

The Politics of Torts

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Judges and commentators have never come to grips with the notion that courts, legislatures, and administrative bodies interact. In the area of torts, for example, the academic community has carefully analyzed the effect of liability doctrines on private accident prevention and avoidance. Yet few scholars have focused on the ways judge-made rules influence the political actions of litigants and public regulators. Scholars have, in other words, largely ignored the status of the parties as members of coalitions or interest groups lobbying legislatures and administrative agencies.¹

By imposing liability on politically influential tort defendants, courts may indirectly prompt legislatures and agencies to consider the underlying cause of a class of cases. The resulting regulation may, in turn, obviate the need for a liability rule. In this Article, I propose that courts should decide limited categories of negligence cases with a view to the possibility of a “political” response.²

To demonstrate my premise, I focus on negligent security litigation. The term “negligent security” refers to cases in which injured crime victims sue commercial enterprises upon or near whose property the crimes occurred. The victims allege that the enterprises should have taken advance measures—such as improving lighting, hiring guards, or at least issuing warnings—that might have prevented the harm.³ Until recently, courts precluded negligent security liability based on a general notion that private parties have no duty to protect unrelated persons from criminal

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1. My view that courts should react to the fact that they are but one of many governmental agencies capable of acting on a given problem is not radical. Others have urged courts to acknowledge the interplay among the various decision-makers. See J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* xviii, 233–39 (1971); Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 577 (1982).

2. I use the term “political” to refer to the reaction of the legislative and executive branches of government to judicial decisions and lobbying by the branches’ constituents. I do not mean to address the separate question which use of the term might raise, that is, whether the actions of the judiciary itself should be considered “political” in a broader sense. See, e.g., D. KAIRYS, *THE POLITICS OF LAW* 1–6 (1982) (rejecting idealized model of law that depicts courts as separate from, and above, politics).

3. See generally *Suits Charging Lax Security Are Increasing*, Wall St. J., Oct. 24, 1983, at 33, col. 3. A number of actual and hypothetical examples are considered in detail *infra* text accompanying notes 242–76.

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attack.⁴ A growing number of modern judges have, however, allowed cases to proceed. They have extended standard tort rules to hold libraries,⁵ supermarkets,⁶ restaurants,⁷ schools,⁸ laundromats,⁹ commuter train stations,¹⁰ and summer camps¹¹ accountable for crime-related injuries.¹²

In Part I of this Article, I analyze the peculiar development of negligent security litigation by focusing upon the seminal case, *Kline v. 1500 Massachusetts Avenue Apartment Corporation*.¹³ Despite *Kline's* apparent novelty, its result is consistent with both substantive tort law policies and the broader historical trend toward liberalized liability. I thus conclude that judges have resisted liability in the negligent security context largely because of "process" concerns.¹⁴ I argue that it is precisely where process and substantive tort policies compete that courts should consider the beneficial political effects of a liability rule.¹⁵

In Part II, I use historical examples to identify a model of "political

4. RESTATEMENT OF TORTS §§ 314-15 (1934); RESTATEMENT (SECOND) OF TORTS § 314 (1966).

5. See *Abbott v. New York Pub. Library*, 263 A.D. 314, 319, 32 N.Y.S.2d 963, 968 (1942).

6. *Atamian v. Supermarkets Gen. Corp.*, 146 N.J. Super. 149, 157-58, 369 A.2d 38, 42-43 (1976).

7. *Eastep v. Jack-in-the-Box, Inc.*, 546 S.W.2d 116, 118 (Tex. Civ. App. 1977).

8. *McLeod v. Grant County School Dist. No. 128*, 42 Wash. 2d 316, 321-22, 255 P.2d 360, 363 (1953) (en banc).

9. *Morris v. Barnette*, 553 S.W.2d 648, 649-50 (Tex. Civ. App. 1977) (denying defendant's motion for summary judgment).

10. *Neering v. Illinois Cent. R.R.*, 383 Ill. 366, 374, 50 N.E.2d 497, 501 (1943) (disavowing any reliance on "common carrier" rule).

11. *Wallace v. Der-Ohanian*, 199 Cal. App. 2d 141, 147-48, 18 Cal. Rptr. 892, 896-97 (1962) (evidence sufficient to support finding of liability).

12. The RESTATEMENT (SECOND) OF TORTS § 344 (1965) acknowledges the changing trend. While casting negligent security liability in terms of the duty of possessors of land to invitees, it in essence supports broad liability of commercial enterprises.

If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it

Id. § 344 comment f.

13. 439 F.2d 477 (D.C. Cir. 1970). *Kline* and its progeny are discussed in detail in Haines, *Landlords or Tenants: Who Bears the Costs of Crime?*, 2 CARDOZO L. REV. 299 (1981); Henszey & Weisman, *What Is the Landlord's Responsibility for Criminal Acts Committed on the Premises?*, 6 REAL EST. L.J. 104 (1977); Selvin, *Landlord Tort Liability for Criminal Attacks on Tenants: Developments Since Kline*, 9 REAL EST. L.J. 311 (1981); Note, *Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View From 1500 Massachusetts Avenue*, 59 GEO. L.J. 1153 (1971); Comment, *The Landlord's Emerging Responsibility for Tenant Security*, 71 COLUM. L. REV. 275 (1971).

14. Process concerns reflect an anxiety over the costs and volume of tort litigation, as well as the lack of competence of judges and juries to resolve complex issues that depend on multiple interdependent factors. These concerns are often used to justify an immunity rule. See *infra* note 80.

15. Courts and commentators who reject process as a valid judicial concern will have no use for this Article's "political effects model." Political effects, like process costs, are practical results of liability rules. Because the two sets of considerations are similar in nature and importance, the model suggests that courts should consider neither or both. See *infra* text accompanying notes 191-95. I do not offer the model as an independent, substantive justification for imposing liability in the absence of countervailing process reasoning.

effects." I conclude that these effects may, within limits, offset process concerns and support tort liability that is otherwise sound. Part III illustrates how the "political effects" model would work in practice. It returns to the negligent security context and discusses why the political effects model comes into play. I then apply the model to specific examples of negligent security litigation to show how courts can implement political considerations on a narrow, category-by-category basis.

I. NEGLIGENCE SECURITY LIABILITY AND PROCESS CONCERNS

The history of negligent security litigation is schizophrenic. During the early development of general negligence doctrine,¹⁶ courts distinguished the obligation to prevent third-party harm from the duty of reasonable care: "The fact that [an] actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."¹⁷ Nevertheless, several lines of cases offered a legal basis for negligent security liability. For example, the common law required landowners to take precautions against foreseeable harm to persons invited onto their property.¹⁸ Similarly, innkeepers¹⁹ and

16. The prevailing view of legal historians is that as American industry began to develop, it needed protection against tort litigation to survive. Courts apparently believed industry could not afford to internalize and pay liability costs. Negligence principles therefore began to temper existing strict liability rules. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 12.3, at 749-52 (1956); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 90-91 (1977); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 377-78, 382-83 (1951); cf. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 28, at 161 (5th ed. 1984) [hereinafter cited as *PROSSER & KEETON*] (the "rise [of negligence] coincided in a marked degree with the Industrial Revolution"). Courts—undoubtedly motivated by process considerations—soon developed further "immunities" to liability, which they applied primarily in favor of corporate defendants. See M. HORWITZ, *supra*, at 94-108, 204-06; L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409-10, 416-17 (1973); Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 40-41 (1970). But see Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1723, 1772-75 (1981) [hereinafter cited as Schwartz, *Tort Law*] (questioning conclusion that strict liability controlled 18th century tort law and that pro-industry biases motivated subsequent changes); Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 964-70 (1981) [hereinafter cited as Schwartz, *Vitality of Negligence*] (same).

17. *RESTATEMENT (SECOND) OF TORTS* § 314 (1965); see *RESTATEMENT OF TORTS* § 314 (1934). Courts and commentators fought off changes to the general no-duty principle even in the most compelling of circumstances. Rather than apply the logic of the broad negligence standard of care or adopt a separate flexible rule for harm caused by third parties, the courts created narrow exceptions to the general no-duty rule. The courts thus confined any duty to take affirmative action to protect others to limited situations where a "special relationship" exists between the actor and the person threatened with harm. *RESTATEMENT OF TORTS* §§ 314-20 (1934); *RESTATEMENT (SECOND) OF TORTS* §§ 314, 314A, 314B, 316-21 (1965); see also *Irwin v. Town of Ware*, 392 Mass. 745, 756, 760-62, 467 N.E.2d 1292, 1300, 1302-03 (1984) (citing cases).

18. See *RESTATEMENT (SECOND) OF TORTS* § 314A(3) (1965).

19. See *RESTATEMENT (SECOND) OF TORTS* §§ 314A(2) & 314A app. (1966) (citing cases). It is incorrect to presume that negligent security cases deal with the same type of criminal conspiracy as the innkeeper-guest theory. See Note, *Expanding the Scope of the Implied Warranty of Habitability: A Landlord's Duty to Protect Tenants from Foreseeable Criminal Activity*, 33 VAND. L. REV. 1493,

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other business proprietors²⁰ had special obligations to their patrons. Judges, however, declined to apply these theories in the crime-prevention context.²¹ Even with the dramatic twentieth century expansion of tort liability,²² negligent security litigation lagged behind.²³ Although *Kline* has now made the initial breakthrough and other recent courts have endorsed liability,²⁴ many judges continue to resist the use of tort law to encourage crime prevention.²⁵

1503 (1980); Note, *supra* note 13, at 1167. To the extent innkeeper rules were concerned with crime, they addressed the situation in which innkeepers conspired with thieves to rob travelers and then split the booty. The rules provided a form of strict liability to end these practices.

20. See, e.g., *Bender v. Nalee, Inc.*, 261 Md. 82, 274 A.2d 85 (1971); *Genovay v. Fox*, 50 N.J. Super. 538, 549, 143 A.2d 229, 234-35 (App. Div. 1958), *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959). The reporters of the RESTATEMENT OF TORTS, however, declined to consider the business-patron relationship as one that warranted extended liability.

21. Courts analyzed and misanalyzed negligent security litigation in a variety of ways. Some mistakenly treated it as a subset of bystander rescue cases, in which a general "no duty to rescue" rule applies. See *infra* text accompanying notes 61-66.

Other courts attempted to force negligent security cases into exceptions to the general duty of care—for example, the traditionally limited liability owed by landowners to trespassers. See RESTATEMENT (SECOND) OF TORTS § 333-39 (1965). These exceptions do not comfortably fit the negligent security context. The limitations on landowner liability, in particular, make little sense where a defendant has encouraged a victim to frequent his premises.

22. See, L. FRIEDMAN, *supra* note 16, at 420, 423-25; Schwartz, *Vitality of Negligence*, *supra* note 16, at 964-67.

23. Judges persisted in absolving enterprises from accountability by holding that injury-producing crimes were unforeseeable and a superceding cause of victims' injuries. See, e.g., *Cornpropst v. Sloan*, 528 S.W.2d 188, 198 (Tenn. 1975); *Gulf Reston, Inc. v. Rogers*, 215 Va. 155, 157-58, 207 S.E.2d 841, 844-45 (1974).

24. Honest observers acknowledged *Kline* as an attempt to restructure established tort concepts to deal with the modern crime problem and to impose responsibility upon private parties in a position to take preventive measures. See *Doyle v. Exxon Corp.*, 592 F.2d 44, 46-47 (2d Cir. 1979); *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368, 374-88, 346 A.2d 76, 79-87 (1975); cf. *Scott v. Watson*, 278 Md. 160, 167-69, 359 A.2d 548, 553-54 (1976) (rejecting *Kline* as imposing liability in too narrow a context and basing liability on more general theory). See generally sources cited *supra* note 13.

25. *Kline* provoked a storm of criticism. Some judges rejected its rationale outright. See, e.g., *Trice v. Chicago Housing Auth.*, 14 Ill. App. 3d 97, 100-01, 302 N.E.2d 207, 210 (1973); *McCappin v. Park Capitol Corp.*, 42 N.J. Super. 169, 173, 126 A.2d 51, 53 (App. Div. 1956). Others distinguished *Kline* as a natural outgrowth of the special obligations of innkeepers. See, e.g., *O'Hara v. Western Seven Trees Corp. Intercoast Management*, 75 Cal. App. 3d 798, 802, 142 Cal. Rptr. 487, 489 (1977); *Samson v. Saginaw Professional Bldg., Inc.*, 393 Mich. 393, 407, 224 N.W.2d 843, 849 (1975). This approach ignored the fact that the innkeeper rules had never been so applied. Still others tried to explain the decision as a slight expansion of landlords' obligations to warrant habitability, see, e.g., *Trentacost v. Brussel*, 82 N.J. 214, 228, 412 A.2d 436, 443 (1980); *Brownstein v. Edison*, 103 Misc. 2d 316, 318, 425 N.Y.S.2d 773, 774-75 (Sup. Ct. 1980), or as a contract case resting upon implicit representations made by the specific defendant landlord to Ms. Kline, see, e.g., *O'Hara v. Seven Trees Corp. Intercoast Management*, 75 Cal. App. 3d at 803, 142 Cal. Rptr. at 490. See generally Haines, *supra* note 13, at 304, 327, 354-55 n.195; Henszey & Weisman, *supra* note 13, at 106-07, 111-12, 116-18; Selvin, *supra* note 13, at 314. One commentator sharply criticized the *Kline* court for mentioning a contract theory at all, and thus giving rise to the possibility of confusion. Note, *Landlord-Tenant Relations*, 45 N.Y.U. L. Rev. 943, 952-53 (1970).

After *Kline*, various legislatures also expressed dissatisfaction with the no-duty to prevent crime rule. See PROSSER & KEETON, *supra* note 16, § 56, at 375 n.21 (Vermont, Minnesota, Rhode Island statutes impose limited obligations upon private citizens to act to protect safety of others); see also *State v. Joyce*, 139 Vt. 638, 641, 433 A.2d 271, 273 (1981) (Vermont's criminal statute creates duty to intervene in some circumstances). The New Jersey legislature passed a housing regulation requiring landlords to provide certain protective equipment necessary to the "health, safety and welfare of

There are three possible explanations for this reluctance. First, from a functional or instrumental perspective,²⁶ negligent security liability might appear to skew resource allocation. Second, from a corrective justice standpoint,²⁷ judges may think it unfair to force private parties to take measures against crimes which, in a sense, the parties neither initiate nor control. Third, some courts may fear that authorizing negligent security litigation will embroil them in a morass of undefined and unfocused litigation; process considerations may justify shutting the door to litigation at the pleading stage in the face of other fairness concerns. In the following Sections, I analyze *Kline* as a means for considering these three possible justifications for precluding negligent security lawsuits.

A. *Kline v. 1500 Massachusetts Avenue Apartment Corporation*

Sarah Kline lived in a fashionable Washington, D.C. apartment house in which a growing number of violent crimes had taken place. Ms. Kline was assaulted, robbed, and seriously injured in a public hallway of the building.²⁸ She sued her landlord for failing to take reasonable measures to prevent the increasing criminal activity upon the premises. The landlord argued that its traditional duty extended only to reasonable maintenance of the building.

The United States Court of Appeals for the D.C. Circuit reversed the district court's judgment for the defendant. According to the *Kline* major-

the occupants." 55 N.J. Stat. Ann. § 13A-7 (West Supp. 1985). In response, the New Jersey Supreme Court reconsidered its rejection of *Kline*-type liability. *Trentacost v. Brussell*, 82 N.J. 214, 228-230, 412 A.2d 436, 443 (1980).

26. "The functional approach has come to dominate American tort scholarship." Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 70 (1975) [hereinafter cited as Calabresi, *Concerning Cause*]. The leading proponent of a pure functionalist approach to negligence is Richard Posner. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975); Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29 (1972). The more radical economic analysis of Professor Calabresi supports some form of strict liability, rather than traditional negligence. See, e.g., G. CALABRESI, *THE COST OF ACCIDENTS* (1970); Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975).

27. Different normative approaches emphasize different moral precepts. The early views of Austin and Holmes focused on individual freedom and the abstract notion of "fault." See, e.g., 1 J. AUSTIN, *LECTURES ON JURISPRUDENCE* 407-16 (5th ed. 1911); O.W. HOLMES, *THE COMMON LAW* 77-110 (1881). Professor James developed a more comprehensive emphasis on social or distributive justice. See, e.g., James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948). Tort's modern philosophers explain negligence theory in terms that focus on "individual responsibility," "reciprocal obligations" of members of society, and, more generally, corrective justice between the parties. See, e.g., Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); see also, Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 526-40 (1980) (noting argument that efficient resource allocation is itself moral and that rule furthering efficiency is thus justified on normative basis). See generally Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

28. As in most negligent security cases, Ms. Kline's assailant escaped and therefore could not be sued.

ity, the general rule that a private person has no duty to protect another from criminal attack by a third person²⁹ falters when “applied to the conditions of modern day urban apartment living.”³⁰ The court rested its decision upon the landlord’s awareness of the burgeoning crime problem and the fact that the landlord was in the best position to take preventive measures:

[W]here, as here, the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises exclusively within his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants.³¹

The court reviewed the facts in the record, concluded that the 1500 Massachusetts Avenue Corporation had breached its duty of “reasonable care in all the circumstances,”³² and remanded for a determination of damages.³³

B. *The Substantive Bases for Negligent Security Liability*

1. *Landlord Liability under the Functional View*

Instrumentalists approach tort law as a mechanism for allocating society’s accident-prevention resources. In the *Kline* context, instrumentalists would ask what steps the 1500 Massachusetts Avenue Corporation and other landlords will take after a decision authorizing negligence litigation. How will potential plaintiffs react? Under the functional view, tort liabil-

29. 439 F.2d at 481.

30. *Id.*; see *id.* at 483–85.

31. *Id.* at 481. The Court of Appeals explained its rationale in more detail:

No individual tenant had it within his power to take measures to guard the garage entranceways, to provide scrutiny at the main entrance of the building, to patrol the common hallways and elevators, to set up any kind of a security alarm system in the building, to provide additional locking devices on the main doors, to provide a system of announcement for authorized visitors only, to close the garage doors at appropriate hours, and to see that the entrance was manned at all times. . . . [M]inimization [of the risk of criminal assault] was almost entirely within the power of the landlord

Id. at 480.

32. *Id.* at 485.

33. *Kline* left many questions unresolved. Although the court found liability, it reached the somewhat contradictory conclusion that a landlord is not an “insurer of the safety of his tenants” and owes no duty equivalent to police protection. *Id.* at 487. The court also failed to consider how *Kline* would apply where the cost of crime-prevention passed along to tenants is greater than the price the tenant is willing to pay. *Id.* at 488. Yet however murky some aspects of *Kline* may be, the case unambiguously modified the traditional no-duty to prevent crime rule—at least in the limited landlord-tenant area—to take modern problems and realities into account. See generally sources cited *supra* note 13.

ity is appropriate only where unregulated markets fail to induce behavior that produces the optimal level of spending on safety.³⁴

Negligent security liability encourages landlords to spend funds on basic security devices, including locks, burglar alarms and guards. We cannot predict or quantify how much this will affect the level of criminal activity.³⁵ The new security precautions are likely to deter some criminals from committing further crimes, while causing others simply to transfer their activities to other neighborhoods.³⁶

As a higher level of security becomes the norm, common perceptions of how much security is "reasonable" will adjust. This in turn will provoke a cycle of more precautionary measures.³⁷ Further expenditures may reflect "overspending" on security, but will continue to reduce crime in the neighborhoods.

A liability rule may also have secondary risk-distributive effects. Commercial defendants are likely to invest to some extent in liability insurance. They may, instead, choose to self-insure, by creating a "reserve fund" to cover future negligent security liability judgments. To the extent they can, they will pass along the premium or reserve fund costs to the beneficiaries of the insurance—in the *Kline* setting, the tenants.³⁸ The liability rule thus spreads the cost of crime, pro rata, among the potential victims.³⁹

34. See Calabresi, *Concerning Cause*, *supra* note 26, at 84; Calabresi & Malamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096-97 (1972).

35. Unless we adopt the unsupported assumption that crime will remain at a constant level no matter what steps society takes, it is logical to expect that the likelihood of success will be an important determinant of the crime level. See, e.g., W. LUKSETICH & M. WHITE, *CRIME AND PUBLIC POLICY: AN ECONOMIC APPROACH* 71-80, 117-22 (1982).

36. Empirical evidence measuring the magnitude of the "transfer effect" does not exist. We can even hypothesize a scenario in which reducing the level but shifting the location of crime might prove undesirable. If crime moves to an unpopulated, poorly lit residential area, the less frequent violence that occurs may nonetheless be more serious in character. This scenario, however, probably underestimates the likely net effect of deterrence in commercial sectors.

37. For an excellent article on the means by which the law encourages citizens to increase the level of private expenditures for safety, see Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980).

38. A landlord that takes crime-preventive measures in response to negligent security liability will also charge tenants. See *Kline*, 459 F.2d at 488 (landlord justified in passing on cost). The landlord may, however, bear a portion of the cost itself so as not to raise prices to a prohibitive level. See Clotfelter & Seeley, *The Private Costs of Crime*, in *THE COSTS OF CRIME* 213, 219 (C. Gray ed. 1979).

39. See Pierce, *supra* note 37, at 1285, 1288-89 (tort regulation responds to inability of individuals to participate in negotiations concerning risk). Risk-spreading avoids catastrophic losses that have emotional and economic impact beyond the cost of the injury itself. See, e.g., 2 F. HARPER & F. JAMES, *supra* note 16, at 763 n.7. See generally Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980). As a justification for tort liability, however, the benefits of risk distribution support a strict liability rather than a negligence approach. See, James, *supra* note 27, at 550 (strict liability creates system of social insurance for accidents); Sandler, *Strict Liability and the Need for Legislation*, 53 VA. L. REV. 1509, 1512 (1967) (same). The goals of negligence suggest that society has no abstract interest in compensating the victim at the expense of the defendant. 2 F. HARPER & F. JAMES, *supra*

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These distributive effects of a liability rule are not all positive. The additional expenses may drive marginally profitable enterprises out of business. Tenants, particularly poor tenants, may not be willing or able to pay the increased cost.⁴⁰ More significant from a resource allocation perspective is the fact that *liability* insurance costs and benefits tend to exceed those of *victim compensation* insurance.⁴¹ The *Kline* rule, in effect, encourages landlords to impose on tenants a higher compensation package, at a higher cost, than the customers as a whole would choose to purchase.⁴²

On the surface, it therefore appears that negligent security liability skews resource allocation. The tenants and landlords can bargain directly over rent and security. In theory, bargaining results in a more tailored investment in crime prevention than tort law achieves by forcing landlords to adopt "reasonable" measures. Unless landlords undertake the economically "correct" level of security, the level tenants are willing to pay for,⁴³ the tenants can refuse to rent.

The bargaining model, however, presupposes two critical elements that do not exist in the *Kline* context: equal information on the part of tenants and landlords, and equal ability to act effectively on that information through bargaining and selection of alternatives.⁴⁴ Building managers are

note 16, at 752-58; see Calabresi, *Concerning Cause*, *supra* note 26, at 73; Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 703-07, 715 (1980).

40. Historically, the poor reside and transact business in dangerous areas of cities and are likely to require a greater degree of crime protection. See Henszey & Weisman, *supra* note 13, at 121. Simultaneously, the poor are less able to afford pass-along costs. See *Goldberg v. Housing Auth.*, 38 N.J. 578, 591, 186 A.2d 291, 297-98 (1962); see also Note, *supra* note 13, at 1189, 1196-97. Requiring additional security may drive landlords of low income housing operating at a marginal profit out of business. Negligent security liability thus to some extent takes from poor consumers the freedom of choice to bear the risk of crime in exchange for obtaining goods and services at a lower price. See Comment, *supra* note 13, at 294-301; cf. Posner, *Strict Liability: A Comment*, 2 J. LEG. STUD. 205, 210-11 (1973) (strict liability may fail to accommodate risk-preferring consumers).

Liability, however, merely shifts the true costs of crime from one fortuitously selected as a victim to a broader class of potential victims. Arguably, if internalization of the actual costs of crime prevents an enterprise from operating profitably, it is properly driven out of business. Moreover, pass-along costs of "reasonable" precautions will not necessarily be high. See, e.g., Haines, *supra* note 13, at 351 ("reasonable" security measures in *Kline* might well have entailed no more than installing new locks). As an empirical matter, the *Kline* decision has not had the "dire social consequences" that economists and commentators predicted. Selvin, *supra* note 13, at 318. In the long run, imposition of tort liability may even decrease victims' overall costs by, *inter alia*, reducing the level of crime.

41. Insurance premiums depend in large measure on the size of tort recoveries and the heavy administrative costs associated with litigation. Recoveries typically include sums for pain and suffering, psychological harm, and attorneys' fees that far exceed the losses for which customers would voluntarily insure themselves.

42. Enforced victim compensation insurance to some extent requires poor tenants to subsidize the rich. Wealthier crime victims tend to lose more valuable possessions and suffer greater loss of earnings. Yet each tenant pays an equal premium, set according to the average loss of potential victims.

43. See Posner, *supra* note 40, at 210-211 (1973).

44. See Calabresi & Melamed, *supra* note 34, at 1094-95; Pierce, *supra* note 37, at 1284-85 (economic analysis presumes full information); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109,

better informed than tenants about the nature of crime near their buildings and the available security measures.⁴⁶ Tenants may not even understand the information regarding crime that they do have.⁴⁶ Competing local landlords have an incentive not to publicize or explain the dangerousness of a particular building; publicity highlights the general security problem in the neighborhood⁴⁷ and drives potential customers elsewhere.⁴⁸ On the whole, individual landlords are therefore more able than tenants to obtain and process information and to compare the real costs and benefits of improving security.

Landlords are also in a better position to act on available information.⁴⁹ Because they know tenants have limited alternatives, landlords often refuse to negotiate over specific safety measures with individuals. Unless the tenant can find a way to organize other potential victims and collectively bargain,⁵⁰ he cannot force a given landlord to decrease the risk of crime in exchange for a higher rent.⁵¹

Of course, in the housing example, a safety conscious tenant might express his preference by moving to a more secure, higher-rent building.⁵² Safer but otherwise comparable housing may, however, not be available in the neighborhood. The hesitation of area landlords to draw attention to crime will have caused them to adjust their marketing practices. The landlords may only be able to advertise building safety profitably by

1375 (1974) (resource allocation theory "posits that individuals acting with information adequate to their choice may select for themselves the risks they wish to bear").

45. Attaining optimal resource allocation through a market approach "depends in large part on the quality of consumer information." Shapo, *supra* note 44, at 1371. Sarah Kline, as a security-conscious tenant, may have been aware that a problem existed. She was, however, unlikely to know details of, for example, how often crimes occurred in the building, where, what time of day, and what type of crime. The landlord, as the facts in *Kline* showed, was fully informed. 439 F.2d at 479.

46. Studies of residents of high crime areas show that they generally believe their own neighborhoods to be as safe or safer than the average community, regardless of the actual facts. *See CRIME IN A FREE SOCIETY* 17-18 (R. Winslow ed. 1968).

47. *See* Posner, *supra* note 40, at 211 (advertisement of safety improvement implies that product is hazardous).

48. If, however, relatively safe competing neighborhoods exist, landlords from those areas should, in theory, publicize the danger.

49. Even if a particular group of tenants has accurate information concerning neighborhood crime, for the market to work the tenants must still have "the ability to form rational judgments based upon those facts." Pierce, *supra* note 37, at 1285. As Professor Pierce notes, "[p]sychological studies uniformly demonstrate that individuals have a limited ability to make rational decisions concerning health and safety risks even when they have full knowledge of the nature of the risks." *Id.* at 1286; *see also* G. CALABRESI, *supra* note 26, at 56.

50. An individual tenant, such as Sarah Kline, may volunteer to pay a pro rata share of the costs. She will, however, have no avenue to solicit similar contributions from other tenants. *See* Selvin, *supra* note 13, at 314-15 (cost of collective action by tenants is prohibitively high). Even if Ms. Kline were able to pay the full cost, it would not be fair to force her to carry the burden of other "free rider" tenants.

51. *Kline*, 439 F.2d at 480, 488.

52. *See, e.g., id.* at 492-93 (MacKinnon J., dissenting); *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368, 387, 346 A.2d 76, 86 (1975); *Goldberg v. Housing Auth.*, 38 N.J. 578, 578-88, 186 A.2d 291, 296 (1962).

“packaging” security precautions as one aspect of a luxury establishment.⁵³ Higher rent, luxury buildings ordinarily charge for frills, such as swimming pools, for which the tenant may not want or be able to pay.⁵⁴ Unless at least one landlord breaks rank and openly solicits safety-conscious tenants, existing markets will provide little opportunity for bargaining on the security issue alone.

For all of these reasons, the landlord-tenant “market” fails to produce incentives for commercial enterprises to undertake society’s optimal level of security precautions. A functional approach thus justifies judicial intervention. By imposing negligent security liability on landlords, the *Kline* court placed the burden on central actors with better information and the ability to assess and implement the information. The court could not expect liability to lead to the same economic optimality as “perfect bargaining.” The ultimate result of liability, however, was more likely to be rational than that of a no-liability rule in an imperfect market.⁵⁵

2. Landlord Liability Under the Normative View

For many scholars and courts the notion of “fault” is the theoretical foundation of negligence law.⁵⁶ Principles of corrective justice justify shifting the costs of an accident to the defendant only where the defendant acts in a “blameworthy fashion.”⁵⁷

At a superficial level, the landlord in *Kline* seems innocent.⁵⁸ The 1500 Massachusetts Avenue Corporation did not bring about the crime that injured Sarah Kline.⁵⁹ It could not foresee that a criminal would engage in unlawful conduct at a time when Ms. Kline would get in the criminal’s way. If the government, with its vast law enforcement resources, could not

53. Under current marketing practices, economists disagree on whether crime affects the demand for housing at all. Compare Kain & Quigley, *Measuring the Value of Housing Quality*, 30 J. AM. STAT. ASS’N 532-48 (1970) with Gray & Joelson, *Neighborhood Crime and the Demand for Central City Housing*, in THE COSTS OF CRIME, *supra* note 38, at 47.

54. See Note, *supra* note 13, at 1171.

55. See Calabresi & Melamed, *supra* note 34, at 1096-97 (cost of failing to take disputed safety measure should fall on party in best position to make cost-benefit analysis and most cheaply avoid, or induce avoidance of, costs).

56. See, e.g., Epstein, *supra* note 27, at 152-60; Fletcher, *supra* note 27, at 537-40; Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 903 (1982).

57. 2 F. HARPER & F. JAMES, *supra* note 16, at 753. See generally Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 LAW & PHIL. 5, 6-14 (1983).

58. See, *Kline*, 439 F.2d at 481. Imposing liability on the landlord seems particularly worrisome because a jury may transfer its hostility from the criminal (who has escaped and is not in the courtroom) to the deep-pocket defendant. See Fager, *Liability of Business Proprietors for Criminal Acts of Third Persons*, 29 FED. INS. COUNS. Q., 29, 33 (1978); Haines, *supra* note 13, at 352 (citing authorities).

59. Cf. 2 F. HARPER & F. JAMES, *supra* note 16, at 751 (courts hesitate to impose liability for accident that defendant “had no part in bringing about”).

prevent the injury, it hardly seems fair to attribute moral responsibility to the relatively uninvolved commercial defendant.⁶⁰

Yet the landlord can hardly be equated with an innocent bystander.⁶¹ The landlord is "blameworthy."⁶² It encourages tenants like Sarah Kline to live in a crime-ridden area and expose themselves to injury. A negligence verdict reflects a finding that the landlord's omission of security is unreasonable and has contributed to the victim's injury.⁶³ Thus, if the landlord is comparable to the bystander at all, the best analogy is to the citizen who induces a victim to take a risk—the one type of bystander the common law has traditionally held accountable.⁶⁴ The landlord may be relatively less culpable than the assailant, but that consideration bears

60. Some commentators suggest that the trend towards negligent security liability merely highlights the government's inefficiency in performing its own crime-prevention functions, an inefficiency which does not "justify transferring . . . responsibility to business proprietors." Fager, *supra* note 58, at 33. In recent years, courts have begun to impose liability on municipalities for the negligent failure of the police to prevent crime. See, e.g., *Huhn v. Dixie Ins. Co.*, 453 So. 2d 70 (Fla. App. 1984); *Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984). But see Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 822 (1981) (prevailing view remains no liability). See generally the three opinions in *Chambers-Castanes v. King County*, 100 Wash.2d 275, 669 P.2d 451 (1983).

61. Courts have generally rejected bystander liability in favor of a "no-duty to rescue" rule. See RESTATEMENT OF TORTS § 314 (1934). Whatever the merits of this rule, neither its underlying philosophical concern for the bystander's autonomy nor its emphasis on the bystander's personal safety are relevant to the negligent security defendant. Judges need not concern themselves with such typical "good samaritan" issues as (1) how much danger the bystander must risk if he is required to interfere, see, e.g., Edgar, *The Bystander's Duty and the Law of Torts—An Alternative Proposal*, 8 ST. MARY'S L.J. 302, 303 (1976); (2) is it excusable for him to "freeze" and thereby not act even if he could do so without risk, see, e.g., Edgar, *supra*, at 308; Note, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 YALE L.J. 1787, 1789-90 (1985); and (3) should rational or irrational fear of future retaliation by the criminal be an acceptable defense, see, e.g., Gregory, *The Good Samaritan and the Bad: The Anglo-American Law*, in THE GOOD SAMARITAN AND THE LAW 23, 34-35 (J. Ratcliffe ed. 1966) [hereinafter cited as RATCLIFFE]; Freedman, *No Response to the Cry for Help*, in RATCLIFFE, *supra*, at 171, 176. Negligent security defendants are expected to act before any crime occurs, so they have no need or reason to undertake any risk, to freeze, or to feel fear. Commercial enterprises are, in any event, not entitled to the same degree of privacy and freedom from regulation as are individuals. See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

62. In assessing negligent security defendants' "blameworthiness," it is important to recall that negligence is an objective concept. The "fault" that historically justifies tort liability focuses on whether the defendant acted reasonably, not whether he tried or wanted to injure the plaintiff. See Coleman, *Moral Theories of Torts: Their Scope and Limits: Part I*, 1 LAW & PHIL. 371, 375 (1983).

63. Traditional tort theory often distinguished between acts and omissions that caused harm. But the many exceptions to the general rule, see *supra* note 17, illustrate that practical rather than normative justifications underlie this distinction. See Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112-13 (1908); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 781-83 (1967); see also Weinrib, *supra* note 27, at 251-58 (discussing feaasance/non-feaasance distinction); cf. Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 886 (1934) (most "facts can be compressed to come within the concept of non-feaasance or expanded to fit the mould of misfeaasance").

64. RESTATEMENT (SECOND) OF TORTS § 323 (1965).

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more on issues of comparative negligence and the extent of damages⁶⁵ than on the question of fault itself.⁶⁶

The traditional liability of “innkeepers,” “landowners” and “business inviters”⁶⁷ illustrates why commercial enterprises that solicit customers cannot be considered “blameless” for injuries. By inviting customers in order to secure financial gain, an enterprise fosters crime. It provides a pool of victims and booty in a convenient location for potential wrongdoers. The enterprise is also in a position to take advance measures to avoid the danger.⁶⁸ The early cases thus underscore the enterprise’s corresponding moral obligation to give back, in the form of accident prevention, some of what it takes from customers in the form of risk exposure.⁶⁹ The government’s general responsibility for law enforcement does not eliminate the business’s separate duty to supplement public compensation and public protection.⁷⁰

65. As in other areas of the law, juries are fully capable of adjusting liability to fit a defendant’s guilt. See, for example, *Atamian v. Supermarkets Gen. Corp.*, 146 N.J. Super. 149, 369 A.2d 38, 44 (1976), in which the court left these matters to the jury’s discretion. See generally Franklin, *supra* note 63, at 790–93 (discussing methods by which juries adjust verdicts). Where verdicts are high, the plaintiffs’ suffering will have been commensurate. See *Bass v. City of New York*, 38 A.D. 407, 417, 330 N.Y.S.2d 569, 579 (1972) (economic burden of crime-prevention “is of far less significance than the sufferings of the victim exposed to inadequate protection”).

66. Negligent security liability can be explained and supported by the work of some of tort law’s modern philosophers as well. See *supra* note 27. In Professor Fletcher’s terms, for example, enterprises that make their premises attractive to criminals have imposed a “non-reciprocal” risk upon customers and bystanders. The injuries they cause may thus only be justified by an adequate “excuse” grounded in social utility. See Fletcher, *supra* note 27, at 543–56.

In Professor Epstein’s view, however, the normative key to liability is whether the defendant directly caused plaintiff’s injury. Epstein’s emphasis on individual freedom of action renders it unlikely that he would accept an enterprise’s failure to act as a substitute for causation. See Epstein, *supra* note 27, at 166. Epstein’s strict and somewhat artificial reliance on limited causation notions to define “moral responsibility” has, however, come under severe critical attack. See, e.g., Coleman, *supra* note 62, at 380–81 (1983); England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEG. STUDS. 27, 59–61 (1980); Schwartz, *Vitality of Negligence*, *supra* note 16, at 990, 994, 997.

67. See *supra* notes 19–20 and accompanying text.

68. Cf. RESTATEMENT (SECOND) OF TORTS § 442B (1965) (“Where the negligent conduct . . . increases the risk of a particular harm . . . the fact that the harm is brought about through the intervention of another force does not [necessarily] relieve the actor of liability . . .”).

69. The principle of corrective justice that underlies much of tort law “requires the annulment of . . . wrongful gains” and accomplishes that annulment through the injured plaintiff. Coleman, *supra* note 57, at 6–7. A defendant secures a wrongful benefit when, like the negligent security defendant, he undertakes an activity without paying the costs associated with it. *Id.* at 10.

70. As a practical matter, law enforcement expenditures have not been able to keep pace with the increase in crime. See *infra* notes 198 & 203; cf. Becker, *Crime and Punishment: An Economic Approach*, in G. BECKER & W. LANDES, *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 35 (1974) (“The need for private action is especially great in highly interdependent modern economies.”); Boostrom & Henderson, *Community Action and Crime Prevention: Some Unresolved Issues*, 19 CRIME & SOC. JUST. 24 (1983) (“the criminal justice system might better be seen as a supplemental resource for citizen crime prevention programs”). Business proprietors are often better situated than the government to combat crime in the area under their immediate control. The police can do little more than patrol at random. Because of their lack of familiarity with the premises, the police often cannot even take into account the weaknesses of security measures contained in particular locations. See Note, *supra* note 13, at 1164–66. But absent legal incentives to act, the business community

Judges, nevertheless, hesitate to penalize a party who, like the landlord, cannot reasonably anticipate an accident. Ordinarily, mere awareness that some general danger threatens a victim does not mandate liability.⁷¹ Courts thus rely on foreseeability principles as a normative check on "the scope of [any tort] duty that is based upon the relationship of the parties."⁷² Negligent security liability *does*, however, require a finding of foreseeability. Sarah Kline proved that the 1500 Massachusetts Avenue Corporation had reason to believe (1) crimes would occur on or near its premises, and (2) tenants or bystanders would be injured.⁷³ This showing may have been less than courts demand in some negligence contexts, but it was not unique.⁷⁴ Absent a countervailing moral policy that justified placing the burden on the victim,⁷⁵ the defendant's knowledge of "conditions . . . which constitute[d] a source of potential danger, imposed [on it] the duty of active vigilance. . . ."⁷⁶

Individual negligent security cases will, of course, present proof problems.⁷⁷ The victim must establish that the defendant "by reason of

tends to defer almost entirely to public crime prevention.

Unlike the bystander-rescue situation, there is little danger that imposing liability on negligent security defendants will cause them to become vigilantes or "officious intermeddlers" into private affairs. *See*, Note, *Failure to Rescue: A Comparative Analysis*, 52 COLUM. L. REV. 631, 642 (1952). A negligent security defendant must take crime-preventive measures in advance, at a time when there will not yet be a criminal to lynch or a private matter with which the defendant can interfere. Liability may, of course, encourage business proprietors to engage private security patrols. *See, e.g.*, *Johnston v. Harris*, 387 Mich. 569, 577, 198 N.W.2d 409, 412 (1972) (Brennan, J., dissenting) (noting "unfortunate phenomen[on]" of private industry's intrusion into public safety); *Goldberg v. Housing Auth.*, 38 N.J. 578, 589, 186 A.2d 291, 296 (1962) ("There is no room for the private devices of the frontier days."). But a properly organized private security force, unlike a vigilante posse, represents prevention rather than revenge. "Special police officers" are officially sanctioned in many states, *see, e.g.*, 4 D.C. CODE ANN. § 4-111 (1981); N.J. Stat. Ann. § 45:19-8 (West 1978), and are now routine for most large-scale commercial enterprises.

71. *See, e.g.*, *Cook v. Safeway Stores, Inc.*, 354 A.2d 507, 509-10 (D.C. 1976) (mere fact that robbery may have been foreseeable did not create duty to prevent it); *Samson v. Saginaw Professional Bldg., Inc.*, 393 Mich. 393, 406, 224 N.W.2d 843, 855 (1975) (existence of duty depends on public policy, not simply foreseeability); *Goldberg v. Housing Authority*, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962) ("Everyone can foresee the [possibility of] commission of crime virtually anywhere and at any time."); *see also Harper & Kime, supra* note 63, at 887.

72. Note, *supra* note 13, at 1178.

73. *See, e.g.*, *Allen v. Babrab, Inc.*, 438 So. 2d 356, 357 (Fla. 1983).

74. A driver with faulty brakes, for example, does not know when his brakes will fail or whom he will hit. A producer of a defective product cannot predict whether and how a future injury will occur. These defendants are held morally accountable because they have knowledge of dangerous conditions.

75. Such policies are reflected in the assumption of the risk and contributory negligence doctrines.

76. *Neering v. Illinois Cent. R.R.*, 383 Ill. 366, 379, 50 N.E.2d 497, 503 (1943); *see also Brown v. J.C. Penney Co.*, 64 Or. App. 293, 667 P.2d 1047, 1051, *aff'd*, 297 Or. 695, 688 P.2d 811 (1984).

77. For example, given the virtual impossibility of anticipating precisely where crime will next surface, *see Fager, supra* note 58, at 34, how much must the plaintiff prove that the defendant knew or should have known? *Compare Kline*, 439 F.2d at 483 (knowledge of prior crimes sufficient) *with Latham v. Aronov Realty Co.*, 435 So. 2d 209, 213 (Ala. 1983) (failure to prove knowledge of specific, imminent crime is fatal) *and Admiral's Port Condominium Ass'n v. Feldman*, 426 So. 2d 1054, 1055 (Fla. Dist. Ct. App. 1983) (evidence of similar off-the-premises crimes not probative of foreseeability). Even if the plaintiff can show that the defendant knew some crime could occur, is that sufficient to establish foreseeability of the specific crime and injury the plaintiff suffered? *Compare Cain v.*

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location, mode of doing business, or observation or past experience, should reasonably [have] anticipate[d] criminal conduct”⁷⁸ that exposed the victim to danger. In theory, however, the corrective justice approach, like the instrumental analysis, amply supports the liability doctrine the court of appeals established in *Kline*.⁷⁹

C. *The Process Objections to Negligent Security Liability*

Over the past decade, a significant body of scholarship has focused on the “process costs” of negligence litigation.⁸⁰ Commentators agree that a “reasonableness” standard can lead to fair results in routine accident cases that correspond to jurors’ everyday experience.⁸¹ Process scholars, how-

Vontz, 703 F.2d 1279, 1283 (11th Cir. 1983) (“liability does not depend upon anticipating the particular injury or that a particular person would be injured”) and *Courtney v. Remler*, 566 F. Supp. 1225, 1232–33 (D.S.C. 1983) (generally increasing crime rate on resort island probative of foreseeability of danger at specific hotel) with *Childers v. LCW Apartments*, 333 N.W.2d 677, 679 (Neb. 1983) (evidence of prior burglaries, theft, and vandalism did not establish notice of possible assault) and *Taylor v. Dixon*, 8 Ohio App. 3d 161, 456 N.E.2d 558, 560 (1982) (seven prior robberies not notice of possible shooting in course of eighth robbery), *cert. denied*, 464 U.S. 848 (1983).

The *Kline* court attempted to deal with the first problem by suggesting that foreseeability be proven by evidence of the “rate” of prior criminal activity. 439 F.2d at 483; see *Gomez v. Ticor*, 145 Cal. App. 3d 622, 628, 193 Cal. Rptr. 600 (1983); cf. *Brown v. J.C. Penney Co.*, 64 Or. App. 293, 667 P.2d 1047, 1049 (computer list of past crimes in store vicinity admissible evidence), *aff’d*, 297 Or. 695, 688 P.2d 811 (1984). But the emphasis on proof of actual prior criminal acts has been rejected as too restrictive by most other courts. See, e.g., *Neering v. Illinois Cent. R.R.*, 383 Ill. 366, 377, 50 N.E.2d 497, 502 (1943); *Samson v. Saginaw Professional Bldg., Inc.*, 393 Mich. 393, 406, 224 N.W.2d 843, 849 (1975); *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 445 A.2d 1141 (1982). Notice of criminal activity may often be a matter of common sense. See, e.g., *Virginia D. v. Madesco Invest. Corp.*, 648 S.W.2d 881, 887 (Mo. 1983) (en banc). There seems to be no more reason to require the plaintiff to introduce statistical proof or to limit the jury’s discretion to consider all factors in the crime-prevention context than in any other situation in which tort liability is sought to be imposed. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 302, 448, 449 (1965).

Some courts have taken from the jury the issue of whether a history of one type of crime renders foreseeable another type of crime. See, e.g., *Gulf Reston Inc. v. Rogers*, 215 Va. 155, 159, 207 S.E.2d 841, 845 (1974); *Nigido v. First Nat. Bank of Baltimore*, 264 Md. 702, 703, 288 A.2d 127, 128 (1972). The question of what a defendant of ordinary prudence should foresee is, however, perfectly suited to the application of common sense and community standards that is customarily the province of a jury. See *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36, 40 (N.C. 1981).

78. *Morris v. Barnette*, 553 S.W.2d 648, 650 (Tex. Civ. App. 1977).

79. Negligent security plaintiffs have not yet sought more than an opportunity to submit the issues to a jury under a negligence standard. Yet corrective justice logic may support strict liability. Where a court adopts a normative justification for liability, a defendant arguably should not be able to avoid responsibility by proving that it would have been “unreasonably” expensive to do the right thing.

For purposes of this Article, we need not consider a strict liability approach, nor attempt to define a coherent philosophical corrective justice foundation for negligence law as a whole. It is enough that either traditional approach to tort regulation can justify negligent security liability.

80. The leading and most prolific commentator on the “process” approach has been Professor Henderson. See, e.g., Henderson, *supra* note 56; Henderson, *The Boundary Problems of Enterprise Liability*, 41 MD. L. REV. 659 (1982) [hereinafter cited as Henderson, *Boundary Problems*]; Henderson, *Judicial Review of Manufacturers’ Conscious Design Choice: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973) [hereinafter cited as Henderson, *Judicial Review*]. But others have adopted, or at least considered, the process focus. See, e.g., Owen, *supra* note 39; Twerski, *supra* note 1.

81. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J.

ever, become concerned when courts apply the same standard to complex or technical fact patterns that defy a single "reasonable" solution.⁸² If jurors attempt to fit common-sense reactions to these situations, verdicts become unpredictable.⁸³ Jurors tend to rely on non-probative factors, such as sympathy for the plaintiff or a belief in the defendant's deep pocket. The more irrational the trend of the verdicts, the more likely it becomes that future attorneys will bring meritless claims. Commercial defendants then cannot know how to order their conduct.⁸⁴

Process scholars argue that these effects justify terminating negligence litigation before trial, even where substantive normative and functional tort policies support liability.⁸⁵ Other commentators question the validity of process considerations as judicial criteria;⁸⁶ in practice, few courts have relied expressly on "process" to foreclose litigation. Process analysis does, however, serve to explain numerous well-established but otherwise dubious no-duty rules.⁸⁷

Negligent security litigation presents significant process concerns. Foremost among these are problems of proving causation. For example, the landlord's failure to take security measures in the *Kline* context clearly facilitates crime as a whole. Yet in individual cases it is difficult to assess whether the landlord's omission contributes specifically to the victim's assault. Moreover, by definition, the criminal's conduct is an intervening cause of the injury.⁸⁸ The jury's natural tendency to blur the issue of

467, 478 (1976); Henderson, *supra* note 56, at 911-12, 922-23.

82. Henderson, *supra* note 56, at 947-48; Henderson, *Judicial Review*, *supra* note 80, at 1541.

83. See generally Henderson, *supra* note 81; Henderson, *supra* note 56, at 903 (one goal of legal adjudication is to set standards according to which defendants can govern their affairs and jurors can decide cases).

84. The expense of trials may cause potential defendants to settle needlessly or stop conducting a particular business activity altogether, rather than endure the burden of litigation. The cost of doing business will increase.

85. Professor Henderson focuses primarily on barriers to products liability litigation. He argues that the nature of manufacturing design decisions are "polycentric;" that is, subject to so many inter-related variables that juries will not be able to second guess management decisions on the basis of any definable standards. See, e.g., Henderson, *Judicial Review*, *supra* note 80, at 1536, 1541. This problem of polycentricity, according to Professor Henderson, militates in favor of removing products liability cases from the courts and subjecting the entire subject matter to other forms of regulation. *Id.* at 1577-78.

86. See Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 496 (1976) ("Professor Henderson is, in our opinion, wrong on all counts."). This Article does not take a position on whether it is proper for courts to weigh procedural considerations instead of, or more heavily than, "substantive" tort policies. However, to the extent courts consider "process," I submit that they should consider the practical "political effects" of liability rules as well.

87. See, e.g., Henderson, *supra* note 56, at 923-26, 943-45; Henderson, *supra* note 81, at 480-501 (explaining historical obstacles to litigation in suits by children against parents and malpractice, products liability and environmental cases in process terms).

88. In most crime-prevention situations, it is virtually impossible to demonstrate with any degree of certainty that a particular security measure would have deterred the criminal. See *Hall v. Fraknoi*, 69 Misc. 2d 470, 330 N.Y.S.2d 637, 641 (N.Y. Civ. Ct. 1972) (security system may have delayed

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causation in the ordinary case⁸⁹ is thus exacerbated in negligent security cases by the unusually speculative nature of the inquiry.⁹⁰

To make matters worse, in deciding what security measures are reasonable and whether they would have been likely to prevent the injury,⁹¹ jurors must rely on factors that are not part of their everyday experience. The jury must consider, for example, the nature, cost, and operation of available security measures, how those relate to marketing of the landlord's rental units, and the statistical probabilities that the security measures will reduce specific types of crime.⁹² The less jurors understand, the more likely they are to decide according to gut reactions and personal sympathies.⁹³

Most of the cases rejecting negligent security liability have taken the causation issue from the jury. The courts have held as a matter of law either that the defendant's omission of security did not directly bring about the plaintiff's injuries or that the criminal conduct was a superseding cause.⁹⁴ The courts' refusal to allow juries to decide causation issues normally within the jurors' province suggests that process concerns were on the judges' minds.

criminal's entry but would not have prevented it). Not even "[t]he most specialized and highly-trained government security personnel can predict and prevent these incidents" with any guarantee of success. Fager, *supra* note 58, at 34. Nor can it be proven that the criminal would not have injured someone else had the defendant protected the plaintiff.

89. Cf. Henderson, *Why Creative Judging Won't Save the Products Liability System*, 11 *HOFSTRA L. REV.* 845, 852 (1983) (noting tendency of courts "to play fast and loose with the [causation] requirement" in product design cases). As a practical matter, by allowing jurors to infer causation from the facts, a court may tacitly shift the burden to the defendant to "disprove" causation. Process-sensitive judges may thus have resisted negligent security liability for fear that future courts would hold defendants liable even where, realistically, the defendants could have done nothing to prevent the injuries.

Such a theory of judicial self-mistrust, however, would paralyze the courts. Carried to its logical conclusion, it cautions judges against adopting principled rules because of a general sense that courts are incapable of enforcing them.

90. The other element which juries can easily manipulate is "foreseeability." See *id.* at 849 (proposing strict foreseeability requirement). Assessing foreseeability in the negligent security context presents serious difficulties. See *supra* note 77. Some courts have thus implemented process concerns by imposing strict foreseeability rules that negligent security plaintiffs will rarely, if ever, be able to satisfy. See, e.g., *Kveragas v. Scottish Inns, Inc.*, 565 F. Supp. 258, 259 (E.D. Tenn. 1983); *Latham v. Aronov Realty Co.*, 435 So. 2d 209, 214 (Ala. 1983).

91. See *RESTATEMENT (SECOND) OF TORTS* §§ 302A, 320, 435, 449 (1965).

92. See *supra* note 85.

93. Jury sympathy inevitably rests with crime victims. Commercial enterprises are likely to be viewed as deep-pocket, perhaps even insured, defendants. Jurors will also have difficulty imagining themselves in defendants' shoes. With the benefit of hindsight, they may hold enterprises responsible for failing to take crime-preventive measures which did not in fact appear reasonably necessary at the time of the crime. Under process reasoning, society may thus prefer to leave safety and security decisions for control through direct regulation or the exercise of discretion by an appropriate "enterprise manager," rather than to haphazard adjudication by jury fiat. See Henderson, *supra* note 89, at 847; Henderson, *supra* note 81, at 478-79.

94. See, e.g., *Altepeter v. Virgil State Bank*, 345 Ill. App. 585, 602-03, 104 N.E.2d 334, 342 (1952); *Goldberg v. Housing Auth.*, 38 N.J. 578, 186 A.2d 291, 297-98 (1962); *Cornpropst v. Sloan*, 528 S.W.2d 188, 198 (Tenn. 1975).

Process analysis thus helps explain why many judges have resisted negligent security liability despite the modern trend towards liberalized liability. Allowing the full range of negligent security claims to proceed would, given the level of urban crime, raise the spectre of endless litigation. Although normative and functional doctrines support the recent decisions permitting negligent security litigation, process constraints seem to favor maintaining a no-duty rule.

II. THE POLITICAL EFFECTS OF TORT LIABILITY

Should the courts succumb to the strong substantive reasons for allowing claims to proceed? Or should they bow to the practical considerations favoring a barrier effective at the pleading stage? Part II of this Article suggests that the courts can best resolve their dilemma by considering the "political effect" of tort liability rules.⁹⁵

Ordinarily, of course, courts should decide liability questions solely on the basis of substantive tort theory. Under the model I propose, politics come into play only where secondary practical concerns—usually process concerns—prevent the courts from implementing traditional analysis favoring liability. The practical political consequences of legal rules are every bit as real as process considerations. The fact that a doctrine may stimulate regulatory solutions to the root cause of the litigation can legitimately offset process concerns. A doctrine's beneficial political side-effects should thus, on occasion, be sufficient to overcome judges' doubts about entertaining a new category of cases.⁹⁶

This Article's political effects model acknowledges, and indeed depends upon, the notion that legislatures and administrative bodies are better suited than courts to deal with most social issues.⁹⁷ Lawmakers and regu-

95. The common perception of the judiciary is that of an independent body, immune from political considerations, that decides cases only upon the substantive merits. See, e.g., Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 89 (1979) ("the prospect of a judge intervening actively in governmental politics offends cherished images of the judicial function").

96. Focusing on tort's political effects may also provide an alternative approach for courts concerned with the confusion that artificial, process-based rules may generate. In *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), for example, the California Supreme Court imposed a general duty of reasonable care on landowners for the primary reason that the traditional approach of categorizing the rights of different entrants had become so confusing as to be unmanageable. The *Rowland* court's abrogation of the old rules, though perhaps correct, was hardly principled. Had the court relied instead on tort's political effects, its decision to look past the process concerns embodied in the categorical approach might have been more palatable.

97. See, e.g., D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 257, 298 (1977); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 25 (1957); Henderson, *Judicial Review*, *supra* note 80, at 1531, 1567. But see Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1, 6-7 (1983) [hereinafter cited as Peck, *Comments*]; Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963) (suggesting that in some areas courts are more suited than legislatures to deal with social problems).

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lators, however, often ignore conditions requiring redress, particularly when no vocal constituency is affected. Judges presented with actual controversies, in contrast, have a duty to decide.⁹⁸ In the course of resolving cases, they may identify recurrent dangerous activity unknown to the lawmakers or learn that an obvious danger is more significant than it appears on the surface.

A court faced with such cases might refuse to extend negligence liability because of practical, process concerns.⁹⁹ Allowing cases to proceed on the merits, however, may spur a legislative or administrative response that ultimately will eliminate case-by-case decision-making. These potential political effects should make the court more willing to accept the interim process costs. The liability rule potentially is temporary. In the short term, it provides relief for victims that substantive tort policies suggest are appropriate. In the long term, it may hasten an overall solution to the underlying social problem. In some circumstances, the new rule may itself bring about changes in social conditions that can ease the legislature's burden in arriving at a solution.¹⁰⁰

These are only broad outlines for when a court might appropriately consider the political ramifications of a tort doctrine. Implementation of these basic considerations is far more complex. The following Sections illustrate the political effects model in more detail.

A. *Examples of the Political Effects Model at Work*

On rare occasions courts have proceeded as if a political response was their goal. Their decisions have played a valuable role in providing stop-gap solutions to social problems, enabling political coalitions to form, and framing important issues for legislative consideration. In hindsight, it is fair to conclude that the resulting legislative attention, compromise, and regulation would not have come about without the spur of judicial action. By analyzing a few of these examples, we can determine how the political effects model works in practice and distill criteria for its implementation in future settings.

98. See J. SAX, *supra* note 1, at 111.

99. See, e.g., Henderson, *Judicial Review*, *supra* note 80, at 1546. Process reasoning does not always require an immunity rule. It may, alternatively, call for clear "strict liability" that avoids the process consequences of ordinary negligence litigation. I focus on the immunity aspect of the process scholarship because that is the context to which tort's political effects are most relevant.

100. See *infra* text accompanying notes 184–86.

1. *Railroad Litigation and Workmen's Compensation*¹⁰¹

In the 1800's, American and English courts confronted a continuing series of accidents in which the negligence of railroad workers injured other employees.¹⁰² The courts quickly developed a tort doctrine that kept victims' lawsuits from getting to the jury stage: the "fellow-servant" rule.¹⁰³ The early decisions did not establish that substantive negligence policies required this legal barrier.¹⁰⁴ Rather, the decisions had the clear purpose and effect of saving courts and railroads from a flood of litigation.¹⁰⁵

The fellow-servant rule should have forecast an end to railway accident cases. But in reacting to the transaction costs of railroad litigation, the courts had underestimated the significance of the social conditions to which the lawsuits responded. Railway accidents did not disappear.¹⁰⁶ Victims, having nowhere else to turn, continued to bring cases in great numbers.¹⁰⁷ In order to allow individual compelling cases to proceed on the merits, subsequent judges created a series of doctrinal exceptions to

101. The following discussion draws heavily on the work of Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

102. The incidence of these accidents was substantial: I.C.C. figures suggest that around the turn of the twentieth century three to five percent of all American railway employees suffered injury. See *id.* at 60 n.34. Statistics on industrial accidents generally reveal an enormous toll of injury, more than 2,000,000 every year. See E. DOWNEY, HISTORY OF WORK ACCIDENT INDEMNITY IN IOWA 1-2 (1912).

103. The fellow-servant rule maintained the artificial and perhaps contrary-to-fact principle that employees assumed the risk of industrial accidents. In the seminal case, Chief Justice Lemuel Shaw of the Massachusetts Supreme Court reasoned that wages for railroad workers already took into account the possibility of accident. *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. (4 Met.) 49 (1842); see also *Murray v. South Carolina R.R.*, 26 S.C.L. (1 McMul.) 385 (1841) and the key English precedent, *Priestley v. Fowler*, 150 Eng. R. 1030 (Ex. 1837).

104. Initially, the courts had a choice of holding railroads accountable for their employees' negligence or creating an immunity in favor of the railroads. Either option was substantively justifiable. The railroad encouraged the work of the negligent employees. It also had a sufficient relationship with both sets of workers that a court might reasonably have found a duty to supervise against negligence or a separate duty to protect the non-negligent employee from harm. See *supra* note 17. Indeed, under traditional *respondeat superior* principles, contemporary observers probably would have expected courts to consider the negligent employee the railroad's agent for purposes of liability. See 1 W. BLACKSTONE, COMMENTARIES* 429-30; Friedman & Ladinsky, *supra* note 101, at 53.

105. Friedman & Ladinsky, *supra* note 101, at 55-58, suggest that this result was not as heartless as it seems. In a time of economic growth and a society changing from its dependence on agriculture to newly developing industry, additional expense might have seriously impeded the advance of technology. See also M. HORWITZ, *supra* note 16, at 94-101 (discussing creation of immunities to support economic development).

106. Indeed, due largely to the lack of incentives for railroads to improve conditions, accidents increased. See Friedman & Ladinsky, *supra* note 101, at 60.

107. *Id.* at 59-60.

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circumvent the fellow-servant barrier.¹⁰⁸ Thus, we find that cases continued to flow and that plaintiffs won many of their lawsuits.¹⁰⁹

The next stage in the development of the railway litigation illustrates the political impact that changes in tort doctrine can have. The courts' *ad hoc* tinkering with the harsh fellow-servant rule made the results in individual accident cases extremely unpredictable. The well-established railroad lobby thus became concerned with not only the outcome, but also the irrationality, of verdicts. Railroads were being forced to pay substantial judgments—in addition to insurance costs and litigation expenses—but could not predict in which cases they would have to pay.¹¹⁰ Moreover, lawyers received much of the money railroads allocated for victim compensation, thus worsening employee morale.¹¹¹ Eventually, it came to be in the railroads' interests to take accident-preventive measures and to seek a national legislative solution to the question of victim compensation.¹¹²

Unlike the railroads, the victims were initially not organized. Individual victims had no common interest other than the source of their injuries.¹¹³ But as the railroads raised the issue of compensation in the legislatures, champions of the victims' point of view stood forth in public debate to resist the industry claims.¹¹⁴ In addition, large and frequent verdicts publicized the significance of railroad injuries. Unions, interested in other aspects of industrial safety, now took up the issue and provided a counterpoint to the railroad lobbies in the legislatures.¹¹⁵

108. The "vice principal" rule, for example, permitted a victim/employee to sue his employer where the negligent employee occupied a supervisory position. See *Haley v. Case*, 142 Mass. 316, 7 N.E. 877 (1886); see also 4 C. LABATT, *MASTER AND SERVANT* § 1434, at 4143 (1913). Some courts found a duty of the employer to provide a "safe place to work, safe tools and safe appliances." Friedman & Ladinsky, *supra* note 101, at 62; see *Wedgewood v. Chicago & Nw. Ry.*, 41 Wis. 478 (1877). Judges tended to allow cases to "go to the jury" where the victim stood a good chance to recover despite the legal rules which seemed to foreclose recovery. See Friedman & Ladinsky, *supra* note 101, at 61; Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, in R. RABIN, *PERSPECTIVES ON TORT LAW* 44, 55 (2d ed. 1983).

109. Friedman & Ladinsky, *supra* note 101, at 60; L. FRIEDMAN, *supra* note 16, at 424.

110. See Friedman & Ladinsky, *supra* note 101, at 65.

111. See W. DODD, *ADMINISTRATION OF WORKMEN'S COMPENSATION* 22-23 (1936).

112. Friedman & Ladinsky, *supra* note 101, at 66-69.

113. Railroad victims were even more isolated than victims of other types of industrial accidents. Victims of dangerous activities in a factory generally lived in a community near the factory. By contrast, railroad employees usually were injured on the road. Local communities had no interest in publicly supporting migrant workers. Because proper venue for lawsuits often lay at the situs of an accident, the physical separation also hampered victims' ability to recover by depriving them of "home town juries."

114. Champions were found within the judiciary, see *Driscoll v. Allis-Chalmers Co.*, 144 Wis. 451, 468-69, 129 N.W. 401, 408-09 (1911) (Winslow, C.J., concurring); *Houg v. Girard Lumber Co.*, 144 Wis. 337, 352, 129 N.W. 633, 639 (1911) (Marshall, J., concurring), the scholarly community, see Pound, *The Need of Sociological Jurisprudence*, 19 GREEN BAG 607, 614 (1907); Walton, *Workmen's Compensation and the Theory of Professional Risk*, 11 COLUM. L. REV. 36 (1911), among politicians, see E. DOWNEY, *supra* note 102, at 277 n.540 (1912) (quoting Theodore Roosevelt), and in the press, see 97 THE OUTLOOK 955-60 (1917).

115. See H. SOMERS & A. SOMERS, *WORKMEN'S COMPENSATION* 320-25 (1954).

By the early twentieth century, the expansion of negligence liability had contributed to a significant change in societal attitudes. "[I]ndustrial accidents and the shortcomings of the fellow-servant rule were [now] widely perceived as problems that had to be solved."¹¹⁶ Railroads began to implement safety measures. Unions began to educate their members on the dangers and to demand change. Political coalitions and lobbies formed. Legislatures began to investigate solutions.¹¹⁷

From this atmosphere, the modern formula for worker's compensation emerged. The legislatures compromised. Employee/victims won adoption of a strict liability compensation scheme for all work-related injuries. In exchange, recovery tables capped the potential awards and worker's compensation was made the exclusive remedy for employee injuries. The fellow-servant rule was abolished.¹¹⁸

This Solomonic solution accepted neither the early tort rules of the fellow-servant era nor the tendency of the later cases to shift the full burden to the employers. But it was a scheme that both the emerging railroad industry and victims could tolerate. It persists to this day. Without the emergence of the stopgap judicial liability principles, the issue of accident victimization might never have gained prominence, the legal issues would not have been as clearly framed, and the legislative solutions we know today might never have been reached.

2. *Medical Malpractice*

Recent trends in medical malpractice litigation provide subtler but equally illustrative insights into the political effect of tort doctrines. From 1935 through 1955, 605 medical malpractice decisions were reported. Only 107 resulted in plaintiffs' verdicts.¹¹⁹ Less than thirty years later, the medical profession decries the state of malpractice litigation as a "crisis."¹²⁰ Proposals for reforming malpractice law and medical victim compensation abound.¹²¹ Numerous legislatures have passed statutes favoring

116. Friedman & Ladinsky, *supra* note 101, at 69.

117. *Id.* at 69-70; see also W. DODD, *supra* note 111, at 18.

118. See Friedman & Ladinsky, *supra* note 101, at 70-72.

119. Stetler, *The History of Reported Medical Professional Liability Cases*, 30 *TEMPLE L.Q.* 366, 368-69 (1957).

120. See M. REDISH, *LEGISLATIVE RESPONSE TO THE MEDICAL MALPRACTICE CRISIS: CONSTITUTIONAL IMPLICATIONS* 1 (1977). For statistics and discussions of recent trends, see U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, *MEDICAL MALPRACTICE: REPORT OF THE SEC'y'S COMM'N ON MEDICAL MALPRACTICE* 2-3, 5-13 (Pub. No. 73-88, Jan. 16, 1973) [hereinafter cited as HEW REPORT]; U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, *APPENDIX: REPORT OF THE SEC'y'S COMM'N ON MEDICAL MALPRACTICE* [hereinafter cited as HEW APP.].

121. See, e.g., ABA COMM'N ON MEDICAL PROFESSIONAL LIABILITY, *DESIGNATED COMPENSABLE EVENT SYSTEM: A FEASIBILITY STUDY* (1979); Ehrenzweig, *Compulsory "Hospital-Accident" Insurance: A Needed First Step Toward the Displacement of Liability for "Medical Malpractice,"* 31 *U. CHI. L. REV.* 279 (1964); Havighurst & Tancredi, *"Medical Adversity Insurance"—A No*

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physician-defendants.¹²² How did the issue transform itself from a subject of trivial import to one of the burning political and social questions of our time?

Unlike the fellow-servant cases, courts have long accepted malpractice as a valid subset of general negligence law.¹²³ A plaintiff is entitled to a jury determination on whether the doctor has exercised "such reasonable skill and diligence as are ordinarily exercised in his profession."¹²⁴ The dearth of cases in the early period seems in large part¹²⁵ to have been due to a "conspiracy . . . of silence."¹²⁶ In order to succeed, a plaintiff must usually introduce the testimony of a physician who will testify that the treating doctor failed to satisfy the requisite standard of care. For reasons of collegiality, fear of reprisals from their own malpractice insurers, and unwillingness to subject themselves to cross-examination, physicians in the early period hesitated to testify.¹²⁷ Several legal doctrines helped defendants obtain pre-trial dismissals and directed verdicts by enhancing plaintiffs' difficulty in obtaining expert testimony.¹²⁸

Fault Approach to Medical Malpractice and Quality Assurance, 1974 *INS. L.J.* 69.

122. See HEW REPORT, *supra* note 120, at 9-16; White & McKenna, *Constitutionality of Recent Medical Malpractice Legislation*, 13 *FORUM* 312 (1977); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 *DUKE L.J.* 1417 (1975).

123. See C. STETLER & A. MORTIZ, *DOCTOR AND PATIENT, AND THE LAW* 306-07 (4th ed. 1962); McCoid, *The Care Required of Medical Practitioners*, 12 *VAND. L. REV.* 549 (1959).

124. *McCandless v. McWha*, 22 Pa. (10 Harris) 261, 267-68 (1853); see *Leighton v. Sargent*, 31 N.H. 119, 132 (1855).

125. Of course, other explanations exist both for the limited number of early malpractice cases and for the recent expansion of liability. These include (1) the fact that personal injury claims in general were rarer, (2) a lower level of insurance, which made doctors less attractive targets for suit, (3) a lesser expectation of exactness in medical science and technique, (4) a smaller malpractice bar willing to file suit on a contingent fee basis, and (5) a closer relationship between patients and unspecialized family doctors, with the resulting hesitation to sue. See Note, *Medical Malpractice Litigation: Some Suggested Improvements and a Possible Alternative*, 18 *U. FLA. L. REV.* 623, 623 (1966); Stewart, *The Malpractice Problem—Its Cause and Cure: The Physician's Perspective*, 51 *IND. L.J.* 134 (1975). Nevertheless, the increased availability of expert assistance is probably the single most dominant feature in the recent expansion of malpractice litigation. See S. LAW & S. POLAN, *PAIN AND PROFIT* 98 (1978).

126. Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 *VILL. L. REV.* 250, 251 (1956); see also Note, *Malpractice and Medical Testimony*, 77 *HARV. L. REV.* 333, 336-38 (1963).

127. D. HARNEY, *MEDICAL MALPRACTICE* 193-95 (1973).

128. For example, courts ruled early on that a malpractice plaintiff must prove that the treating physician breached the general standard of care in the locality in which he practiced. Some courts interpreted this standard to require expert testimony of a local physician, see, e.g., *Tanner v. Sanders*, 247 Ky 90, 96, 56 S.W.2d 718, 721 (1933), or, at the very minimum, a physician of a sister region of comparable size and sophistication, see, e.g., *Small v. Howard*, 128 Mass. 131, 136 (1880). The likelihood of obtaining the assistance of a doctor in a suit against his neighbor, particularly in a small community, was virtually nil.

The "school of practice" doctrine also handicapped plaintiffs' efforts to secure expertise. The rule allowed a practitioner to be judged only according to that "system of medicine" which he purported to practice. A doctor trained at a traditional American medical school could thus not dispute the reasonableness of treatment by a less orthodox physician who believed in drugless therapy, a chiropractor who believed in treatment by manipulation of the spinal column, or a healer who relied on the use of natural herbs. See McCoid, *supra* note 123, at 560-64.

As in the railroad litigation context, however, the legal impediments to malpractice liability soon broke down. Victims, with nowhere to turn for assistance but the courts, continued to bring cases. Courts, compelled by cases which substantively deserved at least jury consideration, created exceptions to the doctrinal barriers.¹²⁹ Again we find a continuing flow of injuries and cases, *ad hoc* judicial reactions, and an uncertain situation in which plaintiffs were able to win many lawsuits in the face of initially unfavorable legal obstacles.¹³⁰

The effects of the changes in physicians' liability paralleled the developments in the worker's compensation context. Doctors for the first time had to confront the realistic possibility of losing negligence suits. Conflicting judicial rules made it difficult for physicians and insurers to predict liability,¹³¹ for it was no longer clear when courts would prevent juries from hearing the merits. Doctors began to avoid risky courses of treatment.¹³² More significantly, political activity erupted. The medical lobby,¹³³ headed by the AMA, saw the need to introduce more certainty into the litigation picture. It began to urge legislative and privately-arranged solutions to the problem of victim compensation.¹³⁴ The insurance lobby

129. The doctrine of *res ipsa loquitur* occasionally enabled plaintiffs to dispense altogether with expert testimony. See McCoid, *supra* note 123, at 621-31.

Some judges tempered the "locality" principle by ruling that the "borders of the locality [extend] so as to include those centers readily accessible." *Tvedt v. Haugen*, 70 N.D. 338, 349, 294 N.W. 183, 188 (1940). With developing modes of modern transportation, these courts thus opened virtually the entire United States as fair game for malpractice comparisons. See McCoid, *supra* note 123, at 570-75; see also Curran, *Problems of Establishing a Standard of Care*, in MEDICAL MALPRACTICE 15, 19-21 (E. Shapiro, A. Needham, E. Gass, S. Karlstrom & J. Arrowsmith eds. 1966). Courts, on occasion, also limited the locality doctrine's effect by allowing plaintiffs' attorneys to cross-examine the treating physician with reference to general medical treatises that incorporated national and international standards of care. See *id.* at 21; see also S. LAW & S. POLAN, *supra* note 125, at 100 (1978) ("The erosion of the locality rule has probably had greater impact on the increase in malpractice claims in recent years than any other change in the law.")

The "school of practice" rule also weakened. The doctor's right to rely on his school of practice gave way where the doctor led a patient to believe he had the ability to make a diagnosis beyond his limitations. This exception tended to subsume all physicians who held themselves out as "general practitioners." See McCoid, *supra* note 123, at 561-73.

130. Courts also loosened the requirements of other legal doctrines that helped limit malpractice litigation. For example, exceptions to rigid statutes of limitations have been expanded. See, e.g., D. HARNEY, *supra* note 127, at 249. Judges created the new doctrine of "informed consent." See *Salgo v. Leland Stanford, Jr., University Bd. of Trust.*, 154 Cal. App. 2d 560, 317 P.2d 170 (1957); J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 48-84 (1984). Each of these developments further illustrates how shifts in basic tort principles realigned burdens in the malpractice field. See generally HEW REPORT, *supra* note 120, at 27-30.

131. See *The Problems of Insuring Medical Malpractice*, in *Continuing Medical Malpractice Insurance Crisis 1975: Hearing Before the Subcomm. on Health of the Sen. Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 185 (1975).

132. See, e.g., HEW REPORT, *supra* note 120, at 14-15; AEI, *THE MEDICAL MALPRACTICE DILEMMA* 4-5 (1976); see also sources cited *infra* note 139.

133. See Peck, *Comments*, *supra* note 97, at 18 ("members of the healthcare professions . . . are experienced in lobbying for or against legislation, as are insurance companies").

134. See C. PHILIP & R. FAUST, *MEDICAL MALPRACTICE PANELS IN FOUR STATES* 13 (1977); American Pub. Health Ass'n, *Policy On Malpractice*, 67 AM. J. PUB. HEALTH 96 (1977); Mills,

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sought protective legislation. To dramatize the problem they raised premiums at a geometric rate.¹³⁵

On the other side, publicity surrounding large verdicts and the legislative push by the medical lobby inevitably drew attention to the incidence of malpractice. Opponents to limitations on liability¹³⁶ and champions of medical consumers came to the spotlight. They organized opposition to the anti-liability, pro-defendant campaigns, and gave voice to the formerly unrepresented victim class.¹³⁷

It is too early to ascertain the final results the changes in tort doctrine have wrought.¹³⁸ But the shift of the bias in the case law from the stronger to the weaker political group has clearly provoked not only coalitions "for" and "against" victim compensation, but a new attitude. The prospect of liability created an emphasis—some argue even an overemphasis¹³⁹—on safety techniques in medical practice. Consumer awareness is at an all-time high, a fact which itself contributes to safer treatment.¹⁴⁰ Commissions have been established to study alternative methods of victim compensation.¹⁴¹ Legislatures are experimenting with compromise solutions to balance the desire for victim compensation and society's need for a stable and not-too-timid medical profession.¹⁴² Although several legisla-

Malpractice Litigation: Are Solutions in Sight?, 232 J. A.M.A. 369 (1975); Roth & Rosenthal, *Non Fault Based Medical Injury Compensation Systems*, in HEW APP., *supra* note 120, at 450; Virginia Research Group, *Alternatives to Litigation, IV: The Law of Arbitration in the United States*, in HEW APP., *supra* note 120, at 346.

135. See M. REDISH, *supra* note 120, at 1; SUBCOMM. ON EXECUTIVE REORGANIZATION TO THE SENATE COMM. ON GOV'T OPERATIONS, 91ST CONG., 1ST SESS., *MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN* (Comm. Print 1969) [hereinafter cited as *MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN*].

136. See C. PHILIP & R. FAUST, *supra* note 134, at 24 (opposition to New Mexico's panel system and recovery limitation); *The Medical Malpractice War*, Nat'l L.J., Aug. 27, 1984, at 1, col. 1 (quoting proponents and opponents to changes in malpractice system).

137. See, e.g., Neubauer & Henke, *Medical Malpractice Legislation: Laws Based on a False Premise*, 21 TRIAL 64 (1985); cf. *People v. Smithtown Gen. Hosp.*, 93 Misc.2d 736, 402 N.Y.S.2d 318 (N.Y. Sup. Ct. 1978) (prosecution for permitting unauthorized practice of surgery in hospital).

138. While some commentators are prepared to concede that no workable solution is possible, others point to existing systems in other countries that appear to have reached accommodations between the needs of patients and doctors. See, e.g., Grauers, *Medical Malpractice in Sweden*, 21 TRIAL 52, 54-55 (1985).

139. See, e.g., R. GOTS, *THE TRUTH ABOUT MEDICAL MALPRACTICES: THE PATIENT'S RIGHTS, THE DOCTOR'S RIGHTS* 178-79 (1975); D. HARNEY, *supra* note 127, at 92; A. HOLDER, *MEDICAL MALPRACTICE LAW* 414-15 (1975); *MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN*, *supra* note 135, at 2, 6, 22, 457; *Symposium: The 1975 Indiana Medical Malpractice Act, Introduction: The Indiana Act in Context*, 51 IND. L.J. 91, 92 (1975).

140. See, e.g., C. PHILIP & R. FAUST, *supra* note 134, at 5; L. WILLIAMS, *HOW TO AVOID UNNECESSARY SURGERY* (1971).

141. See *Symposium*, *supra* note 139, at 102; Baird, Monsterman, & Stevens, *Alternatives to Litigation I: Technical Analysis*, in HEW APP., *supra* note 120, at 215; see also R. GOTS, *supra* note 139, at 185-209.

142. See, e.g., *Medical Malpractice Act, 1977 N.M. Laws*, ch. 284, § 3 (compensation fund); 15 S.D.C.L. § 2-22.1 (1984) (applying statute of limitations to minors); see also N.J. S. 604 (1977) and New Hampshire H.R. 314 (ch. 417) (1977) (compensation limits); *Medical Liability and Insurance Improvement Act* § 8.01 (Tex. 1977) (creating cause of action against attorneys who bring frivolous

tures have passed laws that, once again, limit plaintiffs' right to sue,¹⁴³ the public debate has not come to an end.¹⁴⁴ Absent the shift in tort emphasis, the pressure even to consider novel alternatives would in all likelihood not have occurred.

3. *Environmental Litigation*

Today, we recognize government's right and obligation to regulate activities that pollute the environment. That development, however, is recent. It was in some measure inspired by environmental tort litigation.

Originally, environmental causes of action were strictly confined. Courts refused to acknowledge any right of private parties to challenge polluting activities that injured the public as a whole.¹⁴⁵ With time, the courts began to recognize that substantive tort policies supported lawsuits aimed at "public nuisances."¹⁴⁶ They authorized occasional private plaintiffs to challenge conduct that "interfere[d] with the rights of the community at large."¹⁴⁷

From the outset, courts expressed concern over the process consequences of allowing environmental suits.¹⁴⁸ They feared opening the floodgates of litigation. As a result, the courts developed various procedural prerequisites to suit that virtually eliminated the possibility of success.¹⁴⁹ Most of these cut litigation off pre-trial or before the merits had to be decided.¹⁵⁰

malpractice actions).

143. Some legislatures, for example, responded to increasing malpractice litigation by capping liability, trimming "informed consent" rules, and requiring plaintiffs to pursue remedies other than litigation. See generally M. REDISH, *supra* note 120, at 3-4, 9-16 (citing sources); Comment, *supra* note 122.

144. According to one authority, medical malpractice and malpractice insurance is "one of the nations most visible social and political issues." *The Problems of Insuring Medical Malpractice*, *supra* note 131, at 185; see also Note, *Rethinking Medical Malpractice Law in Light of Medicare Cost-Cutting*, 98 HARV. L. REV. 1004, 1017-22 (1985).

145. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1004-06 (1966).

146. Public nuisance theory was the primary legal basis through which private plaintiffs could challenge large scale environmental hazards. Trespass, negligence, strict liability for ultrahazardous activities, and the law of riparian rights were others. For the most part, these legal theories also started out as dead ends but were revived by judicial tinkering with the traditional doctrine. See Maloney, *Judicial Protection of the Environment: A New Role for Common-Law Remedies*, 25 VAND. L. REV. 145, 149-52 (1972); see also W. PROSSER, J. WADE, & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 838 (1976).

147. Prosser, *supra* note 145, at 999.

148. See, e.g., *Alameda Conservation Ass'n v. California*, 437 F.2d 1087, 1090 (9th Cir.), *cert. denied*, 402 U.S. 908 (1971).

149. See, e.g., *Reitze, Private Remedies for Environmental Wrongs*, 5 SUFFOLK L. REV. 778, 803 (1971).

150. For example, a representative plaintiff was allowed to proceed only if he could prove "special damages," differing in kind from that of the general public. See, e.g., *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973); *Strickland v. Lambert*, 268 Ala. 580, 109 So. 2d 664 (1959); *Bouquet v. Hackensack Water Co.*, 101 A. 379 (N.J. 1917). If the plaintiff settled in the area of the pollution voluntarily—that is, "came to the nuisance"—he was deemed to have assumed the risk. See, e.g., *Waschak v. Moffat*, 379 Pa. 441, 452, 109 A.2d 310, 316 (1954). Some courts also barred public

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As in the railroad and malpractice contexts, however, individual judges succumbed to the temptation of reaching the merits of compelling cases.¹⁵¹ By the late 1950's or early 1960's, courts regularly ignored the barriers to environmental nuisance litigation.¹⁵² As a result of these inconsistent legal developments, polluting industries for the first time faced a realistic chance of losing environmental litigation,¹⁵³ but could not always predict when. Ultimately, it was in their interest to take anti-pollution measures.¹⁵⁴ At the same time, industry sought redress in the form of statutes and regulations that would vindicate their right to pollute.

In the environmental context, the activism of the courts had an additional political effect not present, or at least not as prominent, in the worker's compensation and malpractice settings. The occasional, contro-

nuisance suits wherever the state, by any form of legislation, sanctioned the general enterprise engaged in by defendant. *See, e.g.*, *National Container Corp. v. State ex rel. Stockton*, 138 Fla. 32, 189 So. 4 (1939) (tax exemption for establishing plant held to implicitly sanction plant's activities); *see also* Maloney, *supra* note 146, at 147-48 nn.12-16 (citing authorities). Others restricted the categories of "nuisance" to activities that were a crime. *See, e.g.*, W. PROSSER, J. WADE, & V. SCHWARTZ, *supra* note 146, at 837; Maloney, *supra* note 146, at 155. Courts routinely denied injunctive relief on the basis that the "balance of convenience"—i.e. the economic importance of defendant's activities—required that the polluting enterprise be allowed to continue its operations. *See, e.g.*, *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 336, 83 S.W. 658, 666 (1904); *see also* Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126, 1131-34; Maloney, *supra* note 146, at 147-48, 160. In some instances, courts even acknowledged a defendant's wrongdoing but held that it had obtained a "prescriptive right" to carry on its activities by virtue of the fact that no one had challenged them in the past. *See, e.g.*, *Dangelo v. McLean Fire Brick Co.*, 287 F. 14 (6th Cir. 1923); *Hulbert v. California Cement Co.*, 161 Cal. 239, 244, 118 P. 928, 930 (1911); *W.G. Duncan Coal Co. v. Jones*, 254 S.W.2d 720, 723 (Ky. Ct. App. 1953). All in all, it was extremely difficult to bring successful environmental litigation at common law.

151. Judges applied the special damage requirement haphazardly. Some merely required a showing of substantial harm. *See* Prosser, *supra* note 145, at 1009 n.100; W. PROSSER, J. WADE, & V. SCHWARTZ, *supra* note 146, at 841-42 (1976). Many courts demoted "coming to the nuisance" from its status as a legal defense to being merely one factor to be considered in evaluating the merits. *See, e.g.*, Juergensmeyer, *Common Law Remedies and Protection of the Environment*, 6 U. BRITISH COLUMBIA L. REV. 215, 218 (1971); Maloney, *supra* note 146, at 156 and authorities cited therein. Prescriptive rights of defendants were rarely recognized. *See, e.g.*, *Stamm v. City of Albuquerque*, 10 N.M. 491, 503, 62 P. 973, 974 (1900); *see also* Juergensmeyer, *supra* note 150, at 1136 n.31. The RESTATEMENT (SECOND) OF TORTS § 821B (1966), explicitly limited the rule that only crimes could rise to the nuisance level, providing instead that all "unreasonable" activities qualified. *See also* W. PROSSER, J. WADE, & V. SCHWARTZ, *supra* note 146, at 837.

152. In addition to changing the legal obstacles to environmental litigation, modern courts also produced numerous affirmative innovations that eased plaintiffs' task in limiting environmental hazards. *See* Reitze, *Private Remedies for Environmental Wrongs*, 5 SUFFOLK U.L. REV. 779, 810-19 (1971).

153. *See, e.g.*, *Spur Industries v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257, N.E.2d 870, 309 N.Y.S.2d 312 (1970).

154. *See National Environmental Policy: Hearing Before the Sen. Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess., 178 (1969) (statement of Edwin M. Wheeler, Pres., National Plant Food Institute) [hereinafter cited as *Environmental Hearing*]; *see also* L. WENNER, THE ENVIRONMENTAL DECADE IN COURT 1-2 (1982) (NEPA's passage was "relatively noncontroversial" and was "the culmination of a long process . . . during which conflicting interests argued their points of view"); Diamond, *What Business Thinks*, FORTUNE, Feb. 1970, at 118-19, 171-72; *cf.* L. WENNER, *supra*, at 170 (environmentalists have used courts in other spheres, but "eventually the legislative branch simply overturned that action").

versial, litigation successes gave environmentalists a public platform needed to galvanize support. The decisions contributed to an atmosphere of public debate and public interest.¹⁵⁵ Thus, in the 1960's we see a dramatic surge in the membership of environmental groups,¹⁵⁶ the filing of additional lawsuits,¹⁵⁷ and active participation of environmentalists in the legislative process.¹⁵⁸

The most significant result of the change in legal doctrine was political: state and federal legislatures intervened. With the beginning of the 1970's, heavy governmental regulation of the environment became the norm.¹⁵⁹ As in the railroad and malpractice contexts, the legislation for the most part compromised. The National Environmental Protection Act,¹⁶⁰ for example, chose neither to ban polluting activities outright nor to permit federally supported enterprises to continue environmentally destructive conduct. It adopted the alternative of requiring environmental impact studies.¹⁶¹ Other legislation and executive action established supervisory agencies to implement the Act's protections.¹⁶² These compromise measures satisfied neither industry nor environmentalists, but were acceptable to both groups.

It is going too far to credit the changing tort rules with all of the modern regulatory developments. Certainly the prosperity and general activism of the 1960's had as much to do with the willingness of citizens and industry to bear the expense of environmental protection. Nevertheless, judicial activism that circumvented the legal doctrines favoring polluters unquestionably played some role in raising citizen consciousness on the problems of pollution. It encouraged public debate and directed industry and environmental groups alike toward legislative remedies. The conse-

155. See, e.g., *State High Court Ruling Allows Factory Air Pollution at a Price*, N.Y. Times, Mar. 6, 1970, at 45, col. 3 (article on *Boomer v. Atlantic Cement Co.*); *Back to Caveat Emptor*, N.Y. Times, Aug. 24, 1969, § IV, at 12, col. 2. (editorial applauding law suit against car manufacturers for causing Los Angeles pollution); *Los Angeles County Files Antismog Suit*, N.Y. Times, Sept. 6, 1969, at 24, col. 3 (\$100 million suit by Los Angeles county against car manufacturers).

156. See generally Bowling, *The New Conservationist*, 1 J. ENV. ED. 78, 78-79 (1970); Koenig, *Additional Research on Environmental Activism*, 4 ENV. & BEHAV. 472 (1975).

157. See L. WENNER, *supra* note 154, at 21.

158. See *Environmental Hearing*, *supra* note 154, at 145 (statement of Michael McCloskey, Sierra Club); *id.* at 153 (statement of Louis Clapper, Director of Conservation, National Wildlife Federation); *id.* at 175 (statement of Anthony Smith, President & General Counsel, National Parks Ass'n.).

159. Many states enacted their own version of NEPA. See, e.g., CAL. PUB. RES. CODE §§ 21100-21176 (West 1983); ILL. REV. STAT. ch. 1111/2, § 1001 (1983); MD. ANN. CODE art. 41 §§ 447-451 (repealed 1973).

160. National Environmental Policy Act, 42 U.S.C. §§ 4321-70 (1982).

161. *Id.* § 4332(B).

162. See authorities cited in V. YANNAKONE & B. COHEN, ENVIRONMENTAL RIGHTS AND REMEDIES §§ 7.8-7.9 at 476-79, § 7.17 at 566, § 7.28 at 621 (1972).

quence was a new regulatory order that, in the absence of judicial action, might have taken decades to come about.¹⁶³

4. Summary

Because courts that undermined the industrial accident, malpractice, and environmental immunities never fully explained their decisions, it is impossible to prove that the courts intended to provoke a legislative or administrative response. The courts' reactions can be interpreted plausibly as traditional attempts to grapple with difficult areas of tort law in which functional and normative considerations required changes. The examples do, however, illustrate the types of political effects that tort rules can have.

Obviously, not all expansions of negligence liability will produce similar results. Nor is it always desirable for courts to stimulate legislative or administrative response to a particular subject matter. The negative consequences of the interim chaos that results when courts remove legal immunities are legion. Transaction costs and the potential for a flood of litigation increase whenever courts adopt vague standards of care.¹⁶⁴

The following Section analyzes the examples to determine what shared characteristics led to the favorable political responses. By combining that analysis with a realistic evaluation of the dangers inherent in employing tort's political effects model, the Article attempts to set out criteria to govern its implementation.

B. *Implementation of the Political Effects Model*

Ideally, the political effects justification for tort liability leads to a stop-gap legal principle. A new rule temporarily imposes liability upon a politically well-represented group. In response, the group is expected to activate legislative or administrative attention to the social problem underlying the cases in which the rule applies. In the long run, the legislature or executive agency will provide a solution and make the determination of who should bear the accident costs, and how.

Not all new liability decisions, however, will produce this idealized scenario. The courts must thus identify guidelines for when political effect considerations properly come into play.

163. In *Defending the Environment*, Professor Sax presents several case studies of major environmental litigation. He concludes that the courts have "require[d] fuller and more open debate," J. SAX, *supra* note 1, at 113, and helped "open the doors to a far more limber governmental process." *Id.* at 115; see also Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 558 (1970).

164. See, e.g., Henderson, *supra* note 81, at 479 (discussing standard of "reasonableness under all the circumstances").

1. *The Nature of the Social Problem*

In the three historical examples, plaintiffs continued to file cases despite the existence of doctrines that seemed to preclude success.¹⁶⁵ Recurring litigation often highlights a social problem of significant magnitude.¹⁶⁶ Plaintiffs' persistence suggests, on the one hand, that the victims cannot realistically avoid the dangerous activity¹⁶⁷ and, on the other, that the unregulated market is neither reducing the risks nor providing adequate compensation.

Such litigation thus signals a continuing, widespread need for relief. It highlights an underlying social condition that may ultimately require legislative, rather than judicial, solutions.¹⁶⁸ But the signal reaches only judges. Imposing liability upon politically well-represented groups in turn is judges' sole effective means to forward the message for legislative consideration.¹⁶⁹

These characteristics give rise to the first constraint upon judges who would rely on political effects to justify a liability rule. Political considerations are significant only in the context of persistent litigation prompted by conditions that call for comprehensive remedies.¹⁷⁰ Before a court attempts to act as a political catalyst, the court should thus conclude that the

165. The contrast between American and European industrial accident and malpractice litigation is striking. Europe, early on, regulated the railroad industry heavily. The need for malpractice litigation was reduced dramatically by national health insurance systems that automatically cared for injured patients. Thus we see far fewer accidents and cases in Europe than in the United States, and less need for legal doctrines to provoke the victim compensation schemes that have typified the American response.

166. The number and extent of injuries suffered by railroad workers and malpractice plaintiffs in the early litigation periods, for example, was too high to reflect isolated incidents. See Friedman & Ladinsky, *supra* note 101, at 60 (industrial accidents); H. LEWIS & M. LEWIS, *THE MEDICAL OFFENDERS* 25-26 (1970) (estimate that one medical practitioner in nine repeatedly violates professional medical standards).

167. For example, railroad workers, needing jobs, continued to seek railroad employment. Patients, needing medical assistance, requested treatment despite the possibility of serious injury at the hands of doctors. Environmental litigants had no option to avoid the pollution affecting them, since defendants imposed the pollution in the regions which plaintiffs already inhabited.

168. See, e.g., Henderson, *Judicial Review*, *supra* note 80; Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962) (comparing law-making competences of courts and legislatures).

169. Institutional constraints generally limit courts to imposing liability or refusing to do so. Courts have no authority to create a compromise liability scheme, such as workmen's compensation, or to establish alternative mechanisms for dealing with societal problems, such as professional peer review groups and environmental protection agencies. By shifting liability burdens, courts can, however, catalyze the legislature into seeking new solutions.

170. Courts can determine whether a widespread social problem exists by looking to the history of the litigation, its nature, or social evidence and statistics. The assessments, however, are subject to change. A "no-liability" judgment may initially be appropriate because the type of injury in question appears unlikely to recur on a regular basis. That evaluation may later be proven wrong. The scope of the problem itself may change. As time passes, societal and judicial perceptions of the social problem may also evolve, thus creating pressure to change the common law doctrine. Cf. D. HOROWITZ, *supra* note 97, at 295 (for purposes of reviewing established policy, "[l]egislators may rely on interest groups to rekindle their awareness").

case before it stems from a social problem that legislators or administrative regulators should ultimately resolve.¹⁷¹

2. *The Status of Extra-Judicial Consideration of the Problem*

On the surface, it contradicts basic notions of judicial restraint to suggest that judges should act, even occasionally, where other bodies are better suited to decide an issue.¹⁷² But the general prudential guidelines that instruct courts to defer to legislative decision making¹⁷³ assume that legislatures *will* act.¹⁷⁴ The political effects model comes into play only where that assumption rings false. The model is conceived precisely for situations where a catalyst is needed to provoke legislative or administrative attention.¹⁷⁵

This suggests a second constraint for judges who wish to justify a tort rule on a political basis. In addition to evaluating the seriousness of the social problem, the court must also evaluate the status of the problem in the other fora. Is it being debated? Do forces currently exist which are likely to frame the issue clearly, identify alternative solutions, and press the fora to consider the issues seriously? If the legislature or an appropri-

171. In *Whitney v. City of Worcester*, 373 Mass. 208, 366 N.E.2d 1210 (1977), the Massachusetts Supreme Judicial Court announced that it would retroactively redefine governmental tort immunity if, and only if, the legislature failed to take action during its next session. The court hoped to avoid short-term process costs inherent in changing the immunity, while still reaping the benefits of catalyzing the legislature to act. *Id.* at 209-10, 366 N.E.2d at 1211-13; *see also* *Spanel v. Mounds View School District No. 621*, 264 Minn. 279, 118 N.W.2d 795 (1962).

The *Whitney* Court's decision making process, though sharing some goals and features with the political effects model, differs in several significant respects. The political effects model adheres to the traditional view that decisions should be framed in part by a court's need to decide an actual case. Such concreteness forces judges to balance the effects of their decisions realistically and brakes any tendency to adopt "imaginative" results that are not supported by substantive legal analysis. *See infra* note 188 and accompanying text. In reaching only a tentative decision and offering it to the legislature for review, the *Whitney* court did not bite the bullet. In effect, the court gave an advisory opinion. *See* Comment, *Prospective-Retroactive Overruling: Remanding Cases Pending Legislative Determinations of Law*, 58 B.U.L. REV. 818, 838 (1978).

Moreover, the *Whitney* Court's attempt to mold the ultimate legislative response raises serious separation of power concerns. Under the political effects model, a court cannot interfere with the legislature's performance of its duties. The court may consider such factors as the societal need for and likelihood of securing a legislative response, but it ordinarily will not even have a particular legislative solution in mind. The legislature is perfectly free to perform its independent functions without fear of judicial reprisal.

172. *See, e.g., Diver, supra* note 95.

173. *See Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947) (noting "the necessity, if government is to function constitutionally, for each [branch of government] to keep within its own power, including the courts"); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-54 (Brandeis, J., concurring) (discussing "'great gravity and delicacy' of [the Court's] function in passing upon the validity of an act of Congress").

174. *See, e.g., Henderson, Judicial Review, supra* note 80, at 1574.

175. *See Peck, Comments, supra* note 97, at 9 ("It is in areas of legislative inactivity that the judiciary may safely perform a creative role."); *cf. Sax, supra* note 163, at 558 ("The very fact that sensitive courts perceive a need to reorient administrative conduct . . . suggests how insulated . . . agencies may be from the relevant constituencies.").

ate regulatory body has already turned its attention to the "social problem" and given it adequate consideration¹⁷⁶—or is likely to do so without judicial intervention—the court has no reason to act as a political catalyst. If, on the other hand, the other branches of government appear dormant, with no apparent intention of even contemplating the problem, the court should be readier to intervene.

To understand this constraint, consider the example of the railroad accident litigation. Railroad accidents recurred,¹⁷⁷ yet virtually no influential law-making body had addressed them. The railroad unions, perhaps for lack of resources,¹⁷⁸ had not picked up the gauntlet on behalf of victims. Most likely, union members did not even realize there was a battle to be fought. Most private citizens, like the judges who initially adopted the fellow-servant rule, accepted accidents as an inevitable burden of the working man. Hence, as the vitality and wealth of the railroad industry grew and undercut the initial rationales for immunity from suit,¹⁷⁹ the legislatures still did not consider changing the balance to help workers cope with the costs of accidents.

These circumstances might have justified shifting the burden of liability onto defendants. As an historical matter, the prodding of the courts wakened the principal actors—railroads, unions, and the legislatures—to the core problem. The status of the issue in the legislature was, or should have been, a focal consideration.

3. *The Likely Political Effect of the Liability Doctrine*

A related concern is the degree of political effect a court's new doctrine is likely to have. As discussed above, the court that relies on the political effects model should expect that other law-making bodies will ultimately attend to the subject matter of the doctrine. The court must therefore honestly assess the likelihood that its decision will be temporary. Any expansion of liability has short term administrative and process costs.¹⁸⁰ Should

176. If the issue has been debated in the past, the court should consider whether the underlying problem and the abilities of the various parties to bear the burden of accident costs are substantially the same as when the legislature last considered the issue.

177. See *supra* note 102.

178. See Friedman & Ladinsky, *supra* note 101, at 74 ("Labor unions . . . were concerned with more basic (and practical) issues such as wages and hours.")

179. See *id.* at 74. In the early days, courts concluded that employer liability would keep railroads from developing or would put existing companies out of business. See authorities cited *supra* note 16. Only as the railroad industry became secure did judges change their view of employers' legal rights and duties. See Friedman & Ladinsky, *supra* note 101, at 74. Requiring railroads to insure against victim injury became a cost society could then afford.

180. Where, as in all three historical examples, the expansion comes through haphazard exceptions to accepted rules of law, the resulting legal chaos encourages costly litigation, skews potential defendants' business judgments, and creates disparities in victim compensation. Even consistent, across-the-board expansions of liability create transaction costs. For example, defendants must expend

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the legislature fail to react to the court's new rule, the rule and its costs will endure.¹⁸¹ Thus, only a judge who realistically anticipates that his solution will be a stopgap can accept the potentially adverse process consequences of his remedy.

Judges, of course, cannot predict precisely how a legislature will act. But they can assess a liability rule's usefulness as a catalyst, by evaluating the political influence and capacity of the plaintiff and defendant groups. Unless the class disadvantaged by a new liability doctrine is a cohesive group with effective lobbying potential, the doctrine will have little political effect. Railroads, doctors, and corporate polluters represented prime political targets for the courts precisely because they were in a strong position to draw public and legislative attention to the courts' action. Conversely, a powerful, well-organized plaintiff group can seek legislative redress on its own, without waiting for a liability rule to prod its adversary into political action.¹⁸²

An equally important component to a liability rule's potential for political effect is whether the legislature can do anything of substance once it considers the social problem. If the court can conceive of no resolution other than imposing the costs of accidents on the defendant class or the plaintiff class, the court itself can make that choice as easily as the legislature.¹⁸³ If, on the other hand, the court foresees compensation alternatives or avenues the legislature might pursue to counteract the underlying cause of injuries, the court can benefit society by making the issue public.

resources to adjust their activities to accommodate the risk of loss (e.g., in the case of commercial enterprises, by purchasing insurance and spreading the cost of the premiums among their customers). Insurers must recalculate their actuarial tables. Lawyers must retrain and adjust their practices. Judges may need to realign their dockets.

181. The following pages encourage courts to rely upon societal factors not typically recognized in case-sensitive litigation. To inform themselves regarding such criteria as the status of the issue in other fora or the likelihood of a beneficial political response, *see supra* text accompanying notes 172-79, judges will have to adjust the way they determine facts. Numerous commentators have addressed the means by which courts can adjudicate "legislative facts." *See, e.g.,* Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 99-109; Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 HARV. L. REV. 692 (1948). They have pointed out the practical difficulties inherent in this type of fact-finding. *See, e.g.,* Diver, *supra* note 95, at 95-99. Without belittling the problems courts will encounter, the work of these commentators illustrates that means exist—including the use of expert testimony and sociological research—through which courts can obtain the necessary information. Over time, judges and attorneys will no doubt improve upon existing fact-finding techniques and develop new ways of gathering data on the relevant societal factors.

182. *See* Sax, *supra* note 163, at 558, 560, 561; *cf.* Peck, *Comments, supra* note 97, at 16, 18 (judicial activism appropriate in products liability area because consumers and patients are "not organized" and "channels of communication are not arranged in a manner that will bring them together").

183. The court would base its actions on tort's substantive and process-related policies.

4. *The Indirect Effects of the Doctrine*

Any expansion of liability to some degree affects the subsequent conduct of the parties and other members of society. It can also change society's view of what is appropriate conduct.¹⁸⁴ As a consequence, doctrinal shifts may on occasion have stronger political effects than merely drawing attention to a problem. The changes in conduct and attitude may themselves alleviate the underlying problem and thereby ease the legislature's task in arriving at an overall solution.¹⁸⁵

In the railroad context, for example, liability forced the railroads to undertake safety measures. Knowing that an incentive toward safety existed, lawmakers could subsequently rest easier in limiting recoveries achieved by injured workers through the workmen compensation scheme. By the same token, malpractice liability sharply increased the practice of preventive medicine and alerted consumers and insurers to the need to take their own steps against negligent treatment. It therefore radically changed the nature and scope of the problem with which the legislatures had to deal. Nuisance law favorable to plaintiffs required industry to acknowledge that pollution was a real cost of doing business, take steps against pollution, and invest in research and development of anti-pollution devices. Some consumers, having become more conscious of environmental concerns, were prepared to boycott products of companies that refused. These developments again facilitated the legislative response. Where, as in these examples, a court can predict that a new legal doctrine will produce a beneficial change in society's attitudes toward an important societal problem, the balance shifts dramatically in favor of adopting the new rule.¹⁸⁶

184. See Henderson, *supra* note 56, at 920.

185. As courts gain experience in adjudicating the merits of new categories of cases, the courts may themselves develop ways of eliminating the process concerns that caused them to resist liability initially. Professor Henderson describes one example relating to strict product liability. When courts first breached the privity rules that had formerly prevented products liability litigation, the courts adopted a negligence approach vehemently opposed by process scholars. With time and experience, courts learned of the problems inherent in negligence litigation and looked for new means to cope. Ultimately, strict liability—the mirror image of the initial no-duty immunity—developed. See Henderson, *supra* note 56, at 927. While some scholars criticize that result, the change in doctrine unquestionably reduced the courts' early process fears.

186. Professor Epstein cites workmen's compensation legislation as support for the proposition that judicial action cannot bring about a result that would not otherwise occur. The statutory scheme, he argues, "discarded the entire tort liability system . . . and started anew." Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1738 (1982). That analysis ignores the role judicial activism played in producing the new legislative result. Professor Epstein's basic premise assumes that there is no value to speeding along a legislative solution and brushes aside the importance of alleviating victim suffering in the interim. Professor Epstein also attaches no significance to the attitude-changing effects of judicial decisions.

5. *The Merits*

Each element of the political effects model discussed thus far assumes that expanded liability is a stopgap reaction to a social problem, pending ultimate legislative or administrative resolution. In reality, though, the legislature may never act. The court therefore cannot justifiably create doctrinal chaos *simply* in order to provoke a political response. It must be prepared to live with the judicial rule on a long term basis.¹⁸⁷

A judge's obligation to decide each case on its merits precludes use of the model unless functional or normative tort policies support the outcome of the case.¹⁸⁸ Only after identifying a substantive justification for liability can a court—consistent with its adjudicative role—balance political considerations against “non-substantive” process factors that favor an immunity. As a practical matter, this constraint sharply limits the universe of cases in which courts will even get to the stage of weighing the likelihood of fruitful legislative action against the costs to society if the legislature does not act.

6. *Considerations that Minimize Process Concerns*

Once a court reaches the point of balancing the political effect of a new rule against countervailing process constraints, it may reasonably look to factors that minimize the process costs of expanded liability. One factor should be present in virtually every political effects case: The court's result is intended to be temporary. The court should be able to foresee a time when the legislature will respond to the underlying causes of accidents and eliminate the need for the judiciary to decide liability on a case-by-case basis.

Other factors may exist. Where the new doctrine is confined to particu-

187. In the environmental litigation area, Professor Sax suggests that the courts have felt free to protect the environment because enjoining polluting activity is usually a “tentative” decision which can be overturned by the legislature. J. SAX, *supra* note 1, at 153, 175. Professor Sax thus concludes that “[r]ather than being at odds with legislative policy-making, the courts are promoting that process.” *Id.* at 153; *see id.* at 157.

Whatever the merits of Professor Sax's view in the environmental cases he discusses, courts cannot accept his premise as a universal truth. Various factors other than substance—including the defendant's lack of access to the legislature and mere legislative inertia—may prevent a legislature from considering particular issues.

188. Thus, under a functional approach, the court should not be willing to impose liability in a category of cases unless, absent judicial intervention, serious market failures threaten the efficient allocation of resources. In the railway accident, malpractice and environmental cases, market failures may well have been present. Plaintiffs had insufficient information about the dangers of medical treatment and railroad employment to make educated judgments. No effective market existed at all to require environmental polluters to recognize the true cost of their activities.

Under a normative approach, corrective justice must be the initial justification for any liability rule. “Fault” principles called for liability in the three historical examples; the defendants were directly responsible for causing foreseeable injuries to plaintiffs. Until the courts changed the rules, however, defendants received the benefits of “immunities,” based on non-substantive, non-normative factors.

lar categories of cases, the courts need not fear a flood of new litigation; trial judges can halt litigation in other categories at the pleading stage. To the extent a new negligence rule applies primarily in cases that do not require juries to decide highly complex questions,¹⁸⁹ process concerns also decrease. Finally, a new liability decision need not always encompass a negligence approach. The less ambiguous the standard, the fewer the process costs. As those disappear, the reasons to avoid an updated rule vanish as well.¹⁹⁰

C. *The Trade-Off Between Political Effects and Process Costs*

On the surface, reliance on political factors exceeds recognized boundaries of judicial decisionmaking. Process reasoning, on the other hand, seems to conform to "legitimate" exercise of judicial authority. Process concerns emphasize traditional judicial "restraint," whereby courts admit their limited competence and forestall the floods of litigation.

On closer inspection, though, the political effects and process models are analogous approaches to the realities of negligence litigation. Both recommend outcomes for reasons divorced from traditional "substantive" tort theory. Both focus on the practical implications of liability rules for alternative decisionmakers.¹⁹¹

Historically, judges' use of the two approaches has largely been tacit. Were courts to rely expressly on either type of reasoning, they would—to be honest—have to make difficult factual assessments regarding the effects of liability rules. Process justifications for tort immunity rest heavily on empirical assumptions about the rationality of jury verdicts and their effect on private technology and resource-allocation decisions. The political justification for a liability rule depends on the nature of the underlying

189. See *supra* note 85.

190. Professor Epstein hypothesizes that judge-made rules have no long term effects: If a law is worth having, the legislature will eventually enact it. See *supra* note 186. Even accepting that the legislature might at some point in the future have enacted workers' compensation or malpractice and environmental regulation without the prodding of the courts, I suggest that courts served as a catalyst for speedier change. They provided an incentive for political lobbies and legislatures to act and an atmosphere in which new political solutions could result. During the period of attitudinal change, the courts provided stopgap relief for victims who could not afford to wait. Relief was appropriate because (1) there were legal/policy bases for compensation; (2) the doctrinal shifts themselves had beneficial effects that facilitated the work of the non-judicial fora, and (3) in the short term, process costs were not so high that society and the courts could not afford them. In the long term, even under Professor Epstein's theory, a legislature could have overruled the judicial solutions if society had disapproved.

191. Political and process reasoning each react to the fact that courts are not fully qualified to make decisions relating to technical or technological accident-prevention issues. Because process scholars view negligence litigation as an inefficient and expensive form of regulation, they encourage courts to leave questions of liability, compensation, and incentives to government regulators and technology managers alone. The political effects model recognizes that an immunity rule may simply lead to private and public inattention to a category of accidents. It thus attempts to provide incentives for appropriate debate.

social problem, the status of the legislative debate, and the ability of the class of plaintiffs and defendants to focus public attention on the issues. The factual determinations necessary to support implementation of the two theories are equally problematic.

Moreover, both theories are “political.” Courts exercise a political function implicitly whenever they use process considerations to create an immunity. In effect, the courts assume that if private decisionmakers do not act appropriately, victims will influence public regulators to intervene. Where the victim class is unorganized or unorganizable, however, the pressure toward regulatory reform becomes negligible. The political implications of a process immunity are therefore substantial, but hidden from view.

Thus, courts are on similar footing when implementing political and process reasoning. The difference between the two approaches lies not in their legitimacy as judicial tools, but in their perspectives on social costs. Political reasoning takes a long term view of societal benefits and costs; process emphasizes present harms. The political effects model recognizes that the benefits of inducing action in the appropriate forum may, in some cases, outweigh the shorter-run process costs of adopting temporary liability rules.¹⁹²

We must recognize, of course, that no system of predicting the likelihood and consequences of a legislative or administrative response is perfect. If a court’s expectations of a favorable political reaction prove false, the court will have adopted a rule that it should, judged retrospectively, have rejected. The courts will have taken a calculated gamble and lost.¹⁹³

192. Conceptually, it is relatively simple to compare the societal savings produced by a legislative solution to a social problem against the transaction costs of negligence litigation. Quantifying and offsetting the fairness concerns of process scholars is far more difficult.

A politically-based liability rule has theoretical side benefits that parallel a tort immunity’s value in enhancing the rule of law. In a different context, Professor Summers suggests that one of the factors that makes a body of doctrine “good” is whether it involves participatory governance. Summers, *Evaluating and Improving Legal Processes—A Plea for “Process Values,”* 60 CORNELL L. REV. 1, 4–5, 13–14, 20–21 (1974). Extending Professor Summers’ observation somewhat, it is fair to conclude that a legal rule increases in value if it serves to promote or enhance participatory governance, even at a different time and in a different forum—that is, in the legislative process. See, e.g., J. SAX, *supra* note 1, at 113–14 (“courts exercise an overview designed to assure that democratic processes are made to work and reflect the full range of public attitudes”).

193. Arguably, any legislative response—even a simple failure to overturn the court’s liability decision—is preferable to a judicially-imposed immunity rule. The preference for a legislative decision seems particularly strong where the character of the appropriate tort standard depends on practical concerns—such as process consequences and the problem of crime—that are unrelated to traditional substantive tort policies. Legislative inaction, however, can mean many things: for example, (1) lack of interest in an issue or a belief that it is not sufficiently important to merit legislative attention, (2) log-rolling, (3) disagreement with minor aspects of proposed legislation, and (4) fear of the political consequences of action. See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1395–96 (1958). While some courts have considered legislative silence to be significant, see, e.g., *United States v. Standard Oil Co.*, 332 U.S. 301, 315–16 (1947); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487–89 (1940), most have disclaimed its validity as a

The possibility of error should not, however, caution judges to avoid the analysis. The political effects model comes into play only where, by definition, the need for a solution to the underlying social problem is great. Despite the process costs, the strong substantive justifications for the liability rule suggest its adoption will generate some benefits. In addition, courts are required to apply political reasoning so as to minimize process concerns. Under these narrow circumstances, the courts will be able to live with legislative inaction even though they might not, with hindsight, have adopted the liability rule. Prudent judges retain the option of reversing or changing the new liability system in the unlikely event that a court significantly miscalculates both the political effect of the liability rule¹⁹⁴ and the magnitude of the process costs.¹⁹⁵

In short, the potential benefits of judicial activism based on political reasoning outweigh the risks. Courts should not focus so exclusively on process that they ignore the positive long term political effects tort doctrine can have.

III. THE POLITICAL EFFECTS MODEL AND NEGLIGENT SECURITY LITIGATION

A. *In General*

If there is any group of current decisions in which the political effects model seems to be at work, it is the area of negligent security law. Unspoken process fears have held many judges back from recognizing a cause of action. Other judges, for their own unexpressed reasons, have looked past the process consequences and acknowledged a cause of action. This Sec-

reliable indication of legislative intent, *see, e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950); *Helvering v. Hallock*, 309 U.S. 106, 119-121 (1940). Under either view, in order to draw any inference from legislative silence, it is necessary to presuppose that the legislature has considered the issues fully before deciding not to act. *See, e.g.*, *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17, 25-26 (1947); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1941).

194. A court should be able to predict legislative responsiveness fairly accurately. If the court can identify compelling moral or instrumental arguments supporting a liability rule, it knows the legislature had strong reason to act when the courts did not. The legislature's inaction can only be attributed to the lack of a political stimulus. By imposing liability on the politically powerful group, the court should cause this barrier to disappear.

Moreover, once the court creates a right to sue, all the relevant actors may well favor a legislative remedy. As the workers' compensation example shows, potential victims will often join liable institutional defendants in seeking a rational comprehensive system governing accident costs. *See supra* text accompanying notes 117-18. The legislature is unlikely to remain silent where *all* the affected parties coalesce and demand a legislative resolution.

195. The political effects model justifies liability most readily where the court believes that the substantive theoretical support for liability is only barely outweighed by process concerns. *See supra* text accompanying notes 187-88. Political reasoning will thus bring about a disastrous result only where the court underestimates (1) the likelihood of legislative action, (2) the strength of the substantive support for liability, *and* (3) the moderate process consequences of a liability rule. If the court assesses any of these three factors correctly, the resulting liability rule should be tolerable even if the legislature ultimately fails to act.

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tion argues that tort's political effects are, or should be, the justification for the modern approach.¹⁹⁶

1. *The Problem and the Substantive Background*

The two major prerequisites to implementation of the political effects model are present in the negligent security context. First, as we have already seen, liability is consistent with substantive tort theory.¹⁹⁷ Second, negligent security litigation clearly reflects a widespread social problem: violent street crime and the need to protect potential and actual victims.

The crime rate has surged over the past two decades.¹⁹⁸ The incidence of crime has remained greatest in urban areas,¹⁹⁹ particularly commercialized neighborhoods. Absent adequate public law enforcement, only two sets of actors are in a position to do something about the recurring accidents. Enterprises that attract criminals can take security measures. Citizens themselves can refrain from walking in the streets or approaching commercial enterprises near whose property crimes occur. Enterprises, however, have no incentive to take the needed steps, while citizens have thus far refused to hibernate.²⁰⁰ It is therefore not surprising that negligent security victims continue to bring cases.

Under modern negligence theory, we would have expected tort law to

196. This Article takes no position on how courts should reconcile process considerations with countervailing substantive arguments in the absence of any likely political effect. In other words, if process costs of a liability rule are high, the merits favor liability, but tort's political effects do not come into play, the courts must resolve the issue on the basis of independent criteria.

197. See *supra* text accompanying notes 34–79.

198. The FBI's estimate of total indexed offenses has risen, from approximately 2.3 million in 1963 to 12.9 million in 1982. Compare FBI, UNIFORM CRIME REPORTS 40 (1982) with FBI, UNIFORM CRIME REPORTS 2 (1963). Notwithstanding changes in statistical reporting and growth in the U.S. population, the figures still reflect significant increases. Crimes designed to garner financial reward—robbery, burglary, and larceny—increased their share of total crime from 75% to 86%. It is this category that is most relevant to negligent security defendants, whose enterprises attract profit-oriented crime.

199. See U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 13 (1983) [hereinafter cited as JUSTICE REPORT]; see also RESEARCH & FORECASTS, INC., THE FIGGIE REPORT ON FEAR OF CRIME: AMERICA AFRAID 31 (1980) (fear of crime higher in large cities than elsewhere).

200. Perhaps even more than in the railroad, malpractice, and environmental litigation contexts, negligent security plaintiffs are unlikely to abandon the activities which give rise to their injuries. They must live somewhere, so they cannot avoid approaching apartment buildings. They must shop for food and use stores and banks.

Plaintiffs may consider the location of commercial enterprises in choosing which to frequent. But convenience and proximity to home or work, rather than store security, are generally their first concerns. Moreover, most commercial areas in large cities present substantial danger of crime. While the investment of commercial enterprises in safety precautions varies dramatically, customers draw little distinction among similar areas and stores of relatively equal prominence. While a strict cost-benefit analysis might in theory cause consumers to be more selective on the basis of the danger of crime, few have enough information or inclination to make more than a broad choice. They are thus likely to continue to engage in dangerous activity despite the risk.

develop so as to encourage crime prevention by businesses.²⁰¹ Courts have not, however, consistently adopted this approach. The persistence of negligent security litigation in the face of the existing doctrinal obstacles to suit suggests that there is, nonetheless, social pressure towards a change in the law.

2. *The Status of Extra-Judicial Consideration*

Despite the substantial increase in crime, federal and state governments have been slow to respond innovatively.²⁰² Public expenditures on crime control have not kept pace with the incidence of crime.²⁰³ Recent initiatives have focused almost exclusively upon increasing sentences, eliminating civil liberties of criminal defendants, and making parole more difficult.²⁰⁴ The public's concern over the problem of crime, though vocal, has not translated into new programs designed to prevent or eliminate crime before it occurs.²⁰⁵ Rather, like in the workers' compensation context, legislatures and citizens alike have tended to accept the risk of crime as an inevitable burden of city life. Absent some reason to focus on alternative solutions, the legislatures are unlikely to adopt any new approach.

3. *The Direct Political Effects of Negligent Security Liability*

Imposing liability on commercial enterprises such as landlords, hotels, stores, and banks is likely to induce the formation of coalitions and to focus public attention upon the social crisis. Individual victims can attempt to raise a political hue and cry, but rarely will they have the resources, organization, and expertise required for a sustained lobbying effort or media campaign. Commercial enterprises confronted with liability, by contrast, can find each other. If the threat is substantial enough, they are in a position to allocate resources for the purpose of exerting their political sway.²⁰⁶ Merchant groups can thus, in theory, be a catalyst for legislative action.

201. See *supra* notes 18-23 and accompanying text.

202. To take a prominent example, the Law Enforcement Assistance Administration, a federal agency organized in 1968 for the specific purpose of "assist[ing] state and local governments in reducing the incidence of crime," 42 U.S.C. §§ 3711(c)(2), 3721 (1968), immediately devoted the bulk of its funds to traditional police protection mechanisms. See LAW ENFORCEMENT ASSISTANCE ADMIN., SAFE STREETS . . . THE LEAA PROGRAM AT WORK 7 (1971).

203. Government spending for police protection rose less than 70% between 1960 and 1980. JUSTICE REPORT, *supra* note 199, at 100.

204. See, e.g., PRESIDENT'S TASK FORCE, VICTIMS OF CRIME 17-18 (1982).

205. A few jurisdictions have implemented community action programs that appear to be successful, see *infra* note 211, but which have not received much publicity or emulation in other localities. See U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 217 (1982).

206. Little empirical research exists on the effect of lobbying by various interest groups on crime legislation. One recent study, however, shows that while hundreds of groups, including "victim organizations," were concerned with the enactment of the new federal criminal code, only a few influenced

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Nevertheless, the options available to redress the problem are not obvious. Legislatures have already devoted substantial resources to crime-related subjects. They have not, in the end, arrived at any imaginative solutions to the underlying problems of crime and crime-victimization.

Yet unexplored avenues do, in fact, exist. Alternative approaches include public training of private security forces,²⁰⁷ cooperative efforts between police and neighborhood security planners,²⁰⁸ well-defined, specific safety regulations aimed at security,²⁰⁹ tax benefits for crime-prevention measures,²¹⁰ and victim education programs.²¹¹ Any of these remedies can, of course, be coupled with victim compensation systems designed to minimize the transaction costs of case-by-case negligent security litigation.²¹²

Whatever the merits of these or other programs,²¹³ it is clear that countless compromise responses to the crime phenomenon have yet to be evaluated. Arguably, though, judicial action may be unnecessary to goad

the ultimate reform. Other than government agencies and lawyers' organizations, the most influential groups appear to have been business coalitions and labor. See Stolz, *Interest Groups and Criminal Law: The Case of Federal Criminal Code Revision*, 30 CRIME & DELINQ. 91, 95-96 (1984).

207. Such patrols may be more effective than increased police staffs. Officers can be trained to recognize and respond to the needs of individual commercial areas, and resources can be devoted to tailored crime prevention programs. Local merchants benefitting from the patrols can, in theory, be required to provide financial support.

208. Police might, for example, establish floating "safety zones" for pedestrians, in which the police would provide intensive protection. These zones could "float," at different times, to different sections of particular commercial areas. Legislatures might enhance their effect by imposing staggered operating hours for enterprises within the different sections of any given community. Similarly, by establishing uniform standards for burglar alarms—including frequencies and reporting procedures—a legislature could probably make it easier for police to respond to alarms and reduce the price of the alarms for the business community (e.g., by reducing production and marketing costs).

209. See *supra* note 25 (discussing the safety aspects of New Jersey housing code).

210. Cf. 26 U.S.C.A. § 23 (West Supp. 1985) (federal tax credit for installation of energy-saving devices).

211. Crime avoidance education techniques, such as publicizing local crime statistics or requiring commercial enterprises to warn customers of a history of crime in the neighborhood, might be useful. Legislatures can also require potential crime victims to take safety precautions, such as carrying police whistles and participating in escort programs. Cf. N.Y. VEH. & TRAF. LAW § 1229-c (Consol. Supp. 1985) (requiring automobile passengers to wear seatbelts). The limited information that exists suggests that the participation of untrained citizens in crime watch programs has also been effective. See, e.g., NATIONAL LEAGUE OF CITIES, COMMUNITY CRIME PREVENTION AND THE LOCAL OFFICIAL 6 (statement of Patrick Murphy); RESEARCH & FORECASTS, INC., *supra* note 199, at 2-3, 5-10, 23-62; see also *Crime Stopper TV Programs Report Major Success*, CRIM. J. NEWSLETTER, Sept. 17, 1984, at 2.

212. Options include the imposition of liability caps, use of compensation boards, and adoption of a statutory standard of care. See Carrington & Nicholson, *The Victims' Movement: An Idea Whose Time has Come*, 11 PEPPERDINE L. REV. (SYMPOSIUM) 1, 2 (1984) (39 states, D.C., and Virgin Islands have adopted some form of victim compensation statute).

Requiring enterprises to fund such programs, as in the workers' compensation realm, would give business as a whole an incentive to develop new protective measures. A particular scheme, including any compensation "cap," might also in theory be conditioned on adequate security by individual businesses. These conditions would enhance incentives for crime prevention.

213. Of course, radical new approaches exist as well. See N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* (1969); Michalowski, *Crime Control in the 1980's: A Progressive Agenda*, CRIME & SOC. JUST. 13 (Summer 1983). A few states have implemented innovative programs. See RESEARCH & FORECASTS, INC., *supra* note 199, at 10-18, 79-131.

legislatures to consider the alternatives. Crime is, after all, a visible public issue.²¹⁴ The victim class, while perhaps disorganized and under-represented, is not totally without voice.²¹⁵ Some legislatures have considered victim compensation schemes without the prodding of any judicial spur.²¹⁶

Yet careful analysis suggests that imposing liability on merchant groups is likely to hasten the legislative reaction and change the character of the political response. Because of the prevailing attitude that crime prevention is solely a public concern, victim lobbyists generally call for backward-looking legislation such as public victim compensation.²¹⁷ A liability rule will force merchants to participate in the public debate and, for the first time, accept compromise solutions that impose some responsibility on them. Commercial lobbyists seeking to avoid liability and litigation costs, unlike victims, have little hope of securing a direct public subsidy. Their legislative proposals will thus, of political necessity, be coupled with forward-looking provisions directed at the underlying problems of crime and crime-prevention.²¹⁸

We cannot accurately predict the end result of authorizing negligent security liability. A legislature may quickly implement new solutions. The courts may over time discover alternative means to implement the substantive tort policies at lower process costs.²¹⁹ On the other hand, the legisla-

214. Crime is a focus of media attention and the issue has been part of every presidential platform in recent memory. See, e.g., *Ferraro Pledges Federal Aid for Model Crime Control Plans*, CRIM. J. NEWSLETTER, Sept. 17, 1984, at 2 (Reagan/Mondale campaign); N.Y. Times, Nov. 15, 1980, at 9, col. 1 (Reagan/Carter campaign); N.Y. Times, Sept. 28, 1976, at 1, col. 2 (Carter/Ford campaign); N.Y. Times, Aug. 22, 1972, at 35, col. 5 (Nixon/McGovern campaign); N.Y. Times, Aug. 11, 1968, § 4, at 10, col. 1 (Nixon/Humphrey campaign); NATIONAL LEAGUE OF CITIES, *supra* note 211, at 8 (statement of Patrick Murphy, discussing Johnson/Goldwater campaign).

215. There has been a "virtual explosion of interest" in victims' rights in the past five years and a flurry of new victims' rights statutes. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPPERDINE L. REV. (SYMPOSIUM) 23, 26 (1984); see also N.Y. EXEC. LAW §§ 622, 623 (McKinney 1982) (establishing Crime Victims Board to administer all state programs dealing with crime victims and, inter alia, actively to advocate rights and interests of crime victims before other units of government). The Omnibus Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982), received bipartisan support in both houses. See Carrington & Nicholson, *supra* note 212, at 8.

216. In Oklahoma, for example, the Oklahoma District Attorneys Association sponsored legislation. See Turpen, *The Criminal Injustice System: An Overview of the Oklahoma Victims' Bill of Rights*, 17 TULSA L.J. 253 (1981).

217. Cf. Peck, *Comments, supra* note 97, at 16 (victims of defective products seek compensation for their injuries instead of forward-looking deterrent remedies). For examples of crime victim compensation statutes, see O'Neill, *The Good, the Bad, and the Burger Court: Victims' Rights and a New Model of Criminal Review*, 75 J. CRIM. L. & CRIMINOLOGY 363, 370 n.31 (1984). Commercial enterprises, in contrast, have a continuing interest in resolving the underlying causes of accidents for which they must pay.

218. See *infra* text accompanying notes 224-27.

219. See *supra* note 185. One of the goals of courts concerned about process is to define a manageable standard for determining liability. After experiencing litigation for a period of time, courts are often better able to define "compensable events," that is, actions or situations that merit liability. See generally ABA COMM'N ON MEDICAL MALPRACTICE LIABILITY, *supra* note 121 (discussing ABA

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ture may not be able to develop an enlightened response. It may simply return tort law to its previous state²²⁰ or allow negligent security litigation to continue.²²¹ Over time, the courts will have to deal with the process consequences.

The bottom line, however, is that courts can cope with the uncertainty engendered by limited categories²²² of negligent security litigation.²²³ The potential reward inherent in legislative consideration of crime-prevention must be weighed against the danger that the legislature will not act. Judicial risk averseness alone does not justify ignoring the political effects that tort doctrine can have.

4. *The Indirect Effect of the Doctrine*

For several reasons, opening the door to negligent security liability will assist legislatures in dealing with crime. First, it is likely to expand the number of legislative responses that are politically feasible. Second, the liability doctrine's effect on attitudes may itself alleviate the problem of crime prevention and thereby facilitate the legislatures' task of finding a workable alternative.

a. *Industry's Willingness to Accept Alternative Rules*

Galvanizing potential defendants into pursuing the political process does more than merely bring issues to public attention. In the railroad injury example, new judicial doctrines forced the railroads to realize that

efforts to define compensable events in medical malpractice litigation).

220. It is important to recognize that the goal of the political effects model is not necessarily to maintain long-term liability rules favoring plaintiffs. For example, legislatures that abrogated malpractice litigation in response to new liability rules, *see supra* text accompanying notes 141–43, acted consistently with the model's predicted scenario. The new laws are the product of full legislative consideration. They take into account, and sometimes implement, alternative private and regulatory protections for potential malpractice victims. Though in the end negligence liability may be as limited as under a process-based immunity rule, imposing liability initially still had political effects that may have benefitted society.

221. Legislatures and administrators, though, may have problems "putting the genie back in the bottle." In the malpractice area, for example, some courts struck down as unconstitutional legislative decisions to bar malpractice suits. *See Neubauer & Henke, supra* note 137, at 64–65. A court that relies on the political effects model must thus carefully evaluate the range of the permissible legislative response, including the potential scope of the legislature's authority.

222. It is important to remember that courts will use tort's political function to authorize negligent security litigation only in strictly confined categories of cases. *See supra* note 188 and accompanying text.

223. There are, of course, many ways in which the courts can react, including reversing a rule that proves unworkable. *See, e.g., Garcia v. San Antonio Metro. Trans. Auth.*, 105 S.Ct. 1005 (1985). Once courts impose liability, however, they will probably hesitate to recant even after the legislature reveals its intention not to act.

Judges can, however, take steps other than reversing themselves. They can change the liability rule to limit process concerns, or they can reevaluate the doctrine. They may determine that process concerns have not proven to be as dire as they initially predicted and hold that the liability rule should remain on the books.

they would have to share in the burden of industrial accidents. Medical malpractice liability encouraged the profession to volunteer to adopt remedies such as peer review groups and compulsory arbitration. Nuisance litigation led polluting industries to accept their responsibility to take account of environmental concerns.

The negligent security situation is strikingly similar. As the law stands, commercial defendants have no reason to accept any solution which would burden them. Victims want change, but enterprises prefer the status quo. Thus we find that most of the legislative solutions to crime victimization proposed in the absence of enterprisal liability focus exclusively on *public* compensation for victims.²²⁴ This approach has serious flaws. Purely public compensation alone provides no incentives to eliminate the underlying crime problem.²²⁵ Only the defendant class is in a position to take effective security measures.²²⁶ Public expenditures available for crime control are finite and have already proven inadequate to the task.²²⁷ For each of these reasons, any workable solution is likely to require the involvement of the private sector and private resources. The examples of industrial accident, malpractice, and environmental litigation suggest that imposing liability on merchants for negligent security may well bring about such involvement. Without the political catalyst of tort liability, the regulatory solutions obvious and available to the legislatures are likely to remain drastically confined.

b. *Society's View of Private Responsibility for Crime Prevention*

In each of the industrial accident, malpractice, and environmental contexts, the doctrinal shift itself had beneficial effects on contemporary attitudes. Railroads began to take safety precautions; unions and politicians became sensitized to the incidence and seriousness of industrial accidents. Doctors began to take preventive steps to avoid malpractice; consumer awareness was enhanced. Industry took steps against pollution and invested in anti-pollution research; consumer groups grew, became active, and began to demand private environmental initiatives. Not only did the new liability rules draw attention to the underlying social problems, but they both eased the problems themselves and created an atmosphere in which legislative or administrative initiative became simpler and more re-

224. See Jones, *The Costs of Victim Compensation*, in *THE COSTS OF CRIME*, *supra* note 38, at 123; Note, *Compensating the Victims of Crime: Evolving Concept or Dying Theory*, 82 W. VA. L. REV. 89, 107-08 (1982).

225. See Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203, 224 (1978).

226. See *supra* note 70.

227. See *supra* text accompanying notes 203-05.

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alistic. Negligent security liability can, in this respect, play its most dramatic role.

One of the defects of the rule that private actors have no affirmative obligation to protect others from third-party criminal attack is that the rule sets a moral standard.²²⁸ It creates a sense that citizens need not "get involved,"²²⁹ thus reinforcing their natural inclination to avoid responsibility for the well-being of the public-at-large.²³⁰ Legally private parties currently have nothing to fear when they refrain from acting.²³¹ If they do undertake protective measures, the law subjects them to the risk of liability for negligence.²³² As a result, private parties generally avoid "involvement." Their refusal even to cooperate with the police is often cited as a primary factor in the current ineffectiveness of law enforcement.²³³

Imposing negligent security liability cannot, in and of itself, eliminate inaction in the private sector. But at a minimum, it informs commercial enterprises that they must become somewhat involved in crime prevention. More generally, the recognition of a duty to protect third parties would "enhance the perceived desirability"²³⁴ of taking steps to secure the safety of others.²³⁵ A liability rule would "decrease the ambiguity of the current law by providing a norm, or prescription of appropriate conduct."²³⁶

Empirical research suggests that establishing legal norms would also encourage negligent security defendants to protect potential victims for a

228. D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U.L. REV. 800, 809 (1975) ("Legal and moral rules are in symbiotic relationship; one 'learns' what is moral by observing what other people . . . tend to enforce.").

229. See, e.g., A. BIDERMAN, L. JOHNSON, J. MCINTYRE, & A. WEIR, REPORT ON A PILOT STUDY IN THE DISTRICT OF COLUMBIA ON VICTIMIZATION AND ATTITUDES TOWARD LAW ENFORCEMENT 154-58 (1967).

230. As the media publicizes incidents in which private actors have acted on their "inclination" not to get involved, the resulting increase in fear of crime feeds the syndrome. In the now famous Kitty Genovese case, for example, thirty-eight witnesses to a brutal assault and murder stood by and did nothing. See N.Y. Times, Mar. 27, 1964, at 1, col. 4. A year later, after heavy publicity of the events, the witnesses "still did not see why they should have acted." N.Y. Times, Mar. 12, 1965, at 35, col. 6.

231. See Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499, 502 (1965).

232. See, e.g., *Devlin v. Safeway Stores, Inc.* 235 F. Supp. 882 (S.D.N.Y. 1964); see also Rudolph, *supra* note 231, at 510. ("Of all persons, the volunteer is the least protected by the law. He seems always to be treated as an officious intermeddler.").

233. See A. BIDERMAN, L. JOHNSON, J. MCINTYRE, & A. WEIR, *supra* note 229, at 151-57; see also CRIME IN A FREE SOCIETY, *supra* note 46, at 25-26, 31-33 and sources cited therein; Goldstein, *Citizen Cooperation: The Perspective of the Police*, in RATCLIFFE, *supra* note 61, at 199, 201; Note, *supra* note 61, at 1787.

234. Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51, 58 (1972).

235. See Waller, *Rescue and the Common Law: England and Australia*, in RATCLIFFE, *supra* note 61, at 141 (liability would serve "to teach . . . the canons of right and wrong to the community"); Rudolph, *supra* note 231, at 536-37 (a liability rule can "create an environment in which [the individual] could be a better citizen").

236. Note, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L.J. 551, 561 (1980). The new standard of care must, of course, be clear and applied even-handedly if it is to shift attitudes. In order to have the desired effect, the first instances of imposition of liability must also be well publicized. Without knowledge of the standard, citizens cannot be educated by it.

variety of *psychological* reasons.²³⁷ The breakdown of the syndrome of "I don't want to get involved" in the negligent security context can change the public and legislative views of the need to cooperate with law enforcement authorities in other contexts as well.²³⁸

If negligent security liability has an impact in creating an atmosphere in which plaintiffs, defendants, and observers sense some responsibility for each others' safety from crime, any disadvantages of liability will, by comparison, become far less significant.²³⁹ The tort vehicle should, in the short run, promote precisely this type of "morality."²⁴⁰ Ultimately the shift in attitudes is likely to ease the legislature's task in finding a permanent solution to the problem of crime prevention as a whole.

B. *Applications of Negligent Security Liability*

Both for "substantive" and "political" reasons, different negligent security fact patterns may call for different conclusions on liability.²⁴¹ A

237. Most of the research has been conducted in the bystander rescue context. See generally Note, *supra* note 61, at 1788-91 (canvassing and discussing empirical research). One study illustrates that where the law imposes a limited duty to prevent injury to an endangered person, the party in a position to aid is likely to perceive a general moral responsibility to protect victims. See Kaufman, *Legality and Harmfulness of a Bystander's Failure to Intervene as Determinants of Moral Judgment*, in ALTRUISM AND HELPING BEHAVIOR 77 (J. Macaulay & L. Berkowitz eds. 1970); see also Zeisel, *An International Experiment on the Effects of a Good Samaritan Law*, in RATCLIFFE, *supra* note 61, at 209, 211 (citizens of countries that legally require bystander rescue take far stronger moral position than private parties should "get involved").

It has also been established empirically that private parties' perceptions of the need for their involvement to protect victims is affected by both legal requirements and the degree to which other private parties get involved. In one survey, "bystander[s] [were] led by the *apparent* lack of concern of the others to interpret the situation as being less serious than [they] would [have] if alone." Latané & Darley, *Bystander "Apathy,"* 57 AM. SCIENTIST 244, 265 (1969) (emphasis in original). "The results of these experiments suggest[ed] that social inhibition effects may be rather general over a wide variety of emergency situations." *Id.* at 266.

238. Cf. Note, *supra* note 236, at 560 ("On the basis of attribution research, it can be predicted that if people were to become aware of a legal duty to aid another, and if . . . they were to behave consistently with this legal duty, they would eventually come to believe in the duty to aid.").

239. To the extent negligent security litigation teaches citizens that methods for crime prevention exist, it may also be valuable. For example, a recent national study showed 81% of citizens surveyed were "interested in joining" a neighborhood crime watch program. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 218 (1982). Only 17% could say that such a program existed in their neighborhood. *Id.* at 217.

240. See Rudzinski, *The Duty to Rescue: A Comparative Analysis*, in RATCLIFFE, *supra* note 61, at 122; Tunc, *The Volunteer and the Good Samaritan*, in RATCLIFFE, *supra* note 61, at 43, 56-62; see also, Gusfield, *Social Sources of Levites and Samaritans*, in RATCLIFFE, *supra* note 61, 183, 196 ("The very passage of a law is an act of public definition of what is moral or immoral."); Note, *supra* note 236, at 560 ("it may be that morals can be legislated, that our laws can make us better"). But see Selvin, *supra* note 13, at 318, in which the author, based on meager evidence, concludes that the *Kline* decision has had little impact upon the actions of landlords.

241. For example, functional analysis suggests that the more a class of potential victims knows of the danger and can avoid it, the less the need to protect the class by judicial means. The greater the role safety plays in customers' decisions to patronize a commercial enterprise, the greater the existing economic incentive for the enterprises to take preventive measures and to bring the problem of crime in the neighborhood to the attention of governmental decision-makers.

review of actual and hypothetical cases illustrates the variety of results a court might reach.²⁴² This brief and tentative examination of the litigation also shows how process consequences of the political function can be minimized by a careful category-by-category approach.

1. *The Landlord-Tenant Case*²⁴³

A tenant of a metropolitan apartment building is raped in the lobby. Crime in the neighborhood has been on the rise and previous incidents have occurred in the public areas of the building.

As seen in the analysis of *Kline*, there are strong functional and normative justifications for imposing liability on landlords.²⁴⁴ From a political perspective, the problem of street crime in our residential neighborhoods calls for new solutions. Placing the burden of liability on landlords may help to find and implement these solutions.²⁴⁵ In the absence of a change in tort law, it is difficult to imagine incentives that will encourage the ordinary legislative and administrative processes to provide a solution. It seems, therefore, that the D.C. Court of Appeals in *Kline* reached an appropriate result, consistent with political effects criteria.

242. Because the substantive justifications for negligent security and bystander-rescue liability differ radically, *see supra* text accompanying notes 61–66, this Article does not consider good samaritan cases as a subset of negligent security litigation. The political effects model would, in any event, not justify bystander liability. Few legislative alternatives for minimizing the root cause of good samaritan cases come to mind. Even if new solutions are available, imposing tort liability on bystanders who fail to rescue is unlikely to bring about legislative consideration; citizen/bystanders have no more political clout than victims. Liability would therefore not serve the political effects model's purpose.

243. Despite limited success in the courts, tenants continue to file negligent security lawsuits against landlords. *See, e.g.*, Carrigan v. New World Enters., 112 Ill. App. 3d 970, 446 N.E.2d 265 (1983); *cf.* Childers v. LCW Apartments, 214 Neb. 291, 333 N.W.2d 677 (1983) (court does not reach issue of negligent security and jury finds no liability); Shepard v. Drucker & Falk, 63 N.C. App. 667, 306 S.E.2d 199 (1983) (judgment entered for landlord). Since *Kline*, more claims have gone to the jury and many have been successful. *See, e.g.*, Cain v. Vontz, 703 F.2d 1279, 1282–83 (11th Cir. 1983) (failure to repair locks on apartment door); Samson v. Saginaw Professional Bldg., Inc., 393 Mich. 393, 224 N.W.2d 843 (1975) (failure to take safety precautions); Johnston v. Harris, 387 Mich. 569, 198 N.W.2d 409 (1972) (failure to provide adequate lighting and locks); Braitman v. Overlook Terrace Corp., 68 N.J. 368, 346 A.2d 76 (1975) (failure to repair locks); Knapp v. Wilson, 535 S.W.2d 369 (Tex. Civ. App. 1976); *Cf.* Yost v. Monte Vista Apartments, Inc., 26 A.T.L.A. L. REP. 31 (Philadelphia County. Ct. of C. P. July 14, 1983) (\$112,500 settlement). This no doubt reflects the existence of some favorable precedent, the recurring and serious nature of the victims' injuries, and the fact that the landlord-tenant relationship is one that seems ripe for judicial restructuring.

244. *See supra* text accompanying notes 44–55, 62–79.

245. *See* Peck, *Comments, supra* note 97, at 21 (referring to "the experienced lobbyists for . . . apartment-house operators").

2. *The Hotel Case*²⁴⁶

A hotel guest is shot to death in front of the entrance of a fashionable hotel. Previous crimes have been reported in the neighborhood.

The hotel guest/victim context directly parallels *Kline*, but in a setting where the functional justifications for liability are even stronger.²⁴⁷ Hotel owners are as knowledgeable as residential landlords about the relevant crime risks and costs of prevention. Hotel crime victims are even more helpless than residential tenants, because they are in an unfamiliar place, among strangers. Hotel guests are less able to learn of danger or of methods for protecting themselves. They are not sufficiently familiar with other potential victims that they can, even in theory, arrange a collective bargain with hotel-keepers regarding security.

Hotel guests are neither an organized nor an organizable political force that could push for legislative solutions. Lacking an apparent common ground—geographic, economic, social or otherwise—the class of “guests” will have difficulty exchanging information, selecting leaders, and developing new ideas. The only way guests can effectively signal a need for redress is through individual lawsuits. Given the substantive basis for recognizing their right to sue, a court might appropriately choose to pass the signal on to the legislature, by authorizing the litigation.

3. *The Store/Parking Lot Case*²⁴⁸

A store customer is robbed and injured at night in the parking lot. Security experts testify that the parking lot is inadequately lit and that the store is in a high crime area.

246. In number, negligent security lawsuits involving injured hotel guests are second only to landlord-tenant cases. They reach the jury and win more frequently. *See, e.g.*, *Banks v. Hyatt Corp.*, 722 F.2d 214 (5th Cir. 1984); *Orlando Executive Park, Inc. v. Robbins*, 433 So. 2d 491 (Fla. 1983); *Virginia D. v. Madesco Inv. Corp.*, 648 S.W.2d 881 (Mo. 1983) (en banc). Some courts, however, make it difficult for plaintiffs to succeed. *See, e.g.*, *Courtney v. Remler*, 566 F. Supp. 1225 (D.S.C. 1983); *Kveragas v. Scottish Inns, Inc.*, 565 F. Supp. 258 (E.D. Tenn. 1983).

247. Usually, hotel crime victims rely upon the traditional “special relationship” theory under which the common law imposed a high duty of care upon innkeepers towards their guests. *See supra* note 19; *see also* *Orlando Executive Park Inc. v. Robbins*, 433 So. 2d 491, 493 (Fla. 1983) (citing cases); *Virginia D. v. Madesco Inv. Corp.*, 648 S.W.2d 881, 885–86 (Mo. 1983) (en banc); *cf.* *Courtney v. Remler*, 566 F. Supp. 1225, 1233–34 (D.S.C. 1983) (landlord acted reasonably). A few courts, however, have abandoned this distinction and held that hotel liability is appropriate under general negligent security principles. *See, e.g.*, *Banks v. Hyatt Corp.*, 722 F.2d 214, 226 (5th Cir. 1984) (“We find this limitation [of innkeepers’ duties] to be an artificial legal boundary, and decline to adopt it.”); *Morrison v. MGM Grand Hotel*, 570 F. Supp. 1449, 1451 (D. Nev. 1983); *cf.* *Kveragas v. Scottish Inns, Inc.*, 565 F. Supp. 258, 259 (E.D. Tenn. 1983) (restrictive negligent security rules apply equally to innkeepers and other defendant motel operators).

248. As they move from *Kline*-type settings or cases formerly falling within the innkeeper rules,

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Storeowners, like landlords,²⁴⁹ are well-situated to learn of crimes against patrons on their property, take preventive measures, or self-insure. They can spread the cost of security and insurance.

A functional analysis, however, might treat store customers less favorably than tenants. Unlike tenants, for whom security may only be one of many considerations in signing a lease,²⁵⁰ customers of an urban merchant usually have a meaningful choice to shop elsewhere. We would ordinarily not expect a consumer to put his life in danger in order to buy cheaper or better merchandise. If customers indeed choose to frequent safer stores, then the free market is working. The potential loss of patronage gives stores an appropriate incentive to take security measures, without any judicial prodding.

Yet customers may not be as mobile as this analysis assumes.²⁵¹ Moreover, storeowners have superior knowledge of specific dangers near specific stores, contrasted with customers' awareness of at most a general danger in the area. Even a functional approach may thus justify liability.²⁵²

Strong normative justifications in any event call into question the instrumental view that customers "assume the risk" of crime where they reside and shop. The stores attract additional crime. To the extent the store increases the risk, there may be substantive moral reasons to require increased security.

Whether the political effects model can be used to bolster the substantive justifications in any category of "store/parking lot" case depends on many factors. Small businesses are generally well-organized and able to

courts become wary of imposing liability. *See, e.g., Meadows v. Friedman R.R. Salvage Warehouse*, 655 S.W.2d 718, 721 (Mo. App. 1983); *Atamian v. Supermarkets Gen. Corp.*, 146 N.J. Super. 149, 154, 369 A.2d 38, 41 (1976). Numerous courts have precluded store liability by strictly applying foreseeability rules. *See, e.g., Latham v. Aronov Realty Co.*, 435 So. 2d 209, 214 (Ala. 1983); *Cook v. Safeway Stores, Inc.*, 354 A.2d 507 (D.C. Ct. App. 1976); *Taylor v. Dixon*, 8 Ohio App. 3d 161, 456 N.E.2d 558 (1982), *cert. denied*, 464 U.S. 848 (1983). Yet claims involving crime in the vicinity of supermarkets and other stores recur and occasionally succeed. *See, e.g., Doyle v. Exxon Corp.*, 592 F.2d 44 (2d Cir. 1979); *Gomez v. Ticor*, 145 Cal. App. 3d 622, 193 Cal. Rptr. 600 (1983); *Allen v. Babrab, Inc.*, 438 So. 2d 356 (Fla. 1983); *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 445 A.2d 1141 (1982); *Brown v. J.C. Penney Co.*, 64 Or. App. 293, 667 P.2d 1047, *aff'd*, 297 Or. 695, 688 P.2d 811 (1984).

249. *See Butler v. Acme Markets, Inc.*, 89 N.J. 270, 445 A.2d 1141, (1982) (landlord-tenant principles equally applicable in commercial shopkeeper context).

250. *See supra* text accompanying note 53.

251. Customers do not always weigh safety against other considerations. At least for staple items such as food, shoppers tend to patronize neighborhood markets regardless of the danger. Less wealthy city dwellers may not even have the means of transportation to visit stores in other areas.

252. On the other hand, while supermarket customers may be unlikely or unable to change their everyday shopping habits based on safety, patrons of evening entertainment are very likely to forgo a visit to a dangerous cocktail lounge. Evidence concerning marketing trends, recurring criminal activity, and previous responses to crime by the storeowners and customers might suggest liability for markets but not for the lounges.

gain the ear of governmental leaders.²⁵³ In the absence of liability, though, they have little reason to seek legislative or administrative assistance in dealing with crime. Under current tort standards, the business community does not see itself as bearing any responsibility for controlling crime.²⁵⁴ Negligent security liability of storeowners would thus probably have substantial attitude-changing effects.

The extent of consumer awareness and public debate concerning crime near particular shopping areas or types of stores may, however, vary. Where categories of enterprises are notorious for criminal activity near their premises, resulting injuries are well publicized in the news, and neighborhood groups have sought regulatory redress, judicial intervention seems less warranted. Process costs militate against shifting liability where these other means will bring about the full range of the "political effects."

4. *The First Bank Case—Automatic Teller Victims*²⁵⁵

A bank advertises 24-hour service at its sidewalk automatic teller machine. A customer obtains cash from the machine after hours and is robbed. Bank officials are aware that automatic tellers attract robbers.

Crime at automatic teller locations occurs at a staggering rate. Consumers are at most generally aware that there is some danger in using those services. They have no reason or way to know of the exceptionally high risk.

Urban banks, in contrast, keep abreast of criminal activity at their sites. They are familiar with the locations at which customers are likely to be robbed while using automated teller services. Banks nonetheless encourage use of their night-time services indiscriminately, rather than issuing warn-

253. For examples of small business lobbying activity, see *SBA Amendments of 1962: Hearing on S.2970 Before the Subcomm. on Small Business of the Sen. Comm. on Banking and Currency*, 87th Cong., 2d Sess. 47 (1962) (letter of Theron Rice, Legislative Action General Manager, U.S. Chamber of Commerce); *Small Business Investment Act Amendments of 1962: Hearings on H.R. 799 before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 42 (1963) (statement of John Gosnell, Secretary and General Counsel of National Small Business Association).

254. Cf. *Environmental Hearing*, *supra* note 154, at 30, 34 (statement of Senator Henry M. Jackson) ("When the public began to demand legislation to control pollution and to prevent environmental decay, the reaction of those involved in environmental degrading activities was often one of counter-indignation. Businessmen . . . were confronted with costs . . . that they had never before been called upon to pay. They were now about to be penalized for behavior which America had long accepted as normal.")

255. Judges have resisted bank responsibility. One court that recognized liability in theory by sending a case to a jury for decision, *McKinney v. First & Merchants*, No. 59297 (Fairfax Cty. Va. Cir. Ct., Feb. 10, 1984), reported in *NAT'L L.J.*, Feb. 27, 1984, at 11, col. 1, instructed the jury, pursuant to strict Virginia law, that any contributory negligence by plaintiff would bar compensation. The jury entered a verdict for defendant.

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ings and providing special security at the dangerous outposts. Although the banks are in an exclusive position to provide security, few take any measures at all.²⁵⁶ The functional and normative arguments in favor of imposing liability on banks are therefore strong.

The political justification seems to support liability as well. The dangers inherent in modern banking technology reflect a new social phenomenon that legislatures and other governmental bodies have yet to address.²⁵⁷ Since potential victims are unorganized and uninformed about the extent of the danger and the available security measures, they are unlikely to raise the issue in public fora. In contrast, if courts impose liability and the resulting cost of taking crime-preventive measures proves prohibitive, the strong banking lobby is sure to seek legislative assistance.²⁵⁸ Shifting liability would thus promote political debate in precisely the manner envisioned by the political effects model.²⁵⁹

Liability and the resulting publicity should also heighten customer awareness of the danger. This in turn will enable customers to take safety considerations into account and, by withholding their patronage, make the degree of their desire for security known to banks. Customers' heightened awareness of the risk thus may well ease the legislature's ultimate task of providing protection. These indirect effects of liability further justify implementation of the model in the automatic teller case.

256. The customer can only "take or leave" the service. A bank can take a range of measures, including issuing warnings to customers, providing cameras which may deter robbers, erecting bullet proof security installations from which customers can telephone for assistance if a suspicious person is lurking nearby, and hiring security guards. As a last resort, it can even shut its automated tellers entirely.

In deciding whether to introduce automatic teller machines or provide security measures, banks might well look to economists or operations research experts for guidance. But in Hannan & McDowell, *The Determinants of Technology Adoption: The Case of the Banking Firm*, 15 RAND J. ECON. 328 (1984), two such experts propose a model for when banks should or will in fact adopt the new outdoor banking technology without even mentioning customer safety as a relevant factor.

257. Cf. 12 C.F.R. §§ 21.0-21.7 (1985) (minimum bank security requirements). Federal regulations, enforceable only by a \$100 civil penalty, are tailored to manned walk-up teller windows, not automated tellers. *Id.* § 21.1, 21.7, App. A at 286.

258. It is no answer to say the police should merely provide more patrols in the vicinity of banks. See *supra* notes 69-70 and accompanying text. Even if additional public resources were available, police protection, by its nature, must usually react to crime instead of systematically preventing it. Thus, security measures that focus on the particular characteristics of the banking industry are needed to control the incidence of crime at 24-hour machines.

259. Even if a legislature determines not to implement mandatory measures against automatic teller crime, this is a context in which public debate surrounding legislative consideration may itself have beneficial effects in educating potential victims. Potential victims, once informed of the frequency and location of automatic teller robberies, can take steps to protect themselves.

5. *The Second Bank Case—Robbery Victims*²⁶⁰

A customer walks into a bank while a robbery is in progress. He is shot during the escape. There is a relatively high and well-known incidence of bank robbery.

Banks may be somewhat more aware than customers of statistics concerning bank robberies and resulting injuries to bystanders. Yet several factors combine to make negligent security liability less appropriate.

With or without liability, the major expense of bank robberies would remain the stolen bank funds.²⁶¹ This potential loss provides significant incentives on banks to take state-of-the-art security measures to prevent robberies.²⁶² Banks may, of course, focus security at protecting their money or employees, rather than customers. In the vast majority of cases, however, holding banks responsible for personal injuries is not likely to provoke much of a change. Most crime-deterrent, money-protective devices (e.g. guards, cameras, alarms) can satisfy the negligent security liability standard of "reasonable" security measures. Except in extreme cases, banks should thus be able to disprove negligence as a factual matter even if a cause of action is allowed.²⁶³

In addition, the informational barriers that keep victims from perceiving crime risk are arguably less significant than in the automatic teller situation. Bank robberies are well-publicized. Newspaper accounts and motion pictures have dramatized the danger of frequenting banking premises.²⁶⁴ Hence, a negligent security cause of action may not serve the resource allocation function of tort liability.

More significantly, the bank robbery scenario does not satisfy the first

260. A few bank robbery victims have filed lawsuits. The courts have unanimously rejected liability. *See, e.g.*, *Berdeaux v. City Nat'l Bank of Birmingham*, 424 So. 2d 594 (Ala. 1982); *Nigido v. First Nat'l Bank of Baltimore*, 264 Md. 702, 288 A.2d 127 (1972); *Altepeter v. Virgil State Bank*, 345 Ill. App. 585, 104 N.E.2d 334 (1952).

261. A victim's recovery might be as large as the proceeds of a robbery. Few robberies, however, result in injuries. Thus the banks' primary concern, on average, should logically be the risk of losing funds.

262. We could in theory imagine an insurance system in which banks became less concerned over the risk of loss. The size of the potential losses, however, render this possibility remote. Insurers will either insist on security precautions or raise the price of premiums to coincide with the increased danger. Virtually all banks therefore see fit to adopt at least such basic protections as armed guards, time-locked vaults, and videotaping of the premises.

263. *See, e.g.*, *Nigido v. First Nat'l Bank of Baltimore*, 264 Md. 702, 705, 288 A.2d 127, 128 (1972). Of course, banks may occasionally act negligently. Legally, there is then as much justification for courts to impose liability as to decline. *See supra* note 188 and accompanying text. The issue reduces to whether the benefits of shifting liability are worth the process costs. In the absence of a recurring type of negligence, tort's political goals cannot justify liability.

264. Bank patrons can thus realistically balance the magnitude of the risk against the relatively small likelihood a robbery will occur in their presence. Banking by mail procedures give them alternatives.

criterion of the political effects model. The extent of the injury in any particular robbery may be great, but the incidence of bystander victimization is relatively small.²⁶⁵ Bank security measures usually work. Only a few lawsuits alleging bank negligence have been filed. The serious, recurring social condition that underscores the need for tort's political impact may therefore be absent.

A liability rule is also unlikely to have any attitude changing effect, encourage the formation of political coalitions, or foster debate. Because banks already have a significant stake, the incentive to seek any necessary legislative assistance already exists.²⁶⁶ Victims are such a small class that collective representation is no more likely to influence the legislature than individual contact with their congressmen. Shifting liability would therefore probably have little impact in promoting new legislative solutions.

6. *The Airline Hijacking Case*²⁶⁷

An airplane is hijacked by terrorist guerrillas. The hijackers kill a passenger when authorities refuse to give in to their demands.

The hijacking hypothetical underscores the lesson of the bank robbery case. Courts should distinguish among varying negligent security situations because placing the burden upon defendants will not always serve tort's substantive or political justifications.

Even more so than bank robberies, hijackings are extremely visible events. Each occurrence makes the national news. Because of this publicity, potential victims know of the danger.²⁶⁸ They can express their preference for "safety" by choosing other means of transportation. Since air travel is an activity for which potential victims do consider risks and alter-

265. The Bureau of Justice Statistics reports that during the two year period 1978-79, approximately 12,200 bank robberies occurred throughout the entire United States and that approximately 2.1% of these (i.e., 256) resulted in injuries. See *Bank Robbery*, BUREAU OF JUST. STATISTICS BULL., Aug. 1984, at 2. The Bureau's report does not distinguish how many of the 128 cases per year resulted in serious injury that might have merited litigation.

266. Indeed, the federal government has focused on the special problems associated with bank robbery. See *id* at 1.

267. Only hijacking of domestic flights would be covered by common law principles. See, e.g., *Edwards v. National Airlines, Inc.*, 307 So.2d 244 (Fla. Dist. Ct. App. 1974) (suit maintainable against domestic airline for injuries proximately resulting from negligent failure to prevent hijacking), *rev'd*, 336 So.2d 545 (Fla. 1976) (alleged damages too remote). Injuries resulting from international hijacking are subject to the strict liability provisions of the Warsaw Convention. See Note, *Warsaw Convention—Passengers' Right of Recovery Against Airlines for Mental Anguish Suffered in Hijacking*, 3 COLUM. J. OF TRANSNATIONAL L. 452-53 (1974). *But cf.* N.Y. Times, Nov. 28, 1985, at B5, col. 2 (passenger injured in hijacking of cruise ship sues shipping line).

268. Upon entering an airport, they are reminded of the danger as soon as they proceed through the x-ray security system.

natives,²⁶⁹ the market may well already produce appropriate incentives upon airlines to take safety precautions. If it does, the functional justification for tort regulation disappears.

In addition, airlines are not, by themselves, in a position to prevent most types of hijacking attempts.²⁷⁰ The political roots of the crime mean that governments must participate in attacking it.²⁷¹ Airlines share facilities, so security measures must be airport-wide to be effective. Local airport authorities are in at least as important a position to deter hijacking as the airlines themselves. Individual airlines are thus not the type of controlling central actors²⁷² that incentive-producing tort doctrines ordinarily target.

One of the reasons airlines thrive despite hijacking is that it happens infrequently.²⁷³ Passenger injuries in the course of such a crime are even rarer.²⁷⁴ While the handful of actual attempts are serious in nature when they occur, the problem of hijacking no longer rises to epidemic proportions. Thus from a political perspective also, it does not seem to call for radical new solutions.

Moreover, hijacking, because of its political overtones, is perhaps one of the few areas of crime-prevention in which current private attitudes and lack of victim lobbying do not impede successful law enforcement.²⁷⁵ Airlines, passengers, and governments all have an interest in avoiding further incidents. Existing cooperative security measures have helped reduce hijacking attempts to a trickle.²⁷⁶ If better techniques become available, the government and airlines seem prepared to consider every practical precaution. Imposing legal responsibility upon airlines to take preventive measures is unlikely to bring about any shift in attitudes or produce any lobbying activity that would contribute to new solutions.

269. Arguably, potential passengers cannot competently assess the risk of flying. With the high level of publicity given to hijacking, they may well overemphasize the danger, compared with that of other transportation systems.

270. There are exceptions. For example, planes that have no door separating pilots from passengers invite hijackers to enter the cockpit. The installation of doors is within the airline's unilateral control.

271. In terms of compensation, international carriers are already subject to the "cooperative" solution imposed by the Warsaw Convention. Liability is strict, but the level of available compensation is limited. *See, e.g., Harari-Rafal v. Trans World Airlines*, 41 A.D.2d 753, 755, 341 N.Y.S.2d 655, 658 (1973).

272. *See supra* note 55.

273. After the initial surge in domestic-flight hijackings from 1961 to 1972, the frequency reduced to approximately one per year. *See Landes, An Economic Study of U.S. Aircraft Hijacking, 1961-1976*, 21 J. L. & ECON. 1, 3 (1978).

274. Indeed, it is probably fair to say that the dangers of injury from an airline accident far outstrip the danger from a hijacking casualty.

275. *Cf. Landes, supra* note 273, at 4 (American government is cooperating with foreign nations on anti-hijacking measures).

276. *Id.* at 2.

C. *Balancing Process versus Political Effects Costs in Negligent Security Law*

The six examples illustrate the care with which courts should approach negligent security cases. Negligent security liability is a viable, justifiable aspect of general tort law. Its theory, though, is enticing. Courts have tended to adopt or reject it indiscriminately. The substantive and political justifications for liability do not apply equally to all conceivable negligent security situations. Only by keeping the various goals and functions of tort law firmly in mind can courts contemplating negligent security rules avoid creating hopeless confusion in the law.

In the period immediately following implementation of the political effects model, litigation may be marked by a measure of short term process costs. Aspects of the model, though, mitigate the process concerns. Since the political justification comes into play only where liability also furthers tort's substantive goals, the model will authorize only a limited number of new cases. In addition, any new "politically-based" liability rule by definition stems from the expectation that legislatures (1) will select alternative methods to fight crime and compensate victims, and (2) will then relieve the courts of determining negligent security litigation case-by-case. The uncertainty resulting from the rule is therefore likely to be of short duration.

Even if the legislature refuses to act, negligent security litigation need not be procedurally chaotic. Initially, courts will decide whether a group of cases should proceed on a category-by-category rather than a case-by-case basis. Subsequent judges can enforce that decision upon motions to dismiss. Pre-trial motion practice will thus sharply curtail the instances in which lawsuits can reach the jury stage. Since much of the process scholarship focuses on the uncertainty of jury decision-making, the process arguments will often not even come into play.²⁷⁷

The very nature of negligent security litigation mitigates other process concerns. Process costs vary, depending upon the complexity of the course of conduct the court is asked to evaluate.²⁷⁸ The political effects model will probably not justify negligent security liability in many cases involving highly controversial decisions by defendants. Under the model, courts must take into account the legislature's difficulty in defining a manageable standard of care.²⁷⁹

277. See Twerski, *supra* note 1, at 521-26 (arguing that availability of directed verdicts undermines contention that uncertainty of jury decisionmaking justifies no-liability rule in product design litigation).

278. See *supra* note 80; Henderson, *Judicial Review*, *supra* note 80, at 1535-39.

279. The model, for example, rejects liability in the hijacking context in part because security decisions implicate such diverse considerations as the wishes of foreign powers, the need for uniform

Moreover, the run-of-the-mill decision of whether or not to implement security precautions is not particularly confusing or "polycentric."²⁸⁰ It will usually turn largely on cost considerations, rather than the degree to which security will affect the quality or desirability of the defendant's product or service.²⁸¹ Juries thus are likely to be able to apply the reasonableness standard without too much difficulty. The decision of whether a reasonable merchant would bear the additional cost fits within the range of their everyday experience in a way that more technical business and scientific judgments might not.²⁸²

CONCLUSION

In recent years, courts have relied increasingly upon process arguments to brake the expansion of negligence law. This Article has focused on a set of practical considerations that is no more, but certainly no less, significant than process concerns. I do not use political effects to justify liability in the absence of process arguments because I question whether either process or political reasoning are appropriate for judicial decisionmaking. I am convinced, however, that they belong on the same plane.

Courts that emphasize the process costs of a liability rule should consider its potential beneficial effects as well. A fair balance requires courts to weigh all the countervailing practical factors, rather than isolating just one. It may be that political factors have influenced past cases, but judges

action by unrelated airlines and airports, and the existence or desirability of national trade subsidies for different airlines. Similarly, the model is inapplicable to bystander-rescue cases precisely because they involve polycentric issues. The courts must take into account the personal fear of witnesses to crime and the dangers of encouraging interference by citizens who are uncertain as to the nature of the events that are occurring. *See supra* notes 61-66.

280. The types of security precautions available to commercial defendants, such as locks, warnings, video surveillance, and security patrols, will usually be relatively simple concepts jurors can understand from their everyday experience. Expert testimony may be required to explain details, but crime prevention is not so complex a topic that experts are likely to hold undue sway over jurors' decisions.

281. In product design cases, the decision of what safety precautions to adopt implicates not only cost considerations but also factors related to product utility, aesthetics, and marketability. *See Henderson, Judicial Review, supra* note 80, at 1540. In contrast, the safety of an enterprise's premises is usually intertwined only to a limited extent with its ability to offer services. The danger a crime-prevention system protects against is ordinarily extrinsic to the business itself.

There are, of course, exceptions. Even routine security devices such as locks and doormen may complicate the transaction of business. They may, for example, make entry of visitors into a building more difficult. From a marketing perspective, however, this type of "complication" is a safety feature that may enhance rather than decrease the desirability of doing business with the defendant. The key issues for the defendant considering higher security will usually be "how much does it cost" and "is it really worth it," not "how much will it detract from my product." The factors that impact on those issues are likely to be limited in number.

282. The concern that a jury will act emotionally against wealthy defendants remains forceful. That danger, however, is inherent in a jury system and is no more serious in the negligent security than in the traditional accident litigation involving commercial defendants that process scholars would leave in juries' hands.

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have simply not admitted it for fear of opening a “Pandora’s Box.” This Article provides a framework for taking politics into account expressly, in a delineated category of cases, and in a principled way. Using the model to offset political effects against process costs is consistent with the adjudicatory role that courts have traditionally played. Most importantly, balancing politics against process may spur solutions to critical social problems not currently being addressed.

