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Jon D. Hanson
Harvard Law School

Douglas A. Kysar
Cornell Law School

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INTRODUCTION

[L]aws and institutions must go hand in hand with the progress of the human mind.

—Thomas Jefferson (1743-1826)[1]

In two articles published last year, we hypothesized that, because consumers are subject to predictable cognitive processes that depart from rational utility maximization, manufacturers have the opportunity and incentive to manipulate consumer perceptions of product risks.[2] This problem of market manipulation, we argued, follows from basic economic logic–by lowering consumers' risk esti-

* Professor of Law, Harvard University. B.A., 1986, Rice University. J.D., 1990, Yale University.

** Assistant Professor of Law, Cornell University. B.A., 1995, Indiana University. J.D., 1998, Harvard University.

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1. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 10 Writings of Thomas Jefferson, 37, 42-43 (Paul Leicester Ford ed., 1899).

2. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630 (1999) [hereinafter Hanson & Kysar I]; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420 (1999) [hereinafter Hanson & Kysar II]. We have also discussed these issues specifically in the context of tobacco regulation. *See* Jon D. Hanson & Douglas A. Kysar, *The Failure of Economic Theory and Legal Regulation*, *in* Smoking: Risk, Perception, and Policy (Paul Slovic ed., 2000) (in press) [hereinafter Hanson & Kysar III].

mates, manufacturers concomitantly raise consumers' willingness to pay for their products. We found empirical evidence for our market manipulation hypothesis in a variety of places, including the consumer marketing literature, the consumer psychology literature and actual market behavior. As we emphasized, some of that review was intended primarily to give readers a flavor "of how manufacturers manipulate general consumer perceptions."[3] Although that particular evidence may not have provided direct proof of risk-related manipulation, it did support such an inference.[4]

For a variety of reasons, we looked especially closely at the tobacco industry and the market for cigarettes. As we concluded, "our history of tobacco marketing and our review of the smoker risk perception literature are especially significant, as they provide the strongest evidence that manufacturer manipulation not only occurs, but also succeeds."[5] Finally, we revisited the oft-discussed concept of enterprise liability, a products liability regime in which manufacturers are absolutely liable for the costs of all harms that their products cause.[6] We argued that several features of enterprise liability could help alleviate the problem of market manipulation.[7]

Our previous article offered only a "sketch" of the policy prescription we had intended to "flesh out" in this Article.[8] Accordingly, in describing the possible benefits of an enterprise liability system, we emphasized the tentative nature of our prescription and acknowledged that our somewhat cursory treatment may have suffered from the same fault that we found in other scholars' work, namely a failure to take behavioralism[9] seriously. Again, this Ar-

3. Hanson & Kysar II, *supra* note 2, at 1429.

4. *See id.* at 1428-67.

5. *Id.* at 1469-70.

6. Manufacturers, in other words, would pay not just for accidents that they could have prevented, but also for accidents that consumers might have prevented at least cost and accidents that were not cost-justifiably preventable by either the manufacturer or the consumer. In addition, under enterprise liability, absolute liability would be mandatory in the sense that manufacturers would be unable to escape it through warnings or warranty disclaimers. *See* Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 Mich. L. Rev. 683, 693-94 (1993) [hereinafter Croley & Hanson I].

7. *See* Hanson & Kysar II, *supra* note 2, at 1553-71.

8. *See id.* at 1554.

9. "Behavioralism" and "behavioral law and economics" are the terms that legal scholars use to describe a mounting effort to incorporate the findings of cognitive psychology into orthodox law and economics. Although we noted our own dis-

ticle was to provide a more "exhaustive" analysis of the policy implications of market manipulation.[10] When this Article was still just an outline, however, we were confronted with a provocative critique of our earlier articles, particularly our tentative defense of enterprise liability. In an apparent preemptive strike, Professors James Henderson and Jeffrey Rachlinski set out to demonstrate that such a "radical"[11] proposal as enterprise liability is indefensible. Moreover, the authors strongly suggest in their conclusion that our attempts to "take behavioralism seriously" are not, themselves, worthy of being taken seriously.[12]

Despite the stated goal of their article, however, there appears to be a wide margin of overlap between our respective views. At various points in their critique, for example, Henderson and Rachlinski note that "consumers cannot make choices that result in anything like optimal levels of product-related safety;"[13] that manufacturer means of selling products "surely include exploitation of consumers' cognitive limitations and affective vulnerabilities;"[14] that "it is almost certainly true that some manufacturers try to manipulate consumers' assessments of risk some of the time . . . . Market forces ensure that if manufacturers can sell more of a product by manipulating consumer preferences, they will do so;"[15] and that "economic forces induce manufacturers to undertake marketing campaigns that have adverse social consequences that escape remedy under the existing legal regime."[16] In other words,

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comfort with those terms in our previous articles, see Hanson & Kysar I, *supra* note 2, at 633 n.2, and although the use of "behavioralism" is arguably inappropriate in light of the fact that it is cognitive, not behaviorist, psychology that is being integrated into the legal economic methodology, *see* James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 Roger Williams U. L. Rev. 213, 218 n.22 (2000), we take some comfort in the fact that a distinction is sometimes made between "behaviorism" (without the "al"), which is the school of psychology that excludes cognitions from its analysis, and "behavio*ral* science," which is not necessarily so constrained. In any event, the terminology at this point appears to be firmly entrenched in the legal literature. *See, e.g.*, Behavioral Law and Economics (Cass R. Sunstein ed., 2000).

10. *See* Hanson & Kysar II, *supra* note 2, at 1572.
11. *See* Henderson & Rachlinski, *supra* note 9, at 233.
12. *See id.* at 255-58.
13. *Id.* at 213-14.
14. *Id.* at 223.
15. *Id.* at 224.
16. *Id.* at 243.

Henderson and Rachlinski appear to agree with the central theoretical point of our articles.[17] Moreover, they seem to accept one of the major policy implications of our analysis–specifically, that the case for holding cigarette manufacturers absolutely liable for tobacco-caused harms is quite strong.[18]

Their primary disagreement rests with our argument that enterprise liability might provide an effective response to market manipulation in the vast majority of other product contexts. First, Henderson and Rachlinski argue that we overstate the extent of market manipulation and underestimate the ability of existing laws to identify and redress manipulative conduct. In their view, a clearer case must be made that market manipulation is a problem worth solving and that existing laws do not adequately address it before adopting a proposal such as enterprise liability. In addition, they argue that, even if enterprise liability does offer the best theoretical response to market manipulation, it offers little hope of practical results due to certain insurmountable difficulties in implementation. Finally, they contend that enterprise liability might actually backfire if adopted, ultimately exacerbating the problem of market manipulation by enabling product manufacturers who oversell safety through fear-based marketing appeals.

In this Article, we will attempt to climb out of the hole in which Henderson and Rachlinski have placed us. Although we had anticipated writing a shorter article with a slightly different thrust, we very much appreciate the opportunity to address the issues raised by Henderson and Rachlinski, some of which others have also raised, and to clear up aspects of our previous work that may have been confusing or incomplete. Thus, we will respond to Henderson and Rachlinski's specific challenges and describe more particularly the role of enterprise liability as a mediating structure between manipulable consumers and exploitative manufacturers. In doing so, we will generally assume, as Henderson and Rachlinski do,[19] that the goal of the products liability system is efficiency, by which we mean the reduction of accident costs through adjust-

17. Admittedly, however, they do not appear overly impressed with the significance of that point: "[F]ar from being a 'provocative' thesis, it seems almost obvious that manufacturers stand ready, willing and able to exploit human frailty to make a buck." Henderson & Rachlinski, *supra* note 9, at 224 (footnote omitted).

18. *See id.* at 257. In the interest of full disclosure, we note that one of us has served as a consumer-information expert for plaintiffs on several tobacco cases.

19. *See infra* note 38.

ments in the frequency of product usage, the making of all cost-justified investments in care, and the allocation of remaining accident costs to those parties best situated to bear them. That notion of efficiency has long been the central normative measuring stick in the products liability debate. As will be seen, however, the notion is beginning to appear somewhat wooden in the context of more sophisticated understandings of human cognition, risk awareness, preference formation, and decisionmaking. Indeed, the next great challenge for products liability scholars may be to articulate a coherent alternative goal for products liability law, given that the efficiency goal and the rational actor model, as conventionally understood, often require analysts to ignore (or treat as exogenous) many considerations that cognitive theorists have demonstrated are pivotal to people's perceptions of products, perceptions of risks, preferences, and reactions to adverse outcomes.[20]

I. THREE LEVELS OF DEBATE ABOUT ENTERPRISE LIABILITY

Before responding to Henderson and Rachlinski's specific critiques, it will be useful for us first to clarify a number of general points of confusion in their argument. In these introductory remarks, we will take a step back from our most recent discussion regarding the behavioral approach to products liability. Instead, we will give an overview of the modern intellectual debate about enterprise liability, pointing out as we go how Henderson and Rachlinski attempt, in our view unsuccessfully, to characterize that debate to their advantage.

A. *The Basic Level*

In setting up their critique, Henderson and Rachlinski understate the case for enterprise liability. They do recognize some of the benefits of enterprise liability and some of the problems that enterprise liability might address. For example, they write: "[Enterprise liability]'s new proponents argue that [enterprise liability] would force manufacturers to set prices that reflect the true risk products pose and refrain from manipulative advertising about risk, as there would be no profit in it;"[21] and "The new proponents

20. For one attempt to meet that challenge, see Jon D. Hanson & Ana C. Reyes, Law and Attribution: Toward a New Positive Theory of Tort Law (Nov. 10, 2000) (manuscript on file with authors).

21. Henderson & Rachlinski, *supra* note 9, at 219.

of [enterprise liability] argue that . . . . [m]anufacturers might use marketing strategies that lead consumers to underestimate or ignore the dangers a product poses, thereby inducing consumers to purchase products that they might otherwise avoid, or to use products more dangerously than reason dictates."[22] With respect to the particular harms that enterprise liability might prevent, they write: "Distracting consumers from the real risks products pose could have two types of unwanted social consequences: it might undermine consumers' efforts to take precautions against harm and it might attract 'high-risk' consumers to products that they should avoid."[23] Our dissatisfaction with that description is that, as we highlight below, it understates the types of manipulation that can take place and the full range of beneficial effects that enterprise liability might have.

1. *The Basic Case For Enterprise Liability*[24]

To put enterprise liability in context, it is necessary to distinguish among three types of regulation: *command-and-control* rules; *performance-based* standards; and *incentive-based* systems. Roughly, command-and-control rules impose specific requirements on regulated firms. For instance, a polluter might be required to adopt a particular type of technology designed to limit the quantity of pollution. Performance-based standards tell firms what they must accomplish but leave them to decide how best to do so. Such

22. *Id.* at 226-27.

23. *Id.* at 227-28.

24. Although this is a topic that we have written about quite extensively elsewhere, it is necessary to summarize some of the main arguments here. Readers interested in a more thorough treatment should consult those earlier works. *See* Hanson & Kysar II, *supra* note 2; Hanson & Kysar III, *supra* note 2; Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 Cornell L. Rev. 129 (1990) [hereinafter Hanson & Logue I]; *see also* Jon D. Hanson et al., *Smokers' Compensation: Toward a Blueprint for Federal Regulation of Cigarette Manufacturers*, 22 S. Ill. U. L.J. 519 (1998); Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 Harv. L. Rev. 1787 (1996) [hereinafter Croley & Hanson II]; Croley & Hanson I, *supra* note 6; Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 Yale J. on Reg. 1 (1991) [hereinafter Croley & Hanson III].

The summary appearing in this section, Section I.A.1, first appeared, in slightly different form, in Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 Yale L.J. 1163, 1173-78 (1998) [hereinafter, Hanson & Logue II].

a standard, for example, might specify the maximum quantity of pollution that a firm may produce without specifying the means by which the firm is required to comply. Finally, incentive-based systems force firms to internalize the total costs of their activities, leaving firms to decide what, if anything, to do about those costs.

Beginning toward the end of the twentieth century and continuing through today, the clear trend in regulation has been away from command-and-control rules and toward incentive-based (or, as they are sometimes referred to, *market-based*) systems. That trend is consistent with, and largely the result of, an emerging scholarly consensus that incentive-based regulatory systems are often the superior approach because they harness the power of the market to generate efficient outcomes and do not rely on regulators to attempt to identify and mandate those outcomes. As Susan Rose-Ackerman explains, an incentive-based system attempts to internalize all appropriate costs and then permits the decentralized, independent choices of individuals and businesses to shape policy outcomes.[25] If the institution responsible for administering the incentive-based system can determine the marginal cost associated with the underlying product (admittedly, often a big "if"), then it can charge a fee equal to that marginal cost and let the manufacturers respond. That approach arguably avoids the costly and imperfect process of creating fully specified command-and-control rules or performance-based standards, and it ensures that the party with the best information—the manufacturer—is left with an incentive to self-regulate. Put differently, command-and-control and performance-based regulations seek to prohibit or discourage certain market outcomes, while incentive-based regulations seek to eliminate the underlying market failures that give rise to undesirable outcomes.

Enterprise liability is one possible ex post incentive-based regime. In other work,[26] we have argued that enterprise liability is, on efficiency grounds, probably the most desirable products liability regime. That form of regulation may be particularly appropriate when a product's characteristics make consumers *undeterrable*—that is, when tort law can do very little to give consumers more incentives than they already have to take efficient

25. *See* Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 Duke L.J. 1206, 1215 (1994).

26. *See supra* note 24.

precautions.[27] In this Article, we focus on two general sources of consumer undeterrability. First, consumers may be undeterrable if they are optimistic with respect to—that is, if they systematically underestimate—the risks posed by products. Second, consumers may be undeterrable if they are able to externalize product risks to third parties. The latter source of consumer undeterrability may be of less significance than the former, given certain psychological tendencies that mitigate against its existence, a possibility we discuss at greater length below.[28]

Insofar as consumers are undeterrable, tort law should place product-accident costs on manufacturers. Because tort law cannot, by hypothesis, influence consumer decisionmaking, consumers will take too few precautions, will fail to demand efficiently safe products from manufacturers, and will consume too many inefficiently unsafe products.[29] Shifting all of the costs to manufacturers, however, would force them to internalize the relevant costs; they, in turn, would pass those costs along to consumers. At least in theory, that system would lead to optimal manufacturer care levels and optimal activity levels.

To see why that is the case, consider a stylized example of an individual consumer faced with the choice of buying and consuming a package of widgets. If the consumer decides to purchase the widgets, she faces the following costs: $2.00, equaling the nominal price or the purchase price of the widgets (reflecting their production and marketing costs[30]), plus another $2.00, equaling the present value of the future injury-related costs to herself and to others associated with consuming the widgets. Ideally, the consumer

27. For a more complete discussion of the concept of "undeterrability," see Jon D. Hanson & Kyle D. Logue, Toward Placing Products Liability in Context: The Effect of Non-Tort Systems of Deterrence and Other Sources of Undeterrability 21-42 (Oct. 1996) (manuscript on file with authors). Although the term "undeterrable" was not then used, the idea behind it was first discussed in Hanson & Logue I, *supra* note 24, at 159-68, in which one of us (with Kyle Logue) described how the first-party insurance externality produces nonoptimal care levels and activity levels in consumer product markets.

28. *See infra* text accompanying notes 55-56.

29. By "efficiently safe products," we mean products for which manufacturers have made all cost-justified investments in safety. "Inefficiently unsafe products" are those for which not all such investments have been made. The products that Henderson and Rachlinski emphasize, for which the manufacturer provides more than the optimal investment in safety, we will describe later as "inefficiently safe."

30. We are assuming for purposes of this example that the market for widgets is competitive and that manufacturers enjoy only normal profits.

would purchase widgets if and only if she valued a package at $4.00 or higher. Assume, however, that she does not internalize the health-related costs of the widgets—that is, the additional $2.00 of costs has no effect on her decision to purchase widgets. In that case, even if she valued the widgets at only $3.00, she would purchase the widgets. Further suppose that the widget manufacturer ("Acme Widgets") could completely eliminate the $2.00 per package risk by investing an additional $1.50 per package in safety measures. In that case, the efficient outcome would be for Acme to make the investment, thereby eliminating the risk associated with its product.[31] Assuming consumer undeterrability and the absence of manufacturer liability, however, the manufacturer would not invest the $1.50 in risk reduction because doing so would cause the manufacturer to lose customers. Consumers would not perceive the $2.00 reduction in risks associated with the additional cost and would instead purchase cheaper and less safe brands of Widgets.

Those results would present at least two deterrence-related problems. First, consumers would purchase too many packages of widgets; in other words, *activity levels* would be too high. Second, manufacturers would invest too little in accident prevention; that is, *manufacturer care levels* would be too low.[32] The economic case for enterprise liability and other forms of ex post incentive-based regulation, therefore, centers on their ability to force manufacturers, and in turn consumers, to internalize the total costs of widgets. As a consequence, both activity levels and manufacturer care levels would be pushed in the efficient direction. Because the nominal price would equal the total real price, consumers would purchase the efficient quantity of widgets.[33] There would, in short, be no welfare loss associated with the disparity between consumers' valuation of widgets and the total social cost of widgets in the market.

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31. To put that conclusion in terms of Learned Hand's famous formula, see United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), because the burden of preventing the accident ($1.50) is less than the expected accident cost ($2.00), which amounts to the probability times the magnitude of the loss, efficiency requires that the accident be prevented.

32. A third problem is that consumers would lack incentives to take efficient levels of care in using products. However, as we review below, there may be little that tort law can or need do about consumer care levels.

33. The consumer, who valued the next package at only $3.00, would not buy because the price would be $3.50.

Manufacturers benefit when the costs caused by their products are externalized by consumers. The basic case for enterprise liability is that it internalizes those costs, leading the manufacturer to minimize them under the pressures of the market. In that manner, the efficiency advantages that flow from enterprise liability go far beyond the narrow class of potential benefits that Henderson and Rachlinski identify.[34]

2. *The Basic Case Against Enterprise Liability*

In response, tort scholars sometimes argue, as Henderson and Rachlinski do, that a regime that requires manufacturers to warn consumers of a product's risks and that otherwise holds manufacturers liable for failing to make all efficient investments in safety (that is, a fault-based system in which fault is measured in accordance with economic principles), would lead consumers and manufacturers to behave as if all costs were internalized. Roughly, warnings would inform consumers of product risks and could, by themselves, conceivably ensure that all costs are internalized in the sense that consumers accurately perceive such risks and demand appropriate levels of product safety from manufacturers. Holding manufacturers liable for fault in the design or manufacture of their product would serve as a safety net, ensuring that manufacturers produce efficiently safe products even if consumers remain inadequately informed after warnings.

That line of argument, though, does not refute the key point in favor of enterprise liability, which is that it is an incentive-based, market-oriented form of regulation. Enterprise liability imposes costs on the manufacturer as the party best able to determine which designs and warnings would lower the total costs, including accident costs, of its product. Both the warning requirement and a fault-based liability standard rely instead on command-and-control-style regulation. Courts and juries, who typically have neither the ability nor the incentive to make such judgments accurately, must determine how best to inform consumers or to design, package and promote a product. In contrast, enterprise liability harnesses the power of the market to help ensure that products are efficiently designed, consumers are adequately informed, and activity levels are maintained at or near the optimal level. Any re-

34. *See supra* text accompanying notes 21-23.

gime less strict than enterprise liability requires a jury to try to outwit and outmaneuver the market.[35]

So, again, the case for enterprise liability seems logically compelling. To Henderson and Rachlinski, and most other tort scholars who have written on the topic, however, there is still good reason to prefer a fault-based regime. The common law has long understood something that we, the proponents of enterprise liability, have allegedly ignored. A fault-based liability system is in place because the common law is concerned with the economic incentives of consumers as well as of manufacturers. As Henderson and Rachlinski describe,[36] consumers can influence the rate and severity of product accidents in a variety of ways. Given that influence, a fault-based liability system is necessary because "[c]onsumers would have no incentive to undertake their own precautions if manufacturers were forced to bear all of the cost of the harm that products cause."[37] According to Henderson and Rachlinski:

> The traditional fault-based system of products liability law represents a careful balancing of responsibility between consumers and manufacturers. It holds manufacturers responsible for those things that they can best control–incorporating cost-effective safety precautions and providing warnings–and holds consumers liable for the rest. Courts have designed this allocation of liability to ensure that consumers and manufacturers are partners in reaching socially optimal levels of care.[38]

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35. As noted below at text accompanying notes 157-68, however, even enterprise liability requires some degree of guesswork on the part of judges and juries in the context of certain causal judgments.

36. *See* Henderson & Rachlinski, *supra* note 9, at 225-26.

37. *Id.* at 226.

38. *Id.* From that selection, it is clear that Henderson and Rachlinski perceive the common law to be dedicated primarily to serving the goal of efficiency (although they do at one point indicate that the common law is likewise consistent with basic notions of morality). *See also id.* at 216 ("[P]olicy concerns have discouraged widespread adoption of the [enterprise liability] system because it undermines consumer incentives to avoid accidents." (footnote omitted)); *id.* at 224-25 ("Fault-based liability imposes liability on the parties–most often manufacturers or consumers–who can most effectively avoid accidents."); *id.* at 228 ("As stated above, the traditional arguments hold that consumers must bear the risk of harm caused by safely designed products so that consumers will undertake precautions and will avoid products if they are high-risk consumers.").

In Henderson and Rachlinski's view, therefore, fault is "the central feature of products-liability law,"[39] an organic truth evolved over centuries of careful analysis by common law judges. Consequently, our new rhetoric is an attempt "to up-end the traditional arguments that support the role of fault in products cases."[40]

B. *The Intermediate Level*

Despite Henderson and Rachlinski's suggestion that the current, fault-based allocation of responsibility between consumers and manufacturers is tradition-tested, settled, and foundational to tort law, the history of products liability reveals otherwise. To begin with, the allocation of responsibility in products liability law has been anything but stable over the last century. In fact, for at least several decades, a dramatic trend toward enterprise liability was evident in American jurisprudence–a trend that Henderson (with long-time coauthor Professor Aaron Twerski) has recognized unequivocally:

> From the turn of the last century, significant expansions of products liability law have included eliminating the privity requirement in negligence actions, replacing negligence and implied warranty with strict liability in tort, and applying products liability not only to production defects but also to defective product designs and product marketing. Eliminating the requirement that plaintiffs prove product defectiveness as a prerequisite to recovery would seem to be the next logical step on this path.[41]

In other words, if there is a tradition over the last century, it is one of consistent expansion, not equilibrium. Therefore, we believe that explanations other than deference to long-standing, common-law traditions more accurately explain why we are not currently living in a regime of enterprise liability. We provide a brief summary of those explanations here.[42]

As we have just indicated, the conventional wisdom among legal scholars is that throughout most of the twentieth century, and

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39. *Id.* at 253.

40. *Id.* at 228.

41. 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, 1266-67 (1991) (citations omitted).

42. A fuller version of this story is provided in Croley & Hanson I, *supra* note 6, at 695-767.

particularly in the 1960s, 1970s and early 1980s, products liability law was in the midst of what was probably the most significant revolution in the common law's history.[43] Specifically, courts were in a process of expanding and perhaps even abandoning the traditional fault-based rules that Henderson and Rachlinski believe are so critical to the common law's efficiency. Although few scholars maintain that the law made it that far, fewer still dispute the trend.

Similarly, there appears to be wide consensus regarding the premises underlying that trend–a trend that led to Sec. 402(A) of the Restatement (Second) of Torts, among other developments. Those premises, which were assumed by the "first generation" of economics-oriented products liability scholars, included the following: (1) manufacturers exercise unfair market power over consumers; (2) it is cheaper for manufacturers than it is for consumers to insure against product-caused accidents; (3) consumers tend to exercise little control over whether they are injured by products they consume and, in any event, have strong incentives independent of the tort regime to take efficient care when they can; and (4) consumers are optimistic with respect to the underlying risks of products largely because manufacturers manipulate their perceptions through advertising and the like. Given those premises, the case for enterprise liability was nearly inescapable. Moreover, given the fact that those premises did, for a short while, dominate the arguments of legal scholars and, to a lesser extent, influential courts, the law expanded toward enterprise liability.

1. *The Intermediate Case Against Enterprise Liability*

That expansion continued until the early- to mid-1980s, when the brakes were applied and the common law trend was eventually thrown into reverse. The event that precipitated widespread counter-revolutionary court decisions has become popularly known

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43. *See, e.g.*, Joseph A. Page, Book Review, 78 Geo. L.J. 649, 652-53 (1990):

> Although the stirrings of the old tort reform can be traced through judicial decisions during the first half of this century, the pace did not quicken until the 1950s and 1960s. With an extraordinary outburst of energy, the courts recognized their new duties, abolished immunities, and adopted expansive rules for measuring damages. Perhaps the most dramatic development was the judicial adoption of a rule of strict liability for harm caused by defective, unreasonably dangerous products.

Id. (citations omitted).

as the "liability insurance crisis." Roughly speaking, liability insurance rates increased dramatically, insurers refused to offer coverage against certain risks, and manufacturers withdrew some products from the market altogether. Virtually all tort scholars of the day attributed those symptoms to tort law's expansion toward enterprise liability–which explains why the terms "liability insurance crisis" and "tort crisis" subtly became synonymous in both legal academic and popular discourse. Those same tort scholars argued that the crisis stood as proof that the tort system had expanded too far toward enterprise liability and that there must have been something wrong with the premises underlying the common law trend.

In dozens of law review articles published in the mid-1980s, the "second generation" of law and economics scholars set out to identify which of those premises were flawed. And they discovered that, upon close scrutiny, all of them were. Some legal economists argued, for example, that there was no compelling evidence that consumers are optimistic and no theoretical reason to believe that they would be. The idea that manufacturers might manipulate consumers through some bells and whistles in a television ad was considered as silly as it was insulting to the consumer, who, in the work of the most prominent products liability scholars, began to look and act increasingly like the rational actor of their economic models. Others argued that manufacturers did not appear to use market power to exploit consumers and that, even if they did, there is no theoretical reason to believe that they would use that power to make inefficiently safe products. Instead, they would make optimal products and simply exercise their market power by charging a higher price.

The second generation of efficiency-oriented scholars also explained that the tort system is a terribly wasteful form of insurance. They argued that, particularly in light of the number of consumers who already have some form of private or public first-party insurance against product-caused accident risks, it was highly inefficient to force manufacturers to provide unwanted insurance for which consumers would nonetheless have to pay an immense tort tax. Finally, products liability scholars pointed to anecdotes–some real and some later revealed as mythical–that allegedly confirmed their concern that consumers under this virtual tort lottery were actually taking more risks than they otherwise

would, in the apparent hope that a spilled cup of coffee might generate a few million dollars.

The underlying message of all of those arguments was that the tort crisis was the price this country had to pay for accepting the powerful but flawed rhetoric of the early proponents of enterprise liability. Many of those scholars hit the lecture circuit and began to share different versions of that same basic message with legislatures and other public-policy oriented groups. Not surprisingly, their story met with a receptive and well-financed audience of business and insurance interests who had strong financial reasons to join the call for a retreat from enterprise liability and who sprang into action, lobbying Congress and state legislatures. As a consequence, tort law was "reformed" and reverted to the regime that Henderson and Rachlinski are defending.[44]

In their important article, Henderson and Twerski disputed the view that political and economic interests slowed the expansion toward enterprise liability.[45] Instead, they argued, the counter-revolution was driven by the fact that "a system of liability without defect is beyond the capacity of the courts to implement."[46] They pointed to a number of practical difficulties that they viewed as insurmountable by courts attempting to apply enterprise liability, difficulties that have been partially addressed in several arti-

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44. *See id.* at 654-55:

> Despite their apparent similarities, there is an important difference between the old and the new tort reform. The former derived inspiration and major impetus from the ideas of scholars and had its primary influence on the courts. The latter is fueled by the economic self-interest of those who perceive themselves as adversely affected by the tort system. In essence, the new tort reform is a political attack on tort law in the legislative arena.

Id. (citations omitted); *see also* Carl Deal & JoAnne Doroshow, The CALA Files: The Secret Campaign by Big Tobacco and Other Major Industries to Take Away Your Rights 37-43 (2000) (describing the coordinated campaign by the industry coalition to support tort reform through the creation of advocacy groups that appear to be citizen-based); Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 Mo. L. Rev. 1, 5-6 (1995) ("In 1986, hundreds of the nation's largest manufacturers and insurance companies banded together to lobby state governments to enact 'tort reform' legislation, and two years later they formed a separate entity to lobby at the federal level."(citations omitted)); Andrew F. Popper, *A One-Term Tort Reform Tale: Victimizing the Vulnerable*, 35 Harv. J. on Legis. 123, 125-28 (1998) (describing various interest groups aligned in favor of legislative changes to tort law).

45. *See* Henderson & Twerski, *supra* note 41, at 1266-67.

46. *Id.* at 1267.

cles[47] and that will be further addressed in this Article.[48] It will not ruin the surprise to state at this point that we believe the difficulties are quite surmountable and, concomitantly, that interest group action, at times legitimated by legal scholarship, represents the dominant force behind the legislative and judicial abandonment of the trend toward enterprise liability.

2. *The Intermediate Case For Enterprise Liability*

Our depiction of common law trends conveys different messages from those conveyed by Henderson and Rachlinski's account. First, it reveals that there is nothing sacrosanct or even stable about the common law in this area. To be sure, there are some features of products-liability law that have not changed significantly over the past century, but many of its features have been whip-sawed by changing historical trends. Moreover, the very areas that we are debating are the ones that have experienced the most dramatic changes. Second, our depiction reveals that the assumptions that Henderson and Rachlinski seem to treat as given, natural, and immutable–for example, that the fault-based system represents the correct "balancing of responsibility between consumers and manufacturers"[49] in efficiency terms–are actually just conclusions from an argument that is still underway. When they state that the common law has not adopted enterprise liability "because it undermines consumer incentives to avoid accidents,"[50] they are simply asserting their conclusion.

Relatedly, when Henderson and Rachlinski indicate that we are offering "new rhetoric," they are at least partially mistaken. Putting to one side their repeated reduction of our arguments to "rhetoric," we dispute their claim that the arguments are all that new. As we explained in our previous article, the first generation of products liability scholars focused quite explicitly on the problem of manipulation in calling for expanded liability. Significantly, scholars since then have offered little by way of counterargument to those points–in part, we have argued, because the economic models that they employ have no place for such endogenous influences on risk perceptions. It is more accurate, we think, to under-

47. *See infra* text accompanying notes 150-54.
48. *See infra* text accompanying notes 155-69.
49. Henderson & Rachlinski, *supra* note 9, at 226.
50. *Id.* at 216.

stand our earlier work as an effort to revive forgotten arguments–aided by the cognitive behavioralist insights that are posing a challenge to orthodox law and economics in many settings. Put differently, we might fairly be described as offering a *traditional* argument in favor of *traditional* trends in products-liability law.

We have another complaint about the Henderson and Rachlinski nomenclature. They frequently refer to us as the "new proponents" for enterprise liability. They are correct, of course, to distinguish us from the first generation of efficiency-minded scholars and jurists who favored enterprise liability–and who, by implication, offered the "old rhetoric." The problem is really that, except for one or two exceptions, they seem to think that all of the relevant arguments in favor enterprise liability are contained in the articles published last year. A closer look at the other articles that they do at one point cite[51] would have revealed that our line of argument is not *that* new. Indeed, this debate has been taking place for nearly a decade in its current incarnation and, in significant respects, is really a continuation of work that has been going on in legal scholarship for much longer. Their oversight may have been a distinction without a difference were it not for the fact that many of Henderson and Rachlinski's criticisms either mischaracterize or ignore previous work.[52]

Without attempting to replicate any of the detail that we have provided in that previous work, we will briefly summarize some of the key elements of the argument in favor of enterprise liability. Recall that the basic case for enterprise liability follows from its incentive-based regulatory effects. That immense advantage should, in our view, place the burden of proof on those who would rely instead on a command-and-control alternative. Recall also that the principal arguments against enterprise liability are that consumers should pay for the accidents that they can prevent, lest they have no incentive to take care; and that manufacturers should pay for accidents other than the ones that they can cost-justifiably prevent, lest they be forced to provide costly and inefficient accident insurance. Other than those somewhat overlapping conten-

51. *See id.* at 217 n.19.

52. *See, e.g., infra* text accompanying notes 150-52.

tions regarding consumer care and insurance,[53] the second generation simply rejected the arguments of the first generation by asserting that there was no significant consumer information problem and no reason to worry about manufacturer exploitation of consumers. It is just a slight exaggeration, therefore, to say that the only argument clearly *against* enterprise liability is that, as Henderson and Rachlinski put it, "[c]onsumers would have no incentive to undertake their own precautions if manufacturers were forced to bear all of the cost of the harm that products cause."[54]

Although the consumer-incentives argument is no minor point, the case for enterprise liability was, in our view, pretty well made even before our last two articles considered the implications of behavioralism for products liability: as the first generation of enterprise liability advocates argued, consumers have strong reasons to take care regardless of whether they are compensated through tort law for personal injuries. Anecdotes to the contrary about coffee-spilling fortune seekers struck us as unpersuasive–perhaps in large part because there has been no sudden and substantial rash of McDonald's customers spilling 140-degree coffee on their laps and enduring the resultant third-degree burns and skin grafts in order to try their luck with a jury. More generally, the second generation offered no persuasive empirical evidence and relied solely on abstract economic models to support their supposition that a significant number of consumers would behave in a way that seemed so clearly to contradict what we think we know about people.

The belief that consumers have significant incentives to take care independent of the promise of tort compensation is shared even by critics of enterprise liability–indeed, perhaps even by our present critics. Although Henderson and Rachlinski argue that a fault-based system is necessary to ensure that consumers have some incentive to take care, they nonetheless contradict themselves elsewhere by suggesting that consumers have such incentives irrespective of tort-provided compensation:

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53. There exists a fair amount of double counting in those two arguments inasmuch as the major complaint about tort-provided insurance is that it removes the incentives of consumers to take care–that is, it encourages moral hazard and adverse selection in insurance pools.

54. Henderson & Rachlinski, *supra* note 9, at 226.

> No [enterprise liability] system can fully compensate consumers for all of the harm that products cause. Full compensation would require that the system grapple with non-market assets such as life and limb. No tort remedy really fully compensates a parent for the loss of child or a maimed accident victim for the loss of a limb. Neither would it be possible for a tort system to offer an adequate sum for damages so as to make someone truly indifferent between the size of the damages and the injury. Psychological research suggests that the amount that people would be willing to accept to endure extreme injuries ex-ante is much greater than the amount that people would be willing to pay to restore themselves to full health ex-post. Because the legal system always operates ex-post, it will chronically under-compensate victims relative to the ex-ante value people place on life and limb.[55]

We suspect that the contradiction in Henderson and Rachlinski's views may stem from the fact that their argument about the need to provide consumer incentives emerges out of an abstract economic model, whereas their argument immediately above depends on actual evidence and their own intuitions. In any event, we share their intuitions and, and as we have argued elsewhere, there is strong evidence that those intuitions are sound.[56]

Henderson and Rachlinski might respond that there could still be a substantial problem of moral hazard for those product-caused injuries that do not cause major personal injuries or pain and suffering. That may well be, but as one of us, with Kyle Logue, has argued at length,[57] little can be done about the problem that consumers might take less care with respect to pecuniary losses because of the promise of compensation. As critics of enterprise liability have emphasized, the majority of consumers are covered through some form of public or private first-party insurance for some or all of the costs associated with product-caused accidents. Because first-party insurance is largely unable to control for moral hazard and adverse selection in the risk pools relevant to products

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55. *Id.* at 250 (footnote omitted).

56. *See* Croley & Hanson III, *supra* note 24, at 34-37; Croley & Hanson II, *supra* note 24, at 1902-2006; Croley & Hanson I, *supra* note 6, at 790-92; Hanson et al., note 24, at 559-60; *see also* Tom Baker, *On the Genealogy of Moral Hazard*, 75 Tex. L. Rev. 237, 242, 285 (1996).

57. *See generally* Hanson & Logue I, *supra* note 24 (identifying the first-party insurance externality and arguing that it prevents optimal consumer behavior irrespective of tort-provided incentives).

liability, consumers are already externalizing those costs onto their fellow first-party insureds, in what amounts to a tragedy of the commons. Removing tort compensation from those insureds, therefore, would not suddenly force them to internalize the costs of their carelessness.

That *first-party insurance externality* reduces any concern that the legal system should have in striving to place proper incentives on consumers. Insofar as they are insured and truly behave according to the simplistic model underlying the moral hazard theory, consumers are unlikely to take care even if they are well informed of the risks. As Henderson and Rachlinski indicate, it makes little sense to place liability on consumers if they are not informed or if they are otherwise not "inclined and able to act effectively on [their] information."[58]

Finally, what about the alleged adverse insurance effects of the expansion toward enterprise liability? In a pair of articles,[59] one of us, with Steve Croley, has argued not only that the expansion did not generate adverse insurance effects, as critics of enterprise liability claim, but also that the so-called "liability crisis" was not evidence of a tort system in need of reform. Instead, it represented precisely the hoped for manifestation of beneficial deterrence effects associated with the trend toward enterprise liability. After all, the fact that some product prices increased, that some liability insurance rates increased, and that some products were removed from the marketplace is exactly what the first generation of enterprise liability advocates predicted would happen.

In short, even disregarding our two behavioralist articles that attract Henderson and Rachlinski's criticism, we believe that a strong economic case for enterprise liability already exists. The fact that the law has been retreating from its earlier advances only suggests to us the power of flawed economic models, particularly when combined with influential political and economic interests. It does not, we contend, represent evidence that a fault-based liability system is somehow natural or inevitable.

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58. Henderson & Rachlinski, *supra* note 9, at 225.

59. *See* Croley & Hanson II, *supra* note 24, *passim*; Croley & Hanson III, *supra* note 24, at 1914-17.

C. *The Advanced Level*

Despite those forceful arguments, still open in the products liability debate were the questions of how well informed consumers really are and whether manufacturers might somehow find a way to exploit consumers through market manipulation. Initially, scholars sought to answer those questions through a straightforward economic account of consumer information. Debates focused on the costs to the consumer of obtaining information about product risks. In a fairly exhaustive treatment, one of us, with Steve Croley, concluded that the relative infrequency of product accidents would often lead to situations in which it would be quite rational for consumers to remain underinformed of product risks.[60] At the same time, however, some products liability scholars began to view consumer risk awareness through the lens of cognitive psychology, determining that consumer perceptions might be influenced by cognitive factors irrespective of economic costs and benefits. Those scholars generally attempted to predict how one or more cognitive factors would bias consumer risk perceptions in a particular direction.

When we began delving into the cognitive psychology literature we were struck by two things. First, it was plain to us from the experimental evidence that people are incredibly sensitive to subtle variations in the way options are framed–sensitive in the sense of being easily, but unwittingly, manipulated.[61] Second, we noticed that scholars who were also relying on the literature in their products liability arguments were missing or ignoring (or at least failing fully to appreciate) that point.[62] Once we thought about the profitability of risk-perception manipulation, our hypothesis was in place–a hypothesis that, by coincidence, recalled a primary argument of the first generation in favor of enterprise liability.[63]

Bracketing for now doubts concerning the persuasiveness of our empirical evidence, we felt, and still do, that if market manipulation of the sort that we predicted was at all common, then the already strong case for enterprise liability would be even stronger. Indeed, the problem of manipulation greatly heightens the need for

60. *See* Croley & Hanson I, *supra* note 6, at 770-79.
61. *See* Hanson & Kysar I, *supra* note 2, at 643-87, 724-43.
62. *See id.* at 693-721.
63. *See* Hanson & Kysar II, *supra* note 2, at 1567-71.

an incentive-based products liability regime such as enterprise liability. That heightening is true not just because market manipulation provides additional reason to believe that consumers will tend to underestimate product risks, but also because it enhances manufacturers' ability to evade command-and-control alternatives to enterprise liability.[64]

1. *The Extent and Efficacy of Market Manipulation*

To have some sense of that need for market corrective action, it is necessary to have an understanding of the extent of market manipulation–a topic that we covered in significant detail in our previous article. We were thus disappointed to read Henderson and Rachlinski's suggestion that instead of "serious quantitative assessment" we relied on "clever rhetorical moves."[65] Although they admit that satisfying a burden of proof with respect to consumer risk perceptions would "surely [be] a messy and difficult empirical chore," they claim that it is "an essential prelude to abandoning the central feature of products-liability law."[66]

We do not accept Henderson and Rachlinski's unprincipled assignment of the burden of proof. Indeed, for reasons suggested above, we think a good case exists for placing the burden on them as opponents of enterprise liability. Not surprisingly, we think that they would have an extremely difficult time developing the requisite empirical foundations for their defense of the status quo, if the burden of proof were so shifted. In any event, the empirical case we make that market manipulation is ubiquitous and the theoretical argument we make that enterprise liability is the best solution to market manipulation, in our view, are strong enough to

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64. As we describe *infra* text accompanying notes 368-71, other reasons to support enterprise liability include the fact that it eliminates undesirable incentives to avoid safety innovations that exist under a negligence regime.

65. Henderson & Rachlinski, *supra* note 9, at 253-55 ("Their argument fails to provide a *serious* quantitative assessment of the extent of market manipulation."); *see also id.* at 218 ("provides no quantitative assessment of the extent of the problem it purports to identify"); *id.* at 219 ("failure to demonstrate the extent of the social problem that the manipulation of consumers allegedly creates"); *id.* at 230 ("[Enterprise liability's] new proponents do not clearly identify the extent of the problem that manufacturers' attempts to manipulate consumers allegedly create."); *id.* at 253-54 ("Clever rhetorical moves notwithstanding, the debate between those who believe consumers overreact to risk and those who believe consumers under-react to risk cannot be avoided.").

66. *Id.* at 253.

unseat the position that the current legal regime is adequately responsive to such manipulation or that the demonstrably unrealistic models used to justify that regime can, by themselves, yield acceptable answers to important policy questions.

Before summarizing our evidence, we will address some of the more general claims that Henderson and Rachlinski make to suggest that we are operating on shaky empirical foundations. They indicate, for example, that absent empirical evidence to the contrary:

> [t]here are several good reasons to suppose that manipulating consumer risk perceptions is extremely difficult, despite the influence cognitive biases have on these estimates. First, many cognitive processes operate against consumption–the status quo generally runs against purchasing a new product. Second, manufacturers must also compete against manufacturers of other products for consumers' limited budgets. Finally, for manufacturers to manipulate consumers successfully, they must command consumers' attention; advertising may be ubiquitous, but it is also easily ignored by media-savvy consumers who have learned how to disregard advertising.[67]

Those comments indicate that Henderson and Rachlinski misunderstand our point. We do not claim that manufacturers can get consumers to buy just any products. There are, for example, many expensive advertising campaigns and ballyhooed products that flop each year. And even very successful products are not desirable to all consumers.

Our point is simply that manufacturers will improve their chances of success significantly if they can, by accident or with intent, happen upon a device that lowers consumers' risk estimates or otherwise favorably manipulates consumer perceptions. That the market is extremely competitive ensures that manufacturers will tend to find such techniques–just as it ensures that manufacturers will produce effective mousetraps. Such incremental development, whether of mousetraps or manipulation, can occur even without a conscious effort on the part of manufacturers. The fact that they *are* trying to manipulate and the fact that such efforts, though costly, are ubiquitous, provide strong evidence that manipulation works, despite Henderson and Rachlinksi's claim to the

67. *Id.* at 230.

contrary. The same competitive process that Henderson and Rachlinski identify as mitigating of manipulation may actually ensure that manufacturers do not throw their money away, even if many of their attempts at manipulation may fail and even if many consumers may disregard (or think they disregard[68]) advertisements.[69]

Henderson and Rachlinski also complain that our examples "actually suggest only that manufacturers *attempt* to manipulate consumers; they reveal little or no evidence of the success of these efforts."[70] One response to that argument is that it overlooks a crucial component to our story. As we detail below,[71] a large portion of our work was devoted to studying available social science evidence of consumers' perceptions of the risk of smoking. That evidence reveals that tobacco industry efforts to manipulate risk estimates have been quite successful. Another response to Henderson and Rachlinski's argument is that we have merely used market evidence in the same manner that economists typically do and, indeed, in the manner that Henderson and Rachlinski themselves do. We have identified a host of advertising, promotional, litigious, lobbying and other activities that are, at least arguably, designed to shape perceptions of product risks. Our argument has been that the very persistence of such efforts supports the inference that they succeed; otherwise, manufacturers engaging in such

68. *Cf.* Ziva Kunda, Social Cognition: Making Sense of People 22-23 (2000) (noting that *priming*, the processes or experiences that can bring a particular concept to mind, can operate "even when the priming is unconscious," and that "[i]t is possible to flash words on a screen so fast that people will not realize that they have seen any word at all, and yet their judgments will be affected by their exposure to these words").

69. Henderson and Rachlinski also oversimplify the role of the *status quo bias* in consumer behavior. For almost all non-durable consumer products, the relevant status quo is one of repeat purchasing rather than abstinence. Even with respect to durable products, the status quo may not necessarily run against consumption. Consumers rapidly grow accustomed to a given level of consumption and, consistent with the status quo bias, react to deviations from that level with more sensitivity than a standard utility function would predict. *See* Robert F. Frank, Luxury Fever 64-74 (1999); Juliet B. Schor, The Overspent American 3-21 (1998). To the extent that consumers tend to maintain their accustomed level of consumption, therefore, the status quo bias would favor rather than discourage product purchases.

70. Henderson & Rachlinski, *supra* note 9, at 230.

71. *See infra* text accompanying notes 77-178.

costly but unsuccessful efforts would be driven from the marketplace.

Henderson and Rachlinski's primary complaint, though, is with the extent of the evidence that we do offer. In their view, we "provide only anecdotal examples to illustrate the existence of manufacturer manipulation of consumers."[72] Given that market manipulation is, by its very nature, not generally perceived or understood as manipulative (otherwise, it would not be nearly so effective), it is easy to point to a few of the advertisements that we highlighted in our article and claim that they do not, by themselves, constitute enough evidence to warrant our concerns. Easy, but in our view, inaccurate. The problem with Henderson and Rachlinski's conclusion is that it is based on misunderstandings of the evidence that they did review and on the fact that they simply ignored what we described as our most important evidence.

As we did in part, Henderson and Rachlinski describe our evidence as "anecdotal." That characterization, however, may simply be the consequence of their focusing on only the anecdotes.[73]

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72. Henderson & Rachlinski, *supra* note 9, at 230.

73. Henderson and Rachlinski combed our articles and "identif[ied] thirty-eight specific examples of advertisements," *id.* at 231, which they categorized into examples that support our thesis (seven), examples that involve merely "generic efforts to sell more product unrelated to risk" (seventeen), and examples that involve "outright deceptive advertising that have nothing to do with psychology" (fourteen). *Id.* at 231-32 n.80. As noted in the text, this laundry list overlooks vast swaths of our articles containing pertinent evidence of market manipulation, most notably our entire treatment of the subject of tobacco products, which Henderson and Rachlinski admit "largely support[s] [our] thesis," *id.* at 233, n.80, but which they ignore for the bulk of their critique.

Even within their selective list, Henderson and Rachlinski unfairly discount the relevance of many of our examples. For instance, they wave away seventeen specific examples because the examples involve attempts to manipulate product attributes other than specific risk attributes. Yet they make no attempt to respond to our introduction of that evidence, which argued that "[t]he evidence of manipulation of general product perceptions supports an inference of risk perception manipulation by manufacturers as well: if manufacturers manipulate perceptions of non-risk-related products attributes, they likely do the same for risk attributes." Hanson & Kysar II, *supra* note 2, at 1429. That type of reasoning should not be foreign to Henderson and Rachlinski; after all, they cite Professor George Priest's famous article on consumer product warranties, which introduced the very form of argument to the products liability debate. *See* Henderson & Rachlinski, *supra* note 9, at 214, n.4 (citing George L. Priest, *A Theory of the Consumer Product Warranty*, 90 Yale L.J. 1297 (1981)).

They discount fourteen more examples because, in Henderson and Rachlinski's view, they constitute "outright deceptive advertising that have nothing to do

with psychology." Henderson & Rachlinski, *supra* note 9, at 232 n.80. The authors are correct that most–though not all–of those examples rely on a form of manipulation more blunt than the subtle exploitations of cognitive biases on which we have focused most of our attention. Namely, they involve bald lies made in the marketplace by product manufacturers. We would dispute, however, that lies "have nothing to do with psychology." The successful accomplishment of "outright deceptive advertising" surely involves efforts by manufacturers to shape and influence the perceptions and judgments of consumers, and psychology surely has something to say about those efforts. *See, e.g.*, Susan T. Fiske & Shelley E. Taylor, Social Cognition 480-82, 495-98 (1991) (reviewing literature on attitude formation and change, particularly with respect to how people evaluate the credibility and attractiveness of sources of information). More importantly, the perpetration of fraudulent behavior suggests that manufacturers have the motive and will to engage in conduct that is illegal and potentially harmful to customer good will, so long as that conduct might result in lowered consumer perceptions of product risks or elevated perceptions of product benefits. Given that evidence, we find it highly plausible that manufacturers would also be willing to engage in conduct that is below the radar of both regulators and consumers. Finally, quite apart from the question of how one characterizes this brand of manufacturer manipulation, it is still a form of market manipulation and, for all of the reasons that we have described, would often be best combated by enterprise liability.

Henderson and Rachlinski then engage in more specific attempts to discount certain of our examples. For instance, they reject our description of the tactics used by pharmaceutical companies to encourage physicians to prescribe their drugs, calling such efforts "outright bribery." *See* Henderson & Rachlinski, *supra* note 9, at 232 n.80. Like the instances of "outright deceptive advertising" defended in the previous paragraph, however, we fail to see why "outright bribery" is not indicative of a troubled consumer product marketplace. Again, enterprise liability offers potentially ameliorative effects, whether one brands manufacturer conduct as bribery or manipulation. Henderson and Rachlinski also dismiss our examples involving gun advertisements, claiming that "the NRA is not a manufacturer and does not sell guns." *Id.* Even apart from the fact that several of the cited gun advertisements come from gun manufacturers such as Smith & Wesson, not the National Rifle Association, we are not as sure as Henderson and Rachlinski that the NRA does not have an interest in promoting the sale of guns or, indeed, that the line between the NRA and gun manufacturers is so clearly drawn. *See* Brent W. Landau, Recent Legislation, *State Bans on City Gun Lawsuits*, 37 Harv. J. on Legis. 623, 636 n.112 (2000). More importantly, such advertisements, whether the product of manufacturers or not, help to fuel a sort of handgun "arms race" in which manufacturers create guns that are progressively more deadly and more concealable. *See, e.g.*, Tom Diaz, Making a Killing: The Business of Guns in America (1999). Finally, the authors discount our examples involving elasticity and efforts to appear cooperative because they were "not tied to a specific advertising strategy that [Henderson and Rachlinski] could recognize." Henderson & Rachlinski, *supra* note 9, at 232 n.80. They may not have been able to recognize the advertising strategies to which those examples related because the examples featured in our account of tobacco industry manipulation which, as noted above, Henderson and Rachlinski disregarded. In addition, it is not difficult to think of campaigns in which all sorts of companies–from chemical manufacturers to fast food chains–seek to portray themselves as trustworthy, concerned, and public spirited. *See also infra* text accompanying notes 269-73 (describing similar efforts by

There is a different way of reading our earlier work. In our first

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automobile manufacturers). Indeed, quite apart from reading our section on tobacco-industry conduct, one can scarcely watch television without encountering one or another piece of the current multi-million dollar public relations campaign of Philip Morris intended to convince the public that it is a responsible, caring, philanthropic corporate citizen.

In short, we believe that even the narrow aspects of our case on which Henderson and Rachlinski do focus are given short shrift in their analysis. Perhaps no example demonstrates that shorting better than the use of marketing and promotional efforts by manufacturers to convince women in developing countries to purchase infant formula. *See* Hanson & Kysar II, *supra* note 2, at 1464-65. In dismissing those efforts, Henderson and Rachlinski state: "[W]e do not count this as distracting from product risk as the product risk was that of misuse–heavy dilution of the product." Henderson & Rachlinski, *supra* note 9, at 232 n.80. To that characterization we have two responses. First, overdilution, which was just one of several factors that resulted in injury and death among Third World infants raised on formula, may have been a "misuse," but it was a completely foreseeable one for which the manufacturers could be held responsible even under existing products liability law. *See* Restatement (Third) of Torts: Prods. Liab. § 2 cmt. p (1998); Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. Rev. 1193 n.378 (1994) ("During the past quarter century, many courts have expanded the scope of consumer protection to include foreseeable uses including foreseeable misuses."). Second, and more fundamentally, the infant formula example reveals precisely why enterprise liability is needed to enlist manufacturer aid in regulating consumer behavior. Without enterprise liability, infant formula manufacturers engaged in marketing campaigns that were recognized by groups such as the World Health Organization as deceptive and unfair. *See* Hanson & Kysar II, *supra* note 2, at 1465. The first calls for regulation came from the United Nations Protein Advisory Group as early as 1974, yet seven deadly years passed before it even proposed a restrictive advertising code. *See* Caryn L. Finkle, Comment, *Nestle, Infant Formula, and Excuses: The Regulation of Commercial Advertising in Developed Nations*, 14 Nw. J. Int'l L. & Bus. 602, 604 (1994). Even today, results of those international regulatory efforts remain quite mixed. *See id.* Enterprise liability, on the other hand, would provide incentives for manufacturers to accommodate rather than exploit the special circumstances of their customers. It would harness the sophisticated understanding of psychological nuances that manufacturers demonstrate in their marketing practices–infant formula makers preyed on the desire of Third World women to appear "modern" or "Western" through the use of salespersons dressed as medical professionals and such slogans as "Give your baby the benefit of modern research"–to help sharpen consumer awareness of product risks and behaviors that can alleviate those risks.

Our argument is that manufacturers, operating under the incentives of the market, are the best educators of consumers. Properly aligned, market incentives could result in the construction of not only safer manufacturer designs for products, but also of more effective product warnings for consumers. Henderson and Rachlinski overlook those possibilities because they view the harm suffered by developing world infants as solely a result of product misuse by the infants' mothers. Like the many other examples pigeonholed by Henderson and Rachlinski's analysis, we view the situation as involving far more complex interactions between manufacturers and consumers than they apparently do.

article we devoted approximately fifty pages to reviewing the cognitive psychology literature–a literature that reveals an immense variety of ways in which we humans are manipulable and whose authors often recognize the clear application of their work for sellers and marketers.[74] Even absent more direct evidence, the evidence of cognitive psychologists and decision theorists would be adequate to show that market manipulation is a natural and logical consequence of cognitive biases and manufacturer profit motives. Coupled with the more direct evidence that we did offer, these dozens of behavioralist studies ripen into a sophisticated account of why and how manipulation occurs–an account based on decades of empirical research not properly described as anecdotal.

In our second article, we devoted more than one hundred law review pages to providing evidence of market manipulation. Among other sorts of evidence, we described a major research literature and an industry devoted to consumer behavior analysis, both of which seemed informed significantly by psychological theory and evidence. Although that literature has been described as "quasi-empirical,"[75] its practitioners both within and without academic settings generate research stipends several orders of magnitude greater than those from many other academic disciplines.[76] Again, that market evidence does not seem fairly described as anecdotal. After that literature review, we looked carefully at several consumption venues. A fulsome description of the manipulative aspects of the modern American shopping mall could fill a book; but we focused on a couple of the even more common competitive shopping venues, at which many readers would likely believe that manipulation is rare to non-existent: gas stations and supermarkets.

Although our analysis certainly could have gone into more detail, we do not believe that even the sort of evidence we presented can be fairly dismissed as anecdotal. That evidence reveals that the intent and the effect of well designed shopping forums is to

74. *See* Scott Plous, The Psychology of Judgment and Decision Making 27-29, 47 (1993); *see also* Roger Lowenstein, *Outsider Who Challenged Dismal Science*, Wall St. J., June 6, 1996, at C1 (quoting cognitive psychologist Amos Tversky, who stated that his findings would have been familiar to "advertisers and used-car salesmen," though not to orthodox economists).

75. Henderson & Rachlinski, *supra* note 9, at 253.

76. *See* Hanson & Kysar II, *supra* note 2, at 1429 (noting that "[m]anufacturers spend $8 billion per year studying consumer behavior and psychology").

influence the purchasing decisions of consumers and that such manipulation is a motive behind many of the design features that most of us know about and never question. We did not argue that sellers should be liable for such manipulation, but we did point out that the evidence of manipulation of non-risk related perceptions supports a strong inference of manipulation risk-related perceptions. Then, to provide more direct evidence of manipulation of risk-related features, we examined several product types for which such behavior appeared common–for example, food products, pharmaceutical drug products, environmentally marketed products, products marketed to thrillseekers, and products utilizing appeals to fear. In every context that we examined, we found sellers who were devoting significant resources in an effort to manipulate consumers' risk perceptions.

2. *The Lessons of Tobacco Industry Manipulation*

In addition to reducing all of that evidence to one heroic footnote,[77] Henderson and Rachlinski reach their critical conclusion having inexplicably disregarded our most relevant and extensive evidence–our analysis of the market for cigarettes. As we emphasized, "our history of tobacco marketing and our review of the smoker risk perception literature are especially significant, as they provide the strongest evidence that manufacturer manipulation not only occurs, but also succeeds."[78] The best explanation that we can muster for Henderson and Rachlinski's omission is that by accepting our argument that cigarette manufacturers should be absolutely liable,[79] they felt justified in ignoring that evidence. But granting our policy conclusion with respect to cigarettes hardly justifies disregarding the arguments and evidence behind that conclusion, particularly in light of our claims that the tobacco industry evidence was our most important evidence and that it had implications well beyond the market for cigarettes.[80]

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77. *See supra* note 73.

78. Hanson & Kysar II, *supra* note 2, at 1469.

79. *See* Henderson & Rachlinski, *supra* note 9, at 257.

80. Perhaps Henderson and Rachlinski believe that the tobacco industry is exceptional. After all, we ourselves were careful to describe several reasons why we believed that manipulation was especially likely to occur in the market for cigarettes. We noted that the industry's budget for marketing, promotion, and other related activities, and hence its capacity to experiment with manipulative practices, was especially generous among product manufacturers; that consumers long

Our review of the tobacco market suggests just how powerful, omnipresent, and unobservable manipulation can be. Several prominent legal scholars had examined the market for tobacco products and concluded that it was without significant market failures–that, for instance, consumers were well informed of tobacco product risks–and that, therefore, enhanced liability or regulation in such a market would offer no efficiency gains.[81] That same market now happens to be the one for which we have the most available evidence of both industry conduct *and* consumer information. Our ability to observe industry practices in this context is therefore nearly unique, as is our ability to measure their effects. As we have argued, the evidence suggests that consumers are not adequately able to appreciate tobacco product risks or to confront the tobacco purchasing decision with anything like the optimal level of care and cognition.

It may be that the strength of our case is what makes Henderson and Rachlinski feel they can justifiably ignore it. At one point, they hint at that possibility by stating that "[c]igarettes represent the most obvious example of . . . circumstances [in which enterprise liability may be appropriate]. The dangers that they pose trigger both cognitive dissonance and over-optimism more so than the cognitive biases that result in overreaction to risk."[82] By granting our argument and accepting our evidence, they simultaneously seem to disarm it. The problem is that there was nothing "obvious" about the evidence we provided or the conclusions that we drew from it. Perhaps in hindsight Henderson and Rachlinski find the problem-

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have been somewhat aware that tobacco products raise health and safety concerns, thereby enhancing the need on the part of manufacturers to manage consumer perceptions; that the concentrated nature of the industry might have a catalytic effect on the perpetration of manipulative practices. *See* Hanson & Kysar II, *supra* note 2, at 1467-68. Those considerations, however, only suggest that manipulation in the cigarette context will be different in degree, not in kind, from the manipulation that takes place in other markets. *See id.* at 1551-53 (explaining why greater market competition would not drive out all manipulative practices in the tobacco market).

81. *See, e.g.*, Robert D. Tollison & Richard E. Wagner, The Economics of Smoking (1992); W. Kip Viscusi, Smoking: Making the Risky Decision (1992); Gary T. Schwartz, *Tobacco Liability in the Courts*, *in* Smoking Policy: Law, Politics, and Culture 131 (Robert L. Rabin & Stephen D. Sugarman eds., 1993); Gregory P. Taxin, *Tobacco Industry Liability for Cigarette-Related Injuries: "Smokers, Give It Up!"*, 16 J. Prod. & Toxics Liab. 221 (1994); *see also infra* text accompanying note 142 (discussing Henderson and Twerski's earlier views on tobacco products).

82. Henderson & Rachlinski, *supra* note 9, at 257.

atic nature of tobacco markets to be obvious, but at one point in the not too distant past, many scholars,[83] Henderson included,[84] held a vastly different viewpoint.

Henderson and Rachlinski's discounting of the tobacco evidence has important consequences. We examine a single industry closely and demonstrate how it has been preoccupied with manipulation for at least fifty years. That evidence is particularly revealing because it is in depth and because we have access to many of the internal documents that are simply not available to us with other industries–documents that reveal not just the strategies used by manufacturers but the intent behind them. Moreover, we review a great deal of non-anecdotal evidence regarding the effects of those manipulative efforts. A major section of our article entitled "The Actual Success of Market Manipulation,"[85] examines widespread market evidence and a host of empirical studies of consumer risk perceptions with respect to tobacco products. Together that evidence permits us to conclude with reasonable confidence that the incredible efforts and expenditures made by the industry have paid off in terms of influencing consumer perceptions. For those reasons, we argued that our "case study in tobacco industry manipulation provides a degree of proof about consumer product markets greater than anything previously available in the academic literature."[86]

The fact that so many scholars and commentators have trouble believing that consumers could underestimate (or behave as if they underestimate) the risks of one of the most talked-about hazards of the century only demonstrates how difficult it is to recognize the existence and impact of market manipulation. Significantly, enterprise liability reduces the need either to identify market manipulation or to quantify its effects. In the process, it enhances the degree of faith that one may place in the efficiency of market outcomes. At one point in their argument, Henderson and Rachlinski seem to suggest that the mere fact that consumption of certain products, including cigarettes, is widespread indicates that

83. *See supra* note 81.
84. *See infra* text accompanying note 142.
85. Hanson & Kysar II, *supra* note 2, at 1505-51.
86. *Id.* at 1470.

those products are, for some consumers, welfare-enhancing.[87] Under the current regime, we do not believe that such an inference is defensible. However, by internalizing the health costs of those products and by reducing or eliminating the incentive on the part of manufacturers to manipulate consumer understanding of those costs, the institution of enterprise liability would greatly increase the faith that one could place in such an assertion.

By disregarding our cigarette evidence, Henderson and Rachlinski miss another key insight: manipulation involves a great deal more than merely advertising.[88] In fact, as our examples imply, market manipulation extends far beyond the simple attempt to manipulate the cognitive processes of individual consumers directly. It also involves attempts to influence the wide variety of institutions that also exert an influence on consumer views or that might otherwise intervene in the tobacco market because of the risks posed by its products. Henderson and Rachlinski recognize that institutions and mechanisms other than advertising can influence consumer perceptions:

> [E]ven apart from manufacturers, our society includes important entities that benefit from increasing consumer fear of products. These include public-interest consumer advocates, plaintiff's attorneys, hospitals, insurance companies, politicians who adopt consumer rights as one of their issues, con-

87. *See* Henderson & Rachlinski, *supra* note 9, at 230. Henderson and Rachlinski state:

> [Enterprise liability]'s new advocates could argue that the widespread consumption of dangerous products such as cigarettes, alcohol, firearms and motor vehicles provides ample evidence of the success of these marketing campaigns. Such an argument, however, would be misplaced. These products all confer some benefits upon the users. Even without manipulative advertising, many consumers would surely purchase them.

Id. (citations omitted). If consumers would purchase the products without manipulative advertising, then it must be the case that the benefits Henderson and Rachlinski speak of outweigh the costs that consumers would perceive even in the absence of manipulation. That assumption seems to be based simply on the fact that consumption of those products is widespread.

88. As we concluded, the tobacco industry engaged in a "multidimentional approach" employing "diverse manipulative strategies." Hanson & Kysar II, *supra* note 2, at 1502. *Compare, e.g.*, Henderson & Rachlinski, *supra* note 9, at 217 ("These scholars argue that manufacturers employ advertising techniques in ways that completely undermine the justifications for retaining a fault-based liability system.").

> sumer-information media outlets (such as Consumer Reports) and the media in general.[89]

They do not recognize, however, the manner in which manufacturers can influence those same institutions and mechanisms. It is not simply that "the budgets and influence of consumer advocates and consumer information outlets are dwarfed by the power of manufacturer marketing,"[90] but also that manufacturers can compete for influence in those same non-advertising venues. Campaign contributions to politicians, sponsorship of non-governmental institutions, the heavy influence of advertising dollars on media content, and the establishment of faux citizen groups to intervene in public debate are just a few of the most obvious examples of such manufacturer influence.

As noted above, our argument in favor of enterprise liability begins with the widely accepted premise that incentive-based regulations provide the most effective means of accomplishing legal goals. In light of the accomplishments tobacco manufacturers have made in the absence of enterprise liability, we believe that the case for its adoption is even stronger than previously understood. That is, market manipulation suggests that incentive-based regulatory approaches are even more desirable than conventional wisdom would have it.[91] Because it operates at the most basic level of manufacturer motivation–the profit motive–enterprise liability is able to influence manufacturer behavior in a full range of contexts, not just in the areas of product design and warning construction. Advertising, promotion and even the more subtle attempts to affect consumer perceptions described above come under the influence of the legal regime with the adoption of enterprise liability. More importantly, the same forces that manufacturers currently utilize to undermine consumer appreciation of product hazards can be redirected in favor of strengthening such appreciation.

II. Is Existing Products Liability Law Sensitive to the Manipulation of Consumers?

The previous Section outlined our reasons for supporting a products liability system of enterprise liability. In response, Hen-

89. Henderson & Rachlinski, *supra* note 9, at 248.
90. *Id.*
91. *See supra* note 25.

derson and Rachlinski argue that our analysis fails to credit existing systems of regulation for their sensitivity to the problem of market manipulation.[92] Specifically, they claim that: (a) governmental agencies following a command-and-control approach already regulate deceptive advertising; (b) the recently promulgated Restatement (Third) of Torts: Products Liability contains provisions that link manufacturer fault to consumer expectations in a manner that accounts for market manipulation; and (c) novel litigation techniques have developed in response to the problem of cigarette industry conduct. Each of those aspects of current law, according to Henderson and Rachlinski, contributes to the conclusion that "[e]xisting tort remedies are more sensitive to manufacturers' attempts to manipulate consumers than the new proponents of [enterprise liability] suggest."[93]

We wish to emphasize at the outset that we enthusiastically endorse the recent trends toward greater legal recognition of manipulative conduct that Henderson and Rachlinski identify. Too often, the products liability debate deals in archetypes, as if legal regimes occupied only fixed and distinct spheres of possibility. The more accurate conception is of a products liability continuum, ranging from no liability for manufacturers to enterprise liability and featuring various familiar landmarks such as negligence and strict liability along the way. Even those seemingly clear landmarks are resistant to precise definition, as the long-standing struggle to define "defect" has shown.[94] Thus, to some extent, our frequent calls for an enterprise liability standard can be interpreted as a more general call to move along the products liability continuum further toward enterprise liability than under the current regime. Understood in that light, the trends identified by Henderson and Rachlinski, such as novel tobacco litigation and the new sensitivity to advertising in the Third Restatement, actually represent the very type of legal developments that we endorse.

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92. They contend that our case for enterprise liability "fails to take account of the existing legal mechanisms available to address the manipulation of consumers." Henderson & Rachlinski, *supra* note 9, at 218.

93. Henderson & Rachlinski, *supra* note 9, at 234.

94. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 868-72 (1998) (describing the difficulty among commentators of settling upon an agreed understanding of product defect).

Moreover, while we did surmise that enterprise liability offers the best prospect of combating the problem of market manipulation, we did not reach that position without deliberation. A careful reading of our work reveals that we have considered and discussed many of the same sorts of alternative mechanisms for addressing the problem of market manipulation that Henderson and Rachlinski emphasize.[95] We did not argue that other forms of regulation cannot help to address that problem. Indeed, we believe that some other forms of regulation can be useful and, in any event, are sometimes the only available option to redress problematic situations.[96] Nevertheless, we remain skeptical of arguments intended to reassure policymakers and the public that the problem of market manipulation is well in hand, simply because one or more existing regulatory schemes may address it. Our argument has been and continues to be that market manipulation is a major problem under existing legal arrangements. As we have also tried to make clear, there is strong reason to believe that market manipulation, in its countless, malleable varieties, will not be significantly reduced by the many sorts of regulations that have already been attempted and that do not rely on transforming the underlying incentives of manufacturers and sellers of consumer products.[97]

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95. *See, e.g.*, Hanson & Kysar II, *supra* note 2, at 1555-58; Hanson & Logue II, *supra* note 24, at 1263-73, 1322-49; Hanson et al., *supra* note 24, at 524-52.

96. *See, e.g.*, Hanson et al., *supra* note 24, at 527-28.

97. *See, e.g.*, Hanson & Kysar II, *supra* note 2, at 1483 (describing how social science studies have demonstrated that product warnings can have a *forbidden fruit* appeal to children and quoting a tobacco industry document that recognized that "the warning label on the package may be a plus"); Hanson & Logue II, *supra* note 24, at 1168 n.9 (describing how "[e]ach of the two most significant prior efforts to regulate cigarette manufacturers–through warning requirements and advertising bans - turned out to favor the cigarette industry"); Hanson & Kysar, *supra* note 2 (describing ways in which industry public service campaigns, ostensibly designed to help curb underage smoking can have counterproductive results and recounting a variety of ways in which tobacco manufacturers circumvent or, indeed, openly ridicule product warning requirements). Even now, when social concerns appear to be the greatest threat to the tobacco industry, when advertising is supposedly prohibited on television, and when still other types of advertising are prohibited by the global settlements (e.g., outdoor advertisements or advertisements using cartoon characters), cigarette companies are finding ways to advertise. The series of corporate responsibility advertisements recently run by Phillip Morris on television is a perfect example. By projecting an image of charitable largesse and general good will, the tobacco maker is able to confound consumer attitudes about cigarettes: contrary to the predictions of the rational actor model, people's beliefs about the source of a risk greatly affect their view of the magnitude of that risk. The voice mail messages used by Brown and Williamson earlier this year on its

As may now be obvious, one's position on the question of how well the existing law addresses the problem of manipulation depends upon how significant one perceives the underlying problem to be. Henderson and Rachlinski may believe that existing legal arrangements adequately, or nearly adequately, address the problem because they also believe that there is no empirically significant problem to solve. Consistent with that belief, there are several telling features of the examples that Henderson and Rachlinski provide. First, none of their highlighted legal solutions even purport to address the many means of manipulation separate from advertising that we have described. Even if regulators could end, or substantially curtail, harmful manipulation through advertising, the removal of that single weapon from what is an arsenal of available weapons for manufacturers would have only limited benefits.

Second, even with respect to just advertising, we see little reason to feel reassured by the current state of regulation. Despite Henderson and Rachlinski's suggestion that existing legal regulations successfully combat the problem of market manipulation, their examples are of regulations that currently represent, at best, unfulfilled promise–market manipulation is, today, still ubiquitous, and the regulations are too new or too rarely used to have had any significant effect. We will address those criticisms more particularly in this Section by examining each of the alternative legal mechanisms that, according to Henderson and Rachlinski, already provide an adequate response to the problem of market manipulation.

A. *Unfair or Deceptive Trade Practices Regulation*

Henderson and Rachlinski first argue that we overlooked the role of federal and state agencies that regulate unfair and decep-

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customer service number provide another example. *See* Hanson & Kysar, *supra* note 2. The content of the messages is almost surreal in its flagrant mockery of concerns about underage smoking. More surprising, however, is the way in which the 1-800 number used to reach those messages circulated among consumers, ultimately resulting in a highly successful, virtually free, and apparently legal advertising campaign for Brown and Williamson.

We do not argue that *all* of those types of circumventions of legal controls would disappear under enterprise liability. Rather, we argue simply that we have not done the best we can to address an underlying problem merely by adopting a particular regulation directed at one or more symptoms of the problem.

tive trade practices. Contrary to that assertion, in our earlier articles we did acknowledge the fact that the Federal Trade Commission (FTC), state Attorneys General, and other government actors review advertisements for unfair or deceptive practices.[98] However, we argued that such command-and-control regulation could never stay apace with the market's ability to produce massive amounts of ever-evolving exploitative conduct. More precisely, we contended that agencies such as the FTC[99] suffer from a number of institutional limitations that prevent them from fully combating the problem of market manipulation.[100]

Henderson and Rachlinski initially appear to accept our position by noting that "manufacturers and retailers will almost certainly outpace regulatory efforts to develop, ex ante, an effective set of command-and-control restrictions on advertising."[101] To suggest why we have understated the influence of current laws, however, they then highlight the FTC's potential for after-the-fact corrective action: "[T]he breadth of the statutory authority held by the [FTC] allows it to conduct ex post assessments of marketing practices that deceive and harm consumers."[102] Granted, but that does not alter our point. Henderson and Rachlinski do not claim, nor could they, that the authority to act has translated into sufficient action. As we have previously written, the practices challenged by the FTC are likely to "represent only those that have been around long enough or are egregious enough to become transparent."[103] The FTC, and many agencies like it, have very limited resources with which to take advantage of their authority, and it is not at all clear that the penalties they exact pose much of a threat to the thousands of sellers they regulate. Moreover, our argument is that consumer product markets will *evolve* to contain manipulative practices, even if the perpetrators are unaware of their offense. If manufacturers themselves are not cognizant of their

98. *See* Hanson & Kysar II, *supra* note 2, at 1555-58.

99. We use the FTC as our prime example because its regulatory activity is generally regarded as the most comprehensive and successful of governmental actors in the area of deceptive trade practices. *See* Paul H. Rubin, *Information Regulation (Incl. Regulation of Advertising)*, Encyclopedia of Law and Economics 5110 (1997).

100. *See* Hanson & Kysar II, *supra* note 2, at 1555-58; *see also* Hanson & Logue II, *supra* note 24, at 1173-78, 1263-81.

101. Henderson & Rachlinski, *supra* note 9, at 237.

102. *Id.*

103. Hanson & Kysar II, *supra* note 2, at 1556.

manipulative behavior, how can regulators be aware? Put differently, ex post regulation is not equivalent to ex post incentive-based regulation. For those reasons, we do not believe that the FTC's command-and-control approach could ever equal the resolve of financially motivated market actors.

B. *Existing Tort Law and the Third Restatement*

Henderson and Rachlinski make the strongest case that we have undersold the effectiveness of existing products liability law in their discussion of certain doctrines reflected in the Restatement (Third) of Torts: Products Liability. They note that, under the Third Restatement, a manufacturer's primary duty is to adopt reasonable product designs rather than simply warn against product risks.[104] According to this policy, even if a manufacturer undermines the force of a product warning through manipulative advertising, the manufacturer can still theoretically be held liable if the product design is defective. They also note that an important factor in determining the reasonableness of a product design is "the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing."[105] Indeed, according to Henderson and Rachlinski, "the new *Restatement* speaks directly to the potential of advertising to manipulate consumer perceptions and behavior and admonishes courts to be alert to these possibilities in assessing the adequacy of product designs and warnings."[106]

Our earlier articles did not address these aspects of the Third Restatement and, in that respect, we were guilty of underestimating the sensitivity of existing products liability law to manipulative manufacturer conduct, at least inasmuch as the Restatement both reflects and influences the common law. Guided by consumer expectation principles such as those highlighted by

104. This policy is reflected in the Restatement (Third) of Torts: Prod. Liab. § 2 cmt. l (1997). *See also* Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328 (Tex. 1998) (affirming a jury award for injuries caused by an improperly mounted tire, despite clear warning, because safer design was available); Rogers v. Ingersoll-Rand Co., 144 F.3d 841 (D.C. Cir. 1998) (refusing to shield a manufacturer from liability for a non-functioning reverse alarm on a milling machine, despite the existence of a warning to check the reverse alarm before operating machine).

105. Henderson & Rachlinski, *supra* note 9, at 235 (quoting Restatement (Third) of Torts, § 2 cmt. f (1998)).

106. *Id.*

Henderson and Rachlinski, courts can attempt to make judgments about the nature and degree of manipulation involved in a manufacturer's conduct. For instance, as the authors point out, the Ohio Supreme Court has upheld a plaintiff's judgment based on the defective design of an all-terrain vehicle in part because the vehicle was marketed in a manner likely to encourage unreasonably dangerous conduct by drivers.[107]

We welcome such recognition of the impact of manufacturer marketing and related conduct. As we have argued elsewhere,[108] our general recommendation with respect to market manipulation is that policymakers of all stripes–judges, legislators, regulators, legal scholars, economists, public health advocates, and others–give serious thought to the possibility that market manipulation actually is as pervasive and problematic as we have described. The all-terrain vehicle opinion described by Henderson and Rachlinski represents precisely that type of open and deliberate inspection of market conduct. In a more recent example, the New Jersey Supreme Court has created an exception to the traditional learned intermediary tort doctrine in recognition of the fact that pharmaceutical drug manufacturers are marketing directly to consumers with increasingly aggressive techniques that raise doubts about the physician's ability to fulfill the learned intermediary role.[109]

Whether the Third Restatement will help lead courts further in this direction remains to be seen. We are certainly cheered that Henderson and Rachlinski believe that tort law will, in part because of the latest Restatement, take seriously the possibility that "product-related risks should not be undermined by advertisements."[110] Nevertheless, we fear that the type of sensitivity that Henderson and Rachlinski perceive in the Third Restatement will prove too weak a medicine to significantly challenge the disease of

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107. *See id.* at 235-36 (citing Leichtamer v. American Motors Corp., 424 N.E.2d 568 (Ohio 1981)).

108. *See* Hanson & Kysar, *supra* note 2.

109. *See* Perez v. Wyeth Labs., Inc., 734 A.2d 1245 (N.J. 1999); *see also* Honorable v. Easy Life Real Estate System, 100 F. Supp. 2d 885, 888 (N.D. Ill. 2000) (accepting, for purposes of stating a Fair Housing Act claim, the argument that "market outcomes frequently will be heavily influenced, if not determined, by the ability of one actor to control the format of information, the presentation of choices, and, in general, the setting within which market transactions occur, allowing some to exploit those tendencies for gain" (internal quotations omitted)).

110. Henderson & Rachlinski, *supra* note 9, at 234.

market manipulation. Contrasted with the Ohio all-terrain vehicle opinion are cases such as *Joseph E. Seagram & Sons v. McGuire*,[111] in which a group of alcoholics brought suits against manufacturers of alcoholic beverages, alleging that they had failed to warn and instruct plaintiffs of the danger of developing alcoholism from prolonged and excessive consumption of alcoholic beverages. More specifically, plaintiffs argued that defendant "Seagram was advertising and promoting [alcoholic] products to increase consumption, to maintain regular customers, to attract new markets and to suppress vital information,"[112] and that "[t]hese pictorials and writings created the false illusion and false belief that drinking was safe."[113]

The Supreme Court of Texas greeted these claims with a perfunctory application of the "common knowledge" doctrine, in which a defendant manufacturer is not liable for harms which are "generally known and recognized."[114] Despite its otherwise routine application of the defense, the Court noted significant discomfort with the tension it perceived between what is supposedly "common knowledge" and what is prominently displayed in television ads, billboards, and other public venues:

> Obviously, there is a certain irony in the "common knowledge" defense. Because the pervasive danger of alcoholism from prolonged and excessive consumption of alcoholic beverages is so well known, Seagram has no duty to warn or instruct. However, while Seagram argues that the danger of alcoholism is a matter of common knowledge such that it had no duty to warn or instruct, it continues to spend billions of dollars advertising the consumption of alcoholic beverages as a particularly positive activity . . . .
>
> There is . . . substantial evidence that alcohol commercials do encourage alcohol use. By presenting drinkers in carefree social and sexual situations, alcohol commercials connote the harmlessness and acceptability of alcoholic beverages and suggest that alcohol consumption is a particularly

111. 814 S.W.2d 385 (Tex. 1991). Henderson and Twerski helped write an amicus brief supporting the result that the Texas Supreme Court adopted in this appeal. *See* Henderson and Twerski, *supra* note 41, at 1323 n.241.

112. *Seagram*, 814 S.W.2d at 386.

113. *Id.* at 387.

114. Restatement (Second) of Torts § 402A cmt. j (1965). The doctrine also appears in the Third Restatement. *See* Restatement (Third) of Torts: Prod. Liab. § 2 cmt. j (1998).

> positive activity. This visual barrage of attractive and seductive messages infiltrates the audience's consciousness and creates an unconscious presumption in favor of drinking.[115]

Similarly, the Iowa Supreme Court in *Maguire v. Pabst Brewing Co.*,[116] rejected the claim of a plaintiff who was injured when struck by a drunken driver.[117] Plaintiff argued, among other things, that the "untrammeled marketing practices" of a beer manufacturer constituted "an invitation to excess, through exaltation of hedonistic tendencies over good judgment."[118] Despite noting that "there is a ring of truth to plaintiffs' characterization of [the manufacturer's] advertising practices"[119]–which included $25 million per year in expenditures and use of the slogan, "Let's Have Another"–the Court concluded that the plaintiff could not prevail on any of the six theories of liability that he advanced.[120]

An important difference between these cases, in which plaintiffs' claims of undue manufacturer influence failed, and the Ohio all-terrain vehicle case or the New Jersey learned intermediary case, in which such claims succeeded, is that the plaintiffs were unable to link the manufacturer conduct to some existing product defect. In other words, the successful plaintiffs used manufacturer manipulation to supplement evidence of an alternative design or to blunt the force of an otherwise available defense such as assumption of risk or product misuse; the unsuccessful plaintiffs were forced to rely upon evidence of manipulation as their primary vehicle for liability. As Henderson (with Twerski) has noted, courts are extremely reluctant to "hold distributors of nondefective products liable for having promoted their product too aggressively."[121] As the authors report:

> [a]lthough a few decisions over the years have explicitly relied on theories of overpromotion to justify liability in the absence of traditionally defined defect, and although several opinions in more recent alcohol and cigarette litigation have referred disapprovingly to the methods by which distributors

115. *Seagram*, 814 S.W.2d at 388 n.5 (quoting *Note*, 58 So. Cal. L. Rev. 1107 (1985)).

116. 387 N.W.2d 565 (Iowa 1986).

117. *See id.* at 569.

118. *Id.*

119. *Id.*

120. *See id.* at 572.

121. Henderson & Twerski, *supra* note 41, at 1328.

> have promoted their harmful products, American courts generally have not recognized product overpromotion as an indirect means of imposing product-category liability[122]

The Third Restatement reinforces the courts' reluctance by permitting the judicial assessment of manufacturer marketing efforts to occur solely within the context of determining design defectiveness. The inquiry focuses on whether a product is unreasonably dangerous in light of consumer expectations, not on whether consumer awareness of product risks has been manipulated or is otherwise inaccurate. No liability attaches to manipulation alone. That approach necessarily limits the scope of conduct that is subject to legal inspection, even apart from the fact that it only permits inspection of manipulation in the form of product advertising. Ultimately, the approach gives rise to the tension that some courts feel in summarily dismissing novel claims despite their "ring of truth" and despite the "irony" of liquor manufacturers, claiming as "common knowledge" a truth that they spend billions of dollars contradicting.

Of course, we recognize that these cases would face significant problems under any liability regime–problems regarding general and specific causation and the measure of damages, among others. But, putting those difficulties aside, our point is that courts are not adequately sensitive to the problem of manipulation even in extreme cases in which the efforts to manipulate are apparent and disconcerting to judges and juries. The cases also confirm our suspicion that, in many of the instances in which manufacturer manipulation is thickest and most identifiable, judges and juries seem likely to conclude that consumers nevertheless know and understand the underlying risk. That is true because manufacturer incentives to manipulate consumer risk perceptions are strongest in precisely those cases in which consumers have some predicate awareness of the risk.[123] Consequently, just as scholars and com-

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122. *Id.* (citations omitted). This year, those same authors report in their products liability casebook that this type of "negligent marketing" theory is being tested by some crime victims against manufacturers of handguns. *See* James A. Henderson, Jr., & Aaron D. Twerski, Products Liability: Problems and Process 471 (4th ed. 2000). They conclude the discussion, however, by pointing out that "no court ha[s] yet to fashion such a broad 'negligence marketing' theory" and that "[i]t remains to be seen whether the appellate courts will approve such a novel theory of liability." *Id.*

123. *Cf. infra* text accompanying notes 219-26.

mentators struggle to understand how consumers could possibly underestimate the risks of smoking amidst massive public health campaigns, courts and juries will be disinclined to believe that manipulation could be powerful enough to undermine consumer attention to risks that are thought to be a matter of "common knowlege."

One deficiency of the existing products liability system, therefore, seems to be that even in those cases in which judges and juries identify manipulative conduct, they are unduly reluctant to act against it. Indeed, given that current law responds only to fairly egregious manipulation–and then only when consumers cannot be said to have been aware of the risk–it is no surprise that Henderson and Rachlinski can offer so few examples of cases in which concern for market manipulation influenced the judicial outcome. A second, and probably more important, deficiency stems from the fact that manipulation in the vast majority of remaining product markets is far less transparent and, therefore, far less likely to undergo any judicial inspection in products liability cases. That deficiency exists not only because much manipulation is subtle and can occur in forms other than just basic advertising, but also because an extremely common form of risk perception manipulation in consumer product markets is silence. That is, when consumers are not cognizant of a product's risk, the manufacturer's best strategy is generally to leave well enough alone, helping to ensure that consumers remain unduly optimistic with respect to the risk.[124] Therefore, even if courts did routinely conduct inspections of product advertisements in search of manipulative conduct, they would not even attempt to discern the influence of what is perhaps the most prevalent form of manufacturer manipulation.

Enterprise liability, on the other hand, offers the theoretical promise of forcing product risk information out in the open, both through its impact on the price mechanism and through its enhanced incentive for manufacturers to monitor and manage the rate and severity of accidents involving their products. A product risk that goes undiscovered by consumers and for which manufacturers are not liable under a fault-based regime may well turn out under enterprise liability to be one that manufacturers identify and prevent or, alternatively, disclose and explain to consumers,

124. *See infra* text accompanying notes 178, 219-26.

all in an effort to lower liability costs. Enterprise liability aims to avoid reliance upon the limited capabilities of judges and juries to hypothesize alternative designs and discern the impact of marketing. The *Seagram* and *Pabst* courts may have rejected liability against alcohol makers simply because the litigants failed to conjure the reasonable alternative design that existing law generally requires of them.[125] To the extent that enterprise liability forces manufacturers to internalize the costs of product-caused harms, it would help to inspire the production of such alternative designs, along with alternative distribution schemes, product warnings, consumer awareness campaigns, and other as-yet unimagined innovations, all by enlisting the power of the ultimate laboratory–the market.

Henderson and Rachlinski have already "concede[d] that economic forces induce manufacturers to undertake marketing campaigns that have adverse social consequences that escape remedy under the existing legal regime."[126] In other words, they have conceded that consumers are manipulable and that manufacturers exert an influence on both consumer perception and behavior Given that concession, enterprise liability, with its ability to self-discipline manufacturer behavior and enlist manufacturers' marketing prowess in aid of regulating consumer product use, follows as the logical products liability regime. The challenge for those interested in limiting manufacturer exploitation of consumer cognitive biases is to devise a system of regulation that equals the manipulative market in resourcefulness and tireless zeal to influence consumer behavior. As noted in our earlier articles,[127] we believe that the only institution capable of doing so is the market itself. The occasional success of a fault-based liability regime at recognizing manipulative conduct does not alter that belief. It only makes us wonder what conduct is left unrecognized.

C. *Tobacco Litigation*

Henderson and Rachlinski offer one more piece of evidence to show that courts are adjusting tort doctrines to respond to the

125. *See* Restatement (Third) of Torts: Prods. Liab. § 2(b) (1998).

126. Henderson & Rachlinski, *supra* note 9, at 243.

127. *See, e.g.*, Hanson & Kysar II, *supra* note 2, at 1555-58; Hanson et al., *supra* note 24, 597-99.

problem of market manipulation. Specifically, with respect to cigarette-related injuries, they explain that

> the bases of manufacturers' liability have been extended far beyond failure-to-warn. (Indeed, traditional state law failure-to-warn claims are now largely preempted by federal regulations.) A panoply of other theories based on the marketing of cigarettes is available to products liability plaintiffs, some of which clearly reflect growing judicial concern with manufacturers' manipulation of consumers' cognitive biases.[128]

We would interpret their evidence a little differently. We find the history and current state of tobacco litigation and regulation anything but reassuring, for reasons that we have laid out in detail elsewhere. Again, we will not rehearse those arguments here, but a few comments seem in order, particularly in light of Henderson and Rachlinski's claim that we have somehow failed to consider the ways in which the law has already responded to our concerns.

Henderson and Rachlinski seem to be claiming that the judicial system's desire to take manipulation into account is manifested in plaintiffs' use, for many years, of a large number of theories well beyond the limited focus of "failure-to-warn." Their claim, however, confuses cause and effect. The fact that so many legal theories have been attempted is a consequence of the fact that what had been the best option, failure-to-warn, has long been virtually unavailable to plaintiffs. Because of that unavailability, plaintiffs have been forced to experiment with a range of less appealing theories. Many theories have been tried, but the win-loss record over the last fifty years, and even over the last several years, does not reveal a judiciary that is particularly sensitive to the problem of manipulation.[129]

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128. Henderson & Rachlinski, *supra* note 9, at 234 (footnotes omitted).

129. *See* Hanson & Logue II, *supra* note 24, at 1169-72; *see also* Carl T. Bogus, *Gun Litigation and Societal Values*, 32 Conn. L. Rev. 1353, 1365 (2000) ("Since the 1950s more than a thousand lawsuits had been filed against cigarette companies by and on behalf of injured smokers. With the exception of one case relating not to tobacco but to asbestos contained in Kent cigarette's 'Micronite' filter, the cigarette companies had won them all." (citations omitted)). That trend was finally broken by the unprecedented actions brought by state Attorneys General on behalf of their state's Medicaid programs–actions, significantly, that avoided the problem of plaintiff conduct. In addition, a handful of individual tobacco plaintiffs were able to achieve success, at least at the trial court level. *See id.* at 1366. Nevertheless, despite those recent developments, the historical win-loss record for the tobacco

Moreover, probably the biggest obstacle to plaintiff recovery has been some form of the primary argument on which Henderson and Rachlinski rely to reject enterprise liability as a viable policy option: that consumers are adequately informed and need to take responsibility for their consumption choices. Plaintiffs have tried to convince juries and courts that they were manipulated, but their attempts have been unsuccessful. Even when juries were doctrinally barred from considering the assumption of risk defense, they were unable to stop their perceptions of smoker awareness of health hazards from influencing their judgments.[130] Market manipulation takes place in ways that jury members do not recognize. Juries are disinclined to believe that plaintiffs could fall prey to manipulative conduct or, indeed, that such conduct even occurs. If anything, therefore, the history of cigarette litigation demonstrates the ease with which those responsible for regulating the market can be manipulated into believing that consumers are not manipulated. Indeed, the fact that the failure-to-warn option was unavailable and that "mandatory" warnings have been unsuccessful is attributable largely to the industry's successful efforts to create just those results.[131]

Even the headline-grabbing punitive damages verdict levied earlier this year[132] can hardly be considered a result of conventional products liability law. It took a remarkable confluence of events–some of which were largely independent of the tort system–to unearth the evidence upon which that verdict was based. Indeed, without the actions of a few key whistleblowers, a uniquely motivated Surgeon General, a brave and determined FDA Commissioner, and the Congressional subpoena power, the tobacco in-

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industry remains at a stunningly high percentage of victories, even among contemporary lawsuits.

130. Bogus, *supra* note 129, at 1362-66 (reviewing the case of Wilks v. American Tobacco Co., 680 So.2d 839 (Miss. 1996)).

131. *See* Hanson & Logue II, *supra* note 24, at 1322-24; Hanson & Kysar I, *supra* note 2, at 717-21; Hanson & Kysar II, *supra* note 2, at 1509-10. A similar story can be told with respect to other efforts by regulatory agencies to control tobacco manufacturer conduct. Henderson and Rachlinski claim that "the law seems ahead of the cognitive psychological research on this point, having restricted advertising for cigarettes decades ago." Henderson & Rachlinski, *supra* note 9, at 257. As described earlier, however, tobacco manufacturers have found a multitude of ways in which to circumvent regulatory restrictions and, indeed, to turn those restrictions around to their advantage. *See supra* note 97.

132. *See* Gordon Fairclough, *Tobacco Companies Rail Against Verdict, Plan to Appeal $144.87 Billion Award*, Wall St. J., July 17, 2000, at A3.

dustry's string of courtroom victories may well have continued unabated to this day. Put differently, the existing products liability system wrestled with tobacco products for decades and produced a remarkably uniform set of results. With new evidence, the system is beginning to produce some different outcomes, at least in a handful of notable cases. The availability of that new evidence (and the correlative sensitivity to cognitive manipulation found in more recent litigation) is not necessarily a victory of the existing paradigm. Instead, it reflects the brave effort of a few individuals who had little to do with the tort system (except to the extent that they were often themselves sued by tobacco companies). Moreover, even if one were to credit such tobacco litigation as a triumph of the existing products liability system, the system remains a highly imperfect way to confront manipulative conduct on the part of tobacco manufacturers. Far too much conduct escaped legal control for far too long before the judicial system even began to recognize the nature of the tobacco problem.

Finally, Henderson and Rachlinski note that "[t]he recent global settlements of actions by state Attorneys General contain explicit commitments on the part of cigarette manufacturers to curtail efforts to manipulate consumers via advertising, especially efforts to entice young persons to begin smoking."[133] We recognize and endorse those efforts by state Attorneys General to confront market manipulation on the part of tobacco manufacturers directly and creatively. Nevertheless, as one of us has argued elsewhere at length (with Kyle Logue),[134] the global settlements have been ill-conceived from their inception, primarily because they fail to capitalize on the market-based advantages of a regulatory scheme such as enterprise liability. Advertising restrictions have proven far too blunt an instrument to control tobacco industry conduct. At best, such restrictions manage to block tobacco manufacturers from engaging in one type of manipulation; at worst, they create new opportunities for manufacturers to exploit consumer's cognitive failings.[135] Perhaps the ultimate demonstration of such regulatory

133. Henderson & Rachlinski, *supra* note 9, at 234.

134. *See* Hanson & Logue II, *supra* note 24, at 1316-49.

135. *See supra* note 97. In addition, consider the recent "natural" marketing campaigns adopted by R.J. Reynolds for its Salem Menthol cigarettes and Brown & Williamson for its Kool Natural cigarettes. Both campaigns arrived on the heels of increased public scrutiny of the chemical additives in traditionally manufactured cigarettes and efforts by some states and Congress to require full disclosure of

failure is evidence that even the industry's (now required) campaigns to discourage children from smoking can have the opposite effect, a fact of which the industry seems well aware.[136] Our inability to capture precisely the empirical effect of such regulations and industry countermoves only strengthens the need for enterprise liability. Properly disciplined, the market process will unravel such difficult empirical questions for us. Again, the problem with command-and-control approaches, even as embodied in the sweeping and dramatic settlements by state Attorneys General, is that they do not eliminate the underlying incentive to manipulate. They are merely fingers in the cracks of a bursting dam, unable to succeed because they are unable to stem the destructive pressure at its source.

Henderson and Rachlinski might respond here by reminding us that they now concede that cigarette manufacturers should be subject to an enterprise liability rule.[137] Therefore, we should not use the cigarette market as an example of a context in which their arguments against enterprise liability do not apply. We would have two responses to such a contention. First, if Henderson and Rachlinski truly endorse enterprise liability in this context, then they cannot credibly point to current levels of liability for cigarette manufacturers as evidence that the judicial system is sufficiently sensitive to the problem of market manipulation. Every year in this country, cigarettes cause approximately 400,000 deaths.[138] The liability incurred by tobacco manufacturers represents only a

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those additives. The ad campaigns feature forest green design schemes, Edenesque images of waterfalls and lush foliage, and repeated use of the words "nature" and "natural." A single-page print ad for Kool Natural Lights, for instance, repeats the word "natural" a remarkable thirteen times. The companies skirt deceptive advertising liability by linking "natural" with the cigarettes' mint leaf-supplied menthol flavor. The overall effect of the campaigns, however, is far more subtle. As behavioral researchers have noted, people respond more favorably to risks that they view as emanating from natural, as opposed to man-made, sources. In other words, a risk may be underestimated simply because it is attributed to nature. R.J. Reynolds unabashedly exploits that cognitive bias in the tagline to its Salem ads: "Menthol from nature. Created by plants, not people." Never mind that cigarettes typically contain hundreds of additives, most of which are created by people, not plants. *See* Hanson & Logue II, *supra* note 24, at 1348 n.769.

136. *See* Hanson & Kysar II, *supra* note 2, at 1479-83.

137. *See* Henderson & Rachlinski, *supra* note 9, at 257.

138. *See* Hanson & Logue II, *supra* note 24, at 1167.

tiny fraction of that harm.[139] Assuming that causation can be firmly established in only one half of those cases and using a range of values in well-known tobacco cases for purely compensatory damages–from the first jury verdict against the industry (later to be reversed) in *Cipollone v. Liggett Group, Inc.* of $400,000[140] to the more recent award in the Engle class action of roughly $4,000,000 for each of the three sample plaintiffs[141]–total industry liability for compensatory damages alone should be between $80 billion and $800 billion per year. If one accepts that enterprise liability may be appropriate in this context, then clearly tort law has a long way to go in its treatment of tobacco plaintiffs before it can be cited as evidence of the law's sensitivity to market manipulation.

Second, Henderson and Rachlinski's acceptance of the idea of holding cigarette manufactures absolutely liable for cigarette-caused injuries is, at least for Henderson, somewhat of a dramatic conversion. Writing again with Twerski, Henderson once expressed an unambiguous opinion of what the law should be and would be at this point in our history with respect to cigarette litigation:

> We have little doubt that the attempts by some courts to use risk- utility analysis to impose liability on entire product categories in the absence of feasible alternative designs are doomed to failure. Thus, the movement to declare such products as cigarettes . . . categorically defective will be over and done with well before the end of the century. . . . Similarly, the attempt to push failure-to-warn doctrine to extremes in order to impose liability in . . . cigarette . . . litigation is doomed to failure. . . . . [Such] cases share a common denominator. They involve high-profile products with strong consumer demand whose dangers are well-known.
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> One further observation. Asbestos litigation has been a bitter pill for the American judicial system to swallow. . . . Courts will think long and hard before they once again allow such a litigation disaster through the cracks. Asbestos was

139. *See supra* note 129 (describing the industry's historical success at avoiding adverse judgments).

140. 593 F. Supp. 1146 (D.N.J. 1984), rev'd in part and aff'd in part, 893 F.2d 541 (3d Cir. 1990), aff'd in part and rev'd in part, 505 U.S. 504 (1992).

141. *See* Richard Daynard, *The Engle Verdicts and Tobacco Litigation*, 321 Brit. Med. J. 312 (2000).

> factually unique. The dangers were hidden and the defendants arguably malevolent. If such a set of facts should return to haunt us in the future, courts will have to cope. But they will not change the law in ways that generate such overwhelming spectacles on a routine basis. Thus to expect that courts will open their doors to litigating the fate of politically unpopular products such as cigarettes . . . providing causes of action to hundreds of thousands of alleged victims, is fantasy. One way or another, these category-liability cases will be brought to heel.[142]

Ten years ago, Henderson unmistakably and confidently held the views that smokers are well informed and that manufacturer liability would therefore be inappropriate. Striking, too, is his certainty that, even if some case were to emerge in which plaintiffs were ill-informed and defendants were malevolent, judges would not open the courthouse doors. In light of those strongly held views, we credit Henderson for recognizing that market manipulation has played a role in adversely skewing smokers' risk perceptions and for urging courts to welcome tobacco plaintiffs. However, with respect to the judicial reaction, the record is mixed and, in a literal sense, the jury is out: it is far too premature to wave recent tobacco verdicts as a banner of the existing liability system's sensitivity to manipulation.

Moreover, we believe that Henderson's change of view on tobacco litigation supports a strong presumption in favor of adopting enterprise liability even in non-tobacco contexts. Henderson and Twerski's view in 1991 regarding consumer risk perceptions was both understandable and extremely widely held, especially among economically-oriented products liability commentators. That Henderson and Rachlinski now see it as wrong, presumably because of the rare opportunity to look at detailed evidence indicating as much, is telling. How many other product markets would turn out to contain "hidden dangers" or even "malevolent defendants" under such scrutiny? The confidence that most of us place in our opinion about how well informed consumers are about product risks is as unwarranted as it is widespread. Our confidence in our ability to recognize when and how market manipulation might operate with

142. James A. Henderson & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. Rev. 1332, 1336-37 (1991) (footnotes omitted).

respect to any product–as any products liability regime less complete than enterprise liability requires–seems no more justified. Enterprise liability, in contrast, does not so significantly depend on our demonstrably limited abilities to make such discernments. As such, we believe that it is preferable to any alternative that requires drawing fine lines on limited evidence, using limited faculties, with, at least so far, limited results.

D. *Summary*

We have described a variety of reasons why existing systems of consumer product regulation do not sufficiently redress widespread manipulation of consumer product risk and benefit perceptions. Henderson and Rachlinski, in their final analysis, do not appear to dispute that fact, "conced[ing] that economic forces induce manufacturers to undertake marketing campaigns that have adverse social consequences that escape remedy under the existing legal regime."[143] Whether because of underenforcement of legal rules by agencies, widespread failure to bring claims by potential plaintiffs,[144] inability on the part of agencies, courts and juries to appreciate and act against manipulation, failure of any of the current regulatory alternatives to address the many forms of market manipulation other than advertising, manipulation of juries by litigants and their attorneys in a manner similar to market manipulation, or the fact that no current law responds to manufacturer manipulation of consumer preferences,[145] manufacturer conduct has not been controlled in the manner or to the extent predicted by a standard legal economic model of this problem.

For those reasons, we believe that existing law should yield to a more dramatic policy solution–a solution such as enterprise liability. While Henderson and Rachlinski argue with some force that "the existing liability system does a much better job . . . than [enterprise liability] proponents give it credit for,"[146] even those authors admit that no incarnation of the existing system has proven as adept at combating manipulation as is necessary. In

143. Henderson & Rachlinski, *supra* note 9, at 243.

144. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983).

145. This possibility is discussed *infra* text accompanying notes 191, 379-91.

146. Henderson & Rachlinski, *supra* note 9, at 243.

such a case, we believe that enterprise liability is justified simply because it is the most potent products liability regime that the law can offer, though we recognize that even enterprise liability will prove inadequate in some respects.[147] That is, in addition to the many other arguments that we and others have made in favor of enterprise liability, one can now add the argument that enterprise liability represents the best hope the law has at constraining the incredibly slippery and subtle phenomenon of market manipulation.

No one can know precisely what the world would look like had enterprise liability long been the law of the land. But we cannot help but imagine that many of those 400,000 people per year who now die from smoking-related diseases would strongly prefer such a world, as would many of the other consumers who have been injured or killed by other products after first being manipulated by their manufacturers. We do not agree that the current legal regime is anywhere close to being adequately sensitive to the problem of market manipulation. Nor will it be, we fear, until the trend toward enterprise liability is revived. Consumers should not have to wait for legal scholars and lawmakers to perceive manipulation that is intended by its practitioners both to be unobservable and to alter and obscure what little vision we do have.

III. Is Enterprise Liability Unworkable?

Still, Henderson and Rachlinski contend that, "whatever attractiveness [enterprise liability] may have as a purely theoretical construct, the absolute manufacturers' liability that it calls for could never be made to function as a practical matter."[148] According to Henderson and Rachlinski, the twin insurance evils of moral hazard and adverse selection would combine to prevent enterprise liability from achieving its much-lauded potential to reduce accident costs. Moreover, even apart from those allegedly fundamental flaws of enterprise liability as an "insurance scheme,"[149] Henderson and Rachlinski argue that proponents of enterprise liability have never proposed an operable concept of causation to accompany the no-fault liability standard. Upon close inspection,

147. *See infra* text accompanying notes 167-68.
148. Henderson & Rachlinski, *supra* note 9, at 244.
149. *Id.* at 238.

Henderson and Rachlinski contend, any causation analysis that might be offered would either be utterly unworkable or patently untrue to the theoretical foundations of enterprise liability.

A. *Insurance-Based Arguments*

According to Henderson and Rachlinski, we do "not even attempt to address the practical problems presented by a strict liability system for products."[150] More specifically, they claim that our analysis of enterprise liability "ignores basic mechanics of any insurance scheme"[151] that would render it unworkable. Henderson and Rachlinski's characterization is mistaken. One of us has coauthored five articles entirely or substantially devoted to considering insurance effects and other alleged practical problems of enterprise liability.[152] Above, we briefly reviewed a few of the responses contained in those articles.[153] Henderson and Rachlinski themselves identify one of the most important responses: the fact that consumers have strong incentives to take care regardless of the promise of potential tort awards.[154] But they fail to consider how that fact significantly dampens their fears of insurance market unraveling. More generally, Henderson and Rachlinski do not even attempt to address our rebuttals of their insurance-based arguments, rebuttals that have been part of the written record for some time now.

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150. *Id.* at 218.

151. *Id.* at 238.

152. *See, e.g.*, Hanson & Logue I, *supra* note 24; Croley & Hanson III, *supra* note 24; Croley & Hanson II, *supra* note 24; Hanson & Logue II, *supra* note 24; and Hanson et al., *supra* note 24.

153. *See supra* text accompanying notes 55-59.

154. The authors write: "No tort remedy really fully compensates a parent for the loss of child or a maimed accident victim for the loss of a limb. Neither would it be possible for a tort system to offer an adequate sum for damages so as to make someone truly indifferent between the size of the damages and the injury." Henderson & Rachlinski, *supra* note 9, at 250. In other words, because physical losses of life and limb are imperfectly commensurable with monetary tort awards, the moral hazard problem is at least partially mitigated in the context of a products liability system. Henderson and Rachlinski's description of that incommensurability exists within the same paper that asserts: "Consumers would have no incentive to undertake their own precautions if manufacturers were forced to bear all of the cost of the harm that products cause." *Id.* at 226. No incentive, one must assume, except the fact that "it seems unlikely that a consumer, worried about protecting life and limb, would be willing to ignore safety concerns because the legal system promises some inadequate financial compensation if injury should occur." *Id.* at 250.

Additionally, the lesson that emerges from our work on behavioralism is this: never underestimate the power of consumer product manufacturers to influence the behavior of consumers. Henderson and Rachlinski complain that "[r]equiring manufacturers to serve as absolute insurers would impose liability on manufacturers for harm that could better be prevented by consumers,"[155] apparently believing that manufacturer liability and consumer prevention are mutually exclusive. We see no reason to assume, however, that the institution of enterprise liability would cause manufacturers to suddenly abandon their ability to influence consumer perceptions and preferences–an ability that Henderson and Rachlinski repeatedly acknowledge.[156] Instead, we believe that manufacturers would continue to utilize their arsenal of weapons to shape consumer views of product risks and appropriate product usages. Under enterprise liability, however, this arsenal would be deployed in service of a more socially beneficial cause. Indeed, we believe that the evidence reviewed in our earlier articles suggests that manufacturers would be quite successful in this task. At the absolute least, they would be as adept as first-party insurers.

Because their arguments begin with an inaccurate conception of enterprise liability as solely a third-party insurance scheme, Henderson and Rachlinski severely underestimate the potential for enterprise liability to mitigate the problems of moral hazard and adverse selection while inspiring more efficient risk-avoidance behavior on the part of both manufacturers and consumers. By viewing enterprise liability in this way, Henderson and Rachlinski neglect the active role that manufacturers play in affecting the incidence and severity of product risks, both through their control of the design and manufacture of products and their construction of consumer perceptions and preferences. Similarly, Henderson and Rachlinski fail to perceive the many ways in which manufacturers can replicate and, indeed, surpass the efforts of first-party insurers to segment risk pools and otherwise maintain the integrity of their insurance systems. Their most serious errors, however, are to make those assumptions without acknowledging, let alone addressing, the arguments that undermine them and that have re-

155. *Id.* at 214.
156. *See supra* text accompanying notes 13-17.

mained unanswered for several years now and then to characterize us as somehow failing to confront the debate.

B. *The Difficulty of Defining Causation*

Unlike their insurance-based arguments, one critique of enterprise liability that Henderson and Rachlinski have offered has long gone unanswered. Reviving the powerful critique of enterprise liability made first by Henderson and Twerski,[157] our present critics argue that enterprise liability would "flounder hopelessly"[158] in its attempt to grapple with problems of causation. Without some inherent limiting concept like risk-utility or design defect to narrow the range of causes of harm, the authors believe that the causation analysis under enterprise liability would set no limit on the number of potentially liable parties. Yet, if a notion like risk-utility or design defect is employed to limit the scope of the causation analysis, then the resulting liability system differs from the current system in doctrinal terminology only. A chief argument in favor of enterprise liability is that it requires internalization of all product-caused accident costs, without applying imprecise concepts such as fault. That argument, however, loses much of its force if such concepts are incorporated into the analysis through the back door of causation.

The causation critique of enterprise liability is especially powerful because it addresses the topic in a voice somewhat foreign to standard legal economic analysis of products liability. Economically oriented scholars typically begin their analyses with a bare minimum requirement of "but-for" causation and then, often implicitly and unselfconsciously, look to *policy* to see if the circumstances are such that it makes sense to say that an individual "caused" the accident. Generally, those policy concerns imply that the responsible individual is a person who, in some circumstances, might be able to lower the costs of accidents by adjusting their behavior. That is, there are some potential benefits to be reaped from having that party internalize costs.[159] The legal system has

157. *See, e.g.*, Henderson & Twerski, *supra* note 41, at 1279-83.

158. Henderson & Rachlinski, *supra* note 9, at 241.

159. Professor William Landes and Judge Richard Posner captured that relationship between efficiency and causation as follows: "If the basic purpose of tort law is to promote economic efficiency, a defendant's conduct will be deemed the cause of an injury when making him liable for the consequences of the injury

long adopted a very similar approach–asking first if the defendant is a cause in fact (i.e., "but-for" causation) and next whether, among the many potential causes in fact, the defendant can justly be called the "proximate cause." The latter determination is widely acknowledged by courts and commentators to be driven by policy considerations. Thus, as positivist legal economists have emphasized, the processes for determining causation used by economists and courts are similar.[160]

Significantly, with rare exceptions (Henderson and Twerski's work being chief among them), scholars who have addressed the topic of products liability have assumed that causation can be shown. That is, participants in the debate have typically assumed that, ignoring the conduct of the plaintiff, there are potential deterrence benefits to be gained from holding the defendant liable. The questions being asked by legal economists have instead been of the following sort: Should manufacturers be liable even when the consumer appears to have known the risk? Even when the consumer could have done something to prevent the accident? Even when the accident was not cost-justifiably preventable by the manufacturer? Scholars who oppose enterprise liability have answered "no" to all of these questions. The implicit (and sometimes explicit) assumption, however, has been that, if those questions were answered otherwise, holding defendants liable would make economic sense. Absent considerations of plaintiff knowledge and care, internalizing costs to the defendant is assumed to have beneficial deterrence effects in the products liability contexts under discussion. Most of the major criticisms of enterprise liability, therefore, have sought to show that the answer to one or more of the three questions presented above is "no," *assuming* that causation is established.

Henderson and Twerski's (and now Henderson and Rachlinski's) contribution to the debate is to draw attention to the ambiguity in the word "causation." They observe that under enterprise

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would promote an efficient allocation of resources to safety and care . . . ." William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. Legal Stud. 109, 110 (1983).

160. *See, e.g.*, William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 246-47 (1987); Landes & Posner, *supra* note 159. For more general efficiency-oriented analyses of causation in tort law, see Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69, 106-07 (1975).

liability, manufacturers would supposedly be liable for any accidents that their products "cause." Because "cause" is not defined explicitly, and because the debate has proceeded largely on the assumption that causation is established, Henderson and Rachlinski can plausibly claim that defenders of enterprise liability are advocating manufacturer liability for any accident in which "but-for" causation can be established. At that point it is easy to conjure up examples of situations in which there are several such "but-for" causes. For example, Henderson and Rachlinski write:

> Assume the following sequence of events: A victim-to-be is driving an automobile while intoxicated, swerves to avoid a skate-boarder interfering with traffic, loses control of the automobile, breaks through a traffic barrier and collides violently with a tractor-trailer parked by the roadside. Against which [enterprise liability] insurance pool would a claim for the victim's injuries appropriately be brought? The automobile's [enterprise liability] insurance pool? The alcoholic beverage's? The skate board's? The traffic barrier's? The tractor trailer's? Some of the above? All of the above? If several, or all, of the relevant insurance pools were implicated, on what conceptual basis would responsibility be apportioned?[161]

The most important point to note about that hypothetical is just how far it strays from the prototypical products liability case of a single consumer product inflicting harm on its user. We strongly suspect that the majority of consumer product accident cases do not involve such complex and multifarious causal factors as Henderson and Rachlinski introduce in their scenario. Thus, the cases would not require the type of extended proximate causation analysis that we are about to describe.

Nevertheless, we will take the bait and respond to the questions raised by Henderson and Rachlinski's scenario. In our view, those questions are troublesome because the scenario is full of products that appear to be the "but-for" cause of the injury, but that, absent more information, do not appear to be tied to the accident in a way that clearly suggests internalizing costs would be beneficial. Indeed, by calling the plaintiff a "victim," and by indicating that the plaintiff had considerable control over the accident (for instance, by not becoming intoxicated in the first place), the

161. Henderson & Rachlinski, *supra* note 9, at 241.

example confuses our categories even further. Of all the factors involved, one might think that it is the plaintiff who "caused" the injury and that none of the products had any "causal" connection.

Considerations of that sort, however, involve more than the simple "but-for" type of causation analysis. Instead, they involve the types of policy judgments that are made in the determination of "proximate" cause, raising the question of whether and how a system of enterprise liability would utilize proximate causation principles to narrow the scope of potentially responsible parties. Henderson and Rachlinski apparently believe that enterprise liability would require dismissing the traditional legal concept of proximate causation altogether, and that is why they argue that the above hypothetical would cripple a court applying enterprise liability.[162] As Professor Mark Geistfeld has explained,[163] however, there is no good reason to adopt that view. At the very least, the current method of determining proximate cause could continue unabated under enterprise liability. That is a simple, but often overlooked, point. Identifying a manufacturer to pay for an accident is *not* the goal of enterprise liability. In other words, there is no requirement under enterprise liability that, for every accident in which "but-for" causation can be shown, a corresponding manufacturer must be made to pay compensation. Rather, enterprise liability would continue to employ concepts of proximate causation to make the causation analysis tractable.

The question then becomes, of course, what exactly should those guiding concepts be? Assuming that efficiency is the goal of the tort system, the answer is simply to hold those parties liable for whom liability makes the most economic sense. Elsewhere, one of us (with Melissa Hart)[164] has proposed a series of questions regarding any accident context that can be helpful in determining whether or not the imposition of liability would have beneficial efficiency effects. Pertinent considerations include: whether a particular party appears to have the ability to undertake cost-justifiable investments in care that would prevent or lessen the harm;

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162. *See id.*

163. *See* Mark Geistfeld, *Implementing Enterprise Liability: A Comment on Henderson and Twerski*, 67 N.Y.U. L. Rev. 1157, 1162-66 (1992).

164. *See* Jon D. Hanson & Melissa R. Hart, *Law and Economics*, *in* A Companion to Philosophy of the Law and Legal Theory 311-31 (Dennis Patterson ed., 1994).

whether imposing costs would help regulate activity levels; whether a particular party's responsiveness to legal incentives is blunted by forces like judgment-proofness, insurance, social norms, or, as discussed earlier, an overriding aversion to personal injury due to the inadequate nature of financial compensation; and whether a particular party is in a good position to spread the costs of those accidents that cannot be prevented. To that list, we would add the question of whether a particular party's market position affords them the ability and incentive to manipulate risk perceptions. One can see that considerations of that sort go much further than the analysis of defect that Henderson and Rachlinski offer as the "'conceptual linchpin' that holds products liability law together."[165] Activity levels, to give just one example, are crucial determinants of the efficiency of product markets, yet they find no purchase in the defect analysis that forms the core of present products liability law. The causation analysis for enterprise liability that we envision allows one to consider the full panoply of ways in which liability can help ensure that the goals of the legal system are served.

Returning to Henderson and Rachlinski's hypothetical, the question becomes one of choosing among possible parties to hold liable (or to spread liability among) with those sorts of considerations in mind. For instance, one might suspect that automobiles can be equipped with breathalyzer devices that disable the engine's starter system unless the driver passes a sobriety test. In other words, one might suspect that the care level of car manufacturers (as opposed to say, skate board manufacturers) could best influence this particular accident context, even if one cannot establish that the car was defectively designed. In such a case, liability might be placed upon the automobile manufacturer in Henderson and Rachlinski's hypothetical, in order to spur development of some as-yet unidentified design improvement. Alternatively, one might present evidence that the drunken driver had been served repeatedly by a tavern keeper. Holding tavern keepers liable might well have beneficial deterrence effects in such a case, even when they cannot be shown to have known that the patron was intoxicated. Finally, one might present evidence that alcohol manufacturers and distributors have spent billions of dollars to support

165. Henderson & Rachlinski, *supra* note 9, at 241 n.110 (quoting Henderson & Twerski, *supra* note 41, at 1267).

a market for excessive drinking, as partially acknowledged by the *Seagram* and *Pabst* courts discussed above. Under enterprise liability, at least some of those dollars might be devoted toward, say, discouraging drunk driving, helping tavern keepers and liquor stores find ways to avoid selling to customers likely to drink and drive, and lobbying for federal regulations that might lead to the addition of breathalyzer ignition systems.

We wish to emphasize that a system of enterprise liability coupled with the type of causation analysis that we are describing is considerably more complicated and unruly than admitted by earlier analyses of enterprise liability. In that regard, Henderson and Rachlinski (and Twerski) have made an important point. Enterprise liability cannot adopt a workable notion of causation for cases of a certain complexity without simultaneously retreating somewhat on its promise to avoid independent efficiency analysis. Indeed, by asking juries to consider efficiency and manipulative conduct as factors in the proximate causation determination, we are guilty of incorporating some of the same command-and-control subjectivity that we criticize above in the context of FTC regulation and traditional product-defect litigation. Nevertheless, we believe that the arguments we have made in favor of enterprise liability throughout this and other articles still hold.[166]

Difficulties in the analysis of causation are nothing new to tort law and exist under any regime in which causation is an element. As Judge Calabresi recently put it:

> Did the action for which the defendant is responsible cause, in a legal sense, the harm which the plaintiff suffered?–a question easily put and often very hard to answer. There is,

166. If they do not, and if the sort of causation analysis that we are describing is too complex to do well, as Henderson and Rachlinski might argue, then we are at a loss to see how a fault-based liability scheme is preferable to enterprise liability, given that it requires a similar analysis in every case. Indeed, if such efficiency-oriented determinations cannot be made reliably, perhaps legal theorists, ourselves included, should stop treating efficiency as the actual or desirable goal of tort law. If the laws we apply cannot consistently lead to more efficient outcomes, then why adopt efficiency as the goal of those laws? Perhaps instead we should recognize that other considerations can and should influence legal judgments, both because such considerations matter to humans (even if they do not matter to *Homo Economicus*) and because they can help sort out otherwise intractable problems. *Cf.* Hanson & Reyes, *supra* note 20. As indicated above, we believe that behavioralist insights such as the problem of market manipulation could be introduced as an important first step toward such a richer proximate causation analysis.

> moreover, no older requirement in this area of law than the need to show such a link between the defendant's actions and the plaintiff's loss. It long precedes the obligation to show that the defendant was at fault. Along with the showing of injury, causation constituted an essential part of what the plaintiff had to demonstrate for the early common law action in trespass to lie.
>
> Over the centuries the courts have struggled to give meaning to this requirement–in the simplest of situations, who hit whom, and in the most complex ones, which polluter's emissions, if any, hurt which plaintiff.[167]

Those struggles, however, have yielded only a "welter of confusion."[168]

The real thrust of the causation critique, therefore, is this–there are limits to what enterprise liability can accomplish. Enterprise liability is not the über-efficient panacea that early advocates portrayed it to be or that it appears to be when legal academic debate proceeds on the assumption that causation is uncontroversial. That limitation, however, only appears as such because the products liability debate has for so long dealt in idealized liability rules with the assumption that causation is clearly established. In actuality, products liability cases involve difficult, murky questions of causation. As a result, there are some harms that are simply unreachable by the tort system. Multiple causa-

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167. Zuchowicz v. United States, 140 F.3d 381, 383-84 (2d. Cir. 1998) (footnotes omitted).

168. *See* W. Page Keeton et al., Prosser and Keeton on The Law of Torts 41, at 263 (5th ed. 1984) ("There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts . . . to clarify the subject, is there yet any general agreement as to the best approach."); *id.* at 42 ("'Having no integrated meaning of its own, [proximate cause's] chameleon quality permits it to be substituted for any one of the elements of a negligence case when decision on that element becomes difficult. . . . No other formula . . . so nearly does the work of Aladdin's lamp.") (quoting Leon Green, *Proximate Cause in Texas Negligence Law*, 28 Tex. L. Rev. 471 (1950)); *see also* Joseph W. Glannon, The Law of Torts: Examples and Explanations 145 (1995):

> A great deal of confusion persists about what the term 'proximate cause' is meant to convey. Students find this very frustrating: Justifiably, [they] would like some answers, some solid ground on which to base an understanding of a difficult concept. Frankly, so would I; I have done my homework on this problem, read a lot of heady articles, sorted though the cases, but if I ever thought I could settle this problem . . . I was wrong.

Id.

tion problems, which feature prominently in Henderson and Rachlinski's analysis, are one such category of harms. Another category–harms for which the period of latency is so long that science, and the tort system, struggle to unravel the controlling causal forces–may ultimately be more important. In both cases, however, the most one can say is that enterprise liability would suffer a limitation that *every* system of products liability suffers. Enterprise liability would not be similarly limited for the many remaining categories of product-caused harms that are both more comprehensible and, we suspect, more common.

C. *Summary*

Far from revealing enterprise liability as an unworkable system of products liability regulation, Henderson and Rachlinski have merely raised two bogeymen, one familiar but fallacious, the other accurate but most likely insignificant and, in any event, applicable to all liability regimes. The insurance-based arguments that Henderson and Rachlinski make have been sufficiently addressed in several articles written over the previous decade. Not only do Henderson and Rachlinski fail to respond to those articles, they accuse us of ducking the debate. The authors' causation critique is more fairly made. They rightly point out that enterprise liability will be forced to include some form of command-and-control concepts when faced with certain difficult questions of causation. Their own example, however, reveals the limited impact of the point. We invite readers to reread Henderson and Rachlinski's hypothetical and ask themselves whether its "slapstick"[169] routine typifies products liability cases or whether instead it serves to distract one from the fact that, for the great majority of product harms, liability, not causation, is the contentious issue and enterprise liability, not a fault-based regime, is the most efficacious resolution.

169. James A. Henderson & Aaron D. Twerski, *The Unworkability of Court-Made Enterprise Liability: A Reply to Geistfeld*, 67 N.Y.U. L. Rev. 1174, 1175 (1992).

IV. The Alleged Problem of Consumer Overestimation of Product Risks

Finally, Henderson and Rachlinski contend that, despite having "superficial appeal,"[170] our argument is "ultimately unpersuasive"[171] because it fails to account for a different problem of market manipulation:

> [O]n its own terms, the new rhetoric advocating [enterprise liability] fails to 'take behavioralism seriously' by ignoring the fact that the manipulation of consumers is a two-way street . . . . Consequently, just as some manufacturers most certainly attempt to induce consumers to behave as if a product is safer than it appears, others no less certainly attempt to induce consumers to behave as if a product is more dangerous than it appears.[172]

Advocates of enterprise liability traditionally cite consumer underestimation of product risks as a primary reason for instituting enterprise liability. Because manufacturers appear to have the ability to influence consumers' perceptions in the direction of both underestimation and overestimation, Henderson and Rachlinski argue that enterprise liability is an unjustified "abandoning [of] the central feature of products-liability law."[173]

A. *Manufacturer Incentives To Shape Consumer Perceptions of Risk*

Contrary to Henderson and Rachlinski's assertion, we did not ignore the possibility that manipulation is a two-way street. Our earlier work contained numerous instances in which we describe how manufacturers sometimes seek to increase consumer perceptions of risk. Indeed, in our review of manipulative marketing techniques, we included entire sections dedicated to examples of "Environmentally Marketed Products," "Products Marketed to Thrillseekers," and "Products Utilizing Fear Appeals,"[174] all of which involved manufacturer attempts to heighten consumer awareness of some risks related to the manufacturers' products.

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170. Henderson & Rachlinski, *supra* note 9, at 218.
171. *Id.*
172. *Id.* at 218-19 (footnotes omitted).
173. *Id.* at 253.
174. Hanson & Kysar II, *supra* note 2, at 1459-66.

For instance, with regard to the use of fear appeals,[175] we highlighted several ways in which manufacturers can raise demand for their products by exploiting consumer safety concerns. In particular, we noted that manufacturers of products whose utility lies in guarding against some harm have particularly strong incentives to elevate consumer estimations of the severity of that harm. That type of overselling of safety matches Henderson and Rachlinski's examples of cereal and vitamin manufacturers who elevate consumer awareness of cancer risks in order to promote their products.[176]

We also noted in our earlier articles that manufacturers are subject to what we called the *Volvo Effect*.[177] A manufacturer has little incentive to lower consumers' risk perceptions in circumstances in which its customers are not already concerned about the product's risks.[178] When consumers do have some awareness of the product risk, however, it becomes necessary for manufacturers to manage the content of that awareness. In our view, therefore, the reason that one sees widespread attempts by automobile manufacturers to position their vehicles as particularly safe is precisely because consumers are now aware that driving is a dangerous activity and at least some of that danger is within the control of manufacturers.[179] This Volvo Effect helps to explain Henderson and Rachlinski's examples involving tire and automobile manufacturers. Although they claim that such advertising reflects an effort on the part of the manufacturer to raise pre-existing estimates of the risks of driving, we view the advertising as an attempt to position that particular manufacturer's product as the least dangerous in its class.

Thus, far from "ignoring" the type of manufacturer behavior that Henderson and Rachlinski emphasize, we both identified it and explained it within our model. Indeed, as we discuss below,[180]

175. *See id.* at 1462-66.

176. *See* Henderson & Rachlinski, *supra* note 9, at 245.

177. *See* Hanson & Kysar II, *supra* note 2, at 1466 n.252.

178. The tobacco industry has expressed that very point in one of its strategy documents regarding how to respond to consumer health concerns. *See* NM 942 (explaining that "[f]or companies in countries where the 'health' concern is dormant," "[t]hese companies should not initiate any action which brings the issue to the fore").

179. We return to this topic in significantly more detail below. *See infra* text accompanying notes 241-77.

180. *See infra* text accompanying note 364.

on many occasions we have argued that, to the extent it exists, the problem of consumer overestimation of product risks can be addressed most effectively by a products liability regime of enterprise liability. Nevertheless, given Henderson and Rachlinski's repeated claim that we have ignored the subject, we will provide in this Section a slightly more extended discussion of the circumstances under which manufacturers would attempt to increase consumer risk perceptions. As will be seen, Henderson and Rachlinski's claims about "the possibility that manufacturers frequently have incentives to *over*state the risks products pose"[181] are themselves greatly overstated.

1. *Selling Safety Does Not Necessarily Lead to Overestimation of Product Risks*

To begin with, Henderson and Rachlinski's argument is plagued by a fundamental ambiguity regarding the type of risk that is supposedly being overstated by manufacturers. The authors admit that elevating perceptions of a product risk appears to be a questionable, if not irrational, strategy for manufacturers to adopt insofar as doing so would reduce demand.[182] They then observe, however, that "the media are filled with advertisements that remind consumers of risks posed by some product-related activities."[183] From that evidence, the authors conclude that the problem of manipulation directed toward consumer overestimation of product risks is significant.

There is, we think, a non sequitur in Henderson and Rachlinski's argument that has been concealed by their use of the term "product-related activities." That term allows the authors to recount anecdotes that appear to represent instances in which "[a]dvertisements . . . lead people to overestimate the risk that product-related activities pose."[184] But the term simultaneously distracts readers from the more important point that it is the risk of *products* and not *product-related activities* that is of central concern to the debate over enterprise liability. Once Henderson and Rachlinski's argument is stripped of those elements of manufacturer manipulation that do not actually support their the-

181. Henderson & Rachlinski, *supra* note 9, at 244.
182. *See id.* at 244-45.
183. *Id.* at 245.
184. *Id.*

sis–indeed, that fit more comfortably within our analysis of consumer product markets–the problem of consumer overestimation of product risks appears to be of far less significant concern.

a. *Perceptions of Risk From "Product-Related Activities"*

The conflation of risk categories appears most obviously in Henderson and Rachlinski's use of examples such as the "cereal and vitamin makers [who] remind viewers of the risks of contracting cancer."[185] In those examples, the subject risk does not concern a consumer product at all; that is, even if consumers do overestimate the risk of cancer due to sensationalist vitamin ads, they are not overestimating the risk of any product. Henderson and Rachlinski appear to acknowledge that fact, as when they state that "[i]n some instances, the advertised products constitute stand-alone precautions against the unavoidable risks that life . . . poses."[186] What they do not acknowledge, however, is the fact that manufacturer hyping of such external risks in no way supports the thesis that "manufacturers frequently have incentives to overstate the risks products pose."[187]

Indeed, by holding an artificially inflated view of a product's capacity to prevent an external risk, consumers may concomitantly be underestimating the risk of the harm posed by the product itself. As cognitive psychologist Paul Slovic has noted, individuals often confuse the concepts of cost and benefit, allowing their impression of one of those concepts to influence their estimate of the other: "[J]udgments of risk and benefit are negatively correlated. For many hazards, the greater the perceived benefit, the lower the perceived risk and vice versa."[188] In that manner, a strong perception of a product's benefits can, by itself, cause consumers to underestimate the costs of that same product, including its expected accident costs.[189] Thus, because they involve attempts to enhance

185. *Id.*

186. *Id.*

187. Henderson & Rachlinski, *supra* note 9, at 244 (emphasis in original removed).

188. Paul Slovic, *Rational Actors and Rational Fools: The Influence of Affect on Judgment and Decision-Making*, 6 Roger Williams U. L. Rev. 163, 180-81 (2000) (footnotes omitted); *see also* Ali Siddiq Alhakami & Paul Slovic, *A Psychological Study of the Inverse Relationship Between Perceived Risk and Perceived Benefit*, 14 Risk Analysis 1085 (1994).

189. *See* Hanson & Kysar I, *supra* note 2, at 733.

the perceived benefits of a product in guarding against some external risk, the advertisements that Henderson and Rachlinski believe support their view of consumer overestimation of product risks may actually provide stronger support for our view of consumer underestimation.

To better understand those dynamics, consider a concrete example. In Henderson and Rachlinski's discussion of vitamin and cereal manufacturers who emphasize cancer risks, the authors nowhere mention that many vitamin supplements pose health risks of their own to users. Iron overuse, to give just one example, has been linked with such problems as arthritis, heart disease, cirrhosis, diabetes and impotence. Those risks are especially high for individuals with hemochromatosis, a condition that can only be diagnosed by a physician.[190] Yet, faced with a barrage of ads regarding the risk of cancer from makers of fortified breakfast cereals and vitamin supplements, individuals could easily discount the relative risk of iron overload. Indeed, when one examines the behavior of manufacturers with respect to the potential hazards of vitamin supplements–rather than the external risk of cancer–one sees the familiar attempt to lower rather than raise consumer risk estimates. One vitamin supplement manufacturer, for instance, long marketed its products under the suggestive name "Self-Care," even when its fine print warning label advised consumers only to use the products under the care of a physician. In other words, when vitamin manufacturers discuss the health or safety risks posed by the products themselves–rather than some harm that the products allegedly help to prevent–they do so by engaging in precisely the type of manipulation that we described in our earlier articles. Moreover, for the same reasons that we outlined in our earlier articles, enterprise liability represents the best products liability regime to combat such conduct.

Even with respect to the vitamin manufacturers' emphasis of cancer risks, the best that products liability law can do in such a situation is institute enterprise liability. In our earlier articles, we specifically addressed such manipulative tactics, and argued that no products liability law as currently conceived would be fully effective in responding to them, primarily because no liability sys-

190. *See* Meghan E. Flynn, *A Year in Review From A to Z*, Environmental Nutrition (Dec. 1997).

tem can mitigate manufacturers' ability to shape consumer views of product benefits, as opposed to product costs.[191] A system of enterprise liability would force the makers of vitamins to pay for the costs of any side effects that occur from consumption of their products. It would therefore make the manipulation of perceived product benefits more difficult by requiring the incorporation of actual product costs. It would also reduce the sheer volume of manipulated purchases that occur simply through the price effect of higher prices from internalized accident costs. Still, though, the "purveyors of excess safety" would remain free to press their wares through sensationalist appeals to cancer risks that are allegedly reduced through consumption of the offered product. Contrary to Henderson and Rachlinski's apparent view, that type of manipulation is simply not a subject of products liability law. As such, it can in no way be considered a deficit of enterprise liability.

b. *Perceptions of Risk From Other Products*

Henderson and Rachlinski also confuse the relevant risks when they describe advertisements for automobile tires,[192] bicycle helmets[193] and medical equipment.[194] In each of those instances, the manufacturer is selling a product that is used in conjunction with a *different* product that is itself risky. Efforts to manipulate risk perceptions are therefore directed at the consumer's perceptions of risk from that different product. For instance, if any product risk perception is heightened by the image of infants in tires with the tagline, "you have a lot riding on your tires," it seems primarily to be the risk posed by automobiles, not tires. The advertised tires are positioned as an effective means of reducing whatever risk may be posed by automobiles. That is a significant distinction. On August 9, 2000, Bridgestone/Firestone, Inc., announced the recall of millions of its tires amidst reports from the National Highway Traffic Safety Administration that the tire was responsible for more deaths than any other safety recall in that agency's history, causing at least forty-six deaths in the U.S.[195]

191. *See* Hanson & Kysar II, *supra* note 2, at 1566-67.
192. *See* Henderson & Rachlinski, *supra* note 9, at 245.
193. *See id.* at 247.
194. *See id.* at 245.
195. *See* James R. Healey, *Tires to Be Recalled*, USA Today, Aug. 9, 2000, at 1A.

Over the ensuing months, the estimated death toll in the U.S. increased to 119 and the chief executive officer of Bridgestone/Firestone resigned amidst allegations that the company and its chief customer, Ford Motor Company, had long been aware of the alleged product defect.[196] It seems safe to assume that no Bridgestone/Firestone (or competitor) advertisements ever mentioned the possibility of such a tragic episode.

Similarly, the medical equipment manufacturer that depicts a horrific car accident[197] may arguably enhance consumer awareness of the dangers of driving, but consumer awareness of the dangers of medical equipment is probably not at play in the advertisement at all. If it is, the effect will most likely be to lower consumer appreciation of such dangers by enhancing their view of the benefits of medical equipment.[198] Again, Henderson and Rachlinski appear to recognize the distinction between risk perceptions of the product being sold and the product being protected against,[199] but they nowhere consider how that distinction severely complicates their thesis regarding consumer overestimation of product risks. We believe their the examples, upon careful review, fail to support the argument that manufacturers face significant incentives to prompt consumer overestimation of product risks.

For instance, even assuming that Henderson and Rachlinski are correct that manipulative advertisements in favor of precautionary products result in consumer overestimation of the dangers of the product being protected against, the incentives and opportu-

196. *See* Terril Yue Jones, *Firestone Removes Top Exec Ono*, L.A. Times, Oct. 11, 2000, at C1; Keith Bradsher, *2 Firestone Studies in 1999 Pointed to Tire Problems*, N.Y. Times, Oct. 2, 2000, at A25; David Barboza, *Firestone Workers Cite Lax Quality Control*, N.Y. Times, Sept. 14, 2000, at C1; Miki Tanikawa, *Bridgestone President Admits Tire Quality-Control Problems*, N.Y. Times, Sept. 12, 2000, at C1; Keith Bradsher, *Ford Says Firestone Was Aware of Flaw In Its Tires by 1997*, N.Y. Times, Aug. 14, 2000, at A1; *see also* Thomas A. Fogarty, *Can Courts' Cloak of Secrecy Be Deadly? Judicial Orders Protecting Companies Kept Tire Case Quiet*, USA Today, Oct. 16, 2000, at 1B (claiming that Bridgestone/Firestone has settled dozens of tire-tread separation lawsuits with confidentiality provisions over the last decade).

197. *See* Henderson & Rachlinski, *supra* note 9, at 245.

198. *See supra* text accompanying notes 188-90.

199. *See* Henderson & Rachlinski, *supra* note 9, at 247 ("Manufacturers that sell only safety-related complements to risky activities also have incentives to heighten consumer fears, even though doing so reduces sales of the underlying product.").

nities for manufacturers to manipulate consumer risk perceptions remain highly asymmetric as between under- and overestimation of product risks. Henderson and Rachlinski complain that "[i]t would be naive to assume that the competing efforts of manufacturers who attempt to dampen consumers' fears invariably cancel the efforts of manufacturers who attempt to heighten them."[200] However, as we have argued in our earlier articles, *all* manufacturers have incentives to ensure that consumer estimates of risks posed by their particular products are low. In response, Henderson and Rachlinski argue that some manufacturers of precautionary products also have incentives to ensure that consumer estimates are high with respect to risks posed by a different product that their products are designed to guard against.

We believe it would be naïve to assume that those latter, largely happenstance incentives to maximize perceived risk even remotely operate to cancel out the uniform and powerful incentive that manufacturers have to minimize the perceived risk of their particular offerings. The vast majority of consumer products do not have companion preventative products akin to the bicycle helmet. Instead, they exist as independent offerings for which no product manufacturer will have an incentive to emphasize their risks. Still, Henderson and Rachlinski seem to take comfort in the fact that one medical equipment manufacturer happened to extol the virtues of its product by emphasizing the possibility of automobile accidents—a risk that, significantly, is not unknown to consumers. Conceivably, their argument would carry weight if medical equipment manufacturers were given a $350 billion dollar advertising budget and powerful economic incentives to create advertisements portraying every other potentially risky consumer product on the market, including especially those many products that have not yet been recognized by consumers as potentially dangerous in the way that automobiles have been. As it is, such competitive counter-manipulation simply does not occur in amounts significant enough to alter the conclusions of this debate.

More importantly, it is not at all clear that marketing and promotional efforts by manufacturers of "safety-related complements to risky activities"[201] actually result in consumers overestimating

200. Henderson & Rachlinski, *supra* note 9, at 253.
201. *Id.* at 247.

the riskiness of the underlying product or activity. The *fear appeals* that we emphasized in our earlier articles,[202] which did appear designed to elevate, or at least highlight, consumers' fears, all involved situations in which manufacturers can increase demand for their preventative products without limit, since the harm being guarded against did not involve a consumer product. Henderson and Rachlinski's examples of advertisements for companion products such as bicycle helmets, on the other hand, face an important limitation: Every consumer that is scared out of purchasing a bicycle is one less prospective consumer of a bicycle helmet. Therefore, manufacturers of such companion products, if anything, seem far more likely to encourage, rather than discourage, consumption of the "basic product," as doing so will lead directly to increased consumption of the associated safety gear.[203]

Henderson and Rachlinski identify no evidence of the actual results of the advertising campaigns that they describe to rebut such logic.[204] Instead, they rely on assertions such as the following:

> [M]anufacturers of bicycle helmets want to encourage cyclists to believe that their activity poses real risks that can be alleviated through the purchase of helmets. Increasing the perceived dangers associated with cycling surely discourages some people from engaging in the activity who consequently would not buy a helmet, but it might increase the sales of helmets overall.[205]

Again, however, there is no evidence to support the claim that the marketing of helmets increases consumers' risk perceptions or discourages some people from cycling. Indeed, the more plausible

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202. *See supra* text accompanying notes 174-75.

203. Henderson and Rachlinski have an argument in response: Some manufacturers may gain greater market share by overstating the risk of the "basic product," even if the overall market for helmets is thereby reduced. Because that same argument is made primarily with respect to manufacturer manipulation of perceptions of risk from the actual product being sold, we will address it in the sections immediately following.

204. The only evidence of that type that Henderson and Rachlinski provide suggests that media treatment of silicon breast implants may have caused an overestimation of the risks of breast implants. *See* Henderson & Rachlinski, *supra* note 9, at 248. The example, however, deals only with the effects of "a single television news-magazine report," *id.*, and does not in any way represent actions by a manufacturer to raise consumer awareness of a product risk.

205. *Id.* at 247.

story is that the selling of helmets, if it increases risk perceptions at all, only does so insofar as it simultaneously reassures bicycle consumers that the helmet will substantially alleviate those risks. Unlike Henderson and Rachlinski, we see no reason why a manufacturer would need to discourage people from buying bikes when advertising helmets.

Although we do not have the same caliber of evidence for bike helmets that we have for cigarettes, we were able to learn some interesting things about the way in which bikes and bike helmets tend to be sold. We contacted Rob Ferola, the sales manager of The Cycle Loft, New England's largest single bicycle store, and Jeff Haase, the leading salesperson in the country for Gary Fisher Bikes, a manufacturer of premier mountain bikes. Those individuals provided us with the perspectives of, respectively, one person who is in charge of sales at a single, highly successful store, and another who has visited and spent time in many stores across several states. In their experience, all bicycle stores carry helmets and those helmets are virtually always displayed openly and in the same showroom as the bikes. If it were the case that bike helmets deterred shoppers from purchasing bikes, it seems likely that bike shops would not sell helmets or would at least place them in a special place to be seen only by those customers who specifically asked for them. Neither of the individuals we spoke to had experienced or heard of a situation in which a customer had decided not to purchase a bike because of seeing or being shown the helmets. Although some consumers do express safety concerns, they generally arrive at the store with those concerns in mind, and the presence of a range of helmets is often a source of some comfort–not the other way around.

The actual marketing of bicycle helmets, moreover, seems more consistent with our story of manufacturers leading consumers to underestimate product risks, in this case by overstating the degree to which the precautionary product will help to prevent harm. Many of the advertisements appear designed to impart to consumers a feeling of control over the risks of cycling through their selection of a helmet. For instance, Bell Sports, the world's largest manufacturer of bicycle helmets, features images of exhilarating off-road mountain biking in its marketing, along with the

slogan, "Courage for Your Head."[206] The website for Cratoni Helmets, a leading German manufacturer, sports a video introduction of mountain scenes, a revolving helmet, and alternating flashes of the messages, "Cratoni Helmets" and "No Limits."[207] That company's *Mountain Maniac* line of helmets is described as follows: "What are you—CRAZY? We hope so because this helmet was designed for you. Are you drooling over it yet? . . . The Maniac encourages you to push the limit . . . ."[208] Even buyers of the company's less aggressive "Leisure" line of helmets are assured that "[c]asual rides through the city park are more fun when you are confident in your safety."[209]

One also sees helmet manufacturers utilizing the familiar appeal to pseudo-scientific product features that we described in our earlier articles.[210] Lazer, a Belgium manufacturer, boldly proclaims that its *Millennium* helmet "is really a champion when it comes to safety and finish because of its In Mould production process. Its brand new Quick Grip System (QGS) allows for everyone to adapt the helmet to his morphology, even while riding your bike. Loosening a bit during hill climbing and come back to a firmer grip during downhill can be done in a snap."[211] We are not entirely sure what that plug means, but the ability to adjust the helmet to our individual morphology, even while cycling downhill, sounds very impressive. Similarly, the "BrainTrust retention system" of Specialized, a leading U.S. manufacturer, is "designed to provide maximum, cool, lightweight protection for your head . . . [a]nd all the valuable stuff inside it."[212] Again, we are not sure what exactly a "BrainTrust retention system" offers helmet purchasers, but given that Specialized derives the bulk of its profits from selling bicycles, we are fairly confident that the marketing is not designed to talk consumers out of purchasing a bike.

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206. *See* Bell Sports, *at* http://www.bellbikehelmets.com (last visited Dec. 6, 2000).

207. *See* Cratoni Helmets, *at* http://www.cratoni.com/main.html (last visited Dec. 6, 2000).

208. *Id.*

209. *Id.*

210. *See* Hanson & Kysar II, *supra* note 2, at 1453.

211. Lazer, *at* http://www.lazer.be/access_bicycle.htm (last visited Dec. 6, 2000).

212. Specialized, *at* http://www.specialized.com/products/family/?familyid 1004&parentfamilyid=10002 (last visited Dec. 6, 2000).

In short, for at least two reasons we are far less confident than Henderson and Rachlinski that the efforts of some manufacturers to sell their precautionary products will significantly mitigate the problem of manufacturer manipulation toward consumer optimism. First, the limited role that such precautionary products play in the marketplace prevents them from providing anything other than incomplete and unreliable countereffects to the multitude of product risks that consumers face and for which manufacturers have clear incentives to lower consumer risk perceptions. Second, it is not at all clear that the counter-manipulative efforts that do exist in the marketplace actually have the effect of raising consumer estimates of any product risk, as Henderson and Rachlinski claim.

c. *Perceptions of Risk From the Product Being Sold*

Thus, the first two categories of examples offered by Henderson and Rachlinski involve merely indirect attempts to heighten the perceived utility of an advertised product by pointing out dangers posed by some other activity altogether. Their final category of examples, however, features efforts by manufacturers to shape consumer perceptions of the specific product being advertised. Because those examples bear far more directly on the possibility of manufacturer-induced pessimism with respect to product risks, they must shoulder the weight of Henderson and Rachlinski's claim that "just as some manufacturers most certainly attempt to induce consumers to behave as if a product is safer than it appears, others no less certainly attempt to induce consumers to behave as if a product is more dangerous than it appears."[213]

Henderson and Rachlinski seem to assume that any such attempt to sell a safer product will have the effect of increasing consumers' risk perceptions for both the generic product category involved and for the brand being advertised.[214] With that assumption in place, the authors interpret any evidence of manufacturers marketing "safer" products as evidence that those manufacturers

213. Henderson & Rachlinski, *supra* note 9, at 218-19.

214. For instance, the authors note:

> A successful scare campaign will frighten many consumers in the market, thereby increasing demand for safety. Even though this tactic presumably reduces demand for the basic product, it will differentially and offsettingly benefit the manufacturer who has developed a relative advantage in offering safety precautions.

are attempting to raise consumer risk perceptions. Moreover, they seem to think that such evidence supports the view that manufacturer incentives to lead consumers to overestimate product risks are comparable in strength to incentives to lead consumers to underestimate such risks. That assumption is not only unsupported, it is, we strongly suspect, unsupportable.

Like their repetition of the phrase "product-related activities," Henderson and Rachlinski's use of the term "basic product"[215] obfuscates what is actually going on in manufacturer efforts to emphasize product safety. Because the efforts involve an interplay between perceptions of risk from both a generic product category (i.e., cars) and the specific product being advertised (i.e., a Volvo), there are at least three possible effects that such efforts might have on consumer risk perceptions. First, they could increase consumers' pre-existing risk perceptions of both the generic product and, to a lesser extent,[216] the specific brand. Second, selling safety could increase pre-existing risk perceptions of the generic product but lower those of the specific brand. And, finally, selling safety could reduce pre-existing risk perceptions of both the generic product and the specific brand.

Of those three possibilities, the incentives faced by manufacturers will be strongest for selling safety with the third effect, which both expands the generic product market and increases demand for the specific product, and weakest for selling safety with the first effect, which may marginally increase market share but only at the cost of decreasing the generic product market. Even with respect to the second effect, consumers are not necessarily left overestimating a specific product's risk, as Henderson and Rachlinski argue. To the contrary, depending upon the nature of consumer perceptions prior to manipulation, consumers may well be left underestimating that risk. For example, while consumers may

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Id. at 246; *see also id.* ("Even advertisements that seem, at least superficially, designed to assuage consumer fears might actually be targeted at heightening them.").

215. *See id.* ("Even though this tactic presumably reduces overall demand for the basic product . . . ."); *id.* at 248 ("In many cases, manufacturers can capture greater market share for their brands by overstating the risks the basic product poses.").

216. If the marketing effort resulted in an equal or greater increase in risk perceptions of the specific brand, sales would not only decrease market-wide, but also with respect to the particular brand at issue. Thus, manufacturers would not engage in such efforts, at least not for long.

have a heightened awareness of the dangers of driving due to an advertisement featuring "personal testimonials of people who survived accidents in their cars,"[217] they may also simultaneously believe that the particular automobile being advertised reduces those dangers to a greater extent than it actually does.

In sum, even if a manufacturer were to overstate the risk of the generic product as a means of grabbing market share, as Henderson and Rachlinski claim, that would not necessarily lead consumers to overestimate the risks of the actual products they purchase. At times, our critics seem to recognize that fact.[218] They do not recognize, however, that in any such instance the manufacturer's strongest incentive will be to advertise in such a way that consumers are left underestimating the risks posed by the specific product being advertised. In other words, the probability of a product manufacturer purposefully attempting to raise consumer estimates of the risks of its product remains seemingly insignificant. As discussed in the next Section, several good theoretical reasons exist to support that intuition.

2. *Theoretical Reasons Why Marketing that Increases Product Risk Perceptions Is Extremely Rare*

The previous Section clarified ways in which manufacturers may utilize health and safety risks in their marketing, promotional and other influential activities. It also noted that Henderson and Rachlinski's alleged problem of manufacturer heightening of product risk perceptions is actually but one subset of one category of such activities–and a subset which manufacturers have the weakest incentives to pursue. This Section argues that there are several other theoretical reasons that the problem of manufacturer-induced pessimism is unlikely to be significant, particularly as compared to the problem of manufacturer-induced optimism with respect to product risks.

a. *Generic Product Effects Counteract Specific Product Effects*

Henderson and Rachlinski are correct in arguing that there is some incentive for manufacturers to advertise a product's safety.

217. Henderson & Rachlinski, *supra* note 9, at 245.

218. *See, e.g., id.* at 246 ("To be effective, these campaigns must produce some marginal increase in the level of anxiety about the underlying product–anxiety that can be mollified by use of 'safer' versions of the product.").

Still, as scholars have many times noted, such incentives do not yield a significant amount of "safety" advertising.[219] That is true because there are also strong disincentives to engage in that sort of advertising. Put differently, as most legal economists who have looked at the problem acknowledge, the incentives to advertise safety are far from complete, which helps to explain the existence of the aphorism "safety doesn't sell."[220]

The most important reason that safety does not sell is that it raises awareness of a negative aspect of the product–its potential to cause harm. As noted in the previous Section, attempts to market one's product by increasing consumer risk perceptions will often have two contrary effects: it will increase demand for the manufacturer's brand among competitors, but it will also decrease demand for the generic product, including the manufacturer's brand. Henderson and Rachlinski acknowledge that tradeoff, but go on to argue that the problem of manufacturer overemphasis of product risks will remain robust, at least under certain market conditions.[221] In so arguing, however, Henderson and Rachlinski

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219. *See* Hanson & Kysar II, *supra* note 2, at 1466 n.252 (collecting sources); *see also* Richard L. Abel, Book Review, 83 Mich. L. Rev. 772, 785 (1985) ("Few manufacturers seem to find safety an effective 'selling point,' . . . for it hardly figures prominently in their advertising. The problem, of course, is that advertising one's own safety or the dangers of a competing product or service simultaneously alerts consumers and workers to risk.").

220. *See supra* text accompanying notes 177-79; *see infra* text accompanying notes 241-42; *see also* Robert S. Adler & R. David Pittle, *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?*, 1 Yale J. on Reg. 159, 163 & n.19 (1984) (summarizing results of several surveys, one of the advertising industry and another of consumer outdoor garden equipment manufacturers both finding that "in general consumers do not make purchase decisions based on safety," and a third of consumers finding that "safety was . . . not . . . a significant consideration"). Judge Posner has explained the reasoning behind the observation:

> There is . . . a special consideration in the case of safety information: the firm that advertises that its product is safer than a competitor's may plant fears in the minds of potential consumers where none existed before . . . . He must balance the additional sales that he may gain from his rivals by convincing consumers that his product is safer than theirs against the sales that he may lose by disclosing to consumers that the product contains hazards of which they may not have been aware, or may have been only dimly aware.

Richard A. Posner, *Strict Liability: A Comment*, 2 J. Legal Stud. 205, 211 (1973)

221. *See* Henderson & Rachlinski, *supra* note 9, at 247 (describing the authors' "casual, unscientific observation that manufacturers of precautions against unavoidable risks (or products with highly inelastic demand functions) are more likely to rely on advertising campaigns that emphasize risk").

may have overlooked a variety of consequences that flow, or potentially flow, from the acknowledged fact that heightening consumer fears reduces demand in the overall market for a product.

For instance, if consumers typically perceive little or no real risk when purchasing and consuming a given product, then any attempt to market safety will create the possibility of a dramatic and exaggerated increase in risk perceptions among consumers. Evidence suggests that individuals' generic, base-rate risk perceptions tend to be characterized by discontinuous jumps. Below a certain level of objective significance, consumers fail to perceive a risk at all. Beyond that certain level, however, consumers overestimate the risk.[222] Henderson and Rachlinski themselves recognize that stratification of consumer risk awareness: "[P]eople engage in one of two responses to risk: alarmist overreaction (take precautions, better-safe-than-sorry), or complete neglect (out-of-sight, out-of-mind)."[223] To the extent that consumer product risk perceptions fall into the category of "complete neglect," therefore, any attempt by manufacturers to raise awareness of product hazards will run the risk of prompting "alarmist overreaction." Because that disproportionate jump in consumer risk awareness will cause a similarly disproportionate drop in consumer demand for the relevant product, manufacturers face strong disincentives to engage in advertising that increase consumer awareness of product hazards.

Relatedly, advertising that increases risk perceptions regarding a generic product while attempting to portray one brand of that product as relatively safe may trigger the effects of loss aversion.[224] That is, because the loss associated with the consumer's perception of greater risk from the generic product will be disproportionately weighted by the consumer, it may offset whatever supposedly larger gain is associated with the particular product's safety features. Even if the total market shrinkage resulting from such a strategy does not offset the share-of-market increase, it will

222. *See, e.g.*, *Enterprise Responsibility for Personal Injury*, 1 A.L.I. 225 (1991) [hereinafter *Enterprise Responsibility*]. As we have argued at length, there are many ways in which consumers can underestimate the risks of a product even if they accurately perceive or overestimate the generic, base-rate risks of a product. In this section, however, we are referring simply to the latter when discussing product risks.

223. Henderson & Rachlinski, *supra* note 9, at 255 (footnote omitted).

224. *See* Hanson & Kysar II, *supra* note 2, at 673-74.

always reduce the rewards of the strategy and thus the incentive to engage in it in the first place. Manufacturer attempts to *lower* risk perceptions, on the other hand, pose no such cost. They not only help to increase the particular manufacturer's share of the product market, but they may also increase the total size of the market as well.

Finally, Henderson and Rachlinski's argument that manufacturers face incentives "to exaggerate the risks products pose"[225] does not account for the fact that the exaggeration of risk within any particular product market is a competitive strategy with a limited shelf life. As Henderson and Rachlinski note, "grabbing more market share is no less valuable to a firm than expanding the underlying market for the basic product."[226] However, the former strategy, when pursued through a mechanism that concomitantly reduces the overall size of the market, cannot be followed indefinitely. Expanding a firm's market share by cannibalizing the market will only take the firm so far before it ends up with a 100% share of a miniscule market. Increasing the size of the overall market, on the other hand, has no such long-term limit.

In short, manufacturer attempts to elevate consumer risk perceptions erode the very market in which the manufacturer seeks to increase its share. In contrast, the strategy of lowering risk perceptions is robust and uncompromised by any conflicting effects. As such, the incentives to lower risk perceptions are stronger than any competing incentives to raise them.

b. *Potential Competition*

A second factor militating against the use of marketing and other manipulative tactics to increase market share at the expense of market size is the problem posed by free-riding competitors. That is, insofar as a manufacturer's strategy can be replicated relatively easily by its competitors, the manufacturer will know that its opportunities to gain profits by distinguishing itself on safety grounds will often be short lived. Incentives for adopting the strategy, therefore, will be tempered accordingly. That threat of replication is always a problem for any sort of product improvement in a competitive market. However, the problem is heightened here by

225. Henderson & Rachlinski, *supra* note 9, at 219.
226. *Id.* at 248.

the fact that, as each member of the industry follows suit, not only does the original manufacturer's share of the market shrink, but so does the entire size of the market, inasmuch as the message about the product's risk is amplified as each competitor joins the fray. That dynamic effect will also reduce any potential profits that the original manufacturer might hope to receive for safety investments, thereby further reducing the incentive to make and market such investments.[227]

c. *First-Party Insurance*

Potential competitors are not the only force that can reduce manufacturer incentives to acquire market share by targeting safety concerns. As noted above,[228] the coverage of pecuniary losses by first-party insurance may cause consumers to behave as if those losses are externalized, irrespective of what liability rule is in effect or what assurances are made by manufacturers. Thus, with respect to the risk of pecuniary losses, consumers may be less willing to pay for additional precautions, rendering manufacturers less willing to supply such precautions than they would be in an efficient market.[229] For the same reason, manufacturers would be less willing to engage in the strategy of increasing (or decreasing) consumers perceptions of the risk of pecuniary losses in order to grab market share.

Even with respect to nonpecuniary losses–that is, with respect to product-caused losses that are not monetary in nature or otherwise commensurable such that monetary payment is considered adequate by consumers–the nature of first-party insurance in the economy dulls, or at least fails to sharpen, the incentive of manufacturers to engage in affirmative selling of safety. As noted

227. Of course, it is possible that some safety features can be patented–such that they cannot be replicated very easily. The very purpose of patents, economists teach us, is to encourage the development of product improvements when the threat of replication by competitors would otherwise discourage it. Patent protection, however, is not available for every product feature. It will seemingly not be available, for instance, with respect to the many manipulative practices that depend on providing the *appearance*, rather than the reality, of safety. Thus, with respect to those manipulative practices that cannot be patented, the threat of potential competition will remain robust.

228. *See supra* text accompanying notes 57-58.

229. *See generally* Hanson & Logue I, *supra* note 24 (describing in more detail this and other consequences of the first-party insurance externality).

above,[230] we do not believe that the promise of monetary compensation, whether provided by tort law or first-party insurance, will make consumers indifferent to personal injury, death, and pain and suffering. Nevertheless, other things equal, a consumer will be more concerned about safety precautions when she receives an insurance-premium discount based upon their presence. Moreover, by aggregating risk experience data across wide samples of consumers, first-party insurers could, in theory, serve as a surrogate for consumers in the quest to live up to the *Homo Economicus* model. That is, first-party insurers could gather information on product risks that is otherwise unavailable to consumers and make it salient to them through the parties' contractual relationship.

For almost all consumer products, however, first-party insurers do not adjust premiums or otherwise account for the risk characteristics of products purchased and utilized by their insureds.[231] Thus, with respect to most products, manufacturers will not face the prodding force of first-party insurers who, at least in theory, could raise consumer awareness of, and willingness to pay for, product safety precautions. The failure of first-party insurers to so act with respect to the vast majority of consumer products deprives the market of a potent instigator of consumer awareness of product hazards. As such, manufacturers face fewer incentives to exploit consumer safety concerns than they would in a world of perfectly (or even well-) functioning first-party insurance.

d. *Concerns About the Perceptions of Regulators*

Finally, manufacturers must be concerned not just with the risk perceptions of consumers, but also with the perceptions of actual and potential regulators. Any strategy that leads consumers to increase their estimate of risks posed by a particular generic product is likely to have a similar effect on the variety of regulatory institutions that might, based on that estimate, increase the stringency of their regulation. Any market-share increase, therefore, might come not only at the cost of a direct market-size decrease, but also at the cost of greater expenses needed to satisfy

230. *See supra* text accompanying notes 55-56.

231. *See* Hanson & Logue I, *supra* note 24, at 190-94.

increased regulatory requirements and tort damages, and thus an indirect market-size decrease.[232]

e. *Summary*

The foregoing discussion reveals a number of theoretical reasons to doubt that manufacturers face strong incentives to manipulate consumers into overestimating product risks. The most important point to note from that discussion is that the same disincentives, risks, and limitations do not plague manufacturer efforts to manipulate consumers into underestimating product risks. That is, with regard to those latter efforts, there is no counteracting decrease in market size caused by the manipulation; no cascading loss of market size to exacerbate the potential-competition problem; no failure on the part of first-party insurers to fulfill a role that would otherwise facilitate the manipulative efforts; and no concern that emphasizing product hazards will trigger greater regulatory oversight or increased tort damages.

3. *A Closer Look at Henderson and Rachlinski's Examples*

Contrary to Henderson and Rachlinski's claim, therefore, the circumstances under which manufacturers are likely to engage in advertising or other manipulative conduct that attempts to sell safety appear to be quite limited.[233] According to our analysis, manufacturers are very unlikely to engage in overt discussions of product risks in the absence of some predicate consumer concern about those risks. Moreover, when they do address product risks, they will frame the discussion in a way that emphasizes the *safety*, not the riskiness, of their products. That is, if and when "selling safety" occurs, it will tend to yield lower consumer estimates of the risks posed by the product being advertised. Such advertising will have little or no adverse market-size effects, while having desira-

232. Henderson and Rachlinski's anecdote indicating that some entrepreneurs may lobby regulators requesting that their products be required by law, see Henderson & Rachlinski, *supra* note 9, at 246 n.117, does not significantly undermine that point. As noted above, *see supra* text accompanying notes 200-01, the prevalence of products that serve as independently sold and purchased precautions against other products is far too limited to mitigate the problem of manipulation with respect to the vast majority of consumer products.

233. By "selling safety," we mean selling the appearance of safety, regardless of whether the appearance is accurate.

ble market-share (and sometimes even desirable market-size) effects.

Our analysis also yields a few more specific predictions. For instance, a manufacturer will be more likely to invest in a safety feature when its competitors cannot easily replicate equivalent features. Other things equal, a manufacturer will also be more willing to adopt safety features (even those that are easily replicated by competitors) when other forces encourage the addition of such a feature. For example, regulators might require the feature and/or insurers might adjust premiums to reflect the expected savings of the feature. Under those circumstances, the manufacturer will provide the safety feature notwithstanding the potentially adverse impact of raising awareness of consumer safety concerns. That is, once the safety feature is independently required by regulators or encouraged by first-party insurers through mechanisms such as premium discounts, the manufacturer will face less of a disincentive to raising consumer awareness of the potential for the product to cause harm. Moreover, once the manufacturer does begin to provide the safety feature in that manner, it will have strong reasons to utilize its accompanying marketing and other efforts to position the feature as one that lowers consumer estimates of product risks. Finally, holding constant each of those factors, selling safety will be most likely to occur in circumstances under which any replication by subsequent, free-riding manufacturers will increase, rather than decrease, overall market size, given the ex ante incentive of manufacturers to avoid strategies that lead to a cascading loss of market size when potential competitors imitate such strategies.[234]

In addition, from the foregoing analysis, one can see several reasons why selling safety would tend to be more common in industries that are heavily regulated than in those that are not. First, heavy regulation will often correlate with general public awareness of a product risk–because that regulation either resulted from public awareness or enhanced it or both (indeed, the very fact that an industry is heavily regulated may carry an important message to consumers about the product's possible risks). Second, heavy regulation often entails specific safety standards and the addition of particular safety features or warnings on products within an in-

234. *See supra* text accompanying note 227.

dustry–all factors that might enhance consumer awareness of the product's generic risks.[235] Under those circumstances, manufacturers will tend to advertise the safety feature because they will want to lower consumer risk perceptions that might otherwise be enhanced by the regulation and the addition of the feature (or because they will want to claim "credit" for the feature[236]). Furthermore, when an industry is heavily regulated, the regulators sometimes collect data on numbers and causes of accidents–the sort of information that can assist first-party insurers in making more informed judgments about how, if at all, to adjust premiums to reflect an insured's risks. Such information can also be helpful to other institutions, such as public health groups and the media, that can use it to alert the public to the product's risks. Finally, manufacturers would be more willing to sell safety in response to general public awareness or mandates created by regulators because, under those circumstances, such marketing efforts would seem unlikely to lead to additional regulation.[237] In sum, heavy regulation has the potential to mitigate each of the four impediments to selling safety that we reviewed above.[238]

With those admittedly loose predictions in mind, we now turn to the two examples that Henderson and Rachlinski provide of circumstances in which manufacturers actually do appear to be selling safety: cars and cigarettes.[239] Before doing so, however, we think it is important to mention that Henderson and Rachlinski's only pertinent examples are also the ones typically given by legal theorists when they argue that the market for safety works reasonably well.[240] The examples are so popular, we believe, because they are among the only examples available. Moreover, as we dis-

235. That is not to say that regulation itself informs consumers of a product's risks. Our point is simply that regulation may tip consumers off that there may be a significant risk associated with a product.

236. *See infra* text accompanying notes 267-72.

237. *But see infra* text accompanying notes 368-71 (describing disincentives to adoption of safety features caused by present products liability regime).

238. *See supra* text accompanying notes 219-32.

239. We omit from this discussion examples which bear on manufacturer attempts to emphasize some external risk or a risk from different products. *See supra* text accompanying notes 182-203. Instead, we focus only upon Henderson and Rachlinski's examples that involve arguable attempts by manufacturers to elevate perceptions of risk posed by their particular product offerings. As it turns out, only automobiles and cigarettes from their examples fit that bill.

240. For instance, in discussing the question of "how severe a gap there is in the ordinary consumer's . . . appreciation of the comparative risk posed by individ-

cuss in this Section, they seem to be available precisely for the reasons that we predict and not, as Henderson and Rachlinki would have it, because manufacturers independently find it in their interest to increase consumers' perceptions of product risks.

a. *Automobiles*

Henderson and Rachlinski offer numerous examples of car manufacturers advertising the crashworthiness of their models.[241] We of course concede that some automobile advertising does involve selling safety. The question, however, is whether that advertising likely lowers or raises the pre-existing risk perceptions of consumers.

A little historical context helps to answer that question. To begin with, it is important to understand that until relatively recently–say, the late 1980s–a common refrain among American car manufacturers was that "safety doesn't sell." Not only was that a frequent phrase heard around the boardrooms of the Big Three, but it was a guiding principle in advertising and marketing depart-

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ual products or workplaces of different firms," the Reporters for the American Law Institute's study on "enterprise responsibility" stated the following:

> Certainly we do have some such product-specific impressions–for example, that the Volvo is a much safer motor vehicle than a four-wheel-drive Samurai. Firms whose products . . . are safer than the norm have a market incentive to advertise the fact: substantial health information was provided through advertising in the cigarette industry–"our brand has less tar"–even before regulation.

Enterprise Responsibility, *supra* note 222, at 227; *see also* Paul A. LeBel & Richard C. Ausness, *Toward Justice in Tobacco Policymaking: A Critique of Hanson and Logue and an Alternative Approach to the Costs of Cigarettes*, 33 Ga. L. Rev. 693, 731-32 (1999):

> [I]f tobacco companies were otherwise given an incentive to develop safer cigarettes, they would have no difficulty informing the public about the health benefits of such a product. Indeed, the experience in other segments of the economy suggests that 'safety sells,' that is, that risk differentials among brands can be used effectively as a marketing tool . . . . One could draw this inference from the safety-conscious marketing campaigns for Volvo automobiles, for example.

Id.

241. *See, e.g.*, Henderson & Rachlinski, *supra* note 9, at 228 ("automobile manufacturers' emphasis on the crashworthiness of their products"); *id.* at 245 ("a car manufacturer shows personal testimonials of people who survived accidents in their cars"); *id.* ("sellers of basic products emphasize the relative safety of their versions (or brands) the safety features are designed into the basic products themselves; certain types of . . . automobiles reduce the probability of accidents or the risks associated with them").

ments as well; that is, car manufacturers did not put their money where they would not put their mouths. Moreover, at least according to Lee Iacocca's best-selling autobiography, even when manufacturers attempted to sell safety, consumers were not interested. Not only did safety not sell, according to Iacocca, the industry could not "give the stuff away."[242]

Obviously, all that has changed. One cannot understand the reasons for that change without first understanding the emergence of pressures for safety from outside the car market in the 1960s, 70s, and 80s. Prior to 1966, auto manufacturers had no obligations under federal law to alert consumers to, or correct, any defects in a car's design.[243] Any regulations involving cars that did exist focused on altering *driver* behavior–the implicit assumption among consumers, commentators, and lawmakers seemed to be that "cars aren't dangerous, people are." Joan Claybrook and David Bollier explain:

> For decades, [the] extraordinary toll exacted on the highways was not linked to the safety of automobiles themselves. The auto industry instead attributed the many deaths and injuries associated with its product to driver habits, the unpredictable "human factor" that was beyond industry control. The traffic safety establishment focused its attentions on driver education and traffic law enforcement, not safer car design. It is thus not surprising that the public came to believe that highway fatalities were caused by the "nut behind the wheel."[244]

In the early 1960s that understanding of causation began to shift slightly, owing substantially to the efforts of Ralph Nader, including his popular expose of automobile safety, *Unsafe at Any Speed*.[245] As portions of the public came to suspect that automobiles posed their own hazards, federal lawmakers began to take notice. In 1966, Congress adopted the National Traffic and Motor Safety Act and created the National Highway Traffic Safety Ad-

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242. Lee Iacocca, Iacocca: An Autobiography 297 (1984).

243. *See* Joan Claybrook & David Bollier, *The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff*, 3 Yale J. on Reg. 87, 103 (1985).

244. *Id.* at 91 (footnotes omitted).

245. *See* Stephen D. Sugarman, *Nader's Failures?*, 80 Calif. L. Rev. 289, 289 (1992) (book review) ("Although the causal antecedents to the 1966 Act were many, Nader's book, *Unsafe at Any Speed*, and his celebrated foul treatment by General Motors played a prominent role in making auto safety a national issue." (citations omitted)).

ministration (NHTSA). Congress adopted the act, and encouraged the minimum safety standards promulgated by NHTSA, because the industry had otherwise refused to create, much less abide by, its own safety standards (apparently because of its belief that "safety doesn't sell").[246] In the late 1960s and 1970s, therefore, NHTSA issued a host of mandatory safety standards.[247]

The history of products liability litigation against the car industry parallels that of federal regulation. Although state products liability suits had been available to consumers, they were anemic–in part because of the then-prevailing sense that car accidents were "caused" by drivers, in part because accident victims and the plaintiff's bar had little access to public information that might have assisted them in identifying design defects, and in part because of common law doctrines that excluded the type of harms for which car manufacturers could be held responsible. Prior to 1966, auto manufacturers were not liable for car-related injuries so long as their products were free from defective materials and workmanship. Shortly after the regulatory interventions described above took hold, however, products liability law began to pose a more significant threat to car manufacturers. That turning tide was reflected most clearly in the seminal decision of *Larsen v. General Motors Corp.*[248]–a 1968 opinion holding that auto manufacturers could be liable for designs that rendered their cars "uncrashworthy."

The plaintiff in *Larsen* had been injured when "[a] head-on collision, with the impact occurring on the left front corner of the Corvair [driven by the plaintiff], caused a severe rearward thrust of the steering mechansim into the plaintiff's head."[249] General Motors argued, consistent with precedent, that they had "no duty whatsoever to design and manufacture a vehicle . . . which is otherwise 'safe' or 'safer' to occupy during collision impacts."[250] The trial court agreed and granted summary judgment in favor of Gen-

246. *See* S. Rep. No. 89-1301, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2710 ("The committee cannot judge the truth of the conviction that 'safety doesn't sell,' but it is a conviction widely held in the industry which has plainly resulted in the inadequate allocation of resources to safety engineering.").

247. *See infra* text accompanying note 262.

248. 391 F.2d 495 (8th Cir. 1968).

249. *Id.* at 496-97.

250. *Id.* at 497.

eral Motors.[251] The Eighth Circuit disagreed and announced the "crashworthiness doctrine," which focuses not on the cause of the accident, but on the consequences of the accident for the vehicle's occupants–in other words, not with the "first collision" between one vehicle and another, but with the "second collision" between an automobile's passengers and its interior. The court held that "a manufacturer is under a duty to use reasonable care in the design of its vehicles to avoid subjecting the user to an unreasonable risk of injury in the event of a collision."[252] The reasoning of the *Larsen* court found wide acceptance, such that the crashworthiness doctrine, in one form or other, is now the law in nearly all states.[253]

It appears, therefore, that the expansion of federal regulation of automobile manufacturers and the expansion of state-based products liability litigation against those manufacturers have similar origins. It is also the case that the former may have helped to facilitate the latter; that is, there may also be a causal connection between the emergence of administrative regulation of automobiles and the strengthening of tort-based regulation of automobiles.[254] That relationship is true not only because NHTSA helped to foster the then-emerging sense that car manufacturers were indeed partially responsible for much of the harm caused in auto accidents, but also because NHTSA helped plaintiffs to overcome certain more practical barriers to recovery that they had previously faced. Very simply, NHTSA was responsible for collecting, creating, and making available a great deal of information that was relevant and helpful to possible plaintiffs, as well as to many other institutions, including the media and car insurers, that could

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251. *See id.*

252. *Id.* at 502.

253. *See* Jo Anne Clark, Note, *Second Collision Liability: A Critique of Two Approaches to Plaintiff's Burden of Proof*, 68 Iowa L. Rev. 811, 813 (1983) ("Despite initial criticism, the second collision doctrine has achieved virtually unanimous acceptance as a theory of recovery against automobile manufacturers." (citations omitted)).

254. Admittedly, at the time *Larsen* was decided, NHTSA had not yet issued any specific safety regulations. *See* Cynthia M. Certo, Comment, *1993 Changes to Safety Standard 208: Deploying an (Air) Bag Full of Product Liability Claims?*, 67 Temple L. Rev. 673 (1994). The NHTSA released its first set of standards, however, just one year after *Larsen* and, even prior to the release of those standards, the legislative process leading to NHTSA generated enormous attention to the issue of auto safety.

use the information to help encourage demand for safety among consumers.[255]

Today, for instance, automobile insurers appear to be the only providers of consumer-purchased insurance that make any attempt to adjust premiums to reflect the risks posed by different brands of the product.[256] There are several reasons that insurers seem unusually able to make premium adjustments in the context of cars, perhaps the most important of which is that automobile accidents represent a large percentage of the accident costs in our society.[257] Because of those heavy costs, insurers stand to gain significantly from investments in monitoring the automobile consumption choices of their insureds. Moreover, in the context of automobiles, insurance companies have the benefit of important work performed by other institutions including, as noted above, the information gathering efforts of NHTSA.[258] In addition, there exists a vast system of traffic laws and law enforcement officers that gather on-the-spot details regarding automobile accidents, including suspected causes. Those and other factors combine to produce a unique setting in which insurers are able to make judgments about their insureds' automobile selections. We do not mean to say that the government information permits insurers to engage in simple and finely tuned premium adjustments–only that it gives the industry important clues as to how to make some broad-brushed distinctions among insureds. What is clear is that cars are special in this way, and even if premium adjustments are fairly general, they do exist and they do put pressure on consumers to demand and, in turn, manufacturers to supply such features.[259]

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255. For a description of that information and its beneficial effects, see Claybrook & Bollier, *supra* note 243, at 104–17.

256. *See* Hanson & Logue I, *supra* note 24, at 190–94.

257. *See id.* at 192.

258. To give just one example, the insurance industry used data collected by federal regulators along with data collected through its members' own insurance claims to determine that air-bag-equipped vehicles are substantially safer for their occupants. *See* Don Sherman, *It's in the Bag*, Popular Sci., Oct. 1992, at 58.

259. *See, e.g.*, Fred Mannering & Clifford Winston, *Automobile Air Bags in the 1990s: Market Failure or Market Efficiency?*, 38 J. L. & Econ. 265, 265 (1995) (attributing the increase in consumer demand for air bags in part to car insurers: "In 1972 Allstate Insurance was convinced that air bags could save lives–so convinced that it began equipping its company cars with air bags and offering discounts to customers who owned cars with air bags"). In a similar manner, the existence of consumer watchdog groups such as Consumers Union, the publisher of *Consumer Reports*, helps to foster consumer demand for automobile safety by making NHTSA

Nevertheless, for a long time, even with those various external forces at play, the industry was not keen on promoting safety. Indeed, throughout the 1970s and '80s the industry was far more focused on resisting the external forces that were driving it to adopt more safety features than it was on advertising its products as safer.[260] Those resistance efforts were quite successful in delaying and mitigating regulatory interventions: "Automakers successfully resisted installing [air bag] devices from 1968 to 1993 . . . ."[261] Generally, the industry's stated objection to such safety innovations was that they would be expensive, ineffective and potentially dangerous. For instance, Ford Motor Company made the following statement in response to NHTSA's first nineteen motor vehicle safety standards, which included such basic requirements as seatbelts, laminated windshields, interior padding, and collapsible steering wheels: "Many of the temporary standards are unreasonable, arbitrary, and technically unfeasible . . . [I]f we can't meet them when they are published we'll have to close down."[262] Later, Iacocca, then president of Ford, told President Richard Nixon that "the shoulder harnesses [and] the headrests are complete wastes of money . . . [,] and you can see that safety has really killed all of our business," and that "we are in a downhill slide, the likes of which we have never seen in our business."[263]

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crash test data widely available to the public. *See, e.g.*, *Which Cars Do Best in a Crash?*, Consumer Rep., Apr. 1991, at 219, 221.

260. *See* John D. Graham, Auto Safety: Assessing America's Performance 91–104 (1989) (describing the joint and successful lobbying efforts of American automobile manufacturers in resisting air bag regulations throughout the 1970s and early 1980s); Dana P. Babb, *The Deployment of Car Manufacturers into a Sea of Product Liability? Recharacterized Preemption as a Federal Regulatory Compliance Defense in Airbag Litigation*, 75 Wash. U. L.Q. 1677, 1677–78 (1997):

> Throughout the 1970s and 1980s, the Big Three clung to the notion that safety does not sell. However, as the government campaign for the installation of airbags became increasingly public, the demand for better performance and increased safety features escalated. Despite the escalation in demand, car manufacturers vehemently opposed the installation of airbags . . . .

Id. (citations omitted).

261. Certo, *supra* note 254, at 681.

262. Claybrook & Bollier, *supra* note 243, at 97-98.

263. National Archives Nixon Project; National Archives at College Park, College Park, MD, Transcript, Conversation among President Nixon, Lee Iacocca, Henry Ford II, and John Ehrlichman, (Apr. 27, 1971). Iacocca also claimed that air bags could instantly kill a person by breaking the person's neck. *See* Iacocca, *supra* note 242, at 301.

The industry's real concern, however, appears not to have been with the safety or cost of newly required features, but with the possibly that such innovations would lead to increased tort liability for the industry. Such increased liability could result either because earlier automobile designs would be perceived as negligent (in hindsight[264]) or because the new designs would not operate properly. As Iacocca put it, "Whether an air bag fails to work at the proper time or whether it works prematurely, the whole business is a paradise for product liability lawyers."[265] So long as such features as air bags were not perceived as reasonable or customary, however, the industry could continue to avoid liability both for harms that could have been prevented by air bags and for the smaller class of harms that are caused by air bags themselves.[266]

Despite the lobbying efforts of the automobile industry, however, by the end of the 1980s the public was, because of the various institutions involved, well aware that the harms cars caused were often attributable to their manufacturers.[267] Consequently, by that time, safety was becoming a significant concern for a large percentage of consumers. Moreover, the automobile industry was running out of delay tactics and the data supporting air bags was mounting up. In other words, the industry was beginning to understand that it was going to have to adopt many of the key safety features that it had long been fighting.[268] For those reasons, con-

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264. *See infra* text accompanying notes 368-71.

265. Iacocca, *supra* note 242, at 300; *see also* Certo, *supra* note 254, at 682:

> In retrospect, it appears that the automakers' early aversion to air bags stemmed from one overriding factor: fear of massive common law liability imposed by the nation's courts. Throughout the air bag controversy, the concern for liability was so strong that automakers fought mandatory air bag legislation every step of the way.

Id.

266. Ultimately, the industry resisted air bag technology so long that it faced a flood of lawsuits claiming that it was negligent for the manufacturers *not* to include air bags. *See* Certo, *supra* note 254, at 683 (gathering cases). It is noteworthy, we think, that such concerns would not have existed had the automobile industry long been subject to a tort standard of enterprise liability. *See infra* text accompanying notes 368-71.

267. As Justice White put it in the context of examining NHTSA's 1981 decision to rescind the mandatory passive restraint standards, "For nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag and lost–the inflatable restraint was proved sufficiently effective." Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29, 49 (1983).

268. For example, in 1988 NHTSA issued a standard mandating the phase-in of air bags or other passive restraint systems. *See* Certo, *supra* note 254, at 679.

sistent with our predictions, there appeared to be a dramatic sea-change in the mindset and approach of car manufacturers. And so it was that Iacocca went from stating "I'm not sure I'd want one of those [air bags] in my car,"[269] to calling air bags "the greatest innovation since four-wheel brakes"[270] and bragging on television and in newspapers about Chrysler's concern for safety and its decision to *voluntarily* install air bags in all of its cars.[271] Likewise, Ford went from calling the initial NHTSA safety standards, which included seat belts, "unreasonable, arbitrary, and technically unfeasible," to proclaiming on its website, "The safety of our customers is important, and no other safety feature on vehicles today is more effective at reducing the risk of injuries than safety belts."[272] Indeed, the entire automobile industry went from being one whose marketing mantra was "safety doesn't sell," to one whose willingness to claim credit in advertisements for safety innovations forced upon it by other forces serves now as Henderson and Rachlinski's prime example of an industry that advertises safety.

In sum, what happened in those intervening years was not that one manufacturer began heightening the risk perceptions of consumers in the hope of gaining a larger market share. Instead, regulation and litigation and all the information that those institutions made available produced a clear concern about automobile risks and a demand for safety among consumers. Moreover, manufacturers faced increasing regulatory pressure to adopt specific safety features. Thus, given that consumers perceived cars as risky and that manufacturers were going to have to provide certain safety features anyway, it made sense for manufacturers to attempt to lower consumer risk perceptions by promoting safety and acting as though the added features were motivated purely by each manufacturer's concern for Americas' safety. The tremendous historical reluctance of automobile manufacturers to sell safety stands in stark contrast to their current efforts to capitalize on awareness of consumers that, contrary to earlier beliefs, not all

269. Iacocca, *supra* note 242, at 301.

270. Sherman, *supra* note 258, at 58.

271. *See* Graham, *supra* note 260, at 212.

272. Ford Motor Company, *at* http://www.ford.com/servlet/ecmcs/ford/index.jsp?SECTION=OurCompany&LEVEL2=SafetyAndSecurity&LEVEL3vehicleSafetyFeatures&LEVEL4=BeltMinder (last visited Dec. 6, 2000).

driving hazards are attributable solely to the "nut behind the wheel."

This story is not simply our reconstruction. Indeed, similar accounts feature in contemporaneous news accounts of the shift in the industry's attitude toward safety. Consider a 1988 Wall Street Journal article that both described and explained the sudden conversion. The article began as follows: "'You won't hear any more beefs about air bags from me,' crows a two-page newspaper ad from Chrysler Corp. Chairman Lee Iacocca, a one-time air-bag opponent who is now pledging to put them on all his U.S.-built cars by 1990 . . . ."[273] The article goes on to ask:

> Why this sudden turnabout? The primary reason is demand: Auto makers are scrambling to satisfy the growing number of consumers who say they want more safety features in their cars . . . .
>
> And the overriding reason for this is that, in the 25 years since Mr. Nader's book "Unsafe at Any Speed" made automobile safety a national issue, car buyers have been bombarded with increasing amounts of information about the relative merits–and demerits–of the various makes of cars. The news comes from consumer groups; government regulators, who publish the results of crash tests; and insurance companies, which charge more to insure cars with poor safety records than those with good.[274]

Finally, regardless of what actually can be gleaned from the history of automobile marketing, the fact remains that consumers appear to underestimate, not overestimate, the risks of driving. As Professor Christine Jolls has put it, "An amazingly robust finding about human actors–and an important contributor to the phenomenon of risk underestimation–is that people are often unrealistically optimistic about the probability that bad things will happen to them."[275] And chief among the studies leading to that robust finding are ones that determine that "most people tend to believe that they are unusually safe drivers."[276] Indeed, as Jolls notes,

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273. Joseph B. White, *U.S. Auto Makers Decide Safety Sells*, Wall St. J., Aug. 24, 1988.

274. *Id.*

275. Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 Vand. L. Rev. 1649, 1653 (1998).

276. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1537 (1998); *see also* Hanson & Kysar I, *supra* note 2, at 656

"people not only think . . . that the probability of their being involved in an auto accident is lower than the average person's probability, but also think that their probability is lower than the actual probability."[277] Such evidence, though certainly not dispositive, supports our description of manufacturer behavior and consumer perceptions and raises doubts regarding Henderson and Rachlinski's, particularly given that they provide no evidence to suggest otherwise.

b. *Cigarettes*

As discussed above,[278] a fundamental misstep in Henderson and Rachlinski's argument is the assumption that any marketing that addresses safety must necessarily increase risk perceptions. In addition to their discussion of automobile advertisements, that assumption also appears to have been made in their discussion of cigarette marketing. Henderson and Rachlinski note that tobacco manufacturers "have historically created safety-oriented products such as filtered and low-tar cigarettes," and that "more recently, some companies have run advertisements portraying their products as containing only natural ingredients."[279] They then argue that "[t]o be effective, these campaigns *must* produce some marginal increase in the level of anxiety about the underlying product–anxiety that can be mollified by use of 'safer' versions of the product."[280] We see no reason why those campaigns must necessarily raise consumer risk perceptions in order to be effective. Instead, they could have been effective as a response to increased consumer concern that occurred *independent* of the conduct of tobacco manufacturers. Although we do not want to review here our earlier and more detailed discussion of this topic,[281] we will provide a brief version of what we believe to be the more plausible explanation of the tobacco industry's efforts emphasized.

(citing Shelley E Taylor, Positive Illusions: Creative Self-Deception and the Healthy Mind 10–11 (1989) and Ola Svenson, *Are We All Less Risky and More Skillful than our Fellow Drivers?*, 47 Acta Psychologica 143 (1981)).

277. Jolls, *supra* note 276, at 1660.

278. *See supra* text accompanying notes 182-217.

279. Henderson & Rachlinski, *supra* note 9, at 246 (footnote omitted).

280. *Id.* (emphasis added).

281. *See* Hanson & Kysar II, *supra* note 2, at 1467-1553.

As we have noted,[282] the institution of various changes in the architecture of cigarettes has coincided throughout this century with episodes of heightened salience of tobacco safety issues among the public, whether through highly publicized cancer studies in the 1950s, Surgeon General reports in the 1960s, or congressional hearings in the 1990s. Additionally, as noted earlier in this Article,[283] the "natural" cigarettes that Henderson and Rachlinski refer to were introduced shortly after well-reported and ultimately successful efforts by Congress to force the industry to disclose the ingredients of cigarettes. In response to that adverse publicity, the tobacco industry has adopted at least two separate marketing strategies. One is the strategy described earlier which involves the use of the word "natural" and corresponding imagery in product advertisements, along with a non-synthetic menthol flavoring used in the products.[284] Other than those largely cosmetic changes, the cigarettes are no different from traditional additive-containing designs[285] and, thus, consumers have no real reason to believe that the cigarettes are any safer than those traditional designs. Indeed, the campaigns are waged for mentholated cigarettes which research suggests may be "more addicting and more deadly" than non-mentholated cigarettes.[286]

The second type of campaign is for "additive-free" or "all-natural" cigarettes which, reportedly, do not contain chemical additives: "By '100 percent natural,' manufacturers mean they don't use reconstituted tobacco or the flavor-enhancing additives that caused an uproar [in 1994], when cigarette makers revealed a list of nearly 600 chemicals that have been added to cigarettes over the years."[287] Whether these types of cigarettes offer marginal health

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282. *See* Hanson & Kysar II, *supra* note 2, at 1473-83.

283. *See supra* note 135; *see also* Kathleen Donnelly, *The New Buzz Word in Cigarettes? Natural*, News & Observer (Raleigh, NC), Feb. 18, 1996, at E7 ("In 1994, smokers discovered there was more to their cigarettes than tar and nicotine. National Public Radio reported on the additives, and, under pressure from Congress, the tobacco industry released a list of chemicals that seemed to include everything from cocoa to ammonia.").

284. *See supra* note 135.

285. *See* Peter Landau, *Trend Toward Natural Flavours Boosts Menthol In Cigarettes*, Chemical Market Rep., Jan. 11, 1999.

286. *See* Vernellia R. Randall, *Smoking, The African-American Community, and The Proposed National Tobacco Settlement*, 29 U. Tol. L. Rev. 677, 688 (1998).

287. Donnelly, *supra* note 283.

benefits over additive-containing cigarettes is doubtful.[288] What seems more clear, however, is the potential for such cigarettes to trigger a compromise effect in smokers who might otherwise stop using tobacco products altogether.[289] Though he did not couch his description in the behavioralist terms that we used in our previous article, Dr. Ron Davis, formerly the head of the Office on Smoking and Health at the Centers for Disease Control, captured the phenomenon well: "That's one of the reasons cigarette companies are marketing [additive-free cigarettes] so aggressively . . . . A lot of smokers are dying–no pun intended–to find a rationalization to keep smoking. And if they find a product like this, they say, 'I've done my job to change my behavior and live a healthier lifestyle.'"[290]

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288. *See, e.g., id.* (quoting one public health expert as saying, "If they're any less hazardous at all . . . it would be like jumping out the 22nd floor instead of the 24th").

289. *See* Hanson & Kysar II, *supra* note 2, at 1515. Several industry documents emphasize that possibility quite explicitly. *See, e.g.*, MN Trial Exhibit 10,585 ("All work in this area should be directed towards providing consumer reassurance about cigarettes and the smoking habit. This can be provided in different ways, e.g. by claiming low deliveries, by the perception of low deliveries and by the perception of 'mildness'."); Creative Research Group, Project Viking, Volume 11: An Attitudinal Model of Smoking, 1986, Feb.-Mar., prepared for Imperial Tobacco Limited (Canada):

> Quitters may be discouraged from quitting, or at least kept in the market longer, by either of two product opportunities noted before. A less irritating cigarette is one route (Indeed, the practice of switching to lower tar cigarettes and sometimes menthol in the quitting process tacitly recognises this). The safe cigarette would have wide appeal, limited mainly by the social pressures to quit.

Id. B&W, 779103789-779103798 ("Industry Public Relations: [Brown & Williamson] makes an effort to accommodate all possible low 'tar' tastes. . . . Mitigate quitting by offering a choice. . . . Provides smoker with a choice and a reason not to quit.").

290. Donnelly, *supra* note 281. That compromise effect was evident in the following story of two smokers interviewed by a San Francisco journalist investigating the "natural" cigarette push:

> For many who smoke nonadditive cigarettes, [the fact that they are still carcinogenic] is the crucial irony. Like Margaret Tibbatts, they know smoking is a potentially deadly addiction, and they dream of quitting someday. But until then, all-natural cigarettes lighten the load on the conscience, if not on the lungs.
>
> "I've been smoking (American Spirits) for two years," says San Francisco resident Jennifer Mink. "I suppose I'm just killing myself the natural way. I do plan on quitting–realistically, this year sometime. I've done it before, so I'm sure I can do it again."

Thus, one can draw two general conclusions from the tobacco industry marketing campaigns highlighted by Henderson and Rachlinski. First, tobacco companies instituted the campaigns, not as a means of prompting heightened consumer fear of product hazards, but as a response to a heightening that already existed due to external forces. In the particular case of "natural" and "additive-free" cigarettes, the congressional investigation of cigarette additives and the accompanying media reports that tobacco manufacturers were "spiking" cigarettes with everything from cognac to carbon dioxide had already served to increase consumer demand for more natural, "safer" cigarettes. Again, that explanation seems to comport better with both the historical evidence and the incentives of manufacturers than Henderson and Rachlinski's theory that manufacturers raise consumer risk perceptions in the hope that they might simultaneously lower them again. Second, the campaigns seem likely to result in consumer underestimation of the hazards of smoking, rather than overestimation as Henderson and Rachlinski would have us believe. As noted earlier,[291] the "natural" campaigns waged for mentholated cigarettes by R.J. Reynolds and Brown & Williamson rely on the well-documented psychological tendency of individuals to discount the severity of risks that they perceive as "natural" in origin. Similarly, the "additive-free" cigarettes marketed by other tobacco manufacturers seem likely to capture market share among individuals who would otherwise quit smoking altogether, were it not for the illusion of safety and choice provided by the "additive-free" brands.[292] Moreo-

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Edward W. Lempinen, *Natural Smokes for a Health-Conscious Market*, San Francisco Chron., May 17, 1996, at A1.

291. *See supra* note 135.

292. In contrast, Henderson and Rachlinski argue that tobacco industry marketing campaigns are designed merely to attract brand-switchers rather than to maintain or increase the overall size of the market for tobacco products. *See* Henderson & Rachlinski, *supra* note 9, at 246. One response to that contention is that a great deal of evidence suggests that tobacco advertising is oriented toward attracting new smokers. *See* Hanson & Kysar II, *supra* note 2, at 1462-66, 1473-79. Henderson and Rachlinski do not confront that evidence. More importantly, whether tobacco manufacturer efforts attract brand-switchers or new smokers or both, the effect is likely to be the same–encouraging the people who do smoke to underestimate the risks of smoking. As noted in our earlier articles, the type of architectural changes to cigarettes that Henderson and Rachlinski are describing most often do not offer any actual safety benefits to smokers. Rather, the industry's self-proclaimed "health-reassurance cigarettes," see Hanson & Kysar II, *supra* note 2, at 1473-79, are designed to offer the appearance, and not necessarily

ver, both campaigns capitalize on the manner in which people's risk perceptions are heavily biased by affective qualities that they ascribe to the source of risks: "natural," "additive-free" descriptions avoid the dread that is associated with risks that are perceived as technological or man-made (i.e., synthetic chemical additives).

Those results should not be viewed with surprise, given what we know about the market for tobacco products. Consistent with the *Volvo Effect* hypothesis, tobacco manufacturers address safety issues in their marketing and other behavior precisely because consumers have been more or less aware that cigarettes may raise health and safety issues since the "Big Scare" (a period in the mid 1950s during which several high-profile studies were released and publicized identifying a connection between cigarettes and cancer).[293] Richard Kluger calls that period "the end of the age of innocence about the blithe charms of the cigarette," a period that led to a sudden, significant drop in sales.[294] Not surprisingly, manufacturer efforts to portray their products as safe intensified in response to those intensified consumer fears. Consider, for instance, the "Tar Derby" among manufacturers in the late 1950s that has become a staple example among economists of evidence that the unfettered market for safety works well.[295] That episode in the history of tobacco marketing occurred directly on the heels of the Big Scare, as did the emergence of filters, which were designed simply to reassure safety-conscious smokers.[296] Moreover, it appears from the subsequent increase in per capita smoking rates that such industry efforts to assuage heightened fears succeeded.[297]

The fact that cigarette packages have carried prominent government-mandated health warnings for the last several decades also helps to ensure that product safety will be openly (though not necessarily truthfully) addressed by manufacturers. While in

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the reality, of marginal safety benefits over other cigarettes. That is a highly significant distinction because it suggests that the smokers attracted to such cigarettes are not reliably internalizing risk information, whether they are brand-switchers or new smokers.

293. *See* Hanson & Kysar II, *supra* note 2, at 1484-87 & 1503 n.467.

294. Richard Kluger, Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris 133 (1996).

295. *See, e.g.*, W. Kip Viscusi, *Constructive Cigarette Regulation*, 47 Duke L.J. 1095, 1117-18 (1998).

296. *See* Hanson & Kysar II, *supra* note 2, at 1474.

297. *See id.*

many respects, the regulation of cigarettes in the U.S. has been lax compared to products with similar hazards,[298] Americans nevertheless have been reminded continually that "The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."[299] They have also had access to some, albeit limited, cigarette content information due to the Federal Trade Commission's mandatory testing and disclosure of tar and nicotine levels.[300] In addition, consistent with our earlier predictions, that regulatory requirement has encouraged manufacturers to use the disclosed information affirmatively in their efforts to manage consumer risk perceptions.[301] Finally, life insurance carriers sometimes distinguish between smoking and non-smoking insureds when setting premium rates,[302] providing a further reminder to some individuals that smoking raises significant health issues and, hence, a further reason for tobacco manufacturers to manipulate perceptions of those issues.[303]

In short, there are many reasons to suspect that tobacco marketing efforts such as the "natural" and "additive-free" cigarette

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298. *See* Hanson & Logue II, *supra* note 24, at 1167-69.

299. The quoted warning, which featured on cigarette packages beginning in 1970, was replaced by four new rotating warnings in 1984. *See* 15 U.S.C. § 1333(a) (1994).

300. *See* Viscusi, *supra* note 295, at 1118.

301. As Professor Kip Viscusi notes, however, there was a silent period between the "Tar Derby" and the mandatory disclosure regulations, during which the Federal Trade Commission flatly prohibited efforts by tobacco manufacturers to advertise tar and nicotine level information. *See id.*

302. *See* Hanson & Logue II, *supra* note 24, at 1226-27.

303. Of course, like the automobile industry, cigarette manufacturers have fought or otherwise resisted those various forces that led to consumer awareness of safety issues. For instance, just as Detroit waged a war to stall the creation and implementation of federal safety standards for automobiles, cigarette manufacturers have lobbied hard against various efforts to regulate tobacco products over the years. *See generally* Stanton A. Glantz et al., The Cigarette Papers *passim* (1996) (describing some of the industry's efforts of that sort). Similarly, the industry devoted enormous resources toward minimizing its common law liability. An attorney for R.J. Reynolds described the strategy as follows: "The aggressive strategy we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [R.J. Reynolds'] money, but by making that other son of a bitch spend all his." Haines v. Liggett Group, Inc., 814 F. Supp. 414, 421 (D.N.J. 1993). Both of those efforts were buttressed by the industry's overarching campaign to create "controversy" and "doubt" over the pertinent scientific questions regarding the impact of tobacco on health. *See* Hanson & Kysar II, *supra* note 2, at 1483-96.

campaigns flow from the types of factors that we have identified, rather than an interest that manufacturers purportedly have in elevating consumer safety concerns. Before concluding this discussion of Henderson and Rachlinski's tobacco example, it also bears noting that the evidence is strong that smokers underestimate their personal risks of smoking, as we explained at length in our earlier article.[304] Thus, like Henderson and Rachlinski's example of the automobile industry, their discussion of tobacco manufacturers involves a product market for which we have good evidence of consumer risk perceptions, and the evidence suggests that tobacco manufacturers are not leading consumers to overestimate the risks of smoking. To the contrary, it appears that tobacco industry efforts to lower consumer risk perceptions have been remarkably successful, even in the face of significant public health campaigns to raise awareness of the health hazards of smoking.

4. *The Relevance of Competition Within an Industry*

In a separate but related argument, Henderson and Rachlinski claim that our treatment "seems to assume that manufacturers always behave as monopolists."[305] Henderson and Rachlinski point out, however, that "[m]ost industries are competitive"[306] and, consequently, manufacturers are unable to resist the temptation to grab market share by cannibalizing the market. In our earlier article, we acknowledged the fact that "[t]he increased ease of such tactics as coordinated marketing, shared research, and product-design conspiracies makes an oligopolistic industry likely to exhibit more pronounced manipulative practices than competitive industries."[307] However, we concluded that such oligopolistic manipulation just "represent[s] a particularly sharp rendering of practices common to virtually all consumer product markets."[308] Not only do we disagree with Henderson and Rachlinski's claim that firms will frequently harm their own product market in order to enhance their competitive position, but for a variety of reasons, we now think that even we may have undersold the ability of competitive

304. *See* Hanson & Kysar II, *supra* note 2, at 1502-51.
305. Henderson & Rachlinski, *supra* note 9, at 247.
306. *Id.* at 248.
307. Hanson & Kysar II, *supra* note 2, at 1552.
308. *Id.*

industries to behave cooperatively when it comes to consumer risk perceptions.

To begin with, our argument does not depend on an assumption that manufacturers behave as monopolists. Even a manufacturer in a relatively competitive industry will be reluctant to pursue strategies that increase its market share by raising consumer risk estimates, for all of the reasons described above.[309] Moreover, we agree with Henderson and Rachlinski's apparent concession that, to the extent that industries do behave monopolistically, then our conclusion regarding risk perception manipulation is irresistable. That is, the goal of a monopolist with respect to risk perceptions is purely one of maximizing market size through various efforts, including through the use of manipulation to lower consumer risk awareness. Henderson and Rachlinski nowhere consider, however, the possibility that even competitive manufacturers can find ways to cooperate when doing so is good for the industry as a whole. That is, they nowhere consider the possibility that manufacturers can join together to *behave* as monopolists without actually *being* monopolists.

An executive of Archer Daniels Midland Company (ADM) provided a more succinct statement of that point than we ever could. As James M. Griffin of the United States Department of Justice reported following the government's successful conviction of several players in an international lysine price-fixing cartel:

> In another [FBI] tape played at the lysine trial, ADM's President summed up the company's attitude toward its customers in a single phrase, when he told a senior executive from his largest competitor that ADM had a corporate slogan that "penetrated the whole company": *"Our competitors are our friends. Our customers are the enemy."*[310]

As Griffin also noted, "[a]nother characteristic of international cartels is that they frequently use trade associations as a means of providing 'cover' for their cartel activities."[311] If corporations utilize trade associations to accomplish something as clearly unlawful as price-fixing, we see little reason why they would hesitate to use

309. *See supra* text accompanying notes 219-32.

310. James M. Griffin, *An Inside Look at a Cartel at Work: Common Characteristics of International Cartels* (2000), *available at* http://www.usdoj.gov/atr/public/speeches/4489.htm (last visited Oct. 14, 2000) (emphasis added).

311. *Id.*

such associations to coordinate an industry-wide policy with respect to product safety issues.[312]

There are plenty of other examples of manufacturers in a given industry working together, as a monopolist would, particularly with respect to protecting or enhancing consumer perceptions of the generic product that they sell. When the public image of milk was on the decline, for instance, the otherwise competitive milk industry found a way to come together and revive it. They did so, as many industries do, with the help of trade associations, business councils, and other collaborative groups that provide structure and selective incentives for such "monopolistic" endeavors. A campaign of white-mustached celebrities asking the simple question "got milk?" worked wonders for the dairy industry.[313] Such coordinated campaigns are commonplace within all manner of industries, whether or not competitive. Other examples abound: "Beef. It's what's for dinner"; "Pork, the other white meat"; "Cotton, the fabric of our lives"; "Plastics make it possible"; and "Florida orange juice–are you drinking enough?" The success of such campaigns can be striking. Consider, for instance, the fact that trade groups representing the citrus industry have convinced many consumers that oranges are a virtually unparalleled source of vitamin C, when in fact many fruits and vegetables provide comparable amounts of the vitamin per serving.[314]

In addition to providing catchy promotional campaigns, trade groups facilitate manufacturers' efforts to coordinate in defense of their industry from both external and internal threats. For example, U.S. cattle producers cooperated to bring suit against Oprah Winfrey, who stated on her television show that she would not eat hamburgers for fear that U.S. beef might be contaminated with

312. Admittedly, ADM participates in the heavily concentrated agribusiness sector of the economy. *See* Jon Lauck, *Toward An Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N. Dak. L. Rev. 449, 454-55 (1999). The fact that many consumer product industries are similarly concentrated, however, leads one to suspect that similar behavior will be present in those markets. Moreover, as noted in the text, such practices do not appear limited to oligopolistic industries.

313. *See also* Greg Farrell, *Milk Does a Body Good, But Ads Do the Industry Even Better*, USA Today, June 14, 2000, at 7B (describing success of campaign).

314. *See* Roberta Larson Duyff, The American Dietetic Association's Complete Food & Nutrition Guide 88 (1996) (listing seventeen common fruits and vegetables other than oranges that are recommended sources of vitamin C, including four–guava, red bell pepper, papaya and broccoli–that have as much or more vitamin C per serving than oranges).

mad cow disease.[315] Although the industry suit was unsuccessful, the fact that it was brought and litigated to conclusion against a popular and well-financed defendant says quite a bit about how far competitors are willing to go to maintain a positive image of their product. The same is likely true with respect to internal threats, where a single manufacturer attempts to increase its market share by emphasizing safety advantages. Consider the difficulties faced by Smith & Wesson this year after Ed Shultz, its chief executive officer, broke ranks with the U.S. gun industry by agreeing to adopt safety measures such as gun locks, greater control over its distribution chain and the development of "smart gun" technology. Sales by Smith & Wesson have dropped and Shultz himself has endured repeated death threats amidst sharp criticism from the National Rifle Association and fellow industry heads. As William Keys, the president of Colt Manufacturing, put it, "[Smith & Wesson's move] hurts the whole industry. If we don't stick together, we won't ever solve the problem."[316]

Indeed, the incentives for such cooperative punishment are probably greatest in precisely those circumstances that are most relevant to this debate–that is, where the threat of tort liability and regulation and the need for consumer manipulation are most significant. Put differently, although there may not be strong incentives for cooperation among industry members whose product is perceived to pose little or no risk to consumers, those incentives are greatly enhanced as soon as that product is perceived to be risky. We can think of two well-documented examples of such a phenomenon. According to Paul Starr's Pulitzer Prize-winning history of the American medical profession, it was the threat of liability that finally permitted physicians, who had otherwise been unable to gain any sort of cooperative foothold, to "achieve the unity and coherence that had so long eluded them."[317] Through cooperative arrangements, members of medical societies were able to avoid virtually all liability, while non-members were not. Each doctor's incentive to join such arrangements was therefore im-

315. *See* David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DePaul Bus. L.J. 191, 217-23 (1998).

316. Jeff Zeleny, *NRA Aims Hatred at Iowa Native: Hostility, Threats Face Smith & Wesson's Ed Shultz at Gathering*, Des Moines Reg., May 22, 2000, at 1.

317. *See* Paul Starr, The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry 110 (1982).

mense–as was the resultant power that the incentive across all doctors eventually created for the profession.[318]

Similarly, as Richard Kluger describes in his Pulitzer Prize-winning history of the tobacco industry, it was the threat of liability and regulation posed by increased risk perceptions that helped drive cigarette manufacturers to come together and cooperate throughout the second half of the last century.[319] The industry's stated goal was to present an "united front,"[320] including an agreement of each manufacturer not to "seek a competitive advantage" by making explicit health claims regarding their products.[321] The agreement was more than just an industry aspiration; tobacco manufacturers largely stuck to that agreement despite supposed competitive pressures to breach it.[322]

In addition to those empirical counterexamples, there is still another, more theoretical problem with Henderson and Rachlinski's argument that firms are unable to overcome the temptation to grab market share by cannibalizing the market. Over time one would expect any industry in which the strategy were commonly employed to grow more concentrated and, therefore for behavior within that industry to become more monopolistic. That is true for a couple of reasons. First, insofar as the industry can act like a monopolist, industry profits will be maximized. Thus, there will be market pressure for companies to merge in order to enhance cooperation and exploit those otherwise foregone industry profits. Second, even in the absence of such intra-industry mergers and acquisitions, there will be growing concentration in the industry.

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318. *Id.* at 111.

319. *See* Kluger, *supra* note 294, at 133 (describing the tobacco industry's "Big Scare" that followed the release of several studies linking smoking with lung cancer, and detailing the remarkable assemblage of tobacco company chief executive officers in 1953 that, under the guidance of public relations firm Hill & Knowlton, gave birth to the industry's coordinated defense strategy for the remainder of the century); *see also* Hanson & Kysar II, *supra* note 2, at 1483-1502 (describing historical emergence of industry groups such as the Tobacco Industry Research Committee and their importance to the industry in suppressing and confounding consumer understanding of the risks of smoking).

320. *See* Memorandum from Fred Panzer to Horace R. Kornegay 1-2 (May 1, 1972) ("For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts–litigation, politics, and public opinion.").

321. *See* Report of Special Master: Findings of Fact, Conclusions of Law and Recommendations Regarding Non-Liggett Privilege Claims, State v. Philip Morris, Inc. (No. C1-94-8565) (Minn. D. Ct. 1998).

322. *See* Hanson & Kysar II, *supra* note 2, at 1467-1502.

If Henderson and Rachlinski's story is correct, then the dynamic effect of market-share grabbing will move the industry toward monopoly, leading participants to act increasingly as monopolists–individually and in cooperation with the remaining competitors.

In sum, even individual manufacturers in a competitive industry cannot haphazardly adopt a strategy that makes their specific product seem more desirable given that doing so simultaneously makes the generic product seem less desirable; there is often "monopolistic behavior" (that is, manufacturer cooperation within an industry) even among "competitors"; such cooperation is particularly common in the very situations that Henderson and Rachlinski are imagining; and any non-cooperation that does lead to increased risk perceptions is likely to be temporary. Finally, it bears mentioning again that, even if an industry does remain fairly competitive over time, its very competitiveness may discourage the sort of manipulation that Henderson and Rachlinski claim would lead consumers to overestimate product risks.[323]

5. *Is Overestimation Generally Easier To Encourage than Underestimation?*

Henderson and Rachlinski also contend that, other things equal, manufacturers urging overestimation of risk will be more successful than those urging underestimation: "In the main, over-reaction to risk is probably easier to encourage than under-reaction. Many cognitive processes foster overestimates of the probability of an accident."[324] Again, however, they provide virtually no evidence of products whose risks consumers overestimate.[325] Nor do they rebut our argument regarding the many ways in which consumers appear to misunderstand the risks of smoking–despite the fact that cigarettes have long been considered one of the best examples of a product whose risks consumers overestimate. Similarly, they do not rebut the many studies that have been performed demonstrating that people across demographic categories are optimistic with respect to the personal risks posed

323. *See supra* text accompanying note 227.

324. Henderson & Rachlinski, *supra* note 9, at 254.

325. *See supra* note 204.

by a seemingly endless array of products and activities.[326] Finally, they do not consider the ease with which manufacturers might lower consumer risk perceptions at any given moment, whatever consumers' perceptions might have been prior to that moment.

Surprisingly, Henderson and Rachlinski seem to emphasize that ready manipulability at other points in their argument. For example, they write that "so strong is the [representativeness heuristic that people] might disbelieve available and otherwise credible studies."[327] As an example, they note that a popular television advertisement for an analgesic recounts "numerous statistical studies reveal[ing] that it is the most effective pain reliever available," but ultimately relies upon the personal appeal of the product's spokesperson who "asserts that he knows the product works because he uses it."[328] Such advertisements, Henderson and Rachlinski write, "take advantage of natural, but sometimes erroneous, decision-making strategies."[329]

Of course, we agree: theirs is just another version of one of the main points of our previous two articles. Nevertheless, they seem to ignore consumer manipulability when making their claim that pessimism is easier to foster than optimism. Instead, they focus more on "human emotional responses," observing that:

> mental illnesses that involve chronic overreaction to danger, such as post-traumatic stress disorder and phobias, lack any counterparts involving chronic underreaction. Similarly, although excessive anxiety underlies dozens, if not hundreds, of diagnosed mental disorders, only one (sociopathy) involves chronic under-reaction to danger. Even depression is often characterized by states of extreme anxiety.[330]

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326. *See* Hanson & Kysar I, *supra* note 2, at 654–58; *see also* Neil D. Weinstein, *Optimistic Biases about Personal Risks*, 246 Science 1232, 1232 (1989) [hereinafter Weinstein I] ("[Optimistic bias] is robust and widespread. It appears with diverse hazards and samples and with different questions used to elicit the personal risks ratings . . . . Pessimistic biases are . . . rare."); Neil D. Weinstein, *Unrealistic Optimism about Susceptibility to Health Problems: Conclusions from a Community-Wide Sample*, 10 J. Behav. Med. 481, 494-96 (1987) (determining from a demographically diverse sample that "optimistic biases are largely unrelated to age, sex, level of education, or occupational prestige") [hereinafter Weinstein II].

327. Henderson & Rachlinski, *supra* note 9, at 221.

328. *Id.* at 222.

329. *Id.*

330. *Id.* at 254 (footnotes omitted).

From just those observations, Henderson and Rachlinski conclude that "[t]he human brain seems, on the whole, built to overreact to risk rather than to casually disregard risk."[331] Indeed, they add that "it would be remarkable if any species survived the evolutionary process by persistently under-reacting to risk."[332]

Although, we believe that we have already provided a great deal of evidence that casts doubt on their conclusion, we add here two general points. First, with regard to mental illness, the fact that overreaction to risk is common among those who are suffering from some mental illness does not imply, as Henderson and Rachlinski seem to infer, that everyone is inclined to be pessimistic. Indeed, to the contrary, it appears that it may *only* be the clinically depressed who are not optimistic.[333] The work of Daniel Gilbert, a leading psychologist who studies people's emotions, how well people forecast those emotions, and how those forecasts influence people's decisions, appears to support that generalization.[334] Gilbert's research demonstrates how most people tend to look on the bright side–quite the opposite of the image that Henderson and Rachlinski attempt to elicit with their examples of phobic or depressed individuals. According to Gilbert, "[m]ost people are reasonably happy most of the time, and most events do little to change that for long."[335] He adds:

> In science, literature and folklore, . . . people are famous for making the best of bad situations, remembering their successes and overlooking their excesses, trumpeting their tri-

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331. *Id.* at 254.

332. *Id.*

333. *See* Larry T. Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition*, 69 U. Colo. L. Rev. 71, 149 (1998) ("[T]he only group that seems consistently to get it right—to get subjective probabilities to mirror objective probabilities—is the clinically depressed.") (citing Lauren B. Alloy & Lyn Y. Abramson, *Judgment of Contingency in Depressed and Nondepressed Students: Sadder but Wiser?*, 108 J. Experimental Psychol. 441 (1979) and Benjamin M. Dykman et al., *Effects of Ascending and Descending Patterns of Success Upon Dysphoric and Nondysphoric Subjects' Encoding, Recall, and Predictions of Future Success*, 15 Cognitive Therapy & Res. 179 (1991)); Weinstein I, *supra* note 326, at 1232 (summarizing studies suggesting that optimism may be associated with less depression, greater willingness to work hard to make optimism self-fulfilling, and increased physical health).

334. *See, e.g.*, Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 J. Personality & Soc. Psychol. 617 (1998).

335. Philip J. Hilts, *In Forecasting Their Emotions, Most People Flunk Out*, N.Y. Times, Feb. 16, 1999, at D2.

> umphs and excusing their mistakes. Psychologists from Freud to Festinger have described the artful methods which the human mind ignores, augments, transforms and rearranges information in its unending battle [against the bad feelings produced by the world and things in it].[336]

Given such research, by focusing on mental illnesses, Henderson and Rachlinski seem to have confused the exception for the rule.

Second, with regard to "evolutionary process," our intuition is quite different from Henderson and Rachlinski's. Although optimism may have some Darwinian drawbacks, the previous paragraphs indicate that it may have some important advantages as well. Moreover, pessimism and preoccupation with risk seem likely to create significant disadvantages of their own. For instance, it would be remarkable, we think, if a chimpanzee would ever swing from a high, thin vine or a human would ever emerge from its cave (much less hunt large carnivores) absent some degree of optimism. Given that hunger and other sources of necessity likely exposed our early ancestors to many inevitable risks, the ability to put most of those risks out of mind would be crucial for survival because it would leave more capacity for other sorts of cognitive processing–including those necessary to negotiate risks.[337] At least one other legal scholar has written about this issue from an evolutionary biological perspective. Judge Posner, who has no stake in this particular debate recently put it this way: "We need only imagine the kind of cognitive equipment that would be optimal in the prehistoric environment to which early man adapted: when thinking oriented to the distant future or to understanding low-probability events or to balancing immediate impressions against subtler inferences would have had only limited survival value; . . . *when optimism was essential to keep one going in conditions of wretched adversity* . . . ."[338] Similarly, as Ziva Kunda, a Social Cognition Theorist, recently summarized, the various optimistic illusions are likely adaptive because without them, "the threats and difficulties of daily life would doom us to misery and

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336. *Id.*

337. *Cf.* Hanson & Kysar I, *supra* note 2, at 658-59 (describing cognitive dissonance and the illusion of control).

338. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 Stan. L. Rev. 1551, 1570 (1998) (emphasis added).

depression."[339] Moreover, "[t]hey may also increase our motivation and effort, and lead us to persist at difficult tasks even in the face of initial failure,"[340] and thus may be usefully self-fulfilling.

In sum, it is not at all clear that consumer pessimism is easier for manufacturers to encourage than consumer optimism.

B. *Enterprise Liability and the Problem of Consumer Overestimation*

As the preceding discussion makes clear, we do not believe that the alleged problem of consumer overestimation of product risks is significant. For that reason, we also do not believe that Henderson and Rachlinski have identified an especially important problem with enterprise liability when they cite "the possibility, indeed the *certainty*, that under an [enterprise liability] regime, manufacturers would induce consumers to purchase extra safety precautions to reduce the risks of accidents."[341] Nevertheless, we feel compelled to point out a few ways in which their more specific arguments regarding enterprise liability fail to hit their mark. After that discussion, we revisit the question of how enterprise liability might respond to any overestimation of product risks that, for whatever reason, may exist among consumers.

1. *Enterprise Liability Does Not Exacerbate the Problem (Insofar as There Is a Problem)*

Henderson and Rachlinski believe that enterprise liability, because it would force all product prices to reflect expected accident costs, would enable the efforts of manufacturers who attempt to utilize consumer fear for economic gain:

> [A]dopting [enterprise liability] would narrow the gap in price between an efficiently safe product and a product that incorporates an excess of safety precautions. It is precisely this effect that [enterprise liability]'s new proponents advance as a benefit of the system–the monetary price of the product under [enterprise liability] would perfectly reflect all of its

339. Ziva Kunda, Social Cognition: Making Sense of People 233 (2000) (citing and summarizing Shelley E. Taylor & Jonathon D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 Psychol. Bull. 193 (1988)).

340. *Id.* at 233-34.

341. Henderson & Rachlinski, *supra* note 9, at 219.

> costs, making it more likely that consumers will purchase safer products. This feature of [enterprise liability], however, also facilitates exploitation of consumers by purveyors of excess safety.[342]

Upon close scrutiny of their argument, however, one finds no reason to suppose that a products liability regime of enterprise liability would catalyze the type of perceptual manipulation with which Henderson and Rachlinski are concerned.

a. *A Summary of Henderson and Rachlinski's Model*

The authors pose the case of two products, one of which carries an $80 price tag but poses a $10 risk of harm (Design One), the other of which carries a $95 price tag but poses no risk of harm (Design Two). Under a negligence rule, the price of Design One would be $80 because it is an efficient product for which the manufacturer would not be liable. Under enterprise liability, however, the $10 accident cost of Design One would be factored into the price of the product, raising its total price tag to $90. At that point according to Henderson and Rachlinski, consumers, under the manipulative influence of the manufacturer of Design Two, would continue to add the $10 expected accident cost to the price of the product, even though that cost has been internalized into the price mechanism by the products liability system. Such a mistaken belief by consumers would allow the manufacturer of Design Two–the inefficiently safe product–to position its product as the least costly offering. Consumers would view the total cost of Design One as $100 (double-counting the $10 expected accident costs) while the cost of Design Two would remain at $95 even after the institution of enterprise liability (because it poses no accident costs). Even if consumers do not double-count accident costs in that fashion, Henderson and Rachlinski argue that a similar inefficiency would occur due to the fact that consumers view tort law as providing insufficient compensation for bodily injuries. Thus, Henderson and Rachlinski conclude that "[p]urveyors of excessively safe versions of products will find it easier to convince consumers to spend a little extra on safety under an [enterprise liability] system."[343]

342. *Id.* at 251 (footnote omitted).

343. *Id.* at 252.

b. *Fundamental Tension in Henderson and Rachlinski's Argument*

Henderson and Rachlinski's model depends, at heart, on one of two problematic assumptions. Specifically, it assumes either that manufacturers can manipulate consumers to believe that they will not be compensated under enterprise liability or that, even if consumers understand that they will be compensated, consumers will nonetheless realize that tort-based compensation is incomplete. As to the first possibility, Henderson and Rachlinski are actually quite critical of us for assuming that manufacturers can manipulate consumers' risk perceptions without giving equal weight to the possibility that manufacturers can manipulate consumers' perceptions of expected liability-based compensation. They write, for example, that "[enterprise liability]'s new proponents would have us believe that the same consumers who misunderstand safety, risk and their own preferences, somehow perfectly understand that the legal system forces manufacturers to cover them for the injuries products pose. We think not."[344] Elsewhere they state that our analysis "assumes that consumers would be aware that the [enterprise liability] system provides extensive insurance," which they describe as "a remarkable logical flaw in the new rhetoric."[345]

Henderson and Rachlinski have a serious glass-house problem. In their own example, they assume that consumers are perfectly informed of product risks at the same time that consumers are perfectly clueless with respect to the underlying liability regime. By positing that consumers know that Design One poses precisely $10 in expected accident costs and Design Two $0, Henderson and Rachlinski assume that consumers possess perfectly accurate product risk information. That assumption is not only at odds with the theory and evidence marshaled in our articles, but also with the remainder of Henderson and Rachlinski's own critique.[346] Moreover, the implausible assumption is crucial to their story. If, for instance, they had assumed that consumers perceive both products to pose the same average risk, then consumers

344. *Id.* at 219.

345. *Id.* at 249-50 ("The same consumers who are supposedly being duped by manufacturers regarding the risks products pose cannot, at the same time, be expected to understand the legal system accurately.").

346. *See supra* text accompanying notes 13-17.

would prefer Design One even under enterprise liability and even with the double-counting of accident costs.[347]

Simultaneously, Henderson and Rachlinski's argument assumes that consumers remain entirely ignorant of the liability system following institution of enterprise liability. To be sure, the authors buttress that assumption by noting that "purveyors of safety can encourage [consumer ignorance] with their advertising."[348] Nevertheless, we find it highly implausible to believe, on the one hand, that consumers are perfectly aware that Design One poses an expected accident cost of $10 and Design Two $0, and on the other hand, that consumers are completely ignorant of the existence and operation of the legal system. If manufacturers can convince consumers that the legal system does not compensate their losses when it actually does, then we have strong reason to suspect that they can also convince consumers that their products are harmless when they actually are not. Conversely, if consumers really can accurately conduct an on-the-spot analysis of the full risk implications of a product, then we have strong reason to suspect that they can understand the meaning of enterprise liability. In other words, if consumers can function as highly trained engineers, actuaries, and economists while standing in the store aisle, as Henderson and Rachlinski assume, why can they not also be lawyers?

c. *The Implausibility of Double-Counting*

Henderson and Rachlinski also claim that we overlooked the possibility that manufacturers can manipulate consumer perceptions of the liability system. It is that possibility that Henderson and Rachlinski rely upon to construct a scenario in which the manufacturer of Design Two, the inefficiently safe product, could position its product as less costly than could the manufacturer of Design One.[349] The flaw in that line of reasoning, however, is that

347. That is, if consumers viewed Design One and Design Two as both posing an expected accident cost of $5, consumers would continue to purchase Design One under enterprise liability even with double-counting, as its perceived price would be $90, compared to $100 for Design Two.

348. Henderson & Rachlinski, *supra* note 9, at 251.

349. *See id.*

> If consumers are completely ignorant (or suspicious) of the operation of the [enterprise liability] system (ignorance and suspicion that purveyors of safety can encourage with their advertising), then consumers would

if consumers are ignorant of the liability system in the manner described, then it is not clear that those consumers will bring lawsuits when they are injured. That is, if manufacturers successfully convince consumers that tort law offers them no compensation, then consumers will have no reason to bring products liability claims. Without such lawsuits being filed, there will be no accident costs for product manufacturers to internalize. Thus, the alleged double-counting of accident costs–upon which Henderson and Rachlinski's model crucially depends–is a fiction.[350]

d. *The Implausibility of Manufacturer Manipulation with Respect to Perceptions of the Legal System*

Moreover, the dominant incentive of the vast majority of manufacturers under enterprise liability will be to use the "guarantee" that they are required to provide through tort law as a selling point–a way of making their product appear more attractive or less expensive.[351] Any manufacturer of any specific product that seeks to convince consumers that they will not be compensated through tort law will face many challenges. For instance, competitors of that manufacturer will often be able to provide a comparable product, plus a "guarantee." The first manufacturer will not only have to forego that benefit (or face that challenge) but will also have to find a way to counter the marketing prowess of the vast majority of other manufacturers across the industry (and, indeed, the entire economy) who will similarly be inclined to get "credit" for a benefit that the law requires them to provide. Furthermore, the individual manufacturer will also have to face the informative effect of

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count the costs of the accidents associated with the efficiently safe products twice: first, when manufacturers of efficiently safe products include the costs of the accidents that these products cause in the purchase price; and second, when consumers, ignorant of the legal system, act as if they will have to bear the costs of the accidents that efficiently safe products cause.

Id.

350. Henderson and Rachlinski may argue in response that consumers remain ignorant of the liability system only until they are injured, at which point they consult an attorney or otherwise investigate their legal remedies. Still, if manipulation regarding the legal system really is as effective as Henderson and Rachlinski claim, then they must offer some explanation of how consumers could remain completely ignorant of their rights in some circumstances but completely effective in vindicating those rights in other instances.

351. *Cf. supra* text accompanying notes 267-72.

lawyers and other existing or newly arising actors in the marketplace who will have an economic incentive to advertise consumers' rights under enterprise liability. Government agencies, public interest groups, and other entities can and likely will contribute to such efforts. Moreover, the fact that the individual manufacturer does not have special knowledge of, or control over, the underlying issue substantially weakens the manufacturer's ability to counter the wave of information and manipulation in the opposite direction. Those characteristics are all in stark contrast to the manufacturer's ability to manipulate consumer perceptions of product risks–which likewise are limited but, for all the reasons we have discussed above and in our earlier work, far less so.

e. *The Role of Undercompensation by the Tort System*

Henderson and Rachlinski offer an assumption in the alternative. Even if consumers do believe that they will be compensated for product-caused harms, they will know that tort damages provide imperfect compensation. Henderson and Rachlinski write, for example, that "the legal system . . . will chronically undercompensate victims relative to the ex ante value people place on life and limb," and thus, even after taking into account their compensation from the tort system, "consumers . . . would still be willing to purchase further safety precautions."[352] We do not disagree with that assumption, but even so, it provides no help to Henderson and Rachlinski whose numeric example implicitly assumes that consumers will be fully compensated. If tort law does not make plaintiffs whole, then the numbers that they employ do not apply and the conclusions that they draw from those numbers are baseless.

Specifically, Henderson and Rachlinski's numeric example assumes that Design One costs $80 to produce and causes $10 of expected damage. The assumption is that the $10 damages figure accurately captures the value of the harm caused, no matter how or when it is measured. That assumption is implicit throughout the example, and comes very close to being explicit where Henderson and Rachlinski "assume away valuation problems with injury to life and limb."[353] Within those constraints, they then argue that people would prefer Design One at a real cost of $90 to Design Two

352. Henderson & Rachlinski, *supra* note 9, at 250 (footnotes omitted).
353. *Id.* at 252.

at a real cost of $95. Furthermore, they argue that under a highly implausible set of assumptions, it is possible that people may be led to purchase Design Two under enterprise liability when they would not be under negligence.

The error in the argument, though, is that if "the legal system . . . chronically under-compensate[s] victims relative to the ex-ante value people place on life and limb,"[354] as Henderson and Rachlinski argue, then it is not at all clear that consumers are worse off when they purchase Design Two. If the actual harm experienced from Design One accidents is valued at $15 or more, rather than the mere $10 in tort compensation received by victims, then Design Two, not Design One, is the product that consumers should prefer. If consumers cannot accurately place any "value" at all on life and limb, then the point may be even more important. It does not follow, therefore, under the assumption that consumers are inadequately compensated by tort damages that the "inefficiently safe" product really is inefficiently safe.

f. *Comparative Willingness on the Part of Manufacturers To Invest in Manipulation*

Similarly, Henderson and Rachlinski do not consider within their model the comparative willingness of manufacturers to invest in manipulation, which, after all, is not free. Once the costs of manipulation are added to the analysis, it becomes clear that the manufacturer of the more efficient product will, under their assumptions, be more willing to spend on manipulation under enterprise liability than will its inefficient counterpart. According to Henderson and Rachlinski, the manufacturer of Design Two will seek to convince consumers that the products liability regime provides no compensation for them. However, any amount of money that the manufacturer would have to spend would weaken its ability to attract consumers. Indeed, any amount per product that the manufacturer of Design Two had to spend more than $5 would render the investment unprofitable.[355]

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354. *Id.* at 250 (footnote omitted).

355. Suppose, for example, that the manufacturer would have to spend $6 per product sold in order to successfully convince consumers that there would be no compensation provided through the civil liability system. Under that assumption, consumers would prefer Design One at a perceived cost of $100 (and an actual cost, without double-counting, of $90) to Design Two at a real and perceived cost of $101.

More important, consider the manufacturers' relative willingness to invest in manipulation of consumer perceptions of the products' underlying risks. Assuming, as seems plausible, that consumers initially believe that both products pose the same risk, the manufacturer of Design One will always be willing to spend up to $5 *more* per product sold on manipulating consumer risk perceptions than will the manufacturer of Design Two. That is true because $5 represents the actual savings that Design One provides to consumers over Design Two–if only they can be convinced of it. Thus, given the two manufacturers' relative willingness to invest in manipulation, there is good reason to doubt Henderson and Rachlinski's assumption that consumers will perceive Design One to be more risky than Design Two. Indeed, there is good reason to suppose that consumers will perceive the precise opposite.

g. *The Failure To Make Comparisons Between Liability Regimes*

The most fundamental problem with Henderson and Rachlinski's example is that the authors fail to make the sort of comparisons that are required in order to make a well-advised choice among policy options. Henderson and Rachlinski conclude that enterprise liability is undesirable without comparing its potential manipulation-based inefficiencies to the manipulation-based inefficiencies that exist under the current regime. They assume that society has recently moved from a negligence regime to an enterprise liability regime and then examine whether the enterprise liability regime would be efficient. The proper question to ask, however, is whether the enterprise liability system is more or less efficient than the negligence regime, holding everything constant except the change in the legal regime. When that question is asked, the case for enterprise liability is very strong.

According to Henderson and Rachlinski's example, the efficient product, Design One, was the only product that sold under a negligence regime. It had a nominal price of $80, but a real price of $90. The manufacturer of Design Two, according to the model, was unable to persuade consumers that the risks posed by Design One were large enough to justify the added $15 investment. According to the example, therefore, there was an efficiency savings of $5 each time Design One sold instead of Design Two. The move to enterprise liability, however, made it possible for the manufacturer of Design Two to successfully lead consumers to overestimate the

risks of Design One, and thus to purchase Design Two, at an efficiency loss of $5 per product sold.

Even if one supposes, as Henderson and Rachlinski apparently do, that the problem of manipulation is unique to enterprise liability, it is hard to think that the problem is of any real significance. After all, the problem is one that would exist only when the real price differential between an efficiently unsafe product (Design One) and an inefficiently safe product (Design Two) is small enough for consumers to mistakenly view the expected accident costs of the efficiently unsafe product as greater than the price differential. Other things equal, therefore, the problem will be most significant in situations in which the inefficiency associated with the safer product is least significant. That is, the greater the inefficiency associated with the safer product, the more difficult it will be for its manufacturer to convince consumers that the safer product is, nonetheless, the less costly one. On the other hand, for Henderson and Rachlinski's point to carry any normative punch in the choice among liability regimes, it must also be the case that the real price differential is too large for manufacturers to have achieved the same feat of manipulation under negligence.[356] We are simply not persuaded that the class of risks that are "small enough" to manipulate under EL but "not so small" that they could have been manipulated under negligence represents a serious concern, even assuming that everything else about Henderson and Rachlinski's analysis is unassailable.

Now consider the possibility that the source of the problem they have identified–the ability of manufacturers to manipulate consumers' perceptions–would exist under negligence. Under that assumption, the outcome under negligence would be less efficient than the one that they worry might result under enterprise liability. For instance, the purchase of Design One under a negligence regime might often be made by consumers under the falsely optimistic view that the product posed little or no risk. If one assumes

356. *See* Henderson & Rachlinski, *supra* note 9, at 252 n.128:

> Of course, if the purveyors of the inefficiently safe design were to induce consumer to believe that the efficient design is much more dangerous than is the case, they might be able to convince consumers to purchase the inefficiently safe product under any system. The point here, however, is that by narrowing the price gap, [enterprise liability] makes their efforts a little easier.

Id.

that manufacturers manipulate consumers to believe that Design One posed no risk, then with each product purchased, there would be an efficiency loss of up to $10.[357] Moreover, it is clear that the number of products purchased under negligence (each one leading to a potential net loss of $10) would be greater than the number under enterprise liability, simply because the price of the product is higher under enterprise liability. Thus, both the size of the potential inefficiency per product sold and the number of products sold would be greater under negligence than enterprise liability. And that is before taking account of the fact that, as described above,[358] the incentives to manipulate toward consumer underestimation of product risks are not mitigated by conflicting effects in the way that incentives to manipulate toward overestimation are.

There is another way that Henderson and Rachlinski have ignored the potential inefficiencies of a negligence regime in order to suggest that the enterprise liability regime is inferior. One can imagine that a third product, Design Three, dominates the market under negligence at a price of $75, but carries expected accident costs of $30 that are not perceived by consumers. Furthermore, it could easily be the case that courts do not recognize that either Design One or Design Two is superior to Design Three, simply because courts and juries are not especially proficient at making such determinations. The imposition of enterprise liability in such a market would internalize the $30 expected accident costs and would lead to the development of Design One and/or Design Two by manufacturers. Thus, the fact that Henderson and Rachlinski can tell a story in which consumers might prefer Design Two to Design One under enterprise liability overlooks the fact that both of those designs could well be superior to the design that dominates under negligence.

Finally, even if one assumes that consumers have some estimate of the risks posed by Design One, there is still reason to believe under Henderson and Rachlinski's assumptions that enterprise liability would be superior to negligence. Henderson and Rachlinski assume that manufacturers can manipulate consumer perceptions of the underlying liability regime. Under a negligence regime, therefore, the manufacturer of Design One could

357. That would be the case because consumers might actually value the product at some amount lower than its full cost of $90.

358. *See supra* text accompanying notes 219-32.

manipulate consumers into falsely believing that they *will* be compensated for any harm done, such that consumers partially disregard those risks, leading to the same inefficient outcome that occurs when consumers are optimistic with respect to product risks. Again, Henderson and Rachlinski fail to recognize that the problem that they purport to have identified with enterprise liability may be as significant or more significant under the current regime.

h. *Summary*

Henderson and Rachlinski argue that a "remarkable logical flaw" exists within our work, when in fact it is their argument that requires a simultaneous belief in consumer manipulability and consumer omniscience; that assumes unlimited, unmitigated ability on the part of manufacturers to manipulate perceptions of the legal system; that assumes in the alternative imperfect compensation from the legal system without realizing that such an assumption undermines their entire model; and, finally, that criticizes enterprise liability against a hypothetical perfectly functioning market and liability system without providing any comparison of the manipulation-based inefficiencies that exist in alternative legal regimes, including the present one. Those are remarkable logical flaws and, what is worse, they are flaws in service of a point that would be insignificant even if shown. As noted above,[359] the vast majority of the fear appeals that Henderson and Rachlinski believe enterprise liability would catalyze do not bear on consumer product safety–except inasmuch as the hyping of external safety risks can result in an underestimation of risks intrinsic to the product. The remainder are merely tangential attempts to enhance one product's attractiveness by emphasizing hazards posed by another type of product altogether or by emphasizing the safety features of the advertised product, either of which also may lead consumers to underestimate the risks of the particular product being promoted. The fact is that none of Henderson and Rachlinski's empirical examples actually fit their stylized model of a market in which Design One competes with an "excessively safe" Design Two. In essence, therefore, we are asked to abandon hope in enterprise

359. *See supra* text accompanying notes 185-217.

liability because it may exacerbate a problem that has not been shown to exist.

2. *Enterprise Liability Actually Helps to Solve the Problem (Insofar as There Is a Problem)*

Henderson and Rachlinski's basic claim is that we "ignor[ed] the fact that the manipulation of consumers is a two-way street,"[360] and that "some manufacturers struggle to convince consumers that a product-related activity is dangerous while their competitors struggle to convince consumers that the same activity is safe."[361] They believe that market competition between manufacturers in that fashion should result in both overestimation and underestimation of product risks by consumers, with no easy prediction as to which result will predominate.[362] Moreover, unravelling such a "messy and difficult empirical chore," according to Henderson and Rachlinski, "is an essential prelude to abandoning the central feature of products-liability law."[363]

With respect to the first point, we have tried to make clear in the preceding Sections and in our earlier articles that, although the road to manipulation may be a two-way street leading to both under- and overestimation, all the available empirical evidence, as well as the balance of theoretical arguments from economics and psychology, suggest that the vast majority of the traffic is heading in one direction. With respect to the second point, we are not at all sure that the possibility of consumer overestimation of product risks is problematic for enterprise liability. To the contrary, enterprise liability may represent the best hope that the legal system has of combating any problem of consumer overestimation that does exist.

We readily admit that there may be situations in which manufacturers will have an incentive to increase consumers' risk perceptions. Our admission of that point, however, is not recent. Instead, it is a point that we ourselves went out of our way to make. It is also a point that we have argued will apply with equal force to all products liability regimes and that will be best ad-

360. Henderson & Rachlinski, *supra* note 9, at 218 (footnote omitted).
361. *Id.* at 253.
362. *See id.* at 251-55.
363. *Id.* at 253.

dressed (though not perfectly addressed) by enterprise liability.[364] Just as earlier products liability scholars too hastily determined that enterprise liability could not remedy the harmful effects of consumer overestimation of product risks,[365] Henderson and Rachlinski are wrong to conclude that enterprise liability cannot combat manufacturer attempts to induce consumer overestimation.

Enterprise liability offers compensation for all injuries shown to be caused by consumer products. Thus, to the extent that consumers do overestimate a product risk, their resulting concern over that estimation will be reduced in part under enterprise liability by the fact that they know they will receive tort damages for any loss that does occur. Moreover, enterprise liability offers at least the theoretical promise of providing consumers with an independent source of risk information through the price mechanism. Assuming full internalization of product-caused accident costs under enterprise liability, consumers can rely upon product shelf prices to provide at least some means of comparison among and across product lines.

Even absent those price effects, consumers can be more confident under enterprise liability about product safety because they will be better able to trust manufacturers to make decisions that are in the interests of consumers. Although we did not previously express it this way, our point can be described in terms of a well-known insight of agency theory,[366] which holds that "agency costs" are inevitable in economic relationships that rely, to some degree, on trust. Agency costs are defined as the sum of the monitoring and bonding costs between principal and agent necessary to deter disloyal acts on the part of the agents, plus any residual loss incurred due to disloyalty that cannot be cost-justifiably deterred.

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364. *See* Hanson & Kysar II, *supra* note 2, at 1565-67; Hanson & Logue I, *supra* note 24, at 177-81; Croley & Hanson I, *supra* note 6, at 786-92.

365. *See* Hanson & Kysar I, *supra* note 2, at 717.

366. This entire debate can be translated into the terms of agency theory. A very rough version of that translation might be expressed as follows: Opponents of enterprise liability tend to believe that, with the assistance of market forces and ex post analysis of judges and juries, the principals' (consumers') ability to monitor its agents (manufacturers) minimizes agency costs (which comprise the aggregated costs of monitoring, of bonding, and of residual disloyalty). Proponents of enterprise liability tend to believe that agency costs are minimized only when agents are more completely bonded by the threat of liability for product caused injuries.

According to agency theory, an agent (here, the manufacturer) will, other things equal, tend to act more in accordance with the interests of its principals (here, the consumers) if the agent is *bonded*; that is, if the agent's own interests or profits depend in part upon the interests of its principals.[367] Thus, enterprise liability will not only succeed in making manufacturers more loyal to consumer interests, but it will allow consumers to be less concerned about the risks of product designs simply because they understand that manufacturers must bear some of the costs that would otherwise be borne only by injured consumers. Relatedly, not only does enterprise liability encourage better risk information, more effectively conveyed to consumers from manufacturers, but it also enhances the credibility of that information in the eyes of consumers.

Consumers may also place greater faith in manufacturer design decisions under enterprise liability because the system eliminates harmful disincentives to adopting safety innovations that manufacturers currently face under the fault-based regime. As Judge Posner has noted, the market-size reduction effect of any attempt to sell safety under the current regime can inhibit the adoption of safer designs:

> If advertising and marketing a safety improvement are thus discouraged, the incentive to adopt such improvements is reduced. But make the producer liable for the consequence of a hazardous product, and no question of advertising safety improvements to consumers will arise. He will adopt cost-justified precautions not to divert sales from competitors but to minimize liability to injured consumers.[368]

Moreover, despite the apparent safe-harbor of the evidentiary rule that excludes evidence of subsequent remedial measures,[369] manufacturers under current law seem quite concerned about the possibility that consumers, regulators or jury members will view product innovations as evidence that earlier designs were defec-

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367. *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305 (1976); Daniel Levinthal, *A Survey of Agency Models of Organizations*, 9 J. Econ. Behav. & Org. 153 (1988).

368. Posner, *supra* note 220, at 211.

369. *See* Fed. R. Evid. 407.

tive.[370] Indeed, the impact of the hindsight bias on jury determinations[371] significantly compounds manufacturers' reluctance to adopt a new safety precaution. The mere existence of such a precaution will be viewed through the lens of the hindsight bias as strong evidence that the prior design was inadequate and that the manufacturer should have been aware of that inadequacy.

Enterprise liability eliminates all of those disincentives to safety innovation because it imposes liability costs at every stage of the design process. That is, manufacturers of a current design have no reason to fear that adoption of a new design will suddenly force them to internalize costs–they already must internalize costs for the current design. Thus, manufacturers will adopt the new design based not on whether marketing it may reduce overall demand or on whether developing it will result in biased jury or regulatory determinations, but on whether it will cost-justifiably reduce accident costs. Eliminating such harmful disincentives provides one more reason that consumers may have greater assurance under enterprise liability that manufacturers are "bonded" to their interests.

Despite those many reasons for greater consumer trust of manufacturers under enterprise liability, Henderson and Rachlinski remain skeptical. They argue that consumers' ability to rely upon manufacturers will be undermined by the fact that tort law provides imperfect compensation for personal injuries: "[I]t would not be rational for [consumers] to ignore their fears and rely on

370. *See, e.g.*, MN Trial Exhibit 11,296 ("In attempting to develop a 'safe' cigarette you are, by implication in danger of being interpreted as accepting that the current product is 'unsafe' and this is not a position that I think we should take.").

371. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chi. L. Rev. 571, 572 (1998):

> Consider, for example, the dilemma of a defendant who, despite taking reasonable care, has caused an accident and has been sued. The defendant's level of care will be reviewed by a judge or jury who already knows that it proved inadequate to avoid the plaintiff's injury. Consequently, the defendant's level of care will seem less reasonable in hindsight than it did in foresight. Reasonableness must be determined from the perspective of the defendant at the time that the precautions were taken, but the hindsight bias ensures that subsequent events will influence that determination. The law relies on a process that assigns liability in a biased manner.

Id. (citations omitted). *See also* Jolls et al., *supra* note 276, at 1523; Russel B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Cal. L. Rev. 1051, 1098-99 (2000).

manufacturers to make them whole if they are injured. Thus, [enterprise liability] would neither assuage consumer fears nor inhibit manufacturers' ability to exploit those fears."[372] In so arguing, however, Henderson and Rachlinski have merely knocked down a straw man. Our claim is not that enterprise liability will eliminate all incentives for manufacturers to manipulate risk perceptions, only that it will reduce those incentives more effectively than will other products liability systems, including the current regime.[373] Moreover, we do not claim that tort compensation will be full and complete. Incompleteness does not imply, however, that tort compensation will have absolutely no effect on the way in which consumers feel about those risks. Our point is simply that, to the extent that compensation reduces the downside of any possible harm, it will "assuage" (though not eliminate) "consumer fears" and will "inhibit" (though not eliminate) "manufacturers' ability to exploit those fears."

Finally, we must point out that the alleged problem of consumer overestimation has been, at least prior to Henderson and Rachlinski's argument, treated by most products liability scholars as a problem that tort law is not designed to confront. As Professor Mark Geistfeld put it in his survey of products liability theory for the *Encyclopedia of Law and Economics*:

> Imperfect information need not result in overly unsafe products. If consumers overestimate the way in which increased safety investments reduce risk, they will attribute too great a value to safety investments and demand more than the optimal amount of safety. Although this outcome is inefficient, it seems unwise to construct a regulatory regime, with its attendant administrative costs, in order to reduce product safety. Hence there is a pressing need to regulate market transactions only if consumers undervalue safety investments.[374]

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372. Henderson & Rachlinski, *supra* note 9, at 250-51.

373. Where we have indicated that enterprise liability would fully address the problem of overestimation, we have typically been assuming that all losses are pecuniary and compensated through tort law (an assumption that we frequently acknowledge is extreme). *See, e.g.*, Hanson & Logue I, *supra* note 24, at 182, 188.

374. Mark Geistfeld, *Products Liability*, Encyclopedia of Law and Economics 5140 (1997); *see also* Mark Geistfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 Tex. L. Rev. 803, 835-36 (1994) ("If consumers overestimated the product's full price, then manufacturers would have an incentive to provide consumers with accurate information about the product's true

Several other prominent products liability scholars over the past two decades have shared the view that products liability should not be concerned with situations in which consumers overestimate the risks posed by products.[375] It is at least somewhat surprising, therefore, that Henderson and Rachlinski suddenly view the problem as a fundamental roadblock to the institution of enterprise liability.

In short, Henderson and Rachlinski's claim to have undermined the case for enterprise liability depends upon their view that they identify a problem that we ignore. In fact, not only did we not ignore the problem of consumer overestimation of risk, but we also explained why enterprise liability provides a better solution to it than existing law. More important, regardless of whether our argument is compelling, most courts and scholars have, implicitly or explicitly, treated the problem of consumer overestimation of product risks as outside the range of relevant considerations in the choice among liability rules. Even if there is traffic flowing heavily in both directions, therefore, we think it is striking that opponents of enterprise liability are only now acting as if the one lane that has long been dismissed is critically important.

CONCLUSION

As noted at the outset,[376] we had originally planned a much different focus for this Article. Nevertheless, for a number of reasons, we appreciate the opportunity provided by Henderson and Rachlinski's thought-provoking and admirably concise critique.

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full price. Consumers who found such information to be credible would reduce their estimates of the product's full price, thereby increasing consumer demand . . . .")

375. *See, e.g.*, A. Mitchell Polinsky, An Introduction to Law and Economics 99 n.61 (1983) (arguing that if consumers overestimate product risks, manufacturers would have an incentive to voluntarily provide full warranties for their products, thereby achieving a result similar to enterprise liability); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. Legal Stud. 1, 4 (1980) (arguing that manufacturers have obvious incentives to correct consumer overestimation of product risks, irrespective of tort law); W. Kip Viscusi, Reforming Products Liability 65 (1991) (noting that "[i]f risks are highly publicized and are overestimated, there is no need for additional intervention through tort liability"); Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 Md. L. Rev. 1093, 1125 (1993) (contending that "products with risks that consumers are likely to overestimate significantly" should be "excluded from the [liability] system altogether").

376. *See supra* text accompanying notes 19-20.

The two articles that we published last year prompted reactions from those who thought that we had gone too far in our view of market manipulation and from those who thought that we had not gone far enough. Henderson and Rachlinski's challenge is unique among those reactions in that it seems to argue both positions simultaneously. On the one hand, the authors claim that we ignore the many ways in which rational, sovereign consumers can undermine the efficiency of tort law if they are given insufficient incentives to take care.[377] On the other hand, we also ignore the many ways in which manipulative manufacturers can lead consumers to overestimate product dangers and, indeed, snowball them into disbelieving the most basic premise of enterprise liability.[378] Henderson and Rachlinski's account seems to both accept and reject the lessons of behavioralism and the possibility of market manipulation.

The tension in those premises is understandable. As Henderson and Rachlinski note,[379] the current approach to "behavioral law and economics" walks a fine line by attempting to salvage some aspects of the standard legal economic model while dismantling others. We attempted in our earlier articles to walk that line by focusing primarily on risk perception manipulation, arguing that manufacturers almost invariably have incentives to lower consumer perceptions of the risk of the manufacturers' product offerings. In doing so, we put to one side the problem of *preference manipulation*; that is, the efforts of consumer product manufacturers to influence the very content of perceived consumer needs and desires. That particular problem, which we view as far more philosophically troubling than the problem of risk perception manipulation, was to be a major focus of this Article.

Instead, however, we have focused on Henderson and Rachlinski's various important critiques, hopefully sharpening our analysis of the problem of risk perception manipulation and the case for enterprise liability. It is somewhat ironic, therefore, that Henderson and Rachlinski conclude their critique by pointing out the way in which our story of market manipulation casts considerable doubt on the assumption that expressed consumer preferences necessarily represent a positive accrual of utils. As the authors note:

377. *See supra* text accompanying notes 37-40.
378. *See supra* text accompanying notes 170-73.
379. *See* Henderson & Rachlinski, *supra* note 9, at 257-58.

> If consumer preferences are completely constructed, then what exactly is supposed to be the efficient level of consumption? Should the socially optimal demand for soup be measured with the cans in alphabetical order, or not? On a rainy day, or sunny? With what kind of music or ambient odors (if any) in the background? In what section of the store? What should the labels look like? How big are the cans?[380]

Those questions are admittedly troublesome for any economically oriented scholar, but our argument is not that enterprise liability would result in efficiency in the sense that every consumer transaction would be guaranteed to be utility-maximizing (nor, by the way, is it our argument that preferences are "completely constructed"). We have merely argued that the institution of enterprise liability would provide a far greater assurance than does current law that manufacturers and consumers do not unduly discount accident costs associated with the design, manufacture, marketing, purchase and use of consumer products. Where we have discussed the problem of preference manipulation, we have indicated that no products liability system is designed to deal with it.[381] Products liability addresses the actual and perceived incidence of product costs, particularly the costs of product-caused accidents. No products liability regime is designed to address perceptions of product benefits.

In our view, many of Henderson and Rachlinski's examples fall into this category of manipulation that lies beyond the purview of products liability law, at least as it has been traditionally understood. For instance, consider Henderson and Rachlinski's suggested case of breakfast cereals. Manufacturers create fortified breakfast cereals by spraying liquefied vitamins onto ordinary cereal. They then charge a price far higher per unit than the cost of purchasing the ordinary cereal and the vitamins separately.[382] Why, given such "outright deceptive" marketing, do consumers buy the overpriced cereal? Perhaps because, as Henderson and Rachlinski note,[383] they have been convinced by advertisements that the background risk of cancer is high and that the cereal is effective at lowering that risk. Perhaps also because consumers prefer

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380. *Id.* at 258.

381. *See* Hanson & Kysar II, *supra* note 2, at 1566-67.

382. *See* Steve Pratt, *Super Flakes: These Days, a Corn Flake Contains More than Just Corn*, Chi. Trib., May 24, 1995, at 3.

383. *See* Henderson & Rachlinski, *supra* note 9, at 245.

the illusion that they are receiving their vitamins from some "natural" aspect of the cereal rather than an obviously man-made tablet. In either case, however, consumers have been led to purchase an item that would draw sneers from a perfectly rational wealth-maximizer. The remaining examples that Henderson and Rachlinski provide of products that are designed to guard against some external risk (whether or not emanating from another consumer product) are also arguably designed to enhance the perceived utility of the offered product and therefore cast doubt on the "efficiency" of any resulting purchases. In our view, however, such efforts are simply not the province of products liability law. Thus, we find it puzzling that Henderson and Rachlinski offer the examples as evidence against enterprise liability–no one ever claimed that enterprise liability would solve the problem of defining and comparing "true" preferences.

In so arguing, however, we do not mean to suggest that legal policymakers should ignore the problem of preference manipulation altogether. To the contrary, in our view preference manipulation is the driving force behind consumerism and a host of related social and environmental problems and, as such, it is deserving of regulatory attention.[384] If adopted, enterprise liability would provide a starting point for such a project by affording greater assurance that consumers make well-informed market purchases with respect to product risks. We are under no illusion that enterprise liability would sort out the philosophically nettlesome question of whether "the socially optimal demand for soup [should] be measured with the cans in alphabetical order, or not."[385] Nevertheless, enterprise liability would at least diminish one source of doubt regarding the efficacy of consumer product purchases by forcing prices to reflect accident costs and by providing manufacturers with far greater incentives to educate consumers about product risks and appropriate use behaviors.[386] Moreover, as noted in our

384. *See* Douglas A. Kysar, *Ecological Economics: A Macroeconomics for Legal Analysis?* (August 15, 2000) (working title) (manuscript on file with authors).

385. Henderson & Rachlinski, *supra* note 9, at 258.

386. Henderson and Rachlinski attempt to undermine that argument by reminding us that the notion of risk itself is socially constructed, such that no independent yardstick exists against which to measure a product's risk and calculate an appropriate cost factor. They write, "The slight risk of death from skiing creates part of the sport's pleasure whereas the slight risk of death from exposure to a nearby hazardous waste dump creates a massive uproar." *Id.* Of course, their ob-

earlier articles,[387] enterprise liability would make the accomplishment of preference manipulation more difficult than any other products liability regime because it would, in essence, raise the bar which manufacturers must clear in order to manipulate preferences. By internalizing the accident costs caused by a product, enterprise liability would force manufacturers to overcome a higher perceived price of their products when influencing consumer perceptions of product benefits.

One might also consider policy measures outside of products liability in order to help combat the problem of preference manipulation. For instance, one could eliminate the corporate income tax deduction for advertising expenses.[388] That sand-in-the-wheels approach would reduce the sheer volume of advertising that occurs. Given that consumerism depends at least partially on the

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servation is correct, but such disparities in behavior are attributable to differing perceptions of qualitative aspects of the risky activity, such as its perceived voluntariness and naturalness, and not necessarily to differing perceptions of the objective probability of the risk. We scarcely raise an eyebrow at ski resorts because we believe that people are aware of the riskiness of their activity and have made a voluntary choice to endure it in order to individually experience the benefits of a thrilling encounter with nature. We pitch a "massive uproar" over hazardous waste dumps because we believe that residents of targeted sites are being forced against their will to suffer a risk of a human-made harm in order to create a benefit that will only infinitesimally accrue to them. Some orthodox economists like to think that low-income homeowners settle next to toxic waste dumps for the same reason that wealthy thrillseekers vacation in Aspen. They believe that everything can be reduced to a common currency involving dollars and life expectancy and that, in the end, nothing beyond those two measures really matters. Others of us, however, suspect that other factors–economic, social and psychological–are at play.

Again, enterprise liability is not intended to unravel such profound philosophical puzzles. All that the system will do is ensure that the expected accident costs of a consumer product–however imperfectly measured–are incorporated into the cost calculus of manufacturers and consumers. As we have noted several times in this Article, monetary tort awards provide imperfect compensation for physical injury. Likewise, actuarial risk information provides an imperfect predictor of how consumers will react to a given risk, in light of the fact that qualitative and contextual aspects of the risk matter to consumers in determining their reaction. Thus, enterprise liability will not necessarily guarantee a "natural and appropriate risk-benefit assessment." *Id.* It will, however, provide a far greater assurance of knowing and voluntary consumer assumption of product risks than current law.

387. *See* Hanson & Kysar II, *supra* note 2, at 1566-67.

388. *See* Hanson & Kysar III, *supra* note 2; Juliet Schor, The Overspent American: Upscaling, Downshifting, and the New Consumer 165 (1998).

omnipresence of commercial messages,[389] limiting the incidence of advertising might aid in overcoming corporate construction of preferences. A more refined approach might be to eliminate the tax deduction only for advertising expenses covering national campaigns, as such campaigns tend to involve lifestyle marketing and other potentially manipulative techniques, as opposed to advertising on the local level, which focuses more on providing information.

Additionally, one could institute an advertising tax, the revenues of which would be used to fund counter-advertising and other educational efforts designed to instill values that are not represented in commercial advertising.[390] Given that preferences clearly are subject to construction, the government can (and should) participate in the competition to create, manage, and exploit preferences among its citizens. Finally, and perhaps most radically, one could begin to think about a more advanced and informative system of disclosure than any currently practiced efforts. Legal scholars have recently begun proposing innovative ways of utilizing technological advances for the promotion of better informed, more efficient markets.[391] To that list one could add the institution of a centralized database containing detailed information on corporate social and environmental responsibility records. Consumers could instantly access the database using a wireless handheld device and related technology which are already commercially available. The fact that unique UPC scanner codes are already present on the great majority of consumer products would make institution of this system all the more possible.

Those suggestions are obviously incomplete and speculative thoughts on a topic that deserves far deeper treatment than we can provide in this Article. Nevertheless, we feel it is important to take those first faltering steps because, unlike Henderson and Rachlinski, others who have commented on our first two articles felt that even the "radical" solution of enterprise liability would

389. *See generally* Bradley A. Harsch, *Consumerism and Environmental Policy: Moving Past Consumer Culture*, 26 Ecology L.Q. 543, 557-72 (1999) (providing a review of sociological and anthropological understandings of consumerism).

390. *See id.* at 608-10.

391. *See, e.g.*, Hanson & Logue II, *supra* note 24, at 1293-95 (describing the potential use of an electronic card to track individual cigarette consumption); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 Stan. L. Rev. 683, 755-57 (1999) (suggesting the creation of web site devoted to compiling and making available important health and risk information).

provide an incomplete defense against the problem of market manipulation. We agree and look forward to returning to the topic.