THE FREE RADICALS OF TORT

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Rational and irrational people are typically held to an identical tort standard when it is a question of their own liability. On the other hand, when it is a question of whether someone else has encouraged some dangerous behavior, as under the doctrines of duty and proximate cause, the encouragers will be liable only when the persons were part of a group whose members typically lack rationality. The courts' apparent purpose is to prevent accidents in every way possible even if it means diluting the incentives of irrational people in order to increase the incentives of responsible people to refrain from creating tempting opportunities for them.

I. INTRODUCTION

Tort law contains an intriguing but unexplored puzzle. Courts hold that irrational actors, even actors with severe mental illness, are liable for their torts in exactly the same way that rational people would be. Nevertheless, courts also hold rational actors liable for encouraging or provoking irrational actors, under the same circumstances in which they would cut off a defendant's liability if he had instead provoked a rational actor. Why do courts fail in the first situation to make a distinction that they observe in the second situation?

Here is a case example that illustrates the puzzle. In *Satcher v. James H. Drew Shows, Inc.*,[1] the plaintiff's wife, Mrs. Satcher, went to an amusement park and bought a ticket to ride on the bumper cars. The defendant, James H. Drew Shows, Inc., operated this ride.[2] Bumper cars run on an oval metal floor and are propelled by electricity, which each car receives from an aerial that rubs against the metal roof. Each car has its own steering wheel and accelerator pedal and

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[1] 177 SE 2d 846 (Ga Ct App 1970).

[2] See id. at 847.

can travel anywhere on the metal floor of the ride. Bumper car drivers frequently try to bump into other drivers; those who are being assaulted frequently try to dodge their assailants.

The plaintiff's wife paid her admission and took a seat in a bumper car. Then, a group of mental patients was led up to the ride. The patients were on an excursion to the amusement park. When the attendant turned on the electricity to start the ride, the mental patients began to converge on the plaintiff's wife and to crash into her from different angles. After the ride was over, her neck was permanently injured. The plaintiff alleged that the defendant had been negligent by allowing the mental patients to converge on his wife and to injure her. The appellate court held that the trial court erred in dismissing the plaintiff's complaint.[3]

The case illustrates two striking aspects of tort law. First, if the plaintiff had sued the mental patients for battery, she probably would have won. Their mental illness would not have been a defense. The plaintiff did not sue them probably because they lacked the assets to pay a judgment. Second, the assailants' status as mental patients was critical to the defendant's liability for negligence. As will be shown below, if the bumper car drivers were instead well-known bankers, it is unlikely that the defendant would have been liable.

To some analysts both sides of this puzzle will seem odd. Many believe that persons with mental illness should not be liable in the same way as normal people. The same analysts might be equally troubled when they see that the courts hold actors responsible only if a subsequent actor was irresponsible. This rule seems to make irresponsible people less accountable than others. Their bad acts count for less. Under current legal doctrine, it would not be a defense for the *Satcher* defendant to show that the mental patients knew that ganging up on the plaintiff's wife was wrong; similarly irrelevant would be whether the mental patients had moral faculties

[3] Id.

sufficient to weigh whether it was right to gang up on Mrs. Satcher. The *Satcher* defendant was liable simply because it encouraged mental patients instead of bankers. Indeed, the only circumstance that would destroy the defendant's liability is if the group led up to the bumper cars only looked like mental patients when in reality they were well-known bankers. In that bizarre case, the *Satcher* defendant would probably escape negligence liability.[4]

We can solve this puzzle by seeing that tort law is not concerned with corrective justice in its usual moral sense, but instead focuses liability where it will do most good-that is, on responsible people. This point will be further developed.

Economists and others could argue about whether persons with mental illness, children, criminals, riotous groups, and so forth, are or are not rational and on what level. It is a standard economic conclusion that apparently irrational behavior often turns out to be rational when viewed in a slightly different frame. As already noted, however, the negligence doctrines of duty and proximate cause embed a surprising legal distinction between responsible and irresponsible people, which tracks the common understanding of rationality. Responsible people who encourage irresponsible people are often liable, whereas responsible people who encourage other responsible people are usually immune (unless they are liable as principals for their agents). In real life, most of the irresponsible people (whose encouragement leads to liability) are not fully rational in the everyday way of speaking. They are children, young adults, persons with mental illness, criminals, anonymous members of crowds, and the like.

A good name for these irresponsible people is "free radicals." Children, young adults, mental patients, crowds of unidentifiable people, and so forth, frequently behave in radical,

[4] See *Seith v Commonwealth Edison Co*., 89 NE 425 (Ill 1909), see text accompanying note 48 for discussion. The line is somewhat fine, however, because a defendant who encourages Jaycees to wreak havoc will face liability. See *Connolly v Nicollet Hotel*, 95 NW 2d 657 (Minn 1959) (hotel liable for failing to shut down out-of-control Jaycee convention).

tortious ways, and their lack of assets frees them from tort sanctions.[5]

Liability for encouraging free radicals-the EFR doctrine-is interesting both because it is a significant part of tort law and because it seems to treat free radicals differently in two different contexts, and each treatment is the opposite of what most people would predict from commonsense.

II. EVERYONE IS EQUAL BEFORE TORT LAW

Similar to the proverbial laws entitling rich and poor to sleep under bridges, tort law allows both the rational and the irrational to commit torts and does not pay much attention to their special challenges and disabilities. The extremes of this doctrine continue to startle beginning law students and become the first set of examples for Holmes's view that the law of tort, for all of its stress on fault, has little to do with morality.[6]

In *McGuire v. Almy*[7] the defendant was a person with mental illness who still lived in her own home with her relatives who had moved in with her. They had hired a nurse to care for her. One day the defendant was in an ugly mood that her live-in relatives had seen before, and she grabbed a leg from a piece of furniture and began to threaten those around her. The relatives drafted the nurse to disarm her, and the defendant struck her with the furniture leg. The nurse

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[5] I am grateful to my colleague John Witherspoon who found the following definition in the Arthur Rose & Elizabeth Ross, *The Condensed Chemical Dictionary* 514 (Reinhold Publishing, 6th ed 1961):

> [F]ree radicals are always materials with high reactivity and high energy, and can be collected and stored only with special precautions such as collection in solution or at very low temperatures and in the absence of all but inert solvents or diluents. Some efforts have been made to devise means of collecting free radicals for subsequent use to generate power.

[6] Holmes wrote:

> The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy.

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv L Rev 457, 459-60 (1897).

[7] 8 NE 2d 760 (Mass 1937).

sued for battery.

The issue arose whether it was a defense that the defendant was insane, and the court held that it was not.[8] The court said that the proper rule was whether the defendant was capable of the intent that would make a normal person liable for battery. *Vosburg v. Putney*[9] held that a normal person is liable for a battery if he desires to create the unlawful contact-in that case a kick to the plaintiff's shin, in this case a blow to the plaintiff's body. Liability in *McGuire* therefore depended only on whether the defendant wished to strike the plaintiff, which she obviously did. The court stressed a practical reason for its strict rule. Making the concededly irrational defendant liable would render the people possessing an interest in her estate more cautious about watching her.[10]

The courts have applied the *McGuire* principle to a wide range of astounding cases. In *Polmatier v. Russ*,[11] the defendant was paranoid schizophrenic and had the delusion that his father-in-law was a Chinese spy trying to kill him. He therefore shot him first. At the trial a psychiatrist testified that the defendant was legally insane and could not form a rational choice but that he could make a schizophrenic or crazy choice. This diagnosis made no difference. The

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[8] The *McGuire* court said:

> [W]here an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable. This means that in so far as a particular intent would be necessary in order to render a normal person liable, the insane person, in order to be liable, must have been capable of entertaining that same intent and must have entertained it in fact.

Id at 763.

[9] 50 NW 403 (Wis 1891).

[10] The *McGuire* court said:

> [A] rule imposing liability tends to make more watchful those persons who have charge of the defendant and who may be supposed to have some interest in preserving his property.

Id at 762.

[11] 537 A2d 468 (Conn 1988).

defendant was liable because he desired to shoot his father in law and did so.

Children are also liable for their intentional torts as if they were fully responsible adults. The only qualification is that they must possess the maturity to form the intent required for the tort in question. Usually it does not require much maturity to form the needed intent. For battery, for instance, the only intent they need is the desire to commit the unlawful touching or just the ability to know that the contact will result from their act. For other intentional torts, a lesser intent will often suffice.

In *Ellis v. D'Angelo*[12] a four-year-old child was liable for pushing his babysitter down even upon the objection that the child lacked the moral capacity to know that his act was wrongful. Also, in the famous case of *Garratt v. Dailey*[13] a five-year-old child pulled a chair away after a neighbor got up. She fell to the ground when she tried to sit down in the same place where the chair had been before. The court held that the child would be liable even if he was not trying to play a prank on the plaintiff. All that was needed to make him liable was the ability to predict that she would try to sit down in the same place without looking. In other words, the issue had nothing to do with moral responsibility.

Similarly, children are strictly liable for their trespasses to land, whether or not they are morally culpable. In *Huchting v. Engel*[14] a six-year-old child defendant was liable for destroying the plaintiff's shrubs, and in *Seaburg v. Williams*[15] a five-year-eleven-month-old child was liable for starting a fire in his neighbor's garage.

The situation is similar when we move to negligence law, though here children get more

[12] 253 P2d 675 (Cal Ct App 1953).

[13] 279 P2d 1091 (Wash 1955).

[14] 17 Wis 230 (1863).

[15] 148 NE 2d 49 (Ill App Ct 1958). The child was almost six.

of a break than do persons with mental illness. When children are engaged in juvenile activities, the courts hold them to a standard that takes their youth into account. Nevertheless, children and youths are held fully to the adult standard when they engage in many adult activities, such as driving a boat or driving a car.

Persons with mental illness, moreover, are held to the standard of normal people, even when they could not have achieved that standard. In *Breunig v. American Family Insurance Co.*,[16] the plaintiff began having dangerous delusions and continued to drive her car. As the court reasoned-and its reasoning was typical-if a normal person would have realized that the delusions were a danger signal, then it was negligent for the defendant to have continued to drive. In other words, the court imputed a normal person's insight to the mentally ill defendant, and then asked whether she was negligent given she possessed this fictitious insight.

All of these cases reveal a kind of strict liability within the negligence rule. The courts seem much less concerned with moral culpability than with avoiding accidents. Holmes famously glossed the legal doctrine in this area by saying that the courts cut slack for people with "distinct defects,"[17] what we would today call "obvious disabilities." Thus, children riding bicycles, blind people walking with white canes, and persons with mental illness on the hospital grounds, would all get dispensation from the courts. The reason could be that unless the standard for them drops, it is difficult to increase the standard for others who can use more precaution because of what their eyesight tells them, namely, that they are about to interact with someone who will not be using the normal amount of precaution. On the other hand, youths or persons with mental illness driving cars are held to the same standard as everyone else. It is difficult or

[16] 173 NW 2d 619 (Wis 1970).

[17] Oliver Wendell Holmes, Jr., *The Common Law* 88 (Dover Publications, 1881).

impossible for those interacting with them to realize that they need to use more precaution, so we might as well hold the youthful drivers to the same standard as everyone else. Perhaps the justification is similar to the one stated by the *McGuire v. Almy* court. If youths or persons with mental illness have valuable assets and want to drive cars, probably some more responsible person will have an incentive to preserve these assets and will more likely do so if the courts do not give challenged people a break.

III. SOME ARE LESS EQUAL THAN OTHERS

A. Controversial Applications of the EFR Doctrine

Perhaps because of the failed common-law experiments of the 1960s and 1970s, many legal scholars are wary of novel liability. The EFR doctrine is actually old, but some think it is new. Modern legal analysts have generally failed to recognize the importance and extension of the EFR doctrine in tort law. Also, many have argued that intentional wrongdoing should cut off liability for mere negligence.[18] The EFR doctrine, as evolved over the centuries, is totally inconsistent with this idea. It imposes liability when intentional, even criminal, behavior intervenes.

Let us then start with an EFR case that many modern analysts have criticized. In *Weirum v. RKO General, Inc.*[19] the defendant was a popular Los Angeles radio station that broadcast to a teenaged audience. In order to increase the number of its listeners, the station started a promotion called the Super Summer Spectacular in which one of its disk jockeys drove a red muscle car to

[18] For instance, Steven Shavell has written:

> Criminal or intentional acts of parties other than the defendant would seem more important to discourage than those involving uncomplicated negligence, and the former but not the latter tend to exclude the defendant from the scope of liability.

Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J Legal Stud 463, 497 (1980).

[19] 539 P2d 36 (Cal 1975).

various locations in the L.A. area; another disk jockey back at the station announced his changing destinations. Under the rules of the contest, the first listener who caught up with the traveling disk jockey won a small cash prize and a minute or two of fame. The contest was enormously successful. The Real Don Steele later testified that he knew that teenagers were racing to catch up with him.

On the day in question, the station announced that he was going to be at the Holiday Theater in the San Fernando Valley. Seventeen-year-old Robert Sentner and 19-year-old Marsha Baime independently drove their cars to it only to find that they were too late. They then independently decided to follow Steele to his next stop. For the next few miles the Sentner and Baime cars jockeyed for position closest to the Steele vehicle, reaching speeds up to 80 miles an hour. About a mile and a half from Thousand Oaks, the two teenagers heard a broadcast saying that Steele might stop there.[20]

Then, confirming the prediction, the Steele vehicle left the freeway at a Thousand Oaks off-ramp. Either Baime or Sentner, in attempting to follow, forced the decedent's car onto the center divider, where it overturned. Baime stopped to report the accident. Sentner, after pausing momentarily to relate the accident to a passing peace officer, continued to pursue Steele, successfully located him, and collected a cash prize.[21] The jury returned a verdict against the two free radicals and the radio station as joint tortfeasors. The radio station appealed to the California Supreme Court, which affirmed the judgment.

Many have criticized this decision as failing to recognize the undivided responsibility of

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[20] The broadcast said:

> 11:13-The Real Don Steele with bread is heading for Thousand Oaks to give it away. Keep listening to KHJ ... The Real Don Steele out on the highway- with bread to give away-be on the lookout, he may stop in Thousand Oaks and may stop along the way .... Looks like it may be a good stop Steele-drop some bread to those folks. Id at 39.

[21] Id.

the teens in producing this tragedy. To them, the court's decision represents a wrong-headed wish to take the truly culpable parties off the hook and blame a corporation. Of course, the teens remained liable to the extent that they had assets to pay the judgment, and the plaintiff was free to try to execute the entire judgment against either or both. Nevertheless, the radio station was certainly a deeper pocket, and it ended up paying most of the judgment. The rule prevents accidents because tort can operate only against people who can be found and who have the assets to pay tort judgments. When the encouraged people predictably lack exposure to tort law deterrence, the courts have concluded that more responsible people should be deterred from encouraging them.[22] In many cases, imposing liability on the irresponsible people is a futile act, because they will often lack the resources to pay the judgment.

Weirum is not as novel[23] as many people think. The EFR doctrine hails back to a case decided in 1822[24] and even to a dictum from 1773.[25] In any event, *Weirum*'s critics have failed to

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[22] The *Weirum* case slightly preceded modern systems of relative fault in which the jury apportions among joint tortfeasors. See *American Motorcycle Association v Superior Court (Gregos)*, 146 Cal Rptr 182 (1978) (holding that juries should be instructed to apportion fault between joint tortfeasors and that solvent tortfeasors should make up share of insolvent tortfeasors according to jury's apportionment). If the case were to arise under such a system, most juries would probably assess most of the fault to the two teenagers. Nevertheless, if the free radicals were insolvent, the responsible person who has encouraged them would have to pay for their share, assuming the jurisdiction has retained joint liability. If the jurisdiction has adopted several liability, the responsible person would not have to make up the unpaid share of the free radicals' apportioned share of the judgment.

[23] The *Weirum* court came close to imposing liability on First Amendment-protected speech. Nevertheless, the court concluded that the Super Summer Spectacular was either unprotected commercial speech or else unprotected conduct. The issue has arisen in other cases in which the courts have carved out an exception to the EFR doctrine when the defendant encouraged free radicals with First Amendment-protected speech; in these cases, the defendant is immune. See *Olivia N. v NBC*, 178 Cal Rptr 888 (Cal Ct App 1981) (defendant not liable when children sexually abused plaintiff following model provided by the defendant's television show); *Shannon v Walt Disney Productions*, 281 SE 2d 648 (1981) (defendant not liable to child who put out his eye while following, somewhat imperfectly, defendant's instructions on its Mickey Mouse Club Show about how to produce a particular sound effect); *DeFilippo v NBC*, 446 A2d 1036 (RI 1982) (defendant not liable to parents of child who hanged himself following stunt performed on the Johnny Carson Show).

Most critics of *Weirum* stress, not the First Amendment aspect of the case, but that the parties most at fault were the teens and that the court's decision made a corporation liable for their behavior.

[24] The date of *Guille v Swan*, 19 Johns 381 (NY 1822); for discussion see text accompanying note 27.

[25] The date of *Scott v Shepherd*, 96 Eng Rep 525 (KB 1773); for discussion see text accompanying note 38. *Dixon v Bell*, 105 Eng Rep 1023 (KB 1816), for discussion see text accompanying note 43, is another early EFR case.

stress that the California Supreme Court relied on a similar 1925 case from Utah, a jurisdiction unrenowned for common law experiments. In *Shafer v. Keeley Ice Cream Co*.,[26] the defendant was a local business that operated a float in a commercial parade in Salt Lake City. The main feature was young women who threw candy to the crowd as the float passed down the parade line. Whenever the young women threw candy, boys scrambled to get it. During one of these cascades, the boys knocked over the plaintiff, who was an older woman, standing with her family to watch the parade. The court again made the defendant liable. As in so many EFR cases, it probably would have been difficult to find the boys and sue them and probably fruitless to try. They were free radicals both because they were boys and because they were members of a crowd.

Moreover, *Weirum* and *Shafer*, far from being modern innovations, are indistinguishable from *Guille v. Swan*,[27] a case decided by the New York Supreme Court in 1822. The defendant ascended in a balloon over New York City near the plaintiff's garden. Somehow he got into trouble and descended, body hanging out of the car, right into the garden. He called to one of the plaintiff's field workers to help him, in a voice audible to a pursuing crowd. After the balloon descended, it dragged along over potatoes and radishes, about thirty feet, when the defendant was taken out. Soon afterwards, more than two hundred people broke into the plaintiff's garden through the fences, and came on his premises, beating down his vegetables and flowers. The damage done by the defendant with his balloon was about fifteen dollars, but the crowd did much more. The plaintiff's total damages were ninety dollars.

The defendant maintained at trial that he was responsible only for the damage done by his

[26] 234 P 300 (Utah 1925).

[27] 19 Johns 381 (NY 1822).

balloon, and not for the damage done by the crowd, but the trial judge instructed the jury that the defendant was responsible for all the damages. The New York Supreme Court affirmed the plaintiff's judgment and stressed that it did not matter whether the crowd was attracted by a wish to help the defendant or just out of curiosity.[28] They were free radicals. As we will see, courts are especially sensitive to the fact that people behave differently in crowds. One reason must be that being part of a crowd creates anonymity and makes it difficult for an injured plaintiff to assign fault. Thus, a responsible person becomes a free radical by joining an unruly crowd.

Each of these three cases presents basically the same scenario. A responsible person has encouraged irresponsible people to engage in negligent behavior and becomes liable for the harm they have done. In all cases, the free radical behavior was predictable to the defendant and could have been avoided at reasonable cost. This pattern extends backwards almost two hundred years and maybe a little more. The next section will briefly review the early history of the EFR doctrine. Before getting to that, however, let us look at another case that almost always comes up in this context-the famous case of *Ross v. Hartman* decided by the D.C. Circuit in 1943.[29]

The defendant violated a statute that required drivers to take their keys with them when they parked their motor vehicles. This defendant left his keys in his truck outside a parking garage without telling anyone he wanted it parked, and a thief stole it. The thief then collided with the plaintiff, who sued the defendant and cited the statutory duty. The D.C. Circuit,

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[28] Chief Justice Spencer said:

> I will not say that ascending in a balloon is an unlawful act, for it is not so; but, it is certain, that the *AEronaut* has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under such circumstances, would, ordinarily and naturally, draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation; all this he ought to have foreseen, and must be responsible for.

[29] 139 F2d 14 (DC Cir 1943).

overruling its own prior precedent,[30] found the defendant liable and based its decision on three New York cases in which children had hurt themselves or others when they started a car[31] or truck[32] whose owners had left the keys in the ignition and had parked in streets thronged with children. The weakness of *Ross v. Hartman* comes from the fact that car thieves have a greater incentive than others to drive carefully. That way they will not attract the attention of the police. In this context, the problem is self-correcting. The main loser from leaving the key in the ignition is the one who has done so.

Most courts have refused to follow *Ross v. Hartman* on indistinguishable facts.[33] In *Richards v. Stanley*,[34] a case whose facts were identical to *Ross* right down to the San Francisco statute that made it a misdemeanor to park a car without removing the ignition key, the California Supreme Court held that the defendant was not liable. As Justice Traynor said, "By leaving the key in her car [the defendant] at most increased the risk that it might be stolen. Even if she should have foreseen the theft, she had no reason to believe that the thief would be an incompetent driver."[35]

The evolved California rule is typical of that of most jurisdictions. Leaving the keys in

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[30] *Squires v Brooks*, 44 App DC 320 (1916) (defendant not liable for leaving car unlocked in violation of municipal ordinance after thief negligently collided with plaintiff).

[31] *Connell v Berland*, 228 NYS 20 (App Div 1928) (defendant left car parked in street with doors unlocked and key in ignition; one boy started it and crushed another boy).

[32] *Lee v Van Beuren*, 180 NYS 295 (App Div 1920) (defendant liable for parking its electric truck with power switch in on-position after a neighborhood boy started it up, and crushed the five-year-old plaintiff who was sitting on front bumper); *Gumbrell v Clausen Flanagan Brewery*, 192 NYS 451 (App Div 1922) (basically same fact as previous case).

[33] See William H. Danne, Jr., *Liability of Motorist Who Left Key in Ignition for Damage or Injury Caused by Stranger Operating the Vehicle*, 45 ALR 3d 787 (1972).

[34] 271 P2d 23 (Cal 1954).

[35] Id. at 27.

unusually dangerous or difficult-to-manage vehicles will yield liability if they are parked under circumstances that make theft or meddling probable.[36] *Richardson v. Ham*,[37] decided the year after *Stanley*, made a construction company liable for leaving its bulldozer parked overnight, unlocked, on top of a mesa in a built-up area of San Diego. The bulldozer was easy to start, but hard to shut off. The free radicals in that case, aged 17, 18, and 20, fortified with alcohol, started the bulldozer and then could not stop it. After they abandoned it, still moving, the bulldozer went off the edge of the mesa, down the hill, across a freeway, and traveled for about a mile before a retaining wall and utility pole finally halted it. During its random journey, it traveled through a house, seriously injuring the occupants, and then collided with a mobile home and an automobile causing further property damage and personal injuries. In this case, which prefigured *Weirum* and was scarcely distinguishable from it, the California Supreme Court made the bulldozer owners liable to those injured. *Richardson* was distinct from *Ross v. Hartman* because practically any variety of free radical (child, teenager, drunk, thief) would be an extreme hazard to himself and others once he got this bulldozer moving.

Weirum and *Ross v. Hartman* are a good introduction to the EFR doctrine. *Weirum* is a good and reliable expression of the EFR doctrine as it has evolved throughout the United States, though its facts are more dramatic than is typical; *Ross v. Hartman* appears to have been a mistake that does not reflect the more general doctrine in the United States. We can now turn to a brief history of the early development of the EFR doctrine.

B. Early EFR Cases

[36] Compare *Hergenrether v East*, 393 P2d 164 (Cal 1964) (holding the defendant, whose employee left a partially loaded two-ton truck overnight in a dangerous section of city, liable to the plaintiff struck by a thief), with *Avis Rent a Cat Sys, Inc v Superior Court*, 15 Cal Rptr 2d 711 (Cal 1993) (holding that defendant Avis, which maintained poor security in its rental lot, was nevertheless immune from suit from someone with whom a car thief collided).

[37] 285 P2d 269 (Cal 1955).

The first case in which a court considered the EFR problem is *Scott v. Shepherd*,[38] decided by the Court of King's Bench in 1773. On the evening of fair day in Milbourne Port, England, October 28, 1770, the defendant threw a lighted squib, made of gunpowder, from the street into the market house, which was a covered building supported by arches and enclosed at one end, but open at the other and both sides. A large crowd of people was assembled there. The lighted squib originally fell next to Yates's gingerbread stand. One Willis picked it up and threw it across the market house, where it fell next to Ryal's similar stand. Ryal quickly picked up the lighted squib and threw it to another part of the market house where it struck the plaintiff in the face, exploded, and put out one of his eyes.

The plaintiff brought his case for trespass *vi et armis*, and the jury returned a verdict for him. The defendant appealed on the ground that the evidence was insufficient to support this action. In that procedurally unreformed era, a plaintiff had to choose between trespass *vi et armis* and trespass on the case; the former writ was for direct harms, and the latter was for consequential (indirect) harms. *Scott v. Shepherd* presented a famous writ problem because it was unclear whether the intermediate throwers destroyed the directness of the defendant's original throw in producing the harm.

At the trial, it had never become totally clear whether the intermediate throwers were acting out of panicked self-defense or, as Justice Blackstone believed, "to continue the sport" as true free radicals would behave in a crowd.[39] Three of the four judges thought that the intermediate throwers were acting out of self-defense or necessity and that for this reason the

[38] *Scott v Shepherd*, 96 Eng Rep 525 (KB 1773).

[39] Blackstone, J., took the view that the necessity of the subsequent throws was a lot less than the plaintiff claimed. He said: "The throwing it across the market-house, instead of brushing it down, or throwing it out of the open sides into the street, (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act." Id at 527.

harm was direct from the defendant's first throw of the squib.[40] Blackstone, on the other hand, thought they were continuing a game that the defendant had started. On that view of the facts, the harm was merely consequential from the defendant's act, and the proper writ was trespass on the case (which the plaintiff had not selected). Going further, Blackstone cautiously opined that trespass on the case (the ancestor of negligence) would lie against the original thrower on these facts, though that issue was not raised because the plaintiff had elected to stand or fall on trespass *vi et armis*, which required a direct harm.[41] There is hardly a greater expert on the common law of this era than William Blackstone. If his dictum was correct, something like the EFR doctrine existed in 1773.[42]

Guille v. Swan, the 1822 balloonist case already discussed, was probably the original EFR case in this country. Not all 200 members of the crowd that trampled the plaintiff's crops were needed to rescue the defendant. Moreover, Chief Justice Spencer broadly stated his *ratio decidendi*, "Now, if his [the defendant's] descent, under such circumstances, would, ordinarily and naturally, draw a crowd of people about him, either from curiosity, or for the purpose of

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[40] Justices Nares and Gould and Chief Justice DeGrey took this position. In casting his decisive vote for trespass *vi et armis*, Chief Justice DeGrey said:

> It has been urged, that the intervention of a free agent will make a difference: but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with Brothers Gould and Nares, that the present action is maintainable.

Id at 529.

[41] Blackstone, J., said: "I give no opinion whether case would lie against Shepherd for the consequential damage; though, as at present advised, I think, upon the circumstances, it would." Id at 527.

[42] It would not be a classic EFR case because the intermediate throwers, except as members of a crowd, were not classic free radicals. They were tradespeople, and the case shows that they were clearly identifiable, thus unlike the members of the *Guille v Swan* crowd. Blackstone's analysis suggests that if the defendant would be liable on trespass on the case it would be similar to a situation in the parties were co-actors, as in *Keel v Hainline*, 331 P2d 397 (Okla 1958) (defendant liable for battery for participating in game of throw-the-eraser, even though he did not personally make throw that hit plaintiff).

Recently in Illinois, something like the famous case has arisen again. See *Bodkin v 5401 S.P., Inc*, 768 NE 2d 194 (Ill App 2002) (defendant's bartender handed plaintiff a firecracker and unknown patron, presumably drunk, lit it). See text accompanying note 99.

rescuing him from a perilous situation; all this he ought to have foreseen, and must be responsible for." This is a classic description of the EFR doctrine.

Meanwhile in 1816, the English Court of King's Bench had already decided the first indisputable EFR case, which was *Dixon v. Bell*.[43] The defendant kept a loaded gun in his apartment. One day when he was away from it, he sent his thirteen-year-old servant to his landlord to have him get the gun, unload it, and give it to the servant so that she could bring it back to him. Of course, it was difficult to tell whether the muzzle-loading guns of that era were in fact unloaded. The landlord got the gun, took the priming out, told the girl that he had done so, and then gave the gun to the girl. She put it down in the kitchen, but later picked it up to play with the plaintiff's eight-year-old son, saying she was going to shoot him. She pointed the gun at him, pulled the trigger and the gun went off, injuring the plaintiff's son. The plaintiff's declaration basically alleged that the defendant was liable because he had encouraged a free radical.[44] The King's Bench upheld the jury verdict for the plaintiff.

Beginning in 1841, again in England, we get the first case that looks very similar to a swarm of modern EFR cases that begin roughly with the full development of the Industrial Revolution. Recall that the *Ross v. Hartman* court had relied on New York precedents, never overruled and since extended, making someone liable for leaving an unlocked automobile or truck in a crowded neighborhood where children could start it up and hurt themselves or other people. The first case of this type was *Lynch v. Nurdin*,[45] where the defendant's driver had left

[43] 105 Eng Rep 1023 (KB 1816).

[44] The plaintiff's declaration alleged that the defendant had "wrongfully and injuriously sent a female servant ... to fetch away the gun so loaded, he well knowing that the said servant was too young, and an unfit and improper person to be sent for the gun, and to be entrusted with the care or custody of it." Id. at 1023. Besides being the first EFR case, it was also the first negligent entrustment case. Negligent entrustment is a subset of the EFR doctrine.

[45] 113 Eng Rep 1041 (QB 1841).

the defendant's horse and cart in Compton Street for half an hour while the driver was inside an adjoining house. Compton Street was normally thronged, and on this day it was busier than usual, because an adjoining street was blocked. The defendant's driver knew that groups of children would be coming down Compton Street and that they would be interested in his horse and cart. Nevertheless, he dawdled in the house while his cart and horse were sitting in the street. The plaintiff, who was a child between 6 and 7 years old, had his leg crushed beneath the wheels of the cart when another boy, who was playing on the cart, caused it to move, the plaintiff to fall off, and the wheels accidentally to run across the plaintiff's leg. The Queen's Bench held the defendant liable for encouraging free radicals.

In *Lane v. Atlantic Works*,[46] a case from 1872, the defendant parked its truck in Boston with loose iron bars carelessly laid on the flat bed so that they would easily fall off. A twelve-year-old boy got up on the truck and jostled the bars so that they fell off and hurt the eight-year-old plaintiff, who was innocently standing on the sidewalk. The Massachusetts Supreme Court held that the defendant was liable.

As the Industrial Revolution progressed, EFR cases became more common, as did negligence cases more generally. Attractive nuisance is a branch of the EFR doctrine, and an

[46] 111 Mass 136 (1872).

The Pennsylvania Supreme Court decided a famous EFR case the same year. In *Fairbanks v Kerr & Smith*, 70 Pa 86 (1872), the plaintiffs had a contract to pave the sidewalk in the town of New Castle and had provided flagstones for that purpose. These stones were placed in a public street near the curb in three or four piles; each pile containing eight or ten stones laid one on the top of another, but with some of the ends projecting beyond the stones below and unsupported.

The defendant climbed up on one of the stones and began to make a speech. No one was near him when he started, but he ultimately attracted a large number of people many of whom climbed up onto the piles of stones. About five or six people stood on an unsupported flagstone a few feet away from the stone where the defendant was standing and broke it. The plaintiff sued to recover the value of the broken stones. The jury found the defendant liable, and the Pennsylvania Supreme Court affirmed.

Maybe modern conceptions of the First Amendment would prevent liability in a modern case of this type. See *Olivia N. v NBC*, 178 Cal Rptr 888 (Cal Ct App 1981); *Shannon v Walt Disney Productions*, 281 SE 2d 648 (1981); *DeFilippo v NBC*, 446 A2d 1036 (RI 1982).

early case was *Travell v. Bannerman*,[47] where the plaintiff sued the defendant for injuries that he suffered from an explosion. The defendant operated a gun and ammunition factory in Brooklyn, which then as now was full of children. The factory premises were enclosed by a fence, but the adjoining lot, also owned by the defendant, and casually used as a temporary dumping place for ashes and other refuse material from the factory, was unfenced, and crisscrossed by paths worn by people of the neighborhood. For a long time the 14-year-old plaintiff and other boys had used this open lot as a playground. On September 14, 1900, the plaintiff was standing in the street just outside this vacant lot, when two younger boys approached him with a mass of black, asphalt-like material, composed of caked gunpowder and old cannon primers discarded from the defendant's factory. The boys had found this mass, which was about a foot long, among the rubbish on the defendant's vacant lot; and, after joining back up with the plaintiff, they proceeded to extract the pieces of brass that it contained. They could sell these brass pieces to a scrap metal dealer. One of the boys, not the plaintiff, pounded the lump with a rock, and an explosion resulted. The New York Appellate Division affirmed the plaintiff's verdict.

The EFR doctrine has a long history; it is by no means a modern innovation. Throughout the nineteenth century free radical cases developed mass and number as negligence cases did more generally. The following discussion will give more examples of old and new EFR cases and will analyze the pattern of courts' decisions. The most important element is that a free radical is indeed needed. If the encouraged person does not belong to a free radical class, and if the defendant's encouragement stops short of making him a co-actor with the immediate wrongdoer, the defendant is immune. This basic part of the EFR doctrine is the topic of the following section.

[47] 75 NYS 866 (App Div 1902). The case goes a little beyond the standard attractive nuisance case because the harm took place off the defendant's land.

IV. A NON-FREE RADICAL LETS THE DEFENDANT OFF

If the intervening person-the person encouraged by the defendant-belongs to a typically responsible class of persons, the defendant's liability is eliminated. In *Seith v. Commonwealth Electric Co.*,[48] the defendant maintained an electrical grid strung overhead in Chicago. Because of the defendant's negligent maintenance, a wire broke and fell down to a sidewalk. Two nine-year-old girls saw the wire just after it broke, while it was still moving on the ground. Recognizing the danger to passersby, they immediately went to a nearby saloon and told the saloon keeper that a live electrical wire had fallen to the ground. Two police officers who were in the saloon came out to investigate, and one of them walked over to where the wire was lying. At the same time, the plaintiff, who knew nothing of what had happened, came down the back stairs of his nearby apartment. The investigating police officer took his police club and flipped the wire toward the plaintiff. The plaintiff instinctively caught it and suffered a severe electrical shock. Luckily, passersby were able to take a wooden plank and knock the wire from the plaintiff's hands before he was killed. The Illinois Supreme Court reversed the trial court's judgment for the plaintiff and stressed that no one would ever anticipate that a police officer would behave the way this one did.[49] He was a non-free radical. If the girls, instead of the police officer, had

[48] 89 NE 425 (Ill 1909).

[49] Id at 426-27. The *Seith* court said:

> The defendant would be liable, although there was some intervening cause, if it were such as would naturally be anticipated as the result of the wire falling to the ground; but it seems inconceivable that the defendant ought to have anticipated that a policeman would throw the wire upon the plaintiff by striking it with his club when it was lying where no injury would be done by it either to a person on the sidewalk or the roadway. There is no evidence tending in the slightest degree to prove that the policeman struck the wire for the purpose of removing it as a source of danger. He testified that he did not touch it, and told the plaintiff to get away from it; but assuming, as we are bound to do, that the testimony of the children was true, and that he struck the wire and knocked it toward the sidewalk, that testimony did not even remotely tend to prove that he was attempting to remove the wire so as to prevent injurious consequences. The injury to the plaintiff followed as a direct and immediate consequence of the independent act of the policeman, and but for such act any negligence of the defendant would have caused no injury to the plaintiff.

Id at 429.

flipped the wire toward the plaintiff, the defendant would have been liable by analogy to many EFR cases, for instance, *Travell v. Bannerman*, just discussed in the prior section.[50]

Although the *Seith* intervenor belonged to responsible class-police officers-the defendant had no way of predicting that he would belong to a responsible class. Hence, the defendant's liability depended on a fact knowable only after the accident occurred, namely that it was a police officer who intervened and not children or some other free radical who might have been tempted by the downed wire.

In *Snyder v. Colorado Springs & Cripple Creek District Ry.*,[51] the defendant had overcrowded its interurban railroad cars. On the night of December 20, 1900, the plaintiff was a passenger on the defendant's one-car electric commuter train, going from Cripple Creek, Colorado, to Midway, Colorado. He had paid his fare. The car was crowded, and the plaintiff was standing near the door with his hand resting on the door jamb. There were people between plaintiff and the door, some upon the steps. The head of the man upon the lower step reached to about the thigh of the plaintiff. The conductor, in pushing his way through the crowd, pressed the plaintiff against a man who was sitting in a seat on the side of the car. This man became angry, said that he was "getting tired of playing cushion for the electric line," and lifted himself up against the plaintiff and gave a surge by the force of which the plaintiff was literally thrown out of the moving car. The passenger's "surge" must have been fairly substantial, because the plaintiff was flung over the head of the passenger who stood upon the lower step.

The trial court directed a verdict for the defendant, and the Colorado Supreme Court affirmed. The court stressed that the man who threw the defendant out of the railcar was an

[50] See text accompanying note 47.

[51] 85 P 686 (Colo 1906).

ordinary passenger;[52] again, he was a non-free radical. He wasn't really part of the same type of impromptu crowd that preserved the *Guille v. Swan* defendant's liability, but was instead more identifiable.

In *Rubio v. Swiridoff*,[53] the defendant Rudolph Swiridoff and his friend Linda Karcie had been dating each other for about a year and a half, but the relationship had fallen on hard times. When the two met at a bar, they fought, and the defendant peeled out of the restaurant parking lot, burning rubber. Karcie took the shriek of Swiridoff's tires as an insult and challenge. She followed at high speed and collided with and killed the plaintiff's deceased.

Both Karcie and Swiridoff denied participating in any type of race, and the plaintiff did not assert that the two young adults were racing with each other at the time of the accident.

The trial court entered summary judgment for the defendant Swiridoff, holding that under the circumstances he did not owe the plaintiff's deceased a duty of care. The plaintiff appealed, and the appellate court affirmed. Karcie's age is not revealed in the opinion, but it seems clear that she was older than a teenager, because she was in the bar with Swiridoff. Again, she was a non-free radical, so the result was different than in *Weirum*.

Finally, in *Marenghi v. New York City Transit Authority*,[54] the plaintiff brought suit to

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[52] The court said:

> There is nothing to show that such a consequence as happened was liable to occur. It was of course possible that some extremely nervous or irritable person would become angry because of his being inconvenienced on account of the crowded condition of the car; but it is not in accordance with the usual and ordinary course of events to anticipate that a seated passenger would so far lose control of himself on account of having a standing passenger crowded against him that he would eject the standing passenger from the car with such force as to throw him over the head of one who was standing upon the step below the party so ejected. It is apparent from the record in this case that the proximate cause of the injury to plaintiff was the action of the irritated passenger, and that this cause could not be anticipated by defendant or its agents.

Id at 687.

[53] 211 Cal Rptr 338 (Cal Ct App 1985).

[54] 542 NYS2d 542 (App Div 1989).

recover damages for personal injuries sustained by the plaintiff on October 16, 1981, at approximately 10:30 a.m., after she had alighted from a subway train operated by the defendant at the Chambers Street subway station in lower Manhattan. According to the plaintiff's trial testimony, she emerged from the train and had taken a few steps. The doors had closed behind her. Just then she observed an unidentified passenger rushing down a flight of steps that led to the platform, shouting, "Hold the train!" The steps were to her right, although the distance between the plaintiff and this passenger, when she observed him, was unclear from the record. The plaintiff looked backward and to her left, observing about nine feet away the head of the conductor extended through the train's open window. The train doors again opened and then immediately began to close. The unidentified passenger knocked the plaintiff over, injuring her, and jumped over her body and through the closing doors. The train then left the station, leaving the plaintiff injured on the platform. The jury awarded the plaintiff substantial damages, but the New York Appellate Division reversed. The court stressed that nothing about the man suggested that he was a free radical.[55] Opening the doors for a football crowd under similar circumstances would probably lead to liability.

The lesson of these cases, and many like them, is that a defendant can encourage a non-free radical and still face no liability.

IV. EFR FACTORS

Here are seven factors that seem to influence courts in holding a defendant liable for harm immediately caused by free radicals:

[55] The appellate court said:

> It simply could not be expected that because the doors were re-opened the unidentified passenger would run directly into the plaintiff. *PaIsgraf v Long Is R.R. Co*, 248 NY 339, 162 NE 99 (NY 1928). There was no evidence that the station was overcrowded, or that the only path to the open doors was through the spot on which plaintiff was standing.

Id at 543.

1. The defendant's encouragement of the free radical was substantial;

2. The defendant created a scarce opportunity for free radical depredations (similar to the first factor);

3. The free radical acted predictably when judged by a free radical standard;

4. The free radical harmed a third party as opposed to himself;

5. The predictable harm was serious;

6. The defendant's encouraging behavior was deliberate as opposed to inadvertent (important in some cases);

7. The defendant had a special relationship with the free radical, with the victim, or with both (important in some otherwise marginal cases).

A. Substantial Encouragement

When the defendant has only slightly encouraged free radicals, he is not liable. A good example is *Donehue v. Duvall*[56] where the five-year-old plaintiff sued for an injury to his eye. Another child had thrown a dirt clod that struck him. The plaintiff's complaint alleged that, four days before he was attacked, the defendants had had some loads of dirt hauled into their backyard which lay there in a large pile. The defendants knew that neighborhood children had frequented the pile, throwing clods of dirt at each other, and that the defendants should have known that the large clods on the pile created a hazard. The trial court dismissed the complaint, and Illinois Supreme Court affirmed.[57] Similar cases have held that no liability exists for leaving a stake at a construction site[58] or for leaving a screwdriver out in a yard.[59] In all of these cases

[56] 243 NE 2d 222 (Ill 1968).

[57] The Illinois Supreme Court also held that an amended complaint alleging that the defendants' dirt and the dirt clod contained glass also failed to state a cause of action.

[58] *Cole v Housing Authority*, 385 NE 2d 382 (Ill 1979).

the defendant's encouragement was too slight.

A similar case is *Segerman v. Jones*,[60] where the defendant teacher started the calisthenics song "Chicken Fat" on the classroom record player and then left the classroom. The Maryland Supreme Court held that she was not liable when one student kicked out another student's teeth in the course of the calisthenics, after she had left. In order to be liable, she would have had to do something more encouraging of mayhem than just leave the classroom for a few minutes. Again, her encouragement of free radicals was too slight.

One situation exists in which at least in some jurisdictions do not require that the defendant substantially encourage the free radical. It is a modern principle of proximate cause that if a defendant's negligence makes the plaintiff especially vulnerable to someone else's inadvertent negligence, the defendant remains a joint tortfeasor with the second actor.[61] A good example of this doctrine is *Derdiarian v. Felix Contracting Corp*.,[62] in which a worker sued a construction company for failing to provide him a sturdier barrier against errant traffic. The defendant prime contractor was installing an underground gas main and subcontracted with the plaintiff's employer to seal the pipes. For this work, the plaintiff and his crew used molten enamel that was kept in a 400-degree vat. At this same time, a second defendant was driving through town and suffered an epileptic seizure, because he had negligently forgotten to take his anti-seizure pills. This second defendant lost consciousness, and his car crashed through the flimsy horse-type barricade that was set up on the street side of the excavation, struck the vat, and hurt the plaintiff.

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[59] *Dennis Evans v Timmons*, 437 SE 2d 138 (SC Ct App 1993).

[60] 259 A2d 794 (Md 1969).

[61] See Mark F. Grady, *Proximate Cause Decoded*, 50 UCLA L Rev 293, 312-15 (2002).

[62] 414 NE 2d 666 (NY 1980).

The first defendant had negligently failed to guard the worksite from invading traffic, and the second defendant had negligently lost consciousness. Obviously the most likely reason that a car would breach the work area would be when the car's driver had been negligent. Both the trial court and the New York Court of Appeals held both defendants liable, as almost all courts do.[63] In the classic cases, such as this one, the last wrongdoer was both a responsible individual and inadvertently negligent.

Derdiarian was not a case in which the defendant had encouraged free radicals, because having a flimsy barrier around a worksite did not really qualify as an encouragement to free radicals. This was a different kind of case in which the defendant has set the stage for a subsequent act of inadvertent negligence- probably by a non-free radical. Suppose, however, that the second actor turns out to be a free radical, and his wrongdoing is deliberate.

Probably the leading case here is *Bigbee v. Pacific Telephone and Telegraph Co.*,[64] which has become famous. The plaintiff's complaint alleged that on the night of the accident, at approximately 12:20 a.m., the plaintiff was standing in the defendant's telephone booth located in a parking lot of a liquor store on Century Boulevard in Inglewood, California.[65] A second defendant, Roberts, was driving, intoxicated, east along Century Boulevard.[66] Because she was driving under the influence, it seems reasonable to see Roberts as a free radical. Probably because of her intoxication, she lost control of her car and veered off the street into the parking

[63] See, e.g., *Hairston v Alexander Tank & Equipment Co*, 311 SE 2d 559 (NC 1984) (defendant auto dealer liable for not tightening deceased's wheel, which fell off stranding him next to a busy highway where he was struck by a negligently driven automobile).

[64] 665 P2d 947 (Cal 1983).

[65] Id at 948.

[66] Id.

lot, crashing into the telephone booth in which the plaintiff was standing.[67]

The plaintiff saw Roberts's car coming toward him and realized that it would hit the telephone booth. He attempted to escape but was unable to do so because the door had jammed. The plaintiff alleged that the defendant telephone company's failure to maintain its booth was a breach of duty and a cause in fact of his injury.[68] Had the door operated freely, he would have been able to escape and would have suffered no harm. The plaintiff also alleged, as a second untaken precaution, that the defendant negligently located its booth "too close to Century Boulevard, where 'traffic ... traveling easterly, generally and habitually speeded in excess of the posted speed limit,' thereby creating an unreasonable risk of harm to anyone who used the booth."[69]

The California Supreme Court held that the plaintiff's complaint stated a good cause of action,[70] a result that outraged many. Nevertheless, if the defendant would have been liable for a driver who had inadvertently (though negligently) crashed into the booth, perhaps it is not so different if a free radical has done so. That must be the rationale of these California cases.

A more extreme California case of the same type has extended *Bigbee*. In *Wiener v. Southcoast Childcare Centers, Inc.*,[71] the plaintiffs' complaint alleged that the defendant's childcare center was situated on a busy street and that the playground was located immediately adjacent to that street. The playground was enclosed by only a four-foot-high chain link fence, which was inadequate to protect the children from errant automobile traffic coming off of the

[67] Id.

[68] Id.

[69] Id.

[70] See id. at 953.

[71] 132 Cal Rptr 2d 883 (Cal Ct App 2003).

street. The plaintiffs further alleged that the defendants were aware the fence was inadequate, and that the owner of the childcare center had previously requested the church landlord to provide funds to erect a sturdier barrier. When the church refused, the owner did nothing further to remedy the problem. Although the children might have been injured by a negligently errant driver, they were not. Instead, a criminal intentionally smashed through the fence with the intent to kill children. He killed two, who were the plaintiffs' decedents. The California Court of Appeal upheld the complaint, analogizing the case to *Bigbee*.

Again, in both this case and *Bigbee* the respective defendants' negligence did not substantially encourage a free radical. Someone intent on killing children is not significantly encouraged by an inadequate fence; many other opportunities exist. The main argument in favor of both cases is that the injured parties could have been hurt just as easily by an inadvertently negligent driver. Nevertheless, both are extreme cases, and *Wiener* is more extreme than *Bigbee*. If either defendant had been inadvertently negligent, it would be difficult to square these cases with other cases. Normally, courts do not like to extend the liability of people who may have made an innocent mistake. Nevertheless, the *Bigbee* defendant intentionally located its telephone booth in a dangerous place, and the *Wiener* court stressed that the defendant's owner knew that its fence was inadequate.[72] In this type of situation, there is less concern that liability will induce counterproductive substitutions or inefficient reductions in activity levels. Also, the respective defendants both had special relationships with the victims, so they were in a position to indemnify themselves ex ante, which is another circumstance that makes courts more willing to extend liability. It will be interesting to see whether these two cases will be followed in other

[72] A somewhat similar case cited by the *Wiener* court was *Robison v Six Flags Theme Parks, Inc*, 75 Cal Rptr 2d 838 (Cal Ct App 1998), where the defendant maintained an inadequate barrier between its picnic area and parking lot. An incompetent driver crashed through the barrier and hurt the plaintiffs. The court held the amusement park liable even though the negligence of the intervening actors was not totally inadvertent.

jurisdictions.[73]

In order for a defendant to be liable for encouraging free radicals, the encouragement must be substantial. *Bigbee* and *Wiener* are two cases in which the defendant was liable for free radical harm, but neither defendant really encouraged free radicals at all. These cases are exceptional in that they seem to fall under a related but different doctrine that holds defendants liable for setting the stage for subsequent negligence. These cases also extend that doctrine.

B. Scarce Opportunity for Wrongdoing

Often the best way to see whether a defendant has encouraged free radicals is look at the world from their perspective. Has the defendant created some tempting opportunity that does not normally exist for them?

In *Stansbie v. Troman*,[74] the defendant was an interior decorator who was left alone in his client's house. The defendant went out to purchase some wallpaper in the homeowner's absence and failed to lock the door. A thief came through the open door and stole the plaintiff's diamond bracelet, and the court made the defendant liable. Viewed from the perspective of thieves, the

[73] *Bigbee* and *Wiener* are exceptionally extreme when viewed against the history of the proximate cause doctrine. According to early cases, even inadvertent negligence by a responsible person would cut off liability for negligence that was deliberate or bordered on deliberate. See *Stone v Boston & Albany Railroad*, 171 Mass 536 (1898) (defendant negligently storing oil barrels on railroad platform not liable to plaintiff when the most immediate cause of fire was a businessman's dropping a lighted match on it). The modern doctrine that makes people liable for setting the stage for negligence seems to have come from courts' growing recognition that negligence is common, especially inadvertent negligence. If inadvertent negligence is common, it can make good sense to impose liability on those who negligently set the stage for it.

Wiener also seems inconsistent with classic cases such as *Alexander v Town of New Castle*, 115 Ind 51 (1888). The plaintiff got himself deputized as a special policeman in order to arrest Mr. Heavenridge, who was operating a gambling device in town. After he had taken Heavenridge before a judge and got him convicted, the plaintiff was escorting Heavenridge to jail. The pair passed a large excavation that the defendant city had negligently failed to fill in. Seeing his chance, Heavenridge, who was clearly a free radical, threw the plaintiff into the excavation, thus injuring the plaintiff and accomplishing his own escape. The court held this defendant immune. As in *Wiener*, there was a large risk from inadvertently caused injury, as when someone accidentally fell into the hole, but not a particularly attractive opportunity for most free radicals. A possible distinction between the two cases is that a special relationship between the parties existed in *Wiener* but not in *Alexander*.

[74] [1948] 2 KB 48.

defendant made available to them an opportunity that does not normally exist.[75]

Russo v. Grace Institute[76] was similar. There the defendant erected a scaffold next to the building in which the plaintiff rented an apartment. The complaint alleged that armed robbers used the scaffold to gain entry onto the terrace of the plaintiff's apartment and from thence into the apartment itself. Once there they stole the plaintiff's goods. The New York Supreme Court held that the defendant was not entitled to summary judgment. The defendant encouraged free radicals because it made available a scarce and tempting opportunity.

A contrasting case was *Gonzalez v. Derrington*,[77] where the defendant sold free radicals five gallons of gasoline into their open pail, which was a violation of a municipal ordinance that required gasoline to be pumped into closed containers and in quantities not to exceed two gallons. The free radicals then took the gasoline to a bar, spread it around, and lighted it, thus burning the plaintiffs. The defendant was not liable. Although the free radicals in question did need gasoline, it would not have been difficult to siphon this quantity from a car.[78]

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[75] A more obvious English case is *Home Office v Dorset Yacht Co*, [1970] AC 1004 (HL), where the plaintiffs sued the British Home Office for its negligence in allowing seven juvenile offenders to escape from an island where they had been taken for a work detail. Contrary to the defendant's own regulations, instead of setting posting a guard at night, the defendant's employees simply went to sleep. This was a tempting opportunity that did not normally exist for the incarcerated youths. Trying to escape the vicinity, the seven got on board one yacht moored off the island and set it in motion. They collided with plaintiffs' yacht and damaged it. Again, the defendant's encouragement was substantial because the defendant controlled and made available to the free radicals a scarce opportunity for wrongdoing. Allowing a prisoner to escape does not normally lead to liability, especially when the harm he causes happens some time after the escape. See *Buchler v State*, 853 P2d 798 (Ore 1993) (defendant negligently allowed prisoner to escape, and some time later he shot the plaintiff's deceased).

[76] 546 NYS2d 509 (Sup Ct 1989).

[77] 363 P2d 1 (Cal 1961).

[78] A close but distinguishable case is *Daggett v Keshner*, 134 NYS2d 524 (App Div 1954) where the defendant sold the arsonists' accomplices 33 gallons and 55 gallons of gasoline into containers, well in excess of a statute's one-gallon limit. The purpose of the statute was to prevent arson, and the plaintiffs, two police officers, were hurt after they entered the premises about to be torched and were met with an explosion of the gasoline that the defendants had spread around in pails. The purpose was to collect the insurance on the burned building. Although the arsonists could have acquired the gasoline in some other way, the defendant made it easy for them. It would have been more difficult to siphon it from four or five cars. See also *Watson v Kentucky & Indiana Bridge & RR*, 126 SW 146 (Ky 1910) (defendant not liable for spilling gasoline that exploded if intervenor was arsonist as opposed to someone who

Children find many more tempting opportunities for mischief than, for instance, adult thieves. Hence, a defendant who left a gun accessible to children was liable.[79] The gun was something that children might be expected to investigate because not in their normal environment. In a contrasting case, however, when someone leaves a screwdriver out in the yard and one child throws it at another, putting out his eye, the defendant is not liable.[80] A child who wants to throw sharp objects at another child usually does not have to look far in order to find one. On the other hand, when a child has been shooting a bow and arrow in an enclosed porch, and his father takes it away and hides it, the child's grandmother is liable for giving it back to him when the child then shoots out the eye of a nine-month-old child.[81] The grandmother controlled a scarce opportunity for her free radical grandson.

An opportunity is scarce or not depending on the predictable preferences and tastes for mischief of the local free radicals, which may change over time. For instance, *Lynch v. Nurdin*, the old English case mentioned above,[82] seems based on the plausible assumption that the children of that era were interested in unguarded horses and carts and that they could not easily find them. Cases from the early twentieth century seem based on the similar idea that the children of that era were fascinated by automobiles[83] or trucks[84] with keys left in the ignition.

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inadvertently dropped a match into it).

[79] *Hall v Watson*, 2002 WL 1396763 (Ohio App) A contrasting case is *Kingrey v Hill*, 425 SE 2d 798 (Va 1993), where the defendant wife made available to her husband a gun that he was not allowed to own because of a prior conviction. Although he was not permitted to own a gun, there were many other ways in which he could have acquired one.

[80] *Dennis Evans v Timmons*, 437 SE 2d 138 (SC Ct App 1993) (defendant not liable for leaving screwdriver in yard where children could find it).

[81] *Carmona v Padilla*, 163 NYS2d 741 (App Div 1957), aff'd without op, 149 NE 2d 337 (NY 1958).

[82] See text accompanying note 45.

[83] *Connell v Berland*, 228 NYS 20 (App Div 1928) (defendant left car parked in street with doors unlocked and key in ignition; one boy started it and crushed another boy).

Nevertheless, between the extremes of leaving a screwdriver for children (no liability) and leaving a gun (liability), there are many intermediate cases that courts decide based on how tempting to children and how scarce to them was the opportunity that the defendant made available.[85]

C. Predictable Free Radical Behavior

Most free radicals will behave exactly how a reasonable person in the shoes of the encourager would have predicted. This was the situation in each of the EFR cases of liability mentioned above. For instance, if a radio station encourages teens to race to catch a roving disk jockey, they will race, and the radio station is liable. Suppose, however, to be first, one of the teens had shot the other teen. It seems highly doubtful that the radio would be liable in that case.

If an encouraged free radical goes too far, the defendant will escape liability. A good example is *Cole v. German Savings & Loan Society*[86] where the defendant owned an office building with an elevator. A boy, unconnected with the defendant's business, came into the defendant's building and became fascinated with elevator, which was at the time of this case a new invention. The "strange boy," as the court called him, befriended the elevator attendant, who

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[84] *Lee v Van Beuren*, 180 NYS 295 (App Div 1920) (defendant liable for parking its electric truck with power switch in on-position after a neighborhood boy started it up, and crushed the five-year-old plaintiff who was sitting on front bumper); Gumbrell v Clausen Flanagan Brewery, 192 NYS 451 (App Div 1922) (basically same facts as previous case).

[85] In *Loftus v Dehail*, 65 P 379 (Cal 1901), the defendants owned a vacant lot in Los Angeles from which a house had been removed. The plaintiff's brother, who was four years old, pushed the plaintiff, who was seven, into the abandoned cellar. The court held that the evidence was insufficient to support the jury's verdict for the plaintiff. Heights from which playmates can be pushed are not as scarce to children as guns.

The defendant in *Lane v Atlantic Works*, 111 Mass 136 (1872), simply leaving a horse-drawn truck on a city street, as in *Lynch v Nurdin*, was a sufficiently tempting opportunity to create liability. Nevertheless, in *Glassey v Worcester Consol S. Ry*, 70 NE 199 (Mass 1904), the defendant left a large reel, on its side, on the side of a road, outside the traveled portion. Boys turned the reel on its edge and pushed it down the road, ultimately ramming it into the plaintiff's carriage. The court found that the defendant was not liable.

In *Perri v Furama Restaurant, Inc*, 781 NE 2d 631 (Ill App 2002), the defendant's server put a hot teapot on the lazy susan, and a four-year-old child spun it, injuring a two-year-old child. The court held the restaurant liable.

[86] 124 F 113 (8th Cir 1903).

was also a boy. By watching the regular elevator boy, the strange boy learned how to impersonate him. Perhaps the defendant was negligent in failing to keep the boy out of the lobby, because it should have been obvious that he had no business there.

On the day in question the strange boy was hanging around the lobby as usual, standing next to the elevator. A woman walked up to the elevator. The strange boy decided to play a practical joke on the woman. The boy knew the elevator was on an upper floor, but he nevertheless opened the door to the elevator shaft, and beckoned toward it. The woman walked through the open door and fell down the empty shaft. She sued the defendant, which as noted above, owned the building and the elevator. On appeal the court upheld the defendant's verdict below. Assuming that this defendant was negligent in failing to exclude the strange boy from its lobby, the strange boy's negligence went beyond the encouragement provided by the defendant. He behaved in a way that was unpredictable to the defendant. The *Weirum* teenagers behaved exactly the way one would have expected; the strange boy did not.

A similar but more modern case was *Bansasine v. Bodell*[87] where the defendant and his passenger, the plaintiff's deceased, both provoked a driver who had demonstrated that he was highly aggressive. Nevertheless, when the provoked driver shot the deceased, the defendant was not liable. The court stressed the unpredictability of his behavior.[88]

D. Third Parties Threatened

Being a free radical and encouraging free radicals are often their own punishment. The

[87] 927 P2d 675 (Utah App 1996).

[88] The court said:

> We agree that a reasonable juror could not find that defendant should foresee that another driver on the road would fire a gun into his car simply because he shined his high beams on that person, passed him, then sped up as the driver tried to approach. If such a response were so common as to make it foreseeable, the streets and highways of this country would be empty.

Id at 677.

principal reason for tort liability is when the free radicals injure third parties, as in *Weirum v. RKO General, Inc*. and most of the other cases mentioned above. The main exception is children whom the doctrine protects against themselves. The attractive nuisance doctrine is the main branch, but liability for EFR extends beyond dangerous attractions on the land.

Except in the cases where the victims are very small children, the courts do not readily allow the free radicals themselves to recover for injuries they have caused themselves through their free radical behavior. In *Gilmore v. Shell Oil Co*.,[89] the defendant's employee left a loaded revolver behind the counter of the defendant's convenience store. The deceased, who was 17 years old, took the gun, placed it on his temple, and pulled the trigger, killing himself. Although he intentionally shot himself, the evidence made it unlikely that he really wanted to do so. Clearly, if the gun had not been left behind the counter, he would not have killed himself. The trial court entered summary judgment for the defense, and the Alabama Supreme Court affirmed.[90] Tort law is not needed to deter this free radical behavior.[91]

E. Serious Harm

A defendant is likely to be liable if the harm that he has encouraged the free radical to inflict is serious. This is another reason why someone who has left explosives for children to play with[92] is more likely to face liability than someone who has left a screwdriver.[93] Similarly, a

[89] 613 S2d 1272 (Ala 1993).

[90] Accord *Ordonez v Long Island RR*, 492 NYS2d 442 (App Div 1985) (10-year-old deceased intentionally placed iron bar on third rail, knowing that it was electrified); *Gaines v Providence Apartments*, 750 P2d 125 (Okla 1987) (defendant not liable to 14-year-old who built ramp from defendant's trash and broke neck riding a bicycle over it).

[91] In *Yania v Bigan*, 155 A2d 343 (Pa 1959), the defendant encouraged the plaintiff's deceased to jump into a pit, and then, when he did, allowed him to drown without trying to assist him. The case resulted in no liability for the defendant. First, the deceased was not a free radical; instead, he seems to have been a responsible citizen. Also, the harm resulted to the plaintiff himself, not to a third party.

[92] *Travell v Bannerman*, 75 NYS 866 (App Div 1902). See text accompanying note 47.

camp that has issued campers bookbags is not liable if one of them uses the bookbag as a weapon.[94] The predictable harm was not sufficiently serious.[95]

F. Deliberate Encouragement

A battery depends on a defendant's purpose to create an unlawful touching or his knowledge with substantial certainty that this unlawful touching will follow from his act. In negligence law, an actor can either deliberately fail to use a reasonable precaution or can inadvertently omit reasonable precaution.

Some battery cases exist in which the defendant has encouraged a free radical to such an extent that he becomes a co-actor with the person who physically does the deed. In these cases, usually both parties are free radicals, and they are jointly liable for the battery or other intentional tort that results.[96]

Co-actor liability can also arise under negligence law as the case of *Michael R. v. Jeffrey B.*[97] illustrates. The plaintiff Michael R., while walking home from a school banquet, was struck in the eye with a marble and, as a result, was blinded in that eye. The plaintiff brought a negligence action against Jeffrey B, the minor who shot the marble at him, and also against Bruno N., who said, "Hey shoot him; go for it," just before Jeffrey B. shot the plaintiff. Jeffrey B. and Bruno N. had previously been shooting marbles at cars. The trial court granted summary judgment to Bruno N. (the encourager), and the appellate court reversed. This is not the typical

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[93] *Dennis ex rel. Evans v Timmons*, 313 SC 338, 437 SE 2d 138 (1993) (screwdriver).

[94] *Hennen v Terwey*, 1994 WL 1111 (Minn App 1994).

[95] See also *Brewster v Rankins*, 600 NE 2d 154 (Ind App 1992) (defendant school district not liable when it allowed elementary school student to take home golf club to practice and he accidentally struck plaintiff's three-year-old).

[96] *Keel v Hainline*, 331 P2d 397 (Okla 1958) (defendant participated in game of throw-the-eraser and was liable to the person hit even though he did not actually throw the eraser that struck her).

[97] 205 Cal Rptr 312 (Cal Ct App 1984).

case because the two boys were both free radicals. Still, it illustrates an important principle.

A more common EFR situation, as we have seen, is when a responsible party has encouraged a free radical. The easier cases of liability are when the defendant has behaved deliberately. Such was the case in *Weirum v. RKO General, Inc*., in which the radio station deliberately designed and broadcast the dangerous contest. The defendant certainly did not wish the plaintiff's deceased to die, but it did behave deliberately as opposed to inadvertently. Sometimes the line between encouragement and co-action is murky. In a recent case that recapitulates *Scott v. Shepherd*,[98] the defendant's bartender, in a dimly lit bar, handed the plaintiff a powerful firecracker, and an unknown free radical, who was never identified, lit it.[99] The defendant was liable. The court treated the case as one in which the defendant encouraged a free radical. There was evidence that many of the bar's patrons were intoxicated.[100]

A more difficult kind of EFR case, and a rarer case of liability, is when the defendant has inadvertently encouraged free radicals. Early examples are the torpedo cases.[101] In *Mills v. Central of Georgia Ry*.,[102] the plaintiff sued for the wrongful death of one of his sons.

The defendant railroad had left a signal torpedo on its tracks just outside of the town of Eden. A signal torpedo, although a pleasing and attractive-looking object, was an explosive device. Before electrical signaling equipment became common, railroad workers would place torpedoes on top of the tracks in order to give warnings to the engineers of approaching trains.

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[98] See text accompanying notes 38-41.

[99] *Bodkin v 5401 S.P., Inc*, 768 NE 2d 194 (Ill App 2002).

[100] Id. at 206.

[101] See *Mills v Central of Georgia Ry*, 78 SE 816 (Ga 1913); *Harriman v Railway Co*, 12 NE 451 (Ohio 1887); *Penso v McCormick*, 25 NE 156 (Ind 1890).

[102] 78 SE 816 (Ga 1913).

For instance, when a train stalled unexpectedly, the stalled train's crew would run back and set a torpedo to warn oncoming trains to slow down. When an oncoming train blew up the torpedo, it would get the attention of the oncoming train's crew, and they would know to slow down. If a torpedo was not detonated, a railroad employee was supposed to pick it up. According to the plaintiff's complaint, the torpedo in question was not in use, but had been left on the tracks carelessly, that is, inadvertently. The plaintiff's two sons, one 15 years old and the other 8 years old, found the torpedo in question, and the 15-year-old boy hit it with an iron nut or hammer in order to open it and to see what was inside. The torpedo exploded, and a piece of shrapnel hit his brother and killed him.

The defendant demurred to the plaintiff's complaint, and the Georgia Supreme Court ultimately held that the complaint was good. Some of the key-in-the-ignition cases also seem to be situations in which the defendant acted inadvertently as opposed to deliberately. When the harm threatened is sufficiently serious and probable, even the inadvertent creation of an opportunity will yield liability.

G. Special Relationship

Consistently with more general principles of negligence law, when the defendant had a special relationship with the victim, the free radical, or both, liability is more likely. In *Cobb v. Indian Springs, Inc.*,[103] the defendant's security guard, who was supposed to protect the young people living in the mobile home park, instead encouraged one of them to show him how fast his car would go. When the boy lost control of his speeding vehicle and struck another resident, the defendant was liable.

Similarly, a hotel or a common carrier has an especially great duty not to encourage free

[103] 522 SW2d 383 (Ark 1975).

radicals who might attack customers. In *Stagl v. Delta Airlines, Inc.*[104] the defendant maintained a highly disorderly baggage claim area for its passengers. The plaintiff, who was 77 years old, described it as bedlam. The space was so constricted and order so poor that passengers jostled each other constantly to get their bags. The plaintiff was jostled to the ground by another passenger. The court held the defendant liable. The case is similar to *Shafer v. Keeley Ice Cream Co.*,[105] the Utah precedent for *Weirum*, in which a float owner was liable to an older woman for creating disorder along a parade route.

One final limitation is that a defendant who has encouraged free radicals through a nonfeasance as opposed to a misfeasance will normally be immune; a special relationship will be required in this case, as in the rest of negligence law more generally.[106]

V. CONCLUSION

Tort sanctions operate only because people are concerned that they will forfeit their assets if they do not use care to protect their neighbors. By the same token, tort sanctions are largely ineffective against people who lack assets. For this reason, the courts have created duties to avoid encouraging these people. These duties are old-they are certainly not novel-and they are important. Moreover, the duties that we have to avoid encouraging free radicals amount to the law's main strategy for controlling the behavior of apparently irrational individuals.

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[104] 52 F3d 463 (2d Cir 1995) (per Calabresi, J.).

[105] 234 P 300 (Utah 1925). See text accompanying note 26.

[106] See *Jarboe v Edwards*, 223 A2d 402 (Conn Super Ct 1966) (defendant parents failed to hide matches from their pyromaniac son, and he lighted a playmate's pants on fire).