¹ Minnesota, Nebraska, Washington. See note 369 *supra* for the applicable statutes.

³⁸² Alabama, Arizona, Arkansas, Indiana, New Jersey. See note 369 *supra* for applicable statutes.

³⁸³ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Michigan, Montana, Nebraska, Nevada, New Jersey, Oklahoma, Utah. See note 369 *supra* for the applicable statutes.

³⁸⁴ Alaska, Delaware, Florida, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Missouri, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin. See note 369 *supra* for the applicable statutes.

jurisdictions have altered the expression, substituting "at arm's length,"³⁸⁵ "with arm extended,"³⁸⁶ or carrying or using "an exposed cane."³⁸⁷

Thirty-seven states extend the protection of the white cane statutes to the user of the guide dog in the alternative.³⁸⁸ States which permit the blind, the partially blind, and the otherwise incapacitated the use of the guide dog do not forbid its use by others,³⁸⁹ unlike the common statutory practice with respect to the cane.

The duty imposed on the sighted pedestrian or motorist who approaches or comes in contact with the protected class of persons varies with the jurisdiction. Thirty-four states require the motorist to come to a full stop in all cases, and take such precautions as may be necessary to avoid accident or injury to the pedestrian.³⁹⁰ Two of these states require the motorist to remain stationary until the pedestrian clears the roadway,³⁹¹ and Maryland requires the motorist, after stopping, to leave a clear path until the pedestrian is out of the street.³⁹² Virginia requires only that the motorist stop.³⁹³ Eight states require the motorist to stop only when it is necessary to avoid accident or injury;³⁹⁴ nine require the driver yield the right of way and/or take reasonable care to avoid injuring the protected pedestrian without specific mention of stopping.³⁹⁵ Forty-one states impose the duty under the statute on the "approaching" motorist.³⁹⁶

³⁸⁵ Maryland, North Carolina. See note 369 *supra* for the applicable statutes.

³⁸⁶ Minnesota. See note 369 *supra* for the applicable statute.

³⁸⁷ Hawaii. See note 369 *supra* for the applicable statute.

³⁸⁸ Alabama, Alaska, Arizona, Arkansas, California, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia. Of these, thirty-two require only the use of the "guide dog" or "seeing-eye dog" without more; the other five—Arkansas, Iowa, Michigan, New Hampshire, and Oregon—require the animal be "specially trained," harnessed, or in a particular position. See note 369 *supra* for the applicable statutes.

³⁸⁹ See note 74 *supra* for applicable statutes.

³⁹⁰ Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington (inferentially), Wisconsin. See note 369 *supra* for the applicable statutes.

³⁹¹ Nebraska, North Carolina. See note 369 *supra* for the applicable statutes.

³⁹² MD. CODE ANN. art. 66½, § 194 (1957).

³⁹³ VA. CODE § 46.1-237 (Supp. 1964).

³⁹⁴ Alabama, Alaska, Louisiana, Mississippi, New York, Pennsylvania, Texas, West Virginia. See note 369 *supra* for the applicable statutes.

³⁹⁵ Arkansas, Connecticut, Delaware, Hawaii, New Jersey, Ohio, Utah, Wisconsin, Wyoming. See note 369 *supra* for the applicable statutes.

³⁹⁶ Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts,

The duty imposed on the motorist to stop, take precaution, yield and the like is imposed on sighted pedestrians in nine states.³⁹⁷

Those states which require the driver to yield the right of way, or stop, or take reasonable care without specific reference to where or when, nevertheless require that deference be shown the disabled pedestrian, wherever he is found and within the space limitations prescribed by the particular statute. The specific mention of "approaching" adds nothing to the statutes, nor does the use of the term "upon observing." The motorist remains bound to that acuity of observation which graces the ubiquitous reasonable man, and so presumably will be charged with observing him whom he should have rather than him whom he did in fact. Similarly, the requirements of specific acts by the driver, such as sounding the horn and coming to a complete stop in all cases, do not provide greater protection to the disabled pedestrian than is secured by the duty of the driver to "take reasonable care." The driver is thus burdened with possible prosecution for the technical violation of a criminal statute, while his actions under the circumstances may well have been appropriate to the protection of the pedestrian from injury.

Three states provide that the driver must "immediately come to a full stop" when he "approaches within" a specified number of feet of the disabled pedestrian.³⁹⁸ The distances specified are but three or ten feet, distances so short as to make it impossible for an automobile to stop or take other evasive action within them. If the driver need not anticipate the action commanded of him until he is within the distance mentioned, the only remaining question is the extent of the pedestrian's injuries; the driver's civil liability would apparently be strict liability, and his criminal liability cast in doubt because of the practical impossibility of compliance. Judges might reasonably interpret these statutes to require the driver to have come to a stop when he is three or ten feet from the pedestrian. Thus did Wisconsin solve this problem of draftsmanship: "An operator of a vehicle shall stop . . . before approaching closer than 10 feet . . ."³⁹⁹

Thirty-six states provide that the protection of the statutes applies wherever the pedestrian seeks to cross the highway.⁴⁰⁰ Thirteen states

Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin. See note 369 *supra* for the applicable statutes.

³⁹⁷ Alabama, Alaska, Arkansas, California, Colorado, Idaho, Indiana, Montana, Nevada. See note 369 *supra* for the applicable statutes.

³⁹⁸ Georgia (three feet), Michigan (ten feet), Oklahoma (*knowingly* within three feet). See note 369 *supra* for the applicable statutes.

³⁹⁹ WIS. STAT. ANN. § 346.26(1) (1958).

⁴⁰⁰ Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan,

restrict the protection to intersections and crosswalks.⁴⁰¹ Only five states deal with the intersection or crosswalk controlled by an officer or signal.⁴⁰² Presumably it would follow that in the remaining states where the disabled pedestrian is given the right of way without reference to places where there are signals or officers, the disabled pedestrian prevails over any claim built on the command of the officer or the right conferred by the light. Nevertheless, though the Texas statute makes no mention of the signal-controlled crossing, the courts in that state appear unwilling to permit the blind person to recover in a civil action where he entered the crossing against the light.⁴⁰³

Twenty-two states provide that their white cane statutes are not to be construed so as to deprive the disabled pedestrian without canes or dogs of rights to which they would otherwise be entitled; nor are they to be so construed that the failure of disabled pedestrians to use canes or dogs shall constitute contributory negligence or evidence thereof.⁴⁰⁴ Two states provide only that the white cane statute is not to affect other rights outside the statute;⁴⁰⁵ one state, Illinois, uses the contributory negligence disclaimer without reference to other rights,⁴⁰⁶ and the remaining twenty-five states have no saving clause of either type. In these states, presumably, absence of a saving clause will not be construed to deprive disabled pedestrians of rights which were theirs before the statute or to affect the contributory negligence law otherwise applicable to disabled pedestrians without compensatory devices.

In thirty-eight states violations of the white cane statutes are made a

Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Wisconsin. See note 369 *supra* for the applicable statutes.

⁴⁰¹ Alaska, Arizona, Louisiana, Maryland, Minnesota, Mississippi, Missouri, New York, North Carolina, Pennsylvania, Texas, Washington, West Virginia. Alaska, Maryland, New York, North Carolina, Pennsylvania, Texas and West Virginia restrict the statutory applicability to "crosswalks or intersections"; Washington to crosswalks only; Arizona, Minnesota, Missouri, to intersections only, and Louisiana, and Mississippi use the term "at or near" crosswalks or intersections. See note 369 *supra* for the applicable statutes.

⁴⁰² Arkansas says that the special protection does not apply at crossing places controlled by a traffic signal; Maryland that they do not apply at crossings or intersections controlled by an officer or a signal; North Carolina, and Virginia that they do not apply when the crossing is manned but that they do apply when it is controlled by a signal; and New Jersey that traffic signals are not to affect the pedestrian's right. See note 369 *supra* for applicable statutes.

⁴⁰³ *Meacham v. Loving*, 285 S.W.2d 936 (Tex. Sup. Ct. 1956).

⁴⁰⁴ Alabama, Alaska, Arizona, Florida, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Missouri, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, West Virginia, Wisconsin. See note 369 *supra* for the applicable statutes.

⁴⁰⁵ New Hampshire, Oregon. See note 369 *supra* for the applicable statutes.

⁴⁰⁶ ILL. REV. STAT. ANN. ch. 95½, § 172A (Smith-Hurd 1957).

criminal offense, the penalty generally being a small fine or short term imprisonment.⁴⁰⁷ In eleven states the only recourse against the driver is a civil action for damages.⁴⁰⁸

2. Critique and Suggested Reform

The saving clauses in the white cane statutes preserving the rights of the blind non-users of canes or dogs in traffic as they existed in the law before the adoption of the white cane statutes seem prudent and precautionary rather than strictly necessary. That those persons and their rights are not mentioned in the white cane statutes would be a weak and artificial basis of statutory construction upon which to deprive them of the minimum protection afforded them under pre-existing law. On the other hand, the provision that failure to use compensatory devices is not contributory negligence or evidence thereof is innovative and desirable. The reason is hard to find for penalizing the disabled who do not use such devices, for whatever cause—lack of knowledge about their existence or how to use them, embarrassment at becoming conspicuous, or a finding by the individual that the devices are not helpful to him. It seems particularly unjust to penalize those who have not had or do not have the opportunity to receive training in their use. The right to live in the world should not be made to depend on the use of these compensatory devices.

For the same reasons, the provisions in the Arkansas and Arizona white cane statutes requiring the blind to use these devices and making the requirement penally enforceable should be repealed. If this objective is to be attained, it should be by educating the blind in the techniques of using the devices and in their values.⁴⁰⁹

⁴⁰⁷ Nineteen states provide that the violation of the statutory provisions is a misdemeanor, without specifying the penalty to be imposed upon conviction. Alabama, Arizona, California, Georgia, Idaho, Louisiana, Minnesota, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Virginia. Eleven states in addition to making the violation a misdemeanor, specify the permissible bounds of punishment which is limited to a fine. Arkansas, Colorado, Connecticut, Indiana, Iowa, Kentucky, Maryland, Massachusetts, North Dakota, Tennessee, Texas. Eight states, after declaring violations to be misdemeanors, provide for money fines and/or jail sentences as punishment. Alaska, Florida, Kansas, Maine, Michigan, Mississippi, Missouri, West Virginia. See note 369 *supra* for the applicable statutes.

⁴⁰⁸ Delaware, Hawaii, Illinois, New Hampshire, New Jersey, New Mexico, New York, Oregon, Utah, Washington, Wisconsin. See note 369 *supra* for the applicable statutes.

⁴⁰⁹ The Arizona statute, while penally requiring the blind person to use a compensatory device, at the same time declares such unaided travel not to be contributory negligence or evidence thereof. Thus, the blind pedestrian is criminally liable for his failure to take the prescribed action to protect his person while he is not disabled in the civil courts from recovering for the injuries which he suffers as a result of his breach of a legal duty. There are also some odd variances in draftsmanship. In Arkansas, cane users are given the right of way "travelling along or across the streets and highways"; it is only when "walking along the highways and streets" without a cane that blind travelers commit a misdemeanor.

The provision about the way in which the cane is to be held—that it must be in a raised and extended position—should be eliminated. It is not necessarily adapted to increasing the visibility of the cane by drivers, unnecessarily denies the use of the cane while crossing streets and highways as a travel aid in the ordinary way to avoid obstructions and trenches, and creates a certain danger for oncoming pedestrians on crowded streets.

The requirement that the driver stop before coming within a specified distance of the disabled pedestrian or that, without mentioning the distance, to come to a full stop immediately upon approaching the disabled pedestrian, has the advantage of laying down an objectively determinable standard and one which obviously contributes to the safety of the pedestrian. Some question might be raised, however, as to whether this requirement is too mechanical and exacts of the driver more than is necessary for the protection of the pedestrian.

Making the provisions of white cane statutes penally enforceable against drivers does not add significantly to the achievement of the objectives of those provisions. It is hard to imagine that the penal sanctions here have a deterrent effect. The act of running into a disabled pedestrian is not usually a matter of deliberation or design. When it is, more drastic sanctions are in order and are already provided elsewhere in the law. The white cane statutes deal with accidents: with reducing their number by notice to the driver of the physical condition of the pedestrian; with allocating the cost of them, when they do occur, to the drivers and thence to the insurance companies; and with implementing the right of the disabled to live in the world by giving them a right of way in traffic and minimizing, if not eliminating, the ordinary concepts of negligence law. As a practical matter, too, law enforcement agencies are very reluctant to prosecute. It was only after a vigorous campaign of pressure by an organization of the blind that the Berkeley Police Department and the Alameda County District Attorney's office finally proceeded with a prosecution in 1965, under California's white cane law, which is located in the Penal Code and declares breaches to be a misdemeanor,⁴¹⁰ of a motorist who had run down and killed a blind white cane user at an intersection. The judge, who tried the case without a jury and found the motorist guilty as charged, sentenced him to one hour's probation.⁴¹¹

In Arizona, the penal sanction applies to the blind pedestrian without compensatory device when he is walking on a street or highway." It is only at intersections that the blind cane user is given the right of way; and it is only while the disabled pedestrian is "on the highways that failure to use dog or cane may not" be held to constitute prima facie evidence of contributory negligence. See note 369 *supra* for the applicable statutes.

⁴¹⁰ CAL. PEN. CODE §§ 643, 643a, 643b.

⁴¹¹ *People v. McGlynn*, No. C-8471, Municipal Ct. for the Berkeley-Albany Judicial Dist., July 15, 1965.

CONCLUSION

Writers on the law of torts tell us that tort law, always particularly responsive to changing social conditions, is now reaching a new stage in its development.⁴¹² Originally concerned primarily with the protection of property and land, it came to focus, in the period of the industrial revolution, on other forms of property and on injuries to the person, shifting emphasis from the kind of interest infringed to the kind of conduct which created the injury.⁴¹³ Today, when millions of individuals are exposed to traffic, industrial, and many other kinds of accidents, which they are more or less powerless to prevent, individual responsibility for them based on the kind of conduct which brought them about is giving way to community responsibility based on the fact of harm. In accommodating to this change and in contributing to it, concepts of negligence have undergone a transformation; liability has been imposed on the industry the operations of which created the risk; private insurance carriers have assumed the burden and distributed the costs of liability; and social insurance has increasingly entered the field to protect men against hazards of old age, survivorship, unemployment, and disability—hazards over which the individual has little or no control.⁴¹⁴ Does the law of torts today in its dealings with the physically disabled reflect these broad social and legal changes, and especially, how does it stand with respect to the policy of integrating the disabled into the social, economic, and physical life of the community? This is the central question to be asked in reviewing many other fields affecting the disabled as well. Does the law of torts in its basic concepts and current application consciously reject that policy, treat it as a matter of indifference, passively acquiesce in it, or actively implement it? Among these alternatives, it is clear that the courts do not

⁴¹² FLEMING, TORTS 108 (3d ed. 1965); 2 HARPER & JAMES, TORTS § 12.1 (1956); FRIEDMANN, LAW IN A CHANGING SOCIETY ch. 5 (1959).

⁴¹³ FRIEDMANN, *op. cit. supra* note 412.

⁴¹⁴ *Ibid.*; FLEMING, *op. cit. supra* note 412, at ch. 6; 2 HARPER & JAMES, *op. cit. supra* note 412, ch. 11-13; PROSSER, TORTS ch. 1, 4 (3d ed. 1964). Beyond current forms of liability insurance and the social insurance lies loss insurance. Professor Friedmann writes: "Especially in the main countries which have introduced compulsory liability insurance for motor car operators, the effective shift of liability from the driver to the insurance company has increasingly raised the question whether liability insurance should not be openly turned into loss insurance. Loss insurance means an abandonment of the principle of individual tort responsibility and frank substitution of compulsory insurance for loss incurred as a result of certain operations. Administration replaces to that extent civil litigation and an element of social insurance is injected into this sphere of private relationships . . . There is increasing support for the idea that the social importance of traffic accidents justifies the transfer of this complex of legal relationships from the private to the public sphere. Insurance against traffic accidents in that conception becomes assimilated to insurance against industrial accidents which has for many years been separated in all common law countries from general tort liability and turned into a social insurance." FRIEDMANN, *op. cit. supra* note 412.

react positively to this policy, either by way of support or rejection. Indifference and acquiescence also do not accurately describe the judicial attitude. Unawareness is the precise characterization. In the cases, there is nothing like a systematic examination of the policy and its implications for the law of torts. One must scour hard to find an occasional reference to it.

Yet integration is the avowed policy of the land. However imperfectly and variously carried out, it is expressed in the self-care and self-support provisions of the Social Security Act;⁴¹⁵ the sprawling rehabilitation programs of the nation and states;⁴¹⁶ the orientation and rehabilitation centers now multiplying across the country; the programs for the education of the disabled in the public schools; the opening up, still quite incompletely in many areas, of state and federal civil service to the disabled on a non-discriminatory basis;⁴¹⁷ special statutes striking down artificial and arbitrary barriers to the employment of the disabled as teachers in the public schools;⁴¹⁸ and the increasing official and unofficial acceptance of disabled persons on a basis of their individual merits. In the past, the courts have been the dominant force in the creation of the substantive rules of conduct and liability. This has been true generally and specifically with respect to the physically disabled, and their rights to be abroad in the land. In fact, in earlier periods and in many jurisdictions, their rules on this subject embodied a policy in advance of the times. The legislature has now increasingly entered the field. Neither as a matter of the independent judicial role nor as a matter of independent judicial wisdom should the courts disregard the policy of integration thus declared by the legislature; rather decisional law should not only be brought into harmony with that policy but should give it active aid and comfort.

To recognize, as the House of Lords recently did in the *Haley* case,⁴¹⁹ and, as many American courts have done long since,⁴²⁰ that social integration of the disabled is coming into practice and that considerable and ever-increasing numbers of the severely disabled are venturing into the community, and to adapt the law to that practice, is in a sense inevitable—and inevitably slow in some jurisdictions. But these judicial decisions are

⁴¹⁵ 79 Stat. 286, 42 U.S.C. 303, 1201, 1351 (Supp. I, 1965).

⁴¹⁶ 79 Stat. 1282, 29 U.S.C. § 31-45 (Supp. I, 1965).

⁴¹⁷ *The Chavich Case—Outlook for Blind Teachers*, *The Braille Monitor*, Aug. 1965, p. 49.

⁴¹⁸ CAL. EDUC. CODE § 13125; MASS. GEN. LAWS ANN. ch. 15, § 19a (Supp. 1965); N.Y. EDUC. LAW § 3004; PA. STAT. ANN. tit. 24, § 12-1209 (1962).

⁴¹⁹ *Haley v. London Elec. Bd.*, [1965] A.C. 778 (1964).

⁴²⁰ See *Balcom v. City of Independence*, 178 Iowa 685, 696, 160 N.W. 308, 1310 (1916); *Sleeper v. Sandown*, 52 N.H. 244, 251 (1872); *Shields v. Consol. Gas Co.*, 193 App. Div. 86, 183 N.Y. Supp. 240 (1920); *Masterson v. Lennon*, 115 Wash. 305, 308, 197 Pac. 38, 39 (1921).

a response to the fact and not to the policy, to what is and not also to what ought to be. The demands of the policy are what now summon the spirit of reform and acknowledgement of the role of the legislature in the law of torts as it applies to the disabled.

Such reform would not necessarily entail casting aside the traditional framework of the law of negligence, though that might help. What is of utmost importance about carrying on the judicial analysis and discussion of the rights of the disabled to live in the world in the concepts and catch phrases of the law of negligence—unreasonable risk of harm, fault, due care, reasonable man of ordinary prudence, contributory negligence, greater caution, foreseeability—is not just that individual volition and personal conduct are stressed in areas in which they are no longer of paramount significance. The important point is that these concepts and phrases do not place in sharp relief the social policy at stake. Indeed, they come dangerously close actually to obstructing the view of that policy. The question to be asked is not whether the defendant created an unreasonable risk of harm, but whether he interfered with the effectuation of the policy of the social integration of the disabled; not whether the plaintiff conducted himself as a reasonable man of ordinary prudence acting in the light of all the circumstances, but whether he acted pursuant to his right to be a part of his community. Such a transformation of the forms and tests to be applied by the judges would not remove all legal limitations on the conduct of the disabled person. Other policies regarding what the English court of appeals called the ordinary transactions of life, such as those related to the need to dig trenches in the streets, would have to be given their necessary scope. The policy of integration, too, has its own built-in limitations: It cannot be pushed beyond the physical capacity of the disabled. But implementation of that policy does mean that many acts now regarded by those who are not disabled as unreasonable and foolhardy, but which nevertheless are within the disabled person's sense of the risks he must or would run to regain the life-bestowing benefits of the mainstream, would not be taken at his cost, or even at the cost of the trench-digger, but at the cost of the community.

The same result could be achieved also, it is recognized, within the traditional framework of tort law by reading the policy into the existing tests, by declaring reasonable that conduct of the disabled person which is in conformity with the policy, and unreasonable that conduct of the defendant which interferes with the policy. This method of reform fits in with the historic mode of the common law in adapting to changed social and economic conditions. By it, the reform can be accomplished gradually, without any appearance of discontinuity in the law, and within all the conservative safeguards of case-by-case trial. On the other hand, this

method of reform tends to obscure, not only from everybody else, but from the judges themselves, the changes that are necessary and that are being made. It confuses the new direction by using the old signposts. The hands are less likely to be the hands of Esau if the voice is that of Jacob.

Basic determinants of decisions in the law of torts, are, textwriters agree, morality, admonition, compensation, imposition of costs on those who have a capacity to bear them, and the interest of furthering desirable activity without imposing disproportionate burdens on any individuals or groups.⁴²¹ Some of the overtones and some of the partially buried presuppositions of the reasonable man formula are moralistic and individualistic, deriving from the origins of modern negligence law in the industrial revolution and concomitant ethical, economic and political philosophy. In the era of unrestricted free enterprise, the law of torts moved toward the position that there could be no liability without fault and no fault without personal blameworthiness.⁴²² Dean Prosser emphasizes that personal fault has become, or is becoming, legal or social fault—"departure from the conduct required of a man by society for the protection of others"⁴²³—and that legal or social fault is giving way to the notion that the primary task is to decide which interest should prevail "even where no one is at fault."⁴²⁴ But the turn of the century is still turning; and the process of discarding fault liability is far from complete. In considering what is desirable or possible social policy, great weight will always have to be given to the "ethical or moral sense of the community, its feeling of what is fair and just."⁴²⁵ Today the integration policy is beginning to rest on such community feelings. But fault analysis is remarkably fruitless where there is no fault. Whether the disabled pedestrian or the city or its insurance carrier should bear the cost of an injury to the pedestrian resulting from a hazard in the street created by the city is a question of social policy, not of morality. Is the policy of integration of such social importance that it should outweigh the policy, also judged in terms of its social importance, of allowing public bodies which go about digging sewer ditches and opening other holes in the

⁴²¹ 2 HARPER & JAMES, *op. cit. supra* note 412, at § 11.5; PROSSER, *op. cit. supra* note 414, at § 4.

⁴²² Professor Fleming writes that, in the era of the industrial revolution, "the axiom no liability without fault was quickly raised to a dogmatic postulate of justice, because it was best calculated to serve the interests of expanding industry and the rising middle class, in relieving them from the hampering burden of strict liability and conducing to that freedom of individual will and enterprise which was at the forefront of all contemporary aspirations." FLEMING, *op. cit. supra* note 412, at 108.

⁴²³ PROSSER, *op. cit. supra* note 414, at § 4.

⁴²⁴ *Ibid.*

⁴²⁵ 2 HARPER & JAMES, *op. cit. supra* note 412, § 11.5, at 793.

street to do so without the burden, be it slight or great, of seeing to it that the disabled, among other people, will not be injured thereby.

Ideas of compensating the victim and admonishing the wrongdoer are basically linked to presuppositions about fault. The wrongdoer, that is the party who was at fault, must compensate the victim, that is, the party who was innocently going about his business, for the wrong done. Ideas of compensation, punishment, and prevention shade into each other. The admonitory objective of the law of torts today aims at reducing accidents by governing future conduct through the imposition of liability. This, however, is a one way street. It can have a deterrent impact only if liability is imposed on the defendant. The disabled prospective plaintiff does not wait to read the latest negligence decision before going out into the streets to mail a letter, catch a bus, or visit a friend. Even if he did do so and could understand it, the chances are good that he would reject it. The courts' notions of a reasonably prudent disabled person often do not agree with the notions of the reasonably prudent disabled person himself. He, for the most part, figures out what is convenient, possible, or safe for him, sometimes with the advice of experienced and knowledgeable persons, not infrequently on the basis of his own individual trial and error. On the other hand, it is the business of liability-conscious cities, insurance carriers, and construction and transportation companies, to keep abreast of the latest judicial decisions with an eye to altering their operations so as to avoid or reduce liabilities.

So with the distribution of the costs of accidents. The plaintiff generally cannot bear them personally and generally does not carry insurance against them. To the extent that he can bear them they may be ruinous. The defendant, on the other hand, a city, or a construction or transportation company, a store, business, or other place of public accommodation, can transmit the cost to a wider public by means of prices, rates, taxes or insurance. This also goes for the automobile driver, who, though he is only somewhat better off than the disabled pedestrian his car struck down, yet is usually covered by insurance. In the end, those who have the capacity to bear the costs must do so. Even aside from this principle of economic necessity, the cost of social policy should be borne by society. If the policy of integration is socially valuable, then it should be financed by the public generally, least of all by the necessitous disabled traveler.

Thus, while the individualistic, moralistic, fault bases of the reasonable man doctrines of the law of torts have no particular relevance to most aspects of the integration policy, and when they are invoked anyway, they are today tending more and more to give support to that policy, the admonitory, compensatory, and cost distribution aspects of the reasonable man doctrine—as in actual administration they tend to impose the

liability on the defendant and the cost on the public—move in the general direction of supporting the policy of integration, though not necessarily consciously or for reasons that relate to the policy.

As a substitute for the policy of integration, or as a vehicle for effectuating it, the reasonable man standard suffers from another serious weakness. However much the courts may instruct juries that the reasonably prudent man is an idealized mortal, possessing human, not superhuman virtues, but no human or subhuman weaknesses or depravities; however often they may repeat that he is an abstraction not to be confused with any identifiable individual, and especially not with a judge or juror; and however much they may emphasize that he acts in the light of all of the circumstances and that he is physically disabled when the plaintiff is, the jurors are almost entirely able-bodied (blind people are excluded from jury service), and the judge has sound if somewhat aging limbs, fair enough eyesight, and, according to counsel, can hear everything but a good argument. The abstraction they conceive is unavoidably in their image and, in any event, will be applied through the filter of their experiences and make-up. Standing on good feet and legs, erect through the strength of taut muscles, peering through eyes approaching or receding from 20/20 visual acuity, the judge or juror, or their personified image, provide the blind, the deaf, the lame, and the otherwise physically disabled with a standard of reasonableness and prudence in the light of all of their circumstances, including some often quite erroneous imaginings about the nature of the particular disability. Created and applied from this disadvantage-point, the standard contains an inherent weakness which is not overcome by the occasional taking of testimony about the proper use of a cane or other aids and devices. The actions of the reasonably prudent man in like circumstances turn out to be not those taken by the reasonably prudent man actually in the circumstances, but those which a man not in those circumstances imagines he would take if he were in them. At the time of judgment, moreover, he is reasonably ignorant about what they are. In the sense intended by its author, the statement of Judge Hunt in *Davenport v. Ruckman* "that the blind have sources of knowledge not available to others"⁴²⁶ is mere superstition. But in another sense, the statement contains a basic truth: Experience with disability is a more ready source of knowledge about the disability to those who have it than to those who do not.

The right to live in the world—to return to Dean Prosser's formulation of the problem and the proposition with which we began—entails at least a right of free and safe physical access to it through the use of

⁴²⁶ 37 N.Y. 568 (1868).

streets and sidewalks, roads and highways, and the common modes of transportation, communication, and interchange. It includes as well full and equal access to places of public accommodation, places designed to accommodate men in the course of gaining access to the world.

The right to live in the world consists in part of the right to live out of it. The blind, the deaf, the lame, and the otherwise physically disabled, have the same right to privacy that others do; not only the right to rent a home or an apartment, public or private housing, but the right to live in it; the right to determine their living arrangements, the conduct of their lives; the right to select their mates, raise their families, and receive due protection in the safe and secure exercise of these rights. Some of the Englishmen whose houses were their castles, one may suppose, were physically disabled. At least Coke never said aught to the contrary. It was the *ligeantia*, not the visual acuity, which counted.

But the world in which the disabled, too, have a right to live is also on the streets, the highways and byways, in public buildings, and other public places, in the schools and colleges, in the public service and private callings, in the factories, shops and offices, in short, in all the places where men are, go, live, work, and play. The policy of the law, whether made by Congress or by the courts, whether carried out by executive or judicial action, whether implemented through the traditional formulas of the law of torts, the rhetoric of the policy of integration, or the human, natural, or inalienable rights of the Declaration of Independence, the Abolitionist Crusade, the thirteenth, fourteenth, and fifteenth amendments, and the civil rights revolution of today—the policy of the law should be by negative ban and positive fostering, to permit, enable and encourage men to be a part of their communities to the full extent of their physical capacities. The law of torts should link its labors to this conception.

It is no right of substance, it is no policy of integration, if the disabled are not entitled to this. It is no world with fewer appurtenances and access more narrowly defined. Without that right, that policy, that world, it is no living.

APPENDIX

MODEL WHITE CANE LAW

§ 1—It is the policy of this State to encourage and enable the blind, the visually handicapped, and the otherwise physically disabled to participate fully in the social and economic life of the State and to engage in remunerative employment.

§ 2—(a) 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. (b) The blind, the visually handicapped, and the other-

wise 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, 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. (c) Every totally or partially blind person shall have the right to be accompanied by a guide dog, especially trained for the purpose, in any of the places listed in section 2(b) without being required to pay an extra charge for the guide dog; provided that he shall be liable for any damage done to the premises or facilities by such dog.

§ 3—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 such pedestrian; provided that 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 2, 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 such a cane or to use a guide dog in any such places, accommodations or conveyances shall not be held to constitute nor be evidence of contributory negligence.

§ 4—Any person or persons, firm or corporation, or the agent of any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities enumerated in section 2 or otherwise interferes with the rights of a totally or partially blind or otherwise disabled person under section 2 shall be guilty of a misdemeanor.

§ 5—Each year, the Governor shall take suitable public notice of October 15 as White Cane Safety Day. He shall issue a proclamation in which:

- (a) he comments upon the significance of the white cane;
- (b) he calls upon the citizens of the State to observe the provisions of the White Cane Law and to take precautions necessary to the safety of the disabled;
- (c) he reminds the citizens of the State of the policies with respect to the disabled herein declared and urges the citizens to cooperate in giving effect to them;
- (d) he emphasizes the need of the citizens to be aware of the presence of disabled persons in the community and to keep safe and functional for the disabled the streets, highways, sidewalks, walkways, public buildings, public facilities, other public places, places of public accommodation, amusement and resort, and other places to which the public is invited, and to offer assistance to disabled persons upon appropriate occasions.

§ 6—It is the policy of this State that the blind, the visually handicapped, and the otherwise physically disabled shall be employed in the State Service, the service of the political subdivisions of the State, in the public schools, and in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved.