

## Civil Liability for Encouraging Bad Behavior: From Cheering at a Gang Rape to Promoting Opioid Abuse

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CIVIL LIABILITY FOR ENCOURAGING BAD BEHAVIOR: FROM  
CHEERING AT A GANG RAPE TO PROMOTING OPIOID ABUSE

*James A. Henderson, Jr. \**

This Article examines the civil liability of actors who encourage others to behave badly, thereby causing harm. The analysis distinguishes between individual encouragers and business-entity encouragers. Individuals most often intend for the bad behaviors and the consequential harms to occur—witness cheerleaders at a gang rape. This Article advocates stern treatment of such mean-spirited malcontents. On the one hand, if their encouragement is a but-for condition of the others’ harm causing bad behavior, they should be subject to liability based on traditional intentional tort. On the other hand, if their encouragement is not a but-for condition, this essay proposes an exception to the no duty-to-rescue rule that exposes such encouragers to liability. Regarding business entities charged with encouraging bad behavior—witness pharmaceutical companies that allegedly encourage opioid abuse—this essay argues against expanding existing exposures to liability. Commercial distributors of goods and services typically do not intend for the bad behaviors or the harms to occur; thus plaintiffs typically charge them with negligent marketing rather than intentional tort. A major reason for caution in regard to business entities is the invariable tendency of plaintiffs’ lawyers to expand new theories of tort, such as negligent marketing, into systems of strict enterprise liability. While arguably defensible in theory, in actual practice court-made enterprise liability is unmanageable, inefficient, and unfair. Thus, even as this essay advocates expanding the liabilities of individuals who encourage bad behavior in nonbusiness settings, it argues against doing so with respect to commercial entities who distribute and promote goods and services. The former, with few exceptions, deserve to be held civilly liable. The latter, in most instances, do not.

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INTRODUCTION

Would Desdemona’s parents have a cause of action against Iago for manipulating Othello into murdering their daughter?<sup>1</sup> The following analysis answers this and a number of related questions that arise when actors encourage others to behave badly, causing harm. Othello’s conduct—killing his wife—was clearly criminal. In all of the examples considered in this Article in which an individual tort defendant encourages another—the perpetrator—to harm third-person victims, the

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1. See generally WILLIAM SHAKESPEARE, THE TRAGEDY OF OTHELLO, THE MOOR OF VENICE. In this well-known literary example of encouraging bad behavior, Othello, a military general, passes over a subordinate, Iago, for a promotion. Seeking revenge, Iago pretends to be Othello’s friend while gradually convincing Othello that his wife is unfaithful and deserves to die by his hand. Thus, Iago is the quintessential encourager of bad behavior.

same thing is true: The perpetrator's conduct in deliberately causing harm is criminal in nature. The encourager's actions may also be criminal, but this analysis does not pursue that possibility. By contrast, in many cases in which an actor encourages someone who is also the victim, as would be the case if Iago had persuaded Desdemona to take her own life, the victim's self-destructive behavior would not constitute a crime and yet the encourager might nevertheless be criminally, as well as civilly, liable.<sup>2</sup> So the bad behaviors upon which this Article focuses include, but are not limited to, criminal conduct. The harm of which this Article speaks includes physical and emotional harm; it does not include commercial or purely economic loss. For this reason, actions for interference with contractual relations are excluded from the analysis.

Harmful behavior that is immoral or abjectly wasteful presents the possibility that those who encourage such bad behavior will be civilly liable to those harmed by it. When may a tort defendant be said to have *encouraged* bad behavior? For purpose of this analysis, encouragement occurs whenever an actor communicates with another intending to influence the other to behave badly. The actor may also supply the other with the physical, informational, or psychological means necessary to engage in bad behavior, thereby becoming an enabler as well as an encourager.<sup>3</sup> This Article argues that influential communications, either verbal or nonverbal, should suffice to support civil liability when they encourage bad behavior that harms either the addressee or a third-party victim, even if those communications are not but-for causes of the harm. Enablement makes an even stronger case for liability, but encouragement by itself should suffice. Moreover, if liability is otherwise appropriate, the actor who encourages a particular type of bad behavior should be liable for the proximate harms that follow, even if the exact harm experienced was not the harm intended by the actor. Thus, if Othello merely injured Desdemona in a bungled attempt to kill her, Iago should be civilly liable for her injuries.

It is important to distinguish between individual actors who encourage bad behavior and business entities accused of doing likewise. Thus, Part I considers the liability of individual actors and Part II considers the liability of business entities. Under each of these general categories, it

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2. Regarding the victim's self-destructive conduct, see Donald W. Grieshaber, *Suicide—Criminal Aspects*, 1 VILL. L. REV. 316, 317 (1956), which explains that a majority of states hold that suicide is not a crime. Regarding the encouragers' criminal responsibility, see *infra* note 65.

3. In this analysis an enabler is an actor who gives a perpetrator the means to do something. An enabler may not be a but-for cause of a victim's harm if the perpetrator fails to use the means to cause the harm. But if the perpetrator does use the means, the enabler will be a but-for cause of the victim's harm. In any event, a defendant's status as an enabler opens up the possibility that an actor may be liable for negligently inducing bad behavior—negligent marketing—even in the absence of actual intent to cause such behavior to occur. See *generally infra* notes 86–102 and accompanying text (discussing the claim of negligent marketing).

will be helpful to employ specific hypothetical examples to sharpen the analysis. In the first section of Part I, the primary illustrative example of actors encouraging others to harm third-party victims involves a gang rape in a tavern. The analysis of this example focuses on the liability of the individuals who encourage the rapists but do not physically participate in, or otherwise actually cause, the rape. The primary example in the second section of Part I considers an actor encouraging a victim to harm himself. It involves a young woman who, in the course of rejecting a boyfriend's overtures, persuades him to commit suicide. One approach to these illustrative examples would be to consider the defendant actors to have breached duties to rescue the victims from their undesirable fates. When encouragement actually causes harmful bad behavior, plaintiffs do not need rescue theory. But when the encouragement falls short of actually causing the harmful behavior, failure to rescue may be the only cause of action available to the victims.<sup>4</sup> This Article considers the possibility of such rescue-based remedies.

Part II shifts the focus from individual actors to business entities. Here, companies distribute—and encourage the use and consumption of—goods and services that end up harming people. Thus, the companies' distributional activities, accompanied by product promotions, are but-for causes of the harms suffered. Of course, promoting their products is what companies are supposed to do. So something more is required for liability. Part II explores what this something else might be. The examples in Part II mostly involve pharmaceutical companies that allegedly encourage dangerous misuses of their prescription drugs. The leading illustrative example centers on the current opioid crisis. It involves drug companies that, by supplying abnormally large quantities of addictive, non-defective pain killers to certain distributors, have allegedly encouraged pill mills to engage in the illegal and harmful distribution of the company's products to opioid addicts. If a plaintiff cannot prove that the defendant intended to cause the opioid abuse, enablement in the form of negligent marketing may provide a basis for liability. Other illustrative examples in Part II involve pharmaceutical companies that either bribe physicians to overprescribe their products or encourage overconsumption of their products by promoting them through seductive, direct-to-consumer advertising.

In connection with each hypothetical example, the analysis suggests the appropriate outcome and the conceptual/doctrinal paths by which

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4. Tort actions based on misfeasance—intentional torts, negligence, and strict liability—all require plaintiffs to prove but-for, actual causation. *See generally* JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* ch. 2 (9th ed. 2017) (explaining but-for causation). Failure to rescue is the only basis of liability that allows recovery for nonfeasance in the absence of but-for actual causation, in the sense that the would-be rescuer did not cause the initial situation that harmed the victim.

courts might reach that outcome. Rather than rehashing the normative positions supporting both the paths and the outcomes, this essay identifies the normative implications of choosing among alternative positions and makes explicit assumptions regarding which position is preferable. Thus, the analysis is mainly positive—it assumes normative positions and focuses mainly on legal doctrines and conceptual structures. Readers who agree with the author’s underlying normative assumptions may find the analysis persuasive. Conversely, those who disagree with the normative premises may for that reason reject one or more of the suggested approaches. In either event, the author trusts readers will find the analysis enlightening and provocative.

## I. LIABILITY OF INDIVIDUAL ACTORS WHO ENCOURAGE BAD BEHAVIOR

As noted, individual actors present a different set of issues than do business entities. Courts are justified in expanding individuals’ exposures to liability, while quite the opposite is true with regard to businesses accused of encouraging bad behavior in the context of distributing goods and services.

### A. *Encouraging Others to Harm Third-Person Victims*

#### 1. The First Hypothetical Example: Cheering at a Gang Rape

The actual event that inspires this first hypothetical example involved a gang rape in a tavern in New Bedford, Massachusetts. The episode generated a firestorm of public reaction<sup>5</sup> and inspired a well-received movie starring Jodie Foster as the victim and subsequent complainant in a criminal trial.<sup>6</sup> In the hypothetical version considered here, which also occurs in a tavern, three men begin to rape a young woman in the presence of at least thirty other patrons, all of whom are strangers to the victim. Some of these patrons flee and never contact the police. Others remain in the tavern. None of the onlookers, including tavern employees, intervene or attempt to use their cell phones to notify the police. Indeed, a handful of the patron-onlookers cheer the rapists. The question is whether anyone besides the rapists should be civilly liable to the victim. Central to this Article’s analysis is whether the cheerleaders should be liable for having encouraged, without having actually caused, the rapists’ brutal attack.<sup>7</sup>

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5. For an account of the incident and the media reactions, see Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 678 n.17 (1994).

6. See *THE ACCUSED* (Paramount Pictures 1988).

7. Cheering the perpetrators constituted encouragement, but this analysis assumes that the rape would have occurred even in the absence of the cheering. Of course, it is possible that the cheering added marginally to the intensity or duration of the rapists’ attack or may have helped to

Certainly the victim should reach the trier of fact with claims against the tavern's operators for their failure, through their employees, to take reasonable steps to protect a business invitee.<sup>8</sup> Equally clearly, the victim should not reach the jury with failure-to-rescue claims against the patrons who fled the scene or remained as passive bystanders. Under the common law of torts, individuals owe no general duty to rescue strangers<sup>9</sup> in the absence of a preexisting special relationship with the victim,<sup>10</sup> an observed causal connection between the defendants' prior conduct (whether or not negligent) and the victim's plight,<sup>11</sup> or an abandoned attempt by defendants to intervene that leads other would-be rescuers to rest on their oars.<sup>12</sup> Although some commentators have urged recognition of a general legal duty to engage in low-cost rescue,<sup>13</sup> which some of the tavern patrons might have accomplished with their cell phones, this author has elsewhere disagreed with these broad pro-rescue proposals.<sup>14</sup>

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cause onlookers to refrain from rescue. But that would be very difficult to determine and is assumed not to be the case in this hypothetical.

8. For pro-plaintiff treatments of a general duty to take reasonable steps to protect business invitees, see generally David A. Roodman, *Business Owners Duty to Protect Invitees from Third Party Criminal Attacks-or-"Business Owners Beware: Missouri Ups the Ante,"* 54 MO. L. REV. 443 (1989), which reviews recognized theories of liability that impose a duty upon businesses to protect invitees, and Michael J. Yelnosky, *Business Inviters' Duty to Protect Invitees from Criminal Acts*, 134 U. PA. L. REV. 883 (1986), which argues that courts should impose a duty upon businesses to protect invitees. For a discussion of the rule imposing a duty on business entities to rescue invitees on businesses premises open to the public, see RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. d.

9. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 37 cmts. a, b. See generally HENDERSON ET AL., *supra* note 4 (stating that there is an absence of a general duty to rescue).

10. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 40–41. See generally HENDERSON ET AL., *supra* note 4, at 266 (explaining that the most typical exception to the no-duty-to-rescue rule is a preexisting special relationship).

11. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 39. See generally HENDERSON ET AL., *supra* note 4, at 270–71 (explaining this creation of the peril rule).

12. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 44(b). See generally HENDERSON ET AL., *supra* note 4, at 266–69 (explaining this abandonment rule).

13. The classic argument is presented by James Barr Ames. James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 111–13 (1908) (arguing that tort liability should be imposed on those who, with "little or no inconvenience," could have effected a rescue but did not); see also Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 251 (1980) (arguing that a duty of easy rescue would strengthen common law principles); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 25–26 (1993) (stating that requiring easy rescue is justifiable under liberty and privacy principles when a rescuer can bring about a significant social benefit at trivial cost to himself).

14. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 200–01 (1973); James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 928–43 (1982); Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1466 (2008).

From this limited-rescue perspective, even if one assumes (as does this author for purposes of analysis) the existence of an underlying moral duty to make reasonable efforts to rescue strangers,<sup>15</sup> a legal duty to the same effect would present problems of rule-application both in the field and in court that, on grounds of fairness, support the traditional no-legal-duty rule.<sup>16</sup>

Now comes the hard part. What about the cheerleaders? Putting rescue aside for a moment, the rape victim will not make out intentional tort claims because she will not be able to show that the cheerleading caused her to suffer harmful contact or emotional upset.<sup>17</sup> (It will be noted that a successful failure-to-rescue claim would overcome the plaintiff's problem with causation.)<sup>18</sup> Nor will the victim, in the absence of but-for causation, be able to make out a negligence claim against the cheerleaders, other than a claim based on failure-to-rescue.<sup>19</sup> So it comes down to this: Can the plaintiff on these facts make out a rescue-based claim? None of the recognized exceptions to the traditional no-duty rule are available: no preexisting special relationship existed between the cheerleaders and the victim such that the victim would have a reasonable expectation of rescue;<sup>20</sup> none of the cheerleaders began to effect rescue and then abandoned the attempt, causing would-be rescuers to rest on their oars;<sup>21</sup> and none of the cheerleaders contributed, before the fact, to causing the victim's plight.<sup>22</sup>

Again, a minority of commentators urge courts to recognize a general legal duty to engage in low-cost rescue and thus would expose all of the tavern patrons, including the cheerleaders, to potential liability on that

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15. See Weinrib, *supra* note 13. One author has observed that Professor Weinrib subsequently adjusted his position in this regard. See Heyman, *supra* note 5, at 676 n.13. Professor Weinrib's article nevertheless remains a guidepost. In Henderson, *supra* note 14, at 942–43, this author accepts the premise of a moral duty to rescue.

16. See Henderson, *supra* note 14, at 943 (“Courts have refused to impose a general [legal] duty to rescue largely because it would be unmanageable as a guide to either primary or adjudicative behavior.”).

17. See *supra* notes 4, 7 and accompanying text. Regarding the tort of intentional, outrageous infliction of severe emotional distress, but-for causation is necessary. See generally HENDERSON ET AL., *supra* note 4, at ch. 11 (explaining the tort of intentional infliction of emotional distress). The reasonable factual assumption here is that, under the circumstances, the rape victim's suffering was not made worse by the handful of cheerleaders.

18. See *supra* note 4 and accompanying text.

19. See *supra* note 4 and accompanying text.

20. See *supra* note 10 and accompanying text.

21. See *supra* note 12 and accompanying text.

22. See *supra* note 11 and accompanying text.



ground.<sup>23</sup> This author, while accepting the premise of an underlying moral duty, opposes a general legal duty because of problems of unfairness associated with the application of such a legal rule.<sup>24</sup> These problems relate to the necessity, under what may be described as process norms, that legal rules conform to articulable criteria in order to fairly guide the conduct of actors both *ex ante* in the field and *ex post* in the courtroom.<sup>25</sup> Thus, for a legal rule to affect behavior in the manner intended, it must be comprehensible to its addressees;<sup>26</sup> must refer to factual circumstances that actors both in the field and later in court are able to verify;<sup>27</sup> must set a standard for conduct to which its addressees are capable of conforming;<sup>28</sup> and must generate disputes that are fairly manageable in court.<sup>29</sup> In an earlier article developing these process norms, this author explains at length how a general rule requiring low-cost rescue would, in most instances, violate all of them.<sup>30</sup> Tort law admonitions not to cause harm provide built-in limitations that render their applications on the whole both manageable and fair.<sup>31</sup> By contrast, admonitions to prevent harm from befalling strangers, even with the reference to “low cost,” are unavoidably open-ended, ambiguous, and vaguely aspirational.<sup>32</sup> For example, some of the tavern patrons who sat silently and watched the rape—especially those who were somewhat intoxicated—may have been confused over what was happening,<sup>33</sup> may

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23. See *supra* note 13 and accompanying text. If one assumes that all the patrons possessed or had access to cell phones, a plausible case can be made that all the patrons could have affected low-cost rescue by calling the police.

24. See *supra* note 16 and accompanying text.

25. See Henderson, *supra* note 14, at 904–11.

26. *Id.* at 911–13.

27. *Id.* at 913–14.

28. *Id.* at 914–15.

29. *Id.* at 916.

30. *Id.* at 930–40.

31. The legal standards for intentional torts and strict liability are quite specific in their descriptions of the harmful conduct that triggers liability. The reasonable person standard for negligence is more open-ended and thus problematic. See generally James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976) (discussing the limits of adjudication and the expansion of the negligence concept). What reduces the unmanageability of the negligence standard is the requirement that the plaintiff prove with specificity what the defendant should have done differently to reduce or avoid the plaintiff’s harm. See generally Aaron D. Twerski & James A. Henderson, Jr., *Fixing Failure to Warn*, 90 IND. L.J. 237 (2015) (discussing the issues with the failure to warn doctrine).

32. See Henderson, *supra* note 14, at 936–38 (“[N]ot only would the number of defendants tend to complicate failure-to-rescue cases [under a general duty], but the interrelationships among the defendants . . . would present potentially high levels of [unmanageability].”).

33. Further variables such as defendant’s age, distance of defendant from where in the tavern the rape occurred, and the level of lighting would render a general rescue rule difficult to apply fairly and consistently.

reasonably have assumed that the tavern management would intervene;<sup>34</sup> may have been uncertain regarding whom, or how, to call for help;<sup>35</sup> or may have been so psychologically traumatized as to be incapable of responding.<sup>36</sup> To hold defendants to the traditional objective standard of due care—in effect ignoring personal limitations that rendered rescue for some defendants difficult or impossible—would be grossly unfair.<sup>37</sup> And yet, to apply a subjective standard that allows for personal mental and psychological idiosyncrasies would render issues under a general duty to rescue incomprehensible, non-verifiable, and unmanageable.<sup>38</sup>

Thus, a general legal duty to undertake low-cost rescue casts a liability net that is both excessively wide and administratively problematic. A narrower rule that limits liability to encouragers of bad behavior largely avoids such difficulties. By shouting encouragement, the cheerleaders unwittingly identified themselves as potential tort defendants whose civil prosecution would not only be morally justified but would also avoid most of the difficulties described above. Clearly the cheerleaders understood what was happening, even if some of the other patrons in the tavern did not. Equally clearly, the cheerleaders' expressed approval of the gang rape should prevent them from plausibly claiming to have been psychologically paralyzed by disgust or fear.<sup>39</sup> By refusing to contact the police, the cheerleaders breached a moral duty to rescue the victim even if their deplorable conduct did not actually cause the victim to suffer harm.<sup>40</sup> From that perspective, all of the tavern patrons who could easily have called for help breached a moral duty to the victim.<sup>41</sup> Under a formal

34. *Cf. supra* note 8 and accompanying text (discussing potential claims against the operators of the tavern).

35. Young adults—typical law students, for example—probably can't imagine that this might be a problem. They will have to believe the author that for some of us it certainly might be.

36. To this possibility may be the added fear that the rapists, observing that rescue attempts were under way, might turn their anger on the rescuers.

37. For a discussion of the objective standard, see generally HENDERSON ET AL., *supra* note 4, at ch. 3. Certainly, courts do not adjust the standard to reflect individuals' mental incapacities. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11(c) (AM. LAW. INST. 2010). For a discussion of the potential unfairness, under the conformability norm, of applying an objective standard in the context of failure to rescue, see Henderson, *supra* note 14, at 930–32.

38. See Henderson, *supra* note 14, at 932.

39. Paralysis suggests an inability to act. The cheerleaders not only acted but also could not rationally argue that a combination of disgust and fear prevented them from attempting low-cost rescue. Having volunteered to intervene, the marginal costs of being helpful rather than hurtful were presumably lower than they were for non-intervenor. *Cf. supra* note 36 and accompanying text (excusing those who are psychologically disturbed to the point of being incapable of responding).

40. See *supra* note 15 and accompanying text.

41. See *supra* note 15 and accompanying text.

process of rule-application that is manageable and fair, however, only those patrons who unambiguously and openly expressed approval could be held legally liable.<sup>42</sup>

It follows that under the analysis in this Article, the gang rape victim should have a cause of action against the cheerleaders for failing to rescue her,<sup>43</sup> assuming triers of fact could find that an attempted rescue would have been successful. This should be true even if such a cause would not be available against the tavern patrons who fled the scene or remained and watched silently.<sup>44</sup> Upon reflection, the three recognized exceptions to the no-duty-to-rescue rule all serve to identify defendants for whom imposing liability does not present problems of unfairness.<sup>45</sup> In effect, this analysis argues that a fourth exception should be added to the first three: An individual owes a legal duty to act reasonably to rescue another from a threat of harm whenever the individual encourages the other or a third person to cause the threatened harm, thereby demonstrating that the individual appreciates the surrounding factual circumstances and is capable of performing the rescue that the facts warrant. Legal liability will follow upon a plaintiff's showing that an attempted rescue would have succeeded.<sup>46</sup> Those who advocate a legal duty to engage in low-cost rescue would presumably agree with the result suggested here regarding the cheerleaders<sup>47</sup> but would extend the duty to all the tavern patrons who had access to the physical means to call the police but did not.<sup>48</sup> The analysis in this Article treats the cheerleaders as a special case.

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42. Again, none of the difficulties of formally applying a general legal duty to rescue, *see supra* notes 33–38 and accompanying text, would be impediments to fair procedural application of such a legal duty to the cheerleaders. *See supra* note 39 and accompanying text. It will be observed that no concomitant procedural difficulties accompany the informal application of moral standards.

43. Although for a legal duty to rescue to arise the defendant need not create the risk from which the victim needs to be rescued, *see generally* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 7, scope note (AM. LAW INST. 2012) (stating that there are exceptions to the general no-duty-to-rescue rule for people who did not create the risk), to make out a claim for breach of the duty the victim must show that the omitted rescue attempt would have succeeded.

44. *See supra* note 9 and accompanying text.

45. For descriptions of the recognized exceptions, *see supra* notes 10–12 and accompanying text. For descriptions of the problems of rule-application, *see supra* notes 26–29 and accompanying text. Taking as an example the recognized exception based on abandoning a rescue attempt part way through, such a liability rule would be no less comprehensible than the general negligence standard, *cf. supra* note 31 (explaining that a negligence standard is both fair and manageable); would present verifiable issues of fact regarding what actually happened; would describe an obligation—don't quit part way—to which its addressees are presumably capable of conforming; and would be sufficiently specific to be manageable in court.

46. *See supra* note 43 and accompanying text.

47. A general duty would logically subsume all arguably special cases within it.

48. *See supra* note 13 and accompanying text.

## 2. A Second Example: Iago's Treachery

Another example of an individual actor encouraging another to behave badly is the one alluded to in the Introduction: Iago's psychological manipulation of Othello to murder Desdemona.<sup>49</sup> Given the manner in which Shakespeare structures the tragedy, it is likely that Othello would not have killed his wife but for Iago's machinations. To be sure, Othello's personality made him prone in any event to suspecting his wife of infidelity,<sup>50</sup> and the events that finally triggered his rage were in important part a combination of other actors' spite and random chance.<sup>51</sup> This analysis begins by assuming, as the Bard probably intended, that Iago's behavior was a necessary condition for Othello's deadly act. Thus, Iago not only encouraged Othello, he also psychologically enabled him by providing the mindset necessary for Othello to commit murder. An actor can enable a perpetrator in three different but related ways: physically, as would be the case if Iago had held Desdemona while Othello smothered her to death;<sup>52</sup> informationally, as would be the case if Iago had instructed Othello on how to kill his wife without being apprehended;<sup>53</sup> and psychologically, as was the case when Iago convinced Othello, not otherwise inclined to harm Desdemona, that Desdemona deserved to die at his hand.<sup>54</sup> In all of these hypothetical instances of successful enablement, Iago would be exposed to liability for committing an intentional tort, most likely a battery. Iago acted intending to induce Othello to cause a harmful contact with Desdemona's person and such a harmful contact resulted from Iago's actions.<sup>55</sup> And § 5 of the Restatement, Third, of Torts: Liability for Physical and Emotional

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49. See *supra* note 1 and accompanying text.

50. Othello seems to jump quickly to the conclusion that Desdemona has been unfaithful with a recently-demoted soldier, Cassio, when she asks Othello to reinstate Cassio to his previous rank. See SHAKESPEARE, *supra* note 1, act 2, sc. 3.

51. Thus, Iago's wife, Emilia, happens to find and possess one of Desdemona's handkerchiefs, which she gives to Iago who plants it in Cassio's room where Othello will find it. *Id.* act 3, sc. 4.

52. In similar fashion, the cheerleaders in the gang rape hypothetical might have helped hold down the victim.

53. In similar fashion, one or more of the cheerleaders in the earlier example might have instructed the criminal perpetrators on how best to accomplish the rape.

54. The encouragement in the gang rape example might have begun some time before the rape, during which time the cheerleaders talked the rapists into committing the crime. These different modes of enablement parallel the three characteristics of an effective risk minimizer: information regarding the risk, the capacity to act on the information, and adequate motivation. See James A. Henderson, Jr. & Aaron D. Twerski, *Optional Safety Devices: Delegating Product Design Responsibility to the Market*, 45 ARIZ. ST. L.J. 1399, 1403, 1405 (2013). When an actor lacks one (or more) of these characteristics, the enabler steps in and supplies the missing element.

55. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 (AM. LAW INST. 2010).

Harms—the so-called “umbrella intentional tort”<sup>56</sup>—would also support liability.<sup>57</sup> The tort of intentional infliction of mental distress might be available to Desdemona’s representatives against Iago on her behalf.<sup>58</sup> Indeed, Othello’s representatives might also have such a claim.<sup>59</sup>

Should Iago be civilly liable for failing to rescue Desdemona? Of course, Iago’s status as an enabler renders this issue moot.<sup>60</sup> But what if Iago’s encouragement had not caused the murder to occur? What if Othello was already committed to killing his wife and would have done so on his own initiative in the absence of Iago’s treachery? In that scenario, even assuming that courts do not recognize a general duty to rescue, several rescue-based avenues—exceptions to the no-duty rule—might be available to Desdemona’s representatives. For one, Iago may have been in a sufficient preexisting relationship with Desdemona to support her reasonable expectation that Iago would protect her by dissuading Othello from his deadly plan or warning her or her parents.<sup>61</sup> On the reasonable assumption that a relationship sufficient to support a duty to rescue did not exist, and assuming the other two recognized exceptions do not apply,<sup>62</sup> should the proposed fourth exception to the no-duty rule be available on these facts? This author concludes that it should. Thus, by encouraging Othello, Iago demonstrated openly and unambiguously that he was apprised of the relevant facts and was capable of some type of positive intervention. Everyone knows that Iago was a conniving scoundrel, skilled in treachery. It may provide comfort to know that, for those same reasons, he was a tortfeasor as well.

## B. *Encouraging Others to Harm Themselves*

### 1. The First Hypothetical: “Kill Yourself, You Loser!”

This example is inspired by a case of recent notoriety, in which a teenage girl, in the midst of breaking up with her boyfriend, successfully

56. See AARON D. TWERSKI ET AL., TORTS: CASES AND MATERIALS 74–75 (4th ed. 2017).

57. See *id.* (“An actor who intentionally causes physical harm is subject to liability for that harm.”).

58. See *supra* note 17 and accompanying text. Desdemona clearly suffered mental distress leading up to, and including, her final encounter with Othello. On these facts, could a trier find Iago’s conduct “extreme and outrageous,” and Desdemona’s distress “extreme”?

59. See *supra* note 58 and accompanying text.

60. As a successful enabler, Iago was guilty of misfeasance and would be liable for the harms he caused. Desdemona’s representative need not invoke a rescue theory based on nonfeasance.

61. See *supra* note 10 and accompanying text. Given that Desdemona had only recently married Othello, almost certainly she and Iago did not have the necessary relationship.

62. See *supra* notes 11–12 and accompanying text.

encouraged him to commit suicide.<sup>63</sup> She enabled him in this regard by explaining a method for him to use—inhaling carbon monoxide while seated in an idling truck within an enclosed garage—and telling him via cell phone to get back in the truck when he started to exit to safety.<sup>64</sup> On these facts, the victim’s representatives should reach the trier of fact with a claim for battery in much the same manner that Desdemona’s parents should if Iago’s efforts were a but-for cause of their daughter’s murder.<sup>65</sup> The representatives would likely have a claim on behalf of the decedent for intentional infliction of mental suffering.<sup>66</sup> These conclusions rest on traditional law and are fairly straightforward. But what if the girlfriend had not been an enabler? What if proof of a but-for connection between her encouragement and her boyfriend’s death was unavailable or unconvincing? On those assumed facts, would a claim for failure to rescue be made out, either on one or more of the three recognized exceptions to the traditional no-duty rule, or on the proposed fourth exception described in section A? Certainly the girlfriend’s relationship with the victim during their breakup did not support an expectation on his part that she would intervene to help him cope positively with his depression.<sup>67</sup> Moreover, the girlfriend made no abandoned attempt at rescue that could have caused other would-be rescuers to rest on their oars.<sup>68</sup> It could be argued that her previous conduct in terminating their relationship, which might be found to have caused her boyfriend to

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63. See Carla Zavala, Comment, *Manslaughter by Text: Is Encouraging Suicide Manslaughter?*, 47 SETON HALL L. REV. 297, 300–02 (2016).

64. *Id.* at 301, 302. The use of social media as a means to cause harm and influence others to behave badly is a growing problem. See generally Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845 (2010) (citing other recent sources regarding social media influencing harmful behavior).

65. Cf. *supra* note 55 and accompanying text (discussing Iago’s inducement of Othello to harm Desdemona). Apparently, some state prosecutors are filing criminal charges against individuals who, by using opioids with overdose victims, are causing opioid-related deaths. See Joseph Walker, *Prosecutors Treat Opioid Overdoses as Homicides, Snagging Friends, Relatives*, WALL ST. J., <https://www.wsj.com/articles/prosecutors-treat-opioid-overdoses-as-homicides-snagging-friends-relatives-1513538404> [<https://perma.cc/TD7D-TTJP>] (last updated Dec. 17, 2017, 11:12 PM).

66. For earlier examples see *supra* notes 17, 58 and accompanying text. The claim on behalf of the jilted boyfriend is stronger than the two previously considered.

67. See *supra* note 10 and accompanying text. Plaintiffs might try to argue that their relationship before the breakup would support a rescue claim, but the couple discussed how he might kill himself almost from the time of their first meeting.

68. See *supra* note 12 and accompanying text. If her conduct had any effect on third parties, it would be to put them on notice that the boyfriend needed help that she was not providing.

require rescue, gave rise to a legal duty on her part to try to relieve his suicidal inclinations or to notify third parties.<sup>69</sup>

Assuming that neither the break-up nor the girlfriend's subsequent encouragement was a but-for cause of her boyfriend's death, and that the three traditional exceptions to the no-duty-to-rescue rule are not available, would the boyfriend's representatives have a claim based on the earlier-proposed fourth exception?<sup>70</sup> The answer depends on whether the girlfriend's encouragement sufficiently identifies her as a defendant whose civil prosecution would not present problems of rule-application of the sort that often accompany a general duty to rescue, and whether a rescue attempt by her would have succeeded. Clearly the need to try to comfort a depressed person with whom one has a preexisting relationship, or at least to counsel him to seek parental or professional help, would be comprehensible to one in the girlfriend's position. And her willingness to become involved in encouraging her boyfriend to kill himself indicates that she would have been mentally and emotionally (if not ethically) capable of responding to his anguish in a more positive manner. Moreover, a failure-to-rescue claim against her would relieve the court of the task of determining who, from among a potentially large number of possible defendants, may have breached duties to rescue. It is fair to assume that a number of people who knew the victim and observed his suffering might qualify as defendants under a general duty to rescue. The girlfriend's conduct helps to single her out as the leading—possibly the only—candidate.<sup>71</sup> Once again, it is her failure to help her boyfriend, not her encouraging him to kill himself, that constitutes the breach. But her encouragement, even if not a but-for cause of her boyfriend's death, is the circumstance that makes it possible to apply to her the limited rescue rule fairly and consistently.

## 2. A Second Example: "I've Tried My Best to Help, But the Hell With It!"

In this hypothetical example, a mentor attempts, with apparently good intentions, to help a depressed acquaintance to rid himself of recurring thoughts of suicide. After a period during which the mentor urges her troubled friend to seek professional help, the mentor gives up and, out of a mixture of impatience and frustration, tells her friend, "You might as well go ahead and get it over with." Later the same day, the friend kills

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69. See *supra* note 11 and accompanying text.

70. See *supra* text following note 45.

71. Cf. *supra* note 32 and accompanying text (stating that a general duty to rescue strangers would be unmanageable). From the standpoint of allocative efficiency, it could be said that, having intervened in managing her boyfriend's state of mind, the marginal costs of being positive were lower for her than for those who had not intervened to begin with. See *supra* note 39 and accompanying text.

himself and leaves a note making it clear that his friend's harsh words pushed him over the brink. On these facts, and assuming no intent on the mentor's part to cause her friend's death, the decedent's representatives could not make out an intentional tort. How should a court react to a negligent failure-to-rescue claim? One may assume that, given the suicide note, the plaintiff can make out but-for causation. Might this be an example of a well-intentioned actor beginning a rescue and then terminating the effort mid-way, leaving the victim in a worse position than before?<sup>72</sup> Doctrinally, the plaintiffs' problem would be showing that one or more would-be rescuers, realizing that the defendant was rendering counsel, rested on their oars, and that if someone else had stepped in, the suicide would not have occurred.<sup>73</sup> The truly troublesome issue presented would not be whether the defendant owed a duty to undertake reasonable rescue<sup>74</sup> but whether the defendant breached that duty. In this regard, the defendant did not fail to attempt rescue. But could she be found to have been negligent in her attempt to rescue her friend?

Observe that this hypothetical introduces a consideration absent in the earlier examples. In the examples in the previous section, the defendant-actors' conduct—encouraging violent crimes—has no social value whatever. And in the first example in this section involving the girlfriend who acted in the meanest of spirits, the girlfriend's conduct did not carry with it anything positive. By contrast, the instant example involves efforts by an actor dealing with a depressed colleague where the efforts began with good intentions but ended badly. In assessing whether a trier of fact should be allowed to find the mentor negligent in her handling of the situation, the court should apply a common-sense standard of care that allows for nonprofessional defendants to make good faith errors in judgment. On the reasonable assumption that social benefits, as well as risks, accompany well-meaning attempts by laypersons to help others escape the risks associated with severe depression,<sup>75</sup> courts should avoid

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72. See *supra* note 12 and accompanying text.

73. See *supra* note 12 and accompanying text.

74. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 42, 44(b) (AM. LAW INST. 2012).

75. Obviously, it would be preferable for the decedent to have followed his friend's advice and obtained professional help. But it must be true that, in a large majority of instances, well-intentioned help from a friend is better than no help at all. See, e.g., Rachel Feintzeig, *With Workplace Suicides Rising, Companies Plan for the Unthinkable*, WALL ST. J., <https://www.wsj.com/articles/with-workplace-suicides-rising-companies-plan-for-the-unthinkable-1516205932> (last updated Jan. 17, 2018, 4:45 PM) (describing trend toward large employers organizing in-house, first-response monitoring, and counseling in response to workplace suicides); cf. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 355 (Clark, J., dissenting) (arguing that courts should not come down hard on those offering psychological counseling).



taxing such attempts via a strictly-applied liability rule. Indeed, something approaching a formally-recognized privilege for laypersons in such situations to engage in lawful, good-faith counseling might be in order.<sup>76</sup>

## II. LIABILITY OF BUSINESS ENTITIES THAT, THROUGH THEIR MARKETING PRACTICES, ENCOURAGE BAD BEHAVIOR

As noted at the outset, the most important distinction in this Article is between individual actors and business entities. With regard to individual actors who encourage others to behave badly, the doctrinal focus is on failure to rescue. In connection with business entities, a rescue analysis is inappropriate. The exposures of such entities should depend on a narrowly drawn version of negligent marketing.

### A. *Encouraging Actors to Cause Harm to Third Persons*

#### 1. The First Hypothetical Example: Enabling Pill Mills<sup>77</sup> and Unscrupulous Physicians to Promote Opioid Abuse

Opioid abuse and related deaths have increased exponentially in recent years, to the point of presenting a national health crisis.<sup>78</sup> Under traditional products liability principles, pharmaceutical companies that manufacture opioid-based pain killers are exposed to liability when their products are defective at time of distribution.<sup>79</sup> Thus, if at the time of sale

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76. The modifier “lawful” is intended to exclude the unlicensed practice of medicine. The traditional parent-child immunity reflects some of these same concerns that might support a privilege in this context. *See generally* HENDERSON ET AL., *supra* note 4, at 434–38 (discussing intra-family immunity). Additionally, many good Samaritan statutes grant to rescuers immunities from fault-based liability. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1799.102 (West 2018). *See generally* 4 DAVID W. LOUISELL & HAROLD WILLIAMS, *MEDICAL MALPRACTICE* §§ 21.01–.05 (Gordon L. Ohlsson ed., Matthew Bender & Co. 2018) (1960) (discussing good Samaritan statutes).

77. *See* Khary K. Rigg et al., *Prescription Drug Abuse & Diversion: Role of the Pain Clinic*, 40 J. DRUG ISSUES 681, 682 (2010) (“The term ‘pill mill’ is typically used to describe a doctor, clinic, or pharmacy that is prescribing or dispensing controlled prescription drugs inappropriately.”).

78. *See What is the U.S. Opioid Epidemic?*, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.hhs.gov/opioids/about-the-epidemic/index.html> [<https://perma.cc/7XVY-RWGM>] (last updated Sept. 19, 2018). *See generally* Michael E. Schatman & Lynn R. Webster, *The Health Insurance Industry: Perpetuating the Opioid Crisis Through Policies of Cost-Containment and Profitability*, 8 J. PAIN RES. 153 (2015) (containing many citations of secondary sources relating to the crisis).

79. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 6(a) (AM. LAW INST. 1998). *See generally* JAMES A. HENDERSON, JR. ET AL., *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 428–58 (8th ed. 2016) (explaining liability for prescription drugs).

the drugs contain unintended, harmful ingredients,<sup>80</sup> are designed badly,<sup>81</sup> or are distributed without adequate warnings,<sup>82</sup> the companies will be liable for harms caused by such defects. But product defects are not causing the opioid epidemic. The drugs do not contain unintended, harmful ingredients, are not defectively designed, and are sold with adequate warnings. Rather, the categorically addictive qualities of socially valuable, non-defective pain killers are combining with the proneness to addiction of many consumers to cause the epidemic. Assuming that American courts will not attempt to hold such products categorically defective based on the generic risks that such products unavoidably present,<sup>83</sup> and observing that the rescue claims would not increase plaintiffs' chances of recovery given that the defendants' products actually cause the victims' harms,<sup>84</sup> the only potential path to recovery would seem to be claims based on inappropriate marketing.<sup>85</sup>

The plaintiffs' argument in support of inappropriate marketing claims based on the encouragement of bad behavior would go something like this: The pharmaceutical companies that distribute opioid pain killers are aware of the opioid crisis and the role of pill mills and rogue physicians in promoting, at the fringes of the criminal law, massive overconsumption of such addictive drugs. In the course of distributing their products, the drug companies also know that some middlemen entities are purchasing such large quantities of the drugs as to identify them as possible operators of pill mills. And yet the drug companies have continued to promote their products without taking adequate steps either to intervene by refusing to do business with questionable distributees or to notify authorities so that they might enforce relevant criminal regulations. Indeed, a recent report by the minority staff of the Senate Homeland Security and Governmental Affairs Committee indicates that some opioid manufacturers have contributed to nonprofit advocacy groups that promote opioid use as an

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80. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 6(b)(1).

81. *Id.* § 6(b)(2).

82. *Id.* § 6(b)(3).

83. See generally James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991) (discussing how American courts have refused to impose strict liability on distributors of nondefective but generically dangerous products).

84. Cf. *supra* note 60 and accompanying text (explaining that a claim based on misfeasance renders a failure to rescue claim unnecessary). The point here is not that causation-based claims will necessarily succeed but rather that the availability of such claims renders rescue superfluous.

85. See generally HENDERSON ET AL., *supra* note 79, at 413–14 (discussing inappropriate marketing claims); Richard C. Ausness, *Tort Liability for the Sale of Non-Defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S.C. L. REV. 907, 908–09 (2002) (discussing the theory of negligent marketing).

effective means of chronic pain management.<sup>86</sup> While the amounts of such contributions appear modest in relation to the size of the opioid abuse problem (\$8.9 million over six years), the Report advocates more open disclosures of such industry activity.<sup>87</sup> Traditionally, an actor intends consequences that are substantially certain to follow from the actor's conduct.<sup>88</sup> Thus, by shipping drugs to suspect middlemen, drug companies might be said to be intentionally encouraging and enabling opioid abuse. However, in many instances of harmful opioid abuse, plaintiffs will not be able to show that it was substantially certain that abuse would result from the manufacturers' marketing techniques and thus intentional torts will not be made out.<sup>89</sup> The obvious alternative would be claims for negligent marketing.<sup>90</sup> Once again, observe that plaintiffs' causes of action in this regard do not include failure-to-rescue claims; the plaintiffs in these cases complain of misfeasance rather than nonfeasance.<sup>91</sup> Functionally, negligent-marketing claims in the form of negligent enablement are, on a grander scale, akin to traditional claims for negligent entrustment.<sup>92</sup> Over the past several decades, plaintiffs have brought actions against entire industries for the negligent marketing of unavoidably dangerous, non-defective products, but they have been met with only limited success.<sup>93</sup> The courts that have denied recovery as a matter of law have done so largely on social policy grounds.<sup>94</sup>

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86. See Jeanne Whalen, *Drugmakers Funded Groups Promoting Opioid Use, Senator's Report Finds*, WALL ST. J., <https://www.wsj.com/articles/drugmakers-funded-groups-promoting-opioid-use-senators-report-finds-1518482717> (last updated Feb. 12, 2018, 9:12 PM).

87. *Id.*

88. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1(b) (AM. LAW INST. 2010); James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1138 (2001). Because encouragement requires intent to influence, defendants held liable for negligent marketing are in some instances being held liable for enablement, rather than encouragement, of bad behavior. See Henderson & Twerski, *supra* note 83, at 1138–43.

89. See Ausness, *supra* note 85, at 913–14.

90. *Id.*

91. *Cf. supra* notes 60, 84 and accompanying text (explaining that the availability of misfeasance and causation-based claims renders nonfeasance claims unnecessary).

92. Negligent entrustment typically involves a defendant who negligently provides another with a dangerous instrumentality which the other employs to harm himself or a third person. See Henry Woods, *Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability*, 20 ARK. L. REV. 101, 101–02 (1966). This analogy highlights the fact that negligent marketing involves enablement as well as encouragement.

93. See generally James A. Henderson, Jr., *The Impropriety of Punitive Damages in Mass Torts*, 52 GA. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3009389](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009389) [<https://perma.cc/TZ9W-GSZS>] (discussing several examples of claims against industries for nondefective products).

94. See, e.g., *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1058, 1067–68 (N.Y. 2001). In this case, a number of plaintiffs sought to hold forty-nine handgun manufacturers liable

Before turning to the broader social policy issues, it will be helpful to understand the conceptual and administrative difficulties that negligent marketing claims present. One such difficulty concerns the question of what the drug companies might do differently to protect overdose victims. Marginally better warnings would not help much, if at all, nor do reasonable alternative designs appear to be available.<sup>95</sup> If the industry stopped distributing addictive pain killers or placed severe limits on distribution it would interfere with the millions of consumers who require access to legitimate pain management programs.<sup>96</sup> Notifying regulatory authorities regarding suspicious distributees would, if limited to fairly obvious suspects, tell the agencies little that they did not already know and, if expanded even slightly to include distributees, would threaten to overwhelm regulatory agencies with a flood of useless information. And expanded duties to warn regulators would threaten to disrupt legitimate pain management operations which the drug companies might falsely identify as illegitimate out of an abundance of caution. Given these difficulties, it is not surprising that courts thus far have refused to hold corporate defendants liable for failing to monitor the middlemen and end users of opioid drugs or other inherently dangerous products.<sup>97</sup>

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for the harms caused by handgun violence. *Id.* at 1058. In refusing to recognize claims for negligent marketing, the court observed: “This case challenges us to rethink traditional notions of duty, liability, and causation.” *Id.* at 1068.

95. Regarding warnings, drug companies already provide them; moreover, the risks associated with consuming addictive opioids are by now obvious to almost all concerned. Manufacturers do not owe a duty to warn of risks that are obvious and generally known. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(j) (AM. LAW INST. 1998). Regarding design, adequate warnings to prescribing physicians have traditionally constituted a bar to design-based claims. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Drug Designs Are Different*, 111 *YALE L.J.* 151, 171 n.83. (2001). Moreover, the defective design requirements cannot be satisfied—opioids are categorically addictive. *See supra* notes 81, 83 and accompanying text.

96. *See generally* Joseph B. Prater, *West Virginia’s Painful Settlement: How the Oxycontin Phenomenon and Unconventional Theories of Tort Liability May Make Pharmaceutical Companies Liable for Black Markets*, 100 *NW. U. L. REV.* 1409, 1436 (2006) (“Increased litigation could serve to further chill pharmaceutical companies’ development and promotion of narcotic painkillers and, in turn, further the ‘chronic undertreatment of pain.’”). In addition to the negative effects on manufacturers, the author argues that the general aura of illegality would have a chilling effect on physicians who would refuse to prescribe powerful narcotics to patients with legitimate needs. *Id.* at 1437.

97. For evidence that a liability landslide may be around the corner, see Dennis Kneale, *The Opioid Crisis Has Plaintiff Lawyers Smelling Cash*, *WALL ST. J.* (Jan. 3, 2018), <https://www.wsj.com/articles/the-opioid-crisis-has-plaintiff-lawyers-smelling-cash-1515024267> (showing possible parallel to tobacco litigation). For reported decisions dealing with opioid abuse, see Prater, *supra* note 96, at 1417–20. For decisions dealing with firearms, see Ausness, *supra* note 85, at 917–36. For decisions across a spectrum of product categories, see James A. Henderson, Jr., *Sellers of Safe Products Should not be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 *SW. U. L. REV.* 595, 608 (2008).

Another problem accompanying negligent marketing claims relates to proximate causation. Even if drug companies might have made marginal adjustments to help reduce the risk of opioid abuse, and even if courts were willing to recognize the relevant duties, courts would likely find that other causative variables overwhelm any contributions from drug companies. These variables include insatiable appetites and willful misuse on the part of addicts; unscrupulous physicians who prescribe excessive opioid drugs to dependent, demanding patients; illegal smugglers and producers of opiates and derivatives; and huge profits to be made by pill mill operators and rogue physicians that finance efforts to evade both criminal and civil regulators. Given the unavoidably speculative nature of the misuse and causation issues, it is understandable why courts have concluded that legitimate drug companies' marketing practices are not a legal or proximate cause of plaintiffs' opioid abuse.<sup>98</sup>

From a broader social policy perspective, attempting to pressure the pharmaceutical industry to perform as a watchdog in connection with the opioid crisis is a bad idea.<sup>99</sup> As indicated, the pharmaceutical industry can do little, at least at acceptable cost, to moderate opioid abuse. Thus, successful negligent marketing claims would, in reality, impose a variation of strict enterprise liability. This author has elsewhere described how the plaintiffs' bar employs the concept of negligent marketing and other novel legal theories in attempting to impose the functional equivalent of enterprise liability for all the harms for which various socially beneficial and lawful industries are but-for causes.<sup>100</sup> Given the limits on the drug companies' capacity to moderate opioid abuse, together with the reality that marginal increases in price will probably not significantly lower consumption levels of legally distributed opioids that are being abused,<sup>101</sup> imposing strict liability on drug companies will not make America a safer or better place. Instead, especially when accompanied by claims for punitive damages, strict liability places in the hands of specialist trial lawyers the means by which to hold entire

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98. See, e.g., *Foister v. Purdue Pharma, L.P.*, 295 F. Supp. 2d 693, 703–04 (E.D. Ky. 2003). See generally *Prater supra* note 96, at 1419 (“Courts have been reluctant to find causation . . . . The common thread between courts’ rejection of nearly all [drug overdose] claims is the difficulty in establishing causation . . . .”).

99. For an article arguing against the watchdog approach to industry-wide tort liability, see *Henderson, supra* note 97, at 601–13.

100. See *Henderson, supra* note 93 (manuscript at 16).

101. The assumptions here are that insurance covers much of the cost of prescription drugs, demand by addicted abusers is relatively inelastic, and, in any event, the prices of legally-distributed opioids will not greatly exceed those of illegally-distributed substitutes. For an empirical analysis arguing that drug companies and health insurers try to keep the prices of opioids as low as possible, see *Schatman & Webster, supra* note 78, at 155.

industries for ransom via so-called settlement class actions in which the major beneficiaries are the lawyers, not the clients.<sup>102</sup>

The hard truth is that many products and services that provide significant social benefits—for example, prescription drugs, alcoholic beverages, fast food, soft drinks, firearms, sports equipment, and health care<sup>103</sup>—also present generic risks of harm that can be avoided only through more careful, or reduced, use and consumption. By purporting to help optimize levels of use and consumption, broad-based, judicially applied enterprise liability may be attractive in theory.<sup>104</sup> However, in practice, enterprise liability is problematic and fails to accomplish its ostensible objectives.<sup>105</sup> For these reasons, despite what appeared to be a promising future fifty or so years ago, judicially crafted enterprise liability has never taken hold in this country.<sup>106</sup> Formally constrained versions of strict liability appear to have succeeded here and there.<sup>107</sup> But courts have never embraced a broad-based system of the sort proposed by the plaintiffs’ bar in response to the opioid crisis.

## 2. A Second Example: “Prescribe Lots of This Drug and We’ll Send You on a Cruise!”

In keeping with tradition and administrative regulations, licensed physicians decide which drugs, in what dosages, to prescribe for their patients.<sup>108</sup> Presumably these decisions are made in the patients’ best interests based on risk-benefit information supplied by the manufacturers and personal facts determined by the physicians. As reflected in reported decisions, drug companies should explain to physicians both the benefits and the risks associated with drug consumption, presumably without the sort of puffery that invariably accompanies commercial advertising of

102. See Henderson, *supra* note 93 (manuscript at 36).

103. For a discussion of these specific product categories, see Henderson, *supra* note 93 (manuscript at 15–19).

104. James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377, 382 (2002) [hereinafter Henderson, *Why Negligence*]. See generally HENDERSON ET AL., *supra* note 79, at 470–74 (reviewing courts’ approach to products liability cases in the context of food, nonprescription drugs, and cosmetics).

105. See generally Henderson, *Why Negligence*, *supra* note 104, at 390–400 (arguing that broad-based strict liability for enterprises is not administratively viable).

106. *Id.* at 382–85 (discussing how strict liability has not grown in the last half-century).

107. *Id.* at 400–02 (providing examples such as strict liability for manufacturing defects, ultra-hazardous activities, and workplace injuries).

108. HENDERSON ET AL., *supra* note 79, at 429; see also RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 6(d)(1) (AM. LAW INST. 1998) (explaining that manufacturers will be held liable if they fail to provide instructions or warnings to the prescribing healthcare provider).

nonprescription products.<sup>109</sup> The reality surrounding the marketing of prescription drugs appears to be quite different. Credible sources report that drug companies spend large sums to influence physicians to prescribe their drugs, sometimes in ways that do not serve the best interests of their patients.<sup>110</sup> Should someone who has suffered harm from taking a prescription drug have a civil cause of action against the manufacturer if she can prove that the manufacturer sent her prescribing physician and his family on a two-week cruise to Hawaii for having prescribed large quantities of the same drug?

To succeed with such a cause against the manufacturer, in addition to the manufacturer's intention or fault, a plaintiff must establish misprescription by the physician in the particular case, a causal link between the physician's receipt of the cruise and the misprescription, and a causal connection between that misprescription and the plaintiff's harm.<sup>111</sup> A plaintiff might prove that the drug company's incentive program caused physicians generally, including the plaintiff's physician in particular, to prescribe higher amounts of the drug in the aggregate than might be expected. But for an individual patient to show that the incentive program caused her particular harm would be difficult. The proper type and level of prescription in any given instance is a judgment call. Several different drugs will typically have been appropriate, and acceptable dosages will in each case fall within a range.<sup>112</sup> A physician could earn a valuable cruise by routinely choosing a defendant's drug over rival drugs and by prescribing at the high end of the proper range of dosage for every patient, without a particular plaintiff being able to prove in any given instance that the incentives caused her doctor to overprescribe the drug for her.

Moreover, even if a patient were to surmount such difficulties and show that the physician in a particular case misprescribed in response to the defendant company's sales promotions, the plaintiff would be

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109. Cf. *Cipollone v. Liggett Grp., Inc.*, 893 F.2d 541, 569 (3d Cir. 1990) (distinguishing puffery from express warranty), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992). For the general rule regarding prescription drugs, see *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978, 991 (8th Cir. 1969).

110. See HENDERSON ET AL., *supra* note 79, at 414. See generally Richard C. Ausness, *Will More Aggressive Marketing Practices Lead to Greater Tort Liability for Prescription Drug Manufacturers?*, 37 WAKE FOREST L. REV. 97, 133–35 (2002) (arguing that pharmaceutical companies “overpromote” their products to doctors).

111. See generally TWERSKI ET AL., *supra* note 56, at ch. 5 (discussing proximate cause); David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1673, 1686 (2007) (listing the elements of negligence, including proximate cause).

112. For a discussion of situations in which two or more drugs are simultaneously available and how it is the physician's responsibility to decide which one to prescribe for a given patient, see Henderson & Twerski, *supra* note 95, at 155–59.

required to prove that a lower dosage of defendant's drug, a substitute equivalent drug, or no drug at all, would have avoided plaintiff's harm.<sup>113</sup> Thus, although this hypothetical example involves a deplorable conflict of interest and a significant waste of resources, civil liability, focusing on harm to individuals does not represent an effective or adequate regulatory response.<sup>114</sup> Perhaps that is why civil claims against manufacturers based on overpromotion have only rarely succeeded in the real world.<sup>115</sup> Criminal regulations would represent a more effective approach to this problem of curbing patterns of corporate behavior that are harmful in the aggregate but difficult to prove in individual instances.<sup>116</sup>

### B. *Encouraging Victims to Harm Themselves: Promoting Dangerous Modes of Product Use and Consumption*

The main feature that distinguishes the examples in this section from those in the preceding section is clear. There, the plaintiffs charge pharmaceutical companies with encouraging and enabling middlemen and physicians to harm third-party victims. Here, product manufacturers aim their marketing directly at consumers who themselves become victims. As in the preceding section, opportunities arise for plaintiffs' lawyers to apply legal theories of recovery inventively. For example, under products law, when a manufacturer distributes a product without adequately warning users and consumers of nonobvious risks or without proper instructions regarding risk-avoidance measures, it is liable for harms caused by its failure to instruct and warn.<sup>117</sup> It might be argued that, a manner analogous to opioid drug manufacturers who knowingly distribute their products to suspect middlemen,<sup>118</sup> by knowingly distributing products without adequate instructions and warnings, manufacturers encourage dangerous product misuse. But failure to

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113. This is what is commonly referred to as "actual," or "but-for," causation. See HENDERSON ET AL., *supra* note 4, at ch. 2.

114. See generally Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1165 (2014) ("[T]he overall effectiveness of civil litigation in this area is highly questionable.").

115. See HENDERSON ET AL., *supra* note 79, at 414 (describing a "lack of recent success" in cases involving claims based on overpromotion).

116. Although both criminal and tort law aim to reinforce social norms, substantive criminal regulation aims primarily to protect social welfare via state actions rather than, as with tort, the rights of individual victims via private actions. For a useful analysis of the crime/tort distinction and the overlap between the systems, see generally Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 730–32 (2008).

117. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §§ 1, 2(c), 6(a) (AM. LAW INST. 1998); HENDERSON ET AL., *supra* note 79, at 428–44.

118. See *supra* text following note 88.



adequately instruct and warn are, independent of any collateral encouragement to behave badly, sufficient grounds for liability.<sup>119</sup>

The element of encouragement as a basis of liability, independent of failure to warn, is clearer when product advertising enters the picture. This Article will consider two examples. First, product manufacturers sometimes employ aggressive advertising that encourages dangerous modes of product use or consumption, thereby placing unsophisticated product purchasers (or third-party bystanders) at elevated risk of harm. Second, pharmaceutical companies frequently advertise their drugs directly to consumers, touting the benefits (while arguably playing down the risks) provided by their products, thereby breaking with the tradition of aiming prescription drug advertising only at prescribing physicians. The discussion that follows considers each of these examples in turn.

### 1. The First Hypothetical Example: “You Can Drive This Vehicle Anywhere You Have the Guts to Take It!”

Imagine an American manufacturer of all-terrain vehicles (ATVs) advertising that its vehicles are designed to operate effectively in the most difficult off-road terrains imaginable, strongly implying that only persons of skill and courage will be able to meet the challenges presented by the vehicles’ superb engineering. Imagine also that the purchaser of such a vehicle, motivated by the implicit “we dare you!” message in the advertising, takes the ATV into a terrible place, which results in terrible harm to the purchaser. Should the injured purchaser have a cause of action against the manufacturer for encouraging him to behave badly?

Before responding to this question, it will be useful to consider alternative theories of recovery that might be available to the plaintiff on these facts. For example, would the ATV purchaser have a cause based on breach of express warranty? In this context, the advertising would constitute an express warranty by the seller if the assertions of ruggedness constitute an affirmation of fact or promise that became part of the basis of the bargain between the parties.<sup>120</sup> Even though the assertions occurred in advertisements outside the four corners of the contract of sale, as long as the purchaser was aware of the advertising at the time of sale the advertising became part of the basis of the bargain.<sup>121</sup> The problem for the plaintiff would be convincing the court that the assertions regarding ruggedness constitute affirmations of fact or promises rather than mere product puffery—exaggerations of product value that no reasonable

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119. See *supra* text accompanying note 117.

120. U.C.C. § 2-313(1)(a) (AM. LAW INST. & UNIF. LAW COMM’N 2002).

121. See, e.g., *Cipollone v. Liggett Grp., Inc.*, 893 F.2d 541, 567–68 (3d Cir. 1990), *aff’d in part and rev’d in part*, 505 U.S. 504 (1992).

person would take literally.<sup>122</sup> Although several earlier decisions on similar facts held for plaintiffs when the expected harm was especially great,<sup>123</sup> recent decisions have reflected greater judicial skepticism.<sup>124</sup>

Would the plaintiff have a claim that the manufacturer failed to warn regarding the risks of driving in very rugged terrain, thereby rendering the product defective at the time of sale?<sup>125</sup> The major problem is that the risks posed by dangerous terrain may be sufficiently obvious to negate breach of the duty to warn.<sup>126</sup> By contrast, in connection with alleged breaches of express warranty, if an affirmation or promise escapes being deemed puffery the obviousness of the relevant risks should not bar recovery.<sup>127</sup> In effect, the manufacturer who expressly warrants safe product use has promised as much, regardless of the fact that the relevant risks are fairly obvious.<sup>128</sup> Would the plaintiff in the ATV example have a claim for defective design? Almost always, a plaintiff's success with design claims depends on his ability to show that a reasonable alternative design that would have reduced or avoided the plaintiff's harm was available.<sup>129</sup> Most design claims have nothing to do with encouraging bad behavior.<sup>130</sup> But a few courts have toyed with the notion that the design

122. See generally HENDERSON ET AL., *supra* note 79, at 394 (discussing the distinction between express warranties and puffery).

123. See, e.g., *Pau v. Yosemite Park*, 928 F.2d 880, 883 (9th Cir. 1991) (stating that the bicycle leasing company's brochure asserted that the dangerous trail on which plaintiff accidentally died was "a safe and enjoyable cycling area"); *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 358 (6th Cir. 1978) (stating that the drain cleaner was advertised as "safe" but badly disfigured a child).

124. See, e.g., *Mitchell v. Gen. Motors LLC*, No. 3:13-CV-498-CRS, 2014 WL 1319519, at \*1, \*8 (W.D. Ky. Mar. 31, 2014) (stating that advertisement praising vehicle's quality, safety, and reliability were "mere opinions, used to promote sales"); *Wojcik v. Manville*, No. L-373-07, 2010 WL 322893, at \*3 (N.J. Super. Ct. App. Div. Jan. 29, 2010) (stating that statements that helmet was "one of the best" and "great" were mere opinion and not a warranty).

125. Cf. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. §§ 1, 2(c), 6(a) (AM. LAW INST. 1998) (listing failure to warn as a basis of liability for drug manufacturers); *supra* note 79–82 and accompanying text (explaining that failure to warn may be a basis of liability for drug manufacturers).

126. See *supra* note 95 and accompanying text.

127. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. d.

128. U.C.C. § 2-313(1)(a) (AM. LAW INST. & UNIF. LAW COMM'N 2002); *Cipollone v. Liggett Grp., Inc.*, 893 F.2d 541, 569 n.34 (3d Cir. 1990) (stating that it is possible for a purchaser to rely on an express warranty that he knows to be false), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992).

129. Even if the risks associated with product use or consumption are obvious, the manufacturer will be subject to liability if the plaintiff proves that a reasonable alternative design was available at time of sale. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b); see also Henderson & Twerski, *supra* note 54, at 1401 ("In the current American products liability system, a plaintiff attacks a product design by proving that the manufacturer could have adopted a reasonable alternative design . . . that would have prevented the plaintiff's injury.").

130. See HENDERSON ET AL., *supra* note 79, at 446–47.

of some products—semi-automatic handguns with features that make them especially attractive to criminals—are inherently, and thus intentionally, aimed at encouraging their users to behave badly.<sup>131</sup> Because these claims seek to impose what is referred to as “category liability,” where reasonable alternative designs cannot be proven, courts and commentators have by and large refused to recognize them.<sup>132</sup>

Returning to the question earlier deferred, should the plaintiff in the ATV hypothetical recover on the ground that the manufacturer encouraged him to behave badly with the vehicle and thereby harm himself? This author urges courts generally to refuse to recognize such claims. As with the earlier examples of negligent marketing, in which plaintiffs allege that pharmaceutical companies fail to monitor distribution and disrupt the operation of pill mills,<sup>133</sup> it would be difficult for courts to distinguish between legitimate efforts to promote and illegitimate efforts to overpromote inherently dangerous products.<sup>134</sup> The temptation would be for courts to reason backwards to conclusions of corporate fault from the facts of foolish product uses combined with serious harms.<sup>135</sup> If this concern should prove well-founded, and aggressive advertising followed by serious harms invariably provided plaintiffs with grounds for reaching triers of fact, the result would closely resemble the sort of strict enterprise liability criticized earlier.

Moreover, even if courts could fairly and consistently distinguish between acceptable and unacceptable product promotion, the difficult issue of causation would remain. In a typical case, the victim or his representatives will insist that the advertisements inspired the vehicle driver to behave badly. However, self-serving testimony must be doubted on its face. And even if the plaintiff could show that the advertising caused the plaintiff’s bad behavior, triers of fact could be expected to

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131. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. e; *see, e.g.*, *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 163 (Ct. App. 1999), *rev’d*, 28 P.3d 116 (Cal. 2001). The ATV design in the hypothetical example carries with it a bit of built-in “dare you,” but the challenge in the advertising is required to make a plausible case. *See generally* Ausness, *supra* note 85, at 941–42 (pointing out a case in which the design features of a semiautomatic pistol were alleged to have made the product more attractive to criminals).

132. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. e. *See generally* Henderson & Twerski, *supra* note 83, at 1300–07 (discussing problems with risk-utility product-category liability that render it unmanageable for the courts).

133. *See supra* Part II.

134. This difficulty is ubiquitous in tort. Compare the problems that arise when courts distinguish between express warranties and mere puffery. *See* HENDERSON ET AL., *supra* note 79, at 394; *supra* note 122 and accompanying text.

135. *See* HENDERSON ET AL., *supra* note 79, at 394; *cf. supra* note 123–24 and accompanying text (explaining that courts in earlier cases would find for plaintiffs when the expected harm was exceptionally high, but that recent decisions have been less likely to follow this approach).

weigh plaintiff's contributory negligence.<sup>136</sup> When the targets of the advertising are non-adults or persons otherwise uniquely vulnerable to suggestions of potentially self-destructive behavior, this proposed subset of negligent marketing might make sense based on its similarity to negligent entrustment.<sup>137</sup> But with those possible exceptions, courts should leave issues regarding product advertising aimed at encouraging bad behavior to the express warranty and failure-to-warn theories considered earlier.<sup>138</sup>

## 2. A Second Example: "Ask Your Doctor to Prescribe This Wonderful Drug. Don't Take 'No' for an Answer."

American courts have traditionally implemented the learned intermediary rule, under which pharmaceutical companies advertise their drugs, including warnings, to physicians who decide which drugs to prescribe to which of their patients.<sup>139</sup> Having adequately warned the prescribing physicians, drug companies owe no duty to directly warn the patients who consume the drugs nor, under traditional law, are the companies liable for defective designs.<sup>140</sup> The rationale for this "learned intermediary rule" is that the prescribing physician possesses the necessary expertise that patients lack and physicians can be trusted as professionals to act in their patients' best interests.<sup>141</sup> The rule is subject to a number of exceptions, most of which are based on governmental regulations.<sup>142</sup> The exception of interest here is based on the fact that not long ago, drug companies began to promote the benefits of their prescription products by advertising directly to consumers.<sup>143</sup> Some courts and commentators suggest that when drug companies engage in

136. See HENDERSON ET AL., *supra* note 79, at 127–35.

137. See Woods, *supra* note 92.

138. See *supra* notes 119–26 and accompanying text. The rules of decision in those contexts are sufficiently specific to be manageable.

139. For a summary of the learned intermediary rule, see Sheryl Calabro, *Breaking the Shield of the Learned Intermediary Doctrine: Placing the Blame Where It Belongs*, 25 CARDOZO L. REV. 2241, 2249–53 (2004); see also HENDERSON ET AL., *supra* note 79, at 428–35 (explaining the learned intermediary rule); Ausness, *supra* note 110, at 106–07 (discussing the learned intermediary rule and prescription drugs).

140. See Ausness, *supra* note 110, at 106 & n.67. The physicians will presumably share approximate information with their patients. Regarding drug design liability, see generally Henderson & Twerski, *supra* note 95, at 155–59.

141. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 6(d)(1) cmt. d (AM. LAW INST. 1998); Ausness, *supra* note 110, at 108–09.

142. See Ausness, *supra* note 110, at 110–13; Calabro, *supra* note 139, at 2254–56.

143. See Ausness, *supra* note 110, at 98–99.

this sort of direct advertising, they must provide appropriate warnings to the consumers.<sup>144</sup>

The problem with direct prescription drug advertising relates to the broader issue addressed in this Article. It may be argued that by urging consumers to pressure their physicians to prescribe certain drugs, the drug companies are encouraging those consumers to behave badly in ways that place them at unreasonable risk of suffering harm. When a patient urges her physician to prescribe a drug the patient has seen advertised on television, such overtures may affect the physician's decisions in ways that are not in the best interest of the patient.<sup>145</sup> Physicians should, in theory, resist prescribing drugs of questionable value. But they are, as the saying goes, "only human."<sup>146</sup>

Should courts recognize patients' claims against drug companies whose aggressive direct advertising, even if accompanied by adequate (albeit technical) warnings, causes patients to persuade their physicians to prescribe inappropriate drugs that cause the patients to suffer harm? Plaintiffs face several problems. The most serious problem relates to the fact that a plaintiff's claim that a physician succumbed to the patient's entreaties constitutes a claim of medical malpractice against the physician.<sup>147</sup> Even if the patient initially brought action only against the drug company, the company would implead the physician, who would ultimately share the burden of liability.<sup>148</sup> Assuming that physicians generally refuse to give in to patient pressure to prescribe drugs that are only marginally useful and may be downright hazardous, presumably

144. See, e.g., *Perez v. Wyeth Labs. Inc.*, 734 A.2d 1245, 1259 (N.J. 1999) (stating that when manufacturers advertise directly to consumers, they must directly warn consumers); Calabro, *supra* note 139, at 2300 (explaining that a new direct-advertising exception is warranted); see also RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 6 cmt. e ("Case law supports the position taken in §6(d)(2) that warnings should be given directly to patients when the manufacturer is aware that health care medical providers will not be in a position to play the role of the learned intermediary."). See generally Teresa Moran Schwartz, *Consumer-Directed Prescription Drug Advertising and the Learned Intermediary Rule*, 46 FOOD DRUG COSM. L.J. 829, 836–38 (1991) (discussing that a strong case can be made for recognizing an exception to the rule).

145. See Ausness, *supra* note 110, at 110 & nn.90–91.

146. See Tamar V. Terzian, *Direct-to-Consumer Prescription Drug Advertising*, 25 AM. J. L. & MED. 149, 157–58 (1999). If one focuses on the physician's behavior, rather than the patient's, this fact pattern might fit in the previous section A—encouraging actors to act badly in harming third-person victims. But because the advertising here is aimed at consumers, it is more comfortable to include the fact pattern here in section B.

147. Assuming that the manufacturer provided adequate warnings to the physician, the latter would be liable for medical malpractice along with the manufacturer for failing to adequately warn the consumer/patient. See *Perez*, 734 A.2d at 1261 (considering whether physician's negligence should exonerate manufacturer).

148. *Id.* at 1263 ("Pharmaceutical manufacturers may seek contribution, indemnity or exoneration because of the physician's deficient role in prescribing that drug.").

there would be few claims against manufacturers.<sup>149</sup> Regarding claims that survive defendants' motions to bar liability, a combination of sympathy for the physician<sup>150</sup> and impatience with pushy, contributorily negligent plaintiffs<sup>151</sup> would reduce the likelihood of a plaintiff's victory at trial.

Such claims might be deemed worthwhile even if they were to result in liability only in egregious cases. But threatening physicians with liability might generate perverse, unintended consequences that arguably warrant denying all such claims as a matter of law. For example, were courts to allow such claims, prescribing physicians might respond strategically, employing modes of defensive medicine.<sup>152</sup> Thus, whenever a patient forcefully importunes her doctor to prescribe an inherently dangerous but beneficial drug that the doctor might well have chosen even if the patient had not asked, the doctor may tend to choose an alternative, marginally less suitable course of treatment out of concern over potential exposure to liability for having given in to the patient's demands.<sup>153</sup> Requiring drug companies to provide appropriately attention-grabbing warnings in their direct advertising would help to reduce any pressures on physicians to behave strategically,<sup>154</sup> but query whether laypersons are capable of processing highly technical information.<sup>155</sup> In any event, almost no litigation involving direct

149. If many of these claims reach the trier(s) of fact, a form of enterprise liability may develop. *See supra* note 134 and accompanying text.

150. *See Perez*, 734 A.2d at 1263–64 (reflecting sympathy for the beleaguered physician in these situations).

151. *See Ausness, supra* note 85, at 110–13; Calabro, *supra* note 139, at 2254–56, 2315. *See generally* Laura D. Hermer & Howard Brody, *Defensive Medicine, Cost Containment, and Reform*, 25 J. GEN. INTERNAL MED. 470, 471 (2010) (discussing the costs and policy implications of defensive medicine).

152. *See generally* James A. Henderson, Jr., *Learned Hand's Paradox: An Essay on Custom in Negligence Law*, 105 CAL. L. REV. 165, 175 (2017) (stating defensive medicine usually takes the form of overinvestment in care generated by the availability of health-care insurance).

153. Calabro, *supra* note 139, at 2296–98. This is a possibility as long as the substitute drug is an appropriate choice for the patient. *Cf. supra* note 111 and accompanying text (comparing plaintiff's requirement to show causal connection between misprescription and plaintiff's harm).

154. *See Ausness, supra* note 110, at 122 (stating that not only might one expect patients to be more circumspect in raising the possibility of the physician's prescribing advertised drugs, but the physicians could point to the warnings by way of deflecting patients' demands).

155. *See Ausness, supra* note 110, at 108–09 (“Because the physician is medically trained and the patient is not, in most cases, the patient must rely on the physician to choose the most appropriate treatment. . . . [Moreover,] some patients might overreact to consumer-oriented warnings and fail to seek proper medical treatment.”); Lars Noah, *Advertising Prescription Drugs to Consumers: Assessing the Regulatory and Liability Issues*, 32 GA. L. REV. 141, 158–59 (1997) (“[B]ecause of the complexity of risk information about prescription drugs, comprehension problems [would cause difficulties] for lay patients.”).

advertising has occurred<sup>156</sup> since the publication, approximately twenty years ago, of the leading decision imposing a duty on manufacturers to directly warn consumers about the risks accompanying publicly-advertised prescription drugs.<sup>157</sup> Again, the proposed cause of action being considered is not based on drug companies' failing to warn. Rather, it is based on the companies' overpromotion through direct advertising, thereby encouraging patients to interfere with their physicians' decision processes. For the reasons indicated, courts should reject such claims as a matter of law.

### CONCLUSION

The important distinction in this Article is between individual encouragers of bad behavior and business-entity encouragers.<sup>158</sup> With a proposed new exception to the traditional no-duty-to-rescue rule—one that applies mainly to individuals—this analysis places that group of actors in a difficult position. When individuals encourage bad behavior, they invariably intend for that behavior to occur—witness the cheerleaders at a gang rape.<sup>159</sup> If their conduct is a but-for condition of the harm-causing bad behavior, the actors are enablers and are subject to liability based on classic intentional tort. On the other hand, if their encouragement is not a but-for condition of the bad behavior, the proposed new exception to the no-duty-to-rescue rule exposes them to negligence-based liability. Those who encourage and enable others to cause harm by behaving badly are themselves, “bad actors.” This Article argues that they should be tortfeasors as well.

Regarding business entities who promote bad behavior—witness drug companies that allegedly encourage and enable opioid abuse and the operation of pill mills<sup>160</sup>—this Article argues against expanding existing exposures to liability. After all, the same marketing practices that some might characterize as intentionally or negligently promoting bad behavior will appear to others to constitute lawful efforts to promote socially beneficial goods and services. Instead, courts should cautiously defer to

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156. See *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 903, 905 (W. Va. 2007), *superseded by statute*, W. VA. CODE § 55-7-30 (2017), *as recognized in J.C. v. Pfizer, Inc.*, 814 S.E.2d 234 (W. Va. 2018); HENDERSON ET AL., *supra* note 79, at 443 (“Perez . . . has not been influential. Only one state court has followed it.”).

157. See *Perez v. Wyeth Labs. Inc.*, 734 A.2d 1245, 1263 (N.J. 1999); see also Ausness, *supra* note 110, at 98 (discussing drug companies' discovery that they could expand the market for their products by advertising directly to consumers).

158. For a provocative article arguing that the benefit from harmful activity determines the form and substance of tort liability for tort claims between private individuals, fairness principles control, and for claims involving public/business entities, efficiency principles control, see Alex Stein, *The Domain of Torts*, 117 COLUM. L. REV. 535, 611 (2017).

159. See *supra* text accompanying note 23.

160. See *supra* text accompanying note 88.

existing combinations of traditional tort, competitive markets, and administrative regulations to maintain the proper boundaries of liability for harm caused by the promotion of consumer goods and services. The justification for these deferrals lies in the understandable tendency of plaintiffs' lawyers to try to expand new theories of tort to establish broad systems of enterprise liability. This tendency is particularly strong in connection with new theories, such as negligent marketing, that rest in part on assertions that commercial defendants are misleading the public.

While defensible in theory, in actual practice enterprise liability in these contexts would be unmanageable, inefficient, and unfair. Not surprisingly, court-made enterprise liability has never taken hold in this country. But that does not prevent plaintiffs from trying. Thus, American procedural processes—especially those supporting mass torts—have matured to the point that specialists among the organized plaintiffs' bar can plausibly transform any substantive foothold into a mass tort platform for running blackmail and ransom schemes on a very large scale. Even as this Article advocates expanding the liabilities of individuals who encourage bad behavior in nonbusiness settings, it argues against doing so with respect to commercial entities that distribute and promote goods and services. Most individual encouragers are mean-spirited malcontents who intend to cause harm. Business entities alleged to encourage and enable bad behavior are typically promoting goods and services in ways that benefit many consumers and help to expand the economy. The former, with few exceptions, deserve to be held civilly liable. The latter, in most instances, do not.



