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ENABLING TORTS

Robert L. Rabin*

In recent years, critics of tort law have sounded the refrain of a system "out of control," and have had little difficulty in identifying illustrative cases to support their claims. To the dismay of some observers, their worst fears seem to be confirmed once again by the current wave of litigation against handgun manufacturers.1 Some see this litigation as the natural (feared) outgrowth—the predicted domino effect—of the recently-concluded multistate litigation against the tobacco industry.2 Others see it as pure politics, whether tobacco-related or not: an attempt to accomplish regulatory aims that have been largely thwarted in the legislative forum through the judicial system.3 Whatever the motivation, the twin notion of gun manufacturer responsibility for conscious oversupply of a market and negligent distributional practices is attacked as simply the most recent instance of a tort system cut loose from any discernible linkage to sensible foundations.4

But one person's meat is another's poison, as they say. Supporters of the gun litigation would argue that acceptance of these theories would constitute just the latest instance of judicial creativity in tort

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* A. Calder Mackay Professor of Law, Stanford Law School. Thanks to my colleague Marc Franklin for his helpful comments, and to Kirstin Ault, Stanford Law School, Class of 1999, for her research assistance.


One version of this counter-argument would insist that it is a proper function of tort law to assign responsibility and create appropriate incentives for safety when there is protracted legislative inaction in response to a continuing serious personal injury toll. Another, more traditionally lawyer-like, response would be that in fact there is adequate precedent to support this latest effort to force an industry—through the medium of tort liability—to live up to its social responsibilities. These counter-arguments are not self-contradictory, of course, but they do rest on very different assumptions regarding how proactive the judiciary should be in the torts arena.

Rather than focusing narrowly on the handgun litigation, my purpose in this essay is to examine the structure of the claim for redress in a broader tort context—a context that I will refer to as "enabling torts." But first consider the factual pattern common to the handgun cases. Hamilton v. Accu-Tek, a widely-discussed recent case, in which a jury for the first time awarded damages against handgun manufacturers on a collective liability theory, involved actions by seven shooting victims who were injured by illegally obtained weapons. The plaintiffs, only one of whom was actually awarded damages, sued twenty-five gun manufacturers for negligent marketing. The plaintiffs' principal argument was that gun manufacturers over-supply states with weak gun laws and that guns sold in those states subsequently make their way to states with stricter gun laws through an underground market. In fact, post-trial interviews with jurors revealed that they did not find this theory persuasive; instead, they based liability primarily on the failure of certain of the gun manufacturers to supervise the marketing practices of distributors and retailers (especially uncontrolled sales at gun shows). Both theories, however, seem to share a common set of assumptions: guns are extremely hazardous when in the hands of criminal types, and industry market-

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7. See Kairys, supra note 5, at 12-16.
9. Id.
10. Id.
11. Id.
ing practices that facilitate this circumstance are a sufficient basis for assigning responsibility to the industry.\textsuperscript{13}

In my view, there is an underlying premise here that has been inadequately explored. It is best captured, perhaps, by the notion of an enabling tort. And it comes to full flowering in our risk-saturated closing decades of the twentieth century—an epoch in which our perceptions of hazards in the neighborhood, workplace, and environment have reached unprecedented heights. In this milieu, blameworthiness is not so readily confined as was the case in times past.\textsuperscript{14} Beyond the immediate perpetrator of harm, the victim perceives the individual, or

\textsuperscript{13} See Hamilton, 62 F. Supp. 2d 802 (Weinstein, J.). In his opinion supporting the jury verdict, Judge Weinstein framed the duty question as follows: “It is the duty of manufacturers of a uniquely hazardous product, designed to kill and wound human beings, to take reasonable steps available at the point of their sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them.” \textit{Id.} at 825. In Merrill, involving the claim against the assault weapon manufacturer, the court adverted to the duty to manufacture and market a product using “due care not to increase the risk beyond that inherent in the presence of firearms in our society.” Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 163 (1999).

Another theoretical base for recovery in gun cases is products liability. But it is awkward to use either design defect or failure to warn as a basis for responsibility for criminal intervention, as contrasted to injury situations where “innocent” misuse—for example misfiring in child’s play—might well have been avoided by a better design or warning. Nonetheless, some of the municipal suits have included a product defect claim, asserting “personalization devices” could be incorporated into weapons precluding their use by unsanctioned third-parties. See Vanessa O’Connell, \textit{Cleveland Becomes Sixth Municipality to Sue Group of Gun Manufacturers}, \textit{WALL ST. J.}, Apr. 9, 1999, at B3. Products liability theories are outside the scope of this essay.

\textsuperscript{14} Showing considerable prescience, Oliver Wendell Holmes raised this question in his classic article \textit{Privilege, Malice and Intent}: “Why is not a man who sells fire-arms answerable for assaults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, someone will buy a pistol of him for some unlawful end?” Oliver Wendell Holmes, \textit{Privilege, Malice and Intent}, 8 \textit{HARV. L. REV.} 1, 10 (1894). As might be expected, however, Holmes was skeptical—and, in fact, concluded that there should be no liability: “The principle seems to be pretty well established, in this country at least, that every one has a right to rely upon his fellow-men acting lawfully, and, therefore, is not answerable for himself acting upon the assumption that they will do so, however improbable it may be.” \textit{Id.}

Holmes’ assumption that others will act lawfully would, of course, virtually eliminate enabling liability—that is, liability for risk-generating behavior leading to harms caused by third-party intervening conduct. But Holmes was not quite willing to bar the door entirely; instead he addressed exceptions to his no-liability principle:

[The initial actor] is liable, if having authority he commands it; he may be liable if he induces it by persuasion. I do not see that it matters how he knowingly gives the other a motive for unlawful action, whether by fear, fraud, or persuasion, if the motive works. But, in order to take away the protection of his right to rely upon lawful conduct, you must show that he intended to bring about consequences to which that unlawful act was necessary. Ordinarily, this is the same as saying that he must have intended the unlawful act.

\textit{Id.} at 11. As the text that follows will develop, Holmes’ narrow exception, creating liability for third-party intervenor harm only in essence when intended by the initial actor, is a far more restrictive path than tort law has followed.
more often, the enterprise, that set the stage for the suffering that unfolded. The Enabler.

In the sections that follow, I will identify some early manifestations of the enabling concept, discuss its recent extensions, and assess its "fit" with the principal goals of tort law.

I. NEGLIGENT ENTRUSTMENT AND BEYOND

A paradigm case of negligent entrustment involves the car owner who allows an unlicensed or perhaps intoxicated individual to drive his car, and as a consequence, an innocent plaintiff, a pedestrian for example, is injured. Despite the intervening misconduct of the errant driver, the courts have had no difficulty in holding the car owner responsible. Indeed, the principle was given the imprimatur of accepted doctrine in the Restatement of Torts seventy years ago, and is found in slightly different language in Restatement Second, Section 390, which states:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

In reality, the foundational premise of liability here is broader than the plain language of the negligent entrustment doctrine would suggest. Consider the facts of a much-discussed case of more recent vintage, expanding the notion of entrustment considerably beyond a literal reading of the Restatement Second. Defendant provided the funds for her grand-nephew Wilson to purchase an automobile, which


16. RESTATEMENT (FIRST) OF TORTS § 390 (1934). Section 390 is identical in the First and Second Restatements with only the following changes: (1) "in the vicinity of its use" in the First Restatement is replaced by the term "endangered by its use" in the Second Restatement, (2) "from facts known to him should know" in the First is replaced by "had reason to know" in the Second.


he then proceeded to drive in a sufficiently reckless manner to seriously injure the plaintiff.\(^\text{19}\) Strictly speaking, defendant “entrusted” nothing to her young relation; indeed, she mentioned his dubious driving credentials to the co-defendant car dealer.\(^\text{20}\) But she did supply the money that put Wilson behind the wheel, and this could have been taken as tantamount to inviting disaster: Wilson had flunked the driver’s test on numerous occasions (and never passed it), and, to make matters worse, was an alcoholic and a drug abuser.\(^\text{21}\)

It would have been a wooden application of the entrustment doctrine that limited liability to “supplying a chattel” situations, with overtones of ownership and control, and the court acknowledges as much.\(^\text{22}\) The key factor counseling liability, implicit in the opinion, is that defendant paved the way for a truly reckless individual to be imposing serious risks of injury on the public at large.\(^\text{23}\) This, of course, is the essence of the negligent entrustment doctrine. But my point is that the doctrine itself is best viewed as one of a subset of situations that more generically involve enabling behavior that under other circumstances—in this instance, assisting a needy relative to get hold of a car—would seem a perfectly innocent, indeed a commendable act.

Once viewed through this wider lens of risk facilitation, a cluster of superficially unrelated older cases come into focus as bearing a distinct family resemblance. Three examples will suffice. In the leading case of *Hines v. Garrett*,\(^\text{24}\) a young woman was taken beyond her train stop through the careless conduct of the motorman, and, as a consequence, had to walk back at night through a dangerous area known as Hoboes’ Hollow.\(^\text{25}\) She was raped twice, and subsequently brought an action against the carrier for its driver’s negligence.\(^\text{26}\) The case is a classic instance of enabling harm brought to fruition by a malevolent third party, and the court saw it in just those terms.

We do not wish to be understood as questioning the general proposition that no responsibility for a wrong attaches whenever an independent act of a third person intervenes between the negligence complained of and the injury. But . . . this proposition does not apply where the very negligence alleged consists of exposing the injured party to the act causing the injury.\(^\text{27}\)

\(^{19}\) *Id.* at 106.

\(^{20}\) *Id.*

\(^{21}\) *Id.*

\(^{22}\) *Id.* at 105.

\(^{23}\) *Id.* at 106.


\(^{25}\) *Id.* at 691.

\(^{26}\) *Id.*

\(^{27}\) *Id.* at 695 (citation omitted).
Nothing turns on the fact that here the predators were wholly unknown to the defendant—unlike *Vince v. Wilson* and the paradigm negligent entrustment cases where friends and/or relatives turn out to be risky characters. It would be recognizing a limitation without substance, a resurrection of the “control” notion, to distinguish between paving the way for harm by heedlessness to identifiably dangerous persons in contrast to careless non-recognition of dangerous places.

A second, more generic example—the so-called “key in the ignition cases”—sharpens the risk enhancement dimension of this cluster of scenarios. Defendant negligently leaves the key to his/her unlocked car in the ignition; the car is stolen by a third party; the thief’s careless driving injures the plaintiff; and the defendant is sued by the plaintiff. Some state courts base recovery on a statutory proviso; and, interestingly, some of the state courts that deny statutory recovery do so on the basis of legislative intent—more specifically, a perceived intent to reduce auto theft rather than to promote safety. Of still greater salience, some states that afford common law recovery, recognize a duty to the victim only under “special circumstances.” As spelled out by the California Supreme Court, in a case where a truck had been left overnight in a highly dangerous neighborhood with the key in the ignition, those circumstances included

the area in which the truck had been parked—one frequented by persons who had little respect for the rights of others, and populated by alcoholics; the intent that the truck remain in the location for a relatively long period of time—overnight; the size of the vehicle—rendering it capable of inflicting more serious injury or damage if not properly controlled; and the fact that safe operation of a half-loaded two-ton truck was not a matter of common experience.


29. See, e.g., *Cruz v. Middlekauf Lincoln-Mercury*, Inc., 909 P.2d 1252 (Utah 1996), in which defendant car dealer left the keys in the ignitions of cars on its auto sales lot. A thief stole one of the cars and ran into the plaintiffs while trying to evade pursuing police. The three opinions in the case, in which plaintiffs stated a good claim for relief, survey the approaches taken in these scenarios.


31. See, e.g., Hergenrether v. East, 393 P.2d 164 (Cal. 1964) (reinstating plaintiff’s verdict when key left in ignition of truck for extended period of time in “Skid-row” neighborhood); *State Farm Mut. Auto. Ins. Co. v. Grain Belt Breweries, Inc.*, 245 N.W.2d 186 (Minn. 1976) (finding liability for key left in ignition of beer truck in area of bars and liquor stores known for “proportionately” higher incidents of heavy drinking); *Guaspari v. Gorsky*, 36 A.D.2d 225 (N.Y. App. Div. 1971) (finding liability for key left in ignition next to “fire barn” where VFW field day event was taking place).

Note that it might similarly be regarded as unreasonable to leave the keys in the ignition in a respectable upper-middle class neighborhood; after all, the temptation to "joy-ride" is not limited to those whom the courts regard as degenerate types. And in all cases, the costs of vigilance could be taken to be minimal. Yet the court's reference to a "special circumstances requirement" clearly suggests a different outcome in the absence of heightened risk. What is at play here? Under the guise of a traditional doctrinal formulation, "no proximate cause," the courts adhere to a straightforward principle of fairness, call it a disproportionality principle. In this regard, when the misconduct of the intervener—in this instance, the thief behind the wheel—seems considerably more antisocial than that of the initiator, the common law courts have been committed to the proposition that only the egregious immediate wrongdoer should be considered legally responsible. By contrast, an open invitation to reckless types is viewed as another matter.

Increasingly, this proximate cause limitation, reflecting a compartmentalized view of individual responsibility, has been undermined. Consider, in this regard, another generic "enabling" scenario: dram shop and social host liability for alcohol-related auto injuries. At common law, no liability was recognized beyond that of the intoxicated person; drinking oneself into a hazard-creating stupor was simply regarded as independently more outrageous behavior than furnishing liquor to the inebriate. In more recent times, however, the purveyor's responsibility has been recognized as well, both in the enactment of dram shop legislation, and, with less than a consensus, through common law tort responsibility. In an important sense, the erosion of the proximate cause limitation for intervening acts can be regarded as a temporal shift in moral sensibilities from a more individualistic era to one in which tort law (and, on occasion, statutorily-

33. See, e.g., McLaughlin v. Mine Safety Appliances Co., 181 N.E.2d 430 (N.Y. 1962) (offering a perhaps overzealous application of the principle, when a firefighter neglected to mention the need for insulating material on defendant's heating block to a nurse who applied the block to the plaintiff's body; firefighter was held to break the chain of causation to manufacturer). See also RESTATEMENT (SECOND) OF TORTS § 435(2) (1965).


35. For a particularly strong articulation of the judicial role in responding to inadequate legislative responsiveness to this serious social problem, see Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984) (subsequently overturned by legislative reaction). See also Sharon E. Conaway, Comment, The Continuing Search for Solutions to the Drinking Driver Tragedy and the Problem of Social Host Liability, 82 Nw. U. L. REV. 403 (1988).
based civil claims) increasingly reflects more expansive notions of responsibility for the conduct of others.

But the communitarian impulses can be overstated. "Enabling" has a proactive connotation, in my view, that distinguishes this type of responsibility from failures generally to intervene on behalf of an endangered person. Consider, for example the law professor's classic hypothetical of the coldly indifferent onlooker to the plight of a baby on the railroad tracks, a train bearing down on the infant. These latter cases have traditionally been treated as no-duty situations, grounded in a time-honored distinction between instances of misfeasance and nonfeasance—except when a "special relationship" exists. A variation on this failure-to-assist scenario is the famous case of Tarasoff v. Regents of the University of California, in which a therapist was held to have owed a duty to warn a victim of his patient's violence—violence based on intentions that had been revealed to the therapist. But here, too, liability turned on a special relationship—in this instance, between the therapist and his patient—rather than overtly risk-enhancing conduct by the defendant.

By contrast, in the enabling situations that I have been discussing, defendant has affirmatively enhanced the risk of harm, and as a consequence, no special relationship is required to establish responsibility. Reconsider, in this regard, the key-in-the-ignition cases, where all of the parties are clearly strangers to each other. Indeed, in Vince v. Wilson, if the defendant had been a stranger who financed the ne'er-do-well's purchase of the car, rather than his grand-aunt, the case for liability would have been at least as strong if not stronger.

36. See Restatement (Second) of Torts § 315 (1965).
38. Id. at 353.
40. At the same time, consider the continuing limiting power of the misfeasance-nonfeasance theme. Whatever the relationship between Wilson and the defendant, if the defendant's involvement had been not the financing of the purchase but a failure to respond to the dealer's question regarding whether Wilson was sufficiently responsible to warrant selling him a car, it seems virtually certain that defendant's "failure to get involved" would have insulated her from liability. Id. at 105. Consider, in this regard, the interesting recent California Supreme Court decision in Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582 (Cal. 1997). Plaintiff brought a negligent misrepresentation claim against a number of school districts, which had given unreservedly affirmative recommendations for a school administrator, concealing information they had of his past sexual misconduct. Id. at 584. In effect, the claim was that these school districts put the students at risk in the school where the administrator was eventually hired. Subsequently, he sexually abused the plaintiff. Id. at 585. The court recognized an affirmative obligation to disclose, but also cautioned that

[i]n this regard, the California Supreme Court recently held that a no-comment letter is not a nondisclosure
These scattered situations, in which a seemingly isolated careless act enhances the risk that a malevolent or consciously indifferent intervenor will seriously injure an innocent third party, create the backdrop against which enabling behavior of a more entrepreneurial kind comes under judicial scrutiny in our contemporary setting of a risk-sensitized society. The courts have responded by creatively extending, or at least taking seriously the prospect of, liability in contexts where earlier common law courts would most likely have been dismissive on "no-duty" grounds. Such are the creatively expansionist tendencies—maddening to some critics—of the tort system.\footnote{1}

II. Newer Departures: Entrepreneurial Liability Themes

A. Not-So-Random Neighborhood Violence

Times had apparently gotten hard for the owners of 1500 Massachusetts Avenue, a large apartment complex in the vicinity of DuPont Circle in Washington, D.C. As the court describes the situation in or other failure to act, at least in the absence of some special relationship not alleged here. \textit{Id.} at 589. Whatever incentives this limitation might create to simply remain silent across-the-board in fielding requests for letters of reference, the court clearly felt that responsibility was warranted where the defendants explicitly created a false sense of security.

41. In addition to the developments discussed below, there are some singular instances of enabling conduct in the broadcast and print media areas. An especially striking example from the book publishing sphere is \textit{Rice v. Paladin Enterprises, Inc.}, in which defendant published two detailed instruction manuals on various methods for killing a victim and covering up the crime. 128 F.3d 233 (4th Cir. 1997). A third party faithfully followed the instructions and killed three people, whose survivors brought suit against the publisher. \textit{Id.} at 239. Most of the opinion overturning the trial court's entry of summary judgment is devoted to First Amendment considerations that are outside the scope of this essay. But the underlying tort claim bears a strong family connection to the enabling cases I have been discussing—grounded as it is in provision of information to a malevolent third party that made possible his injuring innocent victims. A singular example from the broadcast area is \textit{Weirum v. RKO General, Inc.}, in which a radio station conducted a contest in which the first listener to reach a disk jockey travelling on the freeway would win a prize. 539 P.2d 36, 38 (Cal. 1975). The disk jockey's whereabouts were indicated through periodic broadcast of clues. In their efforts to win the prize, two teenage drivers in separate vehicles engaged in a high speed pursuit, killing the driver of another vehicle which was forced off the highway. The California Supreme Court unanimously affirmed a plaintiff's judgment. \textit{Id.} at 42. The more typical media factual pattern involves a TV program featuring graphic violence that the plaintiff in effect characterizes as a defectively dangerous product—one that incites a third party to violent conduct leading to the plaintiff's injury. Obviously, the causation element in these cases is highly debatable, and there are also, once again, serious First Amendment issues. See, e.g., \textit{Olivia N. v. NBC}, 126 Cal. App. 3d 488 (1981) (involving a claim against defendant broadcaster alleging that the boys responsible for sexually assaulting plaintiff had been incited to do so by a particularly vivid rape scene in a program aired by defendant). Arguably, this scenario is somewhat different from enabling behavior; it is more in the nature of inciting misconduct than enabling it. But this could be regarded as a distinction without a difference.
Kline v. 1500 Massachusetts Avenue Apartment Corp., when the plaintiff moved into the building in 1959, there was a doorman on duty twenty-four hours a day, an employee at a desk in the lobby, two attendants at the parking garage, and a policy of locking the side entrance to the building every evening. Contrast the situation, as the court describes it, seven years later when the plaintiff was assaulted and robbed one evening in an interior corridor, just outside her apartment.

By mid-1966, however, the main entrance had no doorman, the desk in the lobby was left unattended much of the time, the 15th Street entrance was generally unguarded due to a decrease in garage personnel, and the 16th Street entrance was often left unlocked at night. The entrances were allowed to be thus unguarded in the face of an increasing number of assaults, larcenies, and robberies being perpetrated against the tenants in and from the common hallways of the apartment building.

A depressingly familiar sounding tale of American urban violence that became common currency in the 1960s (and thereafter). What is distinctive about the case itself, however, is that it became the leading precedent for recognition of a duty on the part of residential apartment owners to exercise reasonable care to protect their tenants from third-party violence. Interestingly, in the course of the opinion, the court draws on the key-in-the-ignition cases, among others, to support the notion that the defendant in effect had created an environment inviting criminal activity by eliminating the precautionary measures it had taken at the time that the plaintiff initially rented the apartment.

But the main thrust of the opinion is to emphasize a deterrence rationale for creating a duty to protect against third-party violence. Not only is the renter in a better position than the tenant to adopt precautionary measures, but the renter is better situated than the police to diminish the risk of criminal assault on the premises—the police, after all, cannot be expected to patrol the interiors of large residential apartment buildings and to exercise vigilance in private spaces. But implicitly, of course, the main “deterrence gap” is the inability to effectively reach the putative wrongdoer himself, either through criminal or tort sanctions. This is the crux of the matter and the link to creating responsibility for enabling behavior.

42. 439 F.2d 477 (D.C. Cir. 1970).
43. Id. at 479.
44. Id.
45. Id. at 484.
46. Id. at 485-88.
It is similarly the link to a proactive judicial approach in later extensions of the duty to protect against third-party harm in other commercial property settings. Selectively, the courts have seriously considered the prospect of protective duties in contexts ranging from shopping centers to parking facilities and university campuses. The recent California experience is revealing, both of the expansive tendencies and its likely limits.

In *Ann M. v. Pacific Plaza Shopping Center*, the court tried to put to rest an issue that has plagued courts around the country in these cases: whether "prior incidents" are a prerequisite to establishing a duty of precautionary conduct. Once again, there is an interesting parallel here to the key-in-the-ignition cases. "Prior incidents" can be seen as roughly analogous to the "special circumstances" requirement—leaving the car unsecured in a dangerous neighborhood, and so forth—that in California at least is a prerequisite to liability. The notion here is that responsibility is contextual: what might constitute inviting dangerous conduct in one milieu is not necessarily so in another. Correspondingly, what might be regarded as a particularly inviting commercial space to predatory types is similarly contextual; recall the emphasis in *Kline* on the private, secluded areas in a large apartment complex.

*Ann M.* picks up on this point. Although the California court refutes an earlier case that had suggested in dictum that prior incidents were of little consequence, it then goes on to discuss the setting with greater particularity. The case itself had involved a criminal assault in a shopping mall. Suggestively, the court remarked on plaintiff’s failure “to show that, like a parking garage or an all-night convenience store, a retail store located in a shopping center creates ‘an especial temptation and opportunity for criminal misconduct.’” As such, it was unnecessary to determine whether “some types of commercial property are so inherently dangerous that, even in the absence of prior similar incidents, providing security guards will fall within the scope of a landowner’s duty of due care.”

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49. Id. at 215.
52. Id. at 216 n.8.
53. Id.
The California Supreme Court's speculative comment did not go unheeded for long. In Sharon P. v. Arman, Ltd., a state court of appeals, highlighted the "especial temptation" language, and discussed in detail the "unique nature of a parking complex [in which plaintiff had been sexually assaulted], which invites acts of theft and vandalism." The court then held the proprietor to a duty of due care, despite no prior similar incidents on the premises.

In the premises cases, then, we find a selective extension of the enabling concept to what might be characterized as ordinary entrepreneurial activity. The older entrustment notion, even in its broader applications, turned on the aberrational character of the risk-initiator's conduct. Car owners do not routinely lend their vehicles to drug addicts or leave their keys in the ignition in dangerous neighborhoods, just as train operators are not in the business of mistakenly letting off passengers in highly dangerous vicinities. By contrast, the premises-violence cases, as a category, involve commercial activity systematically conducted in circumstances that heighten third-party risks of serious injury to others. Having ventured down this road of intrinsic entrepreneurial risk-enhancement, the courts have, as we shall see, found themselves in hitherto unexplored territory.

B. Hazards in the Workplace

The dramatic upsurge in products liability litigation that has taken place since the mid-1960s provides still another variant on the theme of enabling responsibility. The typical scenario is that the defendant manufactures factory machinery that has a safety guard to protect an employee of the factory owner from having a hand mangled by becoming enmeshed in the machinery. The factory owner/employer removes the safety guard to speed up the production process, and the worker suffers the "foreseeable" injury. I put "foreseeable" in quotes, because it often serves as the battleground in this version of the third-party intervenor story. A minority view is that foreseeability of alteration is irrelevant: since the product was designed and distributed

54. 65 Cal. Rptr. 2d 640 (1997).
56. Id. Just prior to publication of this essay, the California Supreme Court reversed and entered summary judgment for defendant, Sharon P. v. Arman Ltd., 1999 Cal. LEXIS 8163. In doing so, however, the court adhered to the view that a commercial land occupier's duty extended not only to cases of "prior similar instances," but to situations involving "other indications of a reasonably foreseeable risk of violent criminal assaults in that location. . . ." Id. at *38.
with a safety guard, that is the end of the matter.\textsuperscript{58} Harking back to more compartmentalized notions of individual responsibility (see for example, the earlier discussion of pre-dram shop comparative fault of intoxicated party and server), these courts hold that the employer's fault is the "proximate cause" of the injury.

The problem, of course, is that the employer is shielded from tort responsibility, and arguably, as a consequence, meaningful safety incentives, by the workers' compensation laws. For this reason, the pragmatic attraction of enabler's liability—the ability to target a realistic candidate for deterrence pressure, rather than the more egregious but tort-proof employer—is a salient feature of the workplace injury scenario, just as it is in the array of third-party intervenor situations discussed earlier.

Most courts take the more pragmatic view in these workplace injury situations, and reject a single-minded focus on the most immediate wrongdoer.\textsuperscript{59} As indicated, the touchstone is "foreseeability;" that is, the manufacturer's reasonable anticipation that the product will be altered by removal of the safety guard in the quest for greater profitability.

An interesting variant, underscoring the enabling theme, is the course steered by the New York Court of Appeals. In \textit{Robinson v. Reed-Prentice Division},\textsuperscript{60} the court first addressed the alteration scenario in a case in which the machinery had been designed with a complicated interlock system so that the safety shield could not be removed by the employer.\textsuperscript{61} The employer responded by cutting holes in the safety shield so that the machinery could operate without its protections. In the face of this intervening conduct, when the manufacturer of the machinery was sued for subsequent injuries, the court held that substantial modifications after sale insulated the manufacturer from design defect liability.\textsuperscript{62} The court appeared to take a hard line, rejecting a foreseeability-based approach: "[m]aterial alterations at the hands of a third party which work a substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature, however foreseeable that modification may have been, are not within the ambit of the manufacturer's responsibility."\textsuperscript{63}

\textsuperscript{58} \textit{Jones}, 37 F.3d at 423.
\textsuperscript{59} \textit{Piper}, 883 P.2d at 407.
\textsuperscript{60} 403 N.E.2d 440 (N.Y. 1980).
\textsuperscript{61} \textit{Id.} at 441.
\textsuperscript{62} \textit{Id.} at 444.
\textsuperscript{63} \textit{Id.}. 
Nonetheless, six years later, in *Lopez v. Precision Papers, Inc.*, the court qualified its earlier approach. Plaintiff's employer had removed the overhead guard on a forklift to ease entry into low spaces for loading and unloading merchandise; the employee was rendered a quadriplegic by being struck in the head by a large paper roll falling off a wooden pallet. In a terse, two paragraph memorandum opinion, affirming the appellate division's denial of defendant's motion for summary judgment, the court of appeals concluded "[t]here is evidence in this record that the forklift was purposefully manufactured to permit its use without the safety guard." Even more sharply than a foreseeability approach, this condemnation of "purposeful manufacture" that encourages indifference to safety underscores the enabling theme that I have been developing.

C. Toxics in the Environment

When the United States Supreme Court decided *Cipollone v. Liggett Group, Inc.* in 1992, bringing down the curtain on the second wave of tobacco litigation, the invulnerability of the tobacco industry appeared to have reached new heights. Its unbroken string of courtroom successes spanned four decades. The assumed risk defense—that plaintiffs freely choose to smoke despite knowledge of the health hazards—seemed a near-insurmountable obstacle to attacks on the industry through tort litigation. And now the court had preempted negligent failure to warn claims for industry conduct after the 1965 enactment of the cigarette labeling act.

But then the unexpected occurred; rarely has the prospect for success in the tort system experienced an about-face so rapidly. Beginning less than two years later with the filing of state health cost reimbursement suits and class action tort claims, the industry was set on its heels—eventually settling with all fifty of the states, and confronting seemingly endless filings of individual tort suits.

64. 492 N.E.2d 1214 (N.Y. 1986).

65. *Id.* at 1215.

66. *Id.*

67. Recently, the court has extended third-party manufacturer responsibility still further by holding that a manufacturer may have a duty to warn of foreseeable risks of harm even when design defect liability under *Robinson* would be precluded. See *Liriano v. Hobart Corp.*, 700 N.E.2d 303, 308 (N.Y. 1998).


70. For discussion of the strategies relied on in developing the state reimbursement and tort class action litigation, through the 1998 effort to secure federal legislation, see Peter Pringle, *Cornered: Big Tobacco at the Bar of Justice* (1998) (up to the settlement); Robert L.
The state tobacco-related health cost reimbursement suits, in particular, have been promoted as the model for the current municipal cost-recovery suits against handgun manufacturers. Although the tobacco cases undoubtedly have played an inspirational role in launching the municipal handgun suits, the similarities are in fact superficial—based primarily on the shared objective of governmental cost recovery.

The distinctions are critical, and rest on the enabling theme that I have been developing. As indicated at the outset (and discussed further below), the claims of negligent industry practices in marketing of handguns are a direct descendant of the family of enabling torts: the central thrust of the argument being that oversupply and/or irresponsible promotion puts a potentially dangerous product in the hands of criminal actors with malevolent intentions, ultimately leading to the injury of innocent victims. By contrast, the tobacco health care reimbursement suits, as well as the smokers' individual and class action suits, are premised on claims of direct harm experienced by the immediate users of the product. In fact, this is precisely the difficulty that plaintiffs have traditionally faced in winning these cases— their lack of "innocent victim" status. The state reimbursement suits only surmount this barrier by successfully contesting the subrogation-like nature of the claims. Even so, the suits are based on the harmful nature of the industry's product to consumers, rather than an allegation of setting the stage for third-party wrongdoing.

But a more precise analogue to the handgun litigation can be identified by a closer look at the progeny of the traditional tobacco suits; in particular, the less-noticed environmental, or secondhand smoke litigation. Indeed, with far less publicity than the smokers' class action law suits, a Florida state court class action on behalf of flight attendants who claimed to be suffering from a variety of occupationally-based secondhand smoke-induced harms, *Broin v. Philip Morris Cos.*, was filed in 1991. The case was heatedly contested for six years, as scientific studies of the impact of secondhand smoke proliferated,

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72. And fueled, in each instance, by frustration at the dilatory pace of legislative regulatory action.

73. And also by adding theories like violation of consumer protection statutes, etc.—"direct" wrongs to the public.

before settling in 1997 for $300 million in the midst of a global (eventually failed) tobacco settlement debate in Congress.\textsuperscript{75}

The controversial \textit{Broin} settlement set up a research fund, but provided for no compensation to the flight attendants themselves. Instead, the attendants were given the opportunity to pursue individual litigation, sans recourse to punitive damages, with the industry agreeing, in turn, to assume the burden of proof on whether secondhand smoke exposure can be linked to disease.\textsuperscript{76} Thus, the claims of deceit and misinformation on the part of the industry in concealing the risks of harm associated with exposure to secondhand smoke—rather than just to smoking itself—are meant to serve as a template for case-by-case airline attendants’ claims. From the enabling perspective, it follows that this template can serve as a model for other occupational groups and individuals systematically exposed to secondhand smoke, as well. If there is a substantial barrier to success in the environmental tobacco smoke context, it is in establishing causation.\textsuperscript{77}

In the secondhand smoke context, of course, it could be argued that the intervening third parties—either the smokers themselves or the premises operators (bars, restaurants, airlines, etc.)—are neither intentional nor negligent wrongdoers. Although this is a debatable proposition as far as intervening negligence is concerned, it should not matter. In this setting, the essential element in enabler responsibility is that a dangerous “instrumentality” has been put in the hands of a third-party with a foreseeable expectation that a “remote” victim will suffer harm. This is the generating force that has given the enabling concept much of its cross-contextual vitality.\textsuperscript{78}

\section*{III. Entrepreneurial Liability with Collective Responsibility?}

Although the dangerous premises cases and the third-party defective product suits resonate with emerging late-century notions of re-

\textsuperscript{75} Id.


\textsuperscript{78} Similarly, in the handgun context, supplier responsibility for enabling behavior is not necessarily limited to criminal intervention. Handguns are highly dangerous even in the hands of some “innocent” intervening third parties, such as a child who gets hold of his parents’ weapon and in the course of play seriously, but unwittingly, injures a playmate.
sponsibility arising in the course of ordinary commercial activity, they are still grounded in the familiar: a two-party litigation setting in which harm is clearly traceable from an identifiable defendant to a particular plaintiff. This traditional requirement of a causal nexus has been relaxed in some instances in recent mass tort litigation, and, by extension, it is also a feature of the ongoing enabling claims against tobacco and handgun manufacturers.

Like the enabling concept itself, the extension of this relaxed version of wrongdoer identification is based on practical considerations. Not only has the immediate harm been committed by an elusive, often unidentifiable intervenor, but the risk-initiator itself is an enterprise whose product—be it a particular brand of cigarettes or make of handguns—contributes in a collective, nonsegregable way to the overall harm done by tobacco or handguns generically. Or, at least, so goes the argument: traditional case-by-case identification is simply too complex a proposition to be workable.

The paradigm product is DES, a miscarriage preventive that came to be closely identified with cases of cervical cancer in the daughters of women who ingested the product during pregnancy, a generation earlier. The long passage of time, as well as the circumstances under which the product was sold—generally from undifferentiated batches distributed by a large number of drug companies—led to a situation in which most of the victims could not identify the manufacturer whose product had in fact caused their harm. Beginning with the landmark California case of Sindell v. Abbott Laboratories,79 many state courts adopted a version of market share liability, in which the plaintiffs only were required to establish that a substantial share of the market for a "fungible" defective product was represented by the defendants in the case.80 Identification of the particular defendant whose DES was ingested in utero by the plaintiff was not essential. Indeed, the New York Court of Appeals, in a dramatic move, held that even if a defendant could establish that its pill was not the source of a particular plaintiff's harm—a handful of manufacturers distributed identifiable pills or through identifiable retailers—it nonetheless could be held accountable for its proportional share of the harm.81

Market share liability has been criticized as judicial overreaching, tantamount to setting up a social welfare scheme for compensating

79. 607 P.2d 924 (Cal. 1980).
And the courts have demonstrated sensitivity to these protestations by carefully limiting the principle to "fungible" products, for the most part. But the pragmatic impulses underlying enabling liability open the door for creative extensions into this realm.

The wide variety of tobacco brands are essentially similar in their potential for causing secondhand smoke-related harm (handgun "fungibility" may be a somewhat more debatable proposition). The cloak of anonymity covering the sources of immediate harm (legions of unidentifiable smokers and armed assailants, respectively) roughly parallels the vagaries of DES distribution and purchase. And to the extent that market share liability rests on an equitable notion of fairness in allocating responsibility, and/or an efficiency rationale of creating appropriate incentives for safety, advocates of enabling-based industry liability arguably make out as strong a case as the claimants whose theories were persuasive to the Sindell court and its followers. Indeed, from the perspective of incentives to safety, DES was long-removed from the market when Sindell and its progeny were decided, whereas tobacco and handguns enjoy widespread continuing use, despite their associated toll of death and serious injury. And from a fairness perspective, DES victims seem neither more nor less "deserving" than the victims of secondhand smoke and handgun injuries.

Perhaps, then, this newest phase in the saga of enabling liability may have more staying power than its opponents anticipate. Whatever the case, the judiciary has turned out to be far more venturesome in articulating variations on the enabling theme than Oliver Wendell Holmes anticipated in his early speculation on the contours of liability for harm caused by third party intervenors.

IV. CONCLUDING THOUGHTS

But how far can one extend this latest turn in liability for enabling conduct—this notion of collective industry responsibility for marketing products "inviting" misuse and consequent harm to innocent victims? Do the manufacturers of alcoholic beverages bear enabling responsibility for the many thousands of annual drunk driving deaths and serious injuries? Do the manufacturers of baseball bats "enable" their use as a club to beat innocent victims senseless?

84. See Holmes, supra note 14, at 10-11.
It is possible to stop short of handgun liability, of course, and avoid opening this can of worms. On the other hand, it may also be possible to stop at handgun liability, drawing distinctions from these possible further extensions of the enabling notion. Handguns are, after all, designed for a dangerous purpose—that is why even “innocent users” are obligated, both by humanitarian and legal concerns, to keep them well concealed so that they do not fall into the hands of another party, however innocent the third-party’s designs. Baseball bats and alcohol, on the other hand, do not pose risks to the public when properly used. If this distinction seems attenuated when applied to alcohol, consider our ordinary language usage: one “uses” a handgun in harming an innocent victim; one “abuses” alcohol in doing so. These distinctions perhaps carry us to the far reaches of enabling responsibility. Or perhaps not. Looking back to the early 1900s one would have been hard put to predict where our social mores and ethical dictates would take us in creating legal obligations to protect against injuries from unrelated third parties. Looking ahead to a new century, prognostication is equally hazardous.